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United Nations Naval Peace Operations in the Territorial Sea

Rob McLaughlin



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United Nations Naval Peace Operations in the Territorial Sea

International Humanitarian Law Series

VOLUME 24

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United Nations Naval Peace Operations in the Territorial Sea

By

Rob McLaughlin

MARTINUS
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PUBLISHERS

LEIDEN • BOSTON
2009

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Royal Australian Navy Boarding Team conducting UNSC sanctions enforcement in relation to Iraq, North Arabian Gulf, 2002.

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Library of Congress Cataloging-in-Publication Data

McLaughlin, Rob.

United Nations naval peace operations in the territorial sea / by Rob McLaughlin.

p. cm. — (International humanitarian law series ; v. 24)

Includes bibliographical references and index.

ISBN 978-90-04-17479-5 (hardback : alk. paper)

1. International police. 2. United Nations—Armed Forces. 3. Naval law. 4. Territorial waters. 5. Law of the sea. I. Title.

KZ6374.M39 2009

341.5'84—dc22

2009035559

ISSN 1389-6776

ISBN 978 90 04 17479 5

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Whilst both my thesis and this book were written while I was serving as a legal officer in the Royal Australian Navy, they were written in a personal capacity. All opinions and expressed thoughts are my own and may not reflect the position of the Royal Australian Navy, Department of Defence or Commonwealth of Australia.

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For S, C, and A, and for Nick

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Foreword

Having twice commanded multi-national naval forces operating under United Nations (UN) mandate in the Middle East during the past decade, I can say with the deep resonance of practical experience that an analysis of the way in which authority for UN naval operations in the territorial sea might best be understood, constructed and regulated, is both timely and useful.

In naval operations, balancing power, legitimacy and authority is an ever delicate undertaking. This is especially the case in multi-national naval operations conducted under the auspices of the UN, where the need for an internationally recognised and workable authority regime is fundamental to both planning and execution. In no maritime zone is this more relevant than in the territorial sea, laden as it is with apparently competing and conflicting claims as to its primacy and use.

It would be remiss, indeed dangerously so, for the commander of multi-national naval forces engaged in such operations to simply resign him or herself to a 'lowest common denominator' approach to understanding the permissions and limitations under which the force as a whole must operate. It is the commander's responsibility to ensure that the force can exploit its capabilities to the fullest extent of its varied legal and political authorisations when called upon to do so. To do any less is to face the prospect of inefficient, excessively restricted, even hamstrung implementation of the UN mandate, and to run the consequent risk of failure, or even catastrophic failure, with the chilling human, social, economic, political and environmental costs so often associated with such an outcome.

It is therefore vital that the authority envelope for UN naval operations be clearly understood and logically constructed on a mutually agreed basis that is more refined, more legally and politically justifiable, and more operationally sensible than following a simple lowest common denominator approach. Not only will such an understanding promote more nuanced and coherent mandate construction and operational planning, but it will also allow for more efficient and effective implementation, enabling the commander to employ the multi-national force within an agreed and defensible envelope, which enjoys the strong and universal authority that only the UN can provide.

Full and robust debate on this all important matter is both welcome and fundamental to the conduct of future multi-national UN naval operations, particularly in the territorial sea.

Allan du Toit, AM
Rear Admiral, Royal Australian Navy
Commander, Border Protection Command
Canberra

Preface

This book concerns United Nations naval peace operations. It is about the practical legal issues faced in such operations – existing, as they do, both within and between the wider conceptual frameworks of seapower and UN peace operations generally. It is also concerned with the factors that influence and shape the construction, analysis, and assessment of authority with respect to the conduct of UN naval peace operations, most particularly in the Territorial Sea. The ultimate aim of this book is to distil from this experience a conceptually and operationally sound and acceptable approach to constructing authority for the conduct of UN naval peace operations in the Territorial Sea.

The first chapter introduces the issues and tensions that surround and shape the interaction of law, power, and the sea, setting the context in which the analysis is conducted, and outlining the underpinning ‘formula’ behind it – this being, at sea at any rate, that power + legitimation = authority. The second chapter then expands upon the first component concept, offering a brief but contextually necessary examination of the practical issue of allocated *power* in naval peacekeeping. It focuses upon the doctrinal and operational background to UN naval peace operations, and includes an account of the tasks fundamental to naval peacekeeping. Chapter three then centres upon an examination of the second component concept - *legitimation* – as it applies in UN naval peace operations, providing a perspective on legitimation that focuses upon understanding the UN peace operations-use of force-Law of the Sea Convention relationship in an integrative manner.

With the component concepts thus described, chapters four to six provide three discrete examinations of *authority* in UN naval peace operations in the Territorial Sea, concentrating on the actual context and practice of UN peace operations-use of force-LOSC interactions, and analysing the issues cast up by the conduct of such UN naval peace operations. These issues are innocent passage, UN mandated interdiction operations, and the implications of UN transitional administration. Chapter seven then draws the disparate threads together by setting out one proposal for regulating authority for UN naval peace operations in third party Territorial Seas.

* * *

I owe a great debt of gratitude to many people and organisations for the time and support which allowed me to conduct this research, which began as my Doctoral thesis at Cambridge University. First, I must register my thanks and appreciation for the many forms of assistance provided by Cambridge University (particularly the Centre for International Studies and the Lauterpacht Centre), the Cambridge

Commonwealth Trust, Jesus College, The Committee of Vice Chancellors and Principals of the Universities of the United Kingdom, and the Royal Australian Navy. Without this assistance – scholarly, administrative, financial, and other – I would never have been able to convert an intuition into argument.

Second, Captain Helen Marks, the then Director of Naval Legal Services for the Royal Australian Navy, requires special noting. It was her tireless advocacy on my behalf that made it possible for me to pursue this research. I also wish to especially thank Rear Admiral Allan du Toit – not only for his Foreword to this book, but for his constant support in this, and other, endeavours.

Third, there have been a number of scholars and practitioners who read and commented on drafts of both my thesis and this book – in particular, Paul Cornish, Steven Haines, Stuart Kaye, Vaughan Lowe, Tim McCormack, Cameron Moore, Bruce Oswald, Geoffrey Till, and Mark Weller. There were also many with whom I discussed and corresponded on ideas, chief among them a number of thoughtful and supportive scholars, and those senior commanders, military comrades, and government lawyers I have been privileged to serve with. In particular, I must express my deep gratitude to the staff of the Office of International Law in the Attorney General's Department, and the Department of Foreign Affairs and Trade Legal Branch, and to the military and civilian personnel I have worked with and for amongst Australian operational and strategic commands, and the Directorate of Operations and International Law. I have also benefited greatly from discussions with and amongst the Canadian, NZ, UK, US, and other military and academic legal fraternities. I must, however, particularly thank Neil Brown, Alan Cole, Phil Drew, Charles Garraway, Wolff Heintschel von Heinegg, Andrew Jameson, Mike Kelly, David Letts, Dennis Mandsager, Ivan Shearer, and Robin Warner. I only hope that naming them does not risk also burdening them with the need to dissociate themselves from the outcomes! In the course of my research and writing, I have been fortunate enough to have had earlier versions of chapters two, five, and six published in *International Peacekeeping*, the *International and Comparative Law Quarterly*, and the *Melbourne Journal of International Law* respectively. I am most grateful to – respectively – Brill, Cambridge University Press, and the Melbourne Journal of International Law Inc. for permission to incorporate these materials, and to the anonymous reviewers of those articles for their comments and critiques.

Most importantly, however, I must register my deep respect and gratitude for my very patient, perceptive, and much appreciated friend, mentor, and supervisor, Nick Sinclair-Brown – a gem of humanity recently lost to us.

Of course, although my thinking and analysis has benefited greatly from the comments and insights of all of the above, the responsibility for all errors, silly ideas, and plain dumb statements remains resolutely and absolutely my own.

Finally, I must thank my family, and in particular my Wife for her patience and support, and my two young Sons for keeping me grounded.

Chapter 1

Law, Power, and the Sea

The principles of justice are unchanging as the great sea itself, the least variable thing, so far as its essential nature is concerned, in the external world; its applications are as inconstant as the many different kinds of craft that have floated and will float on, under and above that sea.¹

– Ernest Jelf, 1921

There are areas of legal certainty in matters relevant to naval peacekeeping, but not many.²

– Françoise Hampson, 1994

[T]he impact of the 1982 Law of the Sea Convention, which entered into force on 16 November 1994, and the influence of that convention on naval operations, have yet to be fully felt.³

– David Letts, 2001

Context

On 11 September 1999, according to credible reports received by news agencies and human rights organisations,⁴ thirty-five young East Timorese men were forced by pro-Indonesian militias, with the possible complicity of members of the Indonesian military, to board an Indonesian vessel. They were then taken out to sea, executed, and their bodies dumped overboard. Four days later, on 15 September 1999, the United Nations Security Council (UNSC) passed Resolution 1264 (1999) authorising a multinational force – INTERFET – to deploy into East Timor. Its mandate was essentially to re-establish order in the wake of destructive post-referendum vio-

1 Ernest A. Jelf, “International Lawyers and the Law of Naval War”, International Legal Association, *Report of the Thirtieth Conference*, (30 August–3 September, 1921), Sweet & Maxwell, London, 1922; p 275.

2 Françoise J. Hampson, “Naval Peacekeeping and the Law”, in Michael Pugh (ed), *Maritime Security and Peacekeeping: A Framework for United Nations Operations*, Manchester University Press, Manchester, 1994; p 208.

3 David Letts, “The Royal Australian Navy, the Constitution and the Law – Then and Now”, in David Stevens and John Reeve (eds), *Southern Trident: Strategy, History, and the Rise of Australian Naval Power*, Allen & Unwin, Sydney, 2001; p 287.

4 Amnesty International News Service 178/99, “Fear, Intimidation and Forced Relocation in the Archipelago”, 24 September 1999, AI Index ASA 21/166/99.

lence unleashed upon pro-independence East Timorese.⁵ If the chronology had been reversed, however, and INTERFET naval forces had been authorised and present at the time of these killings, forced relocations, and abuses at sea, the desire to respond, and then to act preventively, would likely have been overwhelming – on both a human and a political level. Indeed, when faced with as unambiguous a situation as that alleged to have occurred on 11 September 1999, few commanders would fail to *want* to act. The issue, however, is their authority to do so. And this specific circumstance is merely one example among a range of situations that may run counter to, or impede the effective discharge of, UNSC sanctioned missions.

What is at Stake?

The observations as to uncertainty encapsulated in the quotes prefacing this chapter remain as true today as in 1921, 1994, or 2001. As Politakis has rightly observed of the law relating to naval operations more widely

The subject matter does not lend itself to easy answers. In fact, long neglect has blurred the picture to the point that problems have now assumed an acute, some would even say insurmountable complexity.⁶

What has changed, however, is the pressure for immediate, and immediately examinable, decisions to be made within this variable legal vacuum. This has enlivened the essential nature of the problem from one of academic interest to one of concurrent practical importance, carrying with it a concomitant pressure to decide. This pressure stems from the fact that any decision, even one not to intervene, is highly likely to be internationally visible, carrying in its wake instant political accountability. Justification invariably seeks solace in legal arguments, many of which, on reflection, often owe more to time constraints and expedience than to consistent legal provenance. Unless handled carefully, such ad hoc or expedient legal justifications can have unintended consequences which may impede the future development of more sustainable approaches. This is particularly so where the law being followed, exploited, or both (as is usually the case) operates in an internationally fractious and contested space – as is the case with UN naval peace operations, which are the focus of this book.

5 See, for example, UN Doc S/2000/53, *Report of the Secretary General on the United Nations Transitional Administration in East Timor*, 26 January 2000. This incident is but one of many alleged to have taken place at sea. Further incidents of killing, forced relocation, and other human rights abuses were also reported – see, for example, AI News Service 168/99, “Forced Militia Recruitment and Arrests in Relocation Camps”, 8 September 1999, AI Index 21/139/99; AI News Service 183/99, “Human Rights Situation in West Timor”, 29 September 1999, AI Index ASA 21/174/99; AI News Service 199/99, “Open Letter to President Abdurrahman Wahid, from Pierre Sane, Secretary General Amnesty International”, 22 October 1999, AI Index ASA 21/198/99; “In Search of Truth and Justice”, in *The Economist*, 5–11 February, 2000; p 74; John Martinkus, *A Dirty Little War*, Random House Australia, Sydney, 2003; chapter 10.

6 George P. Politakis, *Modern Aspects of the Law of Naval Warfare and Maritime Neutrality*, Kegan Paul International, London, 1998; p 29.

Underlying Tensions

Authority, Power, and Legitimation

When operating under a UN mandate, local decisions as to how to respond to challenges to that mandate can be far reaching in their consequences – a factor neatly encapsulated in the concept of the ‘strategic Corporal’. Accordingly, the more a clear and rational source of authority exists to provide guidance at the coalface, the more secure the outcome will be. Although at its extremes authority can operate by virtue of power *or* legitimation, authority is both more persuasive and more effective when the two are in balance. Regrettably, as Hampson noted, this is not the case with respect to authority in UN naval peace operations. In such circumstances, it is very important that power is handled with significant care so that practice may be shaped with an eye to becoming legitimating precedent.

Thus in constructing authority to support activities at sea, resolving the tension between power and legitimation is of fundamental importance, and related debate has a long pedigree in international law. “Since time immemorial”, observes Oxman, “political entities have had to define the relationship between their authority and activities at sea”.⁷ Indeed, as Booth agrees, “the law of the sea has always been about politics”.⁸ In the course of this debate, scholars have attempted to define the relationship between the *actor*, the *issue*, the *location*, and the degree of *intervention* authorised in particular circumstances – the who, what, where, and how of naval operations. The shaping of these relationships invariably responds to intensely practical, and often pressing, maritime concerns affecting key national interests such as trade, maintenance of sea lines of communications, and power projection.⁹ Accordingly, as the nature of such issues – and the pressures behind them – evolve with the development of technology and changing state interests, the design of the underlying conceptual authority governing how they are addressed will also change in tandem

7 Bernard H. Oxman, “Human Rights and the United Nations Convention on the Law of the Sea” (1997) 36:1-2 *Columbia Journal of Transnational Law* 399.

8 Kenneth Booth, “The Military Implications of the Changing Law of the Sea”, in John King Gamble Jr. (ed), *Law of the Sea: Neglected Issues* (Proceedings of the Law of the Sea Institute Twelfth Annual Conference, 1978), The Law of the Sea Institute, Honolulu, 1979; pp 335.

9 See, for example, Halford MacKinder’s early writings on the influence of maritime power on trade and access to colonies – Halford MacKinder, “The Great Trade Routes: Lecture I”, in *Journal of The Institute of Bankers*, Vol. 21, Part 1, January 1900; pp 1-6; Halford MacKinder, “The Great Trade Routes: Lecture II”, in *Journal of The Institute of Bankers*, Vol. 21, Part 3, March 1900; pp 137-155; Halford MacKinder, “The Great Trade Routes: Lecture IV”, in *Journal of The Institute of Bankers*, Vol. 21, Part 5, May 1900; pp 266-273; Halford MacKinder, “The Geographical Pivot of History”, in *The Geographical Journal*, Vol. 23, No. 4, April 1904; pp 421-444; See also John Reeve, “The Rise of Modern Naval Strategy circa 1580-1880”, in David Stevens and John Reeve (eds), *Southern Trident: Strategy, History, and the Rise of Australian Naval Power*, Allen & Unwin, Sydney, 2001; p 10, where he underlines the “connection between the emerging state navies of the [1580-1880] period and the new European state system of which they were a part. It was the European – especially the western European – world of competitive states which provided the infrastructure and resources required by navies and the national purposes they served”.

with the arguments employed in justification. However, this is a slow process, for as O'Connell observed, with continuing relevance, "seapower has rarely been understood in all its dimensions by international lawyers, along with most of the educated public...[and] there has never before been a time when the statements on international law in the textbooks have seemed less relevant to the naval officer groping for guidance".¹⁰ This often fundamental disconnect between the law as written, what governments (or the UN, as it may be) wish to achieve with seapower, and what is regarded by naval practitioners as possible or necessary, has often resulted in law trailing rather than defining practice at sea. As a consequence, there is

...no little confusion on the part of military and naval planning staffs engaged in the struggle to write operational orders for situations of limited conflict, in a world where government policy is subjected to the scrutiny of the United Nations, and the conduct of operations must take into account other than military factors.¹¹

This is not always so and, by contrast, where law has kept step with, or rapidly progressed to account for, practice at sea, it has had significant practical implications. The destruction of the German 'pocket' battleship *Graf Spee* in the River Plate in 1939, "when lawyers completed an engagement begun at sea",¹² the sinking of the Argentinean cruiser *General Belgrano* during the Falklands War,¹³ the tentative progressive development of the concept of 'exclusion zones' evidenced in the *San Remo Manual*,¹⁴ and the conduct of sanctions enforcement operations against Iraq continuously for 13 years from 1990-2003 (and indeed, in some respects, thereafter also), offer some of the more defining indications of the effect which law in touch with practice can have on naval operations.

Power of itself has rarely been a sustainable source of authority at sea and the search for ways to entrench authority by legitimation has been a constant theme of maritime international relations. How this has been achieved with regard to particular circumstances, however, has reflected the influences determining the conceptual

10 D.P. O'Connell, "International Law and Contemporary Naval Operations" (1970) 44 *British Yearbook of International Law* 20.

11 O'Connell, "International Law and Contemporary Naval Operations"; p 20.

12 O'Connell, "International Law and Contemporary Naval Operations"; p 80. British use of one aspect of the Law of Naval Warfare – the rule that a warship should not sail from the same harbour within 24 hours of an enemy merchant vessel departing that harbour – allowed for timed British merchant sailings to keep *Graf Spee* in port long enough to be deceived into believing that a more powerful British force had arrived at the mouth of the River Plate, prepared to engage *Graf Spee* as she sailed. The 24 hour rule is found in *Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War* 1907, Art 16. See also J.A. Hall, *The Law of Naval Warfare* (2nd Edition), Chapman and Hall Ltd, London, 1921; pp 160-162. See generally, Natalino Ronzitti (ed), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff, Dordrecht, 1988.

13 See J. Levie, "The Falklands Crisis and the Laws of War", reprinted in Michael N. Schmitt and Leslie C. Green (eds), *Levie on the Law of War*, International Law Studies Vol 70, Naval War College, Newport, 1998; pp 203-213.

14 Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995; paras 105-108.

characterisation of the specific issues and interests engaged – for example the tension between flag and coastal state which underpins much of the law of the sea. Thus each discrete conceptualisation has invariably been reconceptualised as new circumstances are encountered, leading to significant variation across both context and time, spurred and often overshadowed by evolving political environments, technological innovation, and the requirements of both maritime trade and belligerency. However, the fundamental influence driving the conceptual design upon which authority rests has consistently been the legitimisation rather than negation of power.

Any and every generalisation about sea power and strategy theoretically has to be subject to qualification...by reference to specific historical and geographical contexts. That is unarguable; it is also a matter of only secondary moment. Far more important is the fact that to date sea power, even naval power narrowly, has resisted successfully every implicit and explicit challenge to its relevance.¹⁵

This resilience has seen seapower meet, adopt, and incorporate all contextual challenges to its utility and existence – both peaceful and belligerent.

With respect to peaceful uses of the oceans, the *Law of the Sea Convention* 1982 (LOSC) is in many ways a modern reflection of this practical process. In seeking to regulate oceanspace use and management, it has necessarily navigated a fundamentally practical (rather than theoretical) path through the tensions between maritime powers and coastal states. This has been achieved primarily by assuring flag state seapower the freedom to operate, but simultaneously balancing this with constraints to the extent necessary to account for the interests of coastal states.

With respect to belligerent use of the oceans, this process is well illustrated by the parentage of the Law of Naval Warfare (LoNW).¹⁶ On one hand, LoNW is cur-

15 Colin Gray, “Sea Power in Modern Strategy”, in David Stevens and John Reeve (eds), *Southern Trident: Strategy, History, and the Rise of Australian Naval Power*, Allen & Unwin, Sydney, 2001; p 27. See also, J. Ashley Roach, “The Law of Naval Warfare at the Turn of Two Centuries” (2000) 94:1 *American Journal of International Law* 64; O’Connell, “International Law and Contemporary Naval Operations”; pp 19–85. See generally the unequalled D.P. O’Connell, *The Influence of Law on Seapower*, Manchester University Press, Manchester, 1975.

16 The Law of Naval Warfare is comprised of a mix of treaty/convention – both general (such as Hague Law) and specific (such as the *Montreaux Convention* 1936, governing warship transit through the Turkish Straits), custom, and the persuasiveness of a range of international tribunal decisions (such as those relating to submarine warfare at the Nuremberg Trials). It is also one area of international law where the opinions of experts – encapsulated in the *San Remo Manual*, for example – are of heightened significance. The primary documents governing the Law of Naval Warfare are the 1856 *Paris Declaration Respecting Maritime Law*, 1907 *Hague Convention VII Relating to the Conversion of Merchant Ships into Warships*, 1907 *Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines*, 1907 *Hague Convention IX Concerning Bombardment by Naval Forces in Time of War*, 1907 *Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War*, 1907 *Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War*, 1923 *Hague Rules of Aerial Warfare*, 1936 *London Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930*, 1949 *Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 1949

rently characterised as a sub-component of the Law of Armed Conflict (LOAC) / International Humanitarian Law (IHL), aimed at minimising suffering, unnecessary injury and damage during conflict, and at protecting the civilian population as comprehensively as possible.¹⁷ On the other hand, its parentage is also rooted in an ancient and exceedingly practical tenant of seapower – deference to international trade. This renders clarity in conceptual organisation problematic. One example of the result can be found in the *San Remo Manual* definition of ‘contraband’ – reflective of the contemporary state of LoNW – as “goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict”.¹⁸ Contraband thus concerns goods going into the enemy’s territory, not goods coming out. In fact, although there may be some debate, the general position in international law is that where a belligerent is exercising the right of visit and search (as opposed to blockade) under LoNW, that belligerent is limited to dealing with *inbound* shipping and cargoes.¹⁹ Trade goods – including oil – exiting the enemy’s territory, even where the financial return from those exports might be used to support military operations, are not contraband and may not be seized unless blockade is specifically declared and adequately enforced. Whilst the impediment to effective UN operations can be appreciated, the rule merely reflects an entrenched acceptance on the part of the international community that states may prosecute wars at sea, so long as this does not interfere with neutral trade. As well in excess of 90 per cent of today’s trade is still conducted by sea, it is quite clear just how significant both unhindered sea lines of communication and the carriage of goods by sea are for the world economy.²⁰ Thus minimal restriction on the freedom to trade lies

Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. Some important, but non-treaty, documents in the Law of Naval Warfare include the unratified *London Declaration Concerning the Laws of Naval War 1909*, the *Oxford Manual on the Laws of Naval War Governing Relations Between Belligerents* (adopted by the Institute of International Law in 1913 as a reliable guide to the law at that time), and the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994) (recording the opinions from a series of meetings of experts under the auspices of the International Institute of Humanitarian Law as to the state of LoNW in 1994). See also the list of relevant LoNW instruments in the German Navy’s (2002) *Commander’s Handbook: Legal Bases for the Operations of Naval Forces* (2002U-01441); pp 7-9.

17 *San Remo Manual*, Part III – Basic Rules and Target Discrimination.

18 *San Remo Manual*, Art 148.

19 See, for example, International Law Association, *Report of the Sixty-Seventh Conference held at Helsinki, Finland, 12-17 August 1996*, International Law Association, London, 1996; pp 382-87.

20 See UN Commission on Trade and Development, *Review of Maritime Transport: 2003*, United Nations, Geneva, 3 Nov 2003 (UNCTAD/RMT/2003); pp 4-6 – world seaborne trade amounted to 5.89 billion tonnes in 2002 (a 2.5 % growth in seaborne trade), representing 99% by weight, 71-79% by value. By 2007, world seaborne trade (goods loaded) had increased to 7.4 billion tonnes, and the world fleet broke, for the first time, the 1 billion deadweight tons mark to reach 1.04 billion DWT. World container port throughput increased 13.4% – see UN Commission on Trade and Development, *Review of Maritime Transport: 2007*, United Nations, Geneva, 7 December 2007 (UNCTAD/RMT/2007);

at the very core of the concepts of visit and search and contraband. And visit, search, and contraband lie at the very root of LoNW. As Best notes, LoNW is testimony to the fact that wars come and go, but trade goes on forever.²¹

This appreciation of authority at sea as legitimated (sea)power, and its resilience over time can be illustrated by three chronologically disparate examples. The first is the exercise of Venetian seapower in the ninth century. As Venice – nestled between the Eastern (Byzantine) and Western Roman Empires – charted its early, perilous course of nominal submission, but effective and trade-sponsored independence, the importance of dealing with the Slav pirates of the Dalmatian coast became imperative. Venetian power rested on access to ports and resources, and the navigational freedom of its merchant and naval fleets, which were the strongest in the Adriatic. Whilst Venice clearly possessed the power to deal with the Dalmatian pirates, to gain the authority to do so in an area subject to dispute between the Eastern and Western Empires required successive agreements with both empires. Only when armed with this shield of legitimation as complement to the sword of maritime power, did the Venetians feel secure enough in their authority to commence anti-piracy operations.²²

The second example indicating the resilience of this conception of authority at sea as legitimated power is the role of Papal Bulls in European exploration and colonisation in the fourteenth and fifteenth centuries. In the process of European ‘discovery’ of previously unknown territories, the addition of some form of legitimation beyond the mere ability to project power became essential to the appearance of authority. As Castilian and Portuguese mariners ventured further from shore, encountering the Canary Islands, Azores, Cape Verde Islands, and other Atlantic islands and archipelagos, Papal Bulls were requested in order to legitimate claims otherwise resting upon the unpredictable basis of maritime power alone. The Castilian monarchs secured a form of Papal title to the Canaries as early as 1344, and by the reign of Pope Alexander VI, the use of Papal Bulls was considered crucial to legitimating authority over areas of ocean, and the new world. Of Alexander VI’s four Papal Bulls relating to legitimacy over oceans and newly discovered lands, the last two in particular – both in 1493 – demonstrate the importance rulers placed upon bestowed legitimation as the essential accessory of power when exercising authority in the Atlantic Ocean. *Inter Caetera* (4 May 1493)²³ “drew an imaginary boundary line

chs 1, 3, and 5. See generally, Christopher Baldwin, *Seaborne Trade Flows in the Asia Pacific: Present and Future Trends*, Royal Australian Navy Sea Power Centre and University of Wollongong Centre for Maritime Policy, Working Paper No. 9, November 2001. See also Geoffrey Till, “A Changing Focus for the protection of Shipping” in Andrew Forbes (ed), *The Strategic Importance of Seaborne Trade and Shipping*, Seapower Studies Centre, Papers in Australian Maritime Affairs, 2003; pp 17–19; Peter Rimmer, “Commercial Shipping Patterns in the Asian-Pacific Region, 1999–2000: The Rise and Rise of China” in Andrew Forbes (ed), *The Strategic Importance of Seaborne Trade and Shipping*, Seapower Studies Centre, Papers in Australian Maritime Affairs, 2003; pp 35–52.

21 Geoffrey Best, *War and Law Since 1945*, Oxford University Press, Oxford, 1994; p 197.

22 See generally, John Julius Norwich, *A History of Venice*, Penguin, Middlesex, 1982; ch 5.

23 In English translation: see Frances Gardiner Davenport (ed), *European Treaties bearing on the History of the United States and its Dependencies to 1648*, Carnegie Institution of Washington, Washington, 1917 (Reprint: Kessinger Publishing, 2007). The Bull asserted that the Pope did “give, grant, and assign to you and your heirs and successors, kings of

from north to south a hundred leagues west of the Azores and Cape Verde Islands, and provided that the land and sea beyond the line should be a Spanish sphere of exploration".²⁴ The fourth Bull, *Dudum Siquidem* (26 September 1493), purported to extend the geographical scope of this legitimation further still, including "all islands and mainlands whatever, found or to be found... that are or that may seem to be in the route of navigation or travel toward the west or south, whether they be in western parts, or in the regions of the south and east and of India".²⁵ This act of legitimation over the oceans of the New World was then reaffirmed in the Treaty of Tordesillas in 1494. Thus when, just over a century later, Grotius was retained by the Dutch East India Company to undermine the status quo, he did so by observing that as sea flowed through these designated areas, it could not be practically constrained by 'rights' purporting to legitimate exclusive authority. Legitimation must necessarily reflect, Grotius argued, the fact of 'freedom of the seas' – *Mare Liberum*.

The third example evidencing the continuing validity of this approach to the nature of authority at sea as legitimated power is the US Freedom of Navigation Program. Commenced in 1979, this program represents the US response to 'objectionable claims' over oceanspace by combining power (the US Navy and the Department of State) with legitimation (the provisions relating to Territorial Seas, Archipelagic Waters, international straits, and historic bays and gulfs, which the US considers customary international law as reflected in the LOSC 1982). Together, these two factors shape the US belief in its authority to assert navigational freedoms essential to the use of its decisive naval power.²⁶ As President Reagan's 10 March 1983 *Oceans Policy Statement* made clear

The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 LOS] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of

Castile and Leon, forever, together with all their dominions, cities, camps, places and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and south, by drawing and establishing a line from the Arctic pole, namely the north, to the Antarctic pole, namely the south, no matter whether the said mainlands and islands are found and to be found in the direction of India or towards any other quarter, the said line to be distant one hundred leagues towards the west and south from any of the islands commonly known as the Azores and Cape Verde".

24 J.H. Parry, *The Age of Reconnaissance: Discovery, Exploration and Settlement, 1450-1650*, Phoenix Press, London, 1963; ch 9; D.P. O'Connell, *The International Law of the Sea: Volume I* (edited by Ivan Shearer), Clarendon Press, Oxford, 1982; p 2; William J. Aceves, "The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics" (1996) 19:2 *Hastings International and Comparative Law Review* 259 at 260-61. See Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (1608), Translated by Ralph van deman Magoffin, Oxford University Press, Oxford, 1916.

25 In English translation: see Davenport (ed), *European Treaties bearing on the History of the United States and its Dependencies to 1648* (1917).

26 See US Navy Publication NWP 1-14M *Annotated Supplement to the Commander's Handbook on The Law of Naval Operations*, Naval War College, Newport, 2001; Annex A2-7. The *Handbook* was updated in 2007.

the international community in navigation and overflight and other related high seas uses.²⁷

Clearly possessed of the power to ensure access, the US fundamentally relies upon the LOSC and other aspects of customary international law to legitimate its authority to assert navigational freedoms. As the US Navy *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* makes clear, US authority to undertake freedom of navigation operations is clearly based upon the fact that “the United States has accepted this [international] responsibility as a fundamental element of its national policy”:²⁸

The U.S. is committed to protecting and promoting rights and freedoms of navigation and overflight guaranteed to all nations under international law. One way in which the U.S. protects these maritime rights is through the U.S. Freedom of Navigation Program. The program combines diplomatic action and operational assertion of our navigation and over-flight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate U.S. resolve to protect navigational freedoms.²⁹

Notwithstanding the authority on which it is based, the program has not been free of confrontations – including the ‘Black Sea incident’ on 18 March 1986 between the US and Soviet Navies, and the ‘Gulf of Sidra incidents’ in 1981 and 1986 between the US Navy and Libyan forces.³⁰

27 Quoted in *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*; para 2.6. See generally, Aceves, “The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics”; pp 263-64, 277-281; Dennis Mandsager, “The U.S. Freedom of Navigation Program: Policy, Procedure and Future”, in Michael N. Schmitt (ed), *The Law of Military Operations – International Law Studies Vol 72*, Naval War College, Newport, 1998; pp 113-128.

28 *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*; para 2.6.

29 Bureau of Public Affairs, US State Department, *GIST: U.S. Freedom of Navigation Program*, December 1998. The program is alive and well. In 1999, the US Navy conducted 32 targeted freedom of navigation assertions, including assertions against Albania, Malta, and Seychelles regarding claims of a requirement for prior permission for warship innocent passage in the Territorial Sea; Iran, Libya, and Vietnam concerning excessive baselines and maritime zone claims; and Malaysia, Pakistan, and Yemen concerning claimed rights to impose security controls not in accordance with the LOSC – see Department of Defence, *FY 1998 Operational Assertions: Freedom of Navigation* at www.defenselink.mil/execsec/adr1999/apdx_i.rtf or http://www.dod.gov/execsec/adr1999/apdx_i.html. In 2007, Freedom of Navigation assertions were conducted in relation to China, India, Indonesia, Iran, Malaysia, The Maldives, Oman, and The Philippines – www.defenselink.mil/policy/sections/policy_offices/gsa/FY_07_FON_Report.pdf.

30 On the Black Sea incident, where Soviet and US warships reached a stand-off stalemate related to a US assertion of warship innocent passage, without notification, through the Soviet Territorial Sea, see W.E. Butler, “Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy” (1987) 81 *American Journal of International Law* 331 at 343-346; Aceves, “The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics”; pp 295-300; and William J. Aceves, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea” (1993) 46 *Naval War College Review*

The fundamental nature of authority at sea as legitimated power has, consequently, created an inextricable analytical linkage between *theories* dealing with the who-what-where-how aspects of authority, and the *practicalities* of international politics, maritime trade, and power projection. However, the need for a legitimating component in the construction of authority is not universally accepted. For Grotius, as noted previously, the freedom of the seas was a legitimating proposition ultimately supporting and informed by a requirement to justify freedom of navigation and trade, and open use of the seas.

For do not the ocean, navigable in every direction with which God has encompassed all the earth, and the regular and the occasional winds which blow now from one quarter and now from another, offer sufficient proof that Nature has given to all peoples the right of access to all other peoples?³¹

Grotius' reasoning allowed him to conclude that "in the legal phraseology of the Law of Nations, the seas is called indifferently the property of no one (*res nullius*), or a common possession (*res communis*), or public property (*res publica*)".³² Indeed, as many modern commentators note of the practical consequences of Grotius' legacy, it is this notion of the freedom of the seas that underwrites the economic viability of maritime trade, and 'endows' naval force with its flexibility, presence, and global reach.³³

However, for Alfred Thayer Mahan – the 'Clausewitz of the sea' – freedom of the seas was based upon power alone. As Clausewitz observed in opening his treatise *On War*, written over the first third of the nineteenth century,

Force to counter opposing force, equips itself with the inventions of art and science. Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.³⁴

59. For the US position on the Gulf of Sidra, where the US has responded to threats by Libyan aircraft asserting a questionable claim to those waters by shooting the aircraft down, see *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*; Annex A2-8.

31 Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, p 8.

32 Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, p 22. See generally Robin R. Churchill and Vaughan Lowe, *Law of the Sea* (Third Edition), Manchester University Press, Manchester, 1999; p 4; W.E. Butler, "Grotius and the Law of the Sea", in Headley Bull, Benedict Kingsbury, and Adam Roberts (eds), *Hugo Grotius and International Relations*, Clarendon Press, Oxford, 1990; pp 209-220.

33 Charles E. Pirtle, "Military Uses of Ocean Space and the Law of the Sea in the New Millennium" (2000) 31:1-2 *Ocean Development and International Law* 7 at 22-23.

34 Carl von Clausewitz, *On War* (Book I, Chapter 1, Section 2) (Michael Howard and Peter Paret eds and trans) (1976) 75.

Whilst never a correct summation of the relationship between war and law,³⁵ the thrust of Clausewitz's assertion nonetheless reflects Mahan's own comprehension of the relationship between seapower and law. Indeed, for Mahan, law does not even feature as either a characteristic or a caveat of seapower, which he described as the sum of the "general conditions" of geographical position, physical conformation, extent of territory, number of population, national character, and character of government. In a mercantilist view of power reflective of the land-centric views of his near contemporary, Halford Mackinder, neither does law feature in Mahan's "links in the chain of seapower" – production, shipping, and colonies.³⁶ At the First Hague Conference in 1899, it was Mahan's vehemence against attempts to moderate naval warfare by law and prohibition which, for example, resulted in the US casting the only negative vote on a proposal to outlaw certain types of naval armaments. "National honour" and "vital interests", he consistently declared, were determinations which were ultimately only guaranteed by unfettered force – "equity which cannot be had by law must be had by force".³⁷ Mahan was a militarist and thus, as Livezey notes, "it was only natural and perhaps logical that he should look askance at all measures which might tend to limit the effectiveness of war (i.e. immunity of private property at sea), to lessen its rigors (i.e. abolition of asphyxiating gases), or to decrease its frequency (i.e. arbitration)".³⁸ Mahan's concept of the freedom of the seas was thus, *prima facie*, the opposite of Grotius' doctrine, implying either the absence of law or the irrelevance of law – in either case, a legal vacuum – rather than a legitimating framework for ensuring and facilitating rights, and defining obligations. However, for both Grotius and Mahan, theory followed practice at sea.

Guiding Principles

For those who, unlike Mahan, acknowledge the necessity of legitimation beyond the fact of power as an essential component of authority, a second tension affecting UN naval peace operations arises. This is the tension between two fundamental sources of international law – the rights and duties associated with UN Charter Chapter VII peace operations (including those concerning use of force), and rights and duties

35 See, for example, Best, *War and Law Since 1945*, pp 4-9 – "Readers who are inclined to be skeptical about the possibility of law restraining war will...find evidence of its having sometimes and to some extent done so; certain periods of history and certain circumstances having been more propitious for it than others". Best notes, for example, that one characterisation of the Law of War is as "the astonishing paradoxical achievement of civilization".

36 Alfred Thayer Mahan, *The Influence of Sea Power Upon History 1660-1783* (Fifth Edition, 1894), Dover Publications, New York, 1987; pp 28-83.

37 Alfred Thayer Mahan, "The Panama Canal and Sea Power in the Pacific", *Century Magazine*, Vol. LXXXII, June 1911; pp 240-48 (reprinted in Mahan, *Armaments and Arbitration, or the Place of Force in the International Relations of States*, Harper and Brothers, New York, 1912; p 171).

38 William Livezey, *Mahan on Seapower*, University of Oklahoma Press, Norman, 1981; pp 269-78; Scott Allen, "The Elements of Seapower: Mahan Revisited", in E.M Bogese, N. Ginsberg, and J.R. Morgan (eds), *Oceans Yearbook: Volume 7*, University of Chicago Press, Chicago, 1988; p 339.

codified under the LOSC.³⁹ Both have the capability to infuse legal norms into the context within which naval commanders respond to challenges to and incoherencies within UN mandates. Although their reconciliation is thus an immediate challenge in providing a coherent set of legitimating concepts and mechanisms through which authority can be identified and buttressed, the tension has been little studied and scantily analysed. As Warner notes, “for the world’s navies...a close examination of the 1982 LOSC exposes some shortcomings where military uses of the sea are concerned”. This prompts her to ask how, for example, “its provisions interact with the system for maintenance of international peace and security described in the United Nations Charter?”.⁴⁰ Further, there are tensions within each source of legitimation which impact authority in UN peace operations at sea. Among those that have already surfaced in the context of the LOSC, the issue of warship innocent passage is but one example which remains problematic.⁴¹

In the post-Cold War re-ordering of global power relationships, international law as a component of authority has occasionally undergone radical evolution – or re-interpretation – in order to keep pace with new issues and to reflect international practice. Many previously stable assumptions of international law which press upon the LOSC have been subjected to renewed critical scrutiny, exposing a range of problems. Whilst occasionally masquerading as authoritatively settled legitimating doctrines, some of these assumptions have been unmasked as little more than previously ignored issues. Whilst Israel was widely condemned for claiming its raid on the Osiraq reactor in 1981 was an act of anticipatory self-defence, post-11 September 2001 claims by the US in a similar vein – and with similar implications for chronological tenuousness in the linkage between anticipated act and pre-emptive response – resurrected this issue for debate.⁴² Other assumptions have been exposed as issues

39 David Anderson, “Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea” (1995) 44 *International and Comparative Law Quarterly* 313 – Anderson notes the developing status of the LOSC, predicting that it may one day achieve a status similar to that of the UN Charter as a quasi-universal and quasi-constitutional component of the international legal order – p 323.

40 Robin Warner, “The Compatibility of 1982 United Nations Law of the Sea Convention Norms with the Execution of Force Measures that Might be Adopted by the Security Council in Accordance with Chapter VII of the United Nations Charter”, a paper presented at the *Symposium on Maritime International Law*, Valparaiso, Chile, 25-27 June 1996.

41 See, W.E. Butler, “Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy”; pp 334-343.

42 On the Osiraq reactor raid, see UNSC Res 487 (19 June 1981) *Iraq-Israel*. See also the attendant UNSC debate, 12 June 1981, reprinted in, inter alia, (1981) 20 *International Legal Materials* 965. See also, Timothy L.H. McCormack, *Self-Defence in International Law*, St. Martin’s Press, New York, 1996. On the resurrection of this concept, see for example, the then Australian Defence Minister’s comments on “the right to take pre-emptive action and the limits of self-defence in a world of terrorism and weapons of mass destruction” – Robert Hill, *The John Bray Memorial Oration*, 28 November 2002, Adelaide, Australia. In the US, the spectre of pre-emptive self defence was raised in the strategic policy statement *National Security Strategy of the United States*, Washington D.C., September 2002; p 15 – “The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our security”. See also, Steven R. Ratner, “*Jus ad Bellum* and *Jus in Bello* After September 11” (2002) 96 *American Journal of International Law* 905.

which – in the Cold War context – had until recently been considered non-issues. Issues as diverse as Chinese and Japanese views on and participation in UN peace operations,⁴³ through to burgeoning international criminal jurisdiction and an escalating capacity to prosecute national and other leaders for crimes such as genocide, are but two examples that never forced their way onto the international political radar during the bi-polar Cold War. Yet they are fundamental to the international order today.⁴⁴ Other questions simply re-emerged into international legal consciousness after long periods of hibernation. Kosovo and the 2003 Gulf Conflict, for example, have re-ignited and refocused debate on the prospect of collective military action outside the auspices of the UN.⁴⁵

The provisions of the LOSC were similarly long held to be a fundamental aspect of the corpus of the ‘laws of peace’,⁴⁶ but are now increasingly trespassed upon by issues of conflict, conflict management, and the use of force for international purposes. Yet this issue remains relatively untouched. Whilst, for example, the ‘constitutionality’ of UN peace operations has been well accepted since the ICJ’s decision in the *Certain Expenses Advisory Opinion*,⁴⁷ how the LOSC relates to such uses of force for UN purposes remains far from clear. Although the *San Remo Manual* goes some way towards introducing the LOSC into the UN Charter Chapter VII context, through the medium of LoNW – most particularly through a general reference to the powers of the UNSC (Section III) and an assessment of the effect of maritime zones upon belligerency at sea (Part II) – the detail is scant. Furthermore, the harder questions relating to neutrality, consent, and third party Territorial Seas have been left unexplored.⁴⁸ As Staley notes, “through all these activities since its estab-

43 See, for example, Pang Zhongying, “China’s Changing Attitude to UN Peacekeeping”, *International Peacekeeping*, Vol. 12, No. 1, Spring 2005; pp 87-104; Katsumi Ishizuka, “Japan’s New Role in Peace-Building Missions”, *East Asia*, Vol. 23, No. 3, 2006; pp 3-21; Purnendra Jain, “Japan-Australia Security Ties and the United States: the Evolution of the Trilateral Dialogue Process and its Challenges”, *Australian Journal of International Affairs*, Vol. 60, No. 1, December 2006, pp 521-535; p 524.

44 *Rome Statute of the International Criminal Court*, UN Doc A/CONF. 183/9; *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3) (2000) 1 AC 147.

45 On Kosovo, see generally, Wesley Clark, *Waging Modern War: Bosnia, Kosovo, and the Future of Conflict*, Public Affairs, New York, 2002; Marc Weller, “Enforced Negotiations: The Threat and Use of Force to Obtain an International Settlement for Kosovo” (1999) 5:1-2 *International Peacekeeping* 4; Marc Weller, “The US, Iraq and the Use of Force in a Unipolar World”, *Survival*, Vol. 41, No. 4, Winter 1999-2000; pp 81-100.

46 At both the 1958 and 1970-82 UN Conferences on the Law of the Sea (UNCLOS I and III), the issue of Law of the Sea during times of conflict was expressly excluded from consideration. See generally, Bernard H. Oxman, “The Regime of Warships Under the United Nations Convention on the Law of the Sea” (1984) 24:4 *Virginia Journal of International Law* 809 at 811.

47 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) Advisory Opinion* (1962) ICJ Reps. 151. See also, Hilaire McCoubrey and Nigel D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Dartmouth, Aldershot, 1996; p 39.

48 Although the Third Round Table, held at Bergen, Norway, in September 1991 did consider Christopher Greenwood’s Rapporteur’s Report on *The Effect of the United Nations Charter on the Law of Naval Warfare*, the *San Remo Manual* reflects considerations lim-

ishment, the United Nations has not developed a consistent means of operating on the world's oceans in either a peacekeeping or an enforcement role".⁴⁹ Resolving this problem, as Zacklin has correctly observed, is not simply about "a lawyers obsession with clarity and legal definition; it is necessary because the legal character and nature of the operation has a direct bearing on the legal issues which arise and their resolution".⁵⁰

Sovereignty and Global Governance

The relative absence of debate on the interface between the UN Charter, the use of force, and the LOSC (some of the major components of contemporary international law) has also been overshadowed by a wider debate concerning the relationship between modern regimes of 'global governance', and the traditional state-focused concept of sovereignty – a debate about the shape, characteristics, and fundamental assumptions that will underpin the "international public order" of the future.⁵¹ The sovereignty position, as Greenwood observes, is buttressed by the fact that "respect for state sovereignty is one of the cornerstones of the international legal order",⁵² an observation echoed in, inter alia, Kingsbury's description of state sovereignty as a central "normative foundation of international law".⁵³ Ayoob provides an example of this positive defence of sovereignty in his discussion of interventions targeting "state-making" in the Third World. To be sustainable, he argues, the process of democratisation should complement and reflect actual (as opposed to nominal) sovereignty, rather than impose upon it – precisely because sovereignty implies much

ited to the UNSC, neutrality, and self-defence. See, *San Remo Manual* (Commentary); pp 65, 75-76, 79-80. This is not at all surprising considering the milieu in which these issues were discussed – in 1991, there was little to indicate that the nature and scope of UN peace operations generally, and the place of navies within them, would expand and complicate quite so quickly.

- 49 Robert Stephens Staley III, *The Wave of the Future: The United Nations and Naval Peacekeeping*, International Peace Academy and Lynne Rienner Publishers, Boulder, 1992; p 11; See also, Letts, "The Royal Australian Navy, the Constitution and the Law – Then and Now"; p 287.
- 50 Ralph Zacklin, "Managing Peacekeeping from a Legal Perspective" in Daniel Warner (ed), *New Dimensions of Peacekeeping*, Martinus Nijhof, Dordrecht, 1995; p 159.
- 51 Marc Weller, "On the Hazards of Foreign Travel for Dictators and Other International Criminals", *International Affairs*, Vol. 75, No. 3, 1999; p 599. For two notable, and different, perspectives on this tension generally, see (for example) Anne Marie Slaughter, *A New World Order*, Princeton University Press, Princeton, 2004; and Jose E. Alvarez, *International Organisations as Law-Makers*, Oxford University Press, Oxford, 2005. In concerns over oceans regimes, it is a not uncommon view that "concepts of competitive statism have traditionally taken precedence over international co-operation" – Michael Pugh, Jeremy Ginifer, and Eric Grove, "Sea Power, Security, and Peacekeeping after the Cold War", in Michael Pugh (ed), *Maritime Security and Peacekeeping: A Framework for United Nations Operations*, Manchester University Press, Manchester, 1994; p 10.
- 52 Christopher Greenwood, "Is there a Right of Humanitarian Intervention?", *The World Today*, February 1993; p 34 – albeit, as Greenwood continues, as an increasingly challenged and challengeable cornerstone.
- 53 Benedict Kingsbury, "Sovereignty and Inequality" (1998) 9 *European Journal of International Law* 599.

more than merely titular governance. The core of sovereignty is not mere power, but rather is responsibility and thus, as Ayooob concludes, it is hard to encourage strong Westphalian states in the Third World if this underpinning concept is continuously bypassed and ignored.⁵⁴ This traditional notion of sovereignty is enshrined within the UN Charter itself – Articles 2(1) and 2(7) for example – and regularly appears in UN and state rhetoric. Even when purporting to establish regimes of global governance over a particular issue, the UN and states often hedge their intentions with recollections of “non-interference in the internal affairs of states” and “the territorial integrity [and] political unity of sovereign and independent states”.⁵⁵

The global governance position, on the other hand, claims support and nourishment from a range of international actors and concepts challenging the traditional paradigm of state sovereignty, often proposing a legal order presided over by constitutional norms.⁵⁶ This inclination is particularly strong in issues of international peace and security, one of the primary governance concerns of the UN Charter,⁵⁷ where it is the UNSC – the “international constitutional body which exercises peremptory powers in relation to peace and security” – that is the competent organ

54 Mohammed Ayooob, “State Making, State Breaking, and State Failure”, in Chester A. Crocker, Fen Osler Hampson, and Pamela Aall (eds), *Managing Global Chaos: Sources of and Responses to International Conflict*, United States Institute of Peace, Washington D.C., 1996; pp 38–49; See generally, Ove Bring, “The Westphalian Peace Tradition in International Law”, in Michael N. Schmitt (ed), *International Law Studies Volume 75: International Law Across the Spectrum of Conflict*, Naval War College, Newport, 2000; pp 57–80.

55 Respectively found in, for example, UN General Assembly Resolution 1514 (XV) (1960) *Declaration on the Granting of Independence to Colonial Territories and Peoples*, 14 December 1960; paragraph 7; and UN General Assembly Resolution 2625 (XXV) (1970) *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN*, 24 October 1970; paragraph 1.

56 See, for example, Kenneth N. Waltz, *Man, the State, and War: A Theoretical Analysis*, Columbia University Press, New York, 1954; particularly ch VI, where he discusses his third image (an international system) in terms of an absence of a constitutional overlord; and Headley Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd Edition), Columbia University Press, New York, 1977; at, for example, pp 25–26 (the “Grotian view”), and 130–136 (belief in international law as “law” gives it some constitutional effect). This inclination has also been recognised, from as early as 1950, by ICJ judges who have regularly referred to the “constitutional” nature of the UN Charter. See, for example: Judge de Visscher in the *South West Africa Case* (1950) ICJ Reps. 128 at 187; Judge Hersch Lauterpacht in the *South West Africa Case* (No. 2) (1955) ICJ Reps. 67 at 106, 112. Similarly, the decision of the House of Lords in the *Pinochet Case* (No.3) offered clear evidence that several Law Lords held an appreciation of a growing ethos of international constitutionalism – See *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No.3) (2000) 1 AC 147 – especially the judgments of Lords Hutton, Millet, and Phillips of Worth Matravers. See generally, Bardo Fassbender, “The United Nations Charter As Constitution of the International Community” (1998) 36: 3 *Columbia Journal of Transnational Law* 529, for a recent account of some of the major post-World War I strands in this thought. See also, Weller, “The Reality of the Emerging Universal Constitutional Order”; pp 40–63; Ronald St.J. Macdonald, “The Charter of the United Nations as a World Constitution” in Michael N. Schmitt (ed), *International Law Across the Spectrum of Conflict*, International Law Studies Vol 75, Naval War College, Rhode Island, 2000; pp 263–300; Nicholas Onuf, “The Constitution of International Society” (1994) 5 *European Journal of International Law* 1 at 16–17.

57 *Charter of the United Nations* 1945; preamble, Art 1, Chapters V–VIII, XII, for example.

vested with the constitutional legitimation to act.⁵⁸ Indeed, as the ICJ noted in the *Namibia Advisory Opinion*

The members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. *The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.*⁵⁹

The LOSC, a similarly major component of international law which deals with 70 per cent of the earth's surface, both supports and subverts traditional sovereignty. Compare, for example, the sovereignty-laden Continental Shelf regime with the global governance perspective of the common heritage of mankind and the environmental protection regimes of the LOSC.⁶⁰ Indeed for some the LOSC is a "world order treaty" and thus enjoys a special significance – if not a special status – which confers upon it a degree of transcendence of sovereignty.⁶¹ This is similarly so with the UN Charter – another world order treaty – where recent practice by the international community can be said to have challenged the concept of national sovereignty as contemplated in that instrument.⁶² As Weller declares, in the bustle and uncertainty of the post-Cold War international milieu

58 *Charter of the United Nations* 1945; Art 24(1); See Marc Weller, "Armed Samaritans" (1999) August *Counsel* 20.

59 ICJ quoting a statement by the UN Secretary-General to the UNSC, 10 January 1947 – see the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* (1971) ICJ Reps 16 at 52 – my italics.

60 See *Law of the Sea Convention* 1982, Part VI – The Continental Shelf. Art 76, for example, refers to "The continental shelf of a coastal State...". Art 77 similarly decrees that "The coastal State exercises over the continental shelf *sovereign rights* for the purposes of exploring it and exploiting its natural resources". By contrast, Part VII – The High Seas – is explicit, in Art 89, that "No State may validly purport to subject any part of the high seas to its sovereignty". Similarly, the status of the deep seabed ("The Area" dealt with in Part XI) is described in Art 135 – "The Area and its resources are the common heritage of mankind". Art 137 is similarly specific – "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources...". Art 140 explains the implications of this "common heritage" status as being that "Activities in the Area shall...be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing states...". With respect to the protection and preservation of the marine environment, see Part XII, Art 193, which caveats sovereignty with a duty to protect and preserve the environment – "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment".

61 Fassbender, "The United Nations Charter As Constitution of the International Community"; p 550.

62 See generally, David B. Steele, "Securing Peace for Humanitarian Aid", *International Peacekeeping*, Vol. 5, No. 1, Spring 1998; pp 66-88; Oliver P. Richmond, "UN Peace Operations and the Dilemmas of the Peacebuilding Consensus", *International Peacekeeping*, Vol. 11, No. 1, Spring 2004; pp 83-101; Alex J. Bellamy and Paul D. Williams, "Who's Keeping the Peace: Regionalization and Contemporary Peace Operations", *International Security*, Vol. 29, No. 4, Spring 2005; pp 157-195; Yuka Hasegawa, "The United Nations

Even the ultimate source of international order as traditionally conceived, the principle of state sovereignty, has been fundamentally challenged in legal and political theory, and perhaps more startlingly, in the actual practice of governments, peoples, groups and other actors.⁶³

As a quixotic result, the international community is simultaneously confronted by “the presumption in favour, or equally against State freedom”.⁶⁴ Thus any operations law-coloured analysis of UN naval peace operations in the Territorial Sea will – by its very nature – be suffused with, and illuminated by, the implications of this wider question. It is, consequently, not only the nature of seapower and authority at sea which must inform the context of this study, for this wider paradigmatic colouration – stemming from the debate over the relationship between world order authorities and the concept of sovereignty – is also fundamental.

The Issue

Given the need for conceptual clarity and the prevalence of a number of underlying tensions which must be taken into account, the overall aim of this book is to examine the theoretical and practical aspects of UN naval peace operations in the Territorial Sea (including third state Territorial Seas), and to map out a conceptually coherent but also operationally sensible and practical construction of ‘authority’ within which they can be understood, planned and analysed. This will be achieved by examining the character, construction and operation of the primary, and most problematic, ‘authority’ aspects of this issue – the *interaction* between the rights and duties associated with UN Chapter VII peace operations and the rights and duties codified under the Territorial Sea regime of the LOSC, and the *consequences* of this interaction for the conduct of, and use of force in, UN naval peace operations. Whilst scholarship and practice has scratched the surface of the separate relationships between LoNW and the UN Charter, and the LoNW and the LOSC, there is scarce analysis of the third element of this triangle – the interaction between UN Charter Chapter VII and the LOSC. Yet this relationship is seminal for UN naval peace operations. As Warner noted, the LOSC’s “shortcomings where military uses of the sea are concerned” are particularly acute with respect to how its “provisions interact with the system for maintenance of international peace and security described in the United Nations Charter”.⁶⁵

Assistance Mission in Afghanistan: Impartiality in New UN Peace Operations”, *Journal of Intervention and Statebuilding*, Vol. 2, No. 2, 2008; pp 209–226; and the evolving concept of “Responsibility to Protect”.

63 Marc Weller, “The Reality of the Emerging Universal Constitutional Order: Putting the Pieces of the Puzzle Together”, *Cambridge Review of International Affairs*, Vol. 10, No. 2, 1997; p 40.

64 Nikos St. Skourtos, “Legal Effects for Parties and Non-Parties: The Impact of the Law of the Sea Convention”, in Myron H. Nordquist and John Norton Moore (eds), *Entry Into Force of the Law of the Sea Convention* (1994 Rhodes Papers), Martinus Nijhoff Publishers, The Hague, 1995; p 200.

65 Robin Warner, “The Compatibility of 1982 United Nations Law of the Sea Convention Norms with the Execution of Force Measures”. This relationship also raises other com-

Relevance

Before outlining the structure adopted in this book, it is important to explain the relevance of the issue at its core. There are four reasons for addressing the issue of authority in UN naval peace operations. First, whilst the practices and issues themselves may not be new, the issue of authority has (re)emerged in the context of peace operations possibilities only realised (and realisable) in the aftermath of the Cold War. As such, the issue requires “our renewed attention”⁶⁶ and needs to be examined afresh within this new context. To remain useful, norms and the theoretical concepts on which they are based must reflect and keep abreast of international developments.⁶⁷ Second, and as a corollary of this, the issue of constructing authority for UN naval peace operations has not, to date, been addressed in any particular detail. Third, the increasing significance of these practices and issues to the conduct of UN peace operations in general requires that they be addressed. Finally, constructing authority for UN naval peace operations forms an interesting question of international operational authority, the discussion of which may provide some background for addressing further questions on the relationship of the LOSC and UN naval peace operations to other instruments and doctrines of international law. It is worth examining each measure in a little further detail.

The first measure of relevance for this topic is situational – the fact that it has become a substantive, practical issue since 1990 as UN peace operations have developed their current, and still evolving, post-Cold War form.⁶⁸ In this respect, the post-

plications, such as whether the “activities of a multinational naval force, while enforcing Chapter VII resolutions, can be such that, while inconsistent with neutral status, are also inconsistent with belligerent status” – Bruce B. Davidson, “Status and Rights of Warships in a Multinational Force Tasked to Enforce Security Council Resolutions in Accordance with Chapter VII of the United Nations Charter”, a paper presented at the *Symposium on Maritime International Law*, Valparaiso, Chile, 25–27 June 1996.

- 66 Hisashi Owada, “New Challenges to the International Order of the Sea”, in Seoung-Yong Hong, Edward L. Miles, and Choon-ho Park (eds), *The Role of the Oceans in the 21st Century* (Proceedings of the Law of the Sea Institute Twenty-Seventh Annual Conference, 1993), The Law of the Sea Institute, Honolulu, 1995; p 13.
- 67 Pugh, Ginifer, and Grove, “Sea Power, Security and Peacemaking”; p 10; See also Jean-Francois Pulvenis, “New Problems Arising from the Entry into Force of the 1982 Law of the Sea Convention?”, in Najeeb Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff Publishers, The Hague, 1995; p 441 – Pulvenis notes that mere entry into force was no “guarantee” of continued relevance and utility.
- 68 The post-Cold War maritime (and general) security environment is, most argue, “radically” different from that which held fast during the Cold War – See Geoffrey Till’s discussion in “Maritime Strategy and the Twenty-First Century” – Geoffrey Till, *Seapower: Theory and Practice*, Frank Cass & Co., London, 1994; p 176. A more pronounced spirit of international co-operation on peace and security issues emerged (for a period of time, at any rate) subsequent to the end of the Cold War – see Laura Neack, “UN Peacekeeping: In the Interest of Community or Self?”, *Journal of Peace Research*, Vol. 32, No. 2, May 1995; p 181. This created a degree of political space and capital, allowing the UN to “revive and revamp its peacemaking efforts” – see A.B. Fetherston, *Towards a Theory of United Nations Peacekeeping*, Macmillan, London, 1994; pp 129–130. As Ramesh Thakur observes (pre-2002), the end of the Cold War “relieved” the UN and the UNSC in particular of the “disability of [institutionalised] great power disagreement” – see Ramesh Thakur, “From

Cold War international environment differs markedly from its predecessor for three major reasons. First, “since the end of the Cold War, the basic order of the international community has been undergoing drastic structural changes”.⁶⁹ As Lillich records, the Cold War inhibited UNSC peace operations,⁷⁰ while in the post-Cold War period, as Pugh, Crawford, and others note, the UNSC has begun addressing issues of global governance – such as human rights and peace operations – at the apparent expense of sovereignty.⁷¹ Of particular importance in this context of global versus national is how UN peace operations relate to aspects of third state sovereignty, such as the Territorial Seas of adjacent states. This context was recently complicated by a more overt and unapologetic unilateralism in US policy – evident not only in the wake of attacks on the World Trade Centre and Pentagon

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- Peacekeeping to Peace-Enforcement: The UN Operation in Somalia”, *Journal of Modern African Studies*, Vol. 32, No. 3, September 1994; p 390. In William Shawcross’ opinion, “[I]n one way, at the end of the Cold War, the world went back to normal. For decades responses to international crises had been governed by ideology, alliance pressures and a nuclear stalemate. Now national and local interests came, once again, to the fore” – William Shawcross, *Deliver Us from Evil: Warlords and Peacekeepers in a World of Endless Conflict*, Bloomsbury, London, 2000; p 27. This is not to say, however, that the post-Cold War world is any less prone to conflict, and as Allan Stephens and others note, “the international community’s willingness to try to resolve political disputes by resort to violence is not diminishing”. Between 1990 and 1999, there were no less than 37 armed conflicts of which the UNSC has been, or could have been, seised – See Allan Stephens, “Kosovo: Or the Future of War?”, a paper presented to the Australian Institute of International Affairs, Canberra, ACT, Australia, 8 July 1999; p 1. Since 1999, there have been several more, including Afghanistan since 2001, and Iraq since 2003.
- 69 Owada, “New Challenges to the International Order of the Sea”; p 18; For other analyses from a maritime perspective, see also Vladimir Grachev, “United Nations Peacekeeping in Transition”, (1998) 45 *Naval Law Review* 273 at 277, who notes that the dangers inherent in post-Cold War peace operations are significantly greater precisely because it was “the structures that sustained the Cold War [that] also limited the threats to peacekeepers and to their mandates”; and Pirtle, “Military Uses of Ocean Space and the Law of the Sea in the New Millennium”; pp 7, 25.
- 70 Richard B. Lillich, “Humanitarian Intervention Through the United Nations: Towards the Development of Criteria” (1993) 53 *Heidelberg Journal of International Law* 557 at 560-561; See also Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 14 – As Staley optimistically recorded in 1992, many previously shelved initiatives and possibilities for the UN seemed to be re-emerging now that “[t]he ideologically and nationally driven competition of the United States and the Soviet Union has become a thing of the past”. See also, John MacKinlay (ed), *A Guide to Peace Support Operations*, Thomas J. Watson Jr. Institute for International Studies, Brown University, Providence, 1996; p 12; Edward Luttwak, “Give War a Chance”, *Foreign Affairs*, Vol. 78, No. 4, July/August 1999; p 37.
- 71 Michael Pugh, “Peacebuilding as Developmentalism: Concepts from Disaster Research”, *Contemporary Security Policy*, Vol. 16, No. 3, December 1995; p 326; James Crawford, *Democracy in International Law*, (Inaugural Lecture, delivered at the University of Cambridge, 5 March 1993), Cambridge University Press, Cambridge, 1994; pp 13-14. See also the ICJ’s post-Cold War jurisprudence, reflected in the differences between state sovereignty buttressing decisions such as the *Nicaragua Case (Merits)* (1986) ICJ Reps. 14, and the conscious invocation of more universalist, state sovereignty challenging concepts in cases such as the ‘Genocide Case’ *Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)* (1993) ICJ Reps. 325, and the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reps. 226.

on 11 September 2001, but also in other, non-military, matters of global governance such as the Kyoto Protocols for the reduction of greenhouse gas emissions, and the International Criminal Court. Second, the spectrum of possible roles and powers of international organisations and authorities – particularly the UN and the UNSC – has expanded radically since the end of the Cold War.⁷² In 1982, the types of freedoms that preoccupied the negotiators of the LOSC were state-centric freedoms – navigation, fishing, and the conduct of military exercises. Today, international organisations play a major part in the development, implementation, and governance of global issues such as trade (particularly the WTO), the environment, and international peace and security. As Weller concludes of international organisations in the post-Cold War international legal order

The range of executive functions of such [international] institutions can be very extensive and include the authority to take and implement public decisions, at times in the absence of the consent of states, of other international actors, or of individuals at whom the decision may be directed.⁷³

Third, the exponential increase in the number of UN peace operations since the end of the Cold War has contributed to a significant – if occasionally non-linear – learning process. Since 1990, the UN, its member states, and the Department of Peacekeeping Operations (DPKO) have learnt, and in some cases re-learned – for example through the *Brahimi Report* – a good deal on how to mandate, plan for, implement, and monitor UN peace operations. The DPKO in particular has evolved from a “working hours only” organisation without a functional situation room or proper logistics and force planning, and no formalised command and control system (that is, quite unsuited to managing, or even monitoring operations) into something more akin to a strategic level headquarters suited to oversight of several concurrent operations.⁷⁴ Similarly, the UNSC and troop contributing nations have also devel-

72 As Boutros Boutros-Ghali, then UN Secretary General noted in his 1995 *Supplement to An Agenda For Peace*, “[I]t is indisputable that since the end of the cold war there has been a dramatic increase in the United Nations activities related to the maintenance of peace and security”. As Boutros-Ghali notes, as at 31 Jan 1988, as the Cold War drew to its close, the UNSC had adopted 15 Resolutions in the preceding 12 months, and the UN was involved in five peace operations. As at 16 December 1994, the UNSC had adopted 78 Resolutions in the previous 12 months, and was involved in 28 peace operations. See Boutros Boutros-Ghali, *Supplement to An Agenda For Peace*, Department of Public Information, United Nations, New York, 1995; paragraph 8 and table 1. See also Shawcross, *Deliver Us From Evil*; p 32 – “In the first flush of post-Cold War enthusiasm, the Security Council became more and more assertive. The number of resolutions increased exponentially: in 1993 alone there were ninety-three resolutions, compared to an average of fifteen a year during the Cold War years of 1945-88”. See also, Robert I. Rotberg, “Failed States in a World of Terror”, *Foreign Affairs*, July/August 2002.

73 Weller, “Universal Constitutional Order”; p 59.

74 Major General Ian Gordon, Deputy Force Commander Peacekeeping Force, United Nations Transitional Administration in East Timor, interview conducted on 2 February 2002, in Dili, East Timor. See also David Ramsbotham, “Analysis and Assessment for Peacekeeping Operations”, *Intelligence and National Security*, Vol. 10, No. 4, October 1995; pp 163-172; and Paul Diehl, “With the Best of Intentions: Lessons from UNOSOM I and II”, *Studies in Conflict and Terrorism*, Vol. 19, 1996; pp 158-159 – Ramsbotham and

oped practices and processes for planning peace operations generally (such as establishing relationships between troop contributing nations, and formalising command and reporting chains), and have become sensitive to the specifics of implementation (such as being more finely attuned to, and accepting of, the need for more powerful and robust rules of engagement).⁷⁵ Looking at the essentially post-Cold War issue of UN peace operations-use of force-LOSC interaction, and its implications for authority in UN naval peace operations, through a Cold War tinted lens can have no outcome except to mislead.

The second measure of relevance is the fact that – as a consequence of this situation – many issues of authority in contemporary UN naval peace operations have not yet been adequately addressed. In the self-congratulatory atmosphere that immediately followed the conclusion of the Third United Nations Law of the Sea Convention (UNCLOS III), Convention President Koh optimistically declared that the new LOSC was “significant because it is the first comprehensive convention governing *all* aspects of the various uses and resources of the world’s oceans”.⁷⁶ In practice, however, the LOSC is in fact silent or ambiguous on a range of issues, and particularly on the use of force.⁷⁷ Whilst it is clearly arguable that “there [is] a close linkage between the LOS Convention and *national security*”⁷⁸ – a view echoed by the Henkin Panel on United States interests and the LOSC⁷⁹ – the linkage between

Diehl both noted in 1996 that the UN still had a significant way to go in understanding the importance of, and harnessing the value of, timely “intelligence” for situation assessment and early warning. This is still an issue – see United Nations, *Report of the Panel on United Nations Peace Operations* (The “Brahimi Report”), 21 August 2000 (UN Doc S/2000/809).

75 Gordon, interview conducted 2 February 2002, Dili, East Timor. See, for example, the UN’s *Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations*, DPKO (Military Division) (MD/FGS/0220.0001) May 2002.

76 Tommy T.B. Koh, “Negotiating a New World Order for the Sea”, *Virginia Journal of International Law*, Vol. 24, No. 4, 1984; p 783 – my italics.

77 This issue, and the possible reasons for it, will be addressed in a later chapter. It is important to note, however, that there were also other topics not addressed at the UNCLOS III negotiations – see, for example, Tulio Treves, “Entry into Force of the United Nations Law of the Sea Convention: The Road Towards Universality”, in Najeeb Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff Publishers, The Hague, 1995; p 480. Treves notes, in particular, that the “abusive exploitation and squandering of the resources of the seas and the consequential dangers for the environment” – which he believed to be one of the “threats appearing on the horizon” of LOSC implementation and utility – were not adequately dealt with during the negotiations.

78 William L. Schachte, “National Security Interests in the 1982 U.N. Convention on the Law of the Sea”, a paper presented at the *Ocean Policy Affairs Public Forum*, Council on Ocean Law and the American Society of International Law, 1993 (extracted in Thomas A. Clingan, *The Law of the Sea: Ocean Law and Policy*, Austin & Winfield, London, 1994; p 581).

79 The Henkin Panel, “United States Interests in the Law of the Sea Convention” (1994) 88 *American Journal of International Law* 167; See also the analysis of this issue by Edward L. Miles, “U.S. Security Interests in a Post-Cold War World and the Law of the Sea” (1997) 36:1-2 *Columbia Journal of Transnational Law* 373 at 374-382.

the LOSC and *international* peace and security is much less clear.⁸⁰ A recent example of this was the political, operational, and legal confusion over the authority to board and search ships in international waters, without flag state consent, upon suspicion of involvement in transporting weapons of mass destruction (WMD) materials or illegal cargoes (such as drugs) used to finance WMD production – the essence of the Proliferation Security Initiative (PSI).⁸¹ This is unsurprising given the state-centric milieu in which the LOSC was negotiated and developed. Writing in 1994 – ostensibly with respect to UN maritime embargoes, but with general resonance – Politakis observed that “the need for clear, standardised Rules of Engagement (RoE) appli-

80 In 1990, for example, Christopher C. Joyner opined that scholars and policy-makers needed to ask “a number of questions concerning [the LOSC’s] value and relevance as a nascent instrument of international law”, the first of which was: “Does the Convention effectively contribute to the maintenance of international peace and security?” – See Christopher C. Joyner, “Law of the Sea: Evolving National Policies”, *American Society of International Law* (Proceedings of the Eighth Annual Meeting), Washington D.C., 28-31 March, 1990; p 278. This process is further complicated by the fact that, as Michael Pugh argues, traditional lines between national and international interests are becoming less and less distinct – See Michael Pugh, “Is Mahan Still Alive? State Naval Power in the International System” in *Journal of Conflict Studies*, Vol. XVI, No. 2, Fall 1996; pp 109-124.

81 See the Multinational Proliferation Security Initiative, “Statement of Interdiction Principles”, accessible at, for example, the Australian Department of Foreign Affairs website: www.dfat.gov.au/globalissues/psi/psi_statement.html. See also Office of International Law, Australian Attorney-General’s Department, “Proliferation Security Initiative” in Australian and New Zealand Society of International Law, *Newsletter*, No. 4, December 2003; p 2. Multinational PSI has been exercised on several occasions (off the coast of Australia, in the Mediterranean, in the Arabian Sea, and in the Indian Ocean, for example), and there have been at least three actual PSI interdictions, by US and Spanish forces, including a German freighter carrying centrifuge parts to Libya, which was intercepted in October 2003, and the *So San* interdiction in 2002. See generally, Wolff Heintschel von Heinegg, “The Proliferation Security Initiative in the Maritime Domain”, presented at *International Law Challenges: Homeland Security and Combating Terrorism* Conference, US Naval War College, Newport, Rhode Island, 23-25 June 2004; Patricia McNerney, “Proliferation Security Initiative: Maritime Aspects”, presented at *International Law Challenges: Homeland Security and Combating Terrorism* Conference, US Naval War College, Newport, Rhode Island, 23-25 June 2004; Craig Allen, “Comment on Proliferation Security Initiative”, presented at *International Law Challenges: Homeland Security and Combating Terrorism* Conference, US Naval War College, Newport, Rhode Island, 23-25 June 2004; CAPT William Baumgartner, USCG, “Comment on PSI”, presented at *International Law Challenges: Homeland Security and Combating Terrorism* Conference, US Naval War College, Newport, Rhode Island, 23-25 June 2004; Stuart Kaye, “Comment on PSI”, presented at *International Law Challenges: Homeland Security and Combating Terrorism* Conference, US Naval War College, Newport, Rhode Island, 23-25 June 2004; Douglas Guilfoyle, “The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?” (2005) 29:3 *Melbourne University Law Review* 733; Stuart Kaye, “The Proliferation Security Initiative in the Maritime Domain” (2005) 35 *Israel Yearbook on Human Rights* 205. See also “Anti-WMD Interdictions Reach Three”, *The Australian*, 16 January 2004 – www.theaustralian.news.com.au/printpage/0,5942,8405065,00.html accessed 16 January 2004; and Jacquelyn S. Porth, “Pacific Exercise Simulates Interdiction on the High Seas”, *The Washington File*, US Department of State, 12 September 2003 <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&tm=September&x=20030912185450htropo.8249323&t=usinfo/wf-latests.html> on 17 January 2004.

cable to UN-sanctioned maritime interdiction campaigns” was becoming urgent.⁸² Similarly, Hampson, also writing in 1994, described how ambiguities and uncertainties in the LOSC were

...only compounded by the uncertain status of individual provisions in the Convention and the general uncertainty about the effect of a Security Council peacekeeping/peacemaking resolution on the rights otherwise exercisable.⁸³

Yet despite such recognition as an important yet scantily analysed issue, this relationship between the UN Charter (particularly Chapter VII), the use of force, and the LOSC remains relatively unexplored. In the view of many, the UN has muddled through naval peace operations, attempting to establish temporary ad hoc balances “between the piecemeal approach and the process of institutionalisation”.⁸⁴ To paraphrase Miles, whilst the practical military components of (naval) peacekeeping, evidenced in operations in the Former Republic of Yugoslavia, Cambodia, Somalia, Haiti, and East Timor are generally well settled and in place, a very significant non-military component of this regime – a conceptual appreciation of how authority for such operations is constructed – remains relatively under-developed.⁸⁵

The third measure of relevance for this study resides in the fact that the authorities which flow out of the UN Charter-use of force-LOSC interface are becoming an ever more significant issue in UN peace operations.⁸⁶ First, UN mandates are becoming increasingly ‘intrusive’, and the intrusiveness (in both a territorial and a ‘scope of issues’ sense) of naval forces in support of such international operations is escalating apace. Second, as noted previously, the sheer incidence of peace operations involving a significant maritime component is on the rise, and this is subjecting

82 George P. Politakis, “UN-Mandated Naval Operations and the Notion of Pacific Blockade: Comments on Some Recent Developments” (1994) 6 *African Journal of International and Comparative Law* 173 at 174.

83 Hampson, “Naval Peacekeeping”; p 200.

84 Pugh, Ginifer, and Grove, “Sea Power, Security and Peacemaking”; p 15.

85 Miles, “U.S. Security Interests in a Post-Cold War World”; p 374. see also Jeremy Ginifer, “A Conceptual Framework for UN Naval Operations”, in Michael Pugh (ed), *Maritime Security and Peacekeeping: A Framework for United Nations Operations*, Manchester University Press, Manchester, 1994; pp 55, 61. This underdevelopment has yet to be remedied, argue a number of scholars – see, for example, Alex J. Bellamy, “The ‘Next Stage’ in Peace Operations Theory?”, *International Peacekeeping*, Vol. 11, No. 1, Spring 2004; pp 17-38; Alex J. Bellamy and Paul Williams, “What Future for Peace Operations? Brahimi and Beyond”, *International Peacekeeping*, Vol. 11, No. 1, Spring 2004; pp 183-212.

