*JFR Boddens Hosang**

AN ANALYSIS OF SOME RECENT MARITIME CHALLENGES FROM THE PERSPECTIVE OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS

Abstract

The international law of military operations provides a cohesive framework through which military actions and related geopolitical developments can be analysed with the aim to bring them into a clearer legal perspective. This is demonstrated on the basis of three case studies: the 2018 incident in the Kerch Strait between Russian State vessels and Ukrainian warships; the confrontations and tensions in the Mediterranean between Greece and Turkey, as well as between European warships and Turkish vessels; and the freedom of navigation of warships and military aircraft in the South China Sea. In each of these cases, an analysis is presented of the incident or situation in relation to applicable law as well as in relation to the interpretation of the law by the States involved. The latter part of that analysis includes discussing the interaction between geopolitical tensions or goals and the rule of (international) law.

I Introduction

International peace and security are facing a number of complex challenges which threaten geopolitical stability. The Russian annexation of Crimea in 2014 and the armed invasion of Ukraine in 2022 are perhaps the most significant examples of the threat and reality of war in the modern geopolitical arena, which included the use of hybrid tactics as a precursor.[1] The civil war in Libya and recurring tensions

* Senior External Researcher at the Law of Armed Conflict and Military Operations Research Group of the Amsterdam Center for International Law at the University of Amsterdam and Research Fellow at the Netherlands Defence Academy, Breda, the Netherlands. The author is grateful to Prof Dr TD Gill and Prof Dr MC Zwanenburg for their comments on an earlier draft of this article. The views expressed in this article are, however, the sole responsibility of the author.

1 See, eg: James K Wither, 'Making Sense of Hybrid Warfare' (2016) 15(2) *Connections* 73; Sascha-Dominik Dov Bachmann and Anthony Paphiti, 'Russia's Hybrid War and Its Implications for Defence and Security in the United Kingdom' (2016) 44(2) *Scientia Militaria* 28. As regards Russia and Ukraine, see, eg: Johann Schmid, 'Hybrid Warfare on the Ukrainian Battlefield: Developing Theory Based on Empirical Evidence' (2019) 5(1) *Journal on Baltic Security* 5; Nicu Popescu, 'Hybrid Tactics: Russia and the West' (Issue Alert No 46, European Union Institute for Security

in the Mediterranean are testing alliances and fuelling tensions between the East and West, as well as between allies.[2] Finally, although the list could continue for quite a bit longer, the increasing tensions in the South China Sea transcend regional concerns and interests and have the potential to threaten international peace and security on a global scale as more States become involved in the situation.[3]

These situations of tension and crisis have been the subject of numerous analyses, from geopolitical to legal, examining the whole of each situation.[4] While the analysis of *jus ad bellum* — the conditions under which States may resort to the use of armed force in or against another State[5] — and general public international law in relation to these situations is both necessary and valuable, this article instead focuses on specific aspects of three of these situations. The situations include: (1) the maritime aspects of the annexation of Crimea; (2) tensions in the Mediterranean Sea; and (3) the developments in the South China Sea. Specifically, this article intends to analyse the relationship between the law of the sea ('LOTS') and the international

Studies, October 2015) <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Alert_46_Hybrid_Russia.pdf>; Stephanie Stamm and Hanna Sender, 'Understanding Russia's Various Hybrid War Tactics in Ukraine', *Wall Street Journal* (online, 25 February 2022) <https://www.wsj.com/livecoverage/russia-ukraine-latest-news/card/understanding-russia-s-various-hybrid-war-tactics-in-ukraine-H1Hnr8iMvRinuh1qNoB4>.

2 See Marta Dassù, 'Why the War in Libya Is a Test for Italy: And for a Geopolitical European Commission', *European Council on Foreign Relations* (Blog Post, 30 June 2020) <https://www.ecfr.eu/article/commentary_why_the_war_in_libya_is_a_test_for_italy_and_for_a_geopolitical>; Mersiha Gadzo, 'The Unfolding Geopolitical Power Play in War-Torn Libya', *Al Jazeera* (online, 19 June 2020) <https://www.aljazeera.com/news/2020/6/19/the-unfolding-geopolitical-power-play-in-war-torn-libya>.