86 As Shawcross notes, “[W]ith the end of the Cold War, established patterns vanished”, resulting in a form of “nonstructured or destructured conflict” with multiple parties and interlocutors, and often with no one actor enjoying “real authority or decisive force” – See Shawcross, *Deliver Us from Evil*; p 13. Similarly, see Martin van Creveld, *The Transformation of War*, The Free Press, New York, 1991; chapter 2, where he argues that the rise of low-intensity “non-trinitarian” or non-Clausewitzian war – that is, war that is not characterised by the separation, but interaction of, government, military, and populace – is simply the re-emergence of types of conflict common in the pre-Westphalian era. From a maritime perspective, see James Cable, *Gunboat Diplomacy, 1919-1991: Political Applications of Limited Naval Force* (Third Edition), MacMillan in association with ISSS, London, 1994; chapter 6.

the issue of authority to sharper focus and increased scrutiny.⁸⁷ Third, UN mandates inherently contain their own organic first-line of “quality control”,⁸⁸ and more clearly delineated politico-legal limits and better defined RoE – all of which refer back to the fundamental issue of authority – are essential components of this process of self-regulation. This is particularly poignant given that, at least since the *Certain Expenses Case* (1962), UNSC decisions are always “to be presumed lawful until declared otherwise”. This places states under an obligation to comply with UNSC directives, even to the extent of perhaps breaching other provisions of international law – an obligation reiterated in the *Lockerbie* decision (with respect to actions relating to the *Montreal Convention* and the ICAO Regulations), and in a number of domestic cases relating to military operations in Iraq and Afghanistan.⁸⁹ The escalating tempo and intrusiveness of UN peace operations at sea – including the need for intrusion into waters that would otherwise be considered ‘no go zones’, such as third party Territorial Seas – will thus continue to raise questions about UN Chapter VII operations, use of force, the LOSC, and their relationship. As Warner concludes, these dilemmas are increasingly

...significant in dimension and sensitive in nature as they will frequently involve encroachments on the sovereignty of member states of the United Nations in situations where the norms of maritime jurisdiction under the 1982 LOSC conflict with

87 See Alfred H.A. Soons, “A ‘New’ Exception to the Freedom of the High Seas: The Authority of the UN Security Council”, in T.D. Dill and W.P. Heere (eds), *Reflections on Principles and Practice of International Law*, Kluwer Law International, The Hague, 2000; p 207. Examples include UN authorised peace operations (East Timor, Cambodia), regionally authorised peace operations (Bougainville, Solomon Islands), and non-UN authorised operations (Kosovo, Iraq in 2003 – although the authority for these two operations in particular is contentious, with several states arguing, with respect to Iraq, the pre-existence of a continuing UN authorisation).

88 Marc Weller, “Access to Victims: Reconceiving the Right to ‘Intervene’”, in Wybo P. Heere (ed), *International Law and the Hague’s 750th Anniversary as the Capital of International Law*, TMC Asser Instituut, The Hague, 1999; p 368. As Burns notes, clarity in a mandate is essential – John C. Burns, “Preventive Deployment and Diplomacy in Practice”, *RUSI Journal*, February 1998; p 43.

89 *Case Concerning Questions of Interpretation and Application of the Montreal Convention Arising out of the Aerial Incident at Lockerbie (Provisional Measures)* (1992) ICJ Reps. 3. For a detailed discussion of the implications of the case, see Marc Weller, “The Lockerbie Case: A Premature End to the ‘New World Order?’” (1992) 4 *African Journal of International and Comparative Law* 302. On UK jurisprudence relating to the relationship between certain human rights treaty (and legislative) obligations and UNSC resolutions, see *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58 (12 December 2007), and *Secretary of State for Defence v Al-Skeini and others* [2007] UKHL 26 (13 June 2007). In relation to Canada, see *Amnesty International Canada and British Columbia Civil Liberties Association v Chief of Defence Staff for the Canadian Forces, Minister for National Defence and Attorney General of Canada* [2007] FC 1147; and *Amnesty International Canada and British Columbia Civil Liberties Association and Chief of Defence Staff for the Canadian Forces, Minister for National Defence and Attorney General of Canada* [2008] FC 162 (*Amnesty International & Ors v Canadian Minister for Defence & Ors*).

the requirement to enforce international peace and security under Chapter VII of the UN Charter.⁹⁰

The final measure of relevance is the fact that this relationship is not only an under-addressed aspect of contemporary international naval operations, but also a difficult one. As one of the most politically sensitive issues pressing upon the LOSC, the use of force generally lies within that “sphere where some of the uncertainties are likely to [and indeed do] last longest...an area in which the prospects for disagreement are strong and the prospects for legal clarity are weak”.⁹¹ Nowhere is this more evident than with the Territorial Sea regime, the security aspects of which have been subject to significant and continuing post-1945 debate and change, stretching from the *Corfu Channel Case*, through the 1958 *Convention on the Territorial Sea* and the 1982 LOSC, and involving significant changes in appreciations of innocent passage. The international community’s shifting priorities with respect to the sea over the last century has further complicated this uncertainty.⁹² One example is the US volte face over warship innocent passage, evident between the 1930 Hague Codification Conference (when Belgium, Latvia, Bulgaria, Romania, and the US all argued that there was a requirement for coastal state authorisation of warship transit through territorial waters),⁹³ and the US position at the 1958 Geneva Conference on the Law of the Sea.⁹⁴ A mechanism for achieving resolution, or at least discussion, of this issue – particularly with respect to UN naval peace operations – is patently necessary. It is also important given that the future relevance and preservation of the LOSC regime as a whole will in large measure depend upon its ability both to resolve such crucial issues as its relationship with the use of force, and to adapt to a continuously evolving international operational context.⁹⁵

90 Warner, “Compatibility of 1982 United Nations Law of the Sea Convention Norms with the Execution of Force”. See generally, Royal Australian Navy, *RAN Doctrine 2 – The Navy Contribution to Australian Maritime Operations*, Defence Publishing Service, Canberra, 2005; ch 2.

91 Kenneth Booth, “The Military Implications of the Changing Law of the Sea”; p 340; See also the general comments of R.W.G. de Muralt, “The Military Aspects of the UN Law of the Sea Convention” (1985) 32:1 *Netherlands International Law Review* 78.

92 John R. Stevenson and Bernard H. Oxman, “The Future of the United Nations Convention on the Law of the Sea” (1994) 88:3 *American Journal of International Law* 488 at 492.

93 League of Nations, *Conference for the Codification of International Law*, (Bases of Discussion drawn up for the Conference by the Preparatory Committee) Vol II – Territorial Waters; pp 65–72. See also O.G. de Vries Reilingh, “Warships in Territorial Waters, Their Right of Innocent Passage” (1972) 2 *Netherlands Yearbook of International Law* 29 at 40–44.

94 See *United Nations Conference on the Law of the Sea: Official Records*, Vol II: Plenary Meetings, 1958; pp 68 on the vote which saw draft Art 24 (relating to prior notification for warship passage through the Territorial Sea) rejected, thus leaving any definitive statement on the issue out of the 1958 Convention. The current US interpretation is that “[A]ll warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis” – *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*; para 2.3.2.4.

95 Edward L. Miles, “The New Ocean Regime: Facilitating Implementation, Compliance, and Evolution”, keynote presentation at the *Conference on Oceans Governance and Maritime Strategy*, Canberra, ACT, Australia, 18–19 May 1998; p 4; Thomas A. Clingan,

The Conceptualisation of Authority

At the heart of the question addressed in this book lies the nature of the ‘operational authority’ upon which decisions can be based. When assessing the lawfulness of an operation, a lack of conceptual clarity can render any claim to established legal authority highly vulnerable to challenge. However decisions nonetheless have to be made, the stakes can be high, and the scope and consequences of misjudgment can be significant. As has been noted, law follows practice at sea. This is not to say that law is irrelevant, but rather that the envelope within which operational authority can exist must be framed by international law, and cannot run counter to it. However, the absence of specific legal rules means that legitimating expectations are often defined by acceptable practice resting as far as possible on pre-existing or analogous legal bases. This type of operational authority concerns ante-facto, preparatory debates and justifications as to *legitimation* as a component of *authority* to act generally, or to do a particular act specifically, rather than adjudication-focussed law which concerns post-facto allocations of responsibility, compensation, or absolution. As the UN DPKO’s *General Guidelines for Peacekeeping Operations* (as published during the halcyon days of peacekeeping in the mid-1990’s, and recently reiterated in ‘capstone doctrine’) declare, this form of legitimation “rests on an understanding that the operation is just and is representative of the will of the international community as a whole”. It is reflected in operational conduct which “demonstrates firmness in adhering to the mandate entrusted to it by the international community, coupled with understanding for the parties to the conflict whose vital interests are at stake”.⁹⁶ Whether such conduct is considered to be within the operational authority envelope will invariably rest upon a much wider range of considerations than can be easily subject to formal adjudication.

Several examples will illuminate this distinction. First, in a domestic legal context three relatively recent cases in different jurisdictions provide illustrations of the unwillingness of domestic courts to interfere with or adjudicate upon the fundamentally political conduct of international security policy. In the *Campaign for Nuclear Disarmament Case*,⁹⁷ the NGO Campaign for Nuclear Disarmament (CND) addressed the then impending prospect of war in Iraq and the proper interpretation of UNSCR 1441, effectively inviting the UK High Court “to declare that the UK Government would be acting in breach of international law were it to take military action against Iraq without a further Resolution”.⁹⁸ After analysis of a long list of

“The Next Twenty Years of Naval Mobility”, *U.S. Naval Institute Proceedings*, May 1980; p 82.

96 United Nations Department of Peacekeeping Operations, *General Guidelines for Peacekeeping Operations*, United Nations, New York, 1995; p 15; United Nations Departments of Peacekeeping Operations and Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines*, United Nations, New York, March 2008 (the ‘capstone doctrine’); chs 1 and 3.

97 *Campaign for Nuclear Disarmament Case* [2002] EWHC 2759 (QB).

98 *CND Case*, para 2 per Simon Brown LJ. CND argued that “the government should have the benefit of judicial guidance as to what the law is” so that it would not go to war in breach of international law – *CND Case*; para 5 per Simon Brown LJ.

cases,⁹⁹ and consideration of the role of courts in reviewing the Executive's conduct of international affairs, the UK High Court ultimately rejected CND's application at the preliminary stage of justiciability.¹⁰⁰ In the *CND Case*, the UK High Court noted that such areas are generally "forbidden areas" for judicial review.¹⁰¹ The High Court declined both its power to, and at any rate the wisdom of, providing any declaratory relief in the form of declaring the government of the day's interpretation of the UNSCRs to be invalid.

The Australian High Court has come to a similar conclusion with respect to public interest – such as concern for the Australian environment – as a basis for challenging contentious, internationally-focussed, government policy. The test established in the *Australian Conservation Foundation Case* requires a special interest that is more than "a mere intellectual or emotional concern", and which displays some potential gain for the applicant beyond the satisfaction of righting a wrong or upholding a principle.¹⁰² In a situation analogous to that at the centre of the *CND Case*, however, there would be no specifically identifiable domestic context and no link to domestic rights or interests which the High Court would thus recognise. Similarly, the Australian Federal Court has also referred to intractably political 'policy' areas where it will not tread because the Executive is the proper custodian of such decisions, and has greater access to information, political nous, and expert advice than the court.¹⁰³ As Justice Fullager of the High Court of Australia noted in the *Communist Party of Australia Case* (which dealt with 1951 legislation purporting to, amongst other things, outlaw the CPA and similar organisations), when dealing with defence powers, the court "will not substitute for that of the Executive its own opinion" of the appropriateness or sufficiency of an act in promoting the desired end.¹⁰⁴

The US Courts have also taken a similar approach to highly political questions of foreign policy. In *Doe v Bush*¹⁰⁵ an anonymous group of plaintiffs, which included military personnel and members of the US House of Representatives, challenged the authority of the US President to commit forces to an armed conflict in Iraq.

99 See for eg, Simon Brown LJ's analysis at paras 36-39. These cases included *Abbasi & Another; R v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; *Marchiori v The Environment Agency and The Secretary of State for Defence* [2002] EWCA Civ 03; *R v Home Secretary; ex parte Adan* [2001] 2 AC 477.

100 *CND Case*; para 47 (Simon Brown LJ), para 50 (Maurice Kay J), para 64 (Richards J) – that is, that the subject matter was not a proper subject for, or capable of being settled by, a court of law. The court thus did not proceed to the substantive issues.

101 *CND Case*; para 50, Kay J, approving Lord Phillips of Worth Matravers in *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* (2002) EWCA Civ 1598.

102 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 439 per Gibbs J at 530-31, and approved and applied in *Onus v Alcoa of Australia* (1981) 149 CLR 27, which allowed standing for a group of Aborigines who held a special status as cultural custodians of an area.

103 In *Re Minister for Immigration; ex parte Lam* [2003] HCA 6 McHugh and Gummow JJ noted that it is for the court to "declare and enforce limits of power...but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power" – at para 102 – further indicating the High Court's reluctance to insert its own substantive review into the conduct of international relations.

104 *Communist Party Case* (1951) 83 CLR 1, 255, per Fullager J at 255.

105 *Doe v Bush* No. 03-1266 (1st Cir.13 March 2003).

The Court dismissed the case on the grounds of ripeness in that no war had at that stage commenced. Should a US court ever hear a case concerning the decision to go to war, however, it is very likely it would run aground at the justiciability stage, on the well-charted rock of the “political question doctrine”. This doctrine excludes such charged political issues from the court’s review on the grounds that they have properly and constitutionally been referred to another branch of government, or are simply incapable of judicial resolution.¹⁰⁶

In an international context, two further comments will serve to illustrate this point. First, the jurisdiction of the ICJ – the judicial forum in which such issues of high policy as use of force are most likely to be addressed – is based on consent. The ICJ, in the *Case Concerning Legality of Use of Force (Yugoslavia v Belgium)* (1999) (a request for the indication of provisional measures), expressed “deep...concern... at the human tragedy” involved, and indicated that it was “profoundly concerned with the use of force...[which] under the present circumstances...raises very serious issues of international law”. It determined, however, that it could not adjudicate where “any limitation *ratione temporis* attached by one of the Parties to its declaration of acceptance of the Court’s jurisdiction ‘holds good as between the Parties’”, and that “when declarations are made on condition of reciprocity, ‘jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it’”.¹⁰⁷ As the ICJ concluded

Whereas there is a fundamental distinction between the question of the acceptance by a State of the Court’s jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both Parties.¹⁰⁸

This is not to say that instances of use of force between states do not appear on the ICJ’s docket – indeed, between the *Nicaragua Case* (1986) and 2003, there were 25 such applications, including ten by Yugoslavia against the NATO states involved in the Kosovo campaign, and two between the Democratic Republic of the Congo and Uganda.¹⁰⁹ But of these, only one case – *Cameroon v Nigeria* (2002) – reached the stage of judgment on the merits, and in that judgment the ICJ scrupulously avoided

¹⁰⁶ *Colegrove v Green* 66 S.Ct 1198. For a general discussion on this issue, see Lord Alexander of Weedon, QC, “Iraq: The Pax Americana and the Law”, paper presented in London, 2004.

¹⁰⁷ *Case Concerning the Legality of Use of Force in Yugoslavia (Yugoslavia v Belgium)* No. 105/1999, Order of the ICJ in relation to the Request for the Indication of Provisional Measures; paras 16–19, 30, 45. On this point, the ICJ approved of and followed *Phosphates in Morocco, Judgement*, 1938 PCIJ Series A/B, No. 74; p 10; and to its own decision in *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)* (1998) ICJ Reps 298 at para 43.

¹⁰⁸ *Case Concerning the Legality of Use of Force in Yugoslavia (Yugoslavia v Belgium)*; para 47.

¹⁰⁹ *Cases Concerning the Legality of the Use of Force (Yugoslavia v NATO States) (Provisional Measures)* (1999) ICJ Reps 124; *Armed Activities on the Territory of the Congo (DRC v Uganda)* (2000) 39 *International Legal Materials* 1100; and *DRC v Uganda (New Application 2002)* (2002) ICJ Reps. (18 September 2002, General List No. 126). For a discussion of these cases, see Christine Gray, “The Use and Abuse of the International Court of Justice:

any decision on the issue of use of force.¹¹⁰ Since November 2003, the ICJ has handed down judgment in the *Oil Platforms Case (Islamic Republic of Iran v United States of America)*, where it addressed some use of force issues within a specifically maritime context.¹¹¹ However, even on those few occasions where the ICJ has made orders for provisional measures in cases involving use of force (such as freezing forces in place until the issues are resolved), these orders have generally been ignored – as was the situation with both the *Corfu Channel Case* (1949) and the *Nicaragua Case* (1984 and 1986) – or made irrelevant as they are overtaken by events. Indeed, this state of affairs prompted Judge Oda, in his declaration in the *Armed Activities on Territory of the Congo Case* (2000), to warn that

If the Court agrees to be seised of the application or request for the indication of provisional measures of one State in such circumstances, then the repeated disregard of the judgements or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubts as to the judicial role to be played by the Court in the international community.¹¹²

Whilst states are often happy to have the ICJ adjudicate their maritime and land boundary delimitations, issues of compensation for certain wrongful acts, and even in a few cases the legitimacy of recognition of other states, it is extremely rare that a significant issue of large scale use of force ever reaches the merits stage in the ICJ.¹¹³

Cases Concerning the Use of Force After *Nicaragua*” (2003) 14:5 *European Journal of International Law* 867.

- 110 *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) (Merits)* (2002) ICJ Reps. (10 October 2002, General List No. 94).
- 111 *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* ICJ Reps. 6 November 2003. For comment on the case, see Caroline E. Foster, “The Oil Platforms Case and the Use of Force in International Law” (2003) 17:2 *Singapore Journal of International and Comparative Law* 579; James A. Green, “The Oil Platforms Case: An Error of Judgment?” (2004) 9:3 *Journal of Conflict and Security Law* 357; Dominic Raab, “‘Armed Attack’ after the Oil Platforms Case” (2004) 17 *Leiden Journal of International Law* 719; Andrew Garwood-Gowers, “*Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*: Did the ICJ Miss the Boat on the Use of Force?” (2004) 5:1 *Melbourne Journal of International Law* 241. It should be noted, however, that *jus ad bellum* issues have been discussed and determined in non-ICJ forums – for example, in the Eritrea Ethiopia Claims Commission’s Partial Award, *Jus ad Bellum, Ethiopia’s Claims 1-8 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea* (19 December 2005). For discussion, see J. Romesh Weeramantry, “*Partial and Final Arbitration Awards (Eritrea / Ethiopia)*” (2007) 101:3 *American Journal of International Law* 616.
- 112 Declaration of Judge Oda, *Armed Activities on the Territory of the Congo (DRC v Uganda)* (2000) 39 *International Legal Materials* 1100 at 1113.
- 113 See *Nicaragua v United States (Merits)* (1986) ICJ Reps 14. However, due to the nature of the US reservation to the jurisdiction of the ICJ, whilst the Court was able to examine the Nicaragua claims in the context of customary international law (in particular, at paras 174-179), it was precluded from examining the merits in terms of treaty provisions. See also *Nicaragua v United States (Jurisdiction)* (1984) ICJ Reps. 4 at para 73, where the ICJ anticipated its ultimate finding in the Merits judgment that custom and treaty law

Second, despite the fact that there are strong arguments to the effect that there was no thread of continuity through the thirteen years of UNSC Resolutions on Iraq which justified a new recourse to military action, several governments put forward legal arguments which were said to detail exactly this thread of continuing authority. Such decisions are clearly and fundamentally issues of national policy veiled with legitimating legal justifications. As Bowett has argued, “differences of political judgment” either within the UNSC, or between the UNSC and some other body, should not be a justiciable matter.¹¹⁴ To some degree, this is simply recognition of a re-emerging (or continuing) ‘legal realism’ in international law, an approach which gives primacy to the fact that state practice *as it actually is*, rather than *as we might wish it to be* – particularly the practice of the more powerful states – has played a significant role in the rapid evolution of international law since the end of the Cold War.¹¹⁵ Although Craven’s explanation of the Australian Government’s legal justification for military operations in Iraq is certainly at the hawkish end of ‘legal realism’, and whilst it is neither necessarily correct nor agreeable, it is reflective of this mood:

Essentially what one does in these situations is one tries to use international law as a rhetorical or political or moral device and both sides will come up with arguments to say what they are doing is right... Which one of those comes through will probably have less to do [with] which argument is right than to do with force, both diplomatic and physical.¹¹⁶

Thus although some highly charged political and security matters are referred to the ICJ for decisions (as with the *Nicaragua Case*, or the *Arrest Warrants Case*) or advisory opinions (the *Legality of Use of Nuclear Weapons Advisory Opinion*, and the *Israeli Wall Advisory Opinion*),¹¹⁷ this may actually have only very limited effects. With respect to

covering the same ground coexist but maintain separate identities and force, specifically including “freedom of navigation” as an example of this dualist existence. In the *Oil Platforms Case (Merits)* (2003), the ICJ did examine the issue – in a contentious case – of whether a set of incidents comprising use of force did amount to an “armed attack” as between the USA and Iran, and determined that they did not cross the required threshold.

114 Derek Bowett, “The Impact of Security Council Decisions on Dispute Settlement Procedures” (1994) 5 *European Journal of International Law* 1 at 6–7.

115 See, for example, Michael Byers, “The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq”, paper delivered at Duke University, 2004 accessed at www.leda.law.duke.edu/leda/data/8/IRAQRtf.html on 29 March 2004. See generally, Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press, Cambridge, 2004.

116 Comments by Greg Craven, “Law Experts on Legality of Use of Force Against Iraq”, Reporter: Nick Grimm, *PM*, ABC Radio, Friday 14 March 2003 (accessed www.abc.net.au/pm/content/s807386.htm on 20 March 2003).

117 *The Arrest Warrants Case* (ICJ 14 February 2002) at www.icj-cij.org as at 12 July 2003; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1997) 35 ILM 809; On the Israeli wall matter, see UN General Assembly Resolution (Emergency Session) ES-10/14 (8 December 2003) *Israeli Actions in Occupied Palestinian Territory (A/RES/ES-10/14)*, which requested the ICJ provide an advisory opinion as to “what are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Territories...considering the rules and principles of international

advisory opinions, the difficulties of having a UNSC issue referred for such an opinion are almost insurmountable – concurrence by a majority of the UNSC including all five permanent members.¹¹⁸ Indeed, the UNSC has only once requested an advisory opinion – the *Namibia Advisory Opinion* (1971) concerning the legal consequences of South Africa's continued presence in Namibia in disregard of UNSC Resolution 276 (1970). The UN General Assembly has proved less reticent in requesting advisory opinions. However, the general implication, Gray contends, is that there does not seem to be any “general, principled reluctance by states to submit cases on such controversial subject matter to the Court”.¹¹⁹ This can be partly explained by the fact that states often feel the diplomatic kudos they gain from being seen to be a good international citizen by theoretically allowing the ICJ to examine the situation far outweighs any likelihood that the issue will ever reach the merits stage. In the two decades since the *Nicaragua Case*, the ICJ has, in practice, generally accepted that there is a division of powers between the UNSC (which holds the international peace and security dispute resolution function) and the ICJ (which deals with rights and obligations between states), and that – in the vast majority of cases – use of force may not be a matter amenable to judicial resolution.¹²⁰ And although the ICJ has ventured into UNSC Resolution interpretation – as in the *Lockerbie Case*, for example – it is unlikely that a highly contentious and politically weighted issue of UNSC Resolution interpretation (such as whether pre-existing resolutions on Iraq justified further military action) would ever be allowed to proceed to the merits, precisely because of the national interests involved.¹²¹ As Gray concludes of ICJ practice, the Court's “deference shines through the cases” and the ICJ “seems to lose no oppor-

law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”. See also the ICJ *Dossier of Materials Compiled Pursuant to Article 62 Paragraph 2 of the Statute of the International Court of Justice*, 19 January 2004, with respect to the request for an advisory opinion pursuant to UNGA Res E5-10/14 (8 December 2003). See generally, “The Judges and Israel's Wall”, *The Economist*, 21-27 February 2004; p 44. The ICJ's advisory opinion, by 14:1, was that “[T]he construction of the wall being built by Israel, the Occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law” – *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Reps. (9 July 2004, General List No. 131); para 163(3).

118 *Statute of the International Court of Justice* 1945; Art 65, and *Charter of the United Nations* 1945; Art 96.

119 Christine Gray, “The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After *Nicaragua*”; p 904.

120 See, for example, Declaration of Judge Oda, *Armed Activities on the Territory of the Congo (DRC v Uganda)* (2000) 39 *International Legal Materials* 1100 at 1113; and the ICJ's majority judgements in the *Cases Concerning the Legality of the Use of Force* (Yugoslavia v NATO States) (Provisional Measures) (1999) ICJ Reps 124.

121 See generally, Judith Gail Gardam, “Legal Restraints on Security Council Military Enforcement Action” (1996) 17 *Michigan Journal of International Law* 285 at 303-305; Dapo Akande, “The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?” (1997) 46 *International and Comparative Law Quarterly* 309 at 333-341; Andrew Coleman, “The International Court of Justice and Highly Political Matters” (2003) 4:1 *Melbourne Journal of International Law* 29 at 73-75.

tunity to stress the primary role of the Security Council".¹²² Thus although no state relishes the prospect of an ICJ opinion damning their proposed course of action, or damning their conduct after the fact, they may be happy to see such issues appear on the ICJ's docket, secure in the knowledge that little substantive embarrassment or pain will actually result.

Thus the construction of authority for UN naval peace operations is defined by a wide range of assessments, issues, and decisions – many of which are not generally amenable to either domestic or international adjudication by courts or tribunals. It is undoubtedly true that the specific conduct of individual peacekeepers can now generally be subject to either domestic war crimes jurisdiction or the jurisdiction of the International Criminal Court (where the UN peace operation takes place in the context of an armed conflict).¹²³ However, consideration of the wider issue of operational authority will generally be barred from domestic legal adjudication by the triumvirate hurdles of politically sensitive subject matter, inability of the complainant to establish direct effect (and thus standing to bring the issue before the court), and the general reluctance of most courts to impose a judicial opinion in place of a clearly prerogative, and fundamentally political, policy judgment by government. Similarly, in UN peace operations, authority issues are fundamentally UNSC issues, and will thus rarely be found before an international tribunal except to be dismissed at the preliminary jurisdiction level rather than dealt with on the merits. In the case of differing opinions on the existence of a continuing authority to use "all necessary means" against Iraq, for example, it is unlikely that any attempt to submit the question to the ICJ would ever be successful, given the intensely political nature of the 'legal' question, and the deep, fundamentally national, interests involved. Consequently, the analysis in this book is concerned with the construction of a framework of authority within which commanders and governments feel they are permitted to act, rather than on hypothetical analysis of static legal precedent that might be used post facto to justify specific acts before a tribunal.

Methodology

The focus of this book is the Territorial Sea, both as a legal concept and an operational venue which is clearly essential to the conduct of UN naval peace operations. This selection as the primary 'territorial' focus of analysis rests in two factors. First, in terms of the tensions between sovereignty and global governance, and the interface between power and legitimation, the Territorial Sea is one of the more complicated regimes covered by the LOSC,¹²⁴ simultaneously both restrictive and permissive for

¹²² Christine Gray, "The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After *Nicaragua*"; pp 904–905.

¹²³ *Rome Statute of the International Criminal Court* 1998; See also *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law* (1999), available at www.un.org/peace/st_sgb_1999_13.pdf. For an example of detailed domestic implementing legislation, see *Commonwealth Criminal Code Act* 1995 (Australia), Division 268.

¹²⁴ In many ways, the regime of Internal Waters is (with the exception of the sovereign immunity of certain vessels and custom regarding flag and coastal state jurisdictions onboard ships in port) tantamount to 'wet land' for the purposes of legal status and

coastal and flag states. Second, with respect to UN naval peace operations and the use of force, the Territorial Sea is the most significant sphere of maritime activity. The Territorial Sea is the oceanspace most closely linked to any land territory that is subject to a UN mandate, and maritime activities such as force delivery, logistics support, overflight, escort, and monitoring operations in the Territorial Sea are closely linked with, and often vital to, the success of UN peace operations ashore. This is not a straightforward issue, as often the Territorial Sea in question may be that of a third party, non-participating, state. Accordingly, establishing the implications for the who-what-where-how interactions when constructing authority for operational decisions is often difficult and may vary, encompassing some degree of functional UN authority which overlays, or is overlaid upon, either nominal state sovereignty (as in Cambodia), collapsed sovereignty (as in Somalia), nascent but as yet uncrystallised sovereignty (as in East Timor), sovereignty that is notionally vested in one state but actually exercised very differently (as with Kosovo), or third state sovereignty (as with Iran regarding UN sanctions enforcement in the North Arabian Gulf, and Albania with respect to UN operations in the waters of the Former Republic of Yugoslavia). Untangling the who-what-where-how relationship as it applies to the range of decisions that may be required of commanders operating in the Territorial Sea during UN naval peace operations thus lies at the core of this book. And in undertaking this untangling, the aim is to propose a new frame of reference, applying an appropriate method of expressing and assessing legitimation and so providing a sustainable conceptual and practical grounding upon which the conduct of future UN naval peace operations might be based.

Routing Plan

This first chapter has attempted to capture the significance and dilemmas associated with naval support of UNSC mandates. In particular, key concepts have been introduced and the fundamental tensions and assumptions stated. However, all of these merely provide a starting point for an analysis which will incrementally address three issues. First, the operational utility of navies in UN peace operations is very strong and the political implications can be decisive. Here the relationship of political mandate to operational capabilities is crucial. Chapter two will, consequently, outline the wider operational backdrop which sets the scene for authority in UN naval peace operations, providing the context within which any meaningful analysis of these operations must be founded. This discussion is vital to any study of UN naval peace operations because analysis of UNSC resolutions and mandates in general tends towards considerations of higher level *Jus ad Bellum* issues, and of more detailed considerations for land forces – role, structure, armament levels, assigned forces, RoE, and so on. With only a few notable exceptions, there has been little consideration of how the general directions in UNSC mandates actually link – in an operational

jurisdiction. However, this regime – although it can be equally complicated – generally presents as one in which the coastal state's authority is broader, stronger, and more evident than with the Territorial Sea.

sense – missions with naval capabilities.¹²⁵ This discussion establishes the practical operational context within which the discrete authority issues analysed in later chapters must be examined, and thus represents the *power* aspect of authority with respect to UN naval peace operations.

Second, as part of both accommodation and constraint of power, analysing the operation of legitimating mechanisms is essential. Chapter three will examine the conceptual relationship between the UN Charter, the use of force, and the LOSC – the regimes that govern the attendant legitimation of UN naval peace operations. In particular, this chapter involves an analysis of the general colouration of the LOSC with respect to use of force issues, an assessment of the lacunae, and a statement of the interpretive methodology adopted. Chapter three establishes the theoretical operational legitimation envelope or framework within which the authority issues in later chapters must be examined, and thus represents *legitimation* as it relates to the construction of authority for UN naval peace operations.

Third, reconciling power and legitimation in UN naval peace operations is vital in avoiding dysfunctional *authority* consequences. Accordingly, chapters four to seven examine the significance and implications of this combination of power and legitimation on a range of specific situations that could be faced by naval forces involved in UN peace operations in the Territorial Sea. Three chapters deal with specific authority situations – innocent passage, interdiction or sanctions enforcement operations, and the complicating context of UN transitional administration. The final chapter then proposes a scheme through which the authority to conduct UN naval peace operations in that most sensitive potential area of operations – third state Territorial Seas – might be defined, regulated, and analysed.

Exclusions

In order to be manageable, this book necessarily excludes certain issues and areas of consideration which, although relevant, are not essential to the questions that lay at its core. Where appropriate these have been recognised in brief footnoted encapsulations and references to further reading. In particular, it is opportune to note that the focus of this book is on UN naval peace operations rather than belligerency. As a consequence, the analysis will refer to the 2003 conflict in Iraq only insofar as it illuminates any specifically naval aspects of UN peace operations.¹²⁶

¹²⁵ These exceptions, which will be referred to over the course of this book, include Michael Pugh, David Griffiths, Geoffrey Till, Bob Thomas, and Robert Stephens Staley.

¹²⁶ It is relevant to note, however, that the US, UK, and Australia claimed UNSC authorisation for military operations in Iraq in 2003 – see, for example, Bill Campbell, QC, and Chris Moraitis, *Memorandum of Advice on the Use of Force Against Iraq*, Australian Federal Attorney Generals Department and Australian Department of Foreign Affairs and Trade, 18 March 2003, reproduced in (2003) 4:1 *Melbourne Journal of International Law* 178; Statement by Prime Minister Howard, *Hansard: House of Representatives*, Tuesday, 18 March 2003; pp 12505–12509; “The Case for a Legal Attack”, *The Australian*, Tuesday, 18 March 2003; p 11; Foreign and Commonwealth Office, *Iraq: Legal Basis for the Use of Force*, 17 March 2003, annexed to the statement made by the Attorney General, Lord Goldsmith, in answer to a Parliamentary Question by Baroness Ramsay of Cartvale, House of Lords, Tuesday 18 March 2003; *Campaign for Nuclear Disarmament Case* [2002] EWHC 2759 (QB); the statements made in the UNSC on the passing of UNSC Res

Conclusion

As both an authority concept and an operational venue, the Territorial Sea is clearly essential to the conduct of UN naval peace operations. Caught between the tradition of state sovereignty and the challenge of global governance, and hostage to the long-standing practical requirements of seapower, the triptych of power, legitimation, and their interaction in the construction of authority arguably reaches its most acute and complex form in the Territorial Sea. This is particularly so given the relative silence of the LOSC on international peace and security and the use of force. Complexity, however, is no excuse for evading issues. Accordingly, it becomes essential to find some way of analysing the implications of the UN peace operations-use of force-LOSC relationship in order to give shape to a sustainable basis for the authority necessary to support UN naval peace operations in the Territorial Sea. As stated at the outset, there are pressing practical issues that make this a necessity, thus providing this book with its aim – to examine, within their proper context, the most significant of these issues in some detail, and thereby to point the way towards an operationally sensible and politically acceptable approach to defining, regulating, and analysing the extent of authority for UN naval peace operations in the Territorial Sea.

1441 (8 November 2002) on *The Situation in Iraq*, particularly those by Ambassador Negroponte for the US, and Sir Jeremy Greenstock for the UK – UNSC Doc S/PV.4644, Friday 8 November 2002. This issue is more properly one of *Jus ad Bellum* (the authority to go to war) rather than *Jus in Bello* (the laws regulating conduct in war). It is also important to note that in some ways the laws regulating belligerency at sea are in fact more restrictive than those regulating UN peace operations at sea. An example is the law of neutrality – as enshrined in the LoNW – which has significant implications for the conduct of visit and search, and authority to target merchant vessels. In UN Chapter VII peace operations, however, there are, technically, no neutrals. As UN Charter Art 25 states, “members of the United Nations agree to accept *and carry out* the decisions of the Security Council in accordance with the present Charter”. As the provisions of Chapter VII make clear, there is no avenue for sitting on the fence during Chapter VII operations. Article 49, for example, demands that “[T]he members of the United Nations *shall* join in affording mutual assistance in carrying out the measures decided upon by the Security Council”. This no-neutrals approach is further reinforced by Article 50 which provides that any state which finds itself “confronted with special economic problems arising from the *carrying out of those measures* shall have the right to consult the Security Council with regard to a solution of those problems”.

Chapter 2

Power: Naval Force and the Conduct of UN Peace Operations*

From time immemorial the purpose of the navy has been to determine or influence, and sometimes decide, issues on land...the sea has supplied mobility, capability and support throughout history. Those failing the sea power test, notably Alexander and Hitler, also failed the test of longevity.¹

– Edward Beach

The political object – the original motive for the war – will...determine both the military objective to be reached and the amount of effort it requires.²

– Carl von Clausewitz, 1832

Introduction

The politicisation of oceanspace, particularly since 1945,³ has been both fundamental (leading to the creation of new sovereign waters such as Archipelagic Waters), and sensitive (impinged upon by more precisely defined international privileges in forms such as the right of innocent passage, or the conduct of UN peace operations). This operational context thus forms one of the core animating factors in whether a UN peace operation can and will take place. It is this operational context which ultimately dictates why a UN peace operation is initiated and how it will be implemented, and which, consequently, also governs the characterisation and practice of authority in such operations. When this operational context is then overlaid by the ocean's resilience as the world's major means of trade and communication – Mahan's "great highway"⁴ – it becomes unsurprising that global maritime mobility is "important not only to naval powers but to other states that rely on those powers to maintain

* An earlier, shorter, version of this chapter appeared as "Naval Force and the Conduct of Peace Support Operations" (2002) 9:4 *International Peacekeeping* 105.

1 Edward Beach quoted in Robert Ross, "The Role of Amphibious Forces in A Changing World", *RUSI Journal*, April 1996; p 21.

2 Carl von Clausewitz, *On War*, 1832 (1976); Chapter I, Section II.

3 Lorraine Elliot, "The Sea in International Politics", in Sam Bateman and Dick Sherwood (eds), *Oceans Management Policy: The Strategic Dimension*, Centre for Maritime Policy, University of Wollongong, 1995; p 67.

4 Mahan, *The Influence of Seapower Upon History, 1660-1783*; p 25; See also Gray, "Sea Power in Modern Strategy"; p 33; Reeve, "The Rise of Modern Naval Strategy c.1580-1880"; p 8, where he discusses the role of modern navies in "the beginning of globalised interna-

stability and deter aggression, directly or through the United Nations”.⁵ The value of naval power in UN peace operations covers the full operational spectrum. This utility ranges from the perennial synergy between naval power and diplomacy (such as showing the UN or another flag, and modern ‘gunboat diplomacy’), through constabulary functions (such as monitoring cease-fires at sea and along coasts, or enforcing UN sanctioned embargoes), to military roles (such as sea-land strike, or the insertion of land forces).⁶ The US Navy, for example, has been called “the principal military arm of US diplomacy in the post-World War II era”. Indeed, quiet apart for the Freedom of Navigation program previously discussed, approximately 83 per cent of the 325 documented occasions between 1946 and 1991 when the United States responded to a crisis with military force “included naval forces, with about half the reactions being solely naval”.⁷

Yet, as Pugh and others note, “concepts of multinationalism have been conspicuously absent from theories of sea power, even in post-Cold War studies”, and “the existing literature on maritime security and multinational naval operations to support peace and international order is somewhat sparse”.⁸ This anomaly is perhaps most pronounced when considering the interoperability requirements of multinational naval forces. As Gordon notes, “when there are a lot of flags at the table” for a particular UN peace operation, the UN can lay claim to significant “moral authority”.⁹ Indeed, as Gordon continues – not in criticism, but rather as a simple statement of fact – where a homogeneous force of “*x*” size would achieve a goal, a multinational operation (with its attendant problems of interoperability, and the differing levels of training, equipping, and capability that exist between national contingents) often requires a force of “*3x*” to achieve the same goal.¹⁰ Thus within the ultimately political UNSC, operational efficacy is routinely viewed as less important than the political requirement for consensus and its attendant promises of multilateralism and the aura of internationalism. As the ICJ observed as early as the *Corfu Channel Case* (1949), whilst international organisations do have defects, they still offer the best available

tional relations, strategy and war: the world in which we still live – the Mahanian world in which the sea serves as a great global strategic highway”.

- 5 Stevenson and Oxman, “The Future of the UN Convention on the Law of the Sea”; p 493 – my italics.
- 6 See Pugh, Giniifer, and Grove, “Sea Power, Security and Peacemaking”; pp 22-25; Also, see generally, Cable, *Gunboat Diplomacy*; ch 1, ch 6; Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 18; Reeve, “The Rise of Modern Naval Strategy c. 1580-1880”; p 15, noting “the intimate and long-standing link between naval power and diplomacy. Persuasion and deterrence are about creating an image. Warships were and are well suited to creating the image and symbolism of power in the minds of the international community”.
- 7 Pirtle quoting Edward A. Smith, “Military Uses of Ocean Space and the Law of the Sea in the New Millennium”; p 22.
- 8 Michael Pugh, “Introduction”, in Michael Pugh (ed), *Maritime Security and Peacekeeping: A Framework for United Nations Operations*, Manchester University Press, Manchester, 1994; p 2; See also Pugh, Giniifer, and Grove, “Sea Power, Security and Peacemaking”; p 22.
- 9 Gordon, interview, 2 February 2002, Dili, East Timor.
- 10 Gordon, interview 2 February 2002, Dili, East Timor.

path to avoiding major abuses of international law, and opportunism in international peace and security crises, by powerful states.

This influence obviously has substantial implications for the types of forces assigned, the command structures developed, and the 'lowest common denominator' approach to using force as a component of the operation. It is a bald statement of fact that whereas interoperability ashore is often achieved by allocating separate operating areas to separate national contingents (with their own Standard Operating Procedures (SOP), operational concepts and equipment), interoperability at sea is more along functional rather than geographic lines – for example, area missile defence, offshore installation security, boarding operations, patrol and surveillance, or logistic support. This complicates UN naval peace operations – combining disparate naval elements into a single, coherent operation that makes best use of the available resources in functional terms is a significantly different task than managing mere co-location. Multinational land forces generally operate side-by-side but discretely; multinational naval forces generally operate in a much more integrated fashion – an integration that is complicated by the politics of naval contribution. Furthermore, the core unit of naval contribution – the warship – is of a fundamentally different nature to the core unit of contribution ashore (the soldier). Whilst soldiers from lesser developed military forces are easily employed ashore, the pool of states which can routinely contribute warships to UN peace operations is significantly smaller because the 'minimum standard' bar is, by virtue of the need for sustainability and technological interoperability, of necessity much higher. One reason for this paucity of specifically naval analysis and discussion is that UN naval peace operations are traditionally characterised as merely elements of a wider UN peace operation, playing a supporting role to activities ashore. As Pugh comments

Early proposals for United Nations police and peace-keeping forces rarely mentioned maritime forces. Rather they emphasised the more visible and common techniques of land warfare and built their proposed organisations around land forces.¹¹

Independent and purely naval UN peace operations – such as positioning UN flagged ships between two hostile fleets,¹² or mine-clearance operations – have been proposed in the past. For example, in the aftermath of the Iran-Iraq conflict and the 'tanker war', Tuzmukhamedov suggested the possibility of "multilateral operations agreed with the coastal states under the aegis of the United Nations on navigation routes in the Gulf to sweep the mines, raise sunken ships, and clean up

11 See Michael Pugh, "The Historical Record and the Relevance of Force Thresholds", in Michael Pugh (ed), *Maritime Security and Peacekeeping: A Framework for United Nations Operations*, Manchester University Press, Manchester, 1994; pp 32-33; Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*, p 13.

12 Pugh, "Historical Record"; pp 32-33; Ginifer, "A Conceptual Framework"; p 61. The circumstances in which such an autonomous, independent UN naval peace operation could have been conducted have arisen. These instances, however, have generally occurred within political contexts which made the use of a UN naval force unlikely – the Indo-Pakistan Naval War of December 1971, or the UK-Iceland 'Cod Wars' of 1958-76, for example – see, inter alia, O'Connell, *The Influence of Law on Seapower*, pp 2, 7, 15.

other obstructions formed in the course of the conflict”.¹³ Similarly, in 1990, Norton and Weiss also proposed the implementation of a UN naval peace operation in the Persian Gulf:

Now that the Persian Gulf war has ended, the international community has a stake in clearing the deadly debris of the conflict. A mine-clearing task force under the UN flag, financed by the oil-producing littoral nations and tanker owners, could provide a very useful demonstration of UN naval force in action.¹⁴

Thus although under-analysed, naval force does offer the UNSC a flexible and politically sensitive tool for use in UN peace operations – indeed, its full exploitation can be fundamental to the overall success and efficiency of an operation. As with land forces, however, such successful and efficient use is underwritten by an ongoing need for the operational requirements of, and the capabilities of the forces assigned to, each discrete operation to both inform and reflect the UNSC’s approach to operational management. This chapter will begin by defining ‘peace operations’, as this is the conceptual envelope within which the issue is cast. It will then address the general issue of operational utility, describing the operational architecture within which the practice of UN naval peace operations must be viewed, and their authority analysed. This will be achieved by briefly outlining those characteristics of naval power that are useful in UN peace operations, and arguing that it is flexibility which is at the core of this utility, and thus at the core of ‘power’ in these operations. Finally, the analysis will address what are arguably the fundamental functions of naval forces in UN peace operations, and then conclude with a brief discussion of several ancillary tasks that – whilst not generally fundamental – naval forces are occasionally called upon to perform in the course of UN peace operations.

‘Peace Operations’: A Definition

This book is informed by a wide, descriptive, definition of ‘peace operations’. At its origins, the term ‘peacekeeping’ was applied to a narrow group of ceasefire observation, monitoring, and reporting missions – such as UNTSO in Israel, the MFO in the Sinai, and UNFICYP in Cyprus. Subsequent to these early Cold War origins, however, the concept and terminology of peacekeeping has broadened significantly. Indeed, the one constant in post-Cold War UN peace operations is change: As Grachev observes, “[T]he evolution of UN peacekeeping from the traditional kind of patrolling buffer zones and cease-fire lines to the modern, more complex manifestations in the former Yugoslavia, Haiti, and Angola, just to mention a few,

¹³ Tuzmukhamedov, “The Principle of Non-Use of Force and Security at Sea”, in W.E. Butler (ed), *The Non-Use of Force in International Law*, Kluwer Academic Publishers, Dordrecht, 1989; p 183.

¹⁴ See Augustus R. Norton and Thomas G. Weiss, *UN Peacekeepers: Soldiers with a Difference*, Foreign Policy Association, New York, 1990; p 45. UN associated Mine Countermeasures (MCM) operations – such as the RN MCM operation in the Suez during the 1970’s – have of course taken place, but usually as part of wider, land-focused, peace operations ashore.

has been neither smooth nor natural".¹⁵ This has necessitated a continuing, and continuous, reassessment of operational techniques. This environment, exhibiting both conceptual and situational fluidity, requires each new peace operation to be – to some extent – ad hoc. Thus settling on a universal contextual definition for 'peace operations' becomes ever more elusive: As Fetherston noted a decade ago (but with continuing relevance today), "the real difficulty in providing a comprehensive functional definition of peacekeeping is that as peacekeeping takes on more and more functions the definitions get longer, more general and less useful".¹⁶

This contextual fluidity (which is inherent in each UN peace operation), and the flexibility in political and operational outlook which each discrete operation thus requires, has two significant implications for attempts to define peace operations. First, this slippery complexity, and the responses it necessitates, has led to an erosion of the lines that once – theoretically at least – separated peace-making, peace-building, peacekeeping, and peace enforcement. Second, it requires mandates to be interpreted flexibly, as strict literal interpretations leave little room for reaction to changed circumstances. The limited and unnecessarily restrictive mandate of the ONUC in the Congo, for example, had to be overhauled and substantially altered several times in order to remain relevant to its environment. On 14 July 1960, the UNSC authorised the deployment of UN forces "to provide the Government with such military assistance as may be necessary until...the [Congolese] national security forces may be able, in the opinion of the Government, to meet fully their tasks".¹⁷ By 24 November 1961 – after five further resolutions – this far too limited and ambiguous mandate had evolved from "requests" to "calls upon", and expanded to cover (amongst other things) the apprehension of fleeing rebels, the investigation of assassinations of Congolese leaders, an arms embargo, and governmental and administrative support.¹⁸

As a consequence, this book adopts the wider approach of using a single all encompassing term – 'peace operations' – to cover all facets of modern peacekeeping. This is not merely for terminological convenience, for even those states which use 'peace support operations' as the collective term still recognise that it covers the field of peace operations in general. The US, for example, uses the umbrella term 'peace operations' to cover two distinct types of operations – 'peacekeeping' and 'peace enforcement'. US doctrine defines the difference between the two in terms of the presence or absence of three "critical factors" – consent, impartiality, and the use

15 Grachev, "United Nations Peacekeeping in Transition"; p 275. See, also Martin Woollacott, "We're Stumbling, But We're Going in the Right Direction", *The Guardian*, Friday 12 May 2000.

16 Fetherston, *Towards a Theory of United Nations Peacekeeping*; p 128. See also, Nigel D. White, "The UN Charter and Peacekeeping Forces: Constitutional Issues", *International Peacekeeping*, Vol. 3, No. 4, Winter 1996; p 60.

17 UNSC Res 143 (14 July 1960) *The Congo Question*; para 2.

18 See UNSC Res 145 (22 July 1960); UNSC Res 146 (9 August 1960); UNSC Res 157 (17 September 1960); UNSC Res 161 (21 February 1961); UNSC Res 169 (24 November 1961), all on *The Congo Question*. See also the short account of the ONUC operation contained in the Swedish Armed Forces Joint Military Doctrine Publication, *Peace Support Operations*, 1997; pp 1-4 – 1-5.

of force.¹⁹ NATO, Sweden, the UK, and others, refer to ‘peace support operations’ as the collective term, and sub-categorise types of operations under this broad heading. NATO doctrine defines peace support operations as “multi-functional operations, conducted impartially, normally in support of an internationally recognised organisation”.²⁰ Swedish doctrine uses the term peace support operations to cover peacekeeping and peace enforcement, distinguishing between the two sub components. In Swedish doctrine, “peacekeeping” is defined as

Operations carried out with the general consent of the disputing parties, as part of a peace process agreed by these parties, and in support of efforts to promote security and confidence, in order to achieve a long-term peace settlement.²¹

“Peace enforcement”, on the other hand, is defined as

Coercive operations carried out to restore or maintain peace in situations of chaos, or between parties who may not all consent to intervention and who may be engaged in combat activities, in order to help create the conditions for diplomatic and humanitarian activities to support political goals.²²

UK and Australian doctrine, and to a lesser extent recent UN doctrine, depart from this traditional distinction between peacekeeping and peace enforcement by recognising a range of other types of activities within the peace operations spectrum. The major difference is that where UK doctrine uses the collective term “peace support operations”, Australian doctrine uses “peace operations”, and UN doctrine retains “peacekeeping”. But for each set of doctrine, this wider collective includes:

Traditional Peacekeeping, which is generally a UN Charter Chapter VI operation, founded in consent, and concerned with monitoring and facilitating implementation of peace agreements (UNTSO in Israel, and the non-UN based MFO in the Sinai);

Preventive Deployment/Conflict Prevention, normally conducted under UN Charter Chapter VI or through regional organisations, aiming to prevent disputes from escalating into armed conflicts, or to prevent a conflict from spreading into an as yet unaffected region (UNPREDEP in Macedonia);

19 See, for example, US Joint Publication 3-07.3 – *Joint Tactics, Techniques, and Procedures for Peace Operations*, 12 February 1999; p I-10. In the US Doctrine Publication *JTF Commander’s Handbook for Peace Operations*, 16 June 1997; p GL-8, the concepts of peace enforcement and peacekeeping are again defined as aspects of peace operations, although the separate category of “peace building” is apparently distinguished from peace operations as a predominantly diplomatic and economic activity, rather than a military activity.

20 NATO Doctrine Publication, *AJP-3.4.1 – Peace Support Operations*; pp 2-1 – 2-2.

21 Swedish Joint Military Doctrine Publication, *Peace Support Operations*; p 1-2.

22 Swedish Joint Military Doctrine Publication, *Peace Support Operations*; p 1-2.

Peace Enforcement, which is generally a UN Charter Chapter VII operation, fundamentally coercive in nature, and concerned with re-establishing peace or enforcing the terms of a mandate (INTERFET in East Timor, components of ISAF in Afghanistan);

Peace Building, covering military operations in support of political, social, economic and other measures aimed at strengthening or solidifying political settlements (the later stages of UNPROFOR/SFOR in Bosnia-Herzegovina, MINURSO in the Western Sahara, UNTAET in East Timor, and components of ISAF in Afghanistan);

Humanitarian Operations, conducted to relieve human suffering, are often a component of a peace operation, but can be the central component of a peace operation (UNOSOM I in Somalia); and

Peacemaking, covering diplomatic activities such as mediation and good offices, which are generally undertaken after the commencement of conflict in order to establish a rapid ceasefire or peace settlement, to which the military provide logistic, communications, and other forms of support (UNEF in the Middle East).²³

It is this wider, more encompassing approach to defining peace operations which informs this book.

The Characteristics of Naval Force

Analysis of the character of naval power enjoys a long history, evidenced by a detailed and nuanced literature on the concept of seapower.²⁴ This analysis begins with observation on, and theorising about, what it is that naval forces can and are required to do. The Royal Australian Navy's Maritime Doctrine, for example, encompasses a set of eight "operational concepts":

- *Mobility in Mass*: the capacity of warships to carry significant combat power over long distances;
- *Readiness*: the nature of warships and their operations allows them to be prepared and deployed for a variety of contingencies very rapidly, particularly because they do not need to establish initial forward operating bases before becoming operational in theatre;

23 See generally, Australian Defence Force, *Australian Defence Doctrine Publication 3.8 – Peace Operations*, (2004), Canberra, 2004; para 1.11; UK Joint Warfare Publication 3-50 – *Peace Support Operations*, 2000; pp 1-1 – 1-2; UN DPKO, *General Guidelines for Peacekeeping Operations*; pp 5-12; UN DPKO and DFS, *United Nations Peacekeeping Operations: Principles and Guidelines* ('capstone doctrine'); para 2.1.

24 For example, over the course of the Twentieth Century: Mahan, Corbett, Roskill, Booth, Gorshkov, Till, Cable, Gray, et al.

- *Access*: warships can operate wherever there is sufficient depth of water to float, and are only subject to restrictions on their operations in the Internal Waters and Territorial Seas of other States;²⁵
- *Flexibility*: warships can be deployed or withdrawn from an area at will, a flexibility which allows the generation of deliberate political ambiguity, or clarity, in developing situations;
- *Adaptability*: warships can transition from peacetime readiness to the highest state of wartime readiness without giving external indication of the level of preparedness they are at;
- *Reach*: warships carry much of their logistic support with them, thus allowing them to conduct sustained operations independent of home or forward bases;
- *Poise and Persistence*: because warships can conduct long term independent operations – such as embargo operations, or patrolling – they provide a presence which is potentially both proactive and reactive, for sustained periods of time;
- *Resilience*: warships generally have multiple systems and redundancies, and can perform several tasks concurrently, such that major defects or logistics limitations will not generally mean that the unit ceases to make a contribution to the force or purpose as a whole.²⁶

The Royal Navy’s “Attributes of Maritime Power” describe a very similar set of operational characteristics, but contain a ninth independent attribute of “leverage” – the fact that suitable positioning and force packaging allows naval force to exploit opportunity and to have significant, often disproportionate, influence upon events ashore.²⁷ In the RAN scheme, the potential for leverage is more inherent than overt – as in the concept of flexibility, for example. The United States and German Navies, on the other hand, set tasks (or task spectrums) rather than principles at the core of operational analysis, describing (variously) staging and sustainment, search and rescue, port visits, escort, coastal waters and infrastructure patrol and sea control, maritime zone enforcement, embargo monitoring, demonstration of presence, and early warning and surveillance as tasks for naval forces in UN peace operations.²⁸ The Royal Netherlands Navy, in a third approach, describes a series of “potential effects

25 Warships are also, of course, subject to the requirement for ‘due regard’ for the rights of other users and activities which suffuses the LOSC – see Oxman, “The Regime of Warships Under the United Nations Convention on the Law of the Sea”; p 831. Under the rules set out in, for example, paragraph 11 of the *San Remo Manual*, it is proposed that this requirement of due regard also applies during hostilities at sea such that warships should avoid action in areas of fragile or rare marine ecosystems – *San Remo Manual*; Section IV (“Areas of Naval Warfare”).

26 Royal Australian Navy, *Australian Maritime Doctrine 1*, Defence Publishing Service, Canberra, 2000; pp 48–51.

27 Summarised from Royal Navy, *BR 1806 – British Maritime Doctrine* (Second Edition), The Stationary Office, London, 1999; chapter 2, particularly pp 22–28.

28 US Joint Publication 3–07.3 *Joint Tactics, Techniques, and Procedures for Peace Operations*, II–7; German Navy, *Commander’s Handbook: Legal Bases for the Operations of Naval Forces*, p 2.

of the navy” – stabilisation, enforcement, deterrence, reassurance, disruption, defeat, prevention, and protection.²⁹

These operational characteristics in turn imply a unique – an operationally and environmentally specialised – set of *capabilities* which describe and characterise naval forces. In Booth’s opinion, these capabilities can be summarised as

...*versatility*, their ability to perform a variety of tasks; *controllability*, their escalatory and de-escalatory potential; *mobility*, their ability to move between regions with relative independence; *projectionability*, their efficiency as bulk carriers of manpower and firepower; *access potential*, their ability to reach distant locations; *symbolism*, arising from the fact that warships are chunks of national sovereignty; and finally, *endurance*, the staying power of warships which enables them to be adjacent to a problem but removable.³⁰

It is arguable, however, that the general utility of naval forces in UN peace operations can be encapsulated in one concept – *flexibility*. This flexibility is multi-dimensional – encompassing the capacity to “function as a great enabling instrument of strategy”, to be adaptable to evolving conditions, and to operate at all levels of a conflict with poise and sensitivity.³¹ First, naval forces offer flexibility of *movement*, facilitating legally unimpeachable access across oceanspace. Furthermore, this access comes, prima facie, free of many of the restrictions – legal, political, and practical – which bedevil transport across land borders and overflight through national airspace, and is independently sustainable on station for long periods. The US Navy, for example, was able to maintain station off the coast of Liberia for seven months during 1990–91, before being required to rescue 2,400 people as the situation ashore deteriorated. Naval forces operate in an environment characterised by the “physical unity” of the world’s oceans and seas, which cover approximately 70.78 per cent of the earth’s surface, and within 200 kilometres of which the bulk of the world’s population lives. Thus a “reliable ship, competently manned, adequately stored, and equipped with a means for finding the way, can in time reach any country in the world which has a sea coast, and can return whence it came”.³²

Second, naval forces promise flexibility of *presence*, and thus sensitivity to political and military developments in the area of operations. “Naval forces”, argues Till

29 Royal Netherlands Navy, *Manual for Maritime Operations: the Navy’s contribution to the Netherlands Armed Forces*, 2005 (English edition 2008); pp 41–46.

30 Kenneth Booth, *Law, Force, and Diplomacy at Sea*, Allen & Unwin, London, 1985; p 187; On peace operations in particular, see also Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 24 – “In order to demonstrate both its *effectiveness* and its *impartiality*, a multinational force must be able to move wherever and whenever necessary within the area of its peacekeeping responsibility”.

31 Geoffrey Till defines this as the “high versatility” of naval force, encompassing its “particular utility in situations short of absolute conflict” – See Till, *Seapower: Theory and Practice*; p 179; See also Gray, “Sea Power in Modern Strategy”; p 29.

32 Till, *Seapower: Theory and Practice*; p 193; Pirtle, “Military Uses of Ocean Space and the Law of the Sea in the New Millennium”; pp 20–21; Gray, “Sea Power in Modern Strategy”; p 31; See also Reeve, “The Rise of Modern Naval Strategy c. 1580–1880”; p 18, where he discusses the “strategic geography” of the seas and its facilitation of the mobility of naval power.

...do have great advantages in the diplomatic role for they are inherently flexible, mobile and their liability is limited, so that if things go wrong, which often happens, naval forces can be extracted so much more easily than their land or, possibly, air equivalents.³³

As O'Connell, Dalton and others observe, the "manifest usefulness of navies" is that they "do not require another nation's physical territory on which to operate". Navies have the right "to sail the seas and the endurance to do so for requisite periods, while land-based forces cannot present a credible level of coercion without overstepping the boundaries of national authority".³⁴ Thus if the UN or international community wants to emphasise presence, warships can immediately close with the coast of the target state. Alternatively, when the UN or international community wishes to de-emphasise presence, or give the appearance of political room to manoeuvre, warships can immediately be ordered to stand off further out to sea. The limitations of flight times, fuel, pilot fatigue, availability of five-star hotel accommodation for aircrew, and aircraft numbers mean that shore based air forces can not sustain a similar posture for any length of time. Similarly, land forces do not generally offer this degree of flexibility – getting them into an area in the first place is a long and complicated process; getting them out even more so.

Third, naval forces offer flexibility of *employment*. A naval force can quickly implement, and switch between, different levels of force because it inherently contains all the necessary weapons, operators and support required for its various capabilities. General Peter Cosgrove, Commander of the INTERFET operation in East Timor, has strongly emphasised how important it is to ensure the capability of UN peace operations forces to shift to higher levels of use of force: "We found...that forces structured and equipped, ready if necessary, for war were actually very effective... Our troops were able to starkly demonstrate to all interested parties the penalties and sanctions that would accompany any attempt to deliver on the wealth of violent rhetoric". Of naval forces in particular, he described how "the persuasive, intimidatory or deterrent nature of major warships was...an important indicator of national and international resolve and most reassuring to all of us who relied on sea lifelines".³⁵

O'Connell, Cable, and others discuss at least three levels of force that a warship is capable of employing at any given time. The first is 'definitive force', used to produce a *fait accompli* against a specific target – such as strikes upon land targets using naval weapons. The second is 'purposeful force', targeted at some specific asset or location, but applied with the wider purpose of persuading or cajoling some change of policy – such as the Royal Navy's transit of the Corfu Channel in 1946. The third is 'catalytic force', where warships are used to demonstrate power in an attempt to influence and/or stabilise a deteriorating situation – such as deployments of US air-

33 Till, *Seapower: Theory and Practice*, p 190.

34 Jane Gilliland Dalton, "The Influence of Law on Seapower in Desert Shield/Desert Storm" (1993) 41 *Naval Law Review* 27 at 49; O'Connell, *The Influence of Law on Seapower*, p 4.

35 Cosgrove quoted in Ryan, "Primary Responsibilities and Primary Risks": *Australian Defence Force Participation in the International Force East Timor*, Land Warfare Studies Centre, Study Paper No. 304, Canberra, November 2000; pp 18, 79.

craft carriers to the Taiwan Straits region. This flexibility is possible because of the presumption – the potentiality – of immediate access to all of the warship’s capabilities. In most UN peace operations, land forces are often initially deployed only with particular, limited capabilities, and generally require further time, effort, and equipment before any upgrade in capability is possible. It is important to note, however, that the very public presence of a warship – as a form of ‘catalytic’ force – is a double edged sword. Certainly, warships are often the easiest components of military force to deploy, and have a certain media appeal as ‘evidence’ that something is being done. The international and domestic political kudos gained by having a highly visible (but easily withdrawn) ‘flag in theatre’ is often significant. But this consideration has to be balanced by the fact that a successful, well publicised attack on a warship – such as on USS COLE in Aden harbour on 12 October 2000 – can result in disproportionate public perceptions of powerlessness or vulnerability.³⁶

The second element of this flexibility of employment is that warships – similarly to land forces – can utilise their capabilities multi-functionally. Organic helicopter and aviation assets, for example, may be used for strike, observation patrols, logistics support, and evacuations. Similarly, warships themselves can simultaneously provide logistic and medical support, command and control facilities, neutral ground for meetings, and a platform for warfighting.³⁷ This flexibility is indeed well reflected in the range of tasks which naval forces have undertaken in the last decade – ranging from monitoring of ceasefires and embargoes, separation of forces, provision of special skills such as mine clearance, and the protection of merchant shipping, through

36 Another illustration is offered by the truncated first attempt at establishing a UN force in Haiti to monitor implementation of the Governors Island Agreement. The Haiti operation was clearly haunted by the 3 October 1993 loss of eighteen US soldiers in an attack by warlord Mohammed Aided’s militia on US forces undertaking an operation against his organisation in Mogadishu. Eight days later (11 October), as USS HARLAN COUNTY approached Port-au-Prince with US and Canadian forces onboard, the “attaches” – the “successors to the Duvalier regime’s famously feared thugs, the Tonton Macoute”, as Shawcross records – demonstrated in sight of the warship. “They shook their fists, waved placards and shouted threats at the US ship. They were hooligans who undoubtedly would have dispersed at the first sign of the well-armed troops. But among their slogans was one in particular: “We are going to turn this into another Somalia”. News of the “welcome party” and its curses was flashed to Washington, where it provoked a panic. Without even consulting the United Nations, the Clinton administration immediately ordered the *Harlan County* to withdraw from Haitian waters and sail back to the United States”. The Governors Island agreement failed and violence continued. However, argues Shawcross, worse was to follow from “the [US] administration’s terror of venturing to close to the Mogadishu line” – Shawcross, *Deliver Us From Evil*; p 103. This was, Shawcross contends, the international community’s unwillingness to intervene in the genocide in Rwanda, which recent documents indicate the US and the UN knew to be likely, or occurring, at a much earlier stage than previously claimed – see “Rwanda, Remembered”, *The Economist*, 27 March–2 April 2004; p 11; “The Road Out of Hell”, *The Economist*, 27 March–2 April 2004; pp 25–27; Rory Carroll, “Papers Prove US Knew of Genocide in Rwanda”, *Sydney Morning Herald* 1 April 2004, accessed at www.smh.com.au/articles/2004/03/31/1080544556703.html.

37 O’Connell, *The Influence of Law on Sea Power*, pp 4–7; and Cable, *Gunboat Diplomacy*; pp 81–83 also discuss a fourth type of naval force – *expressive force* – where the warship is used to “emphasise attitudes...or provide an outlet for emotion”.

to the delivery of logistic support, care of refugees, and the furnishing and protection of humanitarian relief.

Finally, naval forces provide flexibility of *response*, particularly with respect to use of force and escalatory potential. “Naval forces”, Till observes, “seem able to make the transition from the posture of gladiators to helpful bystanders, and back again with little need to delay or reconfigure, rather more easily than the other services”.³⁸ Land forces deployed as observers are often not equipped to warfighting levels, and do not have the immediate capacity to transform themselves into protectors or enforcers – as the powerlessness of Dutch peacekeepers confronted with the tragedy of Srebrenica has proved.³⁹ These roles require a different suite of attitudes, postures, and weapons and equipment – such as armoured vehicles, engineering plant, artillery, specialist infantry, air support, and a larger and heavier logistics tail. The line between peacekeeping and more active modes of protection and peace enforcement – what General Sir Michael Rose has famously called the “Mogadishu line”⁴⁰ – cannot be as quickly, seamlessly, and in the short term effectively, crossed by land forces as it can by naval forces. Because they often operate as self-contained fighting units, warships generally arrive in an area of operations bunkered, victualled, ammunitioned, and crewed to conduct operations up to and including warfighting. They are, at any given moment, potentially capable of switching gears and credibly escalating or de-escalating their posture.⁴¹ This flexibility – a consequence of the organic, ‘multi-purpose configuration’ of warships in general – is what lends naval force its greatest utility for UN peace operations.

Naval forces thus offer UN peace operations a degree of flexibility that both complements and atones for the limitations of land-based forces. Ross sums up this attribute conceptually when he declares that sea-based forces are “an extremely valuable crisis management” tool because they are able to loiter, send “messages” about resolve, insert and re-embark forces, and “buy diplomatic time”.⁴² But the best testimony is that of practice, and as Scott has observed

One of the hidden lessons of the East Timor operation was the way in which naval units could conduct so many apparently disparate activities concurrently and for extended periods. On a typical day in theatre, a single frigate might, while acting in the presence and deterrence roles in a high state of combat readiness and contributing to the development and maintenance of the wide area surveillance picture,

³⁸ Till, *Seapower: Theory and Practice*, p 180.

³⁹ See United Nations Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, 15 November 1999 (UN Doc. A/54/549); On the issue of mismatch between assigned tasks, and forces assigned, see also *Report of the Panel on United Nations Peace Operations* (The ‘Brahimi Report’), 21 August 2000 (UN Doc. S/2000/809); and UN Doc S/2001/394, *Report of the Secretary-General on “No Exit Without Strategy”: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations*, 20 April 2001.

⁴⁰ See, for example, Laura Silber and Allan Little, *Yugoslavia: Death of a Nation*, Penguin Books, Middlesex, 1997; pp 324–334.

⁴¹ See generally Pugh, “Historical Record”; pp 42–46, for another analysis of characteristics common to UN naval peace operations.

⁴² Ross, “The Role of Amphibious Forces in a Changing World”; p 22.

send parties ashore to assist with repair and rehabilitation work, act as a fuelling platform for maritime and land helicopters, provide onboard rest and relaxation for land component personnel, provide communications facilities and support logistics over the shore.⁴³

With this general attribute thus described, it is possible to examine in more detail the range of specific tasks which naval forces fulfil in UN peace operations. This process will concentrate upon those functions that are fundamental to UN peace operations, and then conclude with a brief outline of several ancillary tasks which are less frequent and fundamental to these operations, but which naval forces are nonetheless often called upon to perform.

Fundamental Functions

Force Delivery

The primary function of naval force in a UN peace operation will always be the delivery of force – both as a defensive shield which shuts out other parties' belligerent options, and as an offensive weapon which can be used when one's own resort to belligerency becomes necessary. This can take several forms, reflecting the main qualities by which force is signalled: capability, flexibility, and revealed or potential power. First, naval forces may be required to physically deliver land and air forces to distant territory. Such *littoral* and *amphibious* operations provide a "flexible and versatile instrument of maritime power",⁴⁴ able to posture threateningly or reassuringly, and to deliver large-scale force at short notice. As Liddell Hart once observed of littoral and amphibious operations, "a self contained and sea based force is the best kind of fire extinguisher, because of its flexibility, reliability, logistic simplicity and relative economy".⁴⁵ It is for these very same reasons that this littoral and amphibious role has been fundamental to UN peace operations in, most recently, Somalia, Haiti, the Persian Gulf, Sierra Leone, and East Timor, where the bulk of UN or international

43 Richard Scott, quoted in Ryan, "*Primary Responsibilities and Primary Risks*": *Australian Defence Force Participation in the International Force East Timor*, pp 80-81.

44 R.S. Tailyour, "The Future of Amphibious Warfare", *RUSI Journal*, Spring 1991; p 33.

45 Basil Liddell Hart, quoted in Tailyour, "The Future of Amphibious Warfare"; p 33. Although fundamentally a theorist of land warfare, Liddell Hart was a strong proponent of seapower as a slow burning but decisive weapon in war, primarily for its capacity to inflict economic strangulation. See, for example, Basil Liddell Hart, *History of the World War 1914-1918* (1934), Pan Macmillan, London, 1970; pp 70-75. As Liddell Hart concludes: "Indeed, if the historian of the future has to select one day as decisive for the outcome of the World War he will probably choose August 2nd, 1914 – before the war, for England, had yet begun – when Mr Winston Churchill, at 1.25 AM, sent the order to mobilise the British Navy. That Navy was to win no Trafalgar, but it was to do more than any other factor towards winning the war for the Allies. For the Navy was the instrument of the blockade, and as the fog of war disperses in the clearer light of these post-war years that blockade is seen to assume larger and larger proportions, to be more and more clearly the decisive agency in the struggle" – p 460.

force troops and equipment were delivered from the sea.⁴⁶ This ability to assert temporary control over oceanspace to ensure the safe and efficient delivery of force has been called “the blindingly obvious lesson in the value of sea power” to emerge from UN peace operations in East Timor.⁴⁷

Second, naval forces may be required to deliver *strike* in support of a UN peace operation, such as naval gunfire support, detection and targeting intelligence, and aircraft and missile strike – as during the 1990–91 Gulf conflict,⁴⁸ and from the Adriatic at differing occasions over the course of the conflict in the Former Republic of Yugoslavia.⁴⁹ As Rear-Admiral Burnell-Nugent, RN, noted of the Bosnian theatre, the closest NATO airfield to the area of operations was in fact a NATO aircraft carrier at sea.⁵⁰ Similarly, during the East Timor UN peace operation, the strike capability of naval forces “created a protective umbrella, within which the land component could operate, confident that it could concentrate on the job to be done in East Timor itself, without the possibility of external interference”.⁵¹

At this point, it is worth making a slight but important digression, for if strike is to become a naval task in any particular UN peace operation, it is a critical requirement that the mandate and credible RoE adequately reflect this authorisation. When analysing an incident and assessing options for action, it is vital that commanders have access to a clear and applicable authority framework, under which localised tactical clarifications and assessments are possible. Such instructions allow commanders to consult and apply useful pre-approved rules and guidelines, rather than requiring them to determine the envelope of permitted responses ab initio and from first principles (such as from the text of the UNSC resolution) for every situation they face.⁵² Nowhere is this more fundamental and important than in relation to use of force.

46 For some comments on the general background to these various operations, see, for example: Ross, “The Role of Amphibious Forces in a Changing World”; pp 21–23; Michael Pugh et al, “Appendix: Chronology of Relevant Circumstances”, in Michael Pugh (ed), *Maritime Security and Peacekeeping: A Framework for United Nations Operations*, Manchester University Press, Manchester, 1994; pp 260–267.

47 John Reeve, *Maritime Strategy and Defence of the Archipelagic Inner Arc*, Royal Australian Navy Sea Power Centre, Working Paper No. 5, March 2001; p 3.

48 Dalton, “The Influence of Law on Seapower in Desert Shield/Desert Storm”; 70–77.

49 See, for example, Pugh, “Historical Record”; p 40. See also Alan Stephens, “Kosovo: Or the Future of War?”; p 9. Stephens, discussing the almost routine choice of air strikes as the primary means of force application in several recent crises, clearly considers that its popularity resides in the fact that “political realities demand the application of combat power in a form which can meet...objectives without stalemate, attrition and unnecessary casualties”. Air strikes have often been perceived to be the most ‘media friendly’, high tech, and low casualty path to demonstrating resolve, although issues of collateral damage and incidental injury in operations Afghanistan will likely have some effect upon this perception.

50 James Burnell-Nugent, “Sea Power and E-Power”, conference paper presented at *Internet and Power: A Revolution in International Affairs?*, University of Cambridge, Cambridge, UK, 11 May 2000.

51 James Goldrick quoted in Ryan, “Primary Responsibilities and Primary Risks”: *Australian Defence Force Participation in the International Force East Timor*, p 79.

52 For naval forces – as with all forces – it is important that UN peace operations RoE reach a number of vital milestones. First, they must be *adequate* to the mission assigned and the political objectives desired. See, for example, Staley, *The Wave of the Future: The*

The third form of force, in the tradition of gunboat diplomacy, which naval power can deliver is *latent force*, or presence, in support of a message or warning on behalf of the UN or international community. As a credible force stationed close to the coast, naval power can act as a significant deterrent, and may play an essential role in halting escalation.⁵³ Similarly, once a cease-fire or other form of agreement is

United Nations and Naval Peacekeeping, p 23 – “If, for example, the function of the multinational force is purely peacekeeping and not enforcement, then the equipment and rules of engagement with which the force operates should reflect this limitation”. Inadequate RoE, such as those imposed on UNPROFOR forces during the siege of Srebrenica, or UN forces in Rwanda, can actually break ‘Nightingale’s rule’ (that is, don’t make it worse) and inflame a crisis by displaying international hesitancy to react and indicating that impunity will go unpunished. The fact that a “credible dissuasive escalation continuum lies in waiting” can act as a significant deterrent to impunity – Steele, “Securing Peace for Humanitarian Aid”; pp 72, 81. As Steele notes, at p 69, “half-hearted” uses of force can make a situation worse rather than better. Ian Gordon similarly argues that “strong” RoE can at least be held in reserve, whereas weak RoE do not allow for escalation if required – Gordon, interview, 2 February 2002, Dili, East Timor. This is in essence the point made by then British Prime Minister Tony Blair – discussing the UN’s apparent powerlessness in Sierra Leone – when he warned that British forces would in future be withheld from peace operations “until the mandate [is] right” – Jonathon Carr-Brown, “Blair Pushes to Sharpen UN Teeth”, *The Sunday Times*, Sunday 12 June 2000. It is also the same point – in reverse – made by General Clark with respect to the premature US declaration that no ground troops would be deployed to halt ethnic cleansing in Kosovo. This early political binding of NATO’s hands significantly inhibited NATO’s negotiating strength – Clark, *Waging Modern War: Bosnia, Kosovo, and the Future of Combat*; pp 281–82, 329–35, 348–49. Second, RoE must be *credible*, that is, matched by force capabilities. As was discovered during the UNTAC operation in Cambodia, operational credibility was significantly eroded by the fact that the majority of assigned international civilian police (CIVPOL) had neither the equipment nor the training to fulfil their mandated tasks, nor to pursue them to the available limits of their RoE – James A. Shear, “Beyond Traditional Peacekeeping: The Case of Cambodia”, in Donald C. Daniel and Brad C. Hayes (eds), *Beyond Traditional Peacekeeping*, St. Martin’s Press, NY, 1995; p 263; see also Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 23 – Staley adds that “if these operating instructions are to have any deterrent value, they must also be clear to the local parties; however, the knowledge should not be so explicit that it could be used against the multinational force”. Finally, to be operationally viable, RoE must be *applicable*, that is legally defensible and useful to the operation, rather than irrelevant, confusing, or artificially restrictive of action. It is thus important, as Lorenz argues from the crucible of US and UN experiences in Somalia, that RoE be practical rather than excessively “legalistic”: “Commanders and legislators often share the inclination to control individual conduct by creating detailed rules. This approach fails to account for essential differences between a deliberate peacetime approach and the prompt response required in combat or ambiguous operations other than war (OOTW) environments” – F.M. Lorenz, “Forging Rules of Engagement: Lessons Learned in Operation United Shield”, *Military Review*, Vol. LXXV, No. 6, November–December 1995; p 19. MacKinlay further argues that RoE must satisfy four conditions in order to have the possibility of success, one of which is: “Provision must be made for the peacekeeping force to take sanctions against forces or individuals violating the agreement...” – See MacKinlay, *The Peacekeepers: An Assessment of Peacekeeping Operations at the Arab–Israel Interface*, Unwin Hyman Ltd, London, 1989; p 215.

53 Vladimir V. Grachev, “United Nations Peacekeeping in Transition”; p 277; See also Giniifer, “A Conceptual Framework”; p 67; A.B. Fetherston, *Towards a Theory of United Nations Peacekeeping*; p 125.

in place, naval forces can continue to patrol in order to show the (UN) flag, providing a visible and credible reminder of UN or other international community presence and oversight.

Patrolling and Monitoring

The second fundamental function of naval power in UN peace operations is to patrol and monitor. This task encompasses a range of functions. First, naval forces undertake a *primary constabulary* role by monitoring compliance with UN resolutions and peace agreements. These tasks include monitoring cease-fires in coastal areas and ensuring maritime lines of demarcation are respected. Such functions were performed by naval forces in Cambodia, the Gulf of Fonseca, and the during the UNTEA operation in West New Guinea/West Irian.⁵⁴ Similarly, naval forces can be instrumental in monitoring and enforcing UN sanctions and embargoes established in conjunction with a UNSC mandate. UN-authorized warships have fulfilled this function in the waters abutting Southern Rhodesia and the Mozambican port of Beira, the Persian Gulf, and the Former Republic of Yugoslavia.⁵⁵

Second, naval forces can undertake *secondary*, or *associated constabulary* roles, such as policing compliance with other specific arrangements that are considered integral to a particular mission. One example is the program of coastal and river patrols undertaken in order to eliminate arms smuggling during the UNTAC mandate in Cambodia, or providing carrier-borne naval aircraft for patrolling no-fly zones in northern, and later southern, Iraq.⁵⁶ Another example is where the UN requests naval assistance in patrolling the Territorial Sea or protecting the offshore resources of a state-in-waiting which is being administered by the UN (such as East Timor under UNTAET), but which has no organic capability to protect these newly acquired ocean resources, or to monitor activity in its nascent Territorial Sea.⁵⁷ A similar situation also existed with respect to protecting and enforcing the sovereignty of Iraq's maritime zones between the fall of the Hussein regime, and the establishment of a UN approved, US dominated, occupation.⁵⁸ Due to the fact that the small Iraqi Navy was destroyed in the opening stages of the 2003 conflict, it was the multinational naval force – operating under a conglomerate of UNSC Resolutions (such

54 These operations will be discussed in further detail in subsequent chapters.

55 Politakis, "UN-Mandated Naval Operations"; pp 182-186, 191, 203-206; Pugh, "Historical Record"; p 40 – in the Persian Gulf, over 13,000 ships were challenged from August-December 1990; Soons, "A 'New' Exception to the Freedom of the High Seas"; pp 209, 211 – in the 1992-3 period, over 12,000 ships were challenged in the waters adjacent to the FRY. Each of these operations will be further discussed in Chapter 5.

56 Pugh et al, "Appendix"; p 266; Weller, "The US, Iraq and the Use of Force in a Unipolar World"; pp 82-84, 95 – on the no-fly zones in Iraq.

57 Weiss and Norton, for example, were discussing the possibility of such use of UN peace-keeping forces as early as 1990 – Weiss and Norton, *UN Peacekeepers: Soldiers with a Difference*; pp 46-48.

58 See UNSC Res 1483 (22 May 2003) *The Situation in Iraq*; particularly paras 4-6 in which the UNSC "calls upon the Authority" (the US dominated Coalition Provisional Authority) to "promote the effective administration" of Iraq and "comply fully with their [occupation] obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907".

as with respect to arms and artefact smuggling), occupation edicts (such as confiscation of certain classes of weapons, and customs issues) and resurrected Iraqi law – that actually patrolled, monitored, and enforced Iraqi maritime sovereignty and protected Iraqi offshore infrastructure (most importantly the offshore oil terminals through which most of the oil from southern Iraq flows).

Logistics Support

The third essential function of naval forces in UN peace operations is to deliver sustained *logistics* support. The vast bulk of supplies, equipment and replacement forces provided on a continuing basis during UN peace operations are delivered from the sea. During UN operations in East Timor, for example, 93.4 per cent of logistics support by volume (91.7 per cent by weight) was delivered from the sea, particularly during periods of uncertainty as to the security of air lanes between the main part of East Timor and the small, separated enclave of Oecussi-Ambeno.⁵⁹ Lack of roads and infrastructure also meant that sea transport was vital within the area of operations. Further, within the territory of East Timor – characterised by “isolated locations and rugged terrain” which hampered land and air transport – operational mobility and logistics support in littoral areas also depended primarily upon use of the sea.⁶⁰ Similarly, UN forces and officials in remote areas of Irian Jaya during the UNTEA operation were positioned and supplied by UN force warships.⁶¹

Ancillary Tasks

The first ancillary task of naval forces is often to serve as the initial – and frequently primary – command and control platform for, and to provide communications facilities in support of, UN peace operations ashore. In East Timor, where the organic communications infrastructure ashore had been substantially destroyed prior to INTERFET’s arrival, several INTERFET warships initially performed roles as communications centres for the UN peace operations force as a whole.⁶²

The second major ancillary task which naval forces are occasionally called upon to perform during UN peace operations, is services protected evacuation (SPE).⁶³ French and US warships, flying the UN flag, first served this purpose during Count

59 Paul Kinghorne, “Operation Stabilise – Australian Naval Participation in East Timor”, *Naval Supply Newsletter*, Vol. 7, No. 2, June 2000; p 26; See also James Goldrick, quoted in Ryan, “Primary Responsibilities and Primary Risks”: *Australian Defence Force Participation in the International Force East Timor*, pp 78-79.

60 Reeve, *Maritime Strategy and Defence of the Archipelagic Inner Arc*; p 7.

61 Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 14.

62 See generally, Ryan, “Primary Responsibilities and Primary Risks”: *Australian Defence Force Participation in the International Force East Timor*, pp 76-89.

63 ‘Services Protected Evacuation’ is one (of several) doctrinal terms for the use of military force to assist in relocation of non-combatants threatened in a foreign country. In some doctrine, SPEs are known as “Non-Combatant Evacuation Operations” (NEOs) – See Royal Navy, *British Maritime Doctrine*; p 224.

Folke Bernadotte's mission to Palestine in 1948, evacuating UN officials through the port of Haifa.⁶⁴

The third major ancillary task which naval forces occasionally perform is to provide 'neutral ground' for negotiations and discussions between parties to a conflict, and between these parties and the international community. As Diehl has observed, the provision of a "fruitful environment for negotiations" is an essential enabling factor in many UN peace operations.⁶⁵ This function often extends to also providing the actual physical environment for negotiations – a place seen to represent impartial or neutral ground where neither party to a conflict holds any situational or environmental advantage. In 1993, for example, HMS INVINCIBLE served this purpose during negotiations over the Vance-Owen Plan for Bosnia.⁶⁶ Similarly, the New Zealand warship HMNZS ENDEAVOUR acted as the platform for the 1990 Bougainville negotiations, while the US warship USS RENVILLE hosted the 1947–48 Dutch-Indonesian talks on Indonesian independence.⁶⁷

Conclusion

The utility and roles of naval force in UN peace operations are, on the whole, relatively little analysed. Yet the inherent flexibility of naval forces – flexibility of movement, presence, employment, and response – is fundamental to all littoral, and many non-littoral, UN peace operations. This flexibility is the core attribute of 'power' that naval forces bring to the UN peace operations lexicon. As evidenced in the range of tasks – both fundamental and ancillary – which they are generally required to undertake in the course of UN peace operations, the importance of naval forces to these operations has been amply demonstrated in Iraq, Cambodia, the Former Yugoslavia, Somalia, Haiti, Sierra Leone, and East Timor. By complementing or enabling the capabilities of land-based forces (as with strike, or amphibious lodgement), and atoning for the limitations of these forces (as with logistics support, or by providing platforms for evacuations or negotiations), naval force is integral to the prospect of success. However, one important consequence of this flexibility, and of the sensitive and aggressive nature of the tasks which naval forces undertake, is a requirement for much more detailed consideration of the character and uses of naval forces when drafting mandates and setting operational envelopes which encompass UN naval operations.⁶⁸ Precisely because warships can credibly and rapidly escalate

64 Pugh, "Historical Record"; p 36; Pugh et al, "Appendix"; p 253; Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; pp 13–14.

65 Paul F. Diehl, *International Peacekeeping*; The John Hopkins University Press, Baltimore, 1994; p 37.

66 Silber and Little, *Death of a Nation*; pp 303–308.

67 Pugh et al, "Appendix"; p 260; From 2000 until late 2003, during a mission to assist the Solomon Islands government in restoring law and order, the Royal Australian and Royal New Zealand Navies kept a warship on station near Honiara (on a rotating basis) prepared to act as neutral ground for further negotiations over the Solomon Islands crisis, or to conduct a NEO if required.

68 See, for example, Pugh, "Historical Record"; p 48; Pugh, Ginifer, and Grove, "Sea Power, Security and Peacemaking"; p 25; Steele, "Securing Peace for Humanitarian Aid"; p 77. See also Geoffrey Kinley, "The Law of Self-Defence, Contemporary Naval Operations,

force and presence, UN naval peace operations mandates and authorisations need to incorporate more robust and relevant guidelines governing force and escalation. Mandates that ignore the peculiarities and sensitivities of both the maritime environment and its unique legitimating framework, and of naval force itself, must confront the possibility of irrelevance to the naval components of an operation. Such mandates must also face up to the very real risks and costs of inefficient use, even misuse, of an expensive but extremely flexible instrument of power. Thus any assessment purporting to comprehensively characterise the place of 'power' in the conduct of UN peace operations in the Territorial Sea must, as a matter of necessity, address the operational context and requirements of naval power in UN peace operations with a maritime component, as these should generate, shape, and colour the UNSC's approach to management of specifically maritime issues. In examining the issues that arise in UN naval peace operations, it is therefore important to keep these contextual forces in mind, for it is they which help determine what can be done, what is done, and therefore what questions need to be asked about the corresponding 'legitimation' required to accompany naval power in any assessment of authority. The next chapter will thus turn to examine this second precursor of authority in UN naval peace operations – legitimation.

and The United Nations Convention on the Law of the Sea", in E.D. Brown and Robin R. Churchill (eds), *The UN Convention on the Law of the Sea: Impact and Implementation* (Proceedings of the Law of the Sea Institute Nineteenth Annual Conference, 1985), The Law of the Sea Institute, Honolulu, 1987; pp 27-28.

Chapter 3

Legitimacy: UN Peace Operations, Force, and the Law of the Sea Convention

The 1958 and 1982 Conventions on the Law of the Sea were intended to regulate the uses of the seas in time of peace. The conferences on the Law of the Sea consciously avoided negotiation of the rules applicable to military operations on the seas.¹

– Robin Churchill and Vaughan Lowe

The Convention on the Law of the Sea must also be seen, and appreciated, in a wider context. For the first time in fifty years, there is now a genuine opportunity for international cooperation to make respect for the principles of international law a meaningful reality. The broader human struggle to ensure that relations between nations, and relations within nations are governed by the rule of law, continues.²

– Boutros Boutros Ghali, United Nations Secretary-General, 1994

Introduction

Although the UNCLOS III negotiations continued for a decade,³ and whilst the LOSC is certainly more comprehensive than any predecessor, it is an incomplete constitution for the oceans. It was simply not possible, with respect to the sea and its uses, to “identify and list each ‘right’ and allocate it to the appropriate side”.⁴ Several delegates declared in their opening statements that they envisaged a comprehensive

¹ Churchill and Lowe, *The Law of the Sea*; p 307.

² Address by the UN Secretary-General to the Assembly of the International Seabed Authority, Kingston, Jamaica, 16 November 1994 (extracted in Anderson, “The Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea”; p 313).

³ The LOSC was opened for signature at Montego Bay on 10 December 1982 and entered into force on 16 November 1994. The first substantive session of UNCLOS III, in New York in December 1973, was mainly concerned with preparatory issues such as the rules of procedure. The opening statements and substantive negotiations began at the Caracas session, June–August 1974 – see United Nations, *Third United Nations Conference on the Law of the Sea: Official Records* Vol I, United Nations, New York, 1973–1974. However, unofficial negotiations and preparatory meetings had begun six years previously. See also, Lennox F. Ballah, “The Universality of the 1982 UN Convention on the Law of the Sea: Common Heritage or Common Burden?”, in Najeeb Al-Naumi and Richard Meese (eds), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff Publishers, The Hague, 1995; p 349.

⁴ See generally Clingan, “The Next Twenty Years of Naval Mobility”; pp 82–93.

treaty, and thus the UNCLOS III negotiations were shaped by this objective. As the Australian delegate noted, the aim of the Conference was to achieve “a lasting convention, if possible universally signed and ratified, which would bring not only order and certainty but also justice and equity into the law of the sea”.⁵ The Greek delegate similarly declared that the Conference should “formulate general legal regulations relating to the fundamental maritime problems... The less room it left for bilateral arrangements, the better would it protect the international legal order”.⁶

The first general point to make, however, is that this objective is not always manifest in the LOSC itself.⁷ Three examples will serve to illustrate this observation. First, as to universality of scope, the consistent unwillingness of several developed states to accept the terms of Part XI of the LOSC – governing the exploitation and redistribution of profits from exploitation of mineral resources of the deep seabed – is one factor that has long hampered this objective of universality.⁸ As Treves notes, “while the Convention had been conceived as a universal instrument, and functioned in part as a universal term of reference, it could not, as drafted, become a universally accepted treaty”.⁹

The second example of this incompleteness – this time as to terminology – is found in the almost total absence of definitions for vital LOSC terms. Early in the Second (Caracas) session, the Israeli delegate flagged this issue, observing that “different meanings attributed to such words as ‘sovereignty’, ‘jurisdiction’, and ‘competence’ could prove to become difficulties”, proposing instead an approach centred on the “material content of proposals rather than their language”.¹⁰ Unfortunately, this approach was not adopted. The consequence, as Tsamenyi notes, is that interpretation has been left prey to the fractious and often contradictory vicissitudes of each party’s domestic legal and political context, rather than in accordance with a single internationally accepted meaning of each important term or phrase.¹¹ Whilst ‘war-

5 Statement by Mr Willesee (Australia), 2 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 88, para 107.

6 Statement by Mr Theodoropoulos (Greece), 9 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 134-135, para 13.

7 See generally, Rudiger Wolfram, “The Legal Order for the Seas and Oceans”, in Myron H. Nordquist and John Norton Moore (eds), *Entry Into Force of the Law of the Sea Convention* (1994 Rhodes Papers), Martinus Nijhoff Publishers, The Hague, 1995; p 162. As Nikos St. Skourtos declares, the LOSC covers “almost all fields of the Law of the Sea in time of peace” – Skourtos, “Legal Effects for Parties and Non-Parties”; p 187 (my italics). It is only in this sense that the LOSC can really be called comprehensive.

8 The US, for example, has not ratified the LOSC 1982. The UK, Japan, Russia, Germany, and Italy also refused to ratify the LOSC until Part XI had been substantially renegotiated via the *Agreement Relating to Implementation of Part XI of the Convention*. Indeed, for each of these states, the ratification dates for the LOSC 1982 and the *Agreement* are the same.

9 Treves, “The Road Towards Universality”; p 443.

10 Mr Rosenne (Israel), 9 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol II, United Nations, New York, 1975; p 99, para 21.

11 Martin Tsamenyi, “Legal Dimension of Maritime Military Operations”, presented at *Seapower 2004: Positioning Navies for the Future*, Sydney, Australia, 3-5 February 2004.

ship' is one of the few terms actually defined,¹² there is no agreed definition of what it means to 'require' a foreign warship to depart a Territorial Sea.¹³ Does this permit, for example, use of force up to and including lethal force against the offending vessel, as part of the 'requiring' process? Some scholars argue that it does authorise the degree of force necessary to 'compel' the delinquent warship to depart. For O'Connell, Shearer, and Delupis, this could legitimately cover Swedish and Norwegian use of depth charges in the 1970-1980's to force Soviet submarines, suspected of non-innocent passage, to the surface as part of 'requiring' them to depart.¹⁴ For Oxman, on the other hand, this may mean no more than the equivalent, less forcible, remedy of 'requiring' a misbehaving diplomat to depart the offended state's territory.¹⁵ Similarly, in relation to Archipelagic Sealanes Passage (ASLP), there is no agreed definition of 'normal mode' in relation to warships exercising ASLP.¹⁶ Does this, for example, permit aircraft carriers to conduct aircraft flight operations – arguably an aircraft carrier's 'normal mode' of operation?¹⁷ Does it allow warships to conduct daily systems operability tests on such weapons and sensors as turrets, missile launchers, and fire control radars (for example, by training a turret and elevating and depressing the gun) – a daily routine at sea and thus arguably part of a warship's 'normal mode'? One natural consequence of this semantic incompleteness is that some issues, whilst raised, were never resolved – such as the requirement or otherwise for prior notification by warships exercising innocent passage through a Territorial Sea.¹⁸ Yet other

12 *Law of the Sea Convention* 1982; Art 29. This definition repeats that developed in the *Geneva Convention on the High Seas* 1958; Art 8(2), which in turn built upon the definition developed in *Hague Convention VII Relating to the Conversion of Merchant Ships into Warships* 1907; Arts 2-4.

13 *Law of the Sea Convention* 1982; Art 30 – "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately".

14 O'Connell (edited Ivan Shearer), *The International Law of the Sea: Volume I*, p 297; See also, O'Connell, *The Influence of Law on Seapower*, pp 140-145. Ingrid Delupis, "Foreign Warships and Immunity for Espionage" (1984) 78 *American Journal of International Law* 53 at 73; Churchill and Lowe, *The Law of the Sea*; p 83.

15 Oxman, "The Regime of Warships"; p 817.

16 *Law of the Sea Convention* 1982; Art 53(3) – ASLP means "the exercise in accordance with this convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit...".

17 The US, for example, argues that 'normal mode' does indeed include conduct of air operations from an Aircraft Carrier. See *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*; para 2.3.4.1.

18 The Chinese delegate made it clear at the opening of the Caracas session that prior authorisation for warship innocent passage had to be reflected in the LOSC – Mr Chai Shu-Fan (China), 2 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 80-81, para 17. Others, such as the Spanish delegate, indicated that they were "astonished" at the claims by some states that warship innocent passage could be subject to a prior notification regime – Mr De Abaroa y Goni (Spain), 12 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 172; para 9. In any event, the issue was left 'constructively ambiguous'. See also, Hyun-Soo Kim, "The 1992 Chinese Territorial Sea Law in the Light of the UN Convention" (1994) 43 *International and Comparative Law Quarterly* 894.

issues – such as the impact of the laws of naval warfare upon LOSC regimes – were simply never raised at all,¹⁹ and have been left for other forums, such as the San Remo Group of Experts, to address. In general, the wider subject of use of force at sea is a telling example of this incompleteness, and the almost total absence of references to the use of force for the purposes of international peace and security is particularly illuminating. As Hampson notes

The law at sea is, itself, all at sea. When taken together with the law of the UN Charter, it is extremely difficult to put forward uncontroversial statements of the law applicable to maritime security operations including sanctions enforcement.²⁰

The third illustration of this point is to be found in the fact that the LOSC provides little substantive guidance on the relationship between the UN Charter, use of force under the Charter, and the LOSC – both generally, and with respect to legitimization in international peace and security in particular. Arguably, there are two primary reasons for this. First, maritime powers have long been loathe to see their freedom of manoeuvre at sea during times of armed conflict significantly restricted by the peace-time regime of the LOSC²¹ – a Mahanian concession within the predominantly Grotian view. This bi-polar view of maritime mobility as *either* a belligerent (UN Charter Chapter VII and armed conflict) *or* a peace-time (LOSC) governed issue has tended to obscure the fact that there is a significant middle ground of overlap between these two extremes. Although the *San Remo Manual* goes some way to raising awareness – at least to the extent that there is indeed an issue of linkage – it is more squarely focussed upon the traditional model of state versus state belligerency rather than the more complex issue of UN naval peace operations, where the lines of demarcation between the competing actors and between peaceful and belligerent action are generally much less clear. Yet although UN peace operations often occupy – albeit untidily – that area of tension and conflict which exists between war and peace, they nonetheless have significant direct and indirect consequences for the functioning of the LOSC. Non-consensual access to third party Territorial Seas, ‘breaches’ of the innocent passage regime, interdiction and sanctions enforcement operations, hydrographic surveying in support of UN peace operations, and the impact of UN peace operations on the ability of the coastal state to carry out LOSC-sanctioned resource exploitation or law enforcement operations are but a few

19 Unquestionably, the LOSC does deal with many – at that time – ‘future’ issues such as environmental protection, sustainability, and the national security of coastal states in the face of increasing uses of the oceans – Stevenson and Oxman, “The Future of the United Nations Convention on the Law of the Sea”; p 499. However, several other future issues were simply not predicted, or not addressed – see, for example, Treves, “The Road Towards Universality”; p 480.

20 Hampson, “Naval Peacekeeping”; p 191.

21 At both the 1958 and 1973–82 Conferences, the resultant Conventions were explicitly expressed to be ‘peacetime regimes’. The *San Remo Manual* (1995) covers some of this ground, but it is incomplete, and takes the form of an advisory analysis by a conference of experts convened by the Institute of International of Humanitarian Law. It is promulgated “in the form of guidelines which states are invited to follow in preparing their military manuals”, rather than as a treaty, although it is to some degree reflective of customary international law.

of these consequences. Conscious consideration of legitimization in UN naval peace operations – which requires some form of combined UN peace operations-use of force-LOSC governance – has long been hampered precisely because the issue is so ambiguous that it has been essentially invisible.

The second reason for this paucity of guidance, in relation to use of force specifically, is that there has been slim substantive precedent and debate on the issue. Indeed, the background to UNCLOS III leaves little surprise at the tendency of the LOSC to avoid or obfuscate use of force issues. Further, those rare references to the sea that the UN Charter does exhibit have enjoyed little debate. The few instances in which the UNSC has specifically addressed the sea have, in fact, generally served only to confuse. UNSC references to interdiction operations in the Territorial Sea of the Former Republic of Yugoslavia, for example, are conceptually opaque, and at first glance seem to send imprecise signals about the wider UN peace operations-LOSC relationship.²² Similarly, the precedent set in UNSC Resolution 221 (1966) regarding the Beira Patrol and Southern Rhodesia is also less useful than it initially appears. First, Resolution 221 explicitly authorised only a single state (UK) to take maritime enforcement action – hardly an auspicious precedent for multilateral UN naval peace operations. Second, the Beira Patrol occurred at a time when the Law of the Sea was, in general, a much more fractious body of international law, with its major components spread among four separate conventions, several declarations, and customary international law. As a precedent, the Beira Patrol is frustratingly unique in both context and application.

Similarly, apart from several proposed but ultimately unsuccessful amendments regarding passage regimes²³ (including the vexed and still ambiguous issue of prior notification or authorisation for warship innocent passage²⁴), and a general debate in 1976 on the peaceful uses of ocean space,²⁵ during negotiations there was little formal discussion concerning uses of force. As a result, the LOSC is – on the whole – “markedly silent” on the specifics of force permissible under its aegis.²⁶ On those occasions

22 See UNSC Resolutions 787, 16 November 1992, and 820, 17 April 1993 on *The Former Republic of Yugoslavia* – this issue will be addressed in detail in Chapter 5.

23 See, for example, the Spanish-Greek proposal in 1976 that Submarines engaged in transit passage of an international strait be required to navigate on the surface – *Third United Nations Conference on the Law of the Sea: Official Records* Vol III, United Nations, New York, 1975; pp 192-195.

24 See, for example the proposal submitted by Malaysia, Morocco, Oman, and Yemen, “Draft Articles on Navigation Through the Territorial Sea, Including Straits Used for International Navigation”, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol III; pp 192-195 (A/CONF.62/C.2/L.16, 22 July 1974). The proposal declared, at Article 15(3) – “The coastal State may require prior notification to or authorisation by its competent authorities for the passage of foreign warships through its territorial sea, in conformity with the regulations in force in such a state”.

25 *Third United Nations Conference on the Law of the Sea: Official Records*, Vol V, United Nations, New York, 1976; pp 54-68 – This debate resulted in the Article 88 reservation of the High Seas for peaceful purposes.

26 Ivan Shearer, “Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels” (1986) 35 *International and Comparative Law Quarterly* 320 at 322; Ivan Shearer, “Enforcement of Laws Against Delinquent Vessels in Australia’s Maritime Zones”, a paper presented at *Policing Australia’s Offshore Zones: Problems and Prospects*, Canberra,

when it does refer to the use of force, the LOSC is generally ambiguous, indirectly hearkens back to the debates preceding the 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone*, or acts to exclude military activities from a particular aspect of its jurisdiction – as with LOSC Art 298(1)(b-c), which excludes military activities and “disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations...” from the otherwise compulsory dispute resolution system.²⁷ One result of this scarcity of precedent and debate, as Oxman argues, is that “the typical response” to a question of how the LOSC coheres with other aspects of international law, is to view such junctions “as a challenge requiring more precise jurisdictional or hierarchical *lines between the fields*”. However, Oxman continues, what scholars should be doing is using the analysis of such junctions “as an opportunity for learning, adaptation and synthesis”.²⁸ International law, as many writers observe, is a multi-functional, fractious, and occasionally incoherent legal system.²⁹ It should be analysed and construed in terms of interfaces, linkages, and syntheses, rather than impermeable, field-specific boundaries.

Thus the starting point in analysing legitimacy in UN naval peace operations is to accept that despite the fact military use of the sea covers a wide and complex range of peace-keeping and war-fighting activities, military subjects rarely found their way onto the UNCLOS III agenda – although several delegates alluded to the issue of international security in their opening statements.³⁰ Further, as Rothwell – analysing

ACT, Australia, 8-9 April 1997; p 14. There were, however, attempts to make claims to a ‘security zone’ capable of being co-extensive with the Territorial Sea. These suggestions were “soundly defeated” at the UNCLOS III negotiations – See J. Ashley Roach, “Excessive Maritime Claims”, *American Society of International Law* (Proceedings of the Eighth Annual Meeting), Washington D.C., 28-31 March, 1990; p 291.

27 *Law of the Sea Convention* (1982); Art 298(1)(b-c). Hampson, for example, argues that these ambiguities are so significant and unresolved that the best and safest policy to adopt is to rely on consent of the coastal state as the basis of maritime activities during peace operations – Hampson, “Naval Peacekeeping”; p 202.

28 Oxman, “Human Rights and the UN Law of the Sea Convention”; p 400 – my italics.

29 See, for example, Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Second Edition), Columbia University Press, New York, 1979; p 5. See also, Vaughan Lowe, “International Legal Issues Arising in the Kosovo Crisis” (2000) 49 *International and Comparative Law Quarterly* 934 at 938 – “International Law is not a static system. It can change”.

30 See, for example, Mr Kolosovsky (USSR), 28 June 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 68, para 31, who referred to the progress of Détente and asserted that “the seas could not be allowed to become areas of rivalry and confrontation, which they would do unless the Conference acted in accord with that constructive trend in international relations”. Mr Willesee (Australia), 2 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 88, para 107 similarly proposed that only with a just convention “could the world hope to avoid the unsettled disputes which held the seeds of disastrous conflict... In the past there had been no general agreement on an international law adequate to ensure the maintenance of peace and security in the seas of the world. The Conference must not let history repeat itself; it must make history”. Mr Ennals (UK), 4 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 110, para 18, similarly noted the need for the Conference to secure an “effective and acceptable regime or the sea... could become an arena of world conflict”. Of note also is the Chinese and Albanian exhortations for the

the French response to the presence of *Rainbow Warrior II* near Muraroa in July 1995 – noted, this general issue of use and levels of force under the LOSC continues to be a central problem confronting implementation.³¹ Despite opinions, as early as 1984, that the “integration of the new regimes of the law of the sea with the rules of naval and air warfare is...a subject that merits attention”,³² and despite the fact that the *San Remo Manual* goes part way towards this goal, integration is yet far from clear or complete. As one well credentialed naval lawyer noted in 2001, the impact of the LOSC on naval operations has “yet to be fully felt”³³ – as was also considered to be the case nearly a decade earlier, when Ginifer asserted that

An adequate conceptual basis has yet to be established for United Nations maritime peace and security initiatives. There is a need for a rigorous conceptual framework appropriate to the changing context of the post-Cold War world.³⁴

Indeed, as operations in the waters of and adjacent to Iraq in the first half of 2003 proved, the form and manner of integrating the LOSC, UNSC resolution enforcement, and the Law of Naval Warfare remains a vexed and open question.

The aim of this chapter is to examine the component of *legitimation* as a contributing factor for *authority* in UN naval peace operations – the background to and context within which the LOSC, use of force, and the UN Charter (particularly Chapter VII) must interact. The centrality of this relationship for defining legitimation and assessing authority in UN naval peace operations resides in the fact that such operations take place in a sphere of activity (the oceans, seas and coasts) over which specific, and arguably customary and thus universal, rules relating to legitimation already exist, but where the conduct itself is sanctioned by reference to a separate, equally universal source of legitimation – in particular, UN Charter Chapter VII. To achieve this aim, the chapter will examine the backdrop to this relation-

Conference to be alert to the “secret aims” of the USSR and USA, whose “diabolical intent [was] to establish, in rivalry and collaboration, their hegemony over both land and sea” – Mr Plaka (Albania), 3 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 99–100, para 34; Mr Chai Shu-Fan (China), 2 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 80–81. See also Tuzmukhamedov, “The Principle of Non-Use of Force and Security at Sea”; p 173–174, where he examines this issue through the lens of disarmament: “In essence the naval topic has remained outside the negotiation machinery and is a ‘blank spot’ in the process of limiting armaments... The 1982 United Nations Convention on the Law of the Sea... does not contain express provisions on this domain. At the same time, one may concur with the views of experts who prepared on behalf of the United Nations General Assembly a ‘Study on the Naval Armaments Race’ and believed that ‘after the entry of the Convention into force, the discussion of the naval armaments race, measures of disarmament in the domain of naval armaments, and questions connected therewith may be conducted on a firmer basis.’”

31 Donald Rothwell, “The Muraroa Exclusion Zone”, *Maritime Studies*, No.83, July–August 1995; p 12.

32 Oxman, “The Regime of Warships”; p 811.

33 Letts, “The Royal Australian Navy, the Constitution and the Law – Then and Now”; p 287.

34 Ginifer, “A Conceptual Framework”; p 55.

ship, beginning with an outline of why legitimating force at sea is a grey area in the LOSC. An understanding of the tensions and influences that governed the LOSC's pre-history, negotiation, and subsequent form and content, will help to contextualise and explain the LOSC's general approach to this issue. The chapter will then outline the nature of the UN Charter's few references to the sea as a subject in international affairs generally, noting the paucity of considered or consistent UNSC precedent with respect to UN naval peace operations. Following this, a brief overview of some examples of difficult practical legitimacy problems will illustrate the continuing relevance of the issue, and the chapter will then conclude with an outline of the interpretive approach to legitimacy, with respect to understanding authority in UN naval peace operations, that has been adopted in this book.

The UNCLOS III Negotiations, Use of Force, and 'Constructive Ambiguity'

During the UNCLOS III negotiations, a variety of historical, procedural, and substantive influences militated against the formulation of detailed and clear provisions on the use of force within the LOSC. These influences, which shaped the LOSC, have clear implications for the way *legitimation* is defined in the LOSC, particularly with respect to naval power. This section of the chapter will briefly outline the effect of six major influences: the historical context of antecedent debates on warship rights; the procedural constraints of consensus negotiation; the 'package deal' approach; the substantive influence of the economic context of UNCLOS III; the 'all in one convention' requirement; and the character of the 'community' issues discussed during negotiations.

Antecedent Debates on Warship Rights

The relationship between warships and legal regimes covering the oceans has a sporadic and contentious history. The first modern attempt to codify the issues of blockade, privateering, and neutrality at sea – the 1856 *Declaration Respecting Maritime Law* – asserted that “[M]aritime law, in time of war, has long been the subject of deplorable disputes”.³⁵ Chronologically, debates regarding warships and the general law of the sea have their precursors in the 1894 Instiut de Droit International draft rules on innocent passage,³⁶ the 1926 International Law Association (ILA) draft articles on maritime jurisdiction in time of peace,³⁷ the 1929 Harvard Draft Convention on the Law of Territorial Waters,³⁸ the 1930 Hague Codification Conference (Points

35 *Declaration Respecting Maritime Law*, signed by Austria, France, Prussia, Russia, Sardinia, turkey, and the UK on 16 April 1856 – preamble.

36 See generally, de Vries Reilingh, “Warships in Territorial Waters: Their Right of Innocent Passage”; p 38.

37 International Law Association, *Report of the Thirty-Fourth Conference*, (5–11 August, 1926), Sweet & Maxwell, London, 1927; p 102; See also, H.M. Cleminson, “Laws of Maritime Jurisdiction in Time of Peace”, International Law Association, *Report of the Thirty-Third Conference*, (8–13 September, 1924), Sweet & Maxwell, London, 1925; pp 285–293.

38 “Harvard Draft Convention on the Law of Territorial Waters” (1929) 23 *American Journal of International Law* (Special Supplement) 295.

XI and X),³⁹ the *Corfu Channel Case* (1949),⁴⁰ the International Law Commission's (ILC) preparatory sessions for the 1958 Conventions (which used the 1930 codification drafts extensively),⁴¹ and the articles in – and equally importantly, the articles left out of – the 1958 *Convention on the Territorial Sea and the Contiguous Zone* itself.⁴² The nature of disputes over the place of warships in law at sea between 1858 and the start of UNCLOS III in 1973 can be distilled into five main thematic, paradigm-setting debates. The first is *peace versus war*. In drafting his report for the ILC's Fourth and Sixth Sessions, the Special Rapporteur on the Territorial Sea, J.P.A. Francois of The Netherlands, had no hesitation in considering “the possible applicability of neutral and belligerent rights and duties”.⁴³ The ILC decided, however, to deal only

39 League of Nations, *Conference for the Codification of International Law: Bases of Discussion Volume II – Territorial Waters*, 1929; pp 65–75.

40 *Corfu Channel Case – Merits (Albania v United Kingdom)* (1949) ICJ Reps. 4.

41 United Nations, *United Nations Conference on the Law on the Sea: Official Records*, Volumes II–III, United Nations, New York, 1958.

42 *Convention on the Territorial Sea and Contiguous Zone* 1958 – in particular draft Art 24, which was in effect permissive of a coastal state right to require prior notification for warship passage through the Territorial Sea. Draft Art 24 was put to the vote, but failing to reach the required two-thirds majority was thus excluded from the Convention. See, United Nations, *United Nations Conference on the Law on the Sea – Official Records*, United Nations, New York -Volume II, 1958; p 68. For discussions of the 1958 Convention and precursor debates, see generally, de Vries Reilingh, “Warships in Territorial Waters: Their Right of Innocent Passage”; pp 48–57; Solomon Slonim, “The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea” (1966) 5 *Columbia Journal of Transnational Law* 96; Shekhar Ghosh, “The Legal Regime of Innocent Passage Through the Territorial Sea” (1980–82) 20 *Indian Journal of International Law* 216 at 226–227; Philip Jessup, “The International Law Commission's 1954 Report on the Regime of the Territorial Sea” (1955) 49 *American Journal of International Law* 221. However, as O'Connell points out, international analysis of state practice on warship passage rights was exceptionally limited between 1875 and 1926 – O'Connell, *International Law of the Sea*, Volume I; pp 277–279. This is all the more curious for the rapid advances made in warship design, construction, range, armament and employment during that half century.

43 J.P.A. Francois, “Report to the Fourth Session of the International Law Commission: The Regime of the Territorial Sea” (in French, 4 April 1952), *Yearbook of the International Law Commission* (1952) Vol II (Documents of the 4th Session, 4 June–8 August, 1952); pp 25–43 (UN Doc A/CN.4/49 and Add.1–9, and UN Doc A/CN.4/53). Of note is the fact that Francois brought to his role of ILC Special Rapporteur for the Law of the Sea components of the ILC's agenda, the experience of having played a significant role – including as a Rapporteur – at the 1930 Hague Codification Conference. Debate at the 4th Session focussed on the High Seas regime – *Yearbook of the International Law Commission* (1952) Vol II (Summary of Records); for example the debates of 15–25 July 1952, pp 142–191. The Territorial Sea and passage rights issues were discussed in greater detail at the 6th, 7th, and 8th sessions of the ILC (1953–1958) see, *Yearbook of the International Law Commission* (1954) Vol I (Summary of Records, 6th Session, 3 June–28 July, 1954); particularly the debates of 22 June–9 July 1954, pp 57–123, and the debate of 20–21 July 1954, pp 154–163; *Yearbook of the International Law Commission* (1955) Vol I (Summary of Records, 7th Session, 2 May–8 July 1955); particularly the debates of 26 May 1955, pp 93–99, and 7–13 June 1955, pp 139–166; *Yearbook of the International Law Commission* (1956) Vol I (Summary of Records, 8th Session, 23 April–4 June 1956); particularly the debate of 15 June 1956, pp 214–215. The ILC's work resulted in UNGA Res 1105(XI), 21 February 1957, which decided to initiate the UNCLOS I process, as well as the Draft Conventions debated at

with the “rules in time of peace”. The comment on the ILC’s *Report of the ILC on the Regime of the Territorial Sea* 1954, draft Article 17, is explicit in this regard, noting that Chapter III (passage rights) “applies only in time of peace: rights of passage in time of war are reserved”.⁴⁴ Although the ILC considered this issue further in 1955, reaching the opposite conclusion with respect to the regime of innocent passage,⁴⁵ at UNCLOS I the US and Soviet delegates, in a moment of rare convergence, agreed that the Conventions would be peacetime instruments. The US delegate declared that it was generally accepted that “innocent passage for warships through the territorial waters of other States was admissible in time of peace”⁴⁶ – a reversal of the US position at the 1930 Hague Codification Conference. The Soviet position in 1954 was similarly that warships could pass through territorial waters, without coastal state authorisation, in times of peace⁴⁷ – itself the subject of a post-1958 volte face which saw the new Soviet position as requiring coastal state authorisation for warship passage through territorial waters.⁴⁸

The second paradigmatic debate was as to the influence of *law versus practice and politics*. Within the context of the Arab-Israeli debates over the Strait of Tiran, the Yemeni delegate declared at UNCLOS I that the “codification of the international law of the sea had political implications, and it was impossible to consider the problems involved from a purely technical point of view”.⁴⁹ Indeed Slonim argues that the UNCLOS I debates

...indicate that juridical authority played a subordinate role to other motivations and interests... In support of their views, the delegates drew very sparingly from legal authority; rather they argued the issues in terms of the practical consequences. On occasion, they advocated proposals which were, in fact, contrary to earlier declared

UNCLOS I. See also, Jessup, “The International Law Commission’s 1954 Report on the Regime of the Territorial Sea”; p 224; and C. John Colombos, *The International Law of the Sea* (5th Edition), Longmans, London, 1962; pp 97-98.

- 44 The three brief and insubstantial references the ILC made to the issue of warships, passage rights, and the UN Charter will be discussed in Chapter 4.
- 45 See *Yearbook of the International Law Commission* (1955) Vol I (Summary of Records: Seventh Session, 2 May-8 July 1955); 26 May 1955, p 94, paras 13-22 – Special Rapporteur Francois, likely relying on the ILC’s inclination (expressed the previous year) to the effect that the Conventions should be peacetime instruments, proposed an amendment to the draft Article on innocent passage to indicate that it was a peacetime regime. Amado, Fitzmaurice, Hsu, and Scelle all disagreed, asserting that innocent passage also applied during armed conflict, and the proposed amendment was withdrawn.
- 46 United Nations, *United Nations Conference on the Law on the Sea: Official Records*, United Nations, New York, 1958; pp 67-68 (UN Doc A/CONF.13/L.39).
- 47 Soviet Academy of Sciences Department of Law, *International Law*, 1947, quoted in de Vries Reilingh, “Warships in Territorial Waters: Their Right of Innocent Passage”; pp 48-49.
- 48 See William Butler, “Soviet Concepts of Innocent Passage” (1965-66) 7 *Harvard International Law Journal* 113 at 118, discussing the 1960 *Soviet Statute on the Protection of the State Borders of the USSR*; Art 16.
- 49 United Nations, *United Nations Conference on the Law on the Sea: Official Records*, Volume III; p 16.

law on the matter. The issue of warships illustrates the relative disinterest of the delegates in legal precedent.⁵⁰

This fervently practical nature of law of the sea issues and their resolution (as discussed in chapter one) has led some commentators to surmise, for example, that there are in fact two parallel rules of customary international law relating to notification for warship innocent passage. As Shao Jin argues

State practice has been dualistic rather than monistic. One group of states, mostly European and North American, have made no distinction between warships and merchant ships or left the matter unregulated. Another group of states, mainly Asian, African and Latin American, have made some requirements for the passage of warships. And both groups of states hold the conviction that their own practice is in accordance with international law.⁵¹

The third paradigm-setting debate relating to warships, passage, and use of force at sea has concerned the implications of *sovereignty versus freedom of passage*. This debate is neatly encapsulated by Slonim, who argues that each state's approach to "the original premise and basic assumptions underlying the right of innocent passage" dictates the manner of that state's comprehension of warship rights. Thus whether a state was most preoccupied with trade, security, fishing, or specific interests (such as the Israeli interest in keeping the Strait of Tiran open, and thus access through the Gulf of Aqaba assured), that state's approach to warship rights often followed suit in the name of consistency.

If it [innocent passage] is a mere grant by the coastal state in derogation of its sovereignty, in case of doubt the rights of the coastal state would be favoured. On the other hand, if the right of innocent passage is an independent right, derived from the universal freedom of navigation, it would follow that the warships of any state are free to traverse territorial waters.⁵²

The implications of this debate for innocent passage will be examined in greater detail in chapter four.

The fourth paradigmatic debate related to the *character of passage versus the nature of the ship*. A US judge, Elihu Root, famously encapsulated the 'nature of the ship' argument in 1912, during the *North Atlantic Coast Fisheries Arbitration*, when he declared of the Territorial Sea that "[W]arships may not pass without consent into this zone because they threaten. Merchant ships may pass and repass, because they

50 Slonim, "The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea"; pp 126-127.

51 Shao Jin, "The Question of Innocent Passage of Warships After UNCLOS III" (1982) 13:1 *Marine Policy* 56 at 67.

52 Slonim, "The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea"; pp 120-125.

do not threaten”.⁵³ This approach to the issue of regulating passage by reference to the nature of particular ships has long persisted in debates over the law of the sea. During UNCLOS III, for example, Fiji proposed a draft article dealing with “ships having special characteristics” which included the requirement for prior notification, and coastal state jurisdiction to make special regulations governing the passage of such vessels.⁵⁴ The alternative view has long been that “[T]he word as used in the phrase ‘right of innocent passage’ refers to the *character of the passage*, not the nature of the ship”.⁵⁵ This approach to the issue reflects an assumption of innocence in the absence of established guilt, rather than the approach based on the nature of the ship, which assumes ‘guilt’ ab initio. The character of passage argument won a partial victory at the Caracas round of UNCLOS III in 1974, when the Group of 77 ceased agitating for “separate regimes for merchant and military shipping”.⁵⁶ Ultimately, however, the articles on innocent passage were left ‘constructively ambiguous’ with respect to prior notification regimes for warships precisely because no final resolution of this particularly vexed manifestation of the *character of passage versus nature of the ship* debate was ever achieved.

The fifth paradigmatic debate, which is intimately related to the fourth, is that of *detail versus generality* with respect to defining ‘innocence’. Article 3 of the *Draft Convention* produced by the Hague Conference in 1930, provides a convenient illustration of the generalist approach to this question. Article 3 proposed, inter alia, that “[P]assage is not innocent when a vessel makes use of the territorial sea of a coastal state for the purpose of doing any act prejudicial to the security, to the public policy or the fiscal interests of that State”.⁵⁷ The ILC’s draft Article 15, used as the basis for discussion at UNCLOS I at Geneva in 1958, reflected the 1930 draft text and added that “submarines are required to navigate on the surface”. The eventual text of Article 14(4) of the *Convention on the Territorial Sea and Contiguous Zone* 1958 was settled as

53 “Proceedings” (1912) 11 *US North Atlantic Coast Fisheries Arbitration: Proceedings Before the Permanent Court of Arbitration at the Hague* 2007.

54 Fiji, “Draft Articles Relating to Passage Through the Territorial Sea”, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol III; pp 196-198, draft Art 6 (A/CONF.62/C.2/L.19, 23 July 1974). The Fijian proposal was concerned with tankers carrying nuclear or other inherently dangerous or noxious substances and materials. At draft Art 12, Fiji did not propose a prior notification regime for warships, but did allow for the possibility (at draft Art 6) that submarines would be permitted to transit through the territorial sea submerged on the basis of prior authorisation. Malaysia, Morocco, Oman, and Yemen, “Draft Articles on Navigation Through the Territorial Sea, Including Straits Used for International Navigation”, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol III; pp 192-195, draft Art 8 (A/CONF.62/C.2/L.16, 22 July 1974) also proposed a regime of prior notification based upon “special characteristics”, including in that class nuclear powered vessels, vessels carrying nuclear weapons or nuclear materials, oil and chemical tankers, and hydrographic and marine research vessels.

55 Thomas J. Lawrence, *The Principles of International Law* (Sixth Edition), MacMillan, New York, 1915; p 196.

56 Edward Miles, “An Interpretation of the Geneva Proceedings, Part II”; p 306.

57 J.P.A. Francois (Special Rapporteur), *Report to the Second Committee: Territorial Sea*; League of Nations Publications, Volume 9, 1930; Annex I, Art 3.

Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and other rules of international law.⁵⁸

However, this provision “came in for much criticism”⁵⁹ – particularly, as Fitzmaurice observed, because the generality of the phrase “peace, good order and security” provided coastal states with a self-defining, rather than objectively defined, provision which was capable of “affording a variety of plausible pretexts for prohibiting or impeding passage”.⁶⁰ Debate continued between 1958 and UNCLOS III as to how best to define ‘innocent’ – via this general mode, or via explicit examples. In 1958, India, for example, had argued for “a detailed enumeration of coastal state rights for regulating passage through the territorial sea”.⁶¹ Between 1958 and UNCLOS III, India dropped this cause and tended more towards a blanket provision, assessing that this provision – as Fitzmaurice had noted – gave the coastal state a pretext for the exercise of much wider powers. On the eve of UNCLOS III, however, India again reversed tack and argued for a detailed list of activities that were non-innocent.⁶² Indeed, most states agreed by 1974 that a detailed definition was preferable⁶³ – although they often differed on the precise nature of that ‘detail’ – and this is the position ultimately reflected in the LOSC 1982 Article 19(2) list of activities considered prejudicial to the peace, good order and security of the coastal state.⁶⁴

58 *Convention of the Territorial Sea and Contiguous Zone* 1958; Art 14(4).

59 Ghosh, “Innocent Passage Through the Territorial Sea”; p 225.

60 Gerald Fitzmaurice, “Some Results of the Geneva Conference on the Law of the Sea” (1959) 8 *International and Comparative Law Quarterly* 91 at 96.

61 United Nations, *United Nations Conference on the Law on the Sea – Official Records* Volume I; p 90.

62 Ghosh, “Innocent Passage Through the Territorial Sea”; p 228.

63 See, for example, the proposals put forward in: “Fiji: Draft Articles Relating to Passage Through the Territorial Sea”, *Third United Nations Conference on the Law of the Sea: Official Records* Vol III (Documents of the First and Second Sessions), 1975 (A/CONF.62/C.2/L.19, 23 July 1973); p 196, Art 3(2); and “Bulgaria, German Democratic Republic, Poland, and USSR: Draft Articles on the Territorial Sea”, *Third United Nations Conference on the Law of the Sea: Official Records* Vol III (Documents of the First and Second Sessions), 1975 (A/CONF.62/C.2/L.26, 29 July 1974); p 203, Art 16.

64 Indeed, by the time the issue was addressed at UNCLOS III, there seems to have been little debate that the detail approach was the desired approach – see, for example, Mr Olszowka (Poland), 17 Jul 74, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol II; p 116, para 18, who indicated that the definition of innocent passage required more work on clarification and detail; Mr Sapozhnikov (Ukrainian SSR), 17 Jul 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol II; p 116, para 29, declaring that “the concept of innocent passage must be defined more precisely, in particular, acts which would be incompatible with it must be specified”; Mrs Warner (Trinidad and Tobago), 17 Jul 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol II; p 118, para 2, asserting that the draft UK Arts 16 and 18 on innocent passage were too restrictive and imprecise, and would not cover, as an example, launching of aircraft from non-military vessels.

The Procedural Constraints of Consensus

As Koh observed in 1984

...the negotiating process of UNCLOS III contained many interesting and unique features. From the very start the Conference committed itself to work by the procedure of consensus.⁶⁵

The aim of this innovation was to draft a Convention that would enjoy the widest possible international support.⁶⁶ The rules of procedure for UNCLOS III – most particularly Rules 37-41 – clearly indicate that voting on an issue was viewed as an undesirable last resort, and that consensus was to be the primary means of drafting.⁶⁷ However, the relevant notion of consensus was itself – at that time – unique to the circumstances of UNCLOS III. As Clingan records

The term “consensus” is nowhere defined in the rules of procedure. In practice, consensus seemed to mean that there had been no formal objection by any country having a significant interest in the issue under discussion.⁶⁸

The result was a carefully constructed and often purposively ambiguous text negotiated over many years. To achieve consensus, Anderson notes, “some key articles were discussed at great length in great detail: all the words used in the provisions were carefully chosen”.⁶⁹ However issues of peace and security and use of force are “deli-

65 Koh, “Negotiating a New World Order for the Sea”; p 780; See also Skourtos, “Legal Effects for Parties and Non-Parties”; pp 208-209, referring to the UN General Assembly’s (UNGA) 1973 ‘gentlemen’s agreement’ concerning the use of the consensus approach during the UNCLOS III process, which was formalised during Session I of UNCLOS III at Caracas in June 1974. See UN General Assembly Decision, made at its 2169th plenary meeting, 16 November 1973, reiterating the “Gentlemen’s Agreement” on decision making at UNCLOS III, originally formulated in UN DOC A/9278 and corr. 1 and 2 (1973). See Robin Churchill and Myron Nordquist (eds), *New Directions in the Law of the Sea: Documents – Volume IV*, The British Institute for International and Comparative Law, London, 1975; pp 543-544.

66 For example, the previously noted statement by Mr Willese (Australia), 2 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 88, para 107.

67 See debate preceding the adoption of the Rules of Procedure – which took up most of the First (New York) session and part of the Second (Caracas) session – *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 54-59. The Rules were finally adopted on 27 June 1974 – see A/CONF.62/L.1 and Working Papers (WP) WP.1 and Add.1, WP.2, WP.3 and Add.1, WP.4 and Add.1, WP.5, and WP.6 – *Third United Nations Conference on the Law of the Sea: Official Records*, Vol III; pp 67-80. See generally, Myron. H. Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol I, Martinus Nijhof Publishers, Dordrecht, 1985; pp 86-103. See also the brief discussions on the nature of consensus in the 6th Plenary Meeting, 12 December 1973, during the First (New York) session of the Conference – *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 16-17.

68 Thomas Clingan, *The Law of the Sea: Ocean Law and Policy*, p 6.

69 Anderson, “Legal implications of the Entry into Force of the UN Convention on the Law of the Sea”; p 322.

cate” at the best of times, and naval states “with important interests at stake... were very careful on the subject of military uses of the sea, avoiding broad discussions of it”.⁷⁰ Apart from a specific resolution of the coastal state versus maritime power security balance with respect to the new concept of archipelagic states⁷¹ – encapsulated most particularly in the concept of ASLP – the unsurprising outcome of UNCLOS III was that, in general, military and security-focussed tensions were never really resolved. The absence or ‘constructive ambiguity’ of references to force in the LOSC was, consequently, all that the process of consensus could support.

The ‘Package Deal’

The trade-offs which allowed construction of the LOSC’s delicately balanced character are generally referred to – even during UNCLOS III itself – as the ‘package deal approach’. As the Norwegian delegate declared during his opening statement in 1974, “[T]he only feasible approach to the substantive issues was the package approach which balanced the advantages gained by different groups of countries and reflected the objective requirements of the situation”.⁷² It was, fundamentally, a method of coordinating the myriad interests of individual states, groups of states, and the international community as a whole within a single convention. As the Philippines delegate observed in his opening statement

The law of the sea to be formulated by the Conference should achieve a balance between the legitimate claims of particular States and of the international community. The proper balance could be achieved only when each State recognised that, at a given point, the interests of the international community were compatible with the particular vital interests of States.⁷³

The LOSC is thus based upon an assessment that all rights and obligations can only be understood as corollaries of other rights and obligations. The typical balance was

70 Muralt, “The Military Aspects of the UN Law of the Sea Convention”; p 80.

71 See Fiji, Indonesia, Mauritius, and Philippines, “Draft Articles Relating to Archipelagic States”, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol III; pp 226-227 (A/CONF.62/C.2/L.49, 9 August 1974).

72 Mr Evensen (Norway), 2 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 85-86, para 73. For detailed analyses of the UNCLOS III trade-off process see generally James Sebenius, *Negotiating the Law of the Sea*, Harvard University Press, Cambridge, Massachusetts, 1984; Robert L. Friedheim, *Negotiating the New Ocean Regime*, University of South Carolina Press, Columbia, 1992; and Jens Evensen, “The Effect of the Law of the Sea Conference Upon the Process of the Formation of International Law: Rapprochement Between Competing Points of View”, in Robert B. Krueger and Stefan A. Riesenfeld (eds), *The Developing Order of the Oceans* (Proceedings of the Law of the Sea Institute Eighteenth Annual Conference, 1984), The Law of the Sea Institute, Honolulu, 1985; p 32.

73 Mr Abad Santos (Philippines), 8 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 125, para 57. See also Mr De Abaroa y Goni (Spain), 12 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 172, para 9, referring to peaceful cooperation and national security as the two “basic principles that should govern navigation in the new law of the sea”.

between the rights and interests of the coastal state and those of the “distant water State or flag State”, or (as is directly reflected in the sovereignty versus global governance context of the LOSC) between global rights such as the navigational rights of the international community, and sovereign rights such as the exclusive interests of coastal and straits states. Skourtos, for example, believes that the LOSC’s restrictions on coastal state rights are imposed precisely to protect the vital interests of not only other members of the international community, but also of the “world community as a whole”.⁷⁴ The UK Representative, Mr Dudgeon, gave early notice of the importance of this trade-off when he declared, at the Second (Caracas) session in July 1974, that the new LOSC they had gathered to draft and debate, must seek to “strike the right balance between the interest of the international community in freedom of navigation and the interests of the coastal State or the straits State in protecting itself”.⁷⁵ Sebenius, in a slightly different interpretation, describes the central trade-off in the UNCLOS III negotiations as being between navigational freedoms and the Part XI Deep Seabed Regime.⁷⁶ Elliot Richardson, the US Ambassador to the UNCLOS III negotiations, similarly records how all participants in the negotiations “understood from the outset that the accommodation of navigational and resource issues must be at the core of any eventual ‘package deal’”.⁷⁷

The first major impact of this approach was that no reservations to the LOSC were permitted.⁷⁸ Whilst the package deal, as Saguirian records, was seen to be “the most effective method of overcoming differences”,⁷⁹ its viability depended heavily upon its non-derogable nature. The quarantining of unresolved use of force issues was therefore achieved by either saying nothing, or by saying something that was open to several – often conflicting – interpretations, and therefore acceptable to all. Thus, as previously noted, the LOSC neither explicitly accepts nor rejects the persistent claims by a number of states as regards the requirement for prior notification or authorisation for warship passage – it simply makes no mention of it. Neither does the LOSC define the parameters of ‘requiring’ a foreign warship to leave the Territorial Sea, again leaving the construction of this core potentiality for force at the mercy of a multitude of differing, often contradictory, national interpretations. The second outcome of this approach was that the few military articles which were agreed upon early in the UNCLOS III process were quickly incorporated into the Draft Convention and insulated from further, potentially consensus breaking, discussion. This was achieved via the rules of procedure, which made it difficult to vote on proposals and amendments, and if a vote was scheduled, made it

74 Skourtos, “Legal Effects for Parties and Non-Parties”; p 188.

75 Mr Dudgeon (UK), 11 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol II; p 101, para 24.

76 Sebenius, *Negotiating the Law of The Sea*; p 73.

77 Elliot Richardson, “Power, Mobility, and the Law of the Sea”, in *Foreign Affairs*, Vol. 58, 1980; pp 902-919. See also, Anderson, “Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea”; p 323; Cable, *Gunboat Diplomacy*; p 150; and Miles, “U.S. Security Interests in a Post-Cold War World”; p 379.

78 *Law of the Sea Convention* 1982; Art 309.

79 Artemy A. Saguirian, “The USSR and the New Law of the Sea Convention: In Search of Practical Solutions”, *American Society of International Law* (Proceedings of the Eighth Annual Meeting), Washington D.C., 28-31 March, 1990; p 299.

difficult for any proposal or amendment to be adopted.⁸⁰ This package deal approach also had other, more contextual limitations. It is, for example, largely due to the fact of non-derogability from the package deal with respect to Part XI of the LOSC that the Convention remained for many years unratified by several major industrialised states.⁸¹

The Substantive Influence of the Economic Context of the Negotiations

The influence of the North-South divide in the LOSC is nowhere more manifest than in its economic tone. The idea of a new just and equitable international economic order permeates the LOSC's regimes on the Seabed, the Exclusive Economic Zone, and the Continental Shelf.⁸² This economic tone suffused the UNCLOS III negotiations, and was overt in Ambassador Pardo's 1967 deep seabed statement to the UNGA – often considered the catalyst for UNCLOS III.⁸³ The LOSC Preamble itself reflects this economic tone, declaring that a major purpose behind the achievement of the LOSC's goals is that it “will contribute to the realisation of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole”.⁸⁴ Two testaments to the intensity of this economic focus are plainly visible in the UNCLOS III records. The first is that the issue formed a common thread through most of the opening statements and proposals at UNCLOS III. The Soviet delegate declared that the “main aim of the Conference was to draw up agreed principles and norms for the rational exploitation of marine resources”.⁸⁵ The UK delegate also asserted that “what was really new about the sea, and what gave the Conference its importance and urgency, was the dramatic revela-

80 See, for example, Rule of Procedure 37 on deferments, timelines, and the exhaustion of all other avenues of agreement before a vote could be scheduled.

81 As noted previously in this chapter.

82 See, for example, *Law of the Sea Convention* 1982; Arts 136, 137, 140 on “The Area” as the common heritage of mankind to be used for the benefit of all, Arts 150-155 on the economic and fiscal policy governing The Area; Arts 56, 62, and 72 on the EEZ; Arts 77 and 82 on the Continental Shelf.

83 Arvid Pardo was at that time Malta's Ambassador to the UN, and it was his argument before the UNGA that the seabed beyond the limits of national jurisdictions – and its (then believed to be) increasingly accessible nodule deposits – should be declared “the common heritage of mankind”, and that nodule exploitation should be undertaken for the benefit of the international community as a whole rather than for the benefit of only those states with the technology and resources to mine the seabed. The UNGA adopted the “common heritage” principle and “proposed the creation of an international regime for the seabed that would ensure ‘equitable sharing by States in the benefits derived therefrom’” – (UNGA Resolution 2749 of 1970). See Ballah, “Common Heritage or Common Burden?”; pp 340-342, for a recent discussion of “Pardo's Vision”. See also Sebenius, *Negotiating the Law of the Sea*; pp 7-8.

84 See Preamble, *Law of the Sea Convention* 1982.

85 Mr Kolosovsky (USSR), 28 June 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 68, para 32.

tion of the wealth which lay on and beneath the seabed”.⁸⁶ The Singaporean delegate was even more explicit

The sea should not be subject to the same injustice as the land had been, but should serve the interests of all mankind and not become the object of avaricious accumulation of wealth by individual nations, regimes, or multinational corporations. It should be an instrument of peace and justice and of collective wealth for all nations.⁸⁷

The second testament to this economic tone was the fact that by 1978 agreement had been reached on 90% of contentious issues, but the inability to reach consensus on the financial arrangements for deep seabed mining extended the negotiations for several more years.⁸⁸ A major consequence of this focus is the fact that the UNCLOS III negotiations and the LOSC reflected this context, such that – in discussions and drafting – a “strong priority [was] accorded economic over political or military considerations”.⁸⁹

The ‘All in One’ Approach

From its outset in 1973, UNCLOS III was animated by a determination “to avoid the result, as in 1958, of a series of discrete conventions on separate topics”. This was arguably so for several reasons. First, as the German Democratic Republic delegate asserted at the Second (Caracas) session in 1974, “[A]ll questions relating to the Law of the Sea were interrelated and should be approached as a whole”.⁹⁰ Second, repeating the 1958 process and developing a series of treaties rather than one treaty would mean that states would be able to selectively become parties to the law of the sea conventions that suited their purposes whilst ignoring those which did not.⁹¹ Had

⁸⁶ Mr Ennals (UK), 4 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 110, para 20.

⁸⁷ Mr Chao (Singapore), 9 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 134–135, para 13. This economic focus is explicit in many of the founding and instrumental documents of UNCLOS III. See, UN Secretary-General, “Economic Implications of Sea-Bed Mineral Development in the International Area”, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol III; pp 5–40 (A/CONF.62/25, 22 May 1974) for example at pp 22–23 on maximising revenues and ensuring participation by developing states; Chile, “Working Paper on the Economic Implications for the Developing Countries of the Exploration of the Sea-bed Beyond the Limits of National Jurisdiction”, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol III; pp 177–182 (A/CONF.62/C.1/L.II, 24 August 1974) – providing an alternative view on the dangers which mining the seabed and flooding the international market with cheap minerals potentially held for those developing states – such as Chile – whose economy depended heavily upon mineral exports.

⁸⁸ Sebenius, *Negotiating the Law of the Sea*; p 8.

⁸⁹ See Evensen, “The Effect of the Law of the Sea Conference on the Formation of International Law”; pp 23–25; Oxman, “The Regime of Warships”; p 862.

⁹⁰ Mr Moldt (GDR), 2 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 79–80, para 3.

⁹¹ Clingan, *Ocean Law and Policy*; p 3.

the LOSC been developed as a series of conventions, it is likely that the US, UK, Germany, Japan, and France would have signed up to those covering the Territorial Sea and the Exclusive Economic Zone, but not those concerning the deep seabed regime. Similarly, whilst many African and Latin American states would have signed a convention assuring them of economic benefits from exploitation of the deep seabed, many – including Madagascar, Somalia, Guinea Bissau, Peru, Panama, and Uruguay (all of which were still agitating at the Third (Geneva) session in 1975 for a 200 nautical mile Territorial Sea)⁹² would not have signed a separate convention limiting the Territorial Sea to 12 nautical miles. A third reason, as Sebenius notes, was that a “widely accepted international agreement offered the potential for halting [the] troublesome jurisdictional creep” that had, between 1958–1968, seen states’ concerns with seaward security, resource control, and pollution lead to claims covering just short of 40% of the world’s oceans – “an area larger than that of the combined continents”.⁹³ Between 1947 and 1950, for example, Chile, Peru, and Equador had all claimed a sovereign maritime zone extending out 200 nautical miles.⁹⁴ Many maritime states clearly and overtly viewed the possibility of this proportion of the oceans becoming subject to sovereign regulation of navigational, fishing, and exploration rights with considerable concern.

With respect to the use of force, however, these two universalist desires – completeness of scope, and universality of application – were often antithetical when analysed within the more prudentially focussed and national interest based context of maritime state versus coastal state debates. Universality of application could never be achieved in the face of non-negotiable security concerns over the potentially limiting effects of a specific and explicit regulatory scheme covering uses of force – of which the long-standing general versus detail approach to innocent passage is an important manifestation. Thus, with respect to the issue of regulating force, completeness of scope was sacrificed in order to further the potential universality of application. It is interesting to note, however, that the economic focus maintained by many parties to the UNCLOS III negotiations actually set the stage for acceptance of the opposite outcome regarding Part XI of the LOSC – the deep seabed regime. Clearly, with respect to this particular issue, the majority of participants felt that completeness of scope was more important than initial universality of application, given that several industrialised states were expected to – and did – refuse to sign the LOSC on the basis of disagreement with Part XI.

The Cold War Context and the ‘International Community’ Thread in the LOSC

Whilst reinforcing the traditional concept of state sovereignty in regimes such as the Territorial Sea and the Continental Shelf, the LOSC also exhibits a strong –

92 See *Third United Nations Conference on the Law of the Sea: Official Records*, Vol IV, United Nations, New York, 1975; pp 75–80.

93 This was, for example, the official US position – see Sebenius, *Negotiating the Law of the Sea*; pp 74–75.

94 See, for example, UN Office of Ocean Affairs, “Overview – Convention and Related Agreements”, accessed at www.un.org/Depts/los/convention_agreements/convention_historical_perspective.

if occasionally obscure – streak of internationalism. This is particularly evident in the LOSC’s internationalist concerns with respect to the global environment, cultural heritage, the common heritage of mankind, and a range of deep seabed mining issues.⁹⁵ The LOSC also has some significant, if indirect, scoping and procedural implications for other global issues such as human rights.⁹⁶ These international community interests, however, reflect the Cold War milieu in which the LOSC was negotiated, with the result that negotiations were hampered by “conflict[s] of strategic or other interests among states”. This context prevented the Conference from resolving certain issues, such as detailed definitions of the naval and use of force aspects of the Convention (as previously discussed). The Conference was naturally overshadowed to some extent by the security concerns of the two superpowers such that while

...there was no conspiracy of silence, in the drafting of the treaty articles the military concerns of the USSR and the United States were largely accepted by the negotiators. Thus the treaty defined the nonmilitary problems and issues.⁹⁷

The LOSC, as Stevenson and Oxman observe, was thus “caught in the crossfire of ideological wars that are now behind us”.⁹⁸ As such, the use of force for international peace and security purposes – today an issue of significant practical importance to the international community – was at that time closely identified with, and insulated from wider discussion by, the Cold War security environment. Thus any discussion typifying use of force as an international community issue – a regular and wide ranging dialogue in the post-Cold War environment – was inconceivable during

95 Mr Kazemi (Iran), 1 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; pp 71-73, para 25, for example, specifically linked the issue of international control of the seabed with the objective of preserving the maritime environment. See also statements on the common heritage concept as the “cornerstone” of the UNCLOS III negotiations – Mr Joseph (Trinidad and Tobago), 1 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol I; p 70, para 3. On the environment, see also Norway, “Working Paper on the Preservation of the Marine Environment”, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol III; p 266 (A/CONF.62/C.3/L.18, 23 August 1974). These concerns are reflected in, for example, *Law of the Sea Convention* 1982; Part XII (Arts 192-237) regarding the environment, Art 303(i) on cultural heritage at sea, Arts 125, 136, 150, 311 and the Preamble on the common heritage concept, and Part XI (Arts 133-191) on “The Area” (the deep seabed).

96 See, for example, Oxman, “Human Rights and the United Nations Law of the Sea Convention”; p 401. Oxman argues that the LOSC has three possible implications for the furtherance of human rights: First, the LOSC “is a global convention that applies to all activities regarding a vast area of the planet”; second, the fact that “a large and increasing majority of states is party to the Convention”; and third, that the parties to the LOSC “accept binding arbitration or adjudication of most disputes [including some types of disputes which have human rights dimensions or implications] arising under the Convention”.

97 Giulio Pontecorvo, quoted in Pirtle, “Military Uses of Ocean Space and the Law of the Sea in the New Millennium”; p 9.

98 Stevenson and Oxman, “The Future of the UN Convention on the Law of the Sea”; p 499.

UNCLOS III negotiations in the 1970's and 1980's.⁹⁹ But contemporary assessment and analysis of the LOSC needs to reflect the post-1989, and indeed the post-2001 shifts in the international order, taking account of "an increased consciousness of the need 'to develop universal norms to address global concerns'."¹⁰⁰ Escaping the security legacy of the 1970s and 1980s, however, often requires addressing new and – from the perspective of that time – novel issues such as the exponential increase in, and the increasing intrusiveness and belligerence of, UN peace operations since the end of the Cold War.

The LOSC, Uses of Force, and Peace Operations

The UN Charter and the Sea

Although the sea does not appear very often in the UN Charter, the UN Charter and its instruments have significant implications for the sea. This is evident on two levels. The first, as Churchill and Lowe observe, is that apart from the International Maritime Organisation itself, many other organisations that are part of the "UN family"

...make some contribution to the subject, although they are not primarily concerned with maritime matters. For example, the International Atomic Energy Agency was responsible for preparing a Convention on Civil Liability for Nuclear Damage, which is applicable to damage caused by nuclear-powered ships, and the World Health Organisation has prepared regulations concerning sanitary and quarantine matters affecting international shipping. Other organisations have clearer interests in maritime matters but, not being primarily regulatory agencies, have a less direct influence on the development of the law. Thus the Food and Agriculture Organisation has made a great contribution to fishery science and to the understanding of conservation techniques...¹⁰¹

The second is that those specific references to the sea or oceanspace that do appear in the UN Charter, are to be found in Chapter VII itself. Article 41 provides that the UNSC "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions" including the "complete or partial interruption of [inter alia]...sea...means of communication".¹⁰² Should Article 41 measures be considered inadequate, Article 42 similarly empowers the UNSC to "take such action by air, sea, or land forces as may be necessary to maintain or restore interna-

99 Although, it is interesting to note, one delegate did make the point during debate that the innocent passage provisions did not address use of force in pursuance of a UN decision – Mr Pollard (Guyana), 17 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol II; p 120, para 33. Unfortunately, this important question was never taken up for discussion.

100 Pulvenis quoting J.I. Charney, "New Problems Arising from the Entry into Force of the United Nations Law of the Sea Convention"; p 426.

101 Churchill and Lowe, *The Law of the Sea*; p 17. The IMO is identified and tasked throughout the LOSC as 'the competent international organisation'.

102 *Charter of the United Nations* 1945; Art 41.

tional peace and security”. This scope of action includes “operations by...sea...forces of Members of the United Nations”.¹⁰³ Finally, Article 43 requires all members of the UN to make available to the UNSC those “armed forces, assistance, and facilities, *including rights of passage*, necessary for the purpose of maintaining peace and security”.¹⁰⁴

Chapter VII Peace Operations and the Sea

The drafters of the UN Charter, as Lillich records, did not expressly address the concept of UN peace operations.¹⁰⁵ Subsequent international practice has filled this operational gap, provided authority for it, and given the UNSC significant and substantial political and operational precedent upon which to draw. Subsequent international concern has also provided a renewed, if often contentious, impetus for re-examining UN peace operations on the conceptual and theoretical level as well.¹⁰⁶ Similarly, the increasing practice of delegating UN peace operations powers to the UN Secretary-General, for example, is nowhere explicitly anticipated in the UN Charter, but is now widely accepted as a legitimate UNSC competence – as with, for example, the appointment by the Secretary-General of ‘Special Representatives’ to head transitional administrations.¹⁰⁷ With respect to the LOSC and the Territorial Sea, however, this accumulated body of political and operational practice is very limited. This paucity exists despite the fact of local and regional instability that has arisen out of competing claims to oceanspace, and the fact that there are some limited specific Chapter VII references to UNSC competencies over the sea. For evidence of the first, one need look only as far as the continuing uncertainties and periodic flare-ups related to the Paracel and Spratley Islands in the South China Sea, subject to a complex mix of competing claims by China, the Philippines, Vietnam, Malaysia, Indonesia, and Brunei,¹⁰⁸ or to the simmering tensions between China,

103 *Charter of the United Nations* 1945; Art 42.

104 *Charter of the United Nations* 1945; Art 43.

105 Lillich, “Humanitarian Intervention Through the United Nations”; p 564.

106 For example, in the concept of “Responsibility to Protect” (R2P) – see *In Larger Freedom: Towards Security, Development and Human Rights for All* (UN Doc A/59/2005) presented to the UN General Assembly 21 May 2005; and UN General Assembly Resolution 60/1. 2005 *World Summit Outcome* (UN Doc A/RES/60/1) 24 October 2005.

107 For example, in Cambodia, East Timor, Kosovo, and to a lesser extent, Iraq and Afghanistan. See also, Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Clarendon Press, Oxford, 1999; p 82.

108 See, for example, Elliott, “The Sea in International Politics”; p 71; Mark Valencia, “Vietnam: Fisheries and Navigation Policies and Issues” (1990) 21 *Ocean Development and International Law* 431; Robin Churchill, “Fisheries Issues in Maritime Boundary Delimitation”, *Marine Policy*, Vol. 17, January 1993; p 45. As Hanns Buchholz notes of another source of such frictions, the extension of Territorial Sea claims in accordance with the 1982 LOSC has placed between 120 and 150 international straits – a potential source of friction and conflict where freedom of passage is concerned – under the control of coastal states – Hanns Buchholz, *Law of the Sea Zones in the Pacific Ocean*, Institute of Asian Affairs, Hamburg, 1987; p 6.

Japan, and Taiwan over disputed oceanspace, and oil and gas fields, in the Senkaku/Diaoyutai area of the East China Sea.¹⁰⁹

For evidence of the second, two points can be made. The first is that UN Charter Chapter VII, whilst having a clear linkage with the peace and security of the coastal state, has a much less certain linkage with – and thus application to – a range of important LOSC issues in regard of which considerations of use of force in an international context may arise, but which are *not* easily characterised as international peace and security issues. Thus problems associated with navigational safety, environmental regulation, scientific research, and constabulary enforcement roles¹¹⁰ all have significant impacts upon – for example – the Territorial Sea, but do not sit comfortably under the aegis of Chapter VII. Several examples will illustrate this point.

First, in terms of the environment, the LOSC has substantial provisions on environmental protection, which interface with other non-Chapter VII provisions of international law and the UN Charter – such as Chapter IX on international economic and social cooperation. These provisions encompass a range of potential uses of force, in an international but non-peace and security context, which relate to environmental protection under both the LOSC and the *Intervention Convention* and its successors. Clearly, for example, use of force against non-state ships to halt pollution (Article I), even against flag-state consent (Article III), is explicitly permitted under the *Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* (1969/73).¹¹¹ This authorisation to use force in environmental defence has been exercised on several occasions, the most well known being the *Torrey Canyon* incident off the south-west coast of Britain in 1967, which provided the impetus for the 1969 *Intervention Convention*. During that incident, Britain used military aircraft and munitions to sink the vessel and set alight the escaped oil.¹¹²

Second, the enforcement of the coastal state's fiscal, customs, immigration, and sanitary laws (the 'FISC' powers) in the contiguous zone, and fisheries and other resource protection in the EEZ, often involve uses of force which are no less international in venue and actors, or potentially (and on occasion actually) lethal for being

109 "Profit over Patriotism", *The Economist*, 21-27 June 2008, p 40.