3 Ian Storey, 'Britain, Brexit, and the South China Sea Dispute', *Maritime Awareness Project* (Analysis Post, 3 February 2020) <http://maritimeawarenessproject.org/wp-content/uploads/2020/02/analysis_storey_020319.pdf>; Derek Grossman, 'Military Build-Up in the South China Sea' in Leszek Buszynski and Do Thanh Hai (eds), *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition* (Routledge, 2020) 182; Li Jianwei and Ramses Amer, 'British Naval Activities in the South China Sea: A Double-Edged Sword?', *Institute for Security & Development Policy* (Blog Post, April 2019) <https://isdp.eu/publication/british-navy-south-china-sea/>; Idrees Ali and Phil Stewart, 'Exclusive: In Rare Move, French Warship Passes through Taiwan Strait', *Reuters* (Blog Post, 25 April 2019) <https://www.reuters.com/article/us-taiwan-france-warship-china-exclusive-idUSKCN1S10Q7>.

4 See, eg: above nn 1–3; Thomas D Grant, 'Annexation of Crimea' (2015) 109(1) *American Journal of International Law* 68; Robin Geiβ, 'Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind' (2015) 91(1) *International Law Studies* 425; 'Ukraine-Russia Symposium', *Lieber Institute* (Web Page) <https://lieber.westpoint.edu/category/ukraine-russia-symposium/>; 'Articles of War: Use of Force', *Lieber Institute* (Web Page) <https://lieber.westpoint.edu/articles-of-war/topics/use-of-force/>.

5 'What Are Jus Ad Bellum and Jus In Bello?', *International Committee of the Red Cross* (Web Page, 22 January 2015) <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

law of military operations ('ILMO') as it applies to naval operations in each of the three situations listed above. As regards the Russian annexation of Crimea, the incident in the Kerch Strait in 2018 between Russian Federal Security Service vessels and three Ukrainian warships will be used to examine the applicability of international law to naval operations in the area, including the *United Nations Convention on the Law of the Sea* ('*UNCLOS*')[6] and international humanitarian law ('IHL') as it applies to naval warfare. As regards the Mediterranean Sea, the confrontation between a French warship and Turkish vessels off the coast of Libya in 2020 will be used to analyse the interaction between the LOTS and the legal aspects and effects of resolutions of the United Nations Security Council ('UNSC'). Additionally, the tensions between Greece and Turkey regarding natural resources will be used to analyse complexities resulting from claims involving maritime zones of strategic economic importance and their interaction with the law on the use of force in military operations. Finally, as regards the South China Sea, the freedom of navigation of warships and military aircraft will be examined — especially as regards the regime of islands and the dispute surrounding the Spratly and Paracel island groups.

Clearly each of these topics could merit (at least) an article of its own, while a comprehensive discussion of each of these topics could fill volumes. However, the purpose of this article is not to be exhaustive, but to offer a more general insight into dimensions of the situations in question focusing on ILMO.[7] Although the status of ILMO as a distinct and recognised sub-element of international law is relatively new, it provides, as a discipline, an integrated and cohesive framework that allows examination of the situations in question with a specific focus on military operations and military conduct. In this way, this 'flux capacitor' of international law allows a broad inclusion of relevant elements of international law while also allowing specific observations as to how these elements affect military operations in the incidents in question.[8] Notwithstanding the scope and depth of ILMO, the analyses of the incidents and topics in question will be brief and are primarily intended to encourage further discussion. That includes discussing the interaction between political interests and goals and the functioning of international law given the inherent geopolitical context in which the military operations, to which ILMO applies, take place.

The situations were not chosen randomly as in each, a level of tension exists between the political interests (legitimate or otherwise) of the parties involved — including economic interests and geopolitical strategy — and the law. This has sometimes led to creative interpretations of both the substance and field of applicable law. The

6 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

7 Terry D Gill, 'ILMO: The "Flux Capacitor" of Contemporary Military Operations' (2019) 112(3) *Militair Rechtelijk Tijdschrift* 5 ('ILMO: The "Flux Capacitor"'). Note especially the description of the dual function of ILMO: at 8–9.