110 See, for example, *Law of the Sea Convention* 1982, Articles 21, 22, 25, and 31.

111 The *Intervention Convention* 1969, has since been extended to cover other forms of pollution via a 1973 *Protocol* to the convention. Indeed, Patricia Birnie and Alan Boyle note that the *Law of the Sea Convention* 1982 Arts 194, 221 and the *Convention on Salvage* 1989 Art 9 both "assume the existence of a right of coastal state intervention under customary and conventional international law...". See, Patricia Birnie and Alan Boyle, *Basic Documents on International Law and the Environment*, Clarendon Press, Oxford, 1995; p 204.

112 See Patricia Birnie and Alana Boyle, *International Law and the Environment*, Clarendon Press, Oxford, 1992; pp 286-288; O'Connell, *International Law of the Sea* Volume II; p 1006; L. Juda, "IMCO and the Regulation of Ocean Pollution From Ships" (1977) 26 *International and Comparative Law Quarterly* 558. For a dissenting view on the actual effectiveness in real terms of this high degree of regulation over "Flag of Convenience" shipping, see William Langwiesche, *The Outlaw Sea: A World of Freedom, Chaos, and Crime*, North Point Press, New York, 2004; pp 86-99.

constabulary.¹¹³ The UK-Icelandic ‘Cod Wars’,¹¹⁴ the multinational drug interdiction patrols in the Caribbean,¹¹⁵ and the offshore interception of suspected people-smuggling vessels by the French, Italian, US, and Australian navies – to name a few – offer some further examples. Each of these authorisations to use force is further internationalised through the right of hot pursuit.¹¹⁶

Third, the right of any warship to conduct a visit on the high seas in accordance with LOSC Article 110 – where there are reasonable grounds for suspecting that the vessel is engaged in one of five prohibited acts¹¹⁷ – also implies a right to use force in what is clearly an international context.¹¹⁸ Further, the extent of this right to use force, whilst ill-defined in the LOSC, is not insignificant. With respect to piracy, this arguably includes the use of lethal force – Article 105, for example, authorises the “seizure” of any pirate vessel or vessel controlled by pirates, and the assumption will generally be that any such seizure is likely to be resisted.¹¹⁹ This authority to use force

113 With respect to the Contiguous Zone, see *Law of the Sea Convention* 1982; Art 33. With respect to the EEZ, see *Law of the Sea Convention* 1982; Art 56 as to the subject matter of these powers; and Art 73 as to enforcement powers.

114 On the ‘Cod Wars’, it is interesting to note that Cable believes that the Royal Navy has suffered two clear “defeats” since 1945, both at the hands of very small maritime powers – Albania during the Corfu Channel incident in 1946, and Iceland, whose small gunboats successfully asserted a claim to exclusive fishing rights in the ‘Cod Wars’ of 1958–76 – James Cable, “The Diffusion of Maritime Power”, *International Relations*, Vol. 7, No. 4, November 1982; p 2139.

115 See *Law of the Sea Convention* 1982; Art 108, which exhorts states to co-operate in suppressing the illicit traffic of psychotropic substances and narcotic drugs, and the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 1988; Art 17, both of which place drug interdiction one level below action to suppress piracy and the other forms of offensive conduct noted in LOSC Art 110. Drug interdiction must still be undertaken with flag state consent – see United Nations, *Draft Practical Guide for Competent Authorities Under Article 17*, United Nations, New York, 2003; pp 3–4. Action to suppress piracy, slave trading and the other Article 110 crimes can take place as of right – no flag state consent is required.

116 *Law of the Sea Convention* 1982; Art III.

117 *Law of the Sea Convention* 1982; Art 110, as amplified by Arts 99–109. The five prohibited acts are piracy, slave trading, unauthorised broadcasting, being without nationality, or whilst refusing to fly a flag or flying a false flag, the vessel is of the same nationality as the visiting warship.

118 See, for example, *Law of the Sea Convention* 1982; Art 110(2), which explicitly details that boarding the vessel is permitted (noting that boarding operations routinely involve the threat of force, and occasionally actual use of force), and Art 110(3), which provides for compensation for loss and damage in the event that the suspicions were unfounded.

119 *Law of the Sea Convention* 1982; Article 105 – “On the high seas or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft...”. Piracy should not be considered an anachronistic concept when considering the use of force at sea. In fact, over the last 15 years, the worldwide incidence of piracy has risen. In 2002, there were 370 reported incidents; in 2003 there were 445 reported incidents, with 21 sailors killed and 71 crew and passengers missing. The vast majority of incidents (151) took place in and around the Indonesian Archipelago, with 64 off the west coast of Africa, and 58 in the waters off Bangladesh – International Maritime Bureau Piracy Reporting Centre, *Piracy and Armed Robbery Against Ships: 2003 Annual Report*, IMB/PRC, London/Kuala Lumpur, 2003. See also, “Sharp Rise in Piracy on the High Seas”, *The Sydney Morning Herald*, 28 January 2004. The International Maritime Bureau’s

at sea, in an international context which is not readily definable as coming under the aegis of the UNSC's responsibility for international peace and security, also exists in a *customary* form with respect to the universal jurisdiction of all states to act to suppress and punish piracy and the slave trade.¹²⁰ This extensive, permissive grey area on use of force at sea within an international context, but where there is no direct linkage to international peace and security, has few – if any – corollaries on land.

Fourth, and of increasing significance, is the issue of international operations in support of the Proliferation Security Initiative (PSI), the linked issue of maritime drug trafficking allegedly financing international terrorism,¹²¹ and the much

Malaysia-based Piracy Reporting Centre has compiled statistics on piracy since 1991. The IMO's Fourth Quarter of 2007 *Report on Acts of Piracy and Armed Robbery Against Ships* (MSC.4/Circ.114, 28 January 2008) indicates that the South China Sea area (12 incidents in the quarter) and West Africa area (20 incidents in the quarter) remain the most significant piracy hotspots (total of 58 incidents for the quarter). Piracy covers the full spectrum from robbery and murder of unwary yachtsmen at sea, through to seizing oil tankers, which are often either held for ransom, or diverted to third ports where the cargoes are sold, the vessel's identity altered, and the vessel then used in further piracy and black-market activities. See: Dave McRae, "Terror at Sea: The Pirates of Indonesia", *The Diplomat*, April-May 2004; pp 10-15; Kimina Lyall, "Australians Terrorised by Pirates" at www.news.com.au/common/printpage/0,6093,9387891.00.html accessed on 26 April 2004.; "Shipping in South-East Asia: Going for the Jugular", *The Economist*, 12-18 June 2004; pp 29-30; Robert C. Beckman, "Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward" (2002) 33 *Ocean Development and International Law* 317, particularly the Appendixes 1-5 summaries of incidents 1998-2002, in each of the Singapore Strait, Malacca Strait, Indonesia, Malaysia, and the South China Sea. For a case study of a high profile recent incident of piracy leading to the most public court proceedings related to piracy in more than a century (in this case, in an Indian court), see Langwiesche, *The Outlaw Sea: A World of Freedom, Chaos, and Crime*; pp 46-83, on the 1999 piratical seizure of the *Alondra Rainbow* and its subsequent apprehension, and the arrest of the pirates, by the Indian Coast Guard and Indian Navy. And then there is Somalia...

120 See generally, Barry H. Dubner, *The Law of International Sea Piracy*, Martinus Nijhof, The Hague, 1980; pp 1-2 on the English trial of Joseph Dawson, Edward Forseith, William Mary, William Bishop, James Lewis, and John Sparks, at The Old Bailey, for "felony and piracy": 8 *William III AD 1696*, 13 *How. St. Tr (1697)*, and 42-47 on piracy as "a crime against the law of nations".

121 For general comments on PSI, see Chapter 1. On specific aspects of PSI, see Mark Coultan, "Al-Qaeda Attack at Sea on Cards: Expert", *Sydney Morning Herald*, 30 March 2004 accessed at www.smh.com.au/articles/2004/03/29/1080544424949.html; "Terrorists Could Target Shipping Lanes", *Sydney Morning Herald*, 31 March 2004 accessed at www.smh.com.au/articles/2004/03/30/1080544495954.html; Cameron Stewart, "UN Warning on Ship Hijackings", *The Australian* 20 February 2004. The attempted targeting of off-shore Iraqi oil platforms by suicide boats on 24 April 2004, the attack on the tanker *Limburg* on 6 October 2002 by Al-Qaeda, the hijacking of a Philippino ferry by Abu Sayyaf on 26 May 2001, the bombing of *USS Cole* on 12 October 2000 in Aden, Yemen, by Al-Qaeda, the Tamil Tiger (LTTE) attack on the Chinese freighter *Yu Jia* on 25 September 1999, and the LTTE sinking the Sri Lankan ferry *MV Newco Endurance* on 25 July 1999, are but some of the more recent and well-known incidents. On maritime drug trafficking allegedly in support of WMD proliferation, consider Australia's interdiction of the North Korean vessel *Pong Su*, which was apprehended landing 125 kg of heroin on Australian territory in April 2003, allegedly with DPRK government knowledge. See, Gosia Kaszubska, "N Korean 'Loyalty' Agent on Drug Ship", *The Australian*, 7 November 2003; p 5; Martin Chulov, "Jumping to Conclusions", *The Australian*, 22 April 2004.

more tenuous linkage of terrorism and piracy.¹²² There are several UN conventions dealing with drugs, WMD proliferation, and terrorism at sea, all of which clearly indicate that these are matters of focussed UN concern.¹²³ Yet these issues involve uses of force at sea, in international waters and in an international context, which the UNSC has not or is unlikely to effectively regulate. Furthermore, in the current security environment, not only is the issue of terrorism at sea rapidly expanding, but the ways in which states propose to respond to the threat are also becoming points of international friction. This was in evidence with Malaysia's cool response to a US plan to deploy forces to conduct 'counter-terrorist operations' in the Malacca Straits, an international sealane characterised by Malaysian, Indonesian and Singaporean Territorial Seas.¹²⁴

A final example is currently hypothetical, but no less significant for that. It became quite evident during UN peace operations in East Timor that hydrographic route survey – ensuring access for warships and the amphibious and logistics support ships upon which the operation depended – can be a significant operational issue. The deep water hydrographic characteristics of the through-archipelago access routes to East Timor via Indonesian waters meant that the issue of access route survey in a third party Territorial Sea, in the course of UN peace operations in an adjacent state/area, did not become oppressive. However, it is easily conceivable that a future operation may require route survey through poorly charted third state Territorial Seas. Unless specifically countenanced by the relevant UNSC resolution, this requirement could easily become a point of significant friction should an assertive third state wish to challenge the right of a UN force to conduct such potentially damaging 'intelligence gathering' operations against them under the guise of UN peace operations in a neighbouring state.¹²⁵ Bowett in particular believes that some states may justifiably look askance at any assertion that, in the absence of reasoned specificity, merely sign-

122 See, for example, Jose Luis Jesus, "Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects" (2003) 18 *International Journal of Marine and Coastal Law* 363; J. Ashley Roach, "Initiatives to Enhance Maritime Security at Sea" (2004) 28 *Marine Policy* 41 at 43-45.

123 See, for example, *International Maritime Organisation Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* 1988; Art 15; *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 1988; Art 17; *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction* 1972; *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* 1993.

124 Mark Baker, "Malaysia Puts US in Place Over Offer to Police Busy Sea Lane", *Sydney Morning Herald*, 6 April 2004 accessed at www.smh.com.au/articles/2004/04/05/1081017106683.html. See also Tiarna Siboro, "RI, Singapore and Malaysia to Sign Pact on Malacca Patrol", *The Jakarta Post*, 15 July 2004 www.thejakartapost.com/yesterdaydetail.asp?field=20040715.co2.

125 Some states go so far as to assert that hydrographic surveying in international waters over which the coastal state has some resource based rights – such as the EEZ – offends the 'security' rights of the coastal state. See, for example, Cheng Xizhong, "A Chinese Perspective of 'Operational Modalities'" (2004) 28 *Marine Policy* 25 at 26-27.

ing the Charter means that Article 25 ties their hands generally and for perpetuity in relation to anything the UNSC subsequently declares.¹²⁶

The second major point to be made regarding the evolution of UNSC practice regarding oceanspace is that where UNSC precedent is scarce, it is prone to be interpreted very narrowly. This is arguably a consequence of inappropriately applying a fundamentally legal, rather than contextual, analysis. In this manner, the relative absence of an issue from UNSC precedent is viewed as an expression of limiting intent. However, a contextually sensitive analysis is much more likely to illuminate such issues, and also – more importantly – to ask why the UNSC has chosen to deal with them in certain ways. Soons, for example, argues that UNSC Resolution 820 on the Former Republic of Yugoslavia (FRY) provides authority for the assertion that

From the practice of the Security Council it follows that they [UN naval peace operations forces] are not permitted in the territorial sea of the target state unless they have been explicitly authorised by the Security Council.¹²⁷

Other scholars, such as Hampson, similarly argue from scarce documentary precedent that UN forces should only ever operate in a Territorial Sea with the coastal state's permission¹²⁸ – a particularly limiting approach to the maritime aspects of UN peace operations. However, this approach to interpretation must be contextualised by the fact that it relates to a single precedent applying to a particular embargo operation (which will be analysed in more detail in chapter five). A more contextual analysis would reveal that the UN *has* clearly operated in Territorial Seas during other UN peace operations without explicitly – in the relevant mandate – empowering its forces to do so. Operations in the Persian Gulf and Somalia, for example, evidenced this practice.¹²⁹ Clearly, restrictive approaches to interpreting the authorities

126 Derek Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures"; p 4. Bowett asserts that equating a UNSC decision with a Charter treaty obligation is "incorrect" because "a Council decision is *not* a treaty obligation. The obligation to comply may be, but the decision *per se* is not". He supports this reading of Article 103 by asking: "Are members to be treated as having accepted, *in advance*, whatever decisions the Council might make, so that such decisions have the very same force as the Charter provisions themselves? It may be doubted whether States ratifying the Charter ever believed they were granting to the Council a blank cheque to modify their legal rights". See also Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*, Kluwer Law International, The Hague, 1998, where – in discussing the trumping effect of UN Charter Art 103 – he (effectively) comes to the opposite conclusion.

127 Soons, "A 'New' Exception to the Freedom of the High Seas"; p 219–220.

128 Hampson, "Naval Peacekeeping"; p 202.

129 Indeed, it is arguable that the UNSC's explicit reference to the Territorial Sea in the FRY embargo situation actually complicated rather than clarified the conduct of monitoring operations in the Adriatic Sea. As Politakis notes, this reference meant that "it was not clear whether warships monitoring the maritime traffic in the Adriatic could freely enter, for the purposes of their mission, the territorial sea of Albania as well as the territorial waters of the former Yugoslav Federal States". Arguably, the more common practice – as with Haiti for example – has been for warships to operate in the relevant Territorial Sea(s) on the assumption that this is implicitly authorised by a UNSC mandate which envisages use of naval units to deliver forces and engage in monitoring operations. See,

inherent in UNSC mandates can have a significant impact – in terms of range and scope – upon the conduct of UN naval peace operations.

Examples of Difficult Legitimacy Problems

There are a number of UNSC–use of force–LOSC relationship issues which continue to challenge the construction of legitimacy for UN naval operations focussed on international peace and security. Five examples will illustrate this point. The first – and arguably most significant – is the issue of ‘neutrality’ at sea during UN naval peace operations. This issue offers a vexed example of the problems associated with the limitations inherent in relying upon the language of a Chapter VII resolution as the substance of legitimation, and well represents the many ambiguities inherent in the interaction between UNSC sanctions regimes, LoNW, and the LOSC. On a strict literal approach, neutrality is not an issue during UNSC Chapter VII peace operations – and therefore not an issue in relation to ‘third party’ Territorial Seas – because UN Charter Article 49 demands that “[T]he members of the United Nations *shall* join in affording mutual assistance in carrying out the measures decided upon by the Security Council”.¹³⁰ Article 25 similarly declares that “[T]he members of the United Nations agree to accept *and carry out* the decisions of the Security Council in accordance with the present Charter”.¹³¹ That there is no concept of neutrality in Chapter VII is further reinforced by Article 50 which provides that any state which finds itself “confronted with special economic problems arising from the *carrying out of those measures* shall have the right to consult the Security Council with regard to a solution of those problems”.¹³² The theoretical assumption is clear – states must comply with UNSC Chapter VII resolutions, even if it causes hardship. But the reality is of course very different: As Politakis observes of the concept of neutrality at sea, it “has generated more doubt than certainty, more inquisition than affirmation”.¹³³ During military operations against Iraq in 1990–1991, India refused refuelling facilities to US and Australian military aircraft enroute to the Gulf, claiming – in essence – a neutral status which was obviously not in line with the technical non-existence of neutrality in Chapter VII operations. Similarly, when a quarter of the Iraqi Airforce was sent to Iran in the hope of avoiding destruction, the US effectively called upon Iran to act as a neutral by impounding the aircraft and crews for the duration of hostilities.¹³⁴

for example, Politakis, “UN-Mandated Naval Operations”; pp 176–77 (Persian Gulf), 182–83 (FRY), 205. Where relative freedom to engage in interdiction operations had perhaps once been assumed, this singular reference by the UNSC temporarily, but considerably, muddied the waters of authority and will be discussed more fully in Chapter 5.

¹³⁰ *Charter of the United Nations* 1945; Art 49.

¹³¹ *Charter of the United Nations* 1945; Art 25.

¹³² *Charter of the United Nations* 1945; Art 50.

¹³³ Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality*, p 346.

¹³⁴ Ivan Shearer, “World Order Implications of the Gulf War”, paper presented in May 1991 (copy on file with author), p 10. For two recent discussions of neutrality at sea, see Wolff Heintschel von Heinegg, “The Protection of Navigation in Case of Armed Conflict” (2003) 18 *International Journal of Marine and Coastal Law* 401; and Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality*, pp 370–404, at (for example)

Similar issues concerning neutrality – essentially that recognition of a *de facto* form of neutrality is both a political and operational necessity during Chapter VII operations – also arose in the naval context of operations in Iraq in 2003. In LoNW, neutrality is a primary operative distinction. Neutrals, the *San Remo Manual* declares, are “any states not party to the conflict”.¹³⁵ As noted in chapter one, LoNW reflects a deep and fundamental concern with the treatment of neutral shipping, as detailed in the rules on interdiction and apprehension of neutral merchant vessels carrying contraband.¹³⁶ It is fair to say that acts permissible with respect to *enemy* shipping under LoNW are only contextually intelligible by comparison with those acts permissible with respect to *neutral* shipping. But for naval forces engaged in Chapter VII peace operations, there are technically no neutrals. Yet the distinction between neutral and enemy shipping is fundamental to the maritime branch of LOAC/IHL. The *San Remo Manual* actually muddies this issue, declaring that

Where, in the course of an international armed conflict, the Security Council has taken preventative or enforcement action involving the application of economic measures under Chapter VII of the Charter, Member States of the United Nations may not rely upon the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council.¹³⁷

One logical – and arguably absurd – outcome of a *literal* application of this provision would seem to be that third state merchant shipping suspected of carrying contraband would immediately be classifiable as *enemy* shipping, because there are no neutrals. This would then render such shipping subject to the suite of rights applicable to enemy merchant shipping during armed conflict at sea, thus transforming contraband-carrying neutral shipping into an enemy ‘military objective’ at the stroke of a pen. This would not accord with the general tenor of IHL, because LoNW implies a more restrictive regime for characterising neutral shipping carrying contraband as liable to attack. However, this differential approach, which a literal application of the ‘no neutrals’ assertion would remove, exists for an important reason – distinction. For example, *enemy merchant shipping* carrying contraband becomes liable to attack under two conditions. First, the vessel must have technically become classifiable as a *military objective* – that is, “by its nature, location, purpose or use it makes an effective contribution to military actions and its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”.¹³⁸ Second, the vessel must then do an act which renders it liable to attack – such as “refusing to stop or actively resisting visit and search or capture”.¹³⁹

p 403 where he notes this “troubled relationship between collective security and neutrality”.

¹³⁵ *San Remo Manual*, para 13.

¹³⁶ *San Remo Manual*, paras 118–124.

¹³⁷ *San Remo Manual*, para 8.

¹³⁸ *San Remo Manual*, para 40, reflecting *Additional Protocol I to the 1949 Geneva Conventions* 1971, Art 52(2).

¹³⁹ *San Remo Manual*, para 60.

The situation is different, however, for *neutral merchant shipping* carrying contraband, which only becomes liable to attack in *exceptional* circumstances and only under more stringent conditions. First, its destruction must offer a *definite military advantage*. This language points to an important theoretical difference in that a neutral merchant vessel cannot – by definition – be a military objective because its neutral flag ensures that it can not be characterised as enemy. A neutral merchant vessel can only render itself “liable to attack” through its own positive actions – never through its mere character. Second, the vessel must offend one of the criteria of transgression.¹⁴⁰ Many of these criteria closely mirror the acts which transform an enemy merchant vessel into a military objective. But with respect to carrying contraband, the culpability requirement for a neutral merchant vessel is significantly stricter than that applying to enemy merchant vessels, requiring both a belief on reasonable grounds that the vessel is carrying contraband, *and* – after prior warning – that the vessel *intentionally and clearly* refuses to stop, or *intentionally and clearly* resists visit, search or capture. This is a much stricter requirement than simply refusing to stop, and places a significantly higher assessment onus upon the naval commander.

The operational implications of distinguishing between neutral and enemy merchant vessels are also reflected in the issue of vessel armament. Where an *enemy merchant vessel* is armed, there is generally a strong assumption in favour of attack. However, the mere fact that a *neutral merchant vessel* is armed is explicitly declared to provide *no* grounds for attack.¹⁴¹ The regimes applicable to contraband-carrying, or armed, enemy and neutral merchant vessels are thus significantly different. To argue, on the basis of an inevitably literal Article 25/Chapter VII mandate approach, that there are no ‘neutrals’ in Chapter VII naval peace operations is thus fraught with significant unintended consequences, and is operationally nonsensical.

In practice, and perhaps counter-intuitively, the resolution to such operational legitimisation quandaries may be found more in the realms of a *procedurally* legitimating decision (which allows the issue to remain constructively ambiguous), rather than in a literal Chapter VII appreciation of the problem. From a practical and political point of view, distinction between ‘neutral’ and ‘enemy’ is vital, for as much as those terms sit uncomfortably within UN naval peace operations, they are nonetheless essential to naval operations where armed conflict is part of the context. Thus to maintain some form of distinction, the issue becomes one of how widely this net of ‘common sense’ quasi-neutrality should be cast. One approach is to apply the LoNW suite of powers relating to ‘neutral’ shipping to vessels of any state not engaged in the military operation, or non-participating states. But this approach effectively renders the assertion that there are no neutrals in Chapter VII operations meaningless, or at the very least conspicuously uncomfortable. A more restrictive approach might be to limit the category to the shipping of ‘persistent objectors’ – in the case of Iraq in 2003, France and Germany, for example – and accord neutral-like rights to shipping from these states. But the practical utility of this approach in, for example, the Arabian Gulf – where German or French flagged vessels are rare – militates against it. For the purposes of analysis, however, the point is that legitimisation in relation to

¹⁴⁰ *San Remo Manual*; para 67.

¹⁴¹ *San Remo Manual*; para 69.

the issue of neutrality in UN naval peace operations is one illustration of the difficult practical legitimisation questions that UN naval peace operations forces can face.

The second example, also found in recent operations in Iraq, provides a further timely and practical instance of a flaw in the legitimisation processes of UNSC mandates. For those states with naval forces in the North Arabian Gulf in May 2003, there was no UNSC resolution covering the essentially occupation roles they were actually undertaking in Iraqi waters after the supposed completion of offensive combat operations in Iraq. This was especially so for the naval forces of states which argued that the UNSC's extant resolutions on Iraq (particularly UNSC Resolution 678, paragraph 2, authorising the use of "all necessary means") had not authorised renewed military operations in Iraq. This furnishes yet another example of a situation involving UN peace operations, the LOSC, and the use of force which – according to each state's particular interpretation – may or may not have been subject to the legitimating process of UNSC mandate promulgation.

The third example relates to UN peace operations such as UNTAC in Cambodia (which was conducted under Chapter VI rather than Chapter VII),¹⁴² UNEF in the Sinai (which was authorised by the UN General Assembly in the face of a UNSC deadlocked by the vetoes of the two main external protagonists – the UK and France),¹⁴³ and the UN General Assembly authorised UN Temporary Executive Authority (UNTEA) operation covering the transfer of sovereignty over West Irian/Irian Jaya from the Netherlands to Indonesia in 1962.¹⁴⁴ The UNSC's powers, under Chapter VI, extend to making non-binding recommendations for dispute resolution, and the nature of these recommendations can extend – if accepted by the parties, and as evidenced by the UNTAC operation – to transitional administration and peace-keeping. Yet as the ILC has noted, "the Security Council would not be empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under VI into binding settle-

¹⁴² See, for example, UNSC Res 745 (28 February 1992) on *Cambodia*, in which the UNSC establishes the UN Transitional Administration in Cambodia without reference to Chapter VII (thus indicating the action is taken in accordance with Chapter VI), and in which the language used is not of the mandatory nature that characterises Chapter VII resolutions – for example, at para 8 where the UNSC "strongly urges" (as opposed to demands) the Cambodian parties to demobilise so that the election process can take place, and in para 9 where the UNSC "appeals" (rather than calls upon) states to provide all *voluntary* assistance and support necessary.

¹⁴³ The UNEF operation in the Sinai (1956–1967) was based upon UNGA resolutions – see UNGA Res 1000 from Emergency Session I (5 November 1956), UNGA Res 1001 from Emergency Session I (7 November 1956), and the general session UNGA Res 1122 (XI) (26 November 1956). See generally the records of the First Special Emergency Session (1–10 November 1956) UN Doc A/3354 (GAOR 1st Emergency Special Session) Suppl No. 1. For a short summation of the UNEF operation, see *Australian Defence Doctrine Publication 3.8 – Peace Operations*, p 1–11.

¹⁴⁴ The Dutch transferred administration of the territory to UNTEA, which was "established by and under the jurisdiction of the Secretary-General" – See *Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian)*, (Signed 15 August 1962), 437 UNTS 273; particularly Article 1, and UNGA Res 1752 of 21 September 1962, where the UNGA approved the delegation to the Secretary-General of the authority to conduct the required transitional administration via UNTEA. The transfer of administration to Indonesia was completed in May 1963.

ments of disputes or situations”.¹⁴⁵ The UNSC is not empowered to *impose* a settlement under Chapter VI, and thus Chapter VI peace operations – such as UNTAC, which was in its time the UN’s most ambitious ever peace operation – are not covered by the asserted legitimacy of a UNSC Chapter VII mandate. Similarly, for UN General Assembly initiated and controlled peace operations such as UNEF, which are authorised in accordance with the *Uniting for Peace* Resolution (1950),¹⁴⁶ and UNGA authorised Transitional Administrations such as UNTEA, it is meaningless to refer to UN Charter Chapter VII legitimacy in resolving scope and authority interaction issues related to such UN peace operations. Indeed, as the ICJ reiterated in the *Israel–Palestine Wall* advisory opinion (2004), the General Assembly does enjoy competence in specific international peace and security issues which the UNSC has not adopted for action.¹⁴⁷

The fourth example begins with a recognition that there are several other components of law applicable in UN naval peace operations which are customary in nature, and thus not easily explained – in terms of legitimation – by a simple cross-reference between the LOSC and the UN Charter. This – albeit hypothetical – example relates to the formation of customary international law. When US President Truman published the *Truman Proclamation on the Continental Shelf* in 1945, it filled a gap in international law which had not been evident until undersea oil drilling became a technological possibility.¹⁴⁸ Although Lord Asquith’s 1951 arbitral decision in the *Abu Dhabi Arbitration*¹⁴⁹ expressed some uncertainty, by the early 1950’s the legitimation of claims to a continental shelf by reference to international law was becoming a widely accepted practice. Indeed the ILC’s preparatory drafting and debates for UNCLOS I (1958) evidence a clear assumption that some form of sovereignty over resources on and under the continental shelf existed – the main debate actually concerned how to geologically define the continental shelf in order to facilitate legal expression of this right.¹⁵⁰ Thus whilst the continental shelf as a

145 G. Arangio-Ruiz, “Report of the Special Rapporteur on State Responsibility” (1992) *Yearbook of the International Law Commission* Vol II (1); p 1 and A/CN.4/SR.2277 (30 June 1992).

146 UN General Assembly Resolution 377 (V) *Uniting for Peace*, 3 November 1950. Para 1 of the Resolution declares the UNGA’s resolve that “if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security...”.

147 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Reps. (9 July 2004, General List No. 131); paras 26–28.

148 “The Truman Proclamation on the Continental Shelf” (1945) 4 *Whiteman’s Digest* 756.

149 Lord Asquith of Bishopstone, “In the Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi” (1952) 1 *International and Comparative Law Quarterly* 247.

150 *Yearbook of the International Law Committee* (1953) Vol I (5th Session, 15 June–14 August 1953), United Nations, New York, 1953 – see, for example statements during debate by Mr Francois (paras 1–5, p 85), Mr Yepes (paras 6–9, pp 85–86), Mr Lauterpacht (paras 10–11, p

legal concept was not incorporated into treaty form until UNCLOS I and the 1958 *Continental Shelf Convention*, it clearly existed in customary international law from at least 1953. Should force ever have been used to protect continental shelf rights between 1953 and 1958 (and indeed after 1958 for those states which did not sign the 1958 *Continental Shelf Convention*) where such force was used in a constabulary context and did not excite UNSC attention, it would clearly have been a further example of use of force in a non-Chapter VII context, even though the continental shelf at that time was – and remains – an issue falling within the scope of the UN Charter and under the authority of selected UN agencies.

Finally, it is far from inconceivable that a similar issue – involving the oceans, rapidly forming customary international law, and international implications regarding use of force – could arise in the future. Two examples illustrate this potential. First, in the wake of a number of catastrophic oil spills occasioned by the break-up at sea of poorly maintained tankers operating under the lax safety regimes provided by many flag of convenience registries, a number of major maritime states (including Spain, Portugal and France) have on occasion denied access to their harbours for such vessels claiming the LOSC-protected right of safe haven in the face of weather, engineering, or medical distress – the concept of *force majeure*. The interaction of this previously assumed right with the newly (re)asserted right of preventive action to avert catastrophic environmental damage is thus one example of a developing debate.¹⁵¹ The possible impact of this debate upon UN naval peace operations forces – for example, if instructed to exclude such ships from ports in an Area of Operations, or when expecting unqualified access to the customary right of haven from *force majeure* in third state ports – is potentially significant. The second potential problem can be identified in recent academic reconsideration of the implications of state practice with respect to foreign military activities in the Exclusive Economic Zone – possibly prompted by a wide-spread coastal state reassessment of rights and powers in maritime jurisdictions beyond the Territorial Sea in order to locate potential defensive responses to PSI interdiction proposals. LOSC 1982 Article 58(1) provides that “all states...enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87...”. These freedoms – collectively known as the ‘High Seas Freedoms’ – specifically include the right to conduct military exercises and operations, with the caveat of ‘due regard’ for the rights and uses of others.¹⁵² The *San Remo Manual* explicitly declares that LoNW anticipates the lawfulness of belligerent military operations in third state EEZs.¹⁵³ There is, however, an expanding body of state practice by a not insignificant number of states – including China, Brazil, India, Malaysia, Pakistan, and Uruguay – to the effect that custom requires that LOSC Article 301 (incorporating into LOSC interpretation the peaceful purposes and principles embodied in UN Charter Chapter I), be interpreted as permit-

86), Mr Liang (paras 12-16, pp 86-87), Mr Pal (paras 17-21, p 87), Mr Alfaro (paras 22-25, p 87), Mr Hsu (paras 26-27, p 87), and Mr el-Khouri (para 28, p 87).

151 Christopher F. Murray, “Any Port in a Storm? The Right of Entry for Reasons of *Force Majeure* or Distress in the Wake of the *Erika* and the *Castor*” (2002) 63 *Ohio State Law Journal* 1465.

152 *Law of the Sea Convention* 1982; Arts 58(1), 87.

153 *San Remo Manual*; para 34.

ting the coastal state to prohibit the conduct of foreign military activities, including exercises, in their EEZs.¹⁵⁴ This is often justified as a function of the ‘due regard’ foreign states must have to the principles of the UN Charter regarding use or threats of force against the sovereignty, territorial integrity or political independence of the coastal state. Clearly, this maturing debate raises LOSC interpretation problems. But the most significant potential implications for UN naval peace operations – those focussing upon the use of custom and state practice to justify extending sovereignty by reference to security, self-defence, and ‘peaceful purposes’, and upon the customary nature of much IHL and LoNW – are clear.

Manifestly, all of these examples fundamentally involve either the use of force in an international context – including in UN peace operations – or comprise acts which would normally be considered prejudicial to the peace, good order and security of the coastal state. But they are either inadequately addressed by, or not directly linked to, Chapter VII. How, then, might a context sensitive and sensible legitimacy be constructed for UN naval peace operations in such ambiguous or uncertain situations?

Assessing Legitimacy

Judge Weeramantry, in the *Lockerbie Case*, observed that the “entire law of the United Nations has been built up around the notion of peace and the prevention of conflict”.¹⁵⁵ As the members of the UN declare in the opening stanza of the Charter’s preamble, their purpose resides in the aspiration that “We the peoples of the United Nations [are] determined to save succeeding generations from the scourge of war...”.¹⁵⁶ In this way, international peace and security forms a fundamental measure by which international law in general is to be understood and interpreted. On the

¹⁵⁴ See, for example, Jon M. Van Dyke, “Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country” (2004) 28 *Marine Policy* 29; and Xizhong, “A Chinese Perspective on ‘Operational Modalities’”; pp 25-26.

¹⁵⁵ *Lockerbie Case* (1992) ICJ Reps. 70 at 180; Similarly, see *Certain Expenses Advising Opinion* (1962) ICJ Reps. 151 at 168 – “The primary place ascribed to international peace and security is natural since the fulfilment of the other purposes [of the UN Charter] will be dependant upon the attainment of that basic condition”. See, for example, Burdick H. Brittin, *International Law for Seagoing Officers* (Fifth Edition), Naval Institute Press, Annapolis, 1986; p 286 – “the maintenance of international peace and security is the prime purpose of the United Nations”. This observation displays an approach to authority and legitimization which views the entire edifice of international law as underpinned by a universal, non-derogable ‘international rule of law’. This rule of law, the argument continues, is the fundamental and animating force behind the international legal order – as, for example, per Sir Gerald Fitzgerald J’s dissent in the *Namibia Case* (1971) ICJ Reps 16 at 220, where he indicated that the UN, even when acting under Chapter VII, was still bound to act within the general principles of international law. It is an order which holds the pursuit and maintenance of peace – widely defined – as one of its core foundations and purposes. Indeed, as James Crawford indicates, given that a central purpose of international law is to reduce and limit conflict, it is arguable that international law promotes democracy not because it is a morally superior form of organisation, but rather because it fosters conditions that seem to reduce the likelihood of conflict – See Crawford, *Democracy in International Law*; pp 3-4.

¹⁵⁶ Preamble to the *Charter of the United Nations* 1945.

general level, the LOSC forms one part of this corpus of international law and is animated by, and interpreted by reference to, the international rule of law and its pursuit of international peace. As Koh declared in 1984 – but with continuing durability – “the [LOS] Convention...represents a victory for the rule of law”¹⁵⁷ – a sentiment echoed by many. As Stevenson and Oxman observe

Since the time of Grotius, the law of the sea has been a significant part of the fabric of modern international law. If we can succeed in strengthening the international law of the sea with a widely ratified Convention, we will strengthen the fabric of international law generally.¹⁵⁸

On the level of detail, the LOSC explicitly genuflects to the international peace and security facet of this rule of law in several ways. Article 301 of the LOSC (peaceful use of the seas) clearly invokes the presence and spirit of Article 2 of the UN Charter. Similarly, in Article 298(1)(c), the LOSC explicitly recognises that certain disputes are a matter for the UNSC – the international body tasked with upholding the international rule of law with respect to international peace and security – and not for the LOSC’s otherwise compulsory dispute resolution system.

In general terms, an integrative or referential approach to the UN peace operations-use of force-LOSC legitimisation relationship characterises UN sanctioned operations undertaken in the Territorial Sea for international peace and security purposes as legitimate *ab initio* – a part of the fabric of the Territorial Sea regime – rather than as legitimate by operation of some trump or exception. Because this general approach views legitimisation (as it relates to a particular issue) as a coherent continuum based upon referential and collaborative interpretation, justified uses of force in the Territorial Sea by naval peace operations forces are not characterised as *exceptions* to the general rule of non-belligerency, but rather as non-belligerent *by definition*. Similarly, an international community role in the Territorial Sea is not seen as *antithetical* to coastal state sovereignty, but rather as *fundamental* to the character of that coastal state sovereignty, governing the way it is defined and applied.

As a reflection of this general integrative approach, the LOSC (including Annexes) contains nearly seventy references to the fact that its subject matter may be governed by “other general rules and principles of international law”.¹⁵⁹ Nowhere

157 Koh, “Negotiating the New World Order for the Sea”; p 783. Similarly, Anderson – discussing the entry into force of the LOSC in 1994, and subsequent moves by several industrialised states to ratify it – noted that “the law of the sea and the international rule of law in general have been strengthened by these developments” – Anderson, “Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea”; p 326. Some scholars, however, are less inclined to optimism on this issue – see, for example, Lea Brilmayer and Natalie Klein, “Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator” (2001) 33:3 *New York University Journal of International Law and Politics* 703 at 768. These two scholars, writing five years after Anderson, express the still unfulfilled hope that “progress towards a generalised international rule of law” will be hastened by the further development of legal institutions such as the LOSC.

158 Stevenson and Oxman, “The Future of the UN Convention on the Law of the Sea”; p 499.

159 As Anderson records, the LOSC “leaves plenty of scope for interpretation or appreciation. Differences over its interpretation and application, including failures to comply

is this more apparent than with issues of use of force, for which the LOSC (as noted previously) quite simply provides little guidance. Indeed, as Shearer observes of the Territorial Sea regime in the LOSC, powers of enforcement and the use of force are merely “assumed or implied”, but with such little organic explanation as to be effectively meaningless.¹⁶⁰ Because the LOSC was intended to operate in situations specifically provided for in its articles, many associated matters – such as the use of force – were left to be regulated within the general framework of international law. And given that the LOSC has now also been incorporated into the legitimating (and ultimately authority) contexts of both UN naval peace operations, and LoNW,¹⁶¹ it has become starkly evident that the LOSC possesses significant gaps and ambiguities with respect to these issues. But it was always the intention of its drafters that the LOSC would be supplemented by regular reference to “other rules of international law”.¹⁶² The consequence is that – apart from its own formal power – the LOSC also accesses two other forms of legitimating power. The first is an inherent *procedural* power. A succinct summation of this procedural aspect is found in the ICJ’s *Namibia Advisory Opinion* (1971) declaration that, “[T]he silence of a treaty as to the existence of...a right cannot be interpreted as implying the exclusion of a right which has its source outside the treaty, in general international law...”.¹⁶³ Thus because it is based upon a soundly established and widely accepted legal process of adaptable cross-referencing, the integrative approach evokes significant legitimation in and of itself. The second form of legitimating power which the LOSC can command is *reflected* power. In the process of incorporating a particular external legal rule into the interpretation of the LOSC itself, the reference simultaneously adopts for the LOSC any powers which attach to that rule in the general corpus of international law. The outcome offered is a relatively seamless incorporation of – for example – the customary regime of the Territorial Seas and the right of innocent passage, or the jus cogens principles of IHL, into the legitimating construct of any particular UN naval peace operation.¹⁶⁴ Accordingly, when faced with some of the more vexing issues of legiti-

with its terms, can be expected to arise in the nature of things” – Anderson, “Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea”; p 324.

160 Shearer, “Enforcement of Laws Against Delinquent Vessels”; p 9.

161 For example, as noted previously, via *San Remo Manual*, Articles 10–12, which incorporate LOSC regimes into LoNW, and Articles 7–9, which incorporate the role of the UNSC and the implications of Chapter VII into LoNW, and which, consequently, *assume* a connection between the UNSC, UN Charter Chapter VII, and the LOSC, but without any indication of how to characterise that relationship.

162 See, for example, the statement during debate by Mr Le Van Loi (Republic of Vietnam), 17 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol II; p 119, para 11, concerning the importance of precision with respect to the necessary application of “other applicable rules of international law”; and the statement, also during debate, by Mr Beesley (Canada), 11 July 1974, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol II; p 103, para 49, that “what had to be done was to restructure the existing rules, which did not mean rejecting earlier concepts but adapting them to existing realities”.

163 *Namibia Advisory Opinion* (1971) ICJ Repts. 15 at para 96.

164 See, for example, Bowett, who argued as early as 1964 that national contingents in UN peace operations forces remain bound by both the treaty and customary obligations that

mation in a UN naval peace operation – such as the issue of neutrality outlined previously – an integrative approach offers few hurdles and promotes an understanding that the legitimating framework can meaningfully incorporate important practical rules for dealing with ‘neutrals’.

Quite apart from its obvious utility in resolving vexed legitimization questions, this approach to legitimization also promises two further ancillary benefits. First, it does not challenge the fundamentally political nature of the initial decision to undertake a UN peace operation, but rather deals exclusively with characterising legitimization and facilitating operations. It operates as a tool for defining the limits of legitimization, and developing implementation guidelines (such as RoE). It provides a mechanism for assessing the legitimization of any contentious maritime acts required of UN naval peace operations forces by referring to a coherent, mutually reinforcing legitimating framework which incorporates the salient features of the LOSC, the UN Charter, and other sources of international law on international peace and security.

Second, this approach to legitimization also offers a high degree of contextually sensitive consistency. By functioning through a referential mechanism that draws associated rules and principles together and interprets them coherently – rather than through a prescriptive approach which treats other aspects or components of law as challengers to be trumped – it develops a responsive legitimization yardstick based on assimilation and collaborative interpretation, rather than adversarial inconsistency. International law and practice regarding, for example, a context sensitive appreciation of the right of self-defence once the UNSC is seised of the particular situation, or the effects of the doctrine of self-determination in that specific context, act to expand UNSC international peace and security jurisdiction and need to be incorporated – or at least incorporable – into the legitimization framework governing each UN naval peace operation.

Three examples will serve to briefly illustrate these points. First, the predecessor to Article 32 of the LOSC – Article 22 on warship immunities in the 1958 *Convention on the Territorial Sea* – referred to “other rules of international law” as governing interpretive authority over this subject.¹⁶⁵ This reference was dropped in LOSC Article 32, and a much wider, universally applicable reference inserted into the LOSC preamble. This reference “affirm[s] that matters not regulated by this Convention continue to be governed by the rules and principles of general international law”.¹⁶⁶ This general notice of incorporation is then followed by a range of more explicit references to specific aspects of international law – external to the LOSC – that govern the interpretation of particular issues within the LOSC. First, on a general level, the LOSC refers to “other internationally lawful uses of the sea” – for example, in Article 58 on the rights and duties of states in the EEZ. Similarly, LOSC Article 2(3) asserts that “sovereignty over the territorial sea is exercised subject to this Convention *and to*

would apply if they were in armed conflict with another state – Derek Bowett et al, *United Nations Forces: A Legal Study of United Nations Practice*, Praeger, New York, 1964; pp 503-506.

165 *United Nations Convention on the Territorial Sea* 1958; Article 22.

166 *Law of the Sea Convention* 1982; preamble.

other rules of international law".¹⁶⁷ Such references clearly anticipate the application of relevant international law to fill the gaps and illuminate the ambiguities inherent in the LOSC.

Second, on a range of specific issues, the LOSC defers to external law to provide the detail of its interpretation by "relating certain rights or obligations to the rules and standards defined by means of other treaties or even to the work of specialised international organisations".¹⁶⁸ Conventions such as *MARPOL 73/78* and bodies such as the IMO play an explicit role in providing detail applicable to the interpretation of LOSC provisions.¹⁶⁹ Similarly, other instruments such as conventions on the suppression of unlawful activities at sea, illicit drug trafficking, transport of migrants by sea, and combating people-trafficking,¹⁷⁰ elaborate upon rights and duties flagged – but not substantively defined – in the LOSC, providing detail as to their application and enforcement. The LOSC, as Roach observes, is in many ways a "mere framework" requiring reference to other instruments and practices of international law to put "flesh on the skeleton".¹⁷¹

Finally, with respect to international peace and security, the LOSC in several ways anticipates and expects an integrative approach to incorporating the requirements of UN Charter Chapter VII. First, as noted previously, LOSC Article 301 consciously invokes UN Charter Article 2, and thus also the detail of associated UN Charter law on legitimation in international peace and security issues. Article 301 of the LOSC provides that

In 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.¹⁷²

The phraseology of Article 301 is obviously drawn direct from UN Charter Article 2(4), and thus incorporates into the LOSC the intent of Article 2(4). This invocation also acknowledges and incorporates, as noted above, UN Charter Article 25/Chapter

¹⁶⁷ *Law of the Sea Convention* 1982; Articles 2(3), 58.

¹⁶⁸ For commentary on this issue, although within slightly different contexts, see Michael C. Stelakatos-Loverdos, "The Contribution of Channels to the Definition of Straits Used for International Navigation" (1998) 13:1 *The International Journal of Marine and Coastal Law* 71 at 87; and Francisco Orrega Vicuna, "The Law of the Sea Experience and the Corpus of International Law: Effects and Interrelationships" in Robert B. Krueger and Stefan A. Riesenfeld (eds), *The Developing Order of the Oceans* (Proceedings of the Law of the Sea Institute Eighteenth Annual Conference, 1984), The Law of the Sea Institute, Honolulu, 1985; p 8.

¹⁶⁹ As noted previously, the IMO is – amongst its other roles – the Article 53(9) "competent international organisation" for adopting Archipelagic Sealanes designations.

¹⁷⁰ *United Nations Secretary General's Oceans Law Report*, United Nations, 1997; paragraphs 132, 183, 143; see also Richard J. Grunawalt, "Maritime Law Enforcement: US Navy/US Coast Guard Cooperation in the War on Drugs at Sea", paper presented at the *Conference on Oceans Governance and Maritime Strategy*, Canberra, ACT, Australia, 18-19 May 1998; pp 5-7.

¹⁷¹ Roach, "Excessive Maritime Claims"; p 293.

¹⁷² *Law of the Sea Convention* 198; Article 301.

VII as a basis for interpreting legitimation when confronting the LOSC's silences and ambiguities on the use of force. This further implies acceptance of legitimating concepts and practice with respect to the wide ambit given to the UNSC to act in relation to international peace and security. It also implies that references to "internationally lawful uses of the sea" must be construed as including UN mandated – and thus by definition 'internationally lawful' – uses of force in the Territorial Sea. Finally, as also noted previously, this acknowledgement and integration is further evidenced in LOSC Article 298, which excludes from the compulsory dispute resolution system any international peace and security issues of which the UNSC is seised.¹⁷³ This clearly operates to incorporate the UN Charter Chapter VII concept of legitimation into the LOSC as an elaborative instrument – a further aspect of using external detail to analyse legitimation in respect of use of force issues upon which the LOSC is otherwise silent.

As is evident from the examples above, it is clear that constructing and assessing legitimacy in UN naval peace operations must be an integrative and referential project. This approach anticipates the LOSC's need to access external sources of procedural and reflected legitimating power, and meets it by providing a sound and stable framework for identifying and incorporating the contextually important sources of legitimation rules, rather than attempting to fix the content of such rules. It is this approach to legitimation that infuses the study of authority – the consequence of the interaction between power and legitimation at sea – as it progresses over the remainder of this book.

Conclusion

Understanding the contextual constraints and influences that governed the UNCLOS III negotiations is essential to understanding the issue of *legitimation* as it emerges from the UN Charter-use of force-LOSC interface. Viewed discretely and independently, resolutions to use of force questions in the LOSC are generally either absent or grey – 'constructively ambiguous'. Similarly, the UN Charter's own relative silence on the status and usages of the sea – except when concerned with international peace and security – also has significant implications for the ability to find a 'fit' incorporating both the requirements of the LOSC and the UN Charter Chapter VII regime, and to ensure this fit itself in turn 'fits' with the practice of authority in UN naval peace operations. This does not, however, mean that a 'fit' to explain the linkage of power and legitimation for authority in UN naval peace operations cannot be found, and the next three chapters will examine this fit in relation to three significant UN naval peace operations issues: Innocent passage and access to the Territorial Sea; sanctions enforcement; and transitional administration.

¹⁷³ *Law of the Sea Convention* 1982; Article 298(1)(c).

Chapter 4

UN Naval Peace Operations, Innocent Passage, and the Use of Force

[In the post-Cold War era] the international community should be able to cope with a situation of...local conflict more expeditiously. In that context, a greater precision on the right of innocent passage in the territorial sea...as embodied in the Convention would seem to acquire an increasing importance for the stability of the global maritime order.¹

– Hisashi Owada, 1993

International law [of the sea] does not yet provide for all situations; a variety in practice may arise as nations take up their responsibilities in these new areas and one may need to make changes for the future. This situation, however, is better than one of neglect.²

– John. B. Hattendorf, 1996

Introduction

The LOSC, as the Spanish delegate to UNCLOS III noted, was anticipated to be a unified regime protecting and serving two intricately related sets of rights and obligations – those of the individual coastal and flag states, and those of the international community, both divisibly and as a whole.³ Nowhere is this delicate balance more evident, more important, and yet more ambiguous than the what-where-who-how as it relates to innocent passage and the international community's authority to use force in the Territorial Sea. With respect to UN naval peace operations, the inherently exceptional nature of the interface between the international community and the Territorial Sea is, however, further complicated by the imported legitimation implications of the UN Charter and Chapter VII. In the Territorial Sea, as with UN peace operations on land, application of the general Article 2(4) and 2(7) prohibitions on the threat or use of force, and interference in the domestic affairs of states, must be interpreted with reference to the UNSC's international peace and secu-

¹ Owada, "New Challenges to the International Order of the Sea"; p 13.

² John B. Hattendorf, "Seapower and Sea Control in Contemporary Times", a lecture delivered at the United States Naval War College, Newport, Rhode Island, 1996; pp 9-10.

³ Mr De Abaroa y Goni (Spain), *Third United Nations Conference on the Law of the Sea: Official Records* Vol I; 12 July 1974, p 172, para 5.

ity competence. Thus third party rights of innocent passage through the Territorial Sea must account for and respond to the necessities of UN naval peace operations. Similarly, the fact of coastal state sovereignty over the Territorial Sea is thus subject to both inherent caveats in favour of the international community generally (such as innocent passage), and imported caveats in favour of international peace and security in particular (such as Chapter VII of the UN Charter).

The next four chapters of this book will examine the construction of *authority* in respect of the types of operational conduct that planners and executors of UN naval peace operations must take into account. The use of force in the territory of another state is the most categorically and prudentially significant act which a state or the international community collectively can contemplate. The interaction between power and legitimation, and the consequent authority context this generates, is to a large degree dependant on whether and how this interaction is cognisant of those issues that are of particular importance to UN naval peace operations in the Territorial Sea. This chapter will therefore examine the problematic issue of innocent passage and use of force generally. Chapter five will analyse a practical example of how a basis of authority can be constructed in support of UN naval peace operations in the Territorial Sea of a non-consenting state – the enforcement of UNSC sanctions regimes. Chapter six will broaden this scope by examining the practice of constructing a similar basis of authority in Territorial Seas within which sovereignty is unclear. Chapter seven, using the doctrine of unit self-defence as a comparative point and a source of principles, will then propose a means of constructing the necessary authority to enable UN naval peace operations in the Territorial Seas of non-directly involved, and non-consenting (third party) states.

The aim in this chapter, therefore, is to describe and analyse a basis of general *authority* for UN naval peace operations in the Territorial Sea, through examining the relationship between innocent passage, use of force, and UN naval peace operations. The chapter will begin with a brief overview of the nature of the Territorial Sea. It will then examine the concept of innocent passage, and describe its implications for UN naval peace operations in the Territorial Sea. Finally, the chapter will conclude with an analysis, in general terms, of the issue of international community uses of force in the Territorial Sea during UN naval peace operations, outlining the purposes, triggering acts, and permissible levels which attach to force in the Territorial Sea.

The Nature of the Territorial Sea

The Territorial Sea regime described in Part II of the LOSC details the width, delimitation, and rights and obligations of states within this most sensitive of ocean zones. The fundamental aspects of this regime (such as the 12 nautical mile width of the Territorial Sea, and Article 19 on innocent passage) were settled relatively early in the UNCLOS III process – as early as 1976 in most cases. Further, these provisions changed little over the subsequent course of negotiations, despite several attempts – even as late as 1982 – to put aspects of the regime back on the agenda.⁴ The result-

4 In 1980, for example, Argentina, China, Ecuador, Madagascar, Peru, and The Philippines proposed an amendment aimed at introducing a regime of prior notification for war-

ant LOSC Territorial Sea regime provides a complex and sensitive setting for naval operations generally, and thus for analysing the relationship between UN naval peace operations and the LOSC. Two preliminary observations help make this evident. First, as noted in chapter one, and as is evident from the analysis in chapter two of naval power as it relates to UN naval peace operations, the Territorial Sea is the physical space in which the vast majority of the most sensitive activities required in such operations are conducted. From sealift and logistics support, through patrolling, monitoring, interdiction, and sea-land strike, to non-combatant evacuation operations and humanitarian assistance/disaster response, the Territorial Sea forms the primary maritime sphere of engagement. It is the zone which, both physically and in terms of authority, provides the essential, graduated link between sea and land. Second, the Territorial Sea is subject to a strict regime of authority and control, precisely because it acts as this crucial zone of transition from the relative freedom of the High Seas and other international waters, to the restrictive regime of land territory. But it is important to appreciate that the Territorial Sea is *not* land territory, and whilst it shares one of its defining principles – sovereignty – with land, other principles impact upon the way in which authority on the oceans and seas is constructed and understood.⁵

This debate as to the fundamental nature of the Territorial Sea has significant implications for warship presence, and was implicitly canvassed in the ILC's preparatory sessions prior to UNCLOS I (1958). Cordova and Zourek, for example, argued that the Territorial Sea was nothing more than an extension of the territory of the coastal state. In seeming consistency with this conceptual approach, Cordova, Zourek and others characterised the right of innocent passage as a coastal state *concession*. The obvious implication of adopting this conceptualisation is that regimes requiring prior notification and authorisation for (as one example) warship passage comfortably coexist with this view of the nature of the Territorial Sea. Francois, Lauterpacht, and Scelle, on the other hand, consistently maintained that the Territorial Sea was inherently and conceptually part of the oceans and seas, although subject to a degree of coastal state sovereignty. The right of innocent passage, to be coherent with this characterisation of the nature of the Territorial Sea, must be viewed as an *internationally defined and allocated right*, rather than a coastal state defined concession. The consequence of this approach is that regimes of prior approval for warship passage would be inconsistent with the conceptual nature of the Territorial Sea.⁶ Responses

ship innocent passage. In 1982 – during the 11th Session – thirty states put forward a proposal to amend the language of Article 21 to include “security” in the specific list of issues upon which the coastal state could adopt laws and regulations regarding innocent passage – “Proposed Amendment to Draft Article 21 by Algeria, Bahrain, Benin [and 25 other states]”, *Third United Nations Conference on the Law of the Sea: Official Records*, Vol. XVI (Summary of Records of Meetings, Eleventh (New York) session, 8 March–30 April 1982) (A/CONF.62/L.117, 13 April 1982). Neither proposal went to a vote, and both were ultimately withdrawn.

- 5 For an extensive historical and jurisprudential consideration of approaches to the legal nature of the Territorial Sea, see D.P. O'Connell, “The Juridical Nature of the Territorial Sea” (1971) 45 *British Yearbook of International Law* 303.
- 6 See, *Yearbook of the International Law Commission* (1954) Vol I, 8 July 1954; paras 25–43, pp 109–116; See also, *Yearbook of the International Law Commission* (1956) Vol I (Summary or Proceedings, Eighth Sessions, 23 April–4 July 1956); 15 June 1956, p 214, para 23, where

to a 1930 Hague Codification Conference questionnaire on the issue had indicated that whilst fifteen states asserted a right of warship innocent passage, only four states (Romania, Bulgaria, Latvia, and the US) asserted that prior notification was required. Three decades later, during the *Corfu Channel Case*, a US/UK survey established that 34 states – now including the US – assumed a right of warship innocent passage, with only one state (Romania) requiring prior notification.⁷ At UNCLOS I, draft Article 24 on warship innocent passage – which had been altered to include a reference to prior notification at the ILC's 1956 session – indicated that such passage “may...[be] subject to previous authorisation or notification”, but would “normally” be granted.⁸ Several states rejected this language and proposed an amendment which would rule out, at the very least, any requirement for prior authorisation. As a consequence, the Draft Article failed to gain the two-thirds majority required for adoption, and thus the entire issue was left ambiguous in the 1958 *Convention on the Territorial Sea and the Contiguous Zone*.⁹ By the time UNCLOS III convened in 1973, the prior notification requirement was supported by proportionately even fewer states, although this significant minority grouping included China and (ultimately) the USSR. It is true that the resultant LOSC Article 19 on innocent passage is ‘constructively ambiguous’ on the issue. However, this is best understood as the only outcome which the consensus-oriented Rules of Procedure, which militated against the issue going to a vote, would allow in the face of continued agitation for a regime of prior notification by a vociferous and dedicated handful of states (such as China and Albania). Of the few delegates who did address the issue of innocent passage through the Territorial Sea, most indicated a tendency to view innocent passage conceptually as an international right rather than a coastal state concession. As the delegate for El Salvador stated, the “regime of free navigation was the major factor *limiting* State power in the area [the Territorial Sea]...which traditionally had been subject to the regime of innocent passage”.¹⁰

Scelle continued to assert that “[T]he territorial sea, the contiguous zone, and the high seas, though different from the legal standpoint, were, from the practical standpoint, all parts of a single element, the sea. And navigation was still navigation, whether the ship were a merchant ship or a warship. Policemen had the same rights of movement on the highway as ordinary citizens – fortunately – for otherwise the only persons who would be able to move about freely would be brigands. In the same way, warships, the policemen of the seas, had the same normal rights of passage as commercial shipping”.

7 *Corfu Channel Case - Pleadings* (1950) ICJ Reps 292-293.

8 *Yearbook of the International Law Commission* (1956) Vol II; p 276.

9 *United Nations Conference on the Law of the Sea: Official Records* (1958) Vol II (Records of Plenary Meetings); p 68. In all, 43 mainly Western Bloc (US, UK, France) or Western Bloc aligned (Japan, Thailand) states voted in favour, 24 Eastern Bloc (USSR, Poland) and newly independent or non-aligned (Indonesia, Federation of Malaya, India) states, plus some otherwise Western Bloc oriented states which had specific local security concerns (South Korea) voted against, and 12 predominantly non-aligned states (Finland, Switzerland, Holy See) abstained.

10 *Third United Nations Conference on the Law of the Sea: Official Records* (Vol I, First [New York] and Second [Caracas] Sessions, 1973-1974), opening statement by Mr Galindo Pohl (El Salvador); p 62, para 35. Of the few other delegates to address this issue, Mr Lidbon (Sweden), and Mr Ennals (UK) indicated that innocent passage was an international right which UNCLOS III must preserve (1 July 1974, pp 76-77, para 80; and 4 July 1974, p 23, para 111 respectively). The vast majority of the (few) other delegates who addressed

The issue of consent for warship passage is but one facet of this wider implicit debate over the nature of the Territorial Sea. Because of the requirement for consensus it was not resolved at UNCLOS III, although the predominant view today is clearly that there is no requirement for prior authorisation or consent for warship innocent passage. One consequence of this now ascendant conceptual characterisation of innocent passage as an *international right* (rather than a coastal state concession), and its consequential appreciation of the Territorial Sea as ultimately *sea* (rather than territory), is that “frontiers at sea...are not accorded the same political, legal or emotive attributes as land frontiers”.¹¹ The Territorial Sea is thus subject to a distinct and fundamentally different regime of control and authority from territory ashore. And unlike the 1958 *Convention on the Territorial Sea and the Contiguous Zone* (which technically allowed reservations to the innocent passage regime) the LOSC Territorial Sea regime is compulsory and universal. Many commentators argue that several aspects of the LOSC have now achieved the status of customary international law in their own right.¹² This general argument has found support in several ICJ judgements. In the *Continental Shelf Case* (1985), for example, the ICJ declared that many LOSC provisions were by then binding “as a rule of customary international law”.¹³ Furthermore, the ICJ has explicitly recognised the Territorial Sea and

issues of passage rights at all were concerned with passage through international straits, not the Territorial Sea – see, for example, the statement by Mr Stevenson (USA) (11 July 1974, pp 161, para 30).

- 11 Pugh, “Introduction”; p 1; See also Brilmayer and Klein, “Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator”; p 703.
- 12 See, for example, Churchill and Lowe, *Law of the Sea*; p 7 – on the Continental Shelf regime. See also, Oxman, “The Regime of Warships”; p 810; Anderson, “The Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea”; p 320; Donald McRae, “State Practice in Relation to Fisheries”, *American Society of International Law* (Proceedings of the Eighth Annual Meeting), Washington D.C., 28–31 March, 1990; p 283. Indeed, many argue that certain LOSC regimes – such as the Territorial Sea and Exclusive Economic Zone – actually achieved customary international law status *during* UNCLOS III, or at any rate *before* the LOSC entered into force – Skourtos, “Legal Effects for Parties and Non-Parties”; p 198. As Pulvenis notes, customary international law regarding the sea “evolved at an accelerated pace” during UNCLOS III – Pulvenis, “New Problems Arising from the Entry into Force of the 1982 LOSC”; p 417. On this, see for example, O’Connell, *The International Law of the Sea* Volume I; pp 47–49, on fishing zones. Elliot Richardson, the US Ambassador to the UNCLOS III negotiations, and writing in 1980, believed that the LOSC navigational regimes had become established customary international law by then – Richardson, “Power, Mobility, and the Law of the Sea”; p 918. Similarly, US President Ronald Regan’s *Ocean Policy Statement* in 1983 asserted the US government’s view that the LOSC 1982, with the exception of Part XI (the “Deep Seabed Regime”), reflected customary international law. See also, John Astley III and Michael N. Schmitt, “The Law of the Sea and Naval Operations” (1997) 42 *Airforce Law Review* 119 at 122. Note, however, the views of the Convention’s final negotiations Chairman, Tommy Koh, who argued – at around the same time – that not all LOSC navigational regimes should be seen as customary international law, particularly given that the new Transit Passage regime for International Straits, and the Archipelagic Sealanes Passage regime were new concepts to arise out of the UNCLOS III negotiations and thus did not reflect existing international practice at that time – see, for example, Sebenius, *Negotiating the Law of the Sea*; pp 91–94.
- 13 *Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment* (1985) I.C.J. Repts. 13 at 30; See also the similar declaration in *Delimitation of the Maritime Boundary between Guinea*

innocent passage regimes as customary international law.¹⁴ As such, it applies to all Territorial Seas without reservation, and the international community's right of innocent passage – a caveat upon a coastal state's sovereignty over its Territorial Sea – is an inseparable aspect of this regime. Thus the regime of innocent passage – practically, conceptually, and in terms of authority – is of fundamental significance for the conduct of UN naval peace operations in the Territorial Sea.

The Concept of Innocent Passage

Defining Innocent Passage

The concept of innocent passage is a defining aspect of the Territorial Sea regime and is central to understanding authority in UN naval peace operations.¹⁵ It is the most significant and fundamental legal difference between the Territorial Sea and land territory, and is the primary reason for the 'sovereignty-minus' nature of the Territorial Sea – that is, coastal state sovereignty caveated by an internationally founded and expressible right of innocent passage.¹⁶ And whilst coastal state sovereignty in the Territorial Sea is primarily expressed through the concept of innocent passage, it is also significantly limited by it. Thus because it is a limitation on coastal state sovereignty, innocent passage – applying to *all* states, not merely to states-parties¹⁷ – is also the primary LOSC mechanism by which the international community's rights in the Territorial Sea are respected and protected.

and Guinea-Bissau (*Award of 14 February 1985*) reprinted in, *International Legal Materials*, 1986; pp 251, 289, 292, 299-300.

- 14 Most recently, for example, in *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain) (Merits)* (2001) ICJ No 87, 16 March 2001. In other proceedings, pre-LOSC Territorial Sea regime agreements and arrangements have been considered as important contextual factors when arriving at delimitation determinations – for example, the arbitral award in *Guyana v Suriname* [2007] PCArb 1 (17 September 2007) chapter five; and *Nicaragua v. Honduras – Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Judgment) [2007] ICJ 2 (General List No. 120, 8 October 2007), at paras 33-50. For comment on these decisions, see Coalter G. Lathrop, "Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v Honduras*)" (2008) 102:1 *American Journal of International Law* 113; and Stephen Fietta, "Guyana/Suriname" (2008) 102:1 *American Journal of International Law* 119.
- 15 The right of innocent passage is formally conferred in *Law of the Sea Convention* 1982; Article 17, and different aspects of the right are further elaborated in Articles 18-32.
- 16 This sovereignty-minus nature of the regime might, however, occasionally be subject to localised "re-accretion" of coastal state sovereignty. See, for example, *Passage Through the Great Belt (Finland v Denmark) (Provisional Measures, Order of 29 July 1991)* (1991) ICJ Reps. 12. See also – on another recent "bridge" dispute – Fabio Spadi, "The Bridge on the Strait of Messina: 'Lowering' the Right of Innocent Passage?" (2001) 50 *International and Comparative Law Quarterly* 411. See generally, William K. Agyebeng, "Theory in Search of Practice: the Right of Innocent Passage in the Territorial Sea" (2006) 39 *Cornell International Law Journal* 371.
- 17 The ICJ in the *Nicaragua Case* (1986) ICJ Reps. 14 at 111, was in no doubt that the LOSC innocent passage regime "does no more than codify customary international law on this point". The United Nations Conference on Environment and Development's *Agenda 21* (1992), introduction to Chapter 17 (dealing with protection of the oceans) similarly refers

Although innocent passage is a single unitary concept, at first glance it appears to comprise two separable elements. The first is the concept of 'passage', defined in LOSC Article 18 as "continuous and expeditious" navigation through the Territorial Sea, from and to any other sea zone.¹⁸ The second element is 'innocence'. This is the more important, substantive, and subjective aspect of the concept of innocent passage as a whole. As Article 19(1) notes, passage – to be characterised as innocent – must not be prejudicial to the "peace, good order and security" of the coastal state. Article 19(2) then lists a series of acts that are by definition considered to be prejudicial to this peace, good order, and security. However, Article 19(1) *also* invokes general international law in defining innocence, by declaring that the definition of innocent passage *also* depends upon the "conformity" of the act in question with other non-LOSC "rules of international law". Similarly, the first act listed in Article 19(2) as prejudicial to the peace, good order, and security of the coastal state also refers inclusively to general international law: Article 19(2)(a) clearly echoes and incorporates UN Charter Article 2(4), prohibiting

...any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, *or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.*¹⁹

to "[I]nternational law, *as reflected in the provisions of the United Nations Convention on the Law of the Sea...*", again indicating a wide appreciation of the customary nature of the LOSC. In a fashion similar to customary international law on self-determination, this raises the prospect of an innocent passage regime existing parallel with, but separate to, the innocent passage regime existing under treaty law. It also has implications for the way in which passage generally and regimes such as self-determination might interact. The UN peace operation in East Timor, for example, had to contend with the implications of this self-determination overlay.

18 Delaying passage is permitted only under certain circumstances – in normal stopping and anchoring incidental to passage, as a result of force majeure, or to assist those in distress at sea – *Law of the Sea Convention* 1982; Articles 17–19. See also Astley and Schmitt, "The Law of the Sea and Naval Operations"; p 132, where they discuss the "right of assistance entry to the Territorial Sea", asserting that this customary right allows a passing warship to delay passage in another state's Territorial Sea, and to take such otherwise "prejudicial" actions as launching helicopters, to render assistance to a distressed vessel *whose location is known*. This is arguably yet another example of an integrative approach to LOSC interpretation – in this case by interpreting the innocent passage regime with a referential nod to the requirements of safety of life at sea (SOLAS), thus making such actions in another state's Territorial Sea innocent by definition, rather than prejudicial to that state's peace, good order and security. Further, a warship may act in this way – but arguably only in the absence of a veto from the coastal state – with no further notice, although prudence would suggest notification to the coastal state of any intention to launch an aircraft to conduct the rescue. However, because the coastal state has primary responsibility for search and rescue in its Territorial Sea, operational practice is that a warship should not launch aircraft to *conduct a search* unless it has the coastal state's permission. Similarly, as Lowe observes, whilst it "is true that under established rules of the law of the sea there is a positive duty to render assistance to any person found at sea in danger of being lost", it is important to remember that this "duty does not itself justify the use of force for the protection of such persons" – A.V. Lowe, "Self-Defence at Sea", in W.E. Butler (ed), *The Non-Use of Force in International Law*, Kluwer Academic Publishers, Dordrecht, 1989; p 195.

19 *Law of the Sea Convention* 1984; Article 19(2)(a) – my italics.

The first issue confronting any approach to defining innocent passage is thus whether the list of acts described as prejudicial in Article 19(2) is indicative or exhaustive. Some scholars refer to the list as a list *inter alia*. Others refer to it as comprehensive and exclusive.²⁰ The *USSR/USA Jackson Hole Statement*, which must be taken as influential given that it represented the concurring opinion of the (at that time) two major maritime powers, referred to the list as exhaustive.²¹ In actual fact, this debate is to some degree esoteric. This is because – given the preference for ambiguity rather than clarity in most definitions in the LOSC, which has left interpretation particularly prone to each nation’s domestic interests in defining terms in particular ways – Art 19(2)(a) (prohibiting any threat or use of force which violates international law), and more particularly Art 19(2)(1) (prohibiting “any other activity not having a direct bearing on passage”) are capable of being read in an expansive, ‘catch all’ manner.

The Limb-by-Limb Approach

The second issue – which is actually the crux of the matter – is how the concept of ‘innocent passage’ can be deconstructed into a practical assessment of flag state authority with regard to UN naval peace operations. The first broad possibility is to finesse the *limb-by-limb* approach, as if the concept comprised a two-part test of lawfulness. This would see innocent passage having to pass not only the test of activity, but also a more objective test of passage. This emphasis on ‘passage’ as a separate issue would obviously have debilitating effects on UN naval peace operations because, as Hampson notes, many maritime activities fundamental to such peace operations – such as loitering and patrolling in the Territorial Sea – could never meet any technical test of ‘passage’.²²

This limb-by-limb approach to innocent passage is also problematic for two further, more conceptual reasons. First, it results in a non-contextual understanding of the concept. As will be discussed below, the concept of innocent passage is indivisible, whereas the limb-by-limb approach splits it into a two-step test which obscures the purpose and history underpinning the concept (that is, freedom of navigation) by making it subject to two discrete, but in practice inseparable, tests. The outcome effectively doubles the opportunities for limiting freedom of navigation. This is not how innocent passage is generally understood. Indeed, a joint Malaysia, Morocco, Oman, and Yemen proposal at UNCLOS III, which split the concept into two separable sub-components of innocence and passage, was rejected.²³

20 Kinley, “The Law of Self-Defence”; p 13, for example, refers to this list of acts being *inter alia*, thus proposing that it is indicative only, rather than exhaustive. Equally arguable is that Article 19(2) only lists *examples* of prejudicial acts. For the opposite view, see Astley and Schmitt, “The Law of the Sea and Naval Operations”; p 131, who assert that the Article 19(2) list of prejudicial acts is “exclusive”.

21 The signatories to the 1989 *Joint Statement by the US and the USSR on Uniform Interpretation of Rules of International Law Governing Innocent Passage* declared that “Article 19 of the Convention of 1982 sets out in paragraph 2 an *exhaustive* list of activities that would render passage not innocent”.

22 Hampson, “Naval Peacekeeping”; p 199.

23 See “Malaysia, Morocco, Oman, and Yemen: Draft Articles on Navigation Through the Territorial Sea” *Third United Nations Conference on the Law of the Sea: Official Records*

Second, the limb-by-limb approach is founded in a now largely unsustainable conceptual understanding of the Territorial Sea as an extension of land within which the coastal state by its own authority grants a right of passage, rather than as an inherent part of the sea within which any sovereignty accorded the coastal state is caveated by a general principle of international law (freedom of navigation subject to innocence) which applies regardless of the coastal state's wishes. The source of authority underpinning innocent passage – as a particularised example of a more general concept – has long been predominantly understood as an international overlay upon sovereignty, rather than a national concession to the international community. In *The S.S. "Wimbledon"* (1923), the first judgment of the Permanent Court of International Justice (PCIJ), the Court dealt with a German refusal to permit the *Wimbledon* passage through the Kiel Canal. The British vessel, on French charter, was carrying munitions destined for Poland, which was at that time engaged in the Russo-Polish War of 1920-1921 in which Germany was a declared neutral. Although the PCIJ's decision – in favour of the vessel's right to passage – was addressed in terms of a specific treaty provision (Article 380 of the *Treaty of Peace of Versailles* 1919), the Court made several comments supportive of the internationalist approach to constructing authority for "the right of free passage". First, the PCIJ noted that this right was "based on the *general rule embodied* in Article 380" – a reference to the rule's wider provenance.²⁴ Second, the Court referred to the right of free passage for belligerent merchant vessels and warships through neutral waters as being confirmed upon the authority of "consistent international practice" and "general considerations of the highest order" as they related to the law of neutrality, not as a national concession which drew its authority from any declaration by a state as to its management of passage as of right.²⁵ Third, the Court noted the similarity of practice with respect to other important canals used for international navigation – the Suez and Panama Canals – and pointed out that these understandings of free passage entailed reservations on the right of self-defence of the territorial sovereign "up to a certain point".²⁶ Finally, the PCIJ made its appreciation of the source of authority for the right of free passage clear when it declared of the canal examples

Moreover they are *merely illustrations of the general opinion* according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, *such waterway is assimilated to natural straits* in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.²⁷

Clearly, the PCIJ considered – at a minimum – that the wider regime of free passage through natural straits was in the nature of a customary, internationally defined

(1974) Vol III (Second Committee Documents - UN Doc A/CONF.62/C.2/L.16, 22 July 1974); pp 192 – Draft Arts 2 (passage) and 3 (innocence).

24 *The S.S. "Wimbledon"* (Collection of Judgments) (1923) PCIJ Series A, No.1, 17 August 1923; p 22.

25 *The S.S. "Wimbledon"* (Collection of Judgments) (1923); p 25.

26 *The S.S. "Wimbledon"* (Collection of Judgments) (1923); pp 26-28.

27 *The S.S. "Wimbledon"* (Collection of Judgments) (1923); p 28.

overlay upon sovereignty which (in this case) governed the way a state could interpret its obligations with respect to neutrality, rather than a state granted and thus state-defined concession.

This understanding of the authority for innocent passage as being in the nature of an international assertion, rather than a national concession, was specifically debated at the ILC's 1954, 1955, and 1956 sessions. Although agreeing to the international nature of the authority for innocent passage generally, during debate on the issue of warship innocent passage through the Territorial Sea, Zourek (relying on Gidel for authority) considered "the passage of foreign warships through the territorial sea as a concession on the part of the coastal State".²⁸ This issue was more fully debated in 1955, where Zourek continued to assert that warship passage was "not a right but a concession granted by the coastal State". Fitzmaurice, Francois, Scelle, and Salamanca all argued the opposite case. Scelle, for example, asserted that the coastal state could forbid or restrict passage "only in cases sanctioned by international law".²⁹ Fitzmaurice, pointing to the 1930 Hague Codification Conference (including the questionnaire), declared that state practice recognised the international locus of authority for warship innocent passage, arguing that it "would be both dangerous and potentially controversial to leave it to the coastal State to decide such issues".³⁰ This debate – manifested in the practical issue of whether a requirement for prior notification of warship passage was recognised (state-constructed authority view) or not recognised (internationally-constructed authority view) – was not conclusively settled except to the extent that no regime of prior authorisation was included in the *Geneva Convention on the Territorial Sea and Contiguous Zone* 1958 Article 14 description of the right of innocent passage. It is also clear that this understanding of the locus of authority for innocent passage as being by nature an international assertion, rather than a national concession, is the approach evident in ICJ jurisprudence. As previously noted, the majority judgments in the *Corfu Channel Case (Merits)* (1949), the *Nicaragua Case (Merits)* (1986), and in *Qatar v Bahrain* (2001)³¹ have con-

28 *Yearbook of the International Law Commission* (1954) Vol I (Summary of Records, 6th Session, 3 June–28 July, 1954); 20 July 1954, para 47, p 158. As a point of interest, see also the statement by Cordova, who argued, with respect to warships, that the law of neutrality shifted the locus of authority to the coastal state so that it could govern innocent passage in order "to remain neutral and avoid being drawn into complications owing to the presence of belligerent ships in its waters" - *Yearbook of the International Law Commission* (1954) Vol I (Summary of Records, 6th Session, 3 June–28 July, 1954); 20 July 1954, para 45, p 158. This position flies in the face of the traditional understanding of warship freedom of passage through neutral waters, evidenced in *Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War* 1907 (for example Arts 1, 8, 10), and in the PCIJ's *The S.S. "Wimbledon"* (1923) judgment, all of which assume an extant *international authority* for warships to transit through neutral territorial waters with no implications upon the coastal state's neutral status, rather than a coastal state right to make rules regarding warship passage and its own neutrality.

29 *Yearbook of the International Law Commission* (1955) Vol I (Summary of Records, 7th Session, 2 May–8 July, 1955); 8 June 1955, P 144, para 7 (Zourek), p 147, para 48 (Scelle).

30 *Yearbook of the International Law Commission* (1955) Vol I (Summary of Records, 7th Session, 2 May–8 July, 1955); 8 June 1955, para 16–21, pp 145–146, 9 June 1955, para 30, p 151.

31 *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain) (Merits)* (16 March 2001) ICJ No.87, majority judgement, paras 223, 252(2)(b).

sistently referred to the right of innocent passage as an internationally authorised and governed right under customary international law (and the LOSC), rather than as a right in the nature of a coastal state concession. Indeed, in its *Gulf of Fonseca (Judgment)* (1992) decision, the ICJ affirmed the existence of a regime of innocent passage as an internationally authorised right regardless of any arguments that the waters of the Gulf were either a three state condominium (El Salvador, Nicaragua, Honduras), or historic waters.³² If ever there was any doubt as to the international locus of authority for the right, there can be none now.

The Activity Approach

The second broad conceptual approach to defining innocent passage is to place determinative weight on the *innocence* aspect of the concept, testing the character of the passage by reference to what the vessel is actually doing in the Territorial Sea, rather than the mere fact of its presence. This is arguably the approach adopted by those who assert that “the test for innocence is linked to *activities* while in the territorial sea, rather than *passage itself*”.³³ Thus assessing an act in terms of innocent passage should be conducted primarily by reference to the overall ‘innocence’ of the activity, rather than the technicalities of ‘passage’. Under this approach, the Article 19(2) list of activities considered prejudicial to the peace, good order, and security of the coastal state becomes both the crux of the concept, and the measurement of compliance. This approach has much to commend it, but it also suffers from a significant flaw in that it essentially ignores the often overlooked Article 19(1) aspect of innocent passage – that it is to be “in conformity with this Convention [such as the Article 19(2) list of activities] *and with other rules of international law*”. Article 19(1) is a clear and fundamental statement that the concept of innocent passage can only be understood by analysing the factors outlined in Article 19(2) within the *wider authority context* prevailing in respect of each situation where assertions of adherence with, or transgressions of, the concept are contentious. Some scholars argue that the ICJ adopted a narrow activity focussed approach in the *Corfu Channel Case*, and that it is thus an authoritative statement of how the concept of innocent passage is to be understood. However, this assertion can be challenged on two grounds.

First, the *Corfu Channel Case* is clearly of limited relevance to the regime of innocent passage through the Territorial Sea. This is because that case dealt *only* with

This point was not disputed by those dissenting judges who addressed it – see, for example, dissenting opinion of Judge Torres Bernadez, para 552.

32 *Gulf of Fonseca (Case Concerning Land, Island and Frontier Dispute: El Salvador v Honduras, Nicaragua Intervening) (Judgment)* (11 September 1992) ICJ; paras 369-420.

33 Oxman, “The Regime of Warships”; p 853 – my italics. See generally, Churchill and Lowe, *Law of the Sea*, pp 81-87; See also O’Connell, *The International Law of the Sea* (Volume I); pp 271-274. O’Connell and Shearer note that modern attention and interpretation has “concentrated on the ‘innocence’ rather than the right of passage”. See also Butler, “Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy”; pp 340-341, where he outlines the more expansive Soviet approach to characterising actions with respect to innocent passage, which asserted that several factors contributed to “colouring” a particular vessel in a “certain ‘legal light’”. These included the function of the vessel, its behaviour, the timing of its actions, and the “status of the waters where it is located at any given time”.

the right of warship passage through straits used for international navigation. This is evident on several levels. First, the UK – asserting that its warships had an international right of passage through the Corfu Channel – hinted at a more general right, but specifically argued the matter as one of straits passage.³⁴ The ICJ’s judgement was similarly limited to the issue of warship passage through international straits.

States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State, provided that the passage is innocent.³⁵

Second, the ICJ’s opinion was, in the words of O’Connell, “dogmatically stated and the Court eschewed any rationalisation of the principle”.³⁶ Indeed, as commentators observed at the time (and since), the ICJ “expressly declined to pronounce one way or the other on the question of passage through territorial waters proper”.³⁷ Third, practice and international debate subsequent to the *Corfu Channel Case* certainly did not conceive of the ICJ’s opinion as having application to warship innocent passage generally, or in the Territorial Sea in particular. At the ILC’s sixth session in 1954, Lauterpacht and Francois were adamant, with little demurrer, that the *Corfu Channel Case* related to international straits only. Zourek, traditionally the counterpoint to Lauterpacht and Francois, was even more adamant on this point, asserting that the case was “controversial” at best, and in fact should be taken as applying only to a limited category of straits, not to all international straits.³⁸ At UNCLOS I, several

³⁴ “Memorial of the United Kingdom”, *Pleadings* (1949) ICJ Repts. Vol I; p 42.

³⁵ *Corfu Channel Case (Merits)* (1949) ICJ Repts I at 28–30.

³⁶ O’Connell, *The International Law of the Sea*; pp 312–313.

³⁷ See, for example, Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice: General Principles and Substantive Law” (1950) 27 *British Yearbook of International Law* 27; footnote 5. See also, Ghosh, “The Legal Regime of Innocent Passage Through the Territorial Sea”; pp 219–223 (1980) – “[t]he opinion of the International Court of Justice in the *Corfu Channel Case* cannot be considered to mean a right of passage by foreign warships through the territorial sea as such. The opinion of the Court was given with regard to a territorial sea which belonged to a different category; if [it] formed part of a ‘strait used for international navigation between two parts of the high seas’”. See similarly, de Vries Reilingh, “Warships in Territorial Waters, Their Right of Innocent Passage”; p 45 (1972); Colombos, *The International Law of the Sea* (Fifth Edition); p 237; Phillip C. Jessup, “The International Law Commission’s 1954 Report on the Regime of the Territorial Sea”; pp 227–229 (1955); Slonim, “The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea”; pp 115–116 (1966). Jin, “The Question of Innocent Passage of Warships”; p 65 (1982) similarly asserts that “[T]he *Corfu Channel Case* (1948) is not one on point, as it represents a case of confrontation over the transit through straits. It is certainly of no avail to cite this case in reinforcing the assertion of a warship’s right of passage through the territorial sea”. See also, Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the Law of the Sea: The Current Regime of “Free” Navigation in Coastal Waters of Third States*, Pinter Publishers, London, 1990; pp 122–150. Each of these writers refers explicitly – albeit, with different conceptual ends in mind – to the fact that the *Corfu Channel Case* must be read as concerning the narrow issue of passage through international straits, not as a general opinion on warship innocent passage through the Territorial Sea.

³⁸ *Yearbook of the International Law Commission* (1954) Vol I (Record of Proceedings: Sixth Session, 3 June–28 Jul 1954); 20 July 1954, p 161, paras 27–28 (Lauterpacht and Francios), para 33 (Zourek).

states – Saudi Arabia, Indonesia, and the USSR, for example – expressed views to the effect that the *Corfu Channel Case* was not even authoritative law with respect to *all* straits used for international navigation, but only with respect to straits connecting two parts of the high seas.³⁹ Similarly, the fact that the issue of prior notification for warship innocent passage through the Territorial Sea even arose at UNCLOS III, whilst the issue of warship passage through international straits was considered as previously settled, indicates that many states accepted the ICJ's decision in the *Corfu Channel Case* as concerning straits alone, and not a wider right of warship innocent passage.

The second factor militating against any view of the *Corfu Channel Case* approach to assessing innocent passage as being more generally applicable and determinative is that it is not actually very clear. As O'Connell – quoted above – noted, the ICJ's assessment was “dogmatic”, and devoid of “rationalisation”. Several scholars have asserted that the ICJ's view of innocent passage hinges on a mode-centric as opposed to a purposive understanding of the concept. O'Connell argues that the ICJ's assertion that the innocence of the passage could not be disputed, provided the passage was conducted in a manner consistent with international law, evidences a modal rather than a purposive test: “In other words, it was not the purpose of the voyage but the way it was conducted that bore upon its innocence or otherwise”.⁴⁰ However, it is equally arguable that the ICJ's mode of passage test – limited as it is to the issue of straits passage – has in any event been overtaken by state practice since 1949. First, the ILC debates in preparation for UNCLOS I indicate a clear concern with something more than mere mode. Two aspects of the debate illustrate this point. First, the ILC linked innocent passage to the *purposes* of peace, good order and (as it was initially drafted) public policy of the coastal state, rather than to a mode-oriented list of prohibited actions.⁴¹ Second, the ILC, and the UNCLOS I delegates, were concerned to include a reference to innocent passage as also governed by “conformity with other international law”, and in this context specifically noted the need for the regime to reflect a purposive link to the UNSC's authority over matters of international peace and security.⁴² Salamanca, for example, explicitly stated that it is the “*intentions* of

39 *United Nations Conference on the Law of the Sea: Official Records* Vol III (1958); pp 93–96.

40 *Corfu Channel Case (Merits)* (1949) ICJ Reps. 1 at 30, discussed by O'Connell, *The International Law of the Sea*; p 313.

41 See, for example, *Yearbook of the International Law Commission* (1954) Vol I (Record of Proceedings: Sixth Session, 3 June–28 Jul 1954); 6 July 1954, p 106, para 70, where, during debate on the phrase “public policy” as a determinant of innocent passage, one member summed up the ILC's view as being that “passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the *purpose of doing any act* prejudicial to the security or public policy of that State or to such of its interests as the territorial sea is intended to protect”. Francois also indicated that he viewed the ratio of the *Corfu Channel Case* as being “it is the duty of every State not to allow its territory to be used for acts contrary to the interests of other States” – an analysis which would not be possible without some form of contextual appreciation of the conduct in question. See, *Yearbook of the International Law Commission* (1954) Vol I (Record of Proceedings: Sixth Session, 3 June–28 Jul 1954); 6 July 1954, p 109, para 24.

42 *Yearbook of the International Law Commission* (1954) Vol I (Record of Proceedings, Sixth Session, 3 June–28 Jul 1954); 8 July 1954, p 109, para 24.

the foreign warship” that are the central definitional concept.⁴³ Further, although Zourek desired a total codification of the regime of innocent passage, Francois and others argued for the purposive catch all because “a complete codification of existing international law” was not possible due to “the vast number of rules, based on usage, concerning the passage of foreign ships”.⁴⁴ Third, both UNCLOS I and UNCLOS III evidenced a concern with practice rather than with ICJ precedent, and the concept of innocent passage has evolved to reflect the former rather than the later. The Yemeni delegate referred explicitly to the “political” nature of the law of the sea as overriding any “purely technical point of view”.⁴⁵ The Israelis also asserted that “it is the *behaviour* of the vessel” – implying a contextual element – that was central to innocent passage, indicating a concern with the purpose of the presence rather than mere mode.⁴⁶ As Slonim records of UNCLOS I, the delegates “did not feel bound to conform to the declared law on the subject, even if this declaration had been made by as authoritative a body as the World Court”, and that “juridical authority played a subordinate role to other motivations and interests”.⁴⁷ Finally, it is also clear that the successor regime to that which lies at the core of the *Corfu Channel Case* is now actually encompassed by a regime different to and separate from that of innocent passage. The subject matter of the *Corfu Channel Case* is now governed by the regime of ‘transit passage’ (LOSC Part III, Articles 37-45), not the regime of innocent passage. Clearly, the limited modal definition scantily endorsed by the ICJ in the *Corfu Channel Case* should not be considered definitive of the regime of innocent passage through the Territorial Sea.

The Contextual Approach

The third broad – and as alluded to above, more conceptually consistent – approach to defining the concept of innocent passage is founded in analysis of the *context* of any given incidence of innocent passage. This is more than a mere assessment of the ‘purpose’ of a vessel’s presence in the Territorial Sea – it is understanding innocent passage as a unitary concept which requires that authority be assessed in terms of act, context, motive and effect. This approach to innocent passage is that which is most faithful to both the provenance of the concept, and the language of LOSC Article 19 when approached in its entirety, rather than with an overly narrow and truncated focus on Article 19(2). The nature of this contextual characterisation of innocent passage is best understood by examining its implications for UN naval peace operations in the Territorial Sea, and it is to this issue that the chapter now turns.

43 *Yearbook of the International Law Commission* (1955) Vol I (Record of Proceedings, Seventh Session, 2 May-8 July 1955); 8 June 1955, p 147, para 41.

44 *Yearbook of the International Law Commission* (1954) Vol I (Record of Proceedings, Sixth session, 3 June-28 July 1954); 9 July 1954, pp 120-121, paras 15-30.

45 *United Nations Conference on the Law of the Sea: Official Records* (1958) Vol III; p 16.

46 UN Doc A/CN.4/99/Add.1 reproduced in (1956) 50 *American Journal of International Law* 998 at 1012.

47 Slonim, “The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea”; pp 111, 126-127.

Innocent Passage, Warships, and UN Charter Chapter VII

The ILC's preparatory debates before UNCLOS I disclose only brief mentions of the issue of Territorial Sea-innocent passage-UN Charter interaction. These brief mentions touch upon the Charter in three ways – one general and two specific. First, in general terms, the ILC's original 1954 comment to the then draft Article 17 on innocent passage asserted that

This chapter applies only in time of peace; rights of passage in time of war are reserved. *No provision in this chapter is meant to affect the rights and obligations of members of the United Nations under the charter.*

Whilst this comment was never examined or rationalised in any detail, it is clear that the ILC assumed that the UN Charter had implications for the regime of innocent passage for warships, although members differed in their (unelaborated) assessments of how wide these implications were. Spiropoulos, disputing a point by Scelle on the impact of Chapter VII upon warship passage regimes, asserted that “[A]ll questions of international law were affected in some degree by the Charter, and he could not see that the problem under discussion was affected any more than another”.⁴⁸

Second, at a specific level, the ILC noted the issue of UN Charter Article 103, but with little substantive consequence. At the 1954 session, during discussion of draft Article 26 on warship passage, Salamanca argued that

...the article should contain some reference to the overriding force of the United Nations Charter, by virtue of its Article 103. For example if, under Article 43 of the Charter or otherwise, the Security Council ordered passage to be stopped or free passage to be granted, nothing should be allowed to interfere with such an order.

Francois agreed to insert a comment to the effect that the article was “without prejudice to Article 103 of the United Nations Charter”, but this was not ultimately done.⁴⁹ The proposal raised the ire of the ‘innocent passage as a state concession’ faction – primarily Cordova and Zourek – and was hence left unresolved. The reason this faction objected was arguably because they felt that any such unequivocal assertion would render their position on the second matter of detail – the effect of UN Charter Article 2(4) and Chapter VII – untenable. Zourek asserted that the Article 2(4) prohibition on the threat or use of force, combined with the fact that warships “by their very nature constituted a potential threat”, meant that regardless of what the regime of innocent passage may have previously asserted, the passage implications of Article 2(4) had now superseded that regime.⁵⁰ Cordova, in a slightly different approach, argued that it was only the coastal state that could decide whether an

48 *Yearbook of the International Law Commission* (1956) Vol I (Record of Proceedings, Eighth Session, 23 April-4 July 1956); 15 June 1956, p 215, para 34.

49 *Yearbook of the International Law Commission* (1954) Vol I (Record of Proceedings, Sixth session, 3 June-28 July 1954); 20 July 1954, p 158, paras 43-44.

50 *Yearbook of the International Law Commission* (1955) Vol I (Record of Proceedings, Seventh Session, 2 May-8 July 1955); 8 June 1955, pp 144-145, para 9.

act was prejudicial to its peace, good order, and public policy, and that UN Charter Article 2(4) had not changed this assumption.⁵¹ In fact, Cordova proposed that the purpose of Article 26 on warship innocent passage expressly be “to enable a State to remain neutral and avoid being drawn into complications owing to the presence of belligerent ships in its waters”. But as Francois quickly pointed out, this proposal was “far too sweeping” and it was not ultimately endorsed.⁵² Indeed, had Cordova’s proposal found its way into the 1958 Convention, it would not only have offended the general drive to keep passage rights during armed conflict out of the Convention, it would also have turned on its head centuries of LoNW custom which explicitly permitted belligerents to transit through neutral waters.

Fitzmaurice, in response to the state concession argument, replied that there was a wider issue involved – “the connexion between a possible violation of the provisions of the United Nations Charter and the question whether a passage was innocent or not”. “Who was to decide”, he asked, “whether a passage could be forbidden on the ground that it would involve violation of the Charter, if there had been no relevant decision by the Security Council”. The answer, Fitzmaurice and Liang separately declared, was that international law, and if necessary the UNSC, should decide whether a particular passage was “*manifestly* not innocent” (thus again indicating a contextual rather than a merely modal approach to defining innocent passage). The Cordova-Zourek approach was therefore unacceptable because it “would be both dangerous and potentially controversial to leave it to the coastal State to decide such issues”.⁵³ Ultimately, however, no express reference to the UN Charter was included, and the delegates at the subsequent UNCLOS I did not insert one. Perhaps this is because, in Scelle’s words

...it was inconceivable that Members, were there a threat of war, would not take measures to support the action of the Security Council. That being so, there must be freedom of movement for warships to travel to parts of the world where aggression, which the Commission had described as the principle international crime, was threatened.⁵⁴

This (misplaced) optimism was also shared by others. Liang, for example, asserted his belief that in such cases

51 *Yearbook of the International Law Commission* (1954) Vol I (Record of Proceedings, Sixth session, 3 June–28 July 1954); 6 July 1954, pp 109–110, para 25.

52 *Yearbook of the International Law Commission* (1954) Vol I (Record of Proceedings, Sixth session, 3 June–28 July 1954); 29 July 1954, p 158, paras 45–46.

53 *Yearbook of the International Law Commission* (1955) Vol I (Record of Proceedings, Seventh Session, 2 May–8 July 1955); 8 June 1955, pp 145, para 16, p 146, para 21, 9 June 1955, p 151, para 30 (Fitzmaurice); pp 143–144, paras 96–97. As Fitzmaurice later argued, in response to a proposal by Scelle that the coastal state be permitted to prohibit passage where the warship was in some manner in breach of the UN Charter, this “suggested not merely that the coastal State might interfere with passage in defence of its own interests, but also that that State be made the sole judge whether passage was innocent within the meaning of the Charter. The latter question was properly one for the Security Council or the General Assembly of the United Nations, and not for individual States”.

54 *Yearbook of the International Law Commission* (1956) Vol I (Record of Proceedings, Eighth Session, 23 April–4 July 1956); 15 June 1956, p 214, para 25.

...the Security Council would have already reached a decision and would have requested States to carry out enforcement measures called for under the Charter. In the absence of such a request it would be risky for a State to take a unilateral decision to refuse passage to a foreign warship. *Such cases need not be provided for, since they belonged to the general category of questions connected with enforcement measures initiated by the Security Council in accordance with the provisions laid down in Chapter VII of the Charter.*⁵⁵

Thus whilst the travaux preparatoires indicate that the ILC recognised that there was an unresolved question regarding the interaction of warship innocent passage and the UN Charter, the ILC as a whole reached no resolution and provided no answers. As an aside, it is interesting to muse as to why, if the ILC in its pre-1958 sessions at least recognised the issue, it never resurfaced during the decade-long course of UNCLOS III negotiations. One possible explanation lies in the fact that the preparatory work for UNCLOS I was done by a small group of law of the sea and international law experts (the ILC) who developed the draft to be debated by the diplomats at UNCLOS I. For UNCLOS III, however, there was no ILC preparatory work and debate. UNCLOS III was both the preparatory work and the diplomatic conference combined, and thus consideration of preparatory issues – often threshed out in pre-conference sessions by experts – was actually conducted by state delegations over the course of UNCLOS III itself. This carried with it a focus on practically active issues rather than on theoretical consistency in speculative issues. A second possibility is that because UNCLOS III took place under the (by then larger) shadow of bi-polarity, this stifled debate on an issue over which the superpowers would undoubtedly have differed (and preferred to retain flexibility by avoiding), and which would thus not have been resolvable at a diplomatic conference. Further, given the post Korean War (1950-54) and Congo emergency (1960-61) retreat in the nature of UN peace operations to more limited (and superpower acceptable) monitoring and verification missions, it is unlikely that many states considered that the interaction of warship innocent passage, peace operations, use of force, and the UN Charter was ever likely to become an issue of any practical concern.

As an arguably seminal assertion in favour of a contextual approach to defining innocent passage by reference to purpose of presence, it is significant that the ICJ has offered generic – but nonetheless applicable – guidance on approaching the issue of interpreting principles and concepts within the context of UN peace operations. The *Namibia Advisory Opinion* (1971) – although specifically relating to the issue of whether the binding effect of Article 25 had been invoked – is authority for the proposition that a UNSC resolution should be interpreted “having regard to the terms of the resolution...the discussions leading to it, the Charter provisions invoked and, in general all the circumstances that might assist in determining the legal consequences of the resolution”.⁵⁶ In other words, when interpreting UNSC resolutions, reference must be had to the *context* of the resolution – an approach that is, incidentally, entirely appropriate given that UNSC resolutions are first and foremost

55 *Yearbook of the International Law Commission* (1955) Vol I (Record of Proceedings, Seventh Session, 2 May-8 July 1955); 8 June 1955, p 144, para 97.

56 *Namibia Advisory Opinion* (1971) ICJ Reps. 15 at 53.

political rather than legal instruments. In UNSC resolutions with naval implications – such as sanctions enforcement resolutions – it is therefore clear that innocent passage should be interpreted in accordance with *context*.

Having examined the relative lack of attention accorded to the three way relationship between the regime of innocent passage, warships, and UN naval peace operations, and described the contextual approach to defining innocent passage by reference to purpose of presence, it should be clear that innocent passage has significant authority implications for UN naval peace operations. This is evident on several levels. An example of the first, more general, level is the expanding role of humanitarian and environmental norms in state practice and treaty law, which must govern the way that the LOSC is interpreted and applied in such situations.⁵⁷ In the con-

57 See, as previously discussed, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Reps. (9 July 2004, General List No. 131, para 89 et seq. See also, *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (1996) ICJ Reps 226 paras 41, 79, 92, 105(E), where the ICJ again approved the opinions of the International Military Tribunal at Nuremberg, and described the fundamental principles of IHL – the “fundamental principle of humanity” (necessity and proportionality) – in terms of non-derogability, referring approvingly to its decision in the *Nicaragua Case* (1986) ICJ Reps. 14 at para 176 regarding the customary status of the principles of necessity and proportionality as principles “constraining” the similarly customary (and treaty) right of self-defence. The implication is clearly that the principle of humanity is intransgressible, and thus of a jus cogens nature. Although the 7:7 split opinion of the Court – para 105(E) – as to its inability “to conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the State would be at stake”, may seem to cast doubt on this assertion of jus cogens character, as Judge Higgins notes in a dissenting judgment, this non-decision by the Court did not reflect what even the nuclear weapons possessing states had conceded in argument when they had “fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the jus ad bellum and the jus in bello” – Dissenting Opinion of Judge Higgins, para 29. In the *Nicaragua Case*, the ICJ also referred approvingly to its judgment in the *Corfu Channel (Merits) Case* (1949) ICJ 22, which described common Art 3 of the *Geneva Conventions* 1949 as a “minimum yardstick” which reflected “elementary considerations of humanity”. See also, *Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law* (ST/SGB/1999/13), United Nations, New York, 6 August 1999. The UN Committee on Peacekeeping expressed criticism of the language in the UNSG’s *Bulletin* in March 2000, arguing that it did not accurately reflect the terms of IHL – see also, United Kingdom, *Joint Services Manual on the Law of Armed Conflict (JSP 383/JSM 3.4)*, Ministry of Defence, United Kingdom, June 2004; para 14.II.I. For comment on this issue, see Judith Gail Gardam, “Legal Restraints on Security Council Military Enforcement Action”; p 312–330; Joseph P. Bialke, “United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict” (2001) 50 *Air Force Law Review* 1 at 36–51, 57–61; Paul C. Szasz, “UN Forces and International Humanitarian Law” in Michael N. Schmitt (ed), *International Law Across the Spectrum of Conflict*, International Law Studies Vol 75, Naval War College, Rhode Island, 2000; pp 507–538; Richard D. Glick, “Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces” (1995) 17 *Michigan Journal of International Law* 53. See, in general, Dapo Akande, “The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?”; pp 309 et seq. Akande concludes that while UNSC Article 39 determinations are not reviewable, the ICJ does have a limited power to “review” where the UNSC declaration forms part of the applicable law, citing, as an example, the situation of a contentious issue “where a jurisdictional link exists between the State seeking review and a State

text of armed conflict it would be very difficult, for example, for a UN naval force commander engaged in sanctions enforcement aimed at suppressing oil smuggling, to have recourse to the appropriate aspects of either IHL and LoNW or the law enforcement powers inherent in the UNSCR, which authorise use of direct fire on a recalcitrant oil dhow, in disregard of the probable resultant environmental damage.

Second, on the more specific level, LOSC Articles 19 and 21 on innocent passage provide a direct injunction to use an integrative approach in LOSC interpretation and analysis. Article 19(1), as noted previously, requires innocent passage to be “in conformity with this Convention *and with other rules of international law*”. Article 21 ultimately requires coastal state laws and regulations which touch upon innocent passage to be “in conformity” with “other rules of international law” that affect innocent passage through the Territorial Sea.⁵⁸ Such ‘other rules’, as noted above, include the very wide powers that international law invokes in the name of international peace and security, including – for example – self-determination and self-defence.⁵⁹ This requirement thus assumes coherence with general international law, and requires that the particularities of innocent passage are understood in the light of relevant applicable rules on UN naval peace operations in the Territorial Sea. This is reinforced by the nature of the innocent passage regime as an international right rather than a coastal state concession. As Glick and others have noted, “the lawfulness of UN armed conflict is defined with reference to mandatory rules of international law...*not permissive rules that allow the host state to define, in its own discretion and by way of its own municipal law, the scope of UN conduct*”.⁶⁰

applying the Council resolution” – at p 342. Another future legitimization debate concerns the binding (or otherwise) effect of UNSC resolutions, as of right, upon international organisations or regional groupings – see, for example, Sebastian Bohr, “Sanctions by the United Nations Security Council and the European Community” (1993) 4 *European Journal of International Law* 256, at 268, where he concludes that the UNSC does not bind the EC itself, although it binds the EC’s member states individually. See, for example, Oxman, “Human Rights and the UN Law of the Sea Convention”; p 415; See also pp 426-428, where Oxman discusses the human rights implications of the LOSC’s use of the phrase “recognised rights” in the *Law of the Sea Convention* 1982, Article 230.

58 *Law of the Sea Convention* 1982, Article 21(1).

59 See, for example, Benedetto Conforti, *The Law and Practice of the United Nations*, Kluwer Law International, The Hague, 1996; pp 247-250; see also Sarooshi, *The United Nations and the Development of Collective Security*; pp 60-61. The concepts of national and unit self-defence, for example, are one such complicated issue. The *Caroline* preconditions are clearly customary; the impact of hot pursuit on the right of self-defence is both a customary and a LOSC issue; the possible curtailment of the right of national self-defence once the UNSC is seized of a situation and the – in one instance – purported authority of the UNSC to alter the right of unit self-defence as applicable in a UN peace operation, is primarily a UN Charter Chapter VII issue. The UN Gulf of Fonseca patrols are one example of a situation where the customary right of unit self-defence, which exists at all times and thus certainly attaches to any unit exercising its right of innocent passage, was purportedly altered (further limited) by the UNSC – see the entry in Pugh et al, “Appendix”; pp 260-261.

60 Glick, “Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces”; p 89. See the *Certain Expenses Advisory Opinion* (1962) ICJ Reps. 151 at 168. This contextual appreciation would include associated Article 98 practice through which the UNSC has delegated increasingly significant UN peace operations powers to the UN Secretary-General. Note, however, that there are several further facets to the capacity of

Third, on the operational level, this contextual appreciation clarifies authority for a range of specific UN naval peace operations activities in their relationship to the Territorial Sea. One example is submerged operations – such as surveillance, monitoring, and intelligence collection, possibly as a precursor to inserting a UN force – conducted in the Territorial Sea during the course of a UN naval peace operation. LOSC Article 20 *prima facie* requires all submarines to navigate on the surface and to show their flag whilst in the Territorial Sea. However, when engaged in UN naval peace operations – an activity governed by some of the “other rules of international law” with which the assessment of innocent passage must conform – the submarine’s actions are by definition innocent and therefore do not violate Article 20. Similarly, launching and recovering aircraft in the Territorial Sea, or landing military forces and equipment, are *prima facie* prohibited under LOSC Article 19(2)(e–f). However, when conducted as part of a UN naval peace operation, such prohibitions must be viewed in conformity with the explicit LOSC requirement that they be interpreted in the light of other applicable international law. Thus, as noted previously, because innocent passage is passage which is not prejudicial to the peace, good order, and security of the coastal state, acts conducted in the course of a UNSC mandated peace operation are – by definition – not to be characterised as having a prejudicial character. Similarly, as LOSC Article 19(2)(a) makes clear, acts listed as prejudicial to the coastal state are acts that use or threaten force “in any...manner in *violation* of the principles of international law embodied in the Charter of the United Nations”.⁶¹ Clearly, UNSC Chapter VII peace operations – positively authorised under the UN Charter – are not a violation of the UN Charter and its principles.⁶² A further exam-

the ICJ, for example, to review UNSC resolutions for *procedural* validity. In the *Namibia Advisory Opinion* (1971) ICJ Reps. 16 at 22, for example, the ICJ discussed the UNSC procedural practice of not characterising abstentions as a bar to adopting a resolution. The ICJ rejected a South African argument to the effect that the resolution in question was invalid because of abstentions. Indeed, a significant minority of the Court argued that if the UNSC refers such a matter to the ICJ, then the ICJ *must* act as if it can review the resolution for procedural validity. Similarly, and more recently, as the only member of the bench to address the specific issue, and in a dissenting judgement, Judge ad hoc Elihu Lauterpacht indicated that a UNSC resolution should not, as a matter of upholding the international rule of law, knowingly breach a rule of *jus cogens*. This may herald a possible, nascent, further grounds of judicial review of UNSC “procedure” – *Genocide Case: Bosnia-Herzegovina v Yugoslavia* (1993) ICJ Reps. 325 at 439–441.

61 *Law of the Sea Convention* 1982, Article 19(2)(a).

62 Indeed, as the ICJ noted in the *Namibia Advisory Opinion*: “The members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. *The only limitations are the fundamental principles and purposes found in Chapter I of the Charter*” – ICJ quoting a statement by the UN Secretary-General to the UNSC, 10 January 1947 – see the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* (1971) ICJ Reps 16 at 52 – my italics. As the ICJ similarly accepted in the *Reparations Case* (1949), *prima facie* regarding the UN as a whole but clearly applicable to the UNSC: “Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties” – *Reparations for Injuries Suffered in the Service of the United Nations Case* (1949) ICJ Reps. 174 at 182. For some, such declarations by the ICJ point more properly towards a doctrine of *inherent* powers rather than one

ple is the UN mandated interdiction operation during the Balkans crises. In UNSC Resolution 820, paragraph 28, the UNSC effectively altered the meaning and scope of innocent passage with respect to the Federal Republic of Yugoslavia (Serbia and Montenegro) Territorial Sea by “*prohibit[ing] all commercial traffic from entering the Territorial Sea*” of the FRY, regardless of the fact that a particular ship was merely engaging in innocent, non-sanctions evading transit through that Territorial Sea whilst bound elsewhere.⁶³

Authority and the Use of Force in the Territorial Sea

As has been previously discussed, whilst the LOSC – as declared in its preamble – aims to establish “a legal order for the seas and oceans”, it makes little direct reference to the use of force as a mechanism in, or a consequence of, establishing and maintaining that order. Analysis of the scant references to use of force that exist in the LOSC reinforces the need to determine legitimation and authority by reference, because the LOSC relies heavily upon the way that the authorisation for use of force is constructed under other applicable aspects of international law – particularly customary and UN Charter law. The remaining section of this chapter shall briefly examine the three defining aspects of force as a concept applicable to UN naval peace operations in the Territorial Sea: Purpose; triggering mechanism; and permissible levels.

Purpose

Use of force in the Territorial Sea is defined primarily by reference to its purpose – providing yet further evidence that a contextual appreciation is the anticipated and more coherent approach to defining innocent passage. The LOSC, however, evidences several different approaches to allocating and detailing ‘purpose’. First, with respect to use of force rights as attached to particular purposes, the LOSC refers overwhelmingly to the coastal state as the recipient. The maritime power of foreign

of implied powers – McCoubrey and White, *Blue Helmets*; pp 44-45. As Nigel White argues, “although debates have continued as to the exact constitutional basis” of the UN’s authority for peace operations, this authority has never really been in doubt since the early 1960’s. Any uncertainty has clearly not restricted the ICJ’s adoption of a “very generous view of the doctrine of implied powers”. The implication of this wide interpretation, Finn Seyersted has argued, is that “such organisations are, like States, in principle free to perform any sovereign act, or any act under international law, which they are in a factual position to perform to attain [their] aims, provided that their constitutions do not preclude such acts... Thus it is not necessary to look for specific provisions in the constitution, or to resort to strained interpretations of texts and intentions, or to look for precedents or constructions to justify legally the performance by an intergovernmental organisation of a sovereign or international act not specifically authorised in its constitution. As an intergovernmental organisation it has an inherent power to perform such acts” – Finn Seyersted, *United Nations Forces in the Law of Peace and War*, A.W. Sijthoff, Leyden, 1966; p 155; See also Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*; paragraphs 442-445.

63 UNSC Resolution 820 (1993) *The Situation in the Former Republic of Yugoslavia*; paragraph 28.

states, and thus of the international community – represented, as Kinley observes, by the “warship” – “makes only fleeting appearances” in the LOSC.⁶⁴ It is the coastal state which is the addressee of detailed authorities over a range of issues including navigation and safety, the environment, natural resources and fishing, customs, fiscal, sanitary and immigration measures, criminal and civil jurisdiction, and security.⁶⁵ The coastal state is also the beneficiary of a wider power to temporarily suspend the right of innocent passage through the Territorial Sea for security purposes.⁶⁶

Foreign ships, however, are the direct addressees of very few LOSC authorities. They are the recipients of the positive authority to stop and anchor as is incidental to passage, or required in a situation of force majeure, or to assist those in distress at sea.⁶⁷ They are also the beneficiaries of the limited rights to be free from unlawful discrimination with respect to their flag, design, construction, manning, or equipment,⁶⁸ and to exercise – with many significant caveats – their flag state jurisdiction over events onboard.⁶⁹ Warships are entitled to the more comprehensive right of sovereign immunity.⁷⁰ However, a much wider inherent authority to use force overlays these limited direct references to the legitimate purposes for which foreign states, or the international community, may use force in the Territorial Sea. This is found in the implicit Article 19(2)(a) authorisation to use force which does not transgress the prohibitions of UN Charter Article 2(4) – such as uses of force in self-defence and in the course of UNSC Chapter VII peace operations. Such activities are therefore, by definition, not to be accounted as non-innocent. Furthermore, by virtue of the preambular incorporation of general international law, and the Article 301 incorporation of UN Charter Chapter VII into the LOSC, this indication that force may legitimately be used for such reserved UNSC purposes suffuses the entire innocent passage regime. Thus, for example, the presence of a direct reference to international peace and security in Article 19 of the LOSC does not imply that it applies only to Article 19. It applies equally, for example, to Article 20, such that a submarine engaged in UN naval peace operations could indeed navigate submerged in the Territorial Sea.

64 Kinley, “The Law of Self-Defence”; p 38.

65 See *Law of the Sea Convention* 1982, Articles 19(2), 21, 22, 24, 25, 27, 28, and 31.

66 *Law of the Sea Convention* 1982, Article 25(3) – This coastal state right is subject to significant caveats however: Any suspension of the regime of innocent passage must be “without discrimination in form or in fact among foreign ships”; can only be “temporary”; must only cover “specified areas”, and not the entire Territorial Sea; is only justified if “essential for the protection of its [the coastal state’s] security, including weapons exercises”; and can only take effect “after having been duly publicised”.

67 *Law of the Sea Convention* 1982, Article 18(2).

68 *Law of the Sea Convention* 1982, Article 21(2).

69 *Law of the Sea Convention* 1982, Articles 27, 28 – These caveats are generally in favour of the coastal state. They include the coastal state’s right to exercise its criminal jurisdiction on a foreign ship in the coastal state’s Territorial Sea where: The “consequences of the crime extend to the coastal state”; the crime disturbs “the peace of the country or the good order of the territorial sea”; where the Master of the vessel or its flag state authorities have requested coastal state assistance; and where coastal state jurisdiction is “necessary for the suppression” of drug trafficking.

70 *Law of the Sea Convention* 1982, Article 32, and Article 95 with respect to immunity on the High Seas.

Triggering Acts

As noted above, the LOSC confers upon a coastal state the option to use force in the Territorial Sea only with respect to a select range of purposes. However, for a use of force to be permissible, the LOSC also requires the incidence of a triggering event related to one of these purposes. Within the LOSC generally, and the Territorial Sea in particular, this trigger is usually identified as ‘illegality’ – the breach of a valid coastal state directive appertaining to one of the legitimate heads of coastal state authority in the Territorial Sea.⁷¹ The occurrence of illegality then acts as the legitimating trigger for the exercise by a coastal state of force in response – such as the power of arrest.⁷² There is, however, a further caveat which overlays this triggering mechanism – the requirement that coastal states not ‘hamper’ innocent passage.⁷³ This has several implications for use of force in the Territorial Sea. First, it requires that the coastal state ascertain whether an act, which may at first appear non-innocent, is being performed for a UNSC authorised purpose – again providing further affirmation of a contextual approach to defining innocent passage. Such a finding may make the act innocent by definition, rendering it inoperable as a valid trigger for a forcible coastal state response. The operations of UNTAC vessels in the Cambodian Territorial Sea, for example, were innocent not merely because they were consensual, but because they were authorised by the UNSC.⁷⁴ They were, in other words, innocent by reason *other than* coastal state consent. This distinction is important because it in turn implies that the coastal state is under an external, non-unilaterally revocable obligation not to hamper operations (as is consistent with the international nature of the right of innocent passage), rather than one founded in and limited by its own, often narrowly construed, consent. This is why non-consensual maritime operations in the Territorial Seas of Bosnia-Herzegovina and the FRY (Serbia and Montenegro) were also entitled to freedom from hampering by any belligerent, non-consenting coastal state. Second, this caveat applies not simply to Article 19(2) acts, but across the entire Territorial Sea and innocent passage regime. Thus, for example, submerged operations in the Territorial Sea in the course of a UN naval peace operation – as noted previously – would not be a valid trigger for a coastal state response involving the use of force. The submarine’s actions are by definition innocent, and therefore do not violate Article 20 and must be left unhampered.

The LOSC is silent on the mechanisms and regime which might trigger a foreign warship’s authority to use force in the Territorial Sea. Ordinarily for warships,

71 There is, however, some debate over the scope of issues subject to this trigger of illegality. Kinley arguably represents the more coherent approach, asserting that the illegality trigger is not limited to those issues listed under Article 19, but rather applies across the whole scope of coastal state authority noted in Part II of the LOSC (Territorial Sea). See Kinley, “The Law of Self-Defence”; p 12. See also, Hampson, “Naval Peacekeeping”; p 201; Oxman, “The Regime of Warships”; p 851.

72 See *Law of the Sea Convention* 1982; Arts 27, 28.

73 *Law of the Sea Convention* 1982, Article 24(1).

74 See Pugh, “Historical Record”; pp 38-40, for a brief discussion of UNTAC maritime operations.

national and unit self-defence are the most significant triggers.⁷⁵ There are, however, three further windows on the use of force by a warship in the Territorial Sea. First, as noted above, there is the complicating overlay of UN naval peace operations authority. This broadens the scope of innocence to include authorised uses of force in the Territorial Sea for UNSC sanctioned purposes. Such uses of force have ranged from monitoring and patrolling (East Timor), through insertion of UN forces (Somalia), to conducting sea-land strike operations (Persian Gulf, FRY). Second, it is arguable that a foreign warship in the Territorial Sea could use 'force' in the course of assisting those in distress at sea. The warship might, for example, use guns to sink a partially submerged vessel because it constitutes an immediate navigation hazard to UN naval forces in the area. Alternatively, the warship might launch a helicopter without coastal state consent for the purpose of rescuing the survivors of a maritime incident. Launching a helicopter is an act explicitly described in Article 19(2)(e) as prejudicial to the peace, good order and security of the coastal state, and is contextually definable as a demonstration of hostile intent – that is, a threat of use of force. However, in the UN naval peace operations context, and given the explicit Article 18(2) and implicit Article 19(1) references to the safety of life at sea (SOLAS), it is arguable that this act would not constitute prejudicial, non-innocent conduct. Third, the LOSC is silent as to the permissible response by a warship when a coastal state does 'hamper' that warship's innocent passage.⁷⁶ Indeed the way in which this situ-

75 These triggers do, however, introduce into LOSC use of force analysis the substance of continuing debates on the nature of the rights of national and unit self-defence. With respect to the right of national self-defence, contentious issues such as the status of the right once the UNSC is seized of a situation, the issue of defence of a UNSC mandate, and the issue of anticipatory self-defence, all have implications for the Territorial Sea. See generally, Weller, "The Use of Force in a Unipolar World"; pp 4, 13; Weller, "Universal Constitutional Order"; p 54; Hampson, "Naval Peacekeeping"; pp 193, 206; Sarooshi, *Collective Security*; pp 71, 77; Greenwood, "Is there a Right of Humanitarian Intervention?"; pp 200-202; Kinley, "The Law of Self-Defence"; pp 20-22. Overall, as noted previously, the records of UNCLOS III indicate that whilst the participants were clearly concerned with issues of national security, there is little evidence of discussion on the issue of self-defence. See also, for example, the succinct summary of the course of the UNCLOS III negotiations contained in the "Introduction" to the UN Division for Ocean Affairs and the Law of the Sea's, *The Law of the Sea: United Nations Convention on the Law of the Sea*, United Nations, New York, 1997; pp 1-6, which readily refers to the influence upon negotiations of the package deal approach and the desire to achieve a "just and equitable international economic order", but mentions "security" only once, and issues of use of force and self-defence not at all.

76 As discussed in chapter 1, the US Navy pursues an express and overt "Freedom of Navigation Program" in order to assert its rights of Innocent, Archipelagic Sealanes, and Transit Passage through disputed waters. Fundamental to this program is the US belief that "if you don't exercise your rights, you lose them" – Richard Grunawalt, "Australian Naval Institute 1997 Vernon Parker Oration", presented in Canberra, Australia, 10 April 1997. This program has led to several incidents at sea, one of the most notable being the 1986 'Black Sea Incident'. On 13 March 1986, two US warships – USS YORKTOWN and USS CARON - entered the Soviet Territorial Sea adjoining the southern part of the Crimean Peninsula. They transited to within six nautical miles of the Soviet coast, and departed the Territorial Sea two hours and twenty-one minutes after entry. The USSR at that time maintained that foreign warships required prior authorisation to pass through the Soviet Territorial Sea. The Soviet patrol vessel (LADNYI) warned the US warships to depart. The US warships acknowledged receipt of the instruction but did not comply

ation interfaces with the broader right of unit self-defence remains, on the whole, a relatively unexplored issue.

Permissible Levels

Once the authority to use force in a particular situation has been triggered, on no issue is the LOSC more silent or obscure than the detail of what degree of force is consequently permissible. In the Territorial Sea, the coastal state can variously “adopt” laws, regulations and *measures* with which vessels “shall comply”,⁷⁷ “take necessary steps” to prevent non-innocent passage,⁷⁸ “require” warships to leave the Territorial Sea “immediately”,⁷⁹ “require” all ships to use traffic separation schemes,⁸⁰ “exercise... jurisdiction”,⁸¹ and – by implication – “hamper” passage “in accordance with” the LOSC itself.⁸² Thus references to permissible degrees of force are uneven, and limited to the coastal state. Again, however, links to other aspects of international law provide some scope for illumination. As noted previously, some scholars argue that the degree of force indicated by the term ‘require’ is comparable to the very limited force permissible in diplomatic ‘incidents’. As Oxman writes

The power to require departure from its territory is of course the classic remedy for a State that lacks enforcement jurisdiction over the sovereign agent or instrumentality of a foreign State, be it a diplomat or a warship.⁸³

For others, such as O’Connell and Shearer, ‘require’ might legitimately encompass depth charging a foreign submarine engaged in impermissible submerged operations in the Territorial Sea.⁸⁴

Similarly, with respect to non-warships, ‘necessary steps’ is generally taken to refer to use of ‘reasonable force as a last resort’, with all of the situational nuances that the *I’m Alone*, *Red Crusader*, and other decisions and incidents import into this concept. In the *I’m Alone* incident – which took place in 1929 off the US coast, during the prohibition era – a British schooner registered in Canada (*I’m Alone*) was ordered

with it, asserting their right to innocent passage through the Territorial Sea in accordance with the Law of the Sea. Further Soviet vessels and aircraft scrambled to the scene, and Black Sea naval and air forces assumed a higher state of readiness. The situation at the scene de-escalated once the US warships exited the Soviet Territorial Sea, but the immediate diplomatic consequences continued for several weeks – see Butler, “Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy”; pp 343-346.

77 *Law of the Sea Convention* 1982, Article 21.

78 *Law of the Sea Convention* 1982, Article 25.

79 *Law of the Sea Convention* 1982, Article 30.

80 *Law of the Sea Convention* 1982, Article 22.

81 *Law of the Sea Convention* 1982, Articles 27, 28.

82 *Law of the Sea Convention* 1982, Article 24.

83 Oxman, “The Regime of Warships”; p 817.

84 O’Connell, *The International Law of the Sea* (Volume I); p 297. In peacetime, such a response would of course be at the sharp end – the culminating point – of a series of graduated actions carried out in an attempt to compel the submarine to surface or to leave the Territorial Sea.

by a US Coast Guard cutter (*Wolcott*) to heave to for inspection, approximately 10 miles off the coast of Louisiana. *I'm Alone*, suspected of smuggling liquor into the US, fled pursued by *Wolcott* and another USCG cutter, *Dexter*. When she continued to refuse to heave to, the USCG cutters fired upon *I'm Alone*. The gunfire was at first aimed above the waterline, and then below it. *I'm Alone* sank. The Commission's Report found that the USCG cutters were entitled to "use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur *incidentally*, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless". However, the Commission went on to note that in this case, the "admittedly *intentional* sinking of the suspected vessel was not justified...". In the *Red Crusader* incident, a Danish fisheries inspection vessel, *Niels Ebbesen*, arrested the Scottish trawler *Red Crusader* near the Faeroe Islands in an area where such fishing was prohibited under a British-Danish treaty. A Danish steaming party was placed aboard, and for a time *Red Crusader* complied with the Danish order to steam to the Faeroes, where the crew would face prosecution. *Red Crusader* then made to escape, and was fired upon by *Niels Ebbesen* – first with warning shots, and when these warnings were ignored, with direct fire using solid shot. *Red Crusader* was damaged, but not sunk. The Anglo-Danish Commission of Inquiry found that despite *Red Crusader's* flagrant violations, and her attempting to escape with the two Danish steaming party members still on board, *Niels Ebbesen* had used excessive and unjustifiable force. First, the Commission found that the Danish vessel had not given warning of its intention to use solid shot, and had escalated to direct fire far too quickly, ignoring "other means [that] should have been attempted, which, if duly persisted in, might have finally persuaded [*Red Crusader's*] Skipper Wood to stop and revert to the normal procedure which he himself had previously followed". Second, the direct fire using solid shot created "danger to human life on *Red Crusader* without proved necessity".⁸⁵

With respect to authorised degrees of force for foreign warships in the Territorial Sea, however, the LOSC is completely silent. Again, it is only through the general incorporation – by the LOSC's own referential language – of customary and UN Charter law and practice on self-defence, use of force, and UN peace operations, that any guidance on the application of these issues in the Territorial Sea is available. Indeed, the International Tribunal for the Law of the Sea (ITLOS) in the "*M/V Saiga*" Case (1999) reinforced this practice by specifically recalling and applying the principles evident in the *I'm Alone* and *Red Crusader* cases when interpreting LOSC Article 111 on "hot pursuit", which for all its length and clarity as to jurisdictional issues, provides no guidance on permissible levels of force when exercising the right. Echoing these two cases, Judge Anderson declared that

P35 [a Guinean patrol boat] did not approach the *Saiga* in the accepted manner for law enforcement vessels. Instead, P35 fired live rounds which...broke bridge and cabin windows on board the *Saiga*... Force must be resorted to only in the last resort and after warnings (including shots across the bow) have been given. Even

85 "The *I'm Alone* Case" (1935) 29 *American Journal of International Law* 326; *The Red Crusader Case* (1962) 35 ILR 485.

then, any live shots must be fired in such a way as to avoid endangering the lives of those on board.⁸⁶

General Consequences for UN Naval Peace Operations

The early establishment of the rule of law as the general governing environment of a UN peace operation is often crucial to success. This is particularly so with respect to practical RoE and guidelines for the use of force in the conduct of specific types of operations. Thus the first point to be taken from this threshold analysis of the UN naval peace operations-innocent passage-use of force relationship is that the existence and scope of the relevant UNSC mandate is central to establishing the authorised purposes, triggers, and permissible levels attending any anticipated or potential use of force during a UN naval peace operation. But for precision as to what is specifically authorised in any particular situation, the generally political – and therefore occasionally ‘constructively ambiguous’ – nature of UNSC mandates often provides little operational guidance. Thus an integrative approach to constructing authority in UN naval peace operations is not only sensible and sensitive to this conundrum, but also vital to resolving it.

Second, the specific incorporation of general international law into the Territorial Sea regime, particularly via references in Articles 19, 21, 31, and 32, offers significant assistance in illuminating the detail inherent in the LOSC’s more oblique references to further authorisations for use of force. The referential incorporation of these authorities also serves to contextualise the triggering mechanisms implicit within them. One example is the Article 19(2)(a) reference to “violations of the principles of international law embodied in the Charter of the United Nations”. Another is the Article 32 reference to the “immunities” of warships. A third is found in the Article 18(2) importation of the safety of life at sea mechanism. Yet another is located in the Article 19(1) “in conformity with...other rules of international law” overlay upon defining ‘innocence’.

A third consequence is that constructing authority for UN naval peace operations in the Territorial Sea generally *requires* the use of detailed non-LOSC, often customary law and jurisprudence on the interpretation of concepts such as ‘necessary means’ and ‘require’, and subsidiary principles (such as use of force) inherent to, but left silent in, the elaboration of other concepts such as ‘hot pursuit’. These terms are present in and fundamental to, but not defined by, the LOSC and have significant implications for both UN naval peace operations and constabulary operations at sea.⁸⁷

86 *M/V Saiga* (*Saint Vincent and the Grenadines v Guinea*) No. 2 (*Judgment*) (1999) ITLOS (1 July 1999); separate opinion of Judge Anderson. See also the main judgment at paras 139–159. In an important comment for maritime constabulary operations, Judge Anderson went on to declare that “[I]n order to ensure respect for these standards, law enforcement officers should receive adequate training in maritime practices and, if armed, should be provided with specific Rules of Engagement”.

87 As previously discussed, see (for example), *Convention Relating to Intervention on High Seas in Cases of Oil Pollution Casualties* 1969, Article 1. The Intervention Convention envisages use of force to destroy a vessel and its cargo to prevent further pollution. See

Conclusion

The regimes of innocent passage and use of force in the Territorial Sea are fundamental to constructing and analysing authority for UN naval peace operations in the Territorial Sea. Innocent passage – contextually understood as the LOSC regime in which coastal state and international community authorities are most precariously and sensitively balanced – explicitly incorporates direct and indirect references to other sources of authority for operational practice in international peace and security, and constitutes the threshold authority issue with respect to the presence of a UN naval force in another state’s Territorial Sea. Similarly, in terms of use of force in the Territorial Sea by the international community – a subject upon which the LOSC is at its most ambiguous – the incorporation of other authority sources and paradigms is both necessary and fundamental. Guidance on the authorised purposes, triggers, and permissible levels of force (for both international peace and security and international constabulary purposes) with relatively direct and specific operational ease, is an essential threshold step for making sense of authority in UN naval peace operations. The next chapters will examine in more detail some specific manifestations of this generally constructed authority as it applies to the conduct of UN naval peace operations in the Territorial Sea.

also Ivan Shearer, “Current Law of the Sea Issues”, in Ross Babbage and Sam Bateman (eds), *Maritime Change: Issues for Asia*, Allen & Unwin, Sydney, 1993; pp 61–62.

Chapter 5

UN Naval Interdiction Operations in the Territorial Sea

A naval pacific blockade though economic in its effect is not purely economic in its methods.¹

– J.F. Williams, 1936

Introduction

The practice of imposing economic sanctions in order to influence the actions of states and other parties – historically with varied levels of actual effectiveness – has a long and chequered history.² Given, however, that more than 90 per cent of the world's trade is carried by sea, it is one particular form of the “so called economic weapon” – that of maritime sanctions enforcement – which tends to dominate the implementation of sanctions regimes.³ Yet despite the frequency with which naval

* An earlier version of this chapter appeared as “United Nations Mandated Naval Interdiction Operations in the Territorial Sea?” (2002) 51:2 *International and Comparative Law Quarterly* 249.

1 J.F. Williams, quoted in Politakis, “UN-Mandated Naval Operations”; p 198.

2 Dalton, “The Influence of Law on Seapower in Desert Shield/Desert Storm”; p 30. O’Connell provides a thorough and nuanced analytical account of belligerent – as opposed to League of Nations or UN mandated – blockade operations conducted by navies since 1918 – See, O’Connell, *The Influence of Law Upon Seapower*, chapters 8–10. For a similar account of the belligerent conduct of blockades, extending back into the 1800s, see Thomas David Jones, “The International Law of Maritime Blockade – A Measure of Naval Economic Interdiction” (1983) 26 *Howard Law Journal* 759; See also Lois Fielding, *Maritime Interception and UN Sanctions: Resolving Issues in the Persian Gulf War, the Conflict in the Former Yugoslavia, and the Haiti Crisis*, Austin & Winfield, London, 1997; pp 19–31; Wolff Heintschel von Heinegg, “Naval Blockade” in Michael N. Schmitt (ed), *International Law Across the Spectrum of Conflict*, International Law Studies, Vol 75, Naval War College, Rhode Island, 2000; pp 203–230. As the focus of this chapter is upon interdiction operations in the context of UN naval peace operations, it will examine only UN mandated naval interdictions. This body of operational experience is distinct – both practically and in terms of authority – from the law and practice of ‘belligerent’ blockades, such as those of the Napoleonic Wars, World Wars I and II, the Vietnam War, the Iran-Iraq War, and the 2006 Israel-Lebanon conflict. The belligerent form of blockade, and the related but separate regime of belligerent visit and search, is properly understood as an aspect of LoNW and the Law of Neutrality – see, *San Remo Manual*, paras 93–104.

3 The aim of naval interdiction is, ultimately, to put pressure on the target state by engaging in varying levels of freedom of movement constriction in order to reduce the adversary’s ability to continue the conflict – see, for example, Royal Australian Navy, *ABR*

forces are used to implement maritime sanctions – or perhaps because of the long but erratic history of naval embargo – the regime as a whole remains haunted by some uncertainties as to its conceptual basis. As Martin observes, “some measures such as ‘pacific blockade’, have at times acquired a technical meaning”, and this has left them ill-equipped to deal with and adjust to new developments in maritime sanctions enforcement practice.⁴ Even prior to 1914, the notion of ‘blockade’ was a bivalent concept. On one hand, it was clearly a weapon of war. On the other, as Politakis notes, blockade was often “conceived not as an instrument of war but as an instrument of peaceful pressure” – a conception carried into the inter-war period by the League of Nations, which considered blockade to be an aspect of “diplomatic coercion” rather than a weapon of war.⁵ More recent UN mandated uses of naval interdiction, however, are arguably more at home under the aegis of use of force. In UNSC Resolution 217 (1965) on the Southern Rhodesia question, the UNSC instituted economic sanctions against Southern Rhodesia, “including an embargo on oil and petroleum products”⁶ on the grounds that the continuance in time of the Southern Rhodesian regime “constitutes a threat to international peace and security”.⁷ In Resolution 221 (1966), the UNSC went further still, both “determining” that the situation in Southern Rhodesia now constituted a “threat to the peace”, and calling upon the UK “to prevent, *by the use of force if necessary*, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia...”.⁸ Thus while some interdiction schemes are designed to operate as a form of eco-

5179 *Manual of International Law*; para 9.1. Jones colourfully, but ultimately correctly, describes it as “economic and operational strangulation” – Jones, “The International Law of Maritime Blockade – A Measure of Naval Economic Interdiction”; p 762.

4 Quoted in Fielding, *Maritime Interception and UN Sanctions*; pp 9–10.

5 Politakis, “UN-Mandated Naval Operations”; pp 200–201. The migration of meaning in such dualist concepts is a slow process and periods in which both ‘meanings’ still hold significance will always exist. Thus despite the early twentieth century tendency to define it as a measure of peaceful diplomatic coercion, blockade has always maintained an independent conceptual ‘existence’ as a weapon of war – see, for example, the thread of belligerency linking the *Paris Declaration Respecting Maritime Law* 1856 (“Privateering is and remains, abolished; The neutral flag covers enemy’s goods, with the exception of contraband of war; Neutral goods, with the exception of contraband of war, are not liable to capture under enemy’s flag; Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy”), the *London Declaration* 1909 (further regulating the law and conduct of blockade), and the *San Remo Manual* 1995 (at paragraphs 93–104, which reflect updated blockade law and practice, in order to govern – for example – means other than “surface ships lying just off the coast”, such as use of submarines in blockade). See generally, Roach, “The Law of Naval Warfare at the Turn of Two Centuries”; pp 69–72. Reeve, “The Rise of Modern Naval Strategy c. 1580–1880”; p 14, records the long history of blockade as a weapon of war, particularly during the Napoleonic era – “Blockade, not fleet action, was the main strategic weapon of the eighteenth-century Royal Navy. As Brian Lavery has observed, for every hour in battle, weeks and months were spent on blockade. This was demanding work which wore down ships and men. But it undermined the morale and seamanship of the French while effectively denying them a naval strategy”.

6 UNSC Resolution 217 (1965) on *The Question of Southern Rhodesia*; paragraph 8.

7 UNSC Resolution 217 (1965) on *The Question of Southern Rhodesia*; paragraph 1.

8 UNSC Resolution 221 (1966) on *The Question of Southern Rhodesia*; paragraphs 1, 5.

conomic, but fundamentally peaceful diplomatic coercion, most recent interdiction operations appear more readily definable as uses of force – but for international peace and security purposes rather than belligerency. Thus the exact conceptual basis underpinning the naval implementation of UN maritime sanctions regimes is caught between two very different, and conceptually distinct, characterisations. Further, the way in which these characterisations are described – coercive or non-coercive, involving the use of military forces or not involving military force – also remains subject to debate.⁹

This chapter will examine some of the authority issues which surround UN mandated naval interdiction operations. For the purposes of this analysis, the term interdiction is used to cover references to both UN mandated sanctions enforcement and UN ‘blockade’ operations, for in UN parlance – as will become apparent – the practical distinction between these two forms of UN naval action is far from clear.¹⁰ This chapter will begin by noting the distinction between interdiction as a fundamentally economic tool and interdiction as a use of force. It will then analyse the relationship between UN Charter Chapter VII Articles 40, 41, and 42 in an attempt to establish how the powers available to the UNSC under these three Articles mesh and interact. This will then permit examination of three significant UN mandated interdiction operations in order to assess how UN naval interdiction *authority* operates in practice. The chapter will then conclude with an analysis of what this practice indicates about authority in UN naval peace operations in the Territorial Sea more generally.

Preliminary Distinctions

Confusion as to conceptual heritage of the diplomatic ‘measure’/use of force ‘weapon’ of naval interdiction is clearly reflected, as noted above, in uncertainty as to its authority character. This confusion can be reduced, however, if naval interdiction is understood not as a single unified concept, but rather as two separate institutions. The first is an economic institution founded, as the League of Nations believed, in the processes of peaceful diplomatic coercion. The second institution is a weapon and is to be

9 See generally, Fielding, *Maritime Interception and UN Sanctions*; p 240.

10 Jochen Frowein underlines this issue in his commentary on UN Charter Article 42 and its reference to “blockade”, when he notes that the Article 42 “concept of a blockade is not to be understood in a technical law-of-war sense. At issue is rather the effective sealing-off of particular coasts or land areas through a military action. An example of a measure constituting a blockade [in the Article 42 sense] – without determining here whether it was undertaken pursuant to Article 42 – was the inspection of tankers which could have had oil for Rhodesia on board, carried out by the British navy on the basis of SC Res. 221 of April 9, 1966” (the Beira Patrol). He also cites the Kuwait blockade (UNSC Resolution 661) as another example of a UN mandated “blockade” which is not, in the technical law-of-war sense, a “blockade” – See Jochen Frowein, “Articles 39-43”, in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, Oxford, Oxford University Press, 1994; pp 605-639, at p 632. As Lois Fielding notes, there is a need for “flexibility in the assessment of lawfulness” of new types of naval operations, and new forms of traditional naval operations such as interdiction. Fielding quotes W.L. Martin’s advocacy “against measuring the legality of innovative naval operations against a set of rigid defining criteria” – Fielding, *Maritime Interception and UN Sanctions*; p 9.

understood, as the UNSC arguably does, as a form of use of force. In some ways, the UN Charter endorses this approach in its distinction between the recommendatory powers of the UNSC to pursue the peaceful settlement of disputes under Chapter VI, and the range of obligatory decisions and measures available under Chapter VII. Undoubtedly, this distinction is occasionally obscured by the differences in character between a *pacifc economic sanctions regime*, involving the use of warships to ‘show the flag’ and to serve as observation and reporting platforms, and a *use of force ‘blockade’*, where warships are used as an active interdiction force to implement either UNSC sanctions enforcement, a visit and search regime, or a blockade (with these last two options arguably only being formally available to UN naval peace operations forces where the situation is one of armed conflict).

Thus approaching interdiction as an umbrella concept encompassing two fundamentally different forms of action does set the stage for a better level of conceptual clarity. Operations involving monitoring recommendatory pacific sanctions regimes of the type envisaged by the League of Nations, should thus be characterised as a form of diplomatic coercion, founded conceptually under the aegis of the pacific settlement of disputes. This *passive* form of naval action is encompassed in a modern form by the peaceful settlement provisions of UN Charter Chapter VI, which could use naval presence as evidence of the international community’s interest, and to both facilitate and remind the target state of the transparency of its conduct. The role of naval forces in this form of action is as the obvious observer, whose duty is to monitor and report on compliance and non-compliance rather than to act as an enforcer. This role may also include acting as the consensual inspector, allowed on board only in accordance with pre-existing authority structures such as flag state consent. Although based in Chapter VII, UNSCR 1718 (2006) – the non-enforcement based ‘interdiction’ regime established on 14 October 2006 in the wake of the DPRK nuclear test that took place on 9 October 2006 – is a recent example of this form of monitoring operation.¹¹ The *active* form of interdiction – also a response to a disruption of international stability, but reflecting a fundamentally different conceptual approach to crisis management – is best understood as one type of use of force for the preservation of international peace and security. This form of naval interdiction is found in Chapter VII of the UN Charter and in LoNW, and involves use of naval forces to actively implement and enforce compliance. It is this form of naval interdiction, essential in many modern UN naval peace operations, which this chapter will address.

11 UNSC Resolution 1718, 14 October 2006 on *Non-proliferation / Democratic People’s Republic of Korea*. See, in particular, paragraph 8(f) – “In order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary...”

Chapter VII and UN Naval Interdiction: The Interaction of Articles 40, 41, and 42

Despite its fundamental importance to the international security environment, the relationship between Articles 40, 41, and 42 of the UN Charter, the teeth of Chapter VII, remains ambiguous. This is particularly so in the case of interdiction operations where

...the legitimacy of acts of force...lies not so much in their intrinsic nature as in the overall circumstances of the case... In other words, it is the circumstances of action rather than the precise means employed that determine the legal claim...to depict action as lawful.¹²

It is thus essential to understand how Articles 40, 41, and 42 interact, because it is this interaction which defines the spectrum within which UN naval interdiction operations can take place.

Article 40 empowers the UNSC to adopt “provisional measures” in relation to a crisis, aimed at preventing “an aggravation of the situation”.¹³ Such provisional measures may include the deployment of UN peace operations forces, including naval forces, as monitors and observers – as occurred with UNEF I in the Middle East, ONUC in the Congo, and ONUCA in Central America.¹⁴ “Peacekeeping is often derived from Article 40”, McCoubrey and White assert

...although its function does not vary with the nature of the obligation on the parties as regards the provisional measures. The nature of peacekeeping remains consensual and non-offensive whether or not the call for provisional measures is mandatory.¹⁵

¹² W.L. Martin quoted in, Fielding, *Maritime Interception and UN Sanctions*; p 10.

¹³ *Charter of the United Nations* (1945), Article 40.

¹⁴ White, “The UN Charter and Peacekeeping Forces: Constitutional Issues”; pp 52-53. Founded in an examination of the basis of the ONUC mandates and UNSC Resolution 161, 27 February 1961 *The Situation in the Congo*, White argues convincingly that “it would be best to summarize ONUC’s actions as having as their constitutional basis the enforcement of provisional measures under Article 40...”. This position is not unchallenged, however. Frowein, “Articles 39-43”; p 619, for example, argues that Article 40 should not be viewed as an authority for the deployment of peacekeeping forces, because Article 42 is the general authority for UNSC uses of force, of which peacekeeping forces are one sub-set. He does recognise, however, that a range of scholars – citing Rosalyn Higgins and Oscar Schachter – and even the then UN Secretary-General during the Congo Crisis, have made persuasive arguments supporting the UNSC’s capacity to create peacekeeping forces using its Article 40 authority and powers. Similarly, Boutros-Ghali, in *An Agenda for Peace* (1992); paragraph 44, indicates that peacekeeping forces can be created under Article 40. For a brief discussion of the ONUCA (UN Observer Group in Central America) monitoring operation, see Sally Morphet, “UN Peacekeeping and Election Monitoring”, in Adam Roberts and Benedict Kingsbury (eds), *United Nations, Divided World: The UN’s Roles in International Relations* (2nd Edition), Clarendon Press, Oxford, 1994; pp 183-239.

¹⁵ McCoubrey and White, *The Blue Helmets*; p 51.

White argues that the use of peacekeeping forces to “enforce provisional measures” is still reconcilable with Article 40 because the provision also provides that “the Security Council shall duly take account of failure to comply with provisional measures”. “In these instances”, White continues

...although it is arguable that the peacekeeping force is not taking enforcement action in the full-blown sense of Article 42, it is taking action which is closer to Chapter VII action, in that it is enforcing provisional measures. This type of action has been much more readily taken in the post-Cold War era (Somalia, Haiti, Rwanda).¹⁶

Article 41 empowers the UNSC to decide “what measures not involving use of armed force are to be employed to give effect to its decisions”, allowing it to call upon members of the UN to implement these measures, which may include “complete or partial interruption of economic relations and of...sea...means of communication”.¹⁷ This *mandatory* sanctions regime – effectively an embargo regime¹⁸ – must be complied with by all member states. Indeed, because it is an international peace and security issue, it is arguable that such regimes must be complied with by *all* states and parties whether UN members or not. Some argue that interpretive problems arise with the wording of Article 41 insofar as the provision seems to relate measures taken under its aegis to the purpose of “interruption of economic relations” rather than international peace and security.¹⁹ However, three points should be considered in relation to this argument. First, Article 41 concerns “decisions” of the UNSC, and these decisions – as Article 39 makes clear – are to be understood in the context of maintaining or restoring international peace and security. Second, Article 41 refers to the interruption of economic relations by (inter alia) naval enforced embargoes to be one form of measure available under its authority, but clearly not the only form. This is evidenced both in the language of Article 41 (by the further reference to “severance of diplomatic relations” as a possible measure) and in UNSC practice (such as the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda under the authority of Article 41). Neither of these measures is fundamentally “economic” in nature. Finally, Article 41 clearly should be read as giving effect to the fundamental purpose of the UNSC – the maintenance of international peace and security – and thus Article 41 actions which may seem economic in focus must nonetheless remain true and effective to this ultimate purpose.

Article 41 naval embargoes have been implemented in several recent international crises. However, whilst the Article 41 basis of these interdiction operations

16 White, “The UN Charter and Peacekeeping Forces: Constitutional Issues”; p 53; See also Elgin Clemens, “No Peace to Keep: Six and Three Quarters Peacekeepers” (1993) 26:1 *New York University Journal of International Law and Politics* 107. Clemens argues for a new form of “Chapter Six-and-three-quarters” peacekeeping with more robust RoE than normal “Blue Helmet” deployments enjoy, but “only after a Chapter Seven force has either silenced or significantly reduced the gunfire” – at p 140.

17 *Charter of the United Nations* (1945); Article 41.

18 See, Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 208.

19 Politakis notes this issue – Politakis, “UN-Mandated Naval Operations”; pp 191–193.

is arguably fundamental, it is not always clear. Soons argues of the Persian Gulf crisis, for example, that “after the ending of hostilities in April 1991”- when Article 51 “ceased to be a basis for enforcing the embargo”- the foundation for continuing multinational interdiction operations reverted to the Article 41 authority underpinning Resolution 665.²⁰ UNSC Resolutions 787 (1992) and 820 (1993) on the Former Republic of Yugoslavia, and 875 (1993) and 917 (1994) on Haiti also arguably sponsored naval interdiction operations under the UNSC’s Article 41 authority.²¹ “The pattern of action arising from the experience in Iraq, Yugoslavia and Haiti”, concludes Politakis, “makes clear that use of naval forces for maritime enforcement action” can be justified and implemented as part of a mandatory economic sanctions regime under Article 41.²²

Article 42 authorises the UNSC to take “such action by [inter alia]...sea forces as may be necessary to maintain or restore international peace and security”, including the implementation of blockades.²³ This authorisation to use force during an interdiction operation is clear and unequivocal. The problem, however, is how it relates to interdiction operations authorised under Article 41. Where the UNSC has determined that there is a threat to international peace and security, a literal approach to the Article 41-42 relationship generally requires action to be categorised, in an either/or interpretation, as one of two types:

20 Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 213.

21 See UNSC Resolution 787 (1992) on *The Former Republic of Yugoslavia*; paragraph 12; UNSC Res 820 (1993) on *The Former Republic of Yugoslavia*; paragraph 29; UNSC Res 875, 16 October 1993 on *Haiti*; paragraph 1. On Haiti, however, note that the initial oil, arms and associated materials embargo was established, under Chapter VII, in paragraphs 3, and 5-14 of UNSC Res 841, 16 June 1993 on *Haiti*; para 6, where the UNSC “decide[d] to prohibit any and all traffic from entering the territory or territorial sea of Haiti” carrying any embargoed cargo. See also, UNSC Res 917, 6 May 1994 on *Haiti*; paragraphs 5-10, which expanded the scope of commodities under embargo. See also the more limited UN mandated embargo imposed in the Sierra Leone situation - UNSC Res 1132, 8 October 1997) on *Sierra Leone*, paragraph 6, where the UNSC, acting under Chapter VII “decide[d] that all states shall prevent the sale or supply to Sierra Leone...of petroleum and petroleum products and arms and related materiel of all types...”, and paragraph 8, where the UNSC, acting under Chapter VIII “authorise[d] ECOWAS, co-operating with the democratically elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to” the supply of petroleum, arms and related materiel, “...including, where necessary and in conformity with applicable international standards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations...”. In UNSC Res 1171, 5 June 1998 on *Sierra Leone*, paragraph 2, the UNSC responded to the reassertion of partial control by the democratically elected Government of Sierra Leone, and altered the embargo by specifying that it applied to all except the Government of Sierra Leone, the ECOMOG observer group, and UN forces, and that import for these organisations could only be through ports specified by the Government and communicated to the UNSC - i.e., ports over which the Government exercised control and through which arms and petroleum imports would be unlikely to end in rebel hands. See also Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 213.

22 Politakis, “UN-Mandated Naval Operations”; p 206.

23 *Charter of the United Nations* (1945); Article 42.

It may amount to the application of measures not involving the use of armed force under Article 41, such as the disruption of economic relations or the severance of diplomatic relations, or may call for the use of such force as may be necessary to maintain or restore international peace and security under Article 42.²⁴

In practice, however, the distinction is far from clear. Scholarly opinion, writes Politakis, “is almost unanimous in recognizing the singular character of resolution 665 (1990) and in pigeon-holing it midway between Article 41 and Article 42 of the Charter”.²⁵ But Resolution 665 is not singular in terms of being unique; it is singular in terms of its importance as a precedent. As Soons has observed, “the phrase used in Resolution 665... became standard language for cases where the Security Council wanted to explicitly authorise States to enforce an embargo at sea”.²⁶ The “phrase” from UNSC Resolution 665 is that contained in Paragraph One, where the UNSC

Call[ed] upon those member states cooperating with the government of Kuwait, which are deploying maritime forces to the area, to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure the strict implementation of the provisions related to such shipping laid down in Resolution 661.²⁷

Higgins has argued of Resolution 665, and hence its antecedents, that

...the implication was that force could be authorised to implement economic sanctions without that use of force being viewed as military sanctions under Article 42. *Just as a minimal use of force by United Nations peacekeeping operations may be authorised by reference to Article 40 of the Charter, so limited force may apparently be authorised by reference to Article 41 even though neither article envisages that possibility.*²⁸

Similarly, Conforti contends that the precedent set by Resolution 665 is that “the forces mentioned in Article 42 of the Charter ought to be set up and employed not only for military action but in furtherance of measures under Article 41”.²⁹ Thus the

24 Malcolm N. Shaw, *International Law* (Fourth Edition), Cambridge University Press, Cambridge, 1997; p 859.

25 Politakis, “UN-Mandated Naval Operations”; p 196.

26 Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 213; See, for example, UNSC Resolutions 787(1992) and 820 (1993) on *The Former Republic of Yugoslavia*, and UNSC Resolutions 875 (1993), paragraph 1, and 917 (1994) on *Haiti*.

27 UNSC Resolution 665, 25 August 1990 on *The Situation in Iraq and Kuwait*; paragraph 1.

28 Rosalyn Higgins, quoted in Politakis, “UN-Mandated Naval Operations”; p 196 – my italics.

29 Benedetto Conforti, “Non-Coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War” (1991) 2 *European Journal of international Law* 110 at 113. Conforti argues that Article 41 measures should also be available for implementation by UN forces “preventively”, and not only – as is currently the case (with the preventive deployment to Macedonia being the exception) – after breaches of international

Article 41-42 relationship should be viewed as a *continuum* in which the UNSC's measures are given effect, so that the need for a clear-cut distinction between measures "not involving the use of armed force" (Article 41) and those involving "action by air, sea or land forces" (Article 42) does not become a debilitating threshold issue. Indeed, because of the range of actions required in UN naval interdiction operations, this ambiguity is arguably a positive trait. At a minimum, enforcement requires the authority to approach, board, demand documents, search, and if required divert or arrest. At the extreme, if a vessel refuses to comply, this authority ultimately extends to firing across that vessel's bows or, as a last resort, disabling it with direct fire. The United States' position with respect to Resolution 665 was always that its Article 41 authorisation allowed warships in the Multinational Force to fire across bows if necessary – which happened for the first time on 18 August 1990 when USS READ and USS ROBERT G. BRADLEY separately fired warning shots across the bows of Iraqi tankers in the Persian Gulf and Gulf of Oman.³⁰ Similarly, the eventual settled French position was that its warships were authorised to employ disabling fire, although only with the further *political* caveat of the President of France's final authorisation.³¹ As Politakis observes, "few would deny that the operations against Iraq, the Former Yugoslav Republics, or Haiti, resemble maritime blockades in anything but name".³²

For the purposes of use of force in maritime interdiction operations conducted as part of a wider UN peace operation, the relationship between Articles 41 and 42 is ambiguous, and is arguably best left that way. When dealing with enforcement, clear-cut "Mogadishu lines" – to use one peacekeeper's term drawn from the Somalia operation, for the operational and attitudinal line that is crossed when a situation transforms from keeping the peace to making the peace – are simply not possible if the measure in question is to be effective. Indeed, to interpret an Article 41 measure as prohibitive of any use of force in its implementation is to condemn that measure to superfluity and ineffectiveness from the outset. Political reticence to use force can be readily disguised as a supposedly legal dictate preventing use of force, and will nullify the intended effect of the measure. This conceptual preference for a 'continuum' approach to Article 41-42 naval interdiction operations is also clearly evident in UNSC practice, and it is to this issue that the analysis now turns.

law have already been committed. Under UNSC Resolution 795 of 11 December 1992, the UNSC authorised a preventive deployment of UNPROFOR forces to assist in stabilising Macedonia in order to prevent its disintegration. This force then handed over to the tailored UNPREDEP (UN Preventive Deployment) force on 31 March 1995 – See Snezana Trifunovska, "Preventive Peacekeeping and the Case of the Former Yugoslav Republic of Macedonia", *International Peacekeeping*, Vol. 4, Nos 1-2, 1997; p 6; see also Burns, "Preventive Deployment and Diplomacy in Practice"; pp 42-45; S.T. Ostrowski, "Preventive Deployment of Troops as Preventive Measures: Macedonia and Beyond" (1997-1998) 30 *New York University Journal of International Law and Politics* 793.

30 Dalton, "The Influence of Law on Seapower in Desert Shield/Desert Storm"; p 40.

31 Dalton, "The Influence of Law on Seapower in Desert Shield/Desert Storm"; p 43.

32 Politakis, "UN-Mandated Naval Operations"; p 191.

Chapter VII and UN Naval Interdiction: Significant Operational Precedents

The Beira Patrol

In Resolution 216 of 12 November 1965, the UNSC condemned the unilateral declaration of independence in Southern Rhodesia by the racist minority Smith Government, and called upon all states not to recognise the regime.³³ In Resolution 217 of 20 November 1965, the UNSC went further still, determining that the situation in Southern Rhodesia was “extremely grave” to the extent that “its continuance in time constitutes a threat to international peace and security”.³⁴ It then called upon the United Kingdom – the former administering power – to “quell this rebellion”,³⁵ and to take “all other appropriate measures which would prove effective in eliminating the authority” of the regime and bringing it to an immediate end.³⁶ Further, echoing the wording of Article 41, the UNSC called upon all states to – amongst other actions – “do their utmost in order to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products”,³⁷ specifically calling upon the UK to enforce this and other announced measures “with vigour”.³⁸ On 9 April 1966, the UNSC, “gravely concerned at reports of substantial supplies of oil” apparently still reaching Southern Rhodesia through the Mozambican port of Beira, determined that “the resulting situation constitutes a threat to the peace”³⁹ and, arguably still acting under Article 41, called upon the UK “to prevent, by the use of force if necessary” the arrival of oil at Beira.⁴⁰ On 10 April 1966, the Tanker *Manuela* was boarded by an armed Royal Navy boarding party and redirected – after the authorisation to use further force was made clear – to another port. By June 1968, some twenty-eight ships had been stopped or ordered to heave to, and the French registered tanker *Artois* had received warning shots across her bows.⁴¹ The UNSC imposed further selective economic sanctions on Southern Rhodesia in Resolution 232 of 16 December 1966, again on the basis of Article 41, rendering these sanctions comprehensive in Resolution 253 of 29 May 1968. By July 1971, more than fifty tankers had been inspected.⁴² The Royal Navy maintained the ‘Beira Patrol’ until 1975.

33 UNSC Resolution 216, 12 November 1965 on *Southern Rhodesia*; preamble. See generally Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, Martinus Nijhoff Publishers, London, 1990.

34 UNSC Resolution 217, 20 November 1965 on *Southern Rhodesia*; paragraph 1.

35 UNSC Resolution 217 (1965) on *Southern Rhodesia*; paragraph 4.

36 UNSC Resolution 217 (1965) on *Southern Rhodesia*; paragraph 5.

37 UNSC Resolution 217 (1965) on *Southern Rhodesia*; paragraph 8.

38 UNSC Resolution 217 (1965) on *Southern Rhodesia*; paragraph 9.

39 UNSC Resolution 221, 9 April 1966 on *Southern Rhodesia*; paragraph 1.

40 UNSC Resolution 221 (1966) on *Southern Rhodesia*; paragraph 5.

41 Politakis, “UN-Mandated Naval Operations”; pp 202–203; See also O’Connell’s discussions of the Beira Patrol, particularly at O’Connell, *The Influence of Law Upon Seapower*, pp 174–175.

42 Frowein, “Articles 39–43”; pp 615–616.

The Beira Patrol was clearly an Article 41 authorised sanctions regime which, quite overtly, envisaged use of force in its enforcement – the phrase “by the use of force if necessary” is quite unmistakable and unequivocal.⁴³ It is not, however, the predominant precedent or authority for this practice – a title clearly held by Resolution 665 (1990) on the Iraq-Kuwait crisis. There are three possible reasons for this. First, the UNSC authorised only one state – the UK – to conduct the Beira Patrol, rather than the post-Resolution 665 practice of inviting all states in the abstract to participate in naval enforcement. Second, and “from a systematic point of view”, Politakis argues that “the Beira blockade was something of an anomaly in that it was established before any mandatory sanctions regime was decided upon”. This contrasts, he observes, with

...the pattern of action arising from the experience in Iraq, Yugoslavia and Haiti [which] makes clear that maritime enforcement action is resorted to only after mandatory economic sanctions under Article 41 have already been put in place.⁴⁴

With respect to this issue, however, it is arguable that Resolution 221, which authorised use of force, had instituted a limited sanctions regime by calling upon all states to “*desist* from providing it [Southern Rhodesia] with arms, equipment and military material...”,⁴⁵ if “*desist*” is interpreted as a directive and is thus mandatory in accordance with Chapter VII generally. Finally, as Soons notes, the phraseology of Resolution 221, with its possibly too direct and uncomfortable reference to “use of force”, has not been followed since. It is the more diplomatic and oblique phraseology of Resolution 665 – “measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council” – which has been repeated in all active interdiction operations since the Iraq-Kuwait crisis.⁴⁶

The Iraq-Kuwait Conflict

The UN interdiction operation provoked by the Iraq-Kuwait crisis forms the modern precedent for such operations. On 6 August 1990, soon after the Iraqi invasion of Kuwait, the UNSC passed Resolution 661 requiring all states to, inter alia, prevent the import of commodities originating in Iraq or Kuwait.⁴⁷ Unlike Resolution 221, however, Resolution 661 “did not provide by its terms for an enforcement mechanism”, an oversight which keenly concerned the United States and its NATO allies.⁴⁸ To overcome this shortfall, a request for assistance from Kuwait was furnished on 12 August 1990. This was required so that the interdiction operation could be justified

43 See, however, Frowein, “Articles 39-43”; pp 624-625. Frowein argues that UNSC Resolution 221, because it expressly authorised the use of force, should be viewed as founded in Article 42, but he notes that this is probably not the generally held opinion on this Resolution and its implementation.

44 Politakis, “UN-Mandated Naval Operations”; p 206.

45 UNSC Resolution 221 (1966) on *Southern Rhodesia*; paragraph 8.

46 Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 217.

47 UNSC Resolution 661, 6 August 1990 on *Iraq-Kuwait*; paragraph 3.

48 Dalton, “The Influence of Law on Seapower in Desert Shield/Desert Storm”; p 33.

as an act of Article 51 collective self-defence rather than a Resolution 661 measure,⁴⁹ and on 17 August 1990, the first Desert Shield interdictions took place when the Iraqi tankers *Al Fao*, and *Al Byaa* and *Al Abid* were intercepted in, respectively, the Red Sea and the Persian Gulf.⁵⁰ On 25 August 1990, the UNSC finally put this issue to rest by recalling Resolution 661's basis in Chapter VII and passing Resolution 665, which authorised the use of

...such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council [i.e. not under the authority of the separate Article 51 right of self-defence] to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990).⁵¹

Curiously, and arguably of political rather than legal importance, this authorisation was given to “those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area”.⁵² Dalton, for example, sees this as significant because it addressed a select and – at that date – finite group, and did not *require* other states to contribute.⁵³ At this point, however, three observations should be made. First, Dalton was writing in 1993 when post-Resolution 665 practice was still scarce. Since then the UNSC has called upon and requested contributions of forces from states, but remains unlikely to demand contributions. Second, post-Resolution 665 references to UN interdiction operations have referred to ‘states’ generally as the addressees of its authority and powers, and have not repeated the potentially limiting language of Resolution 665.⁵⁴ Third, Resolution 665 did arguably leave some latitude for further states to contribute to the multinational naval force by inviting member states to “co-operate as may be necessary to ensure compliance with the provisions of Resolution 661”,⁵⁵ and by “request[ing] all states to provide...such assistance as may be required by the states referred to in paragraph 1”.⁵⁶ It is thus arguable that states could still decide to contribute naval forces to the interdiction operation (and thus become a state referred to in Paragraph 1) post-Resolution 665. This was in fact the case with, for example, Russia, which contributed warships to the

49 See Dalton for a full discussion and description of the diplomatic and legal aspects of US concerns regarding the Article 51-Resolution 661 interface with respect to the Iraq-Kuwait crisis – Dalton, “The Influence of Law on Seapower in Desert Shield/Desert Storm”; p 34-44. Frowein discusses the Article 42-Article 51 interface in the Kuwait situation in terms of its being a political requirement, reflective of the United States’ desire to keep an Article 51 authority “in tact” as an alternative basis for military involvement in the Kuwait-Iraq conflict – Frowein, “Articles 39-43”; pp 634-635.

50 Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; pp 37-38.

51 UNSC Resolution 665, 25 August 1990, on *Iraq-Kuwait*; paragraph 1. See also Dalton, “The Influence of Law on Seapower in Desert Shield/Desert Storm”; pp 44-46.

52 UNSC Resolution 665 (1990), on *Iraq-Kuwait*, paragraph 1.

53 Dalton, “The Influence of Law on Seapower in Desert Shield/Desert Storm”; pp 44-45.

54 See also Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 216.

55 UNSC Resolution 665 (1990), on *Iraq-Kuwait*, paragraph 2.

56 UNSC Resolution 665 (1990), on *Iraq-Kuwait*, paragraph 3.

interdiction operation for the first time in October 1992.⁵⁷ Similarly, New Zealand first contributed warships to the interdiction force in 1994.⁵⁸ There is no implication on the face of Resolution 665 that the Paragraph 1 group of states became a closed grouping as at 25 August 1990, and this certainly was not true in practice. To argue otherwise would be to place an arbitrary and unwarranted restriction upon the UNSC's capacity to assess and accept whatever assistance and contributions it was offered in accordance with paragraphs 2-4 of the Resolution.

During the Iraq-Kuwait crisis, naval interdiction between the passing of Resolution 665 and the commencement of hostilities, and then from the end of hostilities on 3 March 1991 until mid-2003, was based in Resolution 665. At its height, the interdiction force comprised over 95 warships from 18 states, and prior to hostilities in 1991 several thousand vessels were challenged, several hundred boarded, and several warning shots – but no direct disabling shots – fired.⁵⁹ Between 1991 and 2003, thousands more vessels were challenged, several thousand boarded, and hundreds diverted. Resolution 665 is thus the fundamental conceptual precedent for modern UN naval interdiction operations. It is also significant in practical terms, for the Iraq-Kuwait crisis experience was the modern recapitulation of practice in such operations. This practice includes, as Soons records, a whole range of permissible actions

...necessary for effective enforcement of an embargo at sea: interception, and radio requests for information about destination and nature of cargo (which does not in itself affect flag State jurisdiction); boarding and inspection if necessary; and diversion or arrest, again if necessary. The use of force is also allowed as a last resort according to the “rules of engagement” that have usually been co-ordinated among the states participating in the interdiction activities (as the enforcement of an embargo is generally referred to). Usually there is first a warning that force may be used. If that is not heeded, warning shots may be fired, and finally disabling shots, if at all possible without risk to human lives.⁶⁰

57 See, for example, Pugh, “Appendix”; pp 261-262. The first Russian warships to be involved in the interdiction force were the *UDALOY* class destroyer ADMIRAL VINOGRADOV and a supporting tanker.

58 Interview with Brock Symmons, Royal New Zealand Navy, on board HMAS WOLLONGONG, 23 August 2001.

59 Politakis, “UN-Mandated Naval Operations”; p 178-179. By mid-November 1990, almost 150 warships were operating in and around the Gulf, and had intercepted 3,630 merchant vessels, boarding 417 and diverting 16 – Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 38. During the actual hostilities phase of the first Gulf War, coalition forces challenged over 7,500 vessels, boarded and inspected more than 950, and diverted approximately 50 vessels carrying over one million tons of illegal cargo – Astley and Schmitt, “The Law of the Sea and Naval Operations”; pp 144-146. This equated to an investigation rate of 30-40 merchant vessels and 5-10 consequent boardings daily – Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 38. In the two years following the war, the Resolutions 661 and 665 multinational naval force intercepted over 17,800 vessels, boarded approximately 7,400, and diverted 410 ships carrying contraband – Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 41.

60 Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 217-218. This cachet of powers reflects those traditionally available, as initial actions, to warships engaged in

It is this precedent – both in language and in practice – which has dominated and been repeated in UN naval interdiction operations since 1990.

The Former Republic of Yugoslavia: Complications and Extensions

On 14 September 1991, Croatian forces reacted to Federal Yugoslav Army (JNA) incursions into Croatian territory by laying siege to the JNA barracks in Zagreb and establishing a frontline against the Federal forces in eastern and southern Croatia. Belgrade then “ordered a sharp escalation of a war whose stated purpose, now, was the relief of the JNA garrisons, but whose over-riding war aim was to secure the territory on which to build a Serb state in Croatia”.⁶¹ Into this atmosphere of escalating conflict, the UNSC introduced Resolution 713 of 25 September 1991, taking note of and endorsing the ceasefires of 17 and 22 September 1991, and deciding under Chapter VII

...that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.⁶²

This limited Article 41 sanctions regime was supplemented – in Resolution 724 of 15 December 1991 – by the establishment of a Committee to, inter alia, “seek from all States” information on actions taken to implement the Resolution 713 embargo, to “make recommendations to the Council on ways of increasing the effectiveness of the embargo”, and to “recommend appropriate measures in response to violations of the embargo”.⁶³ By May 1992, a nascent UN peace operation was underway,⁶⁴ but the war had spread. On 30 May 1992, frustrated and dismayed by the seeming intractability and spiraling viciousness of the conflict, the UNSC reasserted both its concern and its impartiality by passing Resolution 757, in which it bluntly noted that “in the very complex context of events in the former Socialist Federal Republic of Yugoslavia

belligerent blockade or visit and search – see the *San Remo Manual*, Part IV, Section II (blockade), and Part V (visit and search). See also, for example, O’Connell, *The Influence of Law Upon Seapower*, p 171. This list of powers exercisable when engaged in UN, or belligerent, interdiction operations, or in other inspection and policing type operations – such as fisheries surveillance – is also incorporated into the operational manuals of many navies – see, for example, the scenarios posed in United Kingdom, *BR 3012 – Handbook on the Law of Maritime Operations*, Royal Navy, February 2003; para 7.15. See the *San Remo Manual*; paragraphs 118–124, regarding a belligerent’s right to visit and search enemy merchant vessels during hostilities; see also Roach, “The Law of Naval Warfare at the Turn of Two Centuries”; p 73.

61 Silber and Little, *Yugoslavia: Death of a Nation*; pp 172–175.

62 UNSC Resolution 713, 25 September 1991 on *The Situation in Yugoslavia*; paragraph 6.

63 UNSC Resolution 724, 15 December 1991 on *The Situation in Yugoslavia*; paragraph 5b.

64 See UNSC Resolution 749, 7 April 1992 on *The Situation in Yugoslavia*.

all parties bear some responsibility for the situation". Acting under Chapter VII, the UNSC decided that – amongst other measures – “all States shall prevent”

...the import into their territories of all commodities and products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro) exported therefrom after the date of the present resolution...⁶⁵

The Resolution also added further monitoring and decision-making powers to the bailiwick of the arms embargo monitoring committee established under Resolutions 713 (1991) and 727 (1992).⁶⁶

These arms and export embargoes were continually undermined, however, and the corruptibility of the trans-shipment exception was seen to be partially at fault. Cargoes with bills of lading for shipment through Serbia, but destined for other ports, often never emerged from Serbian territory⁶⁷ – perhaps as often by design as for other reasons. On 16 November 1992, the UNSC expanded the embargo with Resolution 787, acting under Chapter VII and deciding

...in order to ensure that commodities and products transhipped through the Federal Republic of Yugoslavia (Serbia and Montenegro) are not diverted in violation of Resolution 757 (1992), to prohibit the transshipment of crude oil, petroleum products, coal, energy-related equipment, iron, steel, other metals, chemicals, rubber, tyres, vehicles, aircraft and motors of all types unless such transshipment is specifically authorized on a case-by-case basis by the Committee established by resolution 724 (1991) under its no-objection procedure.⁶⁸

The UNSC then crossed the ‘Iraq-Kuwait line’, and in paragraph 12, acting under Chapters VII and VIII of the UN Charter

...call[ed] upon States, acting nationally or through regional agencies or arrangements, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destina-

65 UNSC Resolution 757, 30 May 1992 on *The Situation in the Former Republic of Yugoslavia*; paragraph 4a. The Resolution did, however, list a series of specific exceptions to this embargo with respect to trans-shipment through the Former Republic of Yugoslavia (paragraph 6), and humanitarian aid (paragraph 13f).

66 It is also notable that only ten days previously, on 20 May 1992, the UNSC had recommended to the General Assembly – in Resolution 755 – that Bosnia-Herzegovina be admitted as a new member of the UN, an act which could not fail to reverberate in Belgrade, and which crowned Bosnia’s international acceptance as an independent sovereign state.

67 Fielding, *Maritime Interception and UN Sanctions*; pp 187-188, 242. As Fielding notes, Resolution 787 “provided the next step in the ratcheting up of pressure on Serbia and Montenegro”.

68 UNSC Resolution 787 (1992) on *The Situation in the Former Republic of Yugoslavia*; paragraph 9.

tions and to ensure strict implementation of the provisions of resolutions 713 (1991) and 757 (1992).⁶⁹

The naval interdiction aspect of this UN peace operation now had teeth, and on 17 April 1993, in Resolution 820, the UNSC finally declared the embargo universal, deciding “to prohibit the transport of all commodities and products across the land borders or to or from the ports of the Federal Republic of Yugoslavia (Serbia and Montenegro)” subject to a limited list of exceptions including medical supplies, food, essential humanitarian supplies, and “strictly limited transshipments”, all as monitored and approved by the Committee.⁷⁰

Where Resolution 665 is undoubtedly the precedent for modern naval interdiction operations in support of UN peace operations, it is the FRY case that provides the most complex and provoking example of such operations. The major reason for this lies in the fact that this crisis clearly and overtly raised, in particular, the issue of UN interdiction operations in the Territorial Sea. In two unique, and apparently curious instances in Resolution 820, the UNSC shunned the comfort of accepted ambiguity and muddied the waters surrounding this issue.⁷¹ Whilst a few scholars have subsequently addressed the implications of the UNSC’s two direct references to the Territorial Sea in this Resolution, it is arguable that a comprehensive understanding of their significance has yet to be fully realised. Thus far, this book has argued both on a theoretical and a practical level for an integrative approach to legitimacy, and hence authority, in UN naval peace operations – an approach which does not characterise the LOSC Territorial Sea regime as a challenge to those operations. The question that must now be addressed is whether UN naval interdiction – a task often required in UN naval peace operations – is consistent with this approach, or an exception to it. To this end two further issues will be examined: The unique Resolution 820 references to the Territorial Sea; and the broader question of consent which these references evoke.

69 UNSC Resolution 787 (1992) on *The Situation in the Former Republic of Yugoslavia*; paragraph 12.

70 UNSC Resolution 820 (1993) on *The Former Republic of Yugoslavia*; paragraph 22a-c.

71 Subsequent to UNSC Res 820 (1993), the UNSC did of course make reference to the Territorial Sea in Resolutions regarding the Haitian crisis. These references were, however, specifically limited, and it is the wording of UNSC Res 820 which remains the most significant, and troubling, direct reference to the Territorial Sea in UN naval interdiction precedent. See, for example, UNSC Res 841 (1993), paragraph 6 - where the UNSC “decide[d] to prohibit any and all traffic [carrying prohibited cargo] from entering the territory or territorial sea of Haiti”; UNSC Res 875 (1993), paragraph 1, where the UNSC used the UNSC Res 665 (1990) phrase and crossed the ‘Iraq-Kuwait line’, but without reference to the Territorial Sea; UNSC Res 917 (1994), paragraph 9, where - after extending the embargo to importing Haitian products and commodities, and to the sale or supply of any products and commodities to Haiti (paragraphs 6a, 7 - subject to certain humanitarian and “informational materials” exceptions) - the UNSC “decide[d] to prohibit any and all traffic from entering or leaving the territory or territorial sea of Haiti carrying commodities or products the export of which from Haiti or the sale or supply of which to Haiti would be prohibited under paragraphs 6 and 7 above”. This regime is more limited than that which was authorised under UNSC Res 820 (1993).

References to the Territorial Sea

As with the Iraq-Kuwait conflict, the use of warning shots in the course of the FRY interdiction operations proved generally uncontroversial,⁷² and the range of powers available to UN naval interdiction forces was never really in question. On the face of it, the problems of scope provoked by the FRY context seem to be as to the *range of oceanspace* in which those powers could be exercised, rather than as to the powers themselves. LoNW based interdiction has traditionally been permissible on the High Seas and in the Territorial Sea of a belligerent,⁷³ and this approach was reinforced during the Iraq-Kuwait conflict, and in Iraq during military operations in 2003, where interdiction operations were conducted almost exclusively in international waters such as areas of EEZ and High Seas, and in the Territorial Seas of Iraq and Kuwait.⁷⁴ In Resolution 820 (1993), however, and on top of the wider embargo announced earlier, the UNSC declared that it

28. *Decides* to prohibit all commercial maritime traffic from entering *the territorial sea* of the Federal Republic of Yugoslavia (Serbia and Montenegro) except where authorized on a case-by-case basis by the Committee established by resolution 724 (1991) or in case of *force majeure*.⁷⁵

This is followed by a further paragraph in which the UNSC

29. *Reaffirms* the authority of States acting under paragraph 12 of resolution 787 (1992) to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to enforce the present resolution and its other relevant resolutions, *including in the territorial sea* of the Federal Republic of Yugoslavia (Serbia and Montenegro).⁷⁶

The inclusion of these two references to the Territorial Sea has been an important factor in leading several scholars to the conclusion that UN naval interdiction operations in the Territorial Sea fall under a different, more restrictive regime than other UN naval interdiction operations.⁷⁷ Following an analysis of paragraphs 28 and 29 of Resolution 820, Soons concludes that

It is clear that measures may in any case be taken in all sea areas not subject to the sovereignty of a coastal State, i.e. the areas beyond the territorial sea, including the

⁷² Soons, "A 'New' Exception to the Freedom of the High Seas"; p 218.

⁷³ *San Remo Manual*; paras 14-16.

⁷⁴ Dalton, "The Influence of Law on Seapower in Desert Shield/Desert Storm"; p 51.

⁷⁵ UNSC Resolution 820 (1993) on *The Former Republic of Yugoslavia*; paragraph 28

⁷⁶ UNSC Resolution 820 (1993) on *The Former Republic of Yugoslavia*; paragraph 29

⁷⁷ See generally Soons, "A 'New' Exception to the Freedom of the High Seas"; Fielding, *Maritime Interception and UN Sanctions*; pp 262-264; and Hampson, "Naval Peacekeeping". Politakis also raises this issue, but seemingly more in terms of explicit – v – implied authorisations, rather than in the wider terms of a permissible – v – not permissible paradigm. See, for example, Politakis, "UN-Mandated Naval Operations"; p 205.

EEZ of any coastal State, and the high seas proper. These are the areas where the freedom of navigation operates... From the practice of the Security Council it follows that they [UN naval forces] are not permitted in the territorial sea of the target State unless they have been *explicitly* authorized by the Security Council.⁷⁸

It is arguable, however, that these references to the Territorial Sea indicate significantly more. First, on a general level, the wider political context of Resolution 820 must be considered. Resolution 820 was passed on 17 April 1993, two days after the UNSC's declaration of a safe area around Srebrenica was proved impotent by the surrender of the city and its investiture by Serb forces on 15 April.⁷⁹ This event – a last straw for the UNSC – was reflected in the tone of Resolutions 819 and 820, overtly displaying the UNSC's frustration with Serb forces by explicitly expressing, particularly in the preambles, its deep concern with Bosnian Serb actions.⁸⁰ Given that the UNSC and its resolutions are first, foremost, and ultimately political in nature, that the Former Republic of Yugoslavia (Serbia and Montenegro) and its Bosnian Serb accomplices are the villains of Resolution 820 is clear, as are the UNSC's hints at a more partisan approach to the conflict.

Second, on the more finite level of actual initiatives, Resolution 820 should be understood in this wider context – that is, as a politically focussed and practical reflection of this finger pointing at the Serbs. Resolution 820 dispatched a quite explicit message to the Bosnian Serbs via their Belgrade sponsors – a message conveyed through both the language used in the Resolution itself, and in practical terms by the initiatives taken to *tighten* sanctions on Belgrade. But in order to tighten sanctions, thereby reducing the FRY's capacity to supply the Bosnian Serb forces, the UNSC had to further limit the opportunity for sanction evasion by commercial maritime traffic. In the densely and newly partitioned Territorial Seas of the Eastern Adriatic, a ship could claim (and with documents 'prove') that it was merely transiting the FRY Territorial Sea whilst ultimately bound elsewhere, and then divert quickly and relatively easily into a FRY port.⁸¹ By now placing *all* commercial shipping within the UN naval force's sights, by prohibiting all shipping from even *seeking to enter* the FRY Territorial Sea, the UNSC was implementing something inherently *different* and *beyond* a traditional sanctions interdiction operation, and thus had to explain – in paragraph 28 – what that measure was. The significance of Paragraph

78 Soons, "A 'New' Exception to the Freedom of the High Seas"; p 219.

79 Silber and Little, *Yugoslavia: Death of a Nation*; pp 269–271.

80 See also, for example, paragraph 3 of Resolution 820, expressing "its grave concern at the refusal so far of the Bosnian Serb party to accept" the interim peace plan, while "welcoming" its acceptance by "two of the Bosnian parties" – UNSC Resolution 820 (1993) on *The Former Republic of Yugoslavia*; paragraphs 2–3.

81 On the opportunities for sanction evasion, see (for example), the *Lido II* incident of 1 May 1994. *Lido II* – a tanker under Maltese flag, suddenly altered from her declared route and made way for the Serbia and Montenegro Territorial Sea. The Dutch warship HMNLS VAN KINSBERGEN, with the support of other multinational naval and air units, boarded the tanker, repaired an engine room leak (caused by sabotage, and which had been used as a pretext by the tanker to claim it was entering the Serbia and Montenegrin Territorial Sea to gain assistance to effect repairs), and diverted the tanker. See Royal Netherlands Navy, *Manual for Maritime Operations*; pp 54–5.

28 is that it prohibits all commercial shipping from exercising the right of innocent passage – and indeed any form of passage at all – through the FRY Territorial Sea regardless of whether it carried goods destined for the FRY or not, and regardless of whether it wished only to transit the FRY Territorial Sea or not. Or to put it perhaps more correctly, Paragraph 28 was making clear that the innocent passage regime applicable to that particular Territorial Sea at that specific time, had to be read referentially and in conformity with other applicable rules of international law – in this case, the UNSC’s undoubted international peace and security competence. Thus the UNSC’s explicit authorisation with respect to the Territorial Sea was not an extension of the *oceanspace* in which already assigned powers could be exercised. Rather, it was an extension of both the *group of vessels* deemed to be subject to those powers (that is, *all* commercial shipping, not only shipping carrying goods destined for the FRY), and also an extension of the *powers which the interdiction force could exercise* (that is, the power to implement a general prohibition on even entering the FRY Territorial Sea, whether engaged in innocent passage or not).

Reading paragraph 28 as a generally limiting provision thus seems to be at odds with its political and operational intent. Part of the reason for Soons’ conclusion that paragraph 28 should be read as implying a territorially limited focus (i.e. not normally including the Territorial Sea) rather than a territorially expansive focus (i.e. normally including the Territorial Sea) is because he believes that paragraph 29 (reaffirming the application of the Iraq-Kuwait phrase, including in the FRY Territorial Sea) should be seen in the light of the more narrowly focussed paragraph 28.⁸² It is arguable, however, that the opposite approach is equally valid, and that paragraph 28 – the narrower provision – should be read in the light of paragraph 29 – the more general provision. This leads to a different conclusion as to their combined effect. First, paragraph 29 is simply a restatement of a long-standing precedent first invoked – in the FRY situation – in paragraph 12 of Resolution 787 (1992), and adds nothing new to the oceanspace covered by Resolution 787. Rather, it simply “re-affirms” the interdiction force’s range of operations and adds the timely and important clarification that this includes – and by implication always has – action in the FRY Territorial Sea. Thus the reference to the Territorial Sea in paragraph 29 should not be seen as a ‘grant’ of further oceanspace in which to operate, but rather as a recapitulation of already existing powers with respect to the Territorial Sea – i.e. to conduct the previously mandated naval interdiction operation. Second, the explicit reference to the Territorial Sea in paragraph 28 should be read in the context of this wider paragraph 29 reaffirmation.

Thus what is significant about paragraph 28, as outlined above, is not that it authorises interdiction operations in the Territorial Sea, because such action was always authorised. Rather, as noted previously, what paragraph 28 does is explicitly authorise both *a new target of the interdiction operation* (ships intending to or engaged in transiting the FRY Territorial Sea, even if they have no intention of proceeding into a FRY port), and *a new power exercisable as part of the interdiction operation* (to impinge upon and suspend the right of commercial shipping to conduct any sort of passage, including innocent passage, through the FRY Territorial Sea). This differs from the powers conferred under Resolutions 713, 757, and 787 in one signifi-

82 See Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 219 note 48.

cant practical sense. Under the Resolution 787 process, commercial vessels in the FRY Territorial Sea could be challenged by radio, and if suspected of contravening the sanctions, boarded.⁸³ If the vessel was cleared, the interdiction force was then required to allow it to proceed. Under Resolution 820, however, the interdiction force had the power to force a commercial vessel to leave the FRY Territorial Sea, regardless of whether it was proceeding to a FRY port, and regardless of whether it was carrying prohibited cargo or not. In practice, the post-Resolution 820 amended RoE promulgated for the interdiction operation actually stopped short of fully applying this new power, and indicated that compliant commercial traffic on a genuine course for a nearby non-FRY port should generally be allowed to continue an expeditious transit through the Territorial Sea.⁸⁴ The central point, however, remains extant – that the language of Paragraph 28 does not refer to the Territorial Sea in terms of its being an independent concept within the paragraph, but rather as one aspect in *defining the extra powers that the UNSC is now conferring* – that is, powers to redirect, arrest, and ultimately fire upon *any* commercial shipping that seeks to enter the FRY Territorial Sea, even if merely to transit through that Territorial Sea towards another nation's ports. Resolution 820 thus grants an extension of *powers*, not of oceanspace in which those powers operate. And the reason that the UNSC did this explicitly is because this was something new and beyond both the normal practice of interdiction applying only to vessels departing from or bound for a port in the target state, or carrying banned goods destined for that state (evident in the Beira, Iraq-Kuwait, and until Resolution 820, the FRY situations), and also the standard or routine understanding of innocent passage as it would normally apply in that Territorial Sea.

Finally, on the more general level of the relationship between the Resolution 787 and 820 schemes, it is clearly arguable that there was no prohibition on the right of the UN naval interdiction force to enter and operate in all Territorial Seas of the former Socialist Federal Republic of Yugoslavia – including Serbia and Montenegro – prior to Resolution 820. The implications of the earlier scheme for the Territorial Sea are ambiguous, and despite the fact that the interdiction force did not pursue enforcement in the Serbian and Montenegrin Territorial Sea prior to April 1993, it is – at the minimum – “not clear by the language of paragraph 29 whether or not the Security Council considered states to be authorised to enforce in the territorial sea of the Federal Republic of Yugoslavia prior to Resolution 820”.⁸⁵ Indeed, as Politakis records, even pre-Resolution 820, the clarification needed by the interdiction force was “whether warships monitoring the maritime traffic in the Adriatic could freely enter, for the purposes of their mission, the territorial sea of Albania *as well as the*

83 The NATO/WEU/UN interdiction procedure was essentially the same as that employed during the Iraq-Kuwait interdiction operation. See for example, Fielding, *Maritime Interception and UN Sanctions*; pp 254–259. This process essentially involved a radio challenge and request for information, followed by a decision to either let the vessel proceed (if there was no reason to suspect an intent to breach the sanctions), or to divert or board (if the information gained from the challenge, along with any other available intelligence, founded a reasonable suspicion of intent to breach the sanctions).

84 Fielding, *Maritime Interception and UN Sanctions*; p 290.

85 Fielding, *Maritime Interception and UN Sanctions*; p 286.

territorial waters of the former Yugoslav Federal states⁸⁶ in which it was arguably already authorised to act.

Consent

The question of access to Albania's Territorial Sea (that is, a third state's Territorial Sea) points to the second contentious issue thrown up by UN naval interdiction operations carried out as part of the FRY peace operation – the question of consent. During the Iraq-Kuwait crisis, Dalton records, “the sensitivities of the region to foreign military presence made it *politically appropriate* to avoid offending or unnecessarily pressuring any potential ally”.⁸⁷ One result of this sensitivity was that

...coalition forces operated primarily in international waters. Territorial seas were used only with the knowledge and permission of the coastal states, or as otherwise allowed under international law.⁸⁸

The question, however, is whether consent to conduct UN naval interdiction operations in Territorial Seas (if they are subject to a regime different to that pertaining to other types of UN naval peace operations) is a *legal requirement* or simply an issue of *political concern*. Some scholars argue either that consent is a legal requirement *prima facie*, or is a legal requirement precisely because it is a political concern (thus perhaps indicating state practice).⁸⁹ Soons, for example, believes that “in the territorial sea of a third state, measures can be taken only with the explicit permission of the coastal State”.⁹⁰ This issue is vexed, and obviously has far-reaching implications for UN naval peace operations generally. On one hand, as then UN Secretary-General Boutros-Ghali declared in the *Supplement to An Agenda for Peace* (1995), “the consent of parties” is one of three “important principles of peacekeeping”.⁹¹ Kingsbury – not with specific reference to peacekeeping, but to international law and politics more generally – similarly argues that it is the concept of consent, rather than consensus, which has traditionally and should continue to underpin international law.⁹² Imposing obligations upon states that have not accepted them, particularly with respect to an issue as sensitive as the integrity of their Territorial Sea, risks substituting as the criterion of the “general international will” a well-defined and serviceable regime such as consent, with one that is as yet ill-defined and unsettled.⁹³

This consent-based approach – theoretically persuasive and politically sensitive as it may be – is not, however, always borne out in practice. As White points

86 Politakis, “UN-Mandated Naval Operations”; pp 182–185.

87 Dalton, “The Influence of Law on Seapower in Desert Shield/Desert Storm”; p 52 – my italics.

88 Dalton, “The Influence of Law on Seapower in Desert Shield/Desert Storm”; p 52.

89 See generally Hampson, “Naval Peacekeeping and the Law”.

90 Soons, “A ‘New’ Exception to the Freedom of the High Seas”; p 220.

91 Boutros-Ghali, *Supplement to an Agenda for Peace* (1995); paragraph 33. The other two principles are impartiality, and non-use of force.

92 Kingsbury, “Sovereignty and Inequality”; pp 609–610.

93 Kingsbury, “Sovereignty and Inequality”; p 623.

out, the requirement for consent in UN peace operations is neither a closed nor a decided issue.⁹⁴ Thakur, discussing the Somalia case, makes a similar observation on the unsettled nature of this debate when he observes how

In his *Agenda for Peace*, Boutros-Ghali defined peace-keeping as “the deployment of a United Nations presence in the field, *hitherto* with the consent of all the parties concerned. [This statement is from paragraph 20 of *An Agenda for Peace*, 1992]. By implication, then, he believed that future operations could be organized *without the consent of all the parties*.⁹⁵

In many UN peace operations, ‘consent’ could at best be described as “partial” or “sporadic”.⁹⁶ With respect to the UNPROFOR deployment, for example, ‘consent’ was a concept ill-suited to the vicious and fractious environment in the Former Yugoslavia – not only because it was not universally given, but because the Balkans operation was far removed from the traditional peacekeeping role of separating hostile forces that have agreed to a ceasefire. In a reflection of the wider ongoing debate over sovereignty and universality noted in chapter one, conceptual justifications of intervention in the face of non-consent have in recent years provided a strong challenge to the dominance of the consent-based approach.⁹⁷

94 White, “The UN Charter and Peacekeeping Forces: Constitutional Issues”; p 43.

95 Thakur, “From Peacekeeping to Peace-Enforcement: The UN Operation in Somalia”; p 394 – my italics.

96 Mats R. Berdal, “Military Aspects of UN Peacekeeping”, in Daniel Warner (ed), *New Dimensions of Peacekeeping*, Martinus Nijhoff Publishers, Dordrecht, 1995, pp 131–136 ; p 133.

97 See, for example, “Wars of Intervention: Why and When to Go In”, in *The Economist*, 6 January 2001; pp 17–19; Bruno Simma, “NATO, the UN, and the Use of Force: Legal Aspects” (1999) 10 *European Journal of International Law* 1 at 6–14. Simma characterises NATO’s actions in Kosovo as falling just on the wrong side of the distinction between legality and illegality in the use of force – “only a thin red line separates NATO’s action in Kosovo from international legality”. See also, Antonio Cassese, “Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Countermeasures in the World Community?” (1999) 10 *European Journal of International Law* 23; Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Second Edition), Transnational Publishers, New York, 1997; Fernando Teson, “Collective Humanitarian Intervention” (1996) 17 *Michigan Journal of International Law* 323; Nigel White and Robert Cryer, “Unilateral Enforcement of Resolution 687: A Threat to Far?” (1999) 29 *California Western International Law Journal* 243; Barry Benjamin, “Unilateral Humanitarian Intervention: Legalising the Use of Force to Prevent Human Rights Atrocities” (1992–1993) 16 *Fordham International Law Journal* 120. The Kosovo intervention provided a controversial and provocative backdrop for a wide scale recapitulation and progressive development of these differing views and approaches. See, in particular, several of the submissions to the House of Commons Foreign Affairs Committee Kosovo Inquiry (Fourth Report, June 2000), particularly Ian Brownlie and C.J. Apperley, “Kosovo Crisis Inquiry: International Law Aspects” (2000) 49 *International and Comparative Law Quarterly* 878 (NATO actions were clearly not legal); Christine Chinkin, “The Legality of NATO’s Action in the Former Yugoslavia (FRY) Under International Law” (2000) 49 *International and Comparative Law Quarterly* 910 (NATO actions not prima facie legal, and even the cumulative effect of arguments relating to UNSC knowledge and acquiescence, and the – admittedly controversial – doctrine of humanitarian intervention, whilst persuasive, still

Consent, it is thus arguable, might in many situations actually be a political preference rather than a legal requirement. Among the raft of arguments that can and have been put forward in support of this position, three are of particular importance when considering authority in UN naval peace operations. The first is a 'legal' argument; the second rests in actual practice; and the third is based in the imperative for conceptual coherence. First, although 'legal' argument is often employed to indicate the requirement for consent, three alternative arguments – an injunction against frustration *ab initio*, the general requirements of the UN Charter, and the addressal of UNSC resolutions – can equally be mobilised to indicate that, in Chapter VII contexts, consent is a political nicety rather than a legal necessity. First, as noted previously, the inherent powers of the UNSC to act to maintain international peace and security are generally construed generously.⁹⁸ Thus were consent a legal requirement, the act of any single directly concerned party affected by a prospective UN peace operation in withholding consent would fatally undermine the UNSC's almost universally accepted mandate to act to maintain or restore international peace and security. To assert the primacy of consent over the UNSC's ability to fulfil its mandate in support of international peace and security – the central, primary purpose of the UN system – is to flirt with unacceptable frustration of purpose by a single belligerent state or party.

Second, the UN Charter requires states to implement UNSC resolutions. Fielding, discussing the Resolution 665 request for "all states to provide *in accordance with the Charter*" such assistance as the interdiction force required, hypothesised that

Conceivably, *this request required all states to allow interception activities to take place within their territorial seas as needed...* [B]inding resolutions, specifically "those of the Security Council pursuant to Chapter VII of the United Nations Charter... have the effect of law for members of the organisation". The question of the use of the territorial sea of littoral States in the Persian Gulf by the MIF [Multinational Interception Force] pinpoints a juncture where rights given under the laws of neutrality [and indeed the LOSC] theoretically would disappear in circumstances in which the Security Council has undertaken measures involving use of force under Chapter VII of the UN Charter.⁹⁹

place the actions just on the wrong side of the thin line between legality and illegality); Christopher Greenwood, "International Law and the NATO Intervention in Kosovo" (2000) 49 *International and Comparative Law Quarterly* 926 (NATO actions were legitimate in accordance with an international legal right of humanitarian intervention); Vaughan Lowe, "International Legal Issues Arising in the Kosovo Crisis" (NATO actions not prima facie legally justified, but it is desirable that such a justification be allowed to emerge in customary international law). See also Dino Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia" (2000) 49 *International and Comparative Law Quarterly* 330.

98 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* (1971) ICJ Repts 16 at 52.

99 Fielding, *Maritime Interception and UN Sanctions*; p 100. The quote is from Fielding's 1991 interview with Michael Hinkley, United States Navy Judge Advocate General's Corps – my italics.

Third, UNSC Chapter VII resolutions are increasingly directed to “all States” and not merely to member states. Paragraph 11 of Resolution 757 (1992) on the Former Yugoslavia, for example, expressly confirms that references to “all States” being required to comply with the terms of the Resolution *includes* states not members of the UN. It is clearly arguable that the minimum position is that all states – whether members of the UN or not, whether a directly involved state or not – must comply with resolutions in which “all States” are the addressees.¹⁰⁰ This is the situation that pertained with respect to Resolution 820 and the Former Republic of Yugoslavia (Serbia and Montenegro), where the UNSC had previously and explicitly noted, in the preamble to the earlier Resolution 757, “that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted...”.¹⁰¹ This clearly cast doubt on whether the FRY (Serbia and Montenegro) was even a member of the UN, but the UNSC equally clearly asserted that the FRY was subject *compulsorily* – not on the basis of consent – to the UNSC’s actions and decisions. The situation is arguably similar for a third party state, which should also be understood as being subject compulsorily to the UNSC’s international peace and security jurisdiction. As a minimum, a third party state must not hinder UN peace operations forces in any way and should, in fact, act to positively assist UN forces in the implementation of the UNSC mandate. As Astley and Schmitt note

...a fair argument can be made that a nation cannot simply declare itself neutral and sit by on the sidelines during Chapter VII operations... Moreover, the world community would expect the “neutral” to preclude the aggressor from operating in or entering its territory [including its Territorial Sea], *but to allow UN-authorized forces to operate there*.¹⁰²

The second major argument in support of viewing consent as primarily a political issue is that it is coherent with actual practice in UN naval peace operations.

¹⁰⁰ Note, however, that some scholars see this requirement for non-members to comply as binding for different reasons. Frowein, for example, argues that non-member states are bound to a UNSC international peace and security resolution not by the fact of the UNSC’s “deciding” upon the Resolution, “but rather from the character of the underlying legal norm” which the Resolution in question supports – Frowein, “Articles 39-43”; p 627.

¹⁰¹ UNSC Resolution 757 (1992) on *The Former Republic of Yugoslavia*. For an analysis of the vexed judicial history as to whether Yugoslavia was or was not a member of the UN at the time, see Yehuda Z. Blum, “Was Yugoslavia a Member of the United Nations in the Years 1992-2000?” (2014 *American Journal of International Law* 800).

¹⁰² For their full argument, which is about declared neutrality in the context of UNSC mandated interdiction operations and UN Charter Articles 25 and 49, see, Astley and Schmitt, “The Law of the Sea and Naval Operations”; p 147 – “The dilemma vis-à-vis neutrality is that once the Security Council has acted, member States are obligated to ‘accept and carry out (its) decisions’ and ‘join in affording mutual assistance in carrying out the measures (it has) decided on’. Thus a fair argument can be made that a nation cannot simply declare itself neutral and sit by on the sidelines during Chapter VII operations”.

First, target states such as Iraq, the FRY, and Haiti have obviously not been asked their consent to be subject to UNSC Chapter VII naval interdiction operations. Second, initial consent on the part of 'beneficiaries' of UN peace operations, including interdiction operations – such as Kuwait or Somalia – has never been an authority stumbling block to action, either being assumed because it was not withheld (Kuwait), or because it was impossible to acquire due to the non-existence of a functioning government (Somalia), or because all states must comply with UNSC Chapter VII resolutions. Similarly, while Cambodia was under UN administration, the UNSC's assent was ultimately the only form of 'consent' required for the expansion of the mandate to cover patrolling and enforcement by riverine and coastal arms smuggling patrols. Finally, if operational consistency is valued, practice with respect to adjacent third party Territorial Seas – such as Albania's in the FRY situation, or Indonesia's Territorial Sea and Archipelagic Waters adjacent to East Timor (through which INTERFET asserted a UNSC resolution based right of overflight of Indonesian Archipelagic Waters between East Timor and the associated enclave of Oecussi) – should also view consent as a political preference rather than a legal requirement. The problem, however, is that this issue has never been adequately tested. During the Yugoslav crisis, NATO did ask for permission to conduct operations in the Albanian Territorial Sea.¹⁰³ It is important to remember, however, that Albania is one of the few states that have consistently asserted that the LOSC innocent passage regime allows it to require prior notification of any warship passage. Thus the decision to 'request permission' in this situation was arguably shaped by this rare anomaly in international interpretations of the LOSC, by the political and operational urgency of the situation, and by the need to avoid a lengthy preliminary debate with Albania over the interpretation of innocent passage generally. This paucity of detailed practice thus leaves us in the position of having to assess this problem on grounds other than actual experience. Two approaches offer a way forward. The first is to assess the issue in line with associated practice – i.e. practice with respect to other forms of UN naval peace operations in third party Territorial Seas. The second is to assess the issue against coherence with the wider theoretical underpinnings that inform the construction of authority in UN naval peace operations generally.

UN actions in East Timor, whilst not interdiction-focussed, did prompt consideration of the issue of UN naval peace operations in a third party Territorial Sea (and in this case, Archipelagic Waters) in a much more overt way than in most previous UN peace operations. UNSC Resolution 1264 of 15 September 1999 authorised an international force (INTERFET) to act, under Chapter VII

...to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations, and *authorizes* the States participating in the multinational force to take all necessary measures to fulfil this mandate.¹⁰⁴

103 Fielding, *Maritime Interception and UN Sanctions*, p 263.

104 UNSC Resolution 1264, 15 September 1999 on *East Timor*, paragraph 3.

Resolution 1264 is complicated, however, by the UNSC's specific incorporation of the Indonesian President's 12 September 1999 statement in which he "expressed the readiness of Indonesia to accept an international peacekeeping force through the United Nations in East Timor".¹⁰⁵ The Resolution further expressed an expectation of close coordination between Indonesia and INTERFET in the implementation of the mandate.¹⁰⁶ "This raised some discussion", notes Stephens, "as to the effect of the resolution in the event of non-acquiescence by ID [Indonesia] to INTERFET exercising its navigational rights...over the superadjacent waters and airspace".¹⁰⁷ Following UNSC Resolution 1272 of 25 October 1999, INTERFET communicated to the Indonesian government its intention to no longer seek diplomatic clearance for flights to the territorially separate Oecussi-Ambeno enclave,¹⁰⁸ access to which crossed through Indonesian Archipelagic Waters. Soon after, in early November 1999, Indonesia unilaterally declared the previously agreed and heavily used air corridor closed. This raised the prospect of Indonesian use of force against INTERFET aircraft in response to 'intervention' in Indonesian airspace. By the next morning, however, Indonesia had declared the corridor open again, but the incident prompted immediate consideration of the issues involved. The view of INTERFET legal staff, records Stephens, was

...that ID [Indonesian] "consent" was not necessary for the legitimacy of the Security Council Resolution and that the fulfilment of the mandate justified taking "all necessary measures" *which could include rights of overflight of ID archipelagic waters*.¹⁰⁹

A second example from the early stages of the East Timor UN peace operation similarly points towards consent being a political issue rather than a legal requirement. Resolution 1264 clearly reiterated the need to respect Indonesian territorial integrity, and also enshrined the curious hybrid 'interim' phase of East Timor's status during which Indonesia was still responsible for the maintenance of peace and security in East Timor. The UNSC underlined

...the Government of Indonesia's continuing responsibility under the Agreements of 5 May 1999, taking into account the mandate of the multinational force set out in paragraph 3 above, to maintain peace and security in East Timor in the interim phase between the conclusion of the popular consultation and the start of the imple-

105 UNSC Resolution 1264 (1999) on *East Timor*; preamble.

106 UNSC Resolution 1264 (1999) on *East Timor*; paragraph 4.

107 Dale Stephens, "INTERFET – Maritime Legal Issues", paper presented at a conference on *The Maritime Dimensions of East Timor*, 14 June 2000, Canberra, ACT, Australia; p 2.

108 Robin Warner, Interview, 18 June 2001

109 Dale Stephens, "INTERFET – Maritime Legal Issues"; p 2 – my italics. In this situation, Indonesia was the third party, and the waters concerned were Archipelagic Waters, which have a character very similar, although not identical, to that of a Territorial Sea. In discussion on this issue, one recollection was that several superiors took a good deal of convincing that the UNSC mandate was authoritative, but they eventually accepted this argument and re-opened the air corridor, declaring that the closure had thus been a 'misunderstanding'.

mentation of its results and to guarantee the security of the personnel and premises of UNAMET.¹¹⁰

Thus the territory of East Timor and the waters attached to it existed – for the initial part of the UN peace operation – in a limbo of half-undone Indonesian sovereignty, and half-created UN administrative authority. Yet, as Warner argues

Liberally interpreted, UNSCR 1264 provided INTERFET with the legal authority to *override any navigational restrictions which might previously have applied in East Timor's offshore areas* under the provisions of UNCLOS and exercise those navigational freedoms necessary to fulfil their mandate.¹¹¹

Thus in a situation of uncertain status as to waters, the presumption was that the UN mandate would overlay LOSC rights regardless of whether the waters remained in some way Indonesian, or had in some form reverted to international or UN waters held in trust for the state-in-waiting of East Timor. In practice, however, as Warner continues, “to *facilitate a stable operating environment* and conscious of the dynamic status of Indonesia’s sovereignty in the area”, an Exchange of Notes was conducted in order to more precisely set down the terms of access and reduce the likelihood of an ‘incident’.¹¹² Thus opinion on the naval aspects of the East Timor UN peace operation seems to tend towards viewing consent to operate in an adjacent third party Territorial Sea as politically desirable, but not legally mandatory.¹¹³

The third argument that can be mobilised in support of the view that UN naval interdiction operations can be conducted without consent in third party Territorial Seas is the more esoteric imperative of conceptual coherence. As this book has argued thus far, UN naval peace operations – such as logistics support, amphibious operations, and other demonstrations of force that might otherwise be initially thought to constitute non-innocent passage – can take place in and via third party Territorial Seas. Similarly, and in coherence with this general view, UN naval interdiction operations can and have taken place, as a minimum, in the Territorial Seas of involved states. These findings as to specific acts are in turn coherent with the conceptual approach of viewing UN naval interdiction operations authority and practice as an inherent, integral part of the integrative-referential framework within which UN naval peace operations-use of force-LOSC interaction in general must be understood. Thus on the basis of analogy and associated practice, and in the cause

¹¹⁰ UNSC Resolution 1264 (1999) on *East Timor*, paragraph 5.

¹¹¹ Robin Warner, “Navigational Rights off East Timor”, paper presented at a conference on *The Maritime Dimensions of East Timor*, 14 June 2000, Canberra, ACT, Australia; p 1 – my italics.

¹¹² Warner, “Navigational Rights off East Timor”; pp 2-3 – my italics. It is important to note this distinction: The Exchange of Notes should properly be characterised as a *confirmation* and more detailed elucidation of the access rights inherent in the UNSC Resolution, not as the genesis or instrument of conferral of these rights.

¹¹³ See also, for a wider discussion of the issue of East Timor’s prospective maritime boundaries, Victor Prescott, “The Question of East Timor’s Maritime Boundaries”, *IBRU Boundary and Security Bulletin*, Vol. 7, No. 4, Winter 1999-2000; pp 72-81.

of conceptual coherence with the framework underpinning other UN naval peace operations practice, such actions *should* be viewed as permissible.

Conclusion

UN naval interdiction operations are a standard feature of the modern international peace and security landscape. Yet an understanding of their conceptual authority basis remains far from thorough. The political implementation and operational conduct of UN naval interdiction operations during the Southern Rhodesia, Iraq-Kuwait, and Balkans crises do, however, at least indicate the path towards a more precise – but also politically acceptable – characterisation of interdiction as an aspect of the UNSC's authority to use force in Territorial Seas during peace operations. Further, this indication also offers some guidance as to how the thornier issues in interdiction – such as authority to operate in an adjacent third party Territorial Sea – might be resolved. Thus viewing the Article 40, 41, and 42 relationship as a use of force continuum – in which the capacity of UN naval peace operations forces to quickly and seamlessly escalate or de-escalate a situation is given full effect – sits comfortably with the operational requirements of interdiction, the political requirement for a degree of ambiguity, and with UNSC practice itself. Similarly, the right of UN naval interdiction forces – and indeed of UN naval peace operations forces generally – to operate in first and second party Territorial Seas meshes with the conceptual basis of UN naval peace operations, and seems borne out in UNSC practice. Thus although there are no definitive statements of policy or interpretation on the issue, the argument that there is authority for UN naval interdiction powers to be exercisable in third party Territorial Seas is well-founded. Such a finding would clearly be coherent with associated UN naval peace operations practice, with the fundamental conceptual basis that underpins the organisation and conduct of UN peace operations generally, and with the integrative tenor of the UN naval peace operations-use of force-LOSC relationship. The final two chapters, therefore, will step up incrementally to examine respectively the issue of authority for operations in Territorial Seas of ambiguous status and sovereignty, and then how authority for operations in third party Territorial Seas might, in general terms, be operationally managed and constrained.

Chapter 6

UN Transitional Administration and the Status of the Territorial Sea*

[A] disturbing new phenomenon is emerging: the failed nation-state, utterly incapable of sustaining itself as a member of the international community... As those states descend into violence and anarchy – imperilling their own citizens and threatening their neighbours through refugee flows, political instability, and random warfare – it is becoming clear that something must be done.¹

– Gerald Helman and Steven Ratner

Introduction

There is nothing new in the UN, more particularly the UNSC, undertaking tasks or establishing protocols for the conduct of ‘domestic’ functions in post-conflict areas. This form of temporary UN control and governance has been an element in several UN peace operations,² evidenced in acts of political governance ranging from “reconvening” the Congolese parliament,³ through “restoring law and order” in East Timor,⁴ to establishing and monitoring election systems in Namibia, the Western

* An earlier version of this chapter was first published as “East Timor, Transitional Administration and the Status of the Territorial Sea” (2003) 4:1 *Melbourne Journal of International Law* 323.

1 Gerald Helman and Steven Ratner, “Saving Failed States”, *Foreign Policy*, No. 89, Winter 1992-1993; pp 3-20; See also, Ayoob, “State Making, State Breaking, and State Failure”; pp 46-47.

2 For example the Congo, Irian Jaya, Namibia, Kurdish Iraq, Somalia, Cambodia, Bosnia-Herzegovina, Kosovo, and East Timor – with the milestones arguably being UNSC Res 745 (28 February 1991) on *Cambodia*, and UNSC Res 1272 (15 September 1999) on *East Timor*. See, for further discussion, Michael Matheson, “United Nations Governance of Postconflict Societies” (2001) 95:1 *American Journal of International Law* 76, where Matheson briefly describes the UN’s involvement in trusteeships concerning territories that had been administered, until 1939, under League of Nations’ mandates. See generally, Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, oxford, 2004; chs 1 and 2.

3 UNSC Res 161 (21 February 1961) on *The Congo*; para Br.

4 See, for example, UN Transitional Administration East Timor (UNTAET) Regulation 2000/11, dated 6 March 2000 *On the Organisation of Courts in East Timor* (UNTAET/REG/2000/7); UNTAET REG 2000/30, dated 25 September 2000 *On Transitional Rules of Criminal Procedure* (UNTAET/REG/2000/30); UNTAET REG 2001/22, dated 10 August 2001 *On the Establishment of the East Timor Police Service* (UNTAET/REG/2001/22); UNTAET REG 2001/23, dated 28 August 2001 *On the Establishment of a Prison Service in East Timor* (UNTAET/REG/2001/23); UNTAET REG 2001/24, dated

Sahara, Bosnia-Herzegovina, East Timor, and Cambodia.⁵ At other times it has been manifested in a territorial sense – such as the establishment of “no-fly zones” in Iraq,⁶ and the promulgation of “UN safe areas” during the Balkans conflict.⁷ The current “high water mark”⁸ of UN transitional administration is probably represented by the UN Transitional Administration in East Timor (UNTAET), and the UN Interim Administration Mission in Kosovo (UNMIK). These were missions in which the UNSC, through appointed Special Representatives of the Secretary-

5 September 2001 *On the Establishment of a Legal Aid Service in East Timor* (UNTAET/REG/2001/24).

- 5 See Crawford, *Democracy in International Law*; p 16; As *The Economist* noted of the Constitutional Assembly election run by the UN Transitional Administration in East Timor, “the aim has been to produce an election which the Timorese can later repeat, at a time when they will be entrusted to conduct their own affairs without the UN as their protector” – “East Timor’s Election: On the Road to Independence”, *The Economist*, 1 September 2001; p 25.
- 6 Members of the UNSC were careful at the time to indicate – as the UK did – that “[o]ur aim is to create places and conditions in which the refugees can feel secure. We are not talking of a territorial enclave, a separate Kurdistan or a permanent UN presence. We support the territorial integrity of Iraq. But we have to get the refugees off the mountains”: UK, *Parliamentary Debates*, House of Commons, 15 April 1991, Vol. 182, 21 (Douglas Hurd, Secretary of State for Foreign and Commonwealth Affairs). See also Greenwood, “Is There a Right of Humanitarian Intervention?”; p 36; Weller, “The US, Iraq and the Use of Force in a Unipolar World”; pp 81. As Weller indicates, the no-fly zone and the temporary deployment of UN forces in the Kurdish area of Northern Iraq was an early example of the UN establishing temporary and limited control over the territory of a state without consent (pp 94–95).
- 7 On the tragic ‘safe areas’ experiment, see, for example, Silber and Little, *Yugoslavia: Death of a Nation*; pp 265–275; Noel Malcolm, *Bosnia: A Short History*, New York University Press, New York, 1996; pp 264–265.
- 8 Matthias Ruffert, “The Administration of Kosovo and East Timor by the International Community” (2001) 50:3 *International and Comparative Law Quarterly* 613 at 616; see also Hansjorg Strohmeyer, “Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor” (2001) 95:1 *American Journal of International Law* 46; and Simon Chesterman, “East Timor in Transition: Self-determination, State-building and the United Nations” (2002) 9:1 *International Peacekeeping* 45. The origins of UN transitional administration lie in three comprehensively planned, but never executed UN ‘trusteeships’. The first, the Free City of Trieste, was planned in accordance with the *Treaty of Peace with Italy* (Signed 10 February 1947) 49 UNTS 3, particularly Article 4 (delineating the frontier between Italy and Trieste), Articles 21–22 (on the establishment of the Free City of Trieste), and Annexes VI–X, including Annex VI (The Permanent Statute of the Free Territory of Trieste) and Annex VII (Instrument for the Provisional Regime of the Free Territory of Trieste). The second was the planned, but again unexecuted, UN trusteeship over Libya. This proposed trusteeship was also in accordance with the Italian Peace Treaty of 1947 – *Treaty of Peace with Italy* (1947), Article 23, and Annex XI. The third was the planned UN trusteeship over the City of Jerusalem, pursuant to UNGA Resolution 181 of 29 November 1947 on the partitioning of Palestine. See United Nations General Assembly Resolution 181, 29 November 1947 *On the Future Government of Palestine*, and Doc A/364, “Report of the Special Committee on Palestine”, *Official Records of the Second Session of the General Assembly Supp. II, Vols. I–IV*. For a contemporary account of the political debates surrounding the formation and mandate of the Special Committee of Inquiry, see Jacob Robinson, *Palestine and the United Nations: Prelude to Solution*, Public Affairs Press, Washington D.C., 1947; pp 139–196, including – at p 184 – some of the “possible solutions” canvassed during the early stages of debate.

General (SRSG), exercised unprecedented power and authority over the people and territory under administration.⁹ One issue that has not been widely examined, however, is the practical effect of such mature transitional administration¹⁰ on the status

9 An example of this system in its infancy is the ONUC operation in the Congo. In the course of this operation UN forces secured the state, and UN civilian advisers “effectively ran significant areas of the administration damaged by the fighting and the Belgian departure” – Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*, paragraphs 146–149. Another example of this system in infancy is the transfer of sovereignty over West Irian/Irian Jaya from Dutch to Indonesian governance in 1962, when the Dutch transferred administration of the territory to a UN Temporary Executive Authority (UNTEA) “established by and under the jurisdiction of the Secretary-General” – See *Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian)*, (Signed 15 August 1962), 437 UNTS 273; particularly Article 1, in which the UNGA “acknowledges the role conferred upon the Secretary-General of the United Nations” under the Agreement, and “authorises him to carry out the tasks entrusted to him therein”. See also the further implementing agreements for UNTEA – for example, *Agreement between the United Nations and Indonesia and the Netherlands* 437 UNTS 294. The UNGA approved the delegation to the Secretary-General of the authority to conduct the transitional administration in UNGA Resolution 1752 of 21 September 1962, and UNTEA completed its transfer of administration to Indonesia in May 1963. As discussed previously, UNTEA was a UNGA, rather than a UNSC, peace operation.

10 The post-Cold War progressive development of the transitional administration system is well represented by the Dayton Peace Accords of 14 December 1995, under which a partial transitional administration – the High Representative and the UN Mission in Bosnia-Herzegovina (UNMIBH) – was established in Bosnia-Herzegovina in accordance with Annex 10 (Civilian Implementation) of the Accords: *Bosnia and Herzegovina – Croatia – Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina, with Annexes* (1996) 35 International Legal Materials 75. See also the UN account of the Bosnian peace process, (1995) 49 *United Nations Yearbook* 542–566. A second transitional administration was also established, as required by the Accords and under the authority of the UN, to arrange for the reintegration of the Serb held area of Eastern Slovenia back into Croatia – the complex and very successful UNTAES mission: See UNSC Resolution 1037 (1996). The *Exit Strategies Report* ascribes part of the UNTAES operation’s success to its having been “authorised and resourced in support of... a comprehensive peace treaty” – *Report of the Secretary-General on “No Exit Without Strategy”: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations*; paragraph 17. The by far most complex milestone in the progressive development of UN transitional administration in the immediate post-Cold War period is the UNTAC operation in Cambodia. During the UNTAC mission (as noted previously, a Chapter VI rather than a Chapter VII mission), the UN transitional administration exercised authority over issues as diverse as economic policy and market creation, political governance and institution building, and attempting to cull the existing administration of its corrupt, ineffective, and destructive people and practices – *Paris Conference on Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodian Conflict* (Signed 23 October 1991), (1992) 31 International Legal Materials 174; See also *Agreement Between the Supreme National Council of Cambodia and the United Nations on the Status of the United Nations Transitional Authority in Cambodia* (Signed 7 May 1992) 1673 UNTS 363; Richard Betts, “The Delusion of Impartial Intervention”, *Foreign Affairs*, Vol. 73, No. 6, November–December 1994; p 29. The UNTAC mandate, Betts records, was “a grand-scale takeover of much of the administrative authority in the country, and a program for establishing a new government through supervised elections and a constituent assembly”. A less auspicious example is the UNOSOM II operation in Somalia. See, in particular, UNSC Resolution 837, 6 June 1993 on *Somalia* – “the SG

of any waters attached to that territory – waters that would otherwise be characterised as ‘Territorial’ Sea.

The aim in this chapter is to outline several potential approaches to constructing authority when considering the status of the Territorial Sea of an entity under UN transitional administration. It will first briefly outline the context of transitional administration, and thus authority, in East Timor (the most significant recent example) by distinguishing it from that of the contemporaneous UN transitional administration in Kosovo. The analysis will then employ the East Timor example as a lens through which to examine three possible options for constructing authority as it relates to the Territorial Sea of UN administered entities. The first two of these options are the sovereignty-based possibilities of residual colonial sovereignty and immediate vestment in the state-in-waiting (the entity under transitional administration). The third is an alternative possibility (based in an integrative approach to legitimacy) of temporary UN control of the Territorial Sea-designate. The chapter will then conclude with a brief analysis of the status of the Territorial Seas of entities under some degree of UN transitional administration, but in non-self-determination contexts.

Background: The East Timor Context

Several core aspects of the East Timor context and the UNTAET peace operation can be conveniently illustrated by comparison with that of the contemporaneous UN peace operation in Kosovo. Although similar in execution, the UNTAET peace operation, in which UNSC-mandated power and authority in the entity was exercised until its full independence on 20 May 2002,¹¹ differs from that of Kosovo in three significant ways.

First, given Portugal’s poor colonial development record until it abdicated the territory in 1975, there was little in the way of recent indigenous experience or institutions of self governance in East Timor. Further, the subsequent twenty-five years of Indonesian occupation (1975-1999) saw East Timor essentially governed as a mili-

is authorised under resolution 814 (1993) to take all necessary measures against all those responsible for the public attacks...including those responsible for publicly inciting such attacks to establish the effective authority of UNOSOM throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment”. However, a UNSC mission to Somalia in October 1994 still anticipated failure, observing that “everything the mission saw left its members with a profound sense of unease and a fear that, whether or not UNOSOM leaves, political reconciliation or the emergence of a Government that enjoys widespread acceptance is far from certain. The risk of a return to civil war is real” - UN Doc S/1994/1245, *Report of the Security Council Mission to Somalia on 26 and 27 October 1994*, 3 November 1994; paragraph 44. The ‘mature’ UNTAET and UNMIK transitional administrations – whilst of similar provenance – should be distinguished from these earlier, less comprehensive UN transitional administration operations.

11 UNSC Resolution 1272, 15 September 1999 on *East Timor*, endowed the UN Transitional Administration with “overall responsibility for the administration of East Timor”, and tasked it to “exercise all legislative and executive authority, including the administration of justice”.

tary zone, again with heavily constrained local participation.¹² Kosovo, on the other hand, had recent local experience and memory of significant self-rule and autonomy within the Socialist Federal Republic of Yugoslavia, despite the fact that this autonomy was placed in abeyance during the decade 1989-1999.

Second, while it was a relatively sudden escalation in violence that sparked NATO – and subsequently UN – involvement in Kosovo,¹³ East Timor had been subject to twenty-five years of violence and resource stripping. Some estimates are that approximately 200,000-250,000 East Timorese (between one quarter and one third of the population) died in violence and famines during the 1975-1999 period.¹⁴ This was further compounded by the rampages occurring after the August 1999 East Timorese referendum recorded a 78 per cent vote for independence. During these rampages, integrationist militia and others inflicted further atrocities upon the populace, and destroyed most remaining infrastructure.¹⁵

Third, East Timor had long been “one of the unfinished items on the world’s post-colonial agenda”,¹⁶ recognised by the UN since 1960 as a non-self governing territory under Portuguese administration.¹⁷ During its short period of declared independence (from 28 November 1975, until the Indonesian invasion just over a week later, on 7 December 1975), fifteen states in fact recognised East Timor as independent.¹⁸ Then, during Indonesia’s annexation 1975-1999, the UN recognised Indonesia’s actions as secondary colonialism – that is, the imposition of a new colonial rule (Indonesia) after the end of a previous colonial rule (Portugal). Hence the

12 See generally, William Maley, “Australia and the East Timor Crisis: Some Critical Comments”, *Australian Journal of International Affairs*, Vol.54, No. 2, July 2000, pp 151-162; pp 151-152; Coral Bell, “East Timor, Canberra and Washington: A Case Study in Crisis Management”, *Australian Journal of International Affairs*, Vol.54, No. 2, July 2000, pp 171-176; p 172; Thomas Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, Praeger, London, 1999; pp 134-137.

13 Michael Byers, “Kosovo: An Illegal Intervention” (August 1999) *Counsel* 16 at 17.

14 “Terror in Timor”, *The Economist*, 1 May 1999; p 13; “East Timor Will Not Ask for US Apology over Indonesian Invasion”, *Agence France Presse* Report, 8 December 2001; Stephen Collinson, “US Approved Invasion of East Timor”, *The Age*, 8 December 2001; p 25; “Indonesia Takes East Timor Invasion Report in Stride”, *Reuters* Report, 7 December 2001. John Martinkus records that under Indonesian occupation, “of a population of 750,000, more than 250,000 had died. This was the highest per capita death toll of any conflict in the 20th century” – Martinkus, *A Dirty Little War*; p xv.

15 Shawcross, *Deliver Us From Evil*; pp 355-358; “Waiting for Wahid”, *The Economist*, 12 February 2000; p 73; “In Search of Truth and Justice”; p 74. In the UN sponsored ‘independence or autonomy’ ballot, the East Timorese people comprehensively rejected any further political association with Indonesia. Of the 98% of eligible voters who cast a ballot, 78% voted for independence, despite rampant intimidation and harassment – Martinkus, *A Dirty Little War*; p 332.

16 “Terror in Timor”, *The Economist*; p 13.

17 UNGA Resolution 1542(v) of 15 December 1960; *Charter of the United Nations* 1945, Article 73. See generally, Ruffert, “The Administration of Kosovo and East-Timor by the International Community”; p 621; Helen Quane, “The UN and the Evolving Right to Self-Determination” (1998) 47 *International and Comparative Law Quarterly* 537 at 539.

18 Angola, Albania, Benin, Cape Verde, Congo (Brazzaville), Cambodia, Guinea (Conakry), Guinea-Bissau, Laos, Mozambique, North Korea, Peoples Republic of China, Sao Tome and Principe, Tanzania, and Vietnam – Grant, *The Recognition of States*; p 146

UN asserted that this second colonial dominion did not eliminate East Timor's continuing right to self-determination.¹⁹ The majority ICJ opinion in *The East Timor Case (Portugal v Australia)* (1995) held that no rule of recognition or non-recognition regarding the status of East Timor existed at international law.²⁰ However, this decision did not detract from international acceptance of the former colony's right to a future exercise of its deferred right of self-determination.

These factors, and others, placed East Timor in a significant and distinctive position. Kosovo, on one hand, experienced (until recently) a rather ambiguous existence as a UN protectorate whilst also being an entity that was still formally recognised as part of the state of Yugoslavia (Serbia and Montenegro). Its current independent and sovereign status remains, to some degree, contentious and ambiguous. On the other hand, East Timor's post-colonial status was always recognised as entailing a right to independence if that was the choice of its people. This is important because of the generous scope of international assistance which former colonial entities striving for self-determination are entitled to receive.²¹ It also holds potentially significant

19 UNGA Resolution 2485(xxx) 12 December 1975; UNSC Resolution 384, 22 December 1975 on *East Timor*. The UNGA passed seven subsequent resolutions on East Timor (1976-1982) recognising "the inalienable right of its [East Timor's] people to self-determination" – UNGA Resolution 31/53 (1979) *Question of East Timor*; UNGA Res 32/34 (1977) *Question of East Timor*; UNGA Res 33/39 (1978) *Question of East Timor*; UNGA Res 34/40 (1979) *Question of East Timor*; UNGS Res 35/27 (1980) *Question of East Timor*; UNGA Res 36/50 (1981) *Question of East Timor*; UNGA Res 37/30 (1982) *Question of East Timor*. The UNSC, prior to 1999, had passed two resolutions calling for an end to Indonesia's occupation of East Timor – UNSC Res 384 (1975) and UNSC Res 389 (1976). Resolution 384, for example, "Deplor[ed] the intervention of the armed forces of Indonesia in East Timor"; "Regrett[ed] that the Government of Portugal did not discharge fully its responsibilities as administering power of the Territory under Chapter XI of the Charter"; and "Call[ed] upon all states to respect the territorial integrity of East Timor as well as the inalienable right of its people to self determination in accordance with General Assembly resolution 1514(XV)".

20 *East Timor Case: (Portugal v Australia)* (1995) ICJ Repts. 90.

21 UNGA Res 1514 (1960) *Declaration on the Granting of Independence to Colonial Countries and Peoples*; UNGA Res 2625 (1970) *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*. As Conforti notes, UN practice with respect to a post-colonial entity's right to self-determination has effectively "swept away" the limits on non-interference in a colonial power's "domestic" jurisdiction over such entities, creating a concept of very wide jurisdiction – albeit with a limited sphere of application. See Conforti, *The Law and Practice of the United Nations*; pp 246-251. Self-determination enjoys the status and protection of a right afforded directly in the *UN Charter* (Arts 19(2) and 55), in core international instruments (such as the *International Covenant on Civil and Political Rights* 1966), and as a building block of viable democracy (one of the fundamental tenets of the modern international system) – see Conforti, *The Law and Practice of the United Nations*; p 249; Crawford, *Democracy in International Law*; pp 6-7. However, as Helman and Ratner note, the inalienable nature of the right has often meant that "self-determination, in fact, was given more attention than long-term survivability" – Helman and Ratner, "Saving Failed States"; p 4. See generally, James Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?", in James Crawford (ed), *The Rights of Peoples*, Clarendon Press, Oxford, 1988; pp 55-63; James Crawford, "Some Conclusions", in James Crawford (ed), *The Rights of Peoples*, Clarendon Press, Oxford, 1988; pp 159-175; Quane, "The UN and the Evolving Right to Self-Determination"; pp 537-548.

implications for the UN naval peace operations-use of force-LOSC relationship, the status and legal character of the 'Territorial Sea' of a transitionally administered coastal entity (such as East Timor was, but Kosovo was not), and constructing authority for the conduct of UN naval peace operations within this Territorial Sea.

The Status of a 'Territorial Sea-Designate' During Transitional Administration

It is important to determine the character of East Timor's Territorial Sea whilst under UN transitional administration for two reasons. First, the LOSC Territorial Sea regime contains rights and responsibilities that are vested in the 'coastal state'. These *rights* include the enforcement of applicable domestic laws, powers of arrest, the right to recompense for access to its resources, and the right to compensation for environmental damage inflicted in the Territorial Sea.²² The *responsibilities* include the suppression of piracy (to the extent that it is projected out from, or finds sanctuary within, the Territorial Sea) and some other forms of criminal activity, search and rescue, hydrographic survey, maintenance of navigational safety aids, and taking action in cases of environmental catastrophes (such as the *Torrey Canyon* oil spill, where 'action' included sinking the offending vessel).²³ Even during transitional administration, someone must be vested with, or at least be the focus of, these rights and responsibilities.

Second, different possible schemes of 'ownership' of the Territorial Sea imply different limitations, freedoms, and duties – that is, different *authorities* – for UN naval peace operations forces. This chapter will examine three possible regimes of Territorial Sea 'ownership', using the East Timor situation as a case study. These regimes are: The sovereignty based possibilities of residual Indonesian sovereignty, or immediate East Timorese sovereignty; and the non-sovereignty based possibility of temporary UN 'control' of the Territorial Sea-designate. Each approach has significant implications for authority and freedom of action in UN naval peace operations.

Sovereignty – Residual Colonial Sovereignty

The first possibility is that the 'Territorial Sea-designate' of the state-in-waiting remains with the previous occupying power until the entity achieves full independence. This sovereignty could take the form of a 'sovereignty-minus' or 'residual sovereignty' regime where, in the case of East Timor, Indonesia would have retained nominal sovereignty over the Territorial Sea. Such sovereignty would be subject to the requirements of the UN peace operation, and would have remained only until

22 *Law of the Sea Convention* 1982, Articles 21-22, 25-27, 30, 220. For a discussion of the limitations on these rights see, for example, Oxman, "Human Rights and the United Nations Convention on the Law of the Sea"; pp 420-422; Oxman, "The Regime of Warships"; p 854.

23 See for example, *Law of the Sea Convention* 1982; Arts 24, 28, 198, 211, 221. For discussion, see Miles, "U.S. Security Interests in a Post-Cold War World"; p 390; Oxman, "Human Rights and the United Nations Convention on the Law of the Sea"; p 414; Oxman, "The Regime of Warships"; p 857.

East Timor achieved full independence. This solution is less than satisfactory on several counts.

First, as noted above, 'ownership' of a Territorial Sea implies certain responsibilities. An abdicating or disgruntled former colonial power is unlikely to be interested in fulfilling such duties in an area of oceanspace over which it is about to lose sovereignty and control.

Second, an irresponsible colonial power left with residual sovereignty over the Territorial Sea—designate of a former colony could, whilst ignoring its responsibilities, continue to strip resources from that Territorial Sea in a last gasp of exploitation prior to relinquishing ownership.

Third, residual colonial sovereignty over a former colony's Territorial Sea—designate would greatly complicate relations between the UN transitional administration and the former colonial power. It would create fractious and probably unworkable divisions of responsibility and allow scope for misunderstandings as to who is empowered to enforce laws and undertake certain actions in the Territorial Sea. Under such a scheme, the potential for 'incidents' between the UN naval force and the naval forces of the former colonial power would be enormous. Indeed, in the case of East Timor, the original intention was that the UNSC-sanctioned International Force in East Timor (INTERFET) would gradually assume responsibility for security from the Indonesian forces.²⁴ This led to several stand-offs between INTERFET and Indonesian forces, and left a zone of physical, political, and legal ambiguity in which other 'incidents' could occur. These included looting by some Indonesian forces, and an apparent unwillingness to halt militia violence. Ultimately, this arrangement proved so unworkable that the INTERFET force commander assumed responsibility for security at the first available opportunity. This allowed the commander to effectively implement the mandate, thereby making the Indonesian forces superfluous and able to be shipped out of East Timor as quickly as possible.²⁵

Fourth, such a regime would be at odds with operational practice in UN transitional administration. The current practice of basing UN transitional administration mandates in Chapter VII of the UN Charter entails, as Ruffert notes, "the suspension of all residuary powers of [in the cases of Kosovo and East Timor] both Yugoslavia and Indonesia during international administration".²⁶ On a *legislative* level, practice in East Timor and Kosovo indicated that the law applicable during the period of administration was an amalgam of pre-existing law, international law, and UN regulations. However, as this practice also clearly indicates, the force of any residual colonial law is not dependant in any way upon the sovereignty of the former colonial power. Rather, such law enjoyed force only because it was declared extant by the UN transitional administration. It remained valid only until amended, abolished, or found inconsistent. As UNTAET Regulation 1999/1 *On the Authority*

24 UNSC Res 1264 (1999) *East Timor*, para 5—"underlin[ing] the Government of Indonesia's continuing responsibility...to maintain peace and security in East Timor in the interim phase between the conclusion of the popular consultation and the start of the implementation of its result..."

25 See generally, Ryan, "*Primary Responsibilities and Primary Risks*": *Australian Defence Force Participation in the International Force East Timor*, pp 68-76.

26 Ruffert, "The Administration of Kosovo and East-Timor by the International Community"; p 620.

of the Transitional Administrator in East Timor made clear, residual Indonesian law applied in East Timor during the transitional period only because the Transitional Administrator had so declared. Further, it applied only insofar as it was in accordance with the Transitional Administrator's further regulations and directives.²⁷ Thus, residual sovereignty played no role in such interim authority schemes, and it is consistent that a similar regime would also apply over any associated Territorial Sea-designate. On an *operational* level, practice in East Timor (Kosovo not possessing a coastline) was for UN naval peace operations forces to operate in the Territorial Sea-designate to the exclusion of Indonesian (and indeed all other unauthorised) naval forces.

Finally, a regime of temporary residual sovereignty would generally be antithetical to the intent of UN transitional administration and, in the East Timor case, self-determination. Quite clearly, that intention was to assist the entity to express its own political, social and economic will, allow it to pursue its own chosen future, and equip it with the human, material, and institutional capacity to do so. To leave a former colonial power or occupier – avaricious, disgraced, or otherwise – with any form of temporary sovereignty over, or any residual rights in, the entity would be politically unacceptable to the vast majority of the entity's people, the UNSC, and the wider international community.

Sovereignty – The Territorial Sea Vests Immediately in the State-in-Waiting

The Territorial Sea attaching to the land territory of a former colonial entity will eventually vest in that entity in the form of sovereignty. This is uncontentious, and an immediate investiture in a state-in-waiting of sovereignty over its Territorial Sea-designate is thus an attractive possibility. However, it is also premature and problematic for several significant reasons.

First, a state-in-waiting is *not a state*, and although it will eventually enjoy all of the status, attributes, and access to sovereignty that is accorded to full statehood, the state-in-waiting does not enjoy these benefits under UN transitional administration. This was clear in the case of East Timor. Further, in contexts such as that of East Timor, it must be remembered that self-determination does not automatically translate into independence. Indeed, self-determination can result in association with, or outright incorporation into, another state.²⁸ These are choices which have significant and quite limiting implications, both for sovereignty generally, and for independent 'ownership' of a Territorial Sea in particular.

Second, a regime of immediate investiture of sovereignty over a Territorial Sea-designate requires that a precise moment of vesting be established. This is important because it determines when the colonial power loses the rights and responsibilities of the coastal state, and when the state-in-waiting gains them. Similarly, this moment of transfer of 'ownership' holds significant implications for the liability of a coastal state for breaches of its duties in the Territorial Sea. It is also significant in terms of entitlements to compensation, and other enforcement rights which flow to

27 UNTAET REG 1999/1 *On the Authority of the Transitional Administrator in East Timor*, section 3.

28 *Western Sabara (Advisory Opinion)* (1975) ICJ Reps. 12, para 57.

the coastal state as a result of breaches of the Territorial Sea regime by other states. However, there is no easily definable single point at which this transfer of ownership could take place. The moment of investiture would ultimately be situational rather than certain in international law. The possibilities include the date of the ballot endorsing the choice for independence, the date of declaration of full independence, or even the date from which effective control is established over the capital, or over the Territorial Sea itself.²⁹

Third, where a UN transitional administration is necessary to facilitate the progress of a former colonial entity towards independence, it is generally because the entity itself does not yet possess the institutions, capacity, or resources to realise this independence. In such situations, as was the case with East Timor, it is unlikely that the state-in-waiting would have the ability to enforce its authority, protect its rights, or fulfil its responsibilities vis-a-vis its Territorial Sea. Although the linkage between the *right* to govern and the *ability* to govern oceanspace is not necessarily strong in the LOSC, neither is it non-existent.³⁰

Finally, as with the prospect of residual colonial sovereignty (and hence authorisations for naval activity) in a Territorial Sea, the operational complications of having two differently authorised and differently empowered naval forces operating in the same Territorial Sea are vast. The presence of both an authorised UN naval force and a nascent but independent local naval force, operating independently but simultaneously in the Territorial Sea-designate, using different procedures, operating in accordance with different guidelines, and attempting to exercise jurisdiction over similar issues, is fraught with danger. Again, such a scheme promises the possibility of demarcation disputes, the probability of misunderstandings, and the potential for dangerous ‘incidents’. Indeed, this very issue arose in East Timor, where an indigenous Defence Force (Forças de Defesa de Timor Lorosae – FDTL) was raised and armed (including a maritime element), and commenced deploying to its future operational bases during the period of transitional administration. UNTAET approached the issue of the FDTL’s co-existence with the UNTAET peacekeeping force through a “Transitional Military Arrangement” backed up by localised co-ordinating procedures to cover activities on the ground. These localised procedures involved some degree of phased withdrawal of UN forces, timed to correlate with the FDTL’s move into each area.³¹ However, such ‘friendly on friendly’ operations involving forces sharing or passing through the same territory are very complex and problematic, requiring detailed co-ordinating arrangements, geographical canton-

29 East Timor declared a Territorial Sea to become effective on the day it became independent – 20 May 2002 – see Timor Leste National Parliament Law No. 7/2002 *Maritime Borders of the Territory of the Democratic Republic of Timor-Leste*, passed 23 July 2002 and taking effect from 20 May 2002; Arts 2 and 5. The Legislation was published in the UN Division for Ocean Affairs and the Law of the Sea (2003) *Law of the Sea Bulletin No. 50* at 35-38.

30 Oxman, “Human Rights and the United Nations Convention on the Law of the Sea”; p 402.

31 Gilmore, interview, 6 February 2002, Dili, East Timor.

ment, adjustments to RoE, and a very strictly defined command and control network.³²

*An Alternative Approach – Temporary UN ‘Control’
of the Territorial Sea-Designate*

The UN is not a state, and UN transitional administrations do not draw their authority from the concept of sovereignty. Rather, they draw it from the functional authority of the UNSC, as mediated through the relevant UNSC mandate, to maintain international peace and security. However, UN transitional administrations do act for and on behalf of the territories and peoples they administer. Therefore, an alternative to a sovereignty-based approach to Territorial Sea ‘ownership’ is to view the situation integratively as one of UN temporary ‘control’ over the Territorial Sea-designate. Several authority and operational arguments support this approach.

First, just as UN transitional administration ‘law’ applies as the interim domestic legal order throughout the territory of the entity, it is logical that any attached Territorial Sea should also come under the same integrative legal regime. Practice supports this argument on two levels. First, as was the case during the transitional administration in East Timor, it was UNTAET, under the delegated authority of the UNSC, which had the power to bind the future state to international treaties and to other international agreements (such as the *Timor Gap Treaty*³³) negotiated or acceded to on its behalf.³⁴ Second, as was indicated in *Certain Phosphate Lands in*

32 Gordon, interview, 2 February 2002, Dili, East Timor. Gilmore similarly notes that *geographical* separation of the forces, ensuring minimal contact, was aimed precisely at avoiding both the potential for incidents and problems, and thus also the need to plan comprehensively for their resolution – Gilmore, interview, 6 February 2002, Dili, East Timor. As both Gordon and Gilmore observe, the alternative solution – to divide responsibilities between the two forces by *issue* – was not only effectively unworkable, but would also require geographical cohabitation, thus creating an environment in which incidents and misunderstandings would almost inevitably occur.

33 *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989, entered into force 9 February 1991.

34 *Exchange of Notes Constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) Concerning the Continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989* entered into force 10 February 2000, with effect from 25 October 1999. On the Timor Gap negotiations between Australia and UNTAET, see Don Greenlees and Nigel Watson, “Touch and Go on Way to Timor Deal”, *The Weekend Australian*, 7 July 2001; p 6; Christopher J. Ward, “An Independent East Timor, the Timor Gap Treaty and International Law”, paper presented at *Australian Mining and Petroleum Law Association Twenty-Fourth Annual Conference*, Fremantle, Western Australia, 26–29 July 2000; David M. Ong, “The Legal Status of the Timor Gap Treaty Post-Referendum: Is Joint Development Mandated by International Law?”, 2000 (paper on file with author). On renegotiation of the Timor Gap Treaty between Australia and the newly independent state of East Timor see, for example, Nigel Wilson, “The Line Share”, *The Australian*, 20 April 2004; p 11.

Nauru (Nauru v Australia) (Preliminary Objections) (1992),³⁵ “the International Court seems to have accepted the principle of review of the acts of a trustee affecting the beneficiary prior to the independence of the territory concerned”.³⁶ Although this case dealt specifically with Australia’s UN-sanctioned trusteeship over Nauru, similar fiduciaries, such as the UNSC (while exercising UN transitional administration), should also clearly be liable for such harm. It thus seems widely accepted that the UN should be held liable for breaches of international law by its transitional administrations. This indicates that responsibility for acts that take place within the entity and its Territorial Sea-designate during transitional administration lies with the UN, not with the entity itself. And where responsibility lies, associated authority should also reside.

Second, the UN, although not a state, can and has possessed temporary authority over both land and sea territory. UN transitional administrations hold authority by virtue of the UNSC’s role as the guardian of international peace and security – particularly through the powers accorded the UNSC under Chapter VII of the UN Charter. These powers include any ‘measures’ that the UNSC believes necessary to stabilise a situation and restore international peace and security. These include temporary authority over territory, transitional administration, and the suspension of other ‘sovereign’ rights such as national self-defence (once the UNSC is seized of the issue). International organisations generally, and the UN particularly, are bound by the UN Charter, the wider principles it embodies, and the practice it supports.³⁷ This must include the law and practice of UN peace operations, the maintenance of international peace and security, and the responsibilities inherent in assisting entities to achieve post-colonial self-determination. With respect to the LOSC specifically, the UN itself and relevant UN agencies such as the IMO, all observe the LOSC in practice and aim to fulfil their requirements under it.³⁸ Finally, LOSC Article 305(1)(f) states that the “Convention shall be open for signature by...international organisations, in accordance with Annex IX”.³⁹ Article 4(3) of Annex IX elaborates upon this right, declaring that a signatory international organisation

35 *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* (1992) ICJ Reps. 240.

36 Crawford, *Democracy in International Law*, p 23.

37 *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations* (1969); Article 30(6) (not yet in force). For many scholars, this is a matter of custom, regardless of the *Vienna Convention* – Fassbender, “The United Nations Charter as Constitution”; p 609.

38 Anderson, “Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea”; pp 316–317. As Michael Kelly notes, it “is established that the UN has the capacity to enter into and be bound by international conventions, particularly in view of the Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations”. Further, Kelly continues, it “seems clear from the *Expenses* case that the UN has the capacity to engage in treaties that are in accordance with or authorised by the Charter of the Organisation” – Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*; paragraph 443; *Certain Expenses of the United Nations Case (Advisory Opinion)* (1962) ICJ Reps. 151.

39 *Law of the Sea Convention* 1982, Article 305(1)(f).

...shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States.⁴⁰

Thus, given that member states of the LOSC have transferred their competence for the maintenance of international peace and security to the UN, it is clearly arguable that the UNSC – as a body whose actions and involvement are integral to implementation of the LOSC – can temporarily inherit and exercise rights and responsibilities under the LOSC Territorial Sea regime through an authorised transitional administration. As noted previously, the UN has in fact exercised different forms of temporary authority over both land and sea territory in an integrative rather than a trumping fashion. This has been evident in the Northern Iraq no-fly zone and Kurdish humanitarian operation, the safe areas in the Balkans, and the five kilometre, UN-NATO monitored “ground safety zone” set up *inside Serbian territory* along the border with Kosovo.⁴¹ From a maritime perspective, this practice was most recently illustrated in the declaration of an UNTAET “Area of Operations” (AO) which included the waters around East Timor extending out to twelve nautical miles from East Timor’s baselines.⁴² UNTAET effectively treated the 12 nautical mile sea zone around East Timor as the Territorial Sea-designate of the East Timorese state-in-waiting.⁴³ Further, an effective (if not officially promulgated) regime of maritime zones around East Timor underpinned UNTAET’s capacity to negotiate with states on issues such as the oil and gas resources of the Timor Gap, which presumed an Exclusive Economic Zone-designate and Continental Shelf-designate.⁴⁴

In the context of East Timor, the third major argument supporting this approach is that it conforms with what is required under the international law of self-determination. First, as noted previously, an entity’s legitimate right to self-determination imposes a duty upon other actors – states and the UN – to assist that entity to achieve this self-determination. In turn, this imposed upon the UN transitional administration the duty to protect and promote the territorial integrity, resources, and future sustainable development of the state-in-waiting.⁴⁵ With respect to the Territorial Sea-designate, this duty can involve negotiating advantageous seabed resource treat-

40 *Law of the Sea Convention* 1982, Annex IX, Article 4(3).

41 “The Tension Rises Again”, *The Economist*, 2 December 2000; p 62. UN action has been known, on such occasions, to “lead to the establishment of a degree of internal autonomy within a State polity” to ensure minority rights and humanitarian assistance. See generally Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*; paragraph 127.

42 Letts, interview, Dili, East Timor, 17 February 2002. See also, Robin Warner, “Navigational Rights off East Timor”, in Donald Rothwell and Martin Tsamenyi (eds), *The Maritime Dimensions of Independent East Timor*, Centre for Maritime Policy, Wollongong, 2000; pp 143–158.

43 Letts, interview, Dili, East Timor, 17 February 2002. As Letts notes, however, the formal act of declaration of a Territorial Sea – an act of significant sovereign symbolism – was consciously left for the new government of East Timor to promulgate at independence on 20 May 2002.

44 *Law of the Sea Convention* 1982; Parts V and VI.

45 For example, UNTAET REG 2000/19 *On Protected Places*.

ties, patrolling and protecting the future state's fisheries, and guaranteeing its seaward security. However, this duty to assist could also extend to requiring the UN to undertake (or sub-contract out) Territorial Sea obligations such as maritime search and rescue, hydrographic surveying, and pollution response on behalf of the state-in-waiting during the transitional period.⁴⁶ Second, the LOSC itself is coloured by its context, in this case as reflected in Resolution III as adopted at UNCLOS III, which declared, *inter alia*

In the case of a territory whose people have not attained full independence or other self-governing status recognised by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under this Convention *shall be implemented* for the benefit of the people of the territory with a view to promoting their well-being and development.⁴⁷

Clearly, in the case of a UN transitional administration, it is the UN itself which is best placed both to fulfil this duty with respect to the Territorial Sea-designate, and to hold in trust any rights and benefits that will accrue to the entity on achieving full independence.

The fourth argument in favour of this scheme is that it is far easier to implement and maintain than schemes of residual sovereignty vested in the former colonial power, or interim quasi-sovereignty vested in the state-in-waiting. Initially, the point at which UN control and authority over the Territorial Sea-designate coalesces, and the former colonial power's sovereignty ends, is easily identifiable – it is the moment at which a UNSC resolution implementing a transitional administration comes into force.⁴⁸ In addition, having the UN exercise sole authority over the Territorial Sea-designate during the transitional period allows a UN naval force to operate clearly, effectively, and without external hindrance as the sole enforcer of laws, protector of rights, and implementer of responsibilities within the Territorial Sea. This frees the UN naval force to act without the complications of, and potential for, 'incidents' inherent in a regime of split sovereignty, or divided rights and responsibilities, over the same Territorial Sea.

Thus the most logical, practical, and beneficial approach to authority over the Territorial Sea-designate of a state-in-waiting under UN transitional administra-

⁴⁶ See, for example, Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*, pp 51-53. Under UNTAET, for example, Search and Rescue (SAR) responsibilities were vested in the International Civilian Police (CIVPOL) and the Peacekeeping Force (PKF) components of the transitional administration.

⁴⁷ *Final Act of the Third United Nations Conference on the Law of the Sea*, adopted 10 December 1982, Resolution III (A/Conf.62/SR.167-SR.182) – my italics. Resolution III, “[r]elating to territories whose people have not obtained either full independence or some other self-governing status recognised by the UN or territories under colonial domination”, was one of four resolutions adopted at the Eleventh Session (1982). These four resolutions form, with the LOSC 1982 itself, the ‘integral whole’ which was adopted at UNCLOS III on 30 April 1982 and then opened for signature on 10 December 1982. See also Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Volume I); pp 420-421, 433.

⁴⁸ Or, in the case of Somalia, it is the moment of implementation of other measures requiring or implying UN authority and control over the territory or Territorial Sea.

tion is therefore an integrative scheme of UN 'control' or 'administration'. Effective until the entity achieves full independence, this control differs from sovereignty in four important respects: Time; purpose; endstate; and character. First, the nature of this control is overtly and determinedly temporary. Second, the purpose of UN control is such that it cannot be used for the UN's own enrichment. This is because it is exercised on behalf of, and exists for the benefit of, the entity and its people rather than for the benefit of the controller. It is effectively a beneficiary-trustee relationship. Third, the UN transitional administration is informed by a required endstate in that it is exercised, as was the case in East Timor, with a view to transitioning the territory to self-governance, thus allowing the East Timorese people to exercise their own sovereignty. Finally, the UN is not a state, and thus is not accorded access to many of the international and domestic rights and freedoms inherent in the concept of sovereignty – such as exploitation of the territory's resources for its own gain.⁴⁹

However, while the purpose of UN control is not sovereign in character, within its particular milieu the *scope* of UN control is equally as powerful as that conferred by sovereignty over a Territorial Sea. Under the UN Charter, the LOSC, and a mandate for full or partial transitional administration, the UN possesses the authority to police, control, and manage the affairs of the entity. This includes referential access to the full suite of rights and responsibilities that attach to the Territorial Sea under both the LOSC and the interim domestic legal scheme. As Kingsbury notes, "sovereignty provides the means by which people can express...consent to the application of international legal norms and to international institutional competencies".⁵⁰ Thus while UN transitional 'control' of a Territorial Sea-designate can be neither exploitative and sovereign in purpose, nor indeed sovereign in name, it is nevertheless quasi-sovereign in scope. In terms of both intent to bind the UN transitional administration and the peoples of the entity to the international legal norms and processes that apply in Territorial Seas, UN control over a Territorial Sea is essentially sovereign in effect. This claim is further supported by the scope of issues over which its authority can be exercised.

For some, the non-'sovereign' nature of a UN transitional administration's control over a Territorial Sea (or over land territory) may be too legally ambiguous and uncertain to be satisfactory. With respect to physical territory, some might argue, if authority is not ultimately sourced from sovereignty, it cannot be controlling in nature. This argument is premised upon the rather dogmatic and trump-laced assertion that when it comes to physical territory, sovereignty must exist, and can reside only in states.⁵¹ However, this view ignores the long-standing grey area that exists

49 Letts, for example, described the legal character of UNTAET 'administration' as quasi-sovereign in effect, but with three significant caveats: It was administration *on behalf of* the people of East Timor; it was administration *with a view* to enabling East Timorese self-governance; and it was not properly and legally definable as 'sovereignty' because the UN *is not a state* – Letts, interview, Dili, East Timor, 17 February 2002.

50 Kingsbury, "Sovereignty and Inequality"; p 601.

51 Kelly notes of this "changing face of sovereignty": "There is no question that the concept of sovereignty is a constantly evolving one and that at present we are witnessing one of the more dynamic periods in this evolution" – Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*; paragraph 110, discussing J. Rosenau, "Sovereignty in a Turbulent World" in Gene Lyons and Michael Mastanduno (eds), *Beyond Westphalia?*

between these two extremes. First, the High Seas, the common heritage of mankind, Antarctica, and space – all definable in some form as ‘territory’ – can be utilised appropriately by all states, despite being owned by none.⁵² Second, the UN Trusteeship concept, enshrined in Chapter XII of the UN Charter, is premised upon the notion that there is in fact a middle ground of effective control over territory – one that is neither UN sovereignty, nor an imposition upon the legitimate sovereignty of another state. Third, as noted at the outset of this book, when dealing with oceanspace, ‘authority’ is generally the product of ‘power’ and ‘legitimation’, and sovereignty does not necessarily play the predominant role in defining legitimation at sea. Finally, the nature of the control exercised by a UN transitional administration can be distinguished from ‘occupation’ or ‘colonisation’⁵³ on three grounds: Means; aims; and actors. First, UN transitional administration is a facilitative process of capacity building towards self-government, whereas occupation and colonisation are fundamentally perpetrator-focussed, imposing rule in order to control territory, support access to resources, or to subjugate a populace or polity. Second, UN transitional administration is fundamentally conceived of as a temporary measure, its timeline terminating with the creation of a sustainable and self-administering entity, whereas colonisation (and to a lesser degree, in accordance with *Geneva Convention IV* 1949, occupation) can be of indeterminate duration, and aim to achieve some material or strategic benefit for the occupier. Third, UN transitional administration is undertaken by the UN in its persona as the international community’s representative of altruistic internationalism, whereas occupation or colonisation, whether by a single power or a condominium of powers, is generally undertaken in their own national interests.

As Politakis succinctly observes, “to identify a pattern of UN action which does not enjoy a clear legal basis in the Charter is not uncommon or unique”.⁵⁴ Indeed, UN peace operations best demonstrate this truism. Therefore, just as UN transitional administration is simply the current high water mark in the evolution of the UNSC’s roles and powers with respect to maintaining international peace and secu-

State Sovereignty and International Intervention, 1995; pp 191-2. Similarly, Michael Matheson asks, “does the exercise of [UN transitional] governance represent an impermissible interference with state sovereignty? I believe it does not. The exercise by the Security Council of functions under Chapter VII does not derogate from the sovereignty of any UN member affected by its decisions” – Matheson, “United Nations Governance of Postconflict Societies”; p 84.

52 *Law of the Sea Convention* 1982; Arts 88-99, 136-137 on the seabed as the common heritage of humanity; *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies*, 27 January 1967 (entered into force 10 October 1967), Art 2, and *Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, 18 December 1973 (entered into force 11 July 1984) on the moon as the common heritage of humanity; *Antarctic Treaty*, 1 December 1959 (entered into force 23 June 1961), art 4(2) which effectively ‘suspends’ territorial claims over Antarctica.

53 Some have argued that UN interventions such as those in Somalia and Cambodia were effectively tantamount to a new type of colonialism: See Charles Krauthammer, “The Immaculate Intervention”, *Time*, 26 July 1993; p 66; Thakur, “From Peacekeeping to Peace-Enforcement”; p 404.

54 Politakis, “UN-Mandated Naval Operations”; p 193.

rity, the fact of temporary UN control over a Territorial Sea is also an aspect of these roles and powers. UN integrative control over a Territorial Sea—designate, with a state-in-waiting as the beneficiary, should not be problematic simply because it is not definitively sovereign. It is not, after all, unusual that international law might be ‘constructively ambiguous’ on such politically sensitive issues.

UN Control of Territorial Seas in Non-Self Determination Contexts

It is arguable that describing UN temporary authority over a Territorial Sea as a form of fiduciary control, but attributing to it the full scope of powers, rights, and responsibilities – in essence, the authority – available to a coastal state, could equally operate in non-self determination situations. This chapter will conclude by briefly referring to two previously noted examples of such authority over a Territorial Sea in non-self determination situations: Somalia; and Cambodia.

Somalia – A Failed State

Somalia in 1992 was a state “whose government [had] effectively collapsed with no replacement to provide basic governmental services”.⁵⁵ As in Liberia and Sierra Leone, it was a territory in which weak state structures had unravelled and “violence had become an end in itself, profiting warlords and their factions”.⁵⁶ This anarchy, along with the humanitarian catastrophe of famine and refugee flows, threatened to spill across Somalia’s already porous borders, and to destabilise the region. This, and constant media coverage of the famine, finally prompted the UNSC to declare that the situation constituted a threat to international peace and security.⁵⁷ This was, in effect, the case in point that justified the initially curious wording of the UN General Assembly’s June 1992 resolution on humanitarian involvement, to the effect that humanitarian assistance “*should* [not ‘shall’] be provided with the consent of the affected *country* [not ‘state’ or ‘government’] and in principle on the basis of an appeal by the affected *country*”.⁵⁸ In Somalia, there was no government to give consent, but the situation clearly called for UNSC action. As Kingsbury notes, when the international community dispenses with a state’s sovereignty, it can de-legitimise that state.⁵⁹ But in Somalia, there was no ‘state’, nor even a widely recognised representative of the state, to de-legitimise. Thus UN action in Somalia was not an imposition

55 Diehl, “With the Best of Intentions: Lessons from UNOSOM I and II”; p 193.

56 Shawcross, *Deliver Us From Evil*, p 343; Richard Jackson, “The State and Internal Conflict”, *Australian Journal of International Affairs*, Vol. 55, No. 1, April 2001, pp 65–82; pp 68–74. See generally, Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*; paragraphs 165–166, and chapters 7–10.

57 UNSC Res 837 (1993) *Somalia*. The UNSC initially authorised intervention to facilitate the delivery of humanitarian aid within Somalia, but later expanded this mandate to include creating a stable and relatively safe environment for the distribution of aid, some basic governmental functions, and the apprehension of violators of the mandate.

58 UNGA Res 46/182 (1991) *Strengthening of the Coordination of Humanitarian Assistance of the United Nations* – my italics. See generally, Helman and Ratner, “Saving Failed States”; p 11.

59 Kingsbury, “Sovereignty and Inequality”; pp 620–621.

upon Somalia's sovereignty, nor was it aimed at creating the possibility of such sovereignty (as was the case in East Timor). Rather, UN action was an attempt to restore Somalia's sovereignty. As Helman and Ratner argue, "sovereignty is consistent with the idea of conservatorships [such as that of the UN in Somalia] because the purpose of conservatorship is to enable the state to *resume responsibility for itself*".⁶⁰ However, despite considered arguments voiced at the time that rebuilding Somalia would take five to ten years,⁶¹ the UN withdrew in 1995 and the "grafted political order" it had attempted to establish simply collapsed.⁶²

In the Somalia context, the UN did not usurp state sovereignty. Rather, it attempted to restore it in a territory deemed incapable of expressing this sovereignty. 'Somalia', as a single entity, was incapable of being held accountable for actions taking place within it, and indeed for those actions, perpetrated by its 'nationals', which were having significant effects outside its 'borders'. The limited UN administrative activity in Somalia took on some of the aspects of modern, mature UN transitional administration,⁶³ and also included significant use of the Somali Territorial Sea for UN naval peace operations activities such as logistics support and surveillance. In many ways, this situation was similar to that in East Timor because the possibility of the entity eventually (re)expressing its own sovereignty was perceived to rest upon international assistance in (re)creating the environment and capacity for that expression. Again, the UN effectively exercised functional authority and control over the Somali Territorial Sea – much more comprehensively, in fact, than it ever did over parts of the land territory of Somalia. Thus in the case of a collapsed or failed state (when that state has become incapable of expressing and being held accountable for its sovereignty), UN integrative authority over a Territorial Sea as a fiduciary trustee should be characterised as legitimate even in the absence of any formal request for, or consent to, assistance.

Cambodia – A Failing State

The "need to safeguard international peace and security" can prompt UN action "aimed, at least partly, at rescuing failing states through direct involvement in

60 Helman and Ratner, "Saving Failed States"; p 17 – my italics. Sovereignty is not only about what a state can do internally, but also about who is held responsible internationally.

61 For example, the then New Zealand Foreign Minister, Don McKinnon – see Robert Patman, "The UN Operation in Somalia", in Ramesh Thakur and Carlyle A. Thayer (eds), *A Crisis of Expectations: UN Peacekeeping in the 1990s*, Westview Press, Boulder, 1995; p 99.

62 Thakur, "From Peacekeeping to Peace-Enforcement: The UN Operation in Somalia"; p 403; Diehl, "With the Best of Intentions: Lessons from UNOSOM I and II"; p 153.

63 An example, controversially, was the declaration by the UN Secretary-General's Representative as to the criminal law to be enforced within Somalia. Lorenz summarises the scope of the UNOSOM II mandate as: "Providing humanitarian assistance; rehabilitating political institutions and the economy; promoting national reconciliation; completing the disarmament process; establishing a national police force; and reconstituting the courts and legal system" – Lorenz, "Forging Rules of Engagement: Lessons Learned in Operation United Shield"; p 17.

their internal affairs".⁶⁴ The focus of the UN Transitional Authority in Cambodia (UNTAC) mission was to restore peace, temporarily take over and reform civil administration, and supervise elections in a state that was failing, but had not yet entirely collapsed. In doing so, the UN also aimed to "eliminate a great source of regional tension in Southeast Asia".⁶⁵ Cambodia possessed a corrupt and barely functioning government, but was so racked by civil war and internal strife, and so territorially segmented, as to be on the verge of total disintegration.⁶⁶ The *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict* essentially entailed a temporary voluntary relinquishment of the state of Cambodia's control over its own internal and external affairs,⁶⁷ in the hope that UN administration could rescue the state and save it (and the region) from what would become Somalia's fate. In a corporate analogy, Cambodia placed itself into voluntary administration because it feared it was insolvent, losing control and effectiveness, and because it wanted (with a little encouragement from the international community) to save itself. The UN was called in as the administrator and, as with a corporate administrator, had full powers to manage the state, deal with its assets, and restructure its operations.

The sovereignty of the state of Cambodia, however, still existed, and was vested in the Supreme National Council of Cambodia (SNC) – a body created under the *Paris Peace Agreement* – which comprised representatives from the four main warring factions. Thus the institutional source or holder of Cambodia's sovereignty could be readily identified. Therefore, the context of the relationship between UN authority and state sovereignty in Cambodia differs from that in Somalia and East Timor. In Somalia, sovereignty had existed, but no current institutional holder could be easily identified, while in East Timor, sovereignty had yet to be fully created and adopted by an indigenous institutional holder. In Cambodia, the international community's integrative "acceptance of limitations on [the] absolute sovereignty" of another fellow state allowed the UN to respond effectively and with authority to rescue a failing state by assuming its governmental functions in order to implement a peace agreement.⁶⁸ Further, though sovereignty remained vested in the SNC, this body could not veto UN action and policy. The UN, whilst following unanimous directions from the SNC, was entitled to disregard the SNC's views if, *in the UN's opinion*, they were inconsistent with the peace agreement or its implementation.⁶⁹

In this context, UN authority and control over the Cambodian Territorial Sea was (again) effectively absolute, as was consistent with its delegated authority and responsibilities. However, in this situation, the nominal sovereignty over the Territorial Sea was easily located because it remained with the SNC. Functionally, however, the UN's authority and control was theoretically as wide and unhindered

64 Helman and Ratner, "Saving Failed States"; p 8.

65 Helman and Ratner, "Saving Failed States"; p 8; Shawcross, *Deliver Us From Evil*; chapter 3.

66 See, for example, Shawcross, *Deliver Us From Evil*; pp 22-23.

67 *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict* (the *Paris Peace Agreement*), 23 October 1991; Annex 1, section A.

68 Helman and Ratner, "Saving Failed States"; p 11.

69 *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict* (1991); Annex 1, Section A.

as that of UNTAET in East Timor. Thus, as has been argued, UN authority over a Territorial Sea does not rely on 'sovereignty' for its force and scope – just as the UN naval peace operations-use of force-LOSC relationship does not rely on sovereignty as its common basis. Further, even where sovereignty does exist, regardless of whether it can be 'located' or not, UN authority can still integratively overlay this sovereignty, acting as a referential incorporation of the UNSC's international peace and security authorities into the LOSC Territorial Sea regime. Therefore, given the international community's emerging views regarding the irrelevance (for authority) of a belligerent's 'consent' to an action under Chapter VII to halt that belligerent's illegal conduct, it is also clearly arguable that if Kosovo did have a coastline, the UN transitional administration's authority and control over any Kosovar Territorial Sea would have been as wide and total – and to the exclusion of Yugoslav naval forces – as that which applied in East Timor, regardless of the sovereignty which Serbia and Montenegro at that time still nominally held over the territory of Kosovo.

Conclusion

From its origins in plans for the international administration of Trieste, Libya, and Jerusalem, through to the mature transitional administrations of Kosovo and East Timor, the territorial and effectively domestic authority exercised under UN transitional administrations has expanded the traditional notion of international peace and security. Thus, it seems only consistent that the theory and practice of UN transitional administration should also have similar implications for the UN naval peace operations-use of force-LOSC relationship, and for UN authority at sea – especially in the Territorial Sea-designate of a state-in-waiting such as East Timor prior to 20 May 2002, and indeed even in disintegrated or disintegrating states which are placed temporarily under UN administration. In such situations, UN naval peace operations forces can and have operated as the holders of the only recognised authority in what are effectively, albeit temporarily, UN waters. These precedents clearly and overtly accommodate practices not even contemplated in the LOSC Territorial Sea regime, offering further compelling evidence for, and an assertion of, an integrative approach to UN naval peace operations-use of force-LOSC interaction. Furthermore, as a high water mark, UN transitional administration holds significant, almost quasi-sovereign, implications for authority in UN naval peace operations, and – as with the interdiction operations discussed in the previous chapter – hints at implications for UN naval peace operations in third state Territorial Seas. With this in mind, the final chapter will now squarely confront the issue of UN Chapter VII naval peace operations in third state Territorial Seas by proposing a regulatory regime for their governance.

Chapter 7

Regulating Authority for UN Naval Peace Operations in Third Party Territorial Seas

War ought not to be undertaken except for the enforcement of rights.

– Hugo Grotius, *De Jure Belli Ac Pacis*,
prolegomena, paragraph 25

Introduction

Chapter one of this book opened by posing a hypothetical question: What could a UN naval peace operations force warship do if it came upon a vessel in the Territorial Seas of a third state, on board which the nationals or military personnel of the third state were executing or allowing the execution of nationals from the ‘focus’ state (that is, the state which the mandate directly concerns and in relation to which it authorises a UN peace operation). This question was indicative of the broader issue of how operations required for the effective implementation of a UNSC mandate should be justified when they occur in the Territorial Sea of non-directly involved states (‘third states’). Previous chapters have laid the basis of a general authority to act and if necessary use force in Territorial Seas generally. First, as argued in chapter four, UN naval peace operations are *by definition* not prejudicial to the peace, good order and security of the coastal state concerned. Second, as argued in chapters five and six, two broad types of activities carried out in UN naval peace operations – sanctions enforcement, and naval support of transitional administrations – necessitate a general *presumption* of the authority to operate in any Territorial Sea as circumstances legitimately demand. Additionally, each of the last three chapters has addressed the implementation of UN naval peace operations in terms of an authority which, when examined closely, is tailored to deal not only with the Territorial Seas of directly involved states and the Territorial Sea-designate of entities under transitional administration, but also arguably the Territorial Seas of third states.

With regard to activities in the Territorial Sea of a third state, whilst there is no theoretical impediment to the conduct of UN naval peace operations, there is little operational precedent or doctrine currently providing guidance when engaging with this ultimate, and ultimately very blunt, question. Indeed, only one of the major Operations Law Handbooks appears to address the issue, although it does not directly refer to third state Territorial Seas. The Australian Naval *Manual of International Law* declares that

As a matter of proper construction of the Charter, UNSC resolutions may override pre-existing treaty or customary law where there is an inconsistency and where such

measures are necessary for the maintenance or restoration of international peace and security. Examples of such measures include the imposition of sanctions for the failure of a state to deliver up suspected terrorists *or the authority to engage in non innocent passage in foreign territorial seas* in order to intercept vessels in violation of specific resolutions prohibiting import or export of materials.¹

By contrast, the German *Humanitarian Law in Armed Conflicts Manual* recognises only that “particular rules that vary from the traditional law of neutrality apply to sanctions of the United Nations”, but does not examine the consequences of this assertion, and does not discuss other forms of UN naval peace operations.² British naval doctrine similarly avoids the specific issue of UN naval peace operations in third party Territorial Seas, noting only that “the current debate over the legitimacy or otherwise of humanitarian intervention is one example of an issue bound up with differing perceptions of the limits of sovereignty”.³ British joint operational doctrine is similarly silent on the issue, endorsing the majority of the *San Remo Manual* with respect to the LoNW, but not drawing any connection with UN naval peace operations and the Territorial Sea.⁴ US, French, Japanese, Dutch, and Canadian doctrine also appears silent on the issue of UN naval operations in third state Territorial Seas.⁵ None of this means, however, that it is not an issue of practical significance, nor that it has rarely arisen as a practical problem. Rather, contributing states have often preferred to avoid the issue, weighted as it is with the potential for operational complications, rather than to confront it in order to develop a set of guiding principles. This said,

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- 1 *ABR 5179 Royal Australian Navy Manual of International Law*, Royal Australian Navy, Defence Publishing Service, 1997; para 7.25 – my italics.
 - 2 *Humanitarian Law in Armed Conflicts Manual*, Federal Ministry of Defence, Federal Republic of Germany, VR II 3 August 1992 (DSK VV207320067); para 1103. The *Manual* does address zones of operations during armed conflict at sea, but only to the degree of reflecting the provisions of the *San Remo Manual* – see paras 1010–1013. Part III Section 1 of the German Navy’s *Commander’s Handbook: Legal Bases for the Operations of Naval Forces* (2002) concerns UN operations, but does not specifically refer to the issue of third state Territorial Seas, except to note that when undertaking UN peacemaking measures, “[T]here is no room for applying the law of neutrality” – marginal 445.
 - 3 *BR 3012 – Handbook on the Law of Maritime Operations*, Royal Navy, February 2003; p 138. Indeed, in relation to UN sanctions enforcement, *BR 3012* does not directly discuss the issue of the Territorial Sea as a zone of operations.
 - 4 *Joint Services Manual on the Law of Armed Conflict (JSP383/JSM3.4)*, Ministry of Defence, United Kingdom, June 2004; para 13.7.
 - 5 See, for example, the US Navy’s *Annotated Commander’s Handbook on the Law of Naval Operations*; para 2.3.2.4 (asserting the right of warship innocent passage, but without comment upon the implications of UN authority), and para 7.2.1 (on the impact of UNSC sanctions regimes upon the traditional law of neutrality, but without comment upon the consequences for third state Territorial Seas). See also, *US Army Operational Law Handbook*, United States Army, 2004; pp 422–423 (on the legal authority for UN peace operations, but with no comment upon the effect of this authority for the status of territory). Canadian guidance is encapsulated in *The Law of Armed Conflict at the Operational and Tactical Level – Annotated*, Canadian Forces Judge Advocate General, September 2001 (B-GG-005-027/AF-021); pp 8-2 – 8-4, paras 12–15 (where the right of passage through neutral waters is discussed in terms reflective of the *San Remo Manual*, but with no mention of UN naval peace operations or their implications for the Territorial Sea).

however, in almost all instances where the author has consulted other military legal advisors on this issue, these practitioners have indicated that if asked the specific question, they would ultimately advise in favour of the right to operate in third state Territorial Seas during UN naval peace operations. Heintschel von Heinegg and Mandsager – two of the academic fraternity’s relatively few LoNW experts – argue that notice of a requirement to carry out some act in a third state Territorial Sea should first be given. Ultimately, however, they also conclude that if the coastal state is unable or unwilling to respond to the prohibited conduct in accordance with its obligation to support the implementation of a UNSC resolution, then UN naval peace operations forces should be viewed as authorised to do so.⁶ Stephens and others see less need for notification to the coastal state (although recognising that communication with the coastal state regarding intentions is politically and operationally tactful if time permits), agreeing that UN naval peace operations forces should be viewed as possessed of the authority to conduct sanctioned operations in third state Territorial Seas without either permission or prior notification.⁷ The notable exception – Japan – is explicable in terms of domestic legal limitations,⁸ not

6 Interview with Professor Wolff Heintschel von Heinegg and Professor Dennis Mandsager, conducted at the US Naval War College, Newport, Rhode Island, Friday 25 June 2004.

7 Interview with Commander Dale Stephens, RAN, International Law Department, US Naval War College, Newport, Rhode Island, Friday 25 June 2004.

8 *Constitution of Japan* 1946, Chapter II (entitled “Renunciation of War”), the sole article of which (Article 9) declares that: “1. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. 2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized” – *Constitution of Japan* 1946, (signed into force 3 November 1946); Art 9. See also, Japan Defence Agency, *Defence of Japan* 2002, (English Summary) www.jda.go.jp/e/index_.htm, ch II, section 1, which outlines how the “basic concept of Japan’s defence policy” is governed by this constitutional limitation – “The Constitution does not deny the inherent right of self-defence that Japan is entitled to maintain as a sovereign state, and it allows Japan to possess the minimum level of armed strength to defend that right. The exercise of the right of self-defence is restricted to [certain territorially focussed instances]. In addition, the Government believes that the exercise of the right of collective self-defence is not permissible under the Constitution”. The Japan Supreme Court, whilst admitting the state’s inherent right of self-defence in the *Suragarwa Case* (1959), has not ruled on the constitutionality of the JSDF, although a subordinate court – the District Court at Sapporo, held in 1973 that the JSDF was unconstitutional as a breach of Art 9 – Hiroyuki Hata and Go Nakagawa, *Constitutional Law of Japan*, Kluwer Law International, The Hague, 1997; pp 21–23. For an example of how the Japanese Diet legitimates off-shore operations, see *Law Concerning Cooperation for United Nations Peacekeeping Operations and Other Operations* (1992); sections 2(2) prohibiting “the peace-keeping activities of the JSDF becoming either a threat to use or the actual use of force”, and section 24, limiting the use of weapons by individual JSDF members “strictly to self-defence only” – see Hiroyuki and Nakagawa, *Constitutional Law of Japan*; pp 179–181. See also the Japanese Government information publication, “The International Peace Cooperation Law and Japan’s Participation in International Humanitarian Relief Operations”, which lists the seven types of activities the JSDF may be tasked to undertake in peace operations – medical, SAR, distribution of humanitarian assistance, installation of accommodation facilities, repair and maintenance of services, restoration of

in terms of a necessarily conceptually different appreciation of the issue.⁹

A second significant factor in assessing the concept of authority in relation to specific activities in third state Territorial Seas is that practice to date has relied upon negotiation rather than principle. Sanctions enforcement in the North Arabian Gulf often required access to the Kuwaiti Territorial Sea, and UN naval peace operations in East Timor required passage through and overflight of Indonesian waters, but in each case implementation was formalised by way of Exchanges of Notes or Memorandums of Understanding.¹⁰ This tendency carries three significant dangers. First, it will increasingly undermine the notion that it is the UN rather than the host or focus state that is the authority behind an operation. Second, it would lead to such complexity in managing certain situations and balancing only tangentially affected interests, that it could preclude the achievement of primary operational aims. Third, this approach could lead to a fragmentation of practice rendering general principles elusive. Accordingly, such solutions – although diplomatically seductive – increase the prospective difficulties of operating in circumstances where the agreement of a host or focus state is not readily available or is withdrawn. As such, relying on this position abdicates responsibility for developing the set of strong and reliable norms required, and at the same time undermines the resilience of the UN – even as an authority of last resort.

the natural environment, and equipment logistics support - at the Japan Government website www.pko.go.jp/PKO_E/jh_e.html. This categorical imperative has recently been further altered, allowing sharper JSDF responses to certain situations short of territorial self-defence, through the *Law Concerning Measures to Ensure the Peace and Security of Japan in Situations in Areas Surrounding Japan* (1999) – which was put to use by the Japan Coast Guard in December 2001, when they pursued, engaged in a gun battle with, and subsequently sank, a North Korean spy vessel – and the *Anti-Terrorism Special Measures Law* (2001), which gave legislative approval for the Japan Maritime Self Defence Force (JMSDF) to be deployed to support anti-terrorist operations in the High Seas, EEZ of foreign states, and with consent, the territory of foreign states. However, this support is still limited to measures that “must not constitute the threat or use of force” – see Arts 3-4. An English translation of the law is available at the Japan Government website www.kantei.go.jp/foreign/policy/2001/anti-terrorism/1029terohougaiyou_e.html. With respect to entry into Territorial Seas, however, the JMSDF is limited by the requirements of the *Security of Japan in Situations in Areas Surrounding Japan Law* 2002, which restricts JMSDF involvement in UN sanctions enforcement at sea to operations in the immediate vicinity of Japan. The law does not contain any reference to UN naval operations in third state Territorial Seas. See generally, Japan Defence Agency, *Defence of Japan* 2002, (English Summary); ch III, section 4 on “legislative preparation for armed attacks against Japan and other situations”. See also, Ishizuka, “Japan’s New Role in Peace-Building Missions”, where he discusses the ongoing process of evolution in Japanese peace operations policy.

- 9 The author has sought the views of naval and military legal advisers from the US, the UK, Belgium, Canada, The Netherlands, Norway, Japan, Indonesia, Chile, New Zealand, France, and Germany. As regards Japan, see above.
- 10 Some of the arguments outlined in this chapter are informed by discussions the author has had with UN, Canadian, NZ, US, UK, and Australian naval and military legal advisors in the course of a number of UN and multinational operations. For obvious reasons, and as with the sources noted in footnote 9 above, these discussions took place under Chatham House rules, and thus no particular point of view should be assessed as attributable to any particular set of National Standard Operating Procedures or doctrine, or to any particular legal advisor.

In an endeavour to respond to this shortfall, this chapter proposes a regulatory framework within which UNSC Chapter VII naval peace operations can be conducted within a third state's Territorial Sea. To this end, the chapter will address three issues. First, it will compare two models upon which such a regulatory framework could be based: The mission model; and the unit self-defence model. Second, it will elaborate how the principles governing the preferred model could be translated into the design of the regime. Finally, it will test the design against the specific issues that will most likely be encountered in implementation.

Comparison of Competing Potential Models

Mission Accomplishment

The first and most obvious candidate model is mission accomplishment. This would expressly tie the construction of *authority* to the tasks and roles required to fulfil the designated *mission*. This would remove any ambiguity, as the mission itself would provide the means to determine the outer limits of the authority envelope, and construction of the appropriate authority would be directly linked to what is required for mission accomplishment. In addition, as the definition and detail of both the mission, and the measures of its accomplishment, evolve over time within the context of each particular UN naval peace operation, the envelope of authority could co-evolve, automatically adjusting to match and cohere with changes in context and circumstance.

There are three problems inherent in adopting this solution, all of which are significant and fundamental. First, defining 'success' – mission accomplishment – is a notoriously difficult and elusive process. As an important UN analysis of peace operations has itself noted, "[B]etween clear cut success and failure there lies a large grey area".¹¹ As Bond has noted of the sister concept of 'victory', definitions can range

11 UN Doc S/2001/394, *Report of the Secretary-General on "No Exit Without Strategy": Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations*, 20 April 2001; paragraph 29. See also Lieutenant General Fabio Mini, "Current Issues in Occupation Law", paper presented at *International Law Challenges: Homeland Security and Combating Terrorism* Conference held at the US Naval War College, Newport, Rhode Island, 23-25 June 2004 – (General Mini (Italy) was Commander KFOR in Kosovo, 2002-2003); Paul F. Diehl, *International Peacekeeping*, pp 33-39; Daniel Druckman and Paul C. Stern, "Evaluating Peacekeeping Missions", *Mershon International Studies Review* (Supplement to the *International Studies Quarterly*), Vol. 41, Suppl. 1, May 1997; pp 151-165, the record of a forum involving Paul Diehl, A. Betts Fetherston, Robert Johansen, William Durch, and Steven Ratner. The discussion underlines the unsettled state of this question, particularly in terms of the short term/long term, and quantitative/qualitative aspects of any assessment of 'success'. See generally, David Last, *Theory, Doctrine and Practice of Conflict De-Escalation in Peacekeeping Operations*, Canadian Peacekeeping Press, Clementsport, 1997; John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, United States Institute of Peace Press, Washington D.C., 1997; Hugh Miall, Oliver Ramsbotham, and Tom Woodhouse, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts*, Polity Press, Cambridge, 1999. See also, NATO Doctrine, *Peace Support Operations*; p 2-2, on defining success in terms of strategic objectives, military goals, and military objectives. For a range of differing views on 'success'

through the full spectrum of categorical and prudential concerns,¹² from publicised engagement that nonetheless avoids contributing in ways likely to incur casualties, through involvement founded upon an altruistic belief in the role and functions of the UN. These definitions are also vulnerable to external influences ranging from domestic concerns for re-election, through to concern for greater regional stability. Further, each national contingent's assessment of both 'mission' and 'accomplishment' will vary according to domestic pressures and international perspectives. Thus whilst French involvement in the Congo, for example, might be coloured by domestic francophone pressures which may inform the measure of success, Canadian involvement could be predicated upon different national considerations and measures of success (such as maintaining international recognition of the Canadian contribution to peacekeeping, which began with Canadian Foreign Minister Lester Pearson and the UNEF). Similarly, US conceptions of the importance of swift elections and the installation of 'mature democracy' within a short timeframe, often differ markedly from the more evolutionary approach to installing democracy preferred by many European and other engaged nations – a tension that was evident in Bosnia-Herzegovina and Kosovo, for example.¹³ Although the UNSC goes some way to mitigating this problem by defining the mission – for the UN as a whole, and in very general terms – measuring accomplishment (beyond the very general 'restoration of peace and

within the context of a single UN peace operation (in this case, East Timor), see for example: Paulo Gorjao, "The Legacy and Lessons of the United Nations Transitional Administration in East Timor", *Contemporary Southeast Asia*, Vol. 24, 2002; Jarat Chopra, "Building State Failure in East Timor", *Development and Change*, Vol. 33, No. 5, 2002; pp 979-1000; and Ian Martin and Alexander Mayer-Rieckh, "The United Nations and East Timor: From Self-Determination to State-building", *International Peacekeeping*, Vol. 12, No. 1, Spring 2005; pp 125-145. On a more general level, in relation to post-conflict risk and longer-term success from an economic perspective, see for example: Paul Collier, Anke Hoeffler and Mans Soderbom, "Post-Conflict Risks", *Journal of Peace Research*, Vol. 45, No. 4, 2008; pp 461-478; and Nicholas Sambanis, "Short- and Long-Term Effects of United Nations Peace Operations", *The World Bank Economic Review*, Vol. 22; No. 1, 2008; pp 9-32.

12 See Brian Bond, *The Pursuit of Victory From Napoleon to Saddam Hussein*, Clarendon Press, Oxford, 1996. UN peace operations forces exist to provide a *military solution*, and can *help facilitate a political solution* by maintaining a secure environment for confidence-building and negotiation. But they cannot generate the political solution. Thus where UN forces are inserted into a conflict where the parties have not genuinely agreed to negotiate – such as the MINURSO operation in the Western Sahara – the mere fact of their presence is no guarantee of a political solution. Gordon has described this type of situation as that of two teams, dressed and in the team rooms at the stadium, ready to run out onto the field, but where there has been no agreement on the rules of the game to be played because neither side will concede on any 'rule'. In the Western Sahara situation, for example, one of the 'rules' which needed to be agreed before the game could start was who would be eligible to vote in the referendum. A UN peace operations force, in such a situation, can "keep the crowds off the playing field", thus creating a secure environment in which negotiations can proceed, but it cannot create the political solution, or set the rules of the game. That is ultimately and properly a political rather than a military task – Gordon, interview 2 February 2002, Dili, East Timor. A similar situation arguably confronted the UN peace operation in Sierra Leone in 2000, where there was "no 'peace process' to speak of" – "Sierra Leone: The UN's Frontier Force", in *The Economist*, 4 November 2000; pp 56-59.

13 Mini, "Current Issues in Occupation Law".

security in the area') is much more amorphous and problematic. Integrating each disparate set of national aims into a single and universally applicable measure of success for a particular operation is a fraught, almost impossible task. That which Russia, a traditional ally of Serbia, promoted as the end result of UNMIK in Kosovo was never likely to fully, or even fundamentally, accord with what NATO or the EU believed Kosovo's future to be.¹⁴

The second problem is one of moral hazard – of engaging an inherent tendency for 'ends to justify the means'. Thus the envelope of authority would expand to reflect what the mission requires regardless of whether the mission itself was ambiguous, misplaced, misconstrued, or misunderstood. The consequence is that the disciplining function of authority would be lost – authority as *power* would be reinforced, whilst authority as a *limitation on the use of power* would be obscured by an overriding focus upon mission accomplishment.

The third problem is that mission accomplishment would often be unable to provide an effective response to specific circumstances. The fundamentally political nature of the UNSC means that there is an inherent risk of responding to a situation that has not been fully understood, or on which there is apparently irreconcilable disagreement. The UNSC's prescience is also constrained in evolving situations, resulting in lagging mandates. As noted previously, the ONUC's mission in the Congo in 1960 changed several times, and in fact left the measure of 'accomplishment' in the hands of the Congolese government – whose vested interest was, of course, in keeping the UN engaged for as long as possible – rather than in the hands of the UNSC itself. The UNSC's response to the disintegration of Bosnia-Herzegovina was similarly piecemeal, ad hoc, and ill-timed, resulting in numerous changes of mission and numerous consequent shifts in the definition of 'accomplishment'.¹⁵ In Somalia, UNSC Resolution 793 (1992) contained an explicit recognition of the slippery nature of mission accomplishment when it declared that it

Shar[ed] the Secretary-General's assessment that the situation in Somalia is intolerable and that it has become necessary to *review the basic premises and principles of the United Nations effort in Somalia*, and that UNOSOM's existing course would not in present circumstances be an adequate response to the tragedy in Somalia...¹⁶

These problems render conceptual coherence and consistency of application impossible and thus negate the utility of mission accomplishment as a model on which to base the construction of authority for UN naval peace operations in third state Territorial Seas.

14 See, for example, the Russian Federation's vehemently anti-NATO position with respect to use of force in Kosovo, with particular emphasis on the sovereignty of Serbia – UNSC Debates, 3988th Meeting, 24 March 1999 – *The Situation in Kosovo* (S/PV.3988) – statement of Mr Lavrov (Russian Federation); pp 2-4; UNSC Debates, 4003rd Meeting, 14 May 1999 – *The Situation In Kosovo* (S/PV.4003) – statement of Mr Granovsky (Russian Federations); pp 8-9.

15 See generally, Silber and Little, *Yugoslavia: Death of a Nation*; pp 386-390; Malcolm, *Bosnia: A Short History*; pp 253-271.

16 UNSC Resolution 794, 3 December 1992 on *Somalia*; preamble – my italics.

The Unit Self-Defence Model

The second candidate for a governing concept to underpin the authority of a regulatory regime is unit self-defence. At first glance, this may seem a curious assertion, but self-defence in general has an immediate advantage in offering a coherent, accepted, and almost universally well understood set of basic principles. The broad concept of self-defence and the principles by which it is defined are already well known to, and understood by, naval forces and thus provide a strong conceptual framework within which to operate. This eases the challenge of specific adaptation, which otherwise would require development of a fundamentally novel, and in all likelihood ‘un-marinated’ regime. Additionally, in the 1992 policy statement *Agenda for Peace*, then UN Secretary-General Boutros-Ghali reaffirmed the specific right of unit self-defence as one of the key elements informing the conduct of UN peace operations.¹⁷

Second, the general principles that inform the concept of self-defence in both international law and (albeit under different labels and often further sub-divided) in many domestic legal regimes – that is, necessity and proportionality – are themselves readily adaptable to the specific needs of UN naval peace operations in third state Territorial Seas. Indeed, their current role is precisely what their role in the regulatory regime would be – a combination of analytical tool and measurement test. Furthermore, because these principles are internationally defined and understood, there is more chance of objective best practice being established. The broad ambits of the principles are, on the whole, relatively settled, although there are debates over the limits they set to the scope of self-defence – particularly as necessity slips from immediate to anticipatory to pre-emptive. Before addressing the issue of scope, however, it is useful to consider the aspects of concept design that distinguish the general concept of national self-defence from the more specific concept of unit self-defence in order to appreciate why the latter provides a better model than the former.

Differentiating the Right of National Self-Defence from the Right of Unit Self-Defence

The right of unit self-defence is conceptually separate from the right of national self-defence, and is a “right *sui generis* which exists independently under customary international law”.¹⁸ It is sourced from a different set of custom and practice to the national right, although a common set of principles (namely necessity and proportionality) influence the basic design of both regimes. When dealing with UN naval peace operations, the two concepts must also be differentiated for another very practical reason: Whilst the UN is not a state and thus does not have access to

¹⁷ Boutros-Ghali, supplement to *An Agenda for Peace*, paragraph 33.

¹⁸ The right of an individual to defend themselves when threatened certainly qualifies as a “general principle of law recognised by civilised nations”, and thus as a legitimate aspect of law applicable by the ICJ in determining disputes placed before it – *Statute of the International Court of Justice* 1945; Art 38(1)(c). See also, Dale Stephens, “Rules of Engagement and the Concept of Unit Self Defence” (1998) 45 *Naval Law Review* 126 at 137. Kinley similarly asserts that “all writers agree” that a right of unit self-defence exists – Kinley, “The Law of Self-Defence”; p 20.

the UN Charter Article 51 right of national self-defence, it does deploy forces into harms way under its own flag. The character of those forces – as established in the *Competencies Case*,¹⁹ and as underlined in the European Court of Human Rights' decision in *Behrami and Saramati*²⁰ – is as UN forces, not a mere collection of national contingents, and as such they require access to a non-nationally defined scheme of self-defence. Further, UN naval peace operations forces, as discussed in chapter two, are often the first and most visible armed units to enter a crisis zone, and as such can become obvious and attractive targets for belligerency. Thus the doctrine of unit self-defence, although applicable to all UN forces, is of prime concern to naval forces deploying into fractious and unsettled operational environments. However, the distinction between national and unit self-defence is not widely understood. Even the ICJ in its authoritative decision on self-defence in the *Nicaragua Case* failed to address the doctrine of unit self-defence as an independent issue, and again failed to engage the distinction in the *Oil Platforms Case*.²¹ However, the use of unit self-defence as a source of authority when applicable force is deployed in the course of a sanctioned operation is supported both in practice,²² and implicitly in the language of Article 21 of the *United Nations Convention on the Safety of United Nations and Associated Personnel* 1994, which declares that “[N]othing in this Convention shall be construed so as to derogate from the right to act in self-defence”.²³ Given the specific focus on personnel, the silent subjects of Article 21 are clearly individual UN units and personnel, rather than the UN itself. The clause thus confirms that the Convention is not to be construed so as to alter or in any way limit the right of

19 *Competence of the Assembly Case* (1950) ICJ Reps 4, where the ICJ described the “organs” of the UN, rather than the member states, as the repository of the Organisation’s authority and powers of judgment.

20 *Agim Behrami and Bekir Behrami v France* (Application no. 71412/01); and *Ruzhdi Saramait v France, Germany and Norway* (Application no. 78166/01) (Admissibility) (2 May 2007) ECtHR (Grand Chamber). For discussion of the judgment, see: Kjetil Mujezinovic Larsen, “Attribution of Conduct in Peace Operations: the ‘Ultimate Authority and Control’ Test” (2008) 19:3 *European Journal of International Law* 509; Pierre Bodeau-Livinec, Gionata P. Buzzini, and Santiago Villalpando, “*Behrami & Behrami v. France; Saramati v. France, Germany & Norway*” (2008) 102:2 *American Journal of International Law* 323.

21 With respect to this issue in the *Nicaragua Case*, see *Nicaragua v United States (Merits)* (1986) ICJ Reps. 14 for example paras 35, and 51, where the ICJ uses the phrase “individual self-defence” in terms of a nation’s right to take action in its own defence. This (mis)use of the phrase indicates that the ICJ held little or no appreciation of the tactical concept of individual self-defence as it is understood and applied on operations – that is, the individual person’s right of self-defence, or the right of their collectivity (the unit) to self-defence. As Stephens observes, “the Court seems not to have recognised that unit self-defence is a concept of tactical, rather than strategic or national, significance” – Stephens, “Rules of Engagement and the Concept of Unit Self Defence”; 139.

22 UN forces have used force in self-defence, and indeed have suffered significant casualties in the course of some peace operations. The deaths of Pakistani peacekeepers in Somalia, and Belgian peacekeepers in Rwanda, are but some examples. See generally, Shawcross, *Deliver Us From Evil*; chapters 4 and 5; Diehl, “With the Best of Intentions: Lessons from UNOSOM I and II”; p 161.

23 *United Nations Convention on the Safety of United Nations and Associated Personnel* 1994; Art 21.

these units and individuals, engaged in UN peace operations, to exercise their right of unit self-defence.

The concept of unit self-defence thus differs from that of national self-defence in two significant respects. First, the scheme of unit self-defence attaches to the military unit itself, both in its character as a *military unit* (for example, a warship) and as the *collective of individuals* in that unit (the ship's company), whereas the scheme of national self-defence – whilst often executed by military units – attaches to and is exercised by the state as a unified entity. Second, whilst the substance of the principles defining unit self-defence are similar to those drawn from theory and practice surrounding the scheme of national self-defence – most particularly from the *Caroline* incident – both the core source (domestic law) and the conceptual application (and thus design) of the scheme is fundamentally different. This is why, argues Stephens

Isolated attacks upon warships or aircraft [such as the attacks upon the USS COLE and the USS STARK] do not necessarily allow, under the banner of Article 51, for the initiation of armed conflict between States. Such attacks will, however, always justify actions in unit self-defence...²⁴

Brownlie, who takes a very restrictive view of the Article 51 right of national self-defence, similarly seems to see no contradiction in distinguishing the separate scheme of unit self-defence, asserting that it is one of a range of “particular rules of customary law” which apply at sea, and that “there is no reason for regarding this form of jurisdiction as being based on the right of [national] self-defence”.²⁵ In distinction to national self-defence, unit self-defence is therefore characterised “by its personal focus and has its origin ‘directly and chiefly, in the fact that nature commits to each his own protection’”.²⁶ The fundamental nature of the scheme of unit self-defence is thus by character one of inalienable status attaching to individuals.²⁷ This focus upon

24 Stephens, “Rules of Engagement and the Concept of Unit Self Defence”; pp 136-137. The USS COLE was damaged by a boat-bomb attack in Aden harbour, Yemen, on 12 October 2000. Seventeen sailors were killed – see Department of Defence News Briefing, “Transcript of Press Conference held by Rear Admiral Stephen Pietropaoli, Navy Chief of Information, Tuesday 17 October 2000”, accessed at http://www.defenselink.mil/news/oct2000/t10172000_t1017asd.html; “Navy Announces Results of its Investigation on USS *Cole* (DDG67)”, Navy Office of Information Press Release, 19 January 2001. USS STARK, a US Navy frigate on patrol in the Persian Gulf, was hit on 17 May 1987 by two Exocet missiles fired from an Iraqi F1 mirage attack aircraft. Thirty-seven sailors died in the attack. The Iraqi aircraft had been labelled as friendly by a nearby US AWACS aircraft which was monitoring airspace in the area, and STARK did not detect the missile launch – see generally, Jeffrey Levinson and Randy Edwards, *Missile Inbound: The Attack on the Stark in the Persian Gulf*, United States Naval Institute Press, Annapolis, 1997.

25 Ian Brownlie, *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1963; p 303.

26 The assertion is from Hugo Grotius, *De Jure Belli Ac Pacis*, quoted in Stephens, “Rules of Engagement and the Concept of Unit Self Defence”; p 137. See also, Oscar Schachter, “Self Defence and the Rule of Law” (1989) 83 *American Journal of International Law* 259.

27 Stephens, “Rules of Engagement and the Concept of Unit Self Defence”; p 128, argues that an indicator of this human right is found in the ICJ majority opinion in the *Nuclear Weapons Advisory Opinion* (1996), and in the right to not be arbitrarily deprived of life, as

the survival interests of forces rather than states, and a more responsive attitude to specific acts that threaten survival, thus results in a slightly different conceptual design, albeit subject to similar guiding principles.

Self-Defence: The Governing Principles

The principles governing self-defence (as between states, but with broader utility) were most famously expressed in the *Caroline* principles.²⁸ These essential requirements, as expressed in the correspondence connected to the *Caroline* incident, are that there must exist “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”, and that the action taken in pursuance of self-defence must not be “unreasonable or excessive since the act, justified by the necessity of self-defence, must be limited by the necessity, and kept clearly within it”.²⁹ Custom has entrenched this statement, defining the design of self-defence by reference to the principles of necessity and proportionality. And while, as noted previously, this description of the principles draws provenance from an instance of claimed self-defence between states rather than from any particular body of domestic law, it nevertheless provides a universal entry point into the similar concepts found in the doctrine of unit self-defence.

Necessity

The principle of necessity in relation to unit self-defence requires an immediacy of circumstances which is traditionally met only where the “imminence of the attack [in this case, on the unit] is so clear and the danger so great that defensive action is absolutely necessary”.³⁰ In the case of a warship, this assessment as to necessity is generally made by the Commanding Officer or on-watch warfare officer on the basis of all the information available – including political and operational context, the data provided by sensors, RoE, and the current tactical situation. The current outermost

codified in Article 6(i) of the *International Covenant on Civil and Political Rights* 1966, which the ICJ found to apply regardless of the presence of armed conflict – *Nuclear Weapons Advisory Opinion* (1996) ICJ Reps. 226 at paragraph 25. As discussed previously, the ICJ has cited the principle of “humanity” as an important if not “overriding” factor in several cases involving conflict – the *Corfu Channel* and *Nicaragua* Cases, and the *Nuclear Weapons* and *Israel-Palestine Wall* Advisory Opinions. In the later advisory opinion, at paras 102–111, for example, the ICJ declared that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights”.

28 See generally, Brownlie, *International Law and the Use of Force by States*; ch 13.

29 See Robert Jennings, “The *Caroline* and McLeod Cases” (1938) 32 *American Journal of International Law* 82; Derek Bowett, *Self Defence in International Law*, Manchester University Press, Manchester, 1958; pp 58–60.

30 M. Rogoff and M. Collins Jr, “The *Caroline* Incident and the Development of International Law” (1990) 16 *Brooklyn International Law Journal* 493 at 506. For an operational assertion, see US Navy, *Annotated Supplement to the Commanders Handbook on the Law of Naval Operations*; paragraph 4-3.

parameters of necessity with respect to naval operations are probably best elicited by examining several examples.

The first is the USS VINCENNES incident, where a US warship operating in the Arabian Gulf during a period of heightened tension (in 1988, during the ‘Tanker War’), shot down an Iranian Airbus airliner it believed to be an Iranian F-14 about to attack the ship. This was characterised as “not illegal” by the US House of Representatives investigation following the incident, which indicated that the response fell within the parameters of VINCENNES’ right of unit self-defence.³¹ In other words, it was held that the combination of factors generating the situation in which the missile was fired met the criterion of necessity.³² The second comes from the Falklands War, and took place in a similarly high threat environment. As the British Task Group sailed south towards the Falkland Islands, a positively identified Argentinean Air Force Boeing 707 discovered its position and continued its aerial reconnaissances over a three-day period. Admiral Woodward, the Task Group Commander, was concerned that the intelligence gathered by the B707 would be used to position the Argentinean Navy’s aircraft carrier for a pre-emptive strike on the Task Group. He asked for and received an expansion of RoE, allowing him to engage the B707 the next time it approached to compromise the Task Group’s position, course, and speed. The following evening, with missile lock on a B707 approaching the Task Group in a manner similar to the previous reconnaissance flights, Woodward records how he called for a confirmatory check of commercial air schedules, and then directed that a plotter lay off on a chart the course the aircraft appeared to be following:

Every ten seconds he is getting a mile nearer. The Deck Alert Harrier, launched too late, is not going to get up there until the Burglar is well past... But with twenty seconds to spare [the plotting report]...comes back. ‘He seems to be on a direct line running from Durban to Rio de Janeiro,’ came the careful reply. ‘Weapons tight!’ I order, and the GWO immediately broadcasts it, denying all ships permission to fire. The Harrier is sent to get close in and check visually. Sure enough, he reports back that it is a Brazilian airliner...³³

31 See Marian Nash Leich, “Denial of Liability: *Ex Gratia* Compensation on a Humanitarian Basis” (1989) 83 *American Journal of International Law* 319.

32 See, for example, Harold G. Maier, “*Ex Gratia* Payments and the Iranian Airline Tragedy” (1989) 83 *American Journal of International Law* 325 at 327, where he notes “the apparently...legitimate belief on the part of the American commander that he was firing in self-defence...”. Andreas F. Lowenfeld, “Looking Back and Looking Ahead” (1989) 82 *American Journal of International Law* 336 at 337, does note that in the context of US attempts to shift some blame to Iran (by arguing that “the tragedy would not have happened if Iran had accepted” a twelve month old UNSC Resolution calling for a ceasefire in the war with Iraq), “Vice President Bush’s declaration to the UN Security Council that the *Vincennes* acted in self-defence sounds hollow”. Lowenfeld’s criticism thus seems to relate primarily to the political, rather than the legal, nature of the claim to unit self-defence.

33 Sandy Woodward with Patrick Robinson, *One Hundred Days: The Memoirs of the Falklands Battle Group Commander*, Fontana, London, 1992; pp 101–103. See also Max Hastings and Simon Jenkins, *The Battle for the Falklands*, Pan Books, London, 1983; p 148.

Lack of discussion of the Falklands example is most obviously explicable by the fact that it never actually manifested as an 'incident'. On the whole, however, there also seems to have initially been little public debate as to the self-defence aspect of the VINCENNES incident. Indeed, although a *Newsweek* article and opinion pieces by many of those involved, and later analyses by other Naval and legal commentators eventually re-ignited the issue, much of the initial legal debate focused rather on the US government's civil liability to pay compensation to Iran and to the families of those killed in the tragedy.³⁴ The VINCENNES incident does, however, raise the issue of the 'last irrevocable act' prior to weapons launch as the triggering criterion for self-defence generally.³⁵ In the technological and tactical environment of current naval operations, it is clear that the concept of a 'last irrevocable act' is becoming less and less relevant to the necessity of the decision. The immediacy, lethality, and extensive over-the-horizon-targeting capabilities of modern weapons systems make the last irrevocable act prior to weapons launch almost impossible for the target vessel to determine, and any hesitation in response, based on waiting for such an act, would most likely result in the target ship not surviving to defend itself.³⁶ Indeed, with the integration of sensors, weapons, and command and control systems that is common in modern warships, whilst a dividing line between 'hostile intent' (preparations to launch) and 'actual armed attack' (missile underway) is theoretically possible in guiding the command to engage, this is arguably of little practical value. In a warship operating in a high threat environment – with modern sensor and weapons systems, and a ship's company at high levels of readiness – the distinction between hostile intent and actual attack can be a matter of seconds, and with over-the-horizon-targeting the escalation through hostile intent to actual attack may not even be detectable, let alone assessable. As Lowe similarly concludes, "[I]t is assumed... that international law does admit a right to exercise self defence before the victim has suffered its initial casualty: while this is often described as anticipatory self-defence, given the decisive destructive power of modern armaments it appears to be the only kind of defence which has any practical meaning in many contexts".³⁷ However, as Letts observes, one consequence of this blurring of the line between hostile intent and actual attack (or hostile act) is that it allows for a wider definition of what acts can trigger the scheme of unit self-defence. This has the political effect of (to some degree at least) shifting the onus to the potential aggressor, requiring them to avoid any act which could – in those particular circumstances, at that particular time, and

34 See, for example, Maier, "Ex Gratia Payments and the Iranian Airline Tragedy"; pp 325-332; Leich, "Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis"; pp 319-324; Andreas F. Lowenfeld, "Looking Back and Looking Ahead" (1989) 83 *American Journal of International Law* 336.

35 See generally, O'Connell, *The Influence of Law Upon Seapower*; p 70.

36 This view is shared by a wide range of military legal advisers, including many of the Australian, US, UK, Japanese, German, French, Dutch, Belgian, Norwegian, Canadian, Indonesian, and New Zealand legal advisers with whom the author has discussed and debated this issue over the course of the last decade. Again, Chatham House rules and the dictates of discretion do not permit the naming of specific individuals or the association of specific individuals with specific views.

37 Lowe, "Self-Defence at Sea"; p 194.

with the technology and weapons systems available to the actors – be conceived of as hostile.³⁸

The key, consequently, is the availability and assessment of *context* information – particularly the political and operational situation, the actors, and their circumstances and capabilities. Context shapes the threat environment and will influence the level of significance attributed to acts in rendering the necessity of response. One example has been Chinese naval harassment of Australian warships transiting the sealane between mainland China and Taiwan in early 2001. This harassment – including aggressive manoeuvring, radio harassment, and shining spotlights or signalling lamps into bridge windows – took place at a time when the threat environment existing between Australia and China was low. As such, the situation would not have justified characterising such harassment as demonstrations of hostile intent or as hostile acts that could legitimately trigger a right to respond, with force, in unit self-defence.³⁹ Within this context, the Falklands incident probably provides guidance as to the appropriate decision process, whilst the VINCENNES incident possibly exhibits a lack of both the immediacy and the level of threat essential for satisfying the test of necessity, and thus may sit outside the envelope of self-defence. Some analysts, for example, have described the incident as a case of scenario fulfilment, where data fell into place as “evidence” which merely confirmed a pre-existing mindset.⁴⁰ What both the VINCENNES and the Falklands examples confirm, however, is that despite wider debates over the validity of anticipatory *national* self-defence, for naval forces necessity and the scheme of *unit* self-defence do encompass a right to respond to acts short of actual weapons launch against them. This is why, for naval forces in environments of heightened tension, acts such as the lock-on of a missile or gunnery fire control radar, or assessment that an approaching aircraft is flying an attack profile, can create a situation so threatening as to satisfy the criterion of necessity. However the same acts in a situation of low tension – perhaps detecting the energising of a fire control radar in a low threat environment (such that it clearly appears to be part of daily systems operability tests or maintenance), or an aircraft approaching as part of a reconnaissance flight to establish the identity of an unknown warship in local waters – would not trigger the right to act in unit self-defence. The justification for this wider envelope of necessity when dealing with unit self-defence for naval forces is very simple: Given the over-the-horizon lethality to warships of modern weapons systems, any requirement to wait for actual weapons launch before acting in self-defence may actually deprive the prospective ‘victim’ of any capacity to defend themselves at all.

38 Letts, interview, Dili, East Timor, 17 February 2002.

39 See “Australia Says Relations With China Normal”, a news report aired on *Radio Australia*, 30 April 2001, accessed at the Australian Broadcasting Corporation archive, at <http://abc.net.au/ra/asiapac/summaries/2001/apr01.html>.

40 Simon Bennett, *Tools of Destruction?*, Scarman Centre Occasional Paper, University of Leicester, January 2000; David Evans, *Vincennes: A Case Study* (based on interviews with the main actors by the author) accessed at www.odu.edu/webroot/orgs/as/nrotc.nsf/files/Vincennes.pdf/file/Vincennes.pdf.

Proportionality

The second *Caroline* principle for self-defence is proportionality. For naval forces, four aspects of this principle are of particular importance. First, any assessment as to the proportionality of a unit's response in self-defence should be closely *contemporaneous* to the incident. This is because the response, as noted above, should reflect the attack and the continuing threat, rather than a desire to extract retribution or conduct a reprisal, or as pre-emption of a future attack. Further, this assessment of proportionality is a continuing process, such that as the situation changes and develops, the range of actions considered proportionate under the aegis of unit self-defence will also shift and evolve.⁴¹ Thus, for example, when VINCENNES altered course and increased speed, eventually crossing into the Iranian Territorial Sea, in order to close the position of a flotilla of Iranian Revolutionary Guard Corps – Navy (IRGCN) 'boghammers' (small open speedboats armed with machine guns and small missile or rocket launchers) suspected of firing in the vicinity of VINCENNES' helicopter (which had already acted in self-defence by departing the area), the contemporaneous nature of the response was arguably lost.

The second aspect is that the response, if possible, should be in the minimum mode that still fulfils the aim of self-defence – that is, the *minimum force required* for the minimum time required in order to halt or remove the threat. The appropriate response, where navigationally available, might be to open to a safe range from the hostile contact, rather than to engage it with weapons. As O'Connell proposed

...harassment by manoeuvres is met with evasion or counter-harassment and not by gunfire. Where gunfire has been used, as in fishing disputes, it is not met with counter-gunfire except where this is immediately necessary.⁴²

Special Rapporteur Ago's *Report of the ILC on State Responsibility* in 1980, for example, provides some definition of this aspect of self-defence in his observation – ostensibly regarding necessity, but equally applicable to proportionality – that the respondent must only resort to lethal modes of force if, in the particular circumstances, there was no other means (such as manoeuvring away) of halting the "attack".⁴³

41 See generally, Judith Gail Gardam, "Proportionality and Force in International Law" (1993) 87 *American Journal of International Law* 391 at, inter alia, 404.

42 O'Connell, *The Influence of Law Upon Seapower*, p 64.

43 Roberto Ago, "Report to the ILC on State Responsibility: The Internationally Wrongful Act of the State" *Yearbook of the International Law Commission* (1980) Vol. II Part 1; p 13 at, for example, paragraphs 95, 120. In the *Gabcikovo-Nagymaros Project (Hungary/Slovakia) Case* (1997) ICJ Reps. 7 at paras 51-52, the ICJ explicitly recognised the concept of necessity as one of customary international law, linking it to the "grave and imminent peril" phraseology now reflected in the ILC's final Draft Articles on State Responsibility, Art 25(1)(a), which has maintained this link to the "Caroline Principles" by asserting that a state may not claim necessity as a grounds for precluding the wrongfulness of an act unless, inter alia, the act "is the only means for the State to safeguard an essential interest against a grave and imminent peril..." – See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002; pp 178-186.

This requirement of proportionality is tempered, however, by the third aspect of the principle, which notes that the correct proportionality relationship is that between the action taken in self-defence and *the purpose of halting and repelling the attack*, not between the conduct that constitutes the attack and the conduct employed to defend against it.⁴⁴ Thus, as Ago's *Report on State Responsibility* commented, "the action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered".⁴⁵ Consider, for example, a situation similar to the 1967 incident in which the Israeli warship ELIAT was attacked and later sunk by missiles launched from an Egyptian warship alongside in Alexandria harbour.⁴⁶ Add to this an environment of high tension and the assessed imminence of a second missile salvo (the launch of which, again, could not be accurately detected), from warships in the harbour rather than from a warship individually detectable at sea. In such a case – although prima facie apparently disproportionate – a strike on the warship in harbour, which would likely cause associated damage and casualties in the port area as well, *might* be considered an appropriate and proportionate response.⁴⁷ Ultimately, as with the right of national self-defence, it is 'reasonableness' which patrols the borders of what is and is not acceptable and to a large extent this will depend on evolving state practice as to what is technically feasible.⁴⁸

The final aspect of proportionality that is particularly relevant to the scheme of unit self-defence for naval forces is that the response should be *confined to the geographical area of the attack*.⁴⁹ This is obviously in keeping with the character of the

44 O'Connell, *The Influence of Law Upon Seapower*, p 64. Dalton expresses the customary position on self-defence thus – "the cardinal rule concerning self-defence is that it must be necessary and proportional *to the threat against which one is defending*" – Dalton, "The Influence of Law on Seapower in Desert Shield/Desert Storm"; pp 58.

45 Ago, "Report of the ILC on State Responsibility"; paragraph 121. See also Gardam, "Proportionality and Force in International Law"; p 391. Note, however, that the ILC's Draft Articles on State Responsibility (at Art 51) discuss proportionality in a significantly broader context than only self-defence against armed attack, referring to the proportionality of "countermeasures" and explicitly asserting that the proportionality of countermeasures "must be commensurate with the injury suffered" – see Crawford, *The International Law Commission's Articles on State Responsibility*; pp 294-296.

46 Described and discussed in O'Connell, *The Influence of Law Upon Seapower*; pp 70-71.

47 Another, much more contentious option might be to mine the harbour from which the warship sails. See, for example, O'Connell's discussion of the US decision in 1972 to mine North Vietnamese waters, claiming that this was the only way it could realistically restrict the "overwhelming" logistical support flowing to North Vietnamese forces in the south – O'Connell, *The Influence of Law Upon Seapower*; pp 64-65. Note, however, that this US policy was pursued during a period of hostilities, and that the international laws governing mine warfare differ markedly between periods of tense but nonetheless peacetime operations, and armed conflict. During peacetime, mining another state's internal waters or Territorial Sea is not permissible, but mining international waters outside the harbour in self-defence can in certain circumstances be permissible. The mining of international straits during hostilities, the *San Remo Manual* asserts, is similarly prohibited where it interferes with the right of transit passage and no safe and convenient alternative route is provided – *San Remo Manual*; paragraph 89.

48 Don Greig, "Self-Defence and the Security Council: What Does Article 51 Require?" (1991) 40 *International and Comparative Law Quarterly* 366 at 401-402; Stephens, "Rules of Engagement and the Concept of Unit Self Defence"; p 150.

49 O'Connell, *The Influence of Law Upon Seapower*; pp 65.

scheme as one of self-defence, not reprisal, and with the aim of the proportionate response being to nullify the immediate danger to the unit, not to punish the perpetrator. Thus when the USS PUEBLO, an intelligence gathering vessel which the US asserts was steaming just outside the North Korean Territorial Sea (that is, outside of the twelve nautical mile limit the US, and many other states, recognised as the maximum North Korea could claim as a Territorial Sea) was seized by the North Korean Navy on 23 January 1968, the US was not permitted to (and did not) respond in 'self-defence' by seizing North Korean shipping encountered elsewhere on the oceans.⁵⁰

Combining the Principles into a Regulatory Scheme

In contrast to the reasonably settled 'who', 'what', and 'when' of the right of unit self-defence, the possible 'how' for combining these components into a single scheme capable of adaptation to regulating the conduct of UN naval peace operations in third state Territorial Seas is less settled. This is because there are three discernible variations which, for convenience, will be termed the *basic* scheme, the *active* scheme, and the *mission* scheme.

The 'Basic' Scheme

The 'basic' scheme of unit self-defence is uncontentious and well understood, encompassing the minimum necessary to give efficacy to the right – that is, to respond to attacks upon the unit, its members, its position, or associated units.⁵¹ Thus situations in the UN peace operations record such as the killing of Pakistani peacekeepers in Somalia, and threats and attacks around the positions of UN forces during the Balkans crises, clearly trigger the right.⁵² Although the basic scheme is relatively settled there is doubt as to the extent to which, if at all, it can be *limited*

50 On the *Pueblo* Incident, see generally, Alfred P. Rubin, "The Impact of the *Pueblo* Incident in International Law" (1969) 49:1 *Oregon Law Review* 1. See also, O'Connell, *The Influence of Law Upon Seapower*, pp 65. The vessel was not returned to the US. The ship's company were released on 22 December 1968, eleven months after being seized. North Korea was not signatory to the 1958 *Convention on the Territorial Sea and Contiguous Zone* – which at any rate did not set a 12 nautical mile limit to the Territorial Sea – and whilst it is difficult to distil a definitive answer as to what precisely the state did claim, North Korea was in the habit (at that time) of declaring 'security' zones out to 40 nautical miles. A degree of uncertainty as to North Korea's claims persists – see Stephen Kong, "The Right of Innocent Passage: A Case Study on Two Koreas" (2002) 11:2 *Minnesota Journal of Global Trade* 373.

51 As noted earlier, the right of self-defence is assumed to be one of the fundamentals of UN peace operations, as the supplement to *An Agenda for Peace* made clear in 1995. See also, for example, Sarooshi, *The United Nations and the Development of Collective Security*, p 71 – "It is generally accepted that the use of force by UN peacekeepers in self-defence is lawful".

52 In a 1958 report on the UNEF operation, the then Secretary-General described the applicable "rule" of self-defence as follows: "Men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions" – see Sarooshi, *The United Nations*

by the UNSC. UN practice suggests that this is a possibility, but whether (as is most likely) this is the unintended consequence of pragmatic ad hoc decisions, or whether it evinces a conceptual evolution is hard to assess. During the ONUCA (UN Observer Group in Central America) peace operation, naval patrols were deployed in the Gulf of Fonseca and its river deltas to monitor the Nicaraguan ceasefire and demobilisation agreements, arms smuggling, and cross-border harassment and intervention by “irregulars”.⁵³ In April 1990, the UNSC – having recently expanded the scope of the ONUCA operation in UNSC Resolution 650 (27 March 1990) – accepted an Argentinean offer to supply the naval contingent for the operation.⁵⁴ The four small patrol craft and associated helicopters supplied by Argentina were painted white, marked as UN vessels, and flew the UN flag. In July 1990, its first month of patrolling, the squadron made over 400 verification contacts, and the operation (Operation Gaucho) remained active until 17 January 1992.⁵⁵ However, “to ensure that the inoffensiveness of the ONUCA operation would be widely recognised”, the UNSC required the vessels to be unarmed, “and the rules of engagement...permitted only evasive action if threatened”.⁵⁶ A second example is the purported amendment of the scheme of unit self-defence during the Bosnian peace operation via which the Secretary-General could “stipulate at any time the principles which the Force Commander should take into account when making a decision to call in military support to defend UN peacekeepers”.⁵⁷

To accept the possibility that unit self-defence might be overridden by either the UNSC or individual governments involves accepting two problematic assumptions. First, as noted earlier, unit self-defence is arguably of the nature of an inalienable human right to defend oneself when attacked – a right which attaches to the individuals in the unit, not to the state or, in this case, the UN as an organisation. Just as a state will not generally legislate away or profoundly restrict the right of unit self-defence, nor should the UNSC be viewed as capable of doing so. Second, in respect of the ONUCA operation, the directives against using force if threatened, and to evasively manoeuvre in order to extract from danger, were contained in the RoE for the operation. RoE, as noted previously, are the context-sensitive operational guidelines established for each particular operation, which direct when and how force is to be applied in accordance with the priorities and objectives of the operation. RoE cannot – and arguably do not – amend or remove the totally separate, independent, and unit-focused right of unit self-defence. Indeed, many states consider this fact

and the Development of Collective Security; p 77. On the Balkans, see Silber and Little, *Yugoslavia: Death of a Nation*; pp 268-269.

53 See generally, Pugh, “The Historical Record”; pp 36-38.

54 See UNSC Resolution 650, 27 March 1990, on *Central America: Efforts Towards Peace*, and UNSC letter UN Doc S/21233, dated 5 April 1990.

55 On the Gulf of Fonseca operation, see, Neves, “The Argentine Navy and United Nations Peacekeeping Operations in the Gulf of Fonseca”; pp 40-66; D.N. Griffiths, “The Influence of Seapower Upon Peacekeeping: An Analytical Framework”, *Maritime Working Papers No. 3*, Center for Foreign Policy Studies, Dalhousie University, Halifax, May 1996; p 21.

56 Pugh et al, “Appendix”; pp 260-261.

57 See, *Report of the Secretary-General on Bosnia and Herzegovina*, 30 May 1995 (UN Doc. S/1995/444); pp 16-17; and the Secretary-General’s letter of 27 July 1995 to the UNSC.

so obvious that they do not generally place reiterative rules on unit self-defence in RoE, assuming it as a standard operating procedure that does not require further elaboration. France, Belgium, the Netherlands and the US (for certain types of RoE) are examples. Other states, such as Russia, have promulgated mission-specific RoE which may touch upon unit self-defence, but also a separate body of standing “Rules of Arms Application” (RoAA) which govern routine unit self-defence and law enforcement operations.⁵⁸ Yet other states, for the sake of having a single reference document outlining all aspects of use of force applicable in an operation, do include unit self-defence within RoE, but note its inalienable nature. Australia is an example of this type of approach.

A similar complication is discernible in the UN Secretary-General’s letter of 27 July 1995 to the President of the UNSC, where he discussed the issue of close air support to defend UN peace operations forces in Bosnia and informed the UNSC that

...the Special Representative has today *delegated the necessary authority* to the Force Commander, who is authorised to delegate it further to the Commander of the United Nations Protection Force (UNPROFOR) when operational circumstances so require... I should like to stress that the above measures are all being taken with a view to *implementing existing Security Council resolutions*, in particular resolution 836 (1993), and are consistent with that resolution.⁵⁹

Clearly, use of the phrases “*delegating*” (which implies that the authority he is referring to resides in him as the Secretary-General through a delegation from the UNSC), and “*implementing existing resolutions*” (which indicates that the measure is aimed at implementing the mandate of UNPROFOR), are the operative terms of reference in the letter. Thus it is the implementation of the mandate and the delegation of various aspects of command and control over this implementation, not the – misleading – reference to “defending” UN peace operations forces, which are the governing issues. Further, as noted above, it is not conceptually coherent that the Secretary-General’s declaration could regulate the scheme of unit self-defence, because this particular right is vested directly in the individuals in the unit, not in the UN, the UNSC, or the Secretary-General. The Secretary-General cannot thus ‘delegate’ or limit the scheme of unit self-defence, although two arguably inadvertent instances of anomalous practice indicate a clear need for this issue to be clarified.

The ‘Active’ Scheme

Adherence to the basic scheme of unit self-defence throws up few concerns where the UN force is simply a monitoring force. However, given the issues noted, “where

58 Alexander Skaridov, “The Russian Approach to ROE” (2004) 28 *Marine Policy* 19.

59 See UN Doc. S/1995/623, dated 27 July 1995, concerning the decisions of the North Atlantic Council on 25 July 1995 with respect to the use of NATO airpower to deter Bosnian Serb attacks on Gorazde – my italics. See also *Report of the Secretary-General Pursuant to Resolution 871 (1993)*, 16 March 1994 (UN Doc. S/1994/300); paragraph 12.

the force has additional functions, this limitation poses problems”.⁶⁰ One response has been the development of the conceptual variant of ‘active’ unit self-defence. This arguably first emerged during the ONUC peace operation in the Congo, and then seemed to disappear from the UNSC lexicon until a re-emergence in the early 1990s. The essence of the ONUC’s policy of active unit self-defence, records Bothe, was that

The [UN] force would assert its right of freedom of movement and any attempt to hinder the exercise of his right could be countered with force in the name of self-defence.⁶¹

As Bothe very importantly notes, this form of unit self-defence “closely resembles the action taken by the United Kingdom in the *Corfu Channel Case*”, where the UK response of transiting in a high state of readiness during an extremely symbolic and politically charged subsequent passage, was recognised by the ICJ as legitimate and defensible.⁶² A more recent example of active unit self-defence is found in the UNOSOM II peace operation in Somalia. Under UNSC Resolution 794 (3 December 1992), UN forces were authorised to take actions including arrest and prosecution of offenders in response to any attacks on UN personnel.⁶³ An authorisation for seeking out, apprehending, and prosecuting perpetrators of attacks on UN units, in the full knowledge that doing so will result in resistance such that the unit(s) conducting the apprehension will inevitably need to resort to use of force in self-defence as they execute their orders, does not detract from the validity of the exercise of the right of self-defence. But it is clearly something beyond the more reactive and contemporaneous responses envisaged under the basic scheme of unit self-defence. Perhaps it was the damage to the credibility of UN peace operations forces sustained in the Khmer Rouge ‘bamboo pole roadblock incident’ during the Cambodian operation⁶⁴ that reawakened UNSC awareness of the utility and logic

60 Michael Bothe, “Peacekeeping”, in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*; p 589.

61 Bothe, “Peacekeeping”; p 589. For a brief overview of the ONUC operation, see Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges*; paragraphs 146–148.

62 See *Corfu Channel Case* (1949) ICJ Reps. 4 at 30–31. The ICJ accepted (by 14–2) that it was legitimate for the British warships to be closed up at a higher state of readiness, with weapons manned, whilst transiting a threatening and hostile sea line of communication – a character the *Corfu Channel* at that time exhibited.

63 UNSC Resolution 794, 3 December 1992 on *Somalia*; paras 3–6.

64 On 30 May 1992, in the early months of the UNTAC operation, Akashi (civilian head of the operation) and General Sanderson (Force Commander) attempted to enter the Khmer Rouge zone around the town of Pailin. Their failure to gain access, Shawcross argues, “demonstrated the limits of UN power in a way which was both humiliating and portentous”. Akashi and Sanderson’s convoy had been halted and turned around “by a checkpoint manned by just a couple of young Khmer Rouge soldiers with a thin bamboo pole across the road”. Shawcross argues that “Akashi and Sanderson could have insisted on the UN’s right, under the treaty that the Khmer Rouge had signed in Paris, to enter the Khmer Rouge zone, like any other. They could have demanded that the UN troops with them open the way ahead. Akashi and Sanderson decided to make no such attempt. By turning back they created an image, flashed through-out the world, of UN impotence”

of active unit self-defence. The 2002 *UN Guidelines for the Development of ROE for UN Peacekeeping Operations* now include an essentially 'active self-defence' rule (Rule 1.10), which asserts that

Use of force up to and including deadly force, against any person and/or group that limits or intends to limit freedom of movement, is authorised. When and where possible, permission to use force should be sought from the immediate superior commander.⁶⁵

Indeed, it is interesting to speculate upon how the whole atmosphere of the Cambodian operation might have changed if Akashi and Sanderson had followed the ONUC lead on that occasion by calling the Khmer Rouge bluff, asserting their freedom of manoeuvre, and responding in unit self-defence if the Khmer Rouge had reacted belligerently.⁶⁶

The 'Mission' Scheme

The scheme of 'mission' self-defence, or of units acting in self-defence of themselves *and their mandate*, is extremely unsettled. This approach to the scheme of unit self-defence envisages an extension of the right to encompass response to attacks upon a group, position, or objective that the UN force has been deployed to protect, assist, or promote. Opinions on this issue cover a very wide spectrum, but it seems possible to observe two basic designs. The first version is the right to defend the particular objectives or groups designated in the relevant UNSC mandate. The scope of this

– Shawcross, *Deliver Us from Evil*, p 42. Other perspectives of this incident do, however, exist. As Fen Osler Hampson observes of the Khmer Rouge issue, "[T]he United Nations decided not to use force, fearing military action would jeopardize its neutrality and tie down UN forces in a costly counter-insurgency campaign they were ill-equipped to handle. Such action would have delayed the elections and the implementation of the peace plan". Critics of this approach, Hampson continues, "fail to address the prior question of whether a preventive use of force by the United Nations would have worked anyway, since UN forces were neither equipped nor trained to carry out peace enforcement operations" – Fen Osler Hampson, "Why Orphaned Peace Settlements are More Prone to Failure", in Chester A. Crocker, Fen Osler Hampson, and Pamela Aall (eds), *Managing Global Chaos: Sources of and Responses to International Conflict*, United States Institute of Peace Press, Washington D.C., 1996; p 544.

65 Department of Peacekeeping Operations, *Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations*, DPKO (Military Division) (MD/FGS/0220.0001) May 2002; Attachment 1, Rule 1.10. It is arguable that the second sentence of this rule still reflects a degree of confusion over the provenance and nature of the rights of individual and unit self-defence, in that it intimates that "permission" can be required. A better approach would perhaps be to require the subordinate commander to seek permission regarding whether to conduct the freedom of movement assertion in the first place, noting the contextual likelihood or otherwise of this assertion prompting a belligerent result, which would then raise a need for the UN force to respond in self-defence.

66 This is particularly so given that most Khmer Rouge threats to bring the election process to a halt were never manifested because Khmer Rouge manpower, resources, and support were in fact, by then, very limited. See Shawcross, *Deliver Us From Evil*, chapter 3.

scheme could be as diverse as the inhabitants of a particular Bosnian “safe area”, the progress of a convoy of humanitarian aid in Somalia,⁶⁷ the “consolidation, expansion and maintenance of a secure environment” for other humanitarian operations,⁶⁸ the facilitation of a political settlement,⁶⁹ or the restoration of the institutions of governance.⁷⁰ This approach focuses upon defending the ‘integrity’ of the mandate. The second version is the even wider right to take positive action in ‘self-defence’ of the ‘purposes’ of the UN and its forces more generally.⁷¹ Triggers could thus include acts that ‘hinder’ UN forces, and are therefore a breach of UN Charter Articles 25 and 39-42 (and, coincidentally, of the LOSC Article 19 innocent passage regime), and acts that transgress the UN Charter’s inalienable foundations in human rights.

There are three reasons this expansive scheme of unit self-defence should be treated with great caution. First, the aim of protecting civilians can be achieved under either the basic or the active scheme by classifying civilians as ‘designated’ or ‘specified’ persons in defence of whom a UN peace operations force may exercise individual self-defence. Indeed, this is common operational practice on behalf of many troop contributing nations and is, at any rate, reflective of a general doctrine permitting people to act in self-defence of others, which is found in the domestic criminal law regimes that follow many nations’ forces on their operations. Second, the examples used to support the idea of ‘mission self-defence’ are confused. Statements emanating from the UNSC, national representatives, and the media – all of whom occasionally use careless or misleading language – have often exacerbated this confusion. Both explicitly and by implication many have been guilty of linking, or acquiescing to the linkage of, the concept of unit self-defence with the right to pursue mandate objectives. This confusion is reflected, for example, in then UN Secretary-General Boutros-Ghali’s statement concerning the UNOSOM operation in Somalia, when he declared that the UN force “would not use force except in self-defence, though self-defence would...be deemed to include situations in which armed persons attempted by force to prevent it from carrying out its mandate”.⁷² The call for UN forces to act in ‘self-defence’ to deter attacks on UN safe areas is another

67 UNSC Resolution 794 (1992), on *Somalia*; paras 2-6.

68 See the US Navy’s *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*; para 4.3.2.2. On mission accomplishment, see, for example, Stephens, “Rules of Engagement and the Concept of Unit Self Defence”; pp 140-141, where he discusses the US military’s standing RoE, which includes the very wide direction that unit self-defence may also be triggered by “force used directly to preclude or impede the mission and/or duties of US forces...”. See also, Richard Grunawalt, “The Joint Chiefs of Staff Standing Rules of Engagement: A Judge Advocate’s Primer” (1997) 42 *Air Force Law Review* 245; J. Ashley Roach, “Rules of Engagement”, *Naval War College Review*, January-February 1983; pp 46-53.

69 UNSC Resolution 794 (1992), on *Somalia*; para 1.

70 This was a mandate objective of the ONUC operation in the Congo – see, for example, UNSC Resolution 161 (1961) on *The Congo*; preamble to Part B, and paragraph B3.

71 See, for example, the discussion in McCoubrey and White, *The Blue Helmets*; p 53; White, “The UN Charter and Peacekeeping Forces: Constitutional Issues”; p 53.

72 From UN Doc. S/24868 (1992). See also, for example, Greenwood, “Is There a Right of Humanitarian Intervention?”; p 37; and McCoubrey and White, *The Blue Helmets*; p 53. McCoubrey and White argue (correctly) that “[a]llowing a force to take positive action in defence of its purposes is little different from allowing it to enforce them”.

well known example.⁷³ The problem is not the result – UN peace operations forces are entitled to defend themselves if attacked whilst pursuing a mandate objective – but rather with the linkage of self-defence to the pursuit of that objective rather than to the proper catalyst of hostile act or hostile intent. One example of this confusion is UNSC Resolution 836. As with UNSC Resolution 820 – where the UNSC complicated matters by specifically mentioning the Territorial Sea – the language in the key UNSC Resolution 836, whilst at first glance apparently clear, is actually quite confused. First, in paragraph five, the UNSC extended

...the *mandate* of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas...⁷⁴

The intended consequence of paragraph five is quite explicit – the UNSC is *extending the mandate* of UNPROFOR in order to *further empower* it to use force to *deter* attacks on the Bosnian safe areas. The confusion arises, however, in paragraph nine, in which the UNSC

Authorises UNPROFOR...in carrying out the *mandate* defined in paragraph 5 above, *acting in self-defence*, to take the necessary measures, including use of force, in reply to bombardments against safe areas...or to armed incursions into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.⁷⁵

The UNSC's intentions in drafting paragraph nine were clearly to send a tougher message to the Bosnian Serbs then menacing the UN safe areas, and to back this message with an extension of UNPROFOR's mandate and its RoE.⁷⁶ The issues it specifically addresses are protection of the safe areas, UNPROFOR's freedom of movement,⁷⁷ and the protection of humanitarian aid convoys – that is, mandate purposes. The curious inclusion of the hanging and unconnected phrase "acting in self-defence" adds nothing to the effect of the mandate extension. Arguably the

73 In the Bosnian conflict, attempts to differentiate between "close air support" (used for "self-defence"), and "airstrikes" (used for "enforcement"), arguably served only to exacerbate this confusion between defence and enforcement, protection and punishment – See UN Doc. S/ 1994/94 *Letter from the Secretary-General to the President of the UNSC*, dated 28 January 1994, on force protection and other plans prepared by the UNPROFOR Force Commander, after consultation with the Secretary-General's Special Representative and NATO. See generally, Lamb, "The UN Protection Force in Former Yugoslavia"; p 71; Shawcross, *Deliver Us From Evil*; p 10; and Sarooshi, *The United Nations and the Development of Collective Security*; p 73.

74 UNSC Resolution 836, 4 June 1993, on *Bosnia and Hercegovina*; paragraph 5 – my italics.

75 UNSC Resolution 836 (1993), on *Bosnia and Hercegovina*; paragraph 9.

76 See, for example, the preamble to UNSC Resolution 836, which expresses "grave concern" at the Bosnian Serb party's refusal to accept the Vance-Owen peace plan while "commending" the Bosniacs and Croats for signing, and "condemn[ing] the obstruction, primarily by the Bosnian Serb party, of the delivery of humanitarian assistance".

77 Note that Resolution 836 predates the resurrection of the ONUC approach to active unit self-defence that is evidenced in the UNOSOM II operation in Somalia.

phrase, which was not originally included in the draft resolution,⁷⁸ was inserted precisely to gain support for this extension of UNPROFOR's mandate by obscuring it behind a politically palatable and expedient façade of self-defence – a then necessary, but ultimately ambiguous, political concession to sensitivities and concerns about authorising UN forces to take the initiative in using force. It has no practical effect on the remainder of the paragraph. Indeed, apart from being effectively superfluous, it is arguably nonsensical insofar as the remainder of the Resolution as a whole makes it clear that the uses of force which the UNSC is authorising are all related to mandate objectives and purposes. This is reinforced in paragraph ten, in which the UNSC decided that

...Member States, acting nationally or through regional organisations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR *in the performance of its mandate* set out in paragraphs 5 and 9 above.⁷⁹

In view of the superfluous reference to self-defence in paragraph nine, this declaration was widely interpreted as concerning use of force in self-defence.⁸⁰ Read in conjunction with the rest of Resolution 836, however, it is clear – and indeed explicit – that paragraph ten simply provides a more detailed expression of one type of force to be considered for use in implementing the new RoE foreshadowed in paragraphs five and nine: That is, to provide for *sanctions* against *violations of the mandate*, which is an aspect of *enforcement*. Further, paragraph ten also serves to explicitly empower forces in the area which were not under UNPROFOR command – such as US and other Naval and Air Force squadrons in Europe, the units that would actually provide the promised air power – to use this force on behalf of the UNSC and UNPROFOR. Unit self-defence contemplates action to neutralise the immediate threat to the unit itself, not punitive action aimed at mandate enforcement or a show of political will.

Another example of such possible confusion is unwarranted linkages between the scheme of unit self-defence and RoE on using lethal force to protect or discourage attacks on mission-essential property.⁸¹ Some argue that this confusion is inevitable as the UNSC continues to “blur” the crossover between simple peacekeeping and more modern peace operations by using “humanitarian” issues as a trigger for Chapter VII action.⁸² For others, the real culprit is the fact that

78 Shawcross, *Deliver Us From Evil*, pp 89–91.

79 UNSC Resolution 836 (1993), on *Bosnia and Herzegovina*; paragraph 10.

80 See, for example, Sarooshi, *The United Nations and the Development of Collective Security*, p 72.

81 See, for example, Ryan's short comments on the East Timor operation – Ryan, “*Primary Responsibilities and Primary Risks: Australian Defence Force Participation in the International Force East Timor*”, p 102.

82 See for example, Morphet, “UN Peacekeeping and Election-Monitoring”; p 235; Bothe, “Peacekeeping”; p 589; Lillich, “Humanitarian Intervention Through the United Nations”; p 566.

...the distinction between the operational realities of UN Chapter 6 (Peacekeeping Operations) and UN-mandated Chapter 7 (Peace Enforcement Operations) has become blurred almost to the point of irrelevance. Rather than a clear distinction between observer-type missions and armed interventions, peace operations occur on a broad spectrum of escalating violence.⁸³

The weaknesses that result from this confusion as to the relationship of peacekeeping to peace enforcement, and the relationship between self-defence (including responses in defence of 'designated' persons such as civilians in the area of operations), and use of force to pursue mandate aims, will for the foreseeable future continue to haunt questions as to who can defend what under the scheme of unit self-defence, and whether UN peace operations forces in general have a silent "mandate to protect civilians".⁸⁴ This confusion ceases, however, if we simply characterise uses of force to pursue mandate objectives or to protect the environment established for mandate implementation, as instances of the UNSC conferred scheme to use force in *enforcement*, rather than as an exercise of the independent and custom-based right to use force in unit self-defence.

A second point reinforces this conclusion. As has been noted above, the scheme of unit self-defence "is in the nature of an individual, inalienable human right, which [within its constraints] puts it beyond government [or UNSC] control or consent".⁸⁵ The admission of UNSC directions as to 'extra' triggers – or indeed limitations on triggers – within the scheme thus subverts its whole jurisprudential basis. Further, such directions might actually constitute, *ab initio*, a breach of the conditions for the scheme because they could conceivably require an exercise of self-defence where (for example) passive non-cooperation is hindering a vital and urgent UN force reaction or frustrating the achievement of a time-sensitive core mandate objective. Only a hostile act or its immediate precursor (a demonstration of hostile intent) can properly trigger the scheme of unit self-defence, and the scheme's only proper aim is the cessation or limitation of injury to those encompassed within its bounds.

The hypothetical introduced on the first pages of this book, and reiterated at the beginning of this chapter, questions the construction of authority for a UN naval peace operations force warship encountering a vessel manned by third state supported local militia, in either the entity's or a third state Territorial Sea, and aboard which people are being executed. The very limited basic scheme of unit self-defence would countenance intervention where the vessel threatened the UN warship or an associated unit, or where that particular unit's domestic approach to self-defence countenanced an expansion of the scheme's coverage to include 'designated' persons such as focus state civilians. The active scheme of unit self-defence, on the other hand, would positively provide for (if not require) the warship to insert itself into the situation – possibly by conducting a non-compliant boarding in pursuit of its

83 Ryan, "Primary Responsibilities and Primary Risks": *Australian Defence Force Participation in the International Force East Timor*, p 118.

84 Koenraad Van Brabant, "Security and Protection in Peacekeeping: A Critical Reading of the Belgian Inquiry into Events in Rwanda in 1994", *International Peacekeeping*, Vol. 6, No. 1, 1999; p 152.

85 Stephens, "Rules of Engagement and the Concept of Unit Self Defence"; p 151.

other mandated tasks (such as approach for identity verification during patrolling, monitoring the safety of life at sea conditions on board the vessel, or in defence of designated persons), and then react in self-defence to the threat manifested by militia with weapons. Finally, although it is arguable that a scheme of mission self-defence might present a still more attractive option, allowing the warship to use force in self-defence from the outset, this would be a highly controversial approach. As discussed over the course of this chapter, a 'mission' interpretation of unit self-defence does not 'fit' with either the conceptual foundations or practical heritage of the scheme. Furthermore, such an expansive and contestable interpretation of the scheme of unit self-defence is not necessary, because in operations where this is required, the UNSC will have (or should have) authorised the use of force to enforce its mandate. When UN naval peace operations forces act to defend themselves (or others), it is in accordance with the inalienable scheme of unit self-defence that they respond. When, on the other hand, UN naval peace operations forces employ force to progress a mission purpose or objective, it is the mandate – as countenanced in law, and as distilled into mission RoE – that generally provides their permit to act. It is for these reasons that the active scheme is the preferred scheme – the 'how' of combining the principles of unit self-defence into a coherent regulatory regime. When dealing with the wider issue of authority, it is thus the active scheme which is best positioned to govern any adaptation of the context and principles of unit self-defence to regulating authority for UN naval peace operations in third state Territorial Seas.

Applying the Scheme to Authority for UN Naval Peace Operations in Third State Territorial Seas

As outlined above, it is clear that the active scheme can provide useful and coherent overall guidance for an authority regulatory scheme. This scheme will be referred to as 'active authority assertion'. The essence of the scheme, consequently, is to interpret the interaction of the principles in an 'active' manner, using the tools and tests these principles provide to construct the parameters of authority in UN naval peace operations. In order to illustrate the practical application of this proposed regulatory scheme for authority, the remainder of this chapter will use the author's experience of UNSC sanctions enforcement with respect to Iraq as an illustrative example.

Necessity

The essence of necessity, as analysed above, is found in the interaction of immediacy and the nature of the threat. The issue of *immediacy* is readily translatable into a regulatory scheme for authority, and countenances the possibility of anticipation but not pre-emption. In conducting UNSC sanctions enforcement operations, the requirement of immediacy is met by the appearance of a vessel at the naval cordon. The vessel is then inspected, or if it attempts to evade the cordon, pursued and boarded in order that verification of cargo and documents can take place. This is conceptually the same as response to a hostile act in the unit self-defence lexicon – the vessel has committed a triggering act, such as arriving at or trying to evade the sanctions cordon, and the UN naval force has responded accordingly. Taking one

step back from concurrency as immediacy, anticipation as an aspect of immediacy is demonstrated by the interdiction of the same vessel after it has sailed from its final port prior to attempting to breach the sanctions regime, but at some stage earlier than arrival at the naval sanctions enforcement cordon. This anticipatory interdiction would be based on an assessment akin to determining 'hostile intent' as a trigger to unit self-defence (using indicators such as capability, preparedness, and intention for early warning). Capability, for example, would be met by the fact that the vessel is carrying a cargo, which is either of unknown type, or is known to be in breach of the sanctions. Preparedness would be met by intelligence and tracking which indicated the vessel was ultimately destined for the cordoned port, and any previous history of attempts to evade sanctions by that vessel, its master, or the entity (commercial or otherwise) which has chartered or controls the vessel. Intention would be confirmed by any specific intelligence on the nature of the cargo and intentions as to destination, and by track analysis. Although the preference may be to await the vessel's arrival at the cordon – the 'hostile act' – such anticipatory interdiction may be operationally necessary in at least two situations. The first is where there is a backlog of vessels at the cordon point – either detained for attempted breach of the sanctions but not yet re-directed, or awaiting verification inspections prior to proceeding – and in appropriate cases it is sensible that naval forces stationed further to seaward conduct the appropriate verifications or boardings to ease congestion at the cordon. The second situation is where a boarding requires certain specialist capabilities – such as helicopter fast roping insertion rather than boat insertion, or where the expected levels of resistance require use of a team capable of conducting a non-compliant boarding, rather than a standard boarding team – and the appropriately resourced and capable unit is based further to seaward of the cordon area. As opposed to anticipatory interdiction, however, pre-emption in the context of regulating authority – for example, interdicting a vessel suspected of an ultimate intention to breach the sanctions, but which is proceeding to a non-affected port – would be beyond the authority envelope, just as it is with self-defence. This is for two reasons. First, there is no certainty that the vessel is going to attempt to smuggle its cargo into the cordoned port. In enforcing sanctions against Iraq, the very fact that a vessel carrying a cargo of arms was bound for some other state would not have given rise to any authority to enforce sanctions against it unless and until it demonstrated an intention to attempt delivery of those arms to Iraq. Second, the cargo – arms – is not a cargo in breach of the UNSC sanctions simply because it is arms. It would only take on the character of a sanctions breaching (prohibited) cargo once it was clear the destination of the cargo was the cordoned state (such as Iraq).

The second component of the principle of necessity is the *nature of the threat*. For the purposes of constructing and regulating authority, the nature of the threat should be translated as the *nature of the act*. Thus, in the sanctions enforcement example, the parameters of authority are established by reference to the acts and conduct which the UNSC has mandated against – such as (for example) importing arms into a state (as with the FRY and Iraq) and/or exporting oil or other cargoes from a state (as with Iraq). Thus where the UNSC has not mandated against an act, the regulatory parameters of authority do not encompass the authority to halt or use force to prevent the occurrence of that act. Passage by a gravel carrier transiting from an Iranian port through the Iraqi Territorial Sea, en route to Kuwait, was not

an act prohibited by the UNSC sanctions regime focussed on Iraq. Thus the UN naval force had no authority to deal with the vessel beyond a radio request for its identity and intentions. Unless the vessel altered course in an apparent attempt to run the gauntlet of the cordon and seek entry into an Iraqi port, or there was some intelligence that the vessel would attempt to do so, then its actions would not meet the ‘nature of the act’ criteria as a component of necessity, because the UNSC had not regulated the act of transiting through the Iraqi Territorial Sea.⁸⁶

Proportionality

As argued above, proportionality in the scheme of unit self-defence is governed by four sub-principles. The first is *timing* – the need for the response to the anticipated or actualised prohibited conduct to be contemporaneous to that prohibited conduct. Thus the authority to interdict an anticipated or actual attempt to breach a sanctions regime must be linked very closely in time to the attempt itself. The fact that a vessel had on a previous occasion successfully breached the Iraq sanctions regime – for example, in evading the naval cordon off the Iraqi coast by taking a risky route through the shallows of the Shatt-al-Arab littoral and slipping into sections of Iranian waters which precluded interdiction by the more navigationally constrained warships of the UN naval force – would not confer any subsequent authority to later interdict that vessel whilst it was engaged in other, non-prohibited activities. In such situations, the requirement for a close contemporaneous linkage between act and response is simply not met. Indeed, to later interdict the vessel whilst it was engaged on some other passage – for example, transiting between Iran and Kuwait – on the basis of a previous breach of the sanctions regime would clearly fall outside the operation’s authority parameters as the vessel is not, at that particular time, undertaking a prohibited act. The fact that the vessel had previously breached the sanctions would, however, be one factor in assessing its actual (as opposed to declared) intentions – for example, in determining whether it is actually intending to evade the sanctions by suddenly turning towards an Iraqi port. But until it demonstrated immediate ‘hostile intent’ towards the sanctions regime, the authority scheme would not extend to cover that vessel’s conduct, and interdicting the vessel would be an act outside the parameters of authority.

The second sub-principle relates to the appropriate factor against which to *measure* the ‘proportionality’ of the response. As analysed above, this relationship of proportionality is between the prohibited act and what is required (within the bounds of the legal envelope applicable to the operation) to halt that act, not between the prohibited act and the act undertaken in response. In this respect, in unit self-defence, the linkage is between the hostile act or demonstrated hostile intent, and what is necessary to protect oneself. In terms of constructing and regulating authority, this proportionality measurement principle would thus be understood by assessing what is necessary to halt the prohibited act (such as a breach of the sanctions regime) rather than requiring an operationally nonsensical scheme of different permitted responses linked to different prohibited acts. In the sanctions example, an authority

86 The UNSC can, however, act to regulate even this sort of passage – as indeed it did with respect to the Former Republic of Yugoslavia, as discussed in Chapter 5.

scheme which linked response to the nature of the prohibited act, rather than to what is required (up to a pre-established, legally defensible single threshold) to halt the prohibited act, would create an operational quagmire of differential rules for dealing with different cargoes. Such a regime might, for example, indicate that the response to arms smuggling includes use of force up to and including force likely to cause injury, whilst the response to oil smuggling may only extend to use of force that seriously damages property but does not include force that may inflict serious injury. The response to smuggling dates might be even further limited to measures short of force which is likely to cause any substantial damage. Apart from the obvious difficulties in defining, for a multinational force, the limits of different levels of force – such as what is ‘serious injury’, and what is ‘substantial damage’ – this system would be practically inoperable for two reasons. First, it is rare that there is specific intelligence of the particular prohibited cargo a vessel is carrying. Thus when a vessel attempts to evade the sanctions regime, where there has been no opportunity to verify the type of cargo, the operational naval commander most likely has no idea of the nature of the cargo. Prudence would thus require the commander to assume the lowest priority cargo, and use only that degree of authorised force. To assume a higher priority cargo (and thus authorisation to exercise the higher levels of force), in the absence of any firm indications, would be to potentially exceed the parameters (and protections) of authority. Second, regardless of whether the cargo is dates, oil, or arms, the assumption of a consistent authority across all prohibited cargo types is the only operationally sound scheme that could be adopted. Just as the aim in unit self-defence is *halting the threat* rather than *responding in kind*, the central issue in constructing and regulating authority for UN sanctions enforcement is halting the prohibited act, not attempting to halt the act at different permitted levels which are linked to the nature of the particular prohibited cargo. There is also a further prudential reason to adopt a ‘what is required to halt the prohibited act’ proportionality linkage over a ‘what is the equivalent act’ proportionality linkage – the fact that practice in interdiction operations supports the ‘what is required to halt the act’ approach. As discussed in chapter five, for example, UN naval peace operations forces have on occasion used direct disabling fire to halt sanctions-evading conduct without necessarily specific knowledge of the type of prohibited cargo carried by the delinquent vessel.

The third sub-principle of proportionality in self-defence is that the response must only take the form of the *minimum force required*, employed only for as long as is necessary in order to halt or neutralise the threat. Translated into a scheme for constructing and regulating authority, this sub-component would require use of the minimum force required only for as long as required in order to halt the prohibited act. Thus, as indicated above, the parameters of authority would detail the maximum levels of force permitted in the face of a prohibited act – for example, the use of direct disabling fire – but caveat that outer limit of authority (through RoE) with the requirement to always use the minimum force, on a graduated scale, that is required to halt the act.

In all the previous component principles of this regime for regulating authority, the predominant consideration has been the linkage between act and response, rather than the spatial relationship between the act and response as a single integrated incident, and the location where that incident takes place. For UN naval peace

operations in third party Territorial Seas, these principles touch upon the issue of authority to act and its linkage with location only tangentially, and only to assert that the authority to act is arguably of the same nature (that is, a link between prohibited act and permitted response) regardless of where it takes place. It is thus the final sub-principle of proportionality – *geographical ambit* – through which the scheme squarely confronts the issue of location. As discussed above, the linkage between act and response generally means that the geographical ambit of the act-response event is closely defined. The area encompassing the responding warship and the hostile agent attacking it will generally define the geographical ambit of response to a missile attack on a warship. Where the hostile agent is another warship, the geographical ambit obviously extends to encompass that warship. Where the hostile agent is not only the warship but also some associated third agent – such as an aircraft providing targeting information to the hostile warship – then the geographical ambit of response expands to encompass acts against that aircraft. Where the hostile agent is an aircraft, and the act required to neutralise the threat is to launch a missile at the airfield in the hope of rendering it inoperable, then the geographical ambit of response encompasses that airfield. And where the attacked warship has been rendered incapable of responding in its own self-defence, but another associated warship, authorised and in a position to do so, is able to respond in defence of the stricken warship, then the geographical ambit of response also encompasses that vessel. However, as discussed in relation to the PUEBLO incident, the act and response linkage does not permit expansion of the geographical ambit so widely as to respond against a (in that case) North Korean unit found elsewhere on the oceans and which is neither involved in the incident nor otherwise independently committing a hostile act or demonstrating hostile intent. A response of that nature would be an act of reprisal, not unit self-defence.

In relation to authority regulation for UN naval peace operations, such as sanctions enforcement, the issue of geographical ambit would thus be defined – as are the other component principles – by the act-response linkage rather than its location. In most instances, the act-response incident will take place close to the ‘focus’ (or ‘target’) state’s territory. Thus enforcement of the Iraq sanctions generally took place in or near the Iraqi Territorial Sea, as that was the location of the naval cordon, and thus the likely location of act-response incidents. But there is no requirement that these act-response incidents take place close to (for example) Iraqi territory. As with geographical ambit in relation to unit self-defence, the geography is *defined by the act-response incident*, not by a maritime territorial linkage to any party. Thus the fact that the act-response incident takes place in a third state’s Territorial Sea is not the authority issue. The location in a particular part of oceanspace is technically irrelevant because the geographical ambit of authority is defined by the act-response incident, not by where it happens. Thus enforcing UN sanctions against Iraq in Kuwaiti Territorial Seas is authorised if the act-response incident meets the requirements of the regulatory scheme for authority. The same could be said of enforcing sanctions against Yugoslavia (FRY) in the Albanian Territorial Sea, and responding to challenges to UN naval peace operations in the East Timorese Territorial Sea-designate where those challenges arose from within Indonesian Archipelagic Waters. However, these parameters of authority will generally be limited by other operational caveats. These include the designation of an Area of Operations (within which the RoE that give practical effect to this authority are

implementable), the RoE themselves (which may further limit implementation of the full range of available authority for some operational or political reason), and the fact that potentially adversarial responses to assertions of authority to operate in third state Territorial Seas are often defused through prior negotiation of 'understandings' on this issue – as with Indonesia regarding East Timor, and Kuwait regarding Iraq. Thus if required, where supported by good intelligence and indications of intention, and if this were the most operationally sensible and efficient response to a nascent breach, it would be entirely within the authority regulatory scheme to interdict a vessel bound for Iraq in breach of the sanctions regime in (for example) the Omani Territorial Sea.

Finally, with respect to geographical ambit, it is possible that the mission itself can inherently impose geographical limitations on authority – limitations that practically rather than conceptually govern where UN naval peace operations forces can exercise this authority. Where the mission is sanctions enforcement against a particular state, it is unlikely that the parameters of authority will need to extend across all oceanspace because it would be extremely unlikely that sanctions enforcement linked to Iraq would need to take place in the Pacific or Atlantic oceans. Thus, for example, the exercise of authority in relation to Iraq was generally limited to the waters of the Persian/Arabian Gulf and the Gulf of Oman. This is the geographical area in which forces assigned to the mission operated, the geographical area that constituted the Area of Operations in which their facilitating RoE applied, and the geographical area within which a reasonable and sustainable assessment of intention was possible. Similarly, where the mission is support of a UN transitional administration, there will also be a stronger link to geographical limits, and less mission need to conduct operations in distant third state Territorial Seas. This is because there would be few act-response situations applicable to transitional administration that would need to take place in distant third state Territorial Seas.

If, however, the UN were ever to endorse a Chapter VII mission covering (for example) interdiction of WMD materials headed to any of a number of widely dispersed particular states, it may be that the geographical authority parameters for that particular operation could cover *all* oceanspace. This is simply because there is potential for act-response incidents – such as vessel interdictions – to take place anywhere on the oceans. Thus operational necessity may require that a vessel be interdicted in (for example) the Territorial Sea of Japan, using helicopter inserted boarding teams launched from shore airfields, because this is the last feasible opportunity to interdict with such support available. Intelligence may suggest (for example) that the vessel, believed to be bound for North Korea, will soon thereafter put into place anti-interdiction measures (such as armed crew-members) which would make an interdiction boarding much more likely to result in use of lethal force – an outcome which the relevant UNSC resolution may not necessarily contemplate. Alternatively, the vessel may be intending to receive some additional support through a port en route, and it is operationally sensible to interdict before that particular support is provided and the operational situation thus further complicated. The point, however, is that such a mission would imply a wide geographical ambit for authority, and the active authority assertion scheme offers a conceptually coherent framework for managing and defining the parameters of authority for the operation.

Conclusion

As noted at the outset of this chapter, Grotius argued that the only legitimate reason to use force in the context of international relations was to enforce rights. This chapter has outlined a scheme for constructing and regulating authority for the conduct of UN naval peace operations – operations mandated in support of the UN’s right and responsibility to restore and maintain international peace and security. This framework for active authority assertion is based upon the concept and principles of unit self-defence, but adapted to the requirements of regulating authority. Further, this scheme for constructing and regulating authority for UN naval peace operations – illustrated above in terms of sanctions enforcement – would apply across all the types of UN naval peace operations tasks discussed over the course of this book. Thus where the operation was centred on ensuring the security of the Territorial Sea-designate of an entity under transitional administration, the prohibited acts might not be positively defined (as they are with UN sanctions regimes, where the UNSC expressly states that importing cargo types X and Y is prohibited), but rather defined by implication. Naval operations planners will facilitate this process by distilling the UNSC’s broad ‘mission statement’ into a series of discrete tasks and roles. Acts which are antithetical to these distilled tasks and roles – for example acts aimed at intentionally blocking or hindering the UN naval force’s facilitation of a critical enabler (such as logistics support) – are then definable as prohibited acts. In East Timor, where the mission was to assist the entity of East Timor through transitional administration and provision of security, the UN naval force’s tasks and roles, distilled from this mission, included security patrolling and monitoring of the Territorial Sea-designate, acting to protect the entity’s future maritime resources by conducting fisheries enforcement, and support for the UN peace operations force land component through logistics operations over the shore. Thus acts which aim to prevent the UN naval peace operations force from fulfilling these critical tasks and roles become the prohibited acts over which the regulatory scheme for authority operates – that is, active (and authorised) authority assertion. In this way the components of seapower – power, legitimation, and authority – coalesce into a conceptually coherent and (very importantly) operationally sensible and practical framework for understanding, planning, conducting, and assessing UN naval peace operations in their many different locations and their many different forms.

Conclusion

In 1977, the then First Sea Lord of the Royal Navy, Admiral Sir Edward Ashmore, declared his hope that any future Law of the Sea Convention would address the issue of movement of naval forces - “a sad but necessary condition of preserving peace and good order”.¹ However, a string of “dismal” post-Cold War international failures – the Former Yugoslavia, Liberia, Somalia, Rwanda, Sierra Leone – made it, to paraphrase Lillich, “almost quixotic” to dedicate time to understanding authority as it related to a weak (and for many, failing) experiment in collective international security.² For some, this pessimism was born of the nature and increasing incidence of non-state and intra-state conflict predicted before, and evident since,³ the post-Cold War economic and social failure of a number of ‘artificial’ states created or formalised in the wake of the Second World War - states which were often reliant upon superpower sponsorship for their continued viability or stability. For others it was generated by a reluctance to become overcommitted. Whatever the reason, it is clear that this “stumbling progress”⁴ in UN peace operations experience has overshadowed the need to achieve coherence in the scope and nature of underlying authority at its remoter fringes - such as UN naval peace operations. This conceptual deficit is reflected in the ad hoc nature of practice.

However, recent indications of a tentative degree of success in UN peace operations (such as East Timor and Kosovo) have generated some renewed confidence that multilateral peacekeeping has a sustainable future, albeit one of significantly greater complexity and increasing intrusion on sensitivities of sovereignty. Although a categorical assertion of ‘success’ remains premature, these experiences have gone some way to restoring a more positive outlook, perhaps in turn promising a degree of renewed UNSC vigour and effectiveness. It is thus already well past time that the international community accorded a level of priority to establishing some degree of conceptual and operational stability as to the nature, construction and assessment of the authority within which naval forces can contribute effectively in their support of UN peace operations, particularly in the sensitive area of the Territorial Sea.

The animating concern underpinning this book is that the chaos that could result from a collision between increasingly complex demands and continuing prag-

1 Edward Ashmore, “The Possible Effects on Maritime Operations of Any Future Convention of the Law of the Sea”, *To Use The Sea: Readings in Seapower and Maritime Affairs* (Second Edition), Naval Institute Press, Annapolis, 1977; p 377.

2 Lillich, “Humanitarian Intervention Through the United Nations”; p 557.

3 See, for example, Van Creveld, *The Transformation of War*, pp 57–62.

4 Woollacott, “We’re Stumbling, but We’re Going in the Right Direction”.

matic expediency is a crisis waiting to happen. Failure to address this issue carries a high price – most particularly the hazard of settling for the most immediate and expedient solution. Such solutions often carry with them the prospect of unintended consequences that could significantly impede the efficient, effective, and defensible execution of a range of acts central to UN naval peace operations. It is against this background that this book has sought to chart a conceptually coherent, operationally sensible, and politically practical context within which authority as it relates to UN naval peace operations can be understood, planned for, constructed and analysed. To achieve this, the primary focus has been on the most problematic area of incipient tension – the interaction between the rights and duties associated with UN naval peace operations, use of force, and the LOSC Territorial Sea regime.

A Brief Recapitulation

Power

The book commenced with an examination of the basic characteristics peculiar to power at sea – characteristics that must to be taken into account to prevent any authority construct being fundamentally flawed from the outset. The course of this exploration of power illustrates three thematic aspects which are essential to colouring and shaping the suitability of any authority construct in responding to the requirements of power in UN naval peace operations in the Territorial Sea.

The first aspect to be appreciated is access. As Staley observes, “[I]n order to demonstrate both its effectiveness and its impartiality, a multinational force must be able to move wherever and whenever necessary within the area of its peacekeeping responsibility”.⁵ Access to territory from the great common of the oceans is inevitably via the Territorial Sea, and it is this access that underwrites the core aspect of naval power – its flexibility.⁶ It is also access – the right of unhindered movement into, within, and out of a Territorial Sea – that is essential to the conduct of most UN naval peace operations tasks such as amphibious insertion, logistics-over-the-shore, and visible presence.

The second aspect is the complex character of the post-Cold War political and security environment itself. This factor has significant ramifications on three levels. First, on the general political level, this security environment differs markedly from that of the predominantly bi-polar second half of the twentieth century. The proliferation of non state-centric conflicts, the evolution of powerful non-state international actors (such as warlords, transnational corporations, and international terrorist organisations), and the prominence of asymmetric warfare have challenged not only states and their conventional forces, but also the UN and its peace operations forces. Second, on the level of general conceptualisation, the post-Cold War political and security environment is dominated by debate as to the future shape of

5 Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*, p 24.

6 Some, such as Pirtle, differentiate between *movement rights* and *operational rights* - Pirtle, “Military Uses of Ocean Space and the Law of the Sea in the New Millennium”; p 8. It is arguable, however, that the concept of operational rights is ultimately underwritten by movement rights, which might perhaps be more accurately described as *access rights*.

the international system, the allocations of authority within it, and the balance to be struck between traditional conceptions of state sovereignty, (re)emerging concepts of universalism, the needs of the international community as a whole, the discrete responsibilities of proliferating categories of actors, and the fluctuating – but apparent – tendency of some states and organisations towards unilateralism in peace and security affairs. For UN naval peace operations to be effective (particularly whilst ever larger tracts of oceanspace have been brought under varying degrees of national jurisdictions⁷) they must be founded upon an appreciation of operational practice – the actual tasks, roles and challenges that confront UN naval peace operations forces. Any authority construct must take these factors into account if it is to facilitate a seamless and relatively unproblematic interface between the major bodies of law and practice, and modes of legitimation, that govern and inform UN naval peace operations.

The third aspect is the political and discretionary nature of the UNSC's stewardship of international peace and security. Undoubtedly there is a general aversion among states to reductions in the (increasingly challenged) trumping power of sovereignty – a debate with reflected resonances for the Territorial Sea regime. However, it is also true – and in some ways quite quixotic – that the UNSC, subject as it is to the predilections of a number of the strongest defenders of traditional sovereignty, seems willing (and in some cases even able) to broaden its international peace and security authority and roles.

Any construction of authority for UN naval peace operations in the Territorial Sea needs to 'fit' with these three aspects of power generated (or in some cases, curtailed) by the UNSC's relationship with its member states. This is necessary not only because it is politically practical, but also because it is politically palatable and thus potentially realisable. Further, it does not challenge the fundamentally political nature of the authority to decide whether to initiate a UN naval peace operation. Rather it deals exclusively with facilitating the subsequent authority required for effective implementation, upon which related guidelines, limits, and strategies can be based, and the validity of specifically naval activities assessed.

Legitimacy

Reflecting the intensely pragmatic nature of authority at sea problems, any analysis of legitimacy in UN naval peace operations must genuflect to the practical and political, which has shaped, coloured and animated antecedent debates on how warships and naval operations other than armed conflict were to be understood for the

7 Pirtle, "Military Uses of Ocean Space and the Law of the Sea in the New Millennium"; p 16 – Pirtle records the calculations of two geographers (Lewis M. Alexander and Robert D. Hodgson) that the full suite of possible EEZs could "cover 37.7 million square miles, or 36% of the world's ocean space". He adds to this Arvid Pardo's calculation that the straight baselines regime for archipelagic states "has resulted in the enclosure 'as internal waters [of] up to nearly 15 percent of the oceans'" and his estimate that it "can reasonably be expected to enclose as internal waters a further 20 percent of the oceans in the future". If correct, Pirtle concludes, the ultimate result could be that "as much as 70% of the waters defined as high seas in 1958 may in time become enclosed within national administrative boundaries as defined in Article 86 of the 1982 LOS Convention".

purposes of constructing sensible, practical, but also conceptually sound legitimating frameworks relating to the Territorial Sea. The problem addressed is not a new one, but unless it is properly understood, it will render solutions unsustainable and sterile. Understanding this background, along with the LOSC 1982's specific context, contributes to understanding why the LOSC regime was unable to engage the issue and remained either silent or ambiguous. Understanding this background also assists understanding the integrative nature of the LOSC in particular – a reflection of the intensely practical nature of the way power is legitimated into an authority upon which sustainable legal principles can eventually be grounded. To paraphrase O'Connell, the “pliable character” of the Law of the Sea exists because “it has been made to serve the purposes of seapower, and so has become a weapon in the armoury” of states⁸ – a weapon useful in the conduct of their international relations. Indeed, as O'Connell observes,

For naval power to be used effectively for the resolution or promotion of international disputes, the seizure of the advantages offered by the rules of international law is central to the concept of operations...⁹

Deploying an integrative approach to make sense of the interfaces between UN Charter Chapter VII, use of force, and the LOSC as they affect UN naval peace operations in the Territorial Sea, provides a ‘fit’ with the current state of UN naval peace operations theory and practice. This is primarily a consequence of the ability of an integrative approach to remove the ambiguities that currently exist, and to allow interfaces with the wider concept of authority as it applies to both international peace and security and the law and usage of the sea, whilst avoiding undermining the LOSC in the way that its four 1958 predecessors were, falling into irrelevance as they were overtaken by events and international practice.¹⁰

Authority

Because the UN generally aspires to conduct and control peace operations in its own right (rather than as merely the flag bearer for a condominium of concerned states),¹¹ establishing the scope and nature of the related authority to conduct specific operations is crucial – particularly where the wording of specific mandates can be less than helpful. The constraining but complementary balance that legitimation brings to power is essential in fashioning a basis of authority. As noted at the very outset of this book, authority is the product of the interaction between power and legitimation; power without legitimation is at best simply power, and at worst tyranny, and

8 O'Connell, *The Influence of Law on Sea Power*, p 16.

9 O'Connell, *The Influence of Law on Sea Power*, p 4.

10 The Geneva Conventions on, respectively, *The Territorial Sea and the Contiguous Zone* 1958, *The High Seas* 1958, *The Continental Shelf* 1958, and *Fishing and the Conservation of the Living Resources of the High Seas* 1958.

11 As noted previously, this view has been supported in ICJ jurisprudence – for example, the *Competence of the Assembly Case* (1950) ICJ Reps 4, where the ICJ described the “organs” of the UN, rather than the member states, as the repository of the Organisation's authority and powers of judgment.

legitimation without power is at best representational, and at worst meaningless. Neither alone speaks with authority.

Accordingly, having considered the aspects of power that need to be taken into account and the manner in which this power can be legitimated into a feasible basis of authority, the remainder of the book faced the challenge of bringing these two elements together in relation to specific UN naval peace operations. The subsequent analysis indicated that it is possible to discern plausible responses to specific questions: Can a UN naval peace operations force warship conduct interdiction operations in the Albanian or Indonesian Territorial Sea/Archipelagic Waters without consent? (yes). Can a UN naval peace operations force warship use force in another state's Territorial Sea when interdicting ships attempting to avoid a UN embargo? (yes). How does a UN mandate affect authorisation in a Territorial Sea subject to transitional administration? (by empowering and enabling it to act as if it were its own Territorial Sea). In response to these challenges it is possible to establish that the authority actually accorded to UN naval peace operations forces, in different zones of oceanspace and across a range of purposes, could be constructed in a coherent and consistent manner – a clear improvement on the superficial expediency of ad hoc solution, issue avoidance, or obfuscation.

A central challenge to the conduct of UN naval peace operations was posed by the need to reconcile of the principle of 'innocent passage' with the requirements of such operations. By adopting a contextual definition of innocent passage, it is possible to bring the principle into conceptual consistency with the requirements of UN naval peace operations in the Territorial Sea in a recognisably consistent and readily supportable manner. By thus legitimating the access required for UN naval peace operations, it is possible to entrench the ability to patrol, monitor, interdict, assert presence, and project force in the Territorial Sea. Further, by reconciling innocent passage with the right to use force – disciplined by purpose, triggers, and permissible levels – it became possible to lay the necessary foundations for progressing to consider three discrete operational situations relevant to UN naval peace operations. The first was non-consensual interdiction operations in the Territorial Sea of a directly involved state – as with Iraq and the Former Republic of Yugoslavia. The second concerned operations during transitional administration, where sovereignty over the Territorial Sea is less readily identifiable – as was the case in East Timor, Somalia, and to a lesser extent Cambodia. The third was the ultimate problem in constructing authority for non-consensual UN naval peace operations in the Territorial Sea of a non-involved third state, which prompted the proposal of a scheme using the regime and principles of unit self-defence as a model for constructing and assessing the requisite basis and envelope of authority.

Concluding Comments

Process, not Rules

The course of analysis undertaken in this book suggests that it is possible to establish an authoritative basis upon which UN naval peace operations in the Territorial Sea can be assessed, planned, and executed, by providing a coherent, mutually reinforcing framework of authority which itself incorporates the salient features of the

LOSC, the UN Charter, use of force, custom, and operational practice. This contextual approach is important as it allows the authority generated to develop within a framework of established legal principles without itself needing to proscribe substantive legal rules. Rather, the essential legacy of the analysis suggests that authority takes on its character through an amalgam of framework and process. These two features provide both a means for identifying the requirement for authority, and then a method for incorporating the details of that authority, thus rendering it unnecessary to elaborate a free standing set of substantive rules.

This promises three major benefits for the construction of authority in UN naval peace operations in the Territorial Sea. First, because the LOSC is almost silent on issues of use of force, and the UN Charter almost silent on the use of oceanspace for international peace and security purposes, understanding authority as a framework and a process facilitates access to relevant, appropriate, and situationally sensitive rules to fill the 'gaps' and clarify the current ambiguities. At the political and operational level, this promotes clear, credible, and largely agreed authorisations for common and necessary acts, not only to guide the political and military management of an operation, but also to pre-establish the outer limits of the authority envelope in order to facilitate force planning and employment (and where necessary, deterrence). Similarly, at the tactical level, this provides a conceptual framework which allows individuals and units to use consistent and agreed guidelines – reinforced and amplified by precedent and UN naval operational experience – to analyse incidents and assess options for reaction. This will alleviate the need for constant high level guidance and clarification, which inevitably ensues when mandates are drafted ad hoc and without reference to a settled regulatory and conceptual framework. This approach to authority therefore provides both access to the content of functional, operational authority, and the agreed basis for its use.

Consistent Coherence

Following from the above, the framework and process nature of the authority question in UN naval peace operations in the Territorial Sea promotes a degree of consistency and coherence of practice applicable to these operations as a whole – a matter of particular importance when implementing new mandates and assessing future problems. Indeed the desire for consistency of authority is arguably already evident in the way in which the wording of mandates for interdiction operations in Haiti and the Former Republic of Yugoslavia have followed the pattern established during the Iraq-Kuwait operation.

Continuing Evolution

As previously noted, “the military requirements of UN peacekeeping have dramatically changed in recent years and...this has necessitated a [continuing] reassessment of operational techniques”.¹² From this perspective, a framework and process approach offers the flexibility to allow the basis and envelope of authority to co-evolve with new developments, and avoid the risk of becoming outmoded. Thus

12 Berdal, “Military Aspects of Peacekeeping”; p 132.

the execution of each UN naval peace operation can to some extent remain ‘ad hoc’ with respect to the changing content of specific authority rules – such as levels of force permissible in the conduct of UN peace operations, or the effect of IHL on the implementation of UNSC resolutions. But this construction of authority is not ad hoc with respect to building the sources of specific authority rules into the operation by identifying and integrating authority specifics as required, rather than attempting to fix the content of such rules. This also means that contentious, specific, non-LOSC questions relating to authorisations – such as the place of the VINCENNES incident in the law of unit self-defence, or the development of a workable scheme for interaction between UN naval forces and ‘domestic’ forces created in the course of a UN transitional administration – can be analysed and resolved, and these resolutions then incorporated into our understanding of authority in UN naval peace operations conducted in the Territorial Sea.

The Future?

There still remain, as Rikhye wrote in 1989 (but with continuing relevance today), “many possible tasks for peacekeeping on the oceans”.¹³ Potential future developments in the construction of authority for UN naval peace operations in the Territorial Sea can be categorised into organisational and ambit concerns.

On an organisational level, an occasional and intermittent debate on the development of standing UN forces (including a standing UN naval force to act as a crisis rapid response force) may periodically excite new interest. Indications were noticeable as the multinational naval force operating in the Persian Gulf shaped to its post-2003 circumstances by adopting the ad hoc role of Iraqi Coast Guard, and remain recognisable as the piracy crisis off the Horn of Africa escalates, and as the maritime lessons of the Balkans, Sierra Leone, and East Timor UN peace operations are slowly identified and assessed. Similarly, the implications for UN naval peace operations of the unfortunately labelled ‘war on terrorism’ will also become increasingly apparent, particularly as the possibility of non-consensual WMD or terrorism related interdictions at sea once again emerges for further detailed consideration – as it unfortunately, but inevitably, will.¹⁴ Several models for a standing UN naval force already exist. These range from US Senator Claiborne Pell’s 1966 proposal for an “International Sea Patrol”, through to a standing task group based on the NATO multinational naval force model.¹⁵ A more realisable, and politically

13 See Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*, p 11.

14 See, Roach, “Initiatives to Enhance Maritime Security at Sea”; pp 55-63, where he notes some of the initiatives currently under consideration with respect to entrenching alternative authority bases for activities such as PSI, including the now implemented proposal to specify stronger boarding powers for navies and maritime law enforcement agencies under the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* 1988 (the SUA Convention) – achieved via the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*.

15 See Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*, pp 29-42. Pell, for example, envisaged that this International Sea Patrol would be responsible for, inter alia, the enforcement of “international safety regulations at sea”, the “operation of a world-wide rescue service”, and “for enforcement of international law concerning nav-

and economically palatable, organisational future for UN naval peace operations is perhaps the creation of a co-ordinating body. One proposal has been for a discrete 'UN Maritime Peace Operations Agency' which would provide a central mustering point for distilled expertise, planning, and policy development for future UN naval peace operations.¹⁶ Were such an independent agency established, it would of course require strong links with both the DPKO and the IMO. Alternatively, and perhaps more realistically, a Naval Operations Agency could be established as a subsidiary organ of the DPKO. The common purpose, however, would be that such an Agency – wherever housed and of whatever status – should then become the focus for planning UN naval peace operations, and progressively developing the theory and practice required for consistency in these operations. It could also take the lead role in facilitating resolutions for the suite of problems inherent to UN (and thus multinational) naval peace operations – such as the demands of interoperability, command, control and communications procedures, and the multitude of other requirements necessary for the effective application of naval force. Importantly, it could adopt a holistic role in developing 'doctrine' on constructing authority for UN naval peace operations, including on the sensitive issue of UN naval peace operations in third party Territorial Seas.

With respect to the potential future ambit of UN naval peace operations in the Territorial Sea, there are a range of possible, indeed probable, actions that UN naval peace operations forces may be required to undertake in the near future. Warner, for example, has raised the possibility of UN naval peace operations taking place within a coastal state's Internal Waters without consent and absent an authorised UN peace operation ashore¹⁷ – a step beyond operations in the Territorial Sea, and in a maritime zone that has long been equated to land territory, and thus subject to (almost) the same authority regimes as land territory. This might include UN flagged ships entering Internal Waters without permission in order to evacuate a group facing a Rwanda-type genocide. Staley asks whether environmental protection might also become a proper aspect of UN naval peace operations. Indeed, as he notes, the ability

gation at sea". Staley also discusses other proposals based upon the NATO model, the United States Coast Guard experience of co-operative operations in the Caribbean, the non-UN Multinational Force and Observers (Sinai) coastal patrol unit, and the Persian Gulf Multinational Interception Force. It is arguable, however, that the high cost of the materiel, logistic, organisational, training, and administrative infrastructures required to underwrite such a force is probably prohibitive, because although "land-based peacekeeping... is a complicated and expensive proposition, the situation at sea is far more complex both for contributing nations and for the actual maritime peacekeeping team itself" – Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; p 15-16. Further, it is not likely that troop contributing nations would react generously to proposals for a standing naval force: As Staley concludes, "navies are expensive, and nations rarely have all the ships and personnel they feel they need for their own effective defence... Any ship lent to the United Nations is one less ship available to the donor nation". Besides, one could argue, the current system of ad hoc contributions by states to UN naval peace operations as and when required has to date been relatively successful, so there is little need to supplant it with a new, untested, and more expensive alternative.

16 See, for example, Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*; pp 43-50.

17 Warner, "The Compatibility of 1982 United Nations Law of the Sea Convention Norms with the Execution of Force"; p 102.

to react earlier “to prevent, counter, or contain” acts such as the Iraqi release of massive quantities of oil into the Persian Gulf during 1990–1991, may have reduced the scale of the resultant environmental catastrophe.¹⁸ In an even more expansive prediction, Matheson believes that there may in the future

be situations in which the Security Council would be justified in directing a permanent change in some aspect of the status, boundaries, political structure, or legal system of a territory within a state, if the Council should determine that doing so is necessary to restore and maintain international peace and security.¹⁹

Matheson goes on to cite three hypothetical examples: A UNSC sponsored “change in the boundaries of a state...necessary to give its neighbours better security against a repetition of armed attack”; a UNSC “guarantee of autonomy to a particular part of a state’s territory or population” where this is necessary to avoid further civil conflict that might threaten international peace and security; and a UNSC enforced “permanent nullification of discriminatory restrictions on one population group”.²⁰ The implications in terms of constructing authority for new types of UN naval peace operations – patrolling hotly contested maritime and coastal boundaries, conducting evacuations or relocations, and even engaging rogue elements in offensive LoNW-based operations – are significant, but not insurmountable.

Ultimately, however, the next challenge to the construction of authority in UN naval peace operations in the Territorial Sea might simply result from a more active assertion of the already authorised and existing potential of UN naval peace operations forces. As Staley records of the UN operation in the former Yugoslavia, “the Yugoslav navy’s shelling of such coastal cities as Dubrovnik might have been deterred by a United Nations maritime force in place off the coast, operating under United Nations resolutions and negotiated agreements to prevent such hostile naval activity”.²¹ Perhaps this is the naval equivalent of the ‘bamboo pole roadblock incident’ during UNTAC – a situation where it was political or operational will (or perhaps technical capacity), rather than authority, which was lacking. Thus the next challenge may in fact be a willingness to more fully exploit the power and legitimation that UN naval peace operations can already harness in Territorial Seas. But escaping the essentially ad hoc nature of past practice – for example, by adopting and applying a scheme for constructing, analysing, and describing authority for UN naval peace operations in the Territorial Sea – ultimately requires a further act of political and operational will. This is a catalyst that a construction of authority can assume, but cannot inherently provide. One thing, however, is certain: If we choose the wrong approach, or even no approach, to constructing authority and assessing its practical applications, or sacrifice consistency to expediency, we will inevitably cause many more problems than we will resolve.

18 Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*, pp 19–20.

19 Matheson, “United Nations Governance of Postconflict Societies”; p 85.

20 Matheson, “United Nations Governance of Postconflict Societies”; p 85.

21 Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping*, p 19.

Glossary

ASEAN	Association of South East Asian Nations
CIVPOL	International Civilian Police
DPKO	Department of Peacekeeping Operations (United Nations)
EC	European Community
EEZ	Exclusive Economic Zone
FDTL	Forças de Defesa de Timor Lorosae (East Timor Defence Force)
FRY	Former Republic of Yugoslavia
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law (Law of Armed Conflict)
IMO	International Maritime Organisation
INTERFET	International Force East Timor
JNA	Yugoslav National Army
LoNW	Law of Naval Warfare
LOSC	Law of the Sea Convention 1982
MINURSO	United Nations Mission for the Referendum in Western Sahara
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
ONUC	United Nations Operation in the Congo
ONUSCA	United Nations Observer Group in Central America
OOTW	Operations Other Than War
RoE	Rules of Engagement
SLOC	Sea Line of Communication
SPE	(Armed) Services Protected Evacuation
UN	United Nations
UN Charter	Charter of the United Nations 1945
UNAMET	United Nations Assistance Mission in East Timor
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNEF	United Nations Emergency Force (Middle East)
UNGA	United Nations General Assembly
UNMIBH	United Nations Mission in Bosnia-Herzegovina
UNMIK	United Nations Mission in Kosovo
UNMISSET	United Nations Mission in Support of East Timor
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Deployment (Macedonia)

UNPROFOR	United Nations Protection Force (Former Republic of Yugoslavia)
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNTAC	United Nations Transitional Authority in Cambodia
UNTAES	United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Nations Transitional Administration in East Timor
UNTEA	United Nations Temporary Executive Authority (West Irian/Irian Jaya)

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- France (Navy)
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