8 Ibid 5–6. A flux capacitor is a fictional piece of technology used to facilitate time travel in the film *Back to the Future* (Universal Pictures, 1985) and its sequels: at 5.

tension is not necessarily related to the more traditional aspect of compliance with the law, as the views expressed by the States involved include legal explanations of their positions regardless of whether those explanations are tenable. In other words, the views do not deny the applicability of international law to the situations in question, nor do they seek to violate applicable law directly, but rather appear to utilise the law to further the goals and interests of the States concerned. While that, in itself, can be a natural interaction between politics and law, and part of the common purpose of politics and law in 'ordering societal relations'[9] even on the international level, there is nonetheless some cause for concern. While clearly law is derived from political processes and decisions,[10] and can equally be changed by political processes and decisions, 'law' as an entity once created — including, but not limited to, the institutions and processes related to that entity — must also function with sufficient distance from political processes if it is to serve its purpose.[11] Part of that purpose is to ensure predictability, stability and a degree of continuity in the ordering of relations.[12] There are conceptual difficulties discussed in academic writing as regards describing the role of international law from neither a 'utopian' nor an 'apologetic' point of view.[13] Notwithstanding these difficulties, a balance must be maintained between the dynamic and interactive relationship between politics and law and the normative role of law in restraining ad-hoc political opportunism. Political choices which directly violate (international) law most clearly affect legitimacy.[14] Similarly, it may be suggested that creative interpretation or selective application of the law strictly as a means to further geopolitical goals to the detriment of others may impact the legitimacy of those decisions, as well as undermine the role (and rule) of law in general. In other words, in addition to the goal stated above, this article intends to examine the interaction between bodies of (international) law in the face of complex situations of geopolitical tension.

9 Miro Cerar, 'The Relationship between Law and Politics' (2009) 15(1) *Annual Survey of International and Comparative Law* 19, 31.

10 This observation also applies to national laws created by the legislative process in the State in question, for which the national institutions are commonly political in nature, and to international law as created by States through the ratification of treaties and the establishment of international institutions, among other things.

11 See Cerar (n 9) 20–1, including the discussion of the monistic and dualistic ontological views of politics and law, as well as the observation that law can be a means of achieving political goals but must also be autonomous and independent to a relevant degree: at 35–7.

12 Ibid 30.

13 Martti Koskenniemi, 'The Politics of International Law' (1990) 1(1) *European Journal of International Law* 4, 9; Martti Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20(1) *European Journal of International Law* 7, 8.

14 See Gill, 'ILMO: The "Flux Capacitor"' (n 7) 7–8.

II The Kerch Strait Incident

A *The Incident*

On 25 November 2018, three Ukrainian military vessels were on an approach to the Kerch Strait from the Black Sea, with the intent to traverse the strait and head for a Ukrainian port in the Sea of Azov. They were subsequently stopped near the strait by vessels of the Russian Federal Security Service coast guard. After some time, the Ukrainian vessels proceeded to leave the area, heading back into the Black Sea. They were subsequently pursued by the Russian vessels and — after the *Berdyansk* was fired upon resulting in damage to the vessel and injuries being sustained by the crew members — all three vessels were boarded and seized by the Russian authorities.[15] The crew members were taken off the vessels and charged with illegal trespass into Russian territory.[16]

B *Applicable Law*

In this Part, the interplay between *UNCLOS* and IHL, including the law of naval warfare ('LONW'), will be discussed. First, the status of the Kerch Strait and the incident itself will be analysed from the perspective of the LOTS. Next, the incident will be examined from the perspective of IHL. Finally, a conclusion will be presented as to which body of law is more suitable for evaluating the incident.

1 *Status of the Kerch Strait*

The Kerch Strait is a narrow strait that connects the Black Sea and the Sea of Azov and is bordered on one side by the Crimean Peninsula and on the other side by Russia (see Figure 1 below).

Until the independence of Ukraine and the dissolution of the Union of Soviet Socialist Republics ('USSR') in 1991, the strait and the enclosed Sea of Azov behind it fell within the definitions of art 10 of *UNCLOS* regarding bays and, following the demarcation line declared by the USSR in 1985,[17] both the Kerch Strait and the Sea of Azov became internal waters of the USSR.[18] Following the dissolution of the USSR, art 10 of *UNCLOS* no longer applied, as the strait and the Sea of Azov

---

15 *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Order)* (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019) [30]–[31] ('*Order*'). This case will be discussed in greater detail in Part II(B)(2)(c) below.

16 *Order* (n 15) [32].

17 *4450 Declaration*, (USSR) Council of Ministers, 15 January 1985, 39 [35]–[36] ['4450 Declaration', *Office of Legal Affairs* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1985_Declaration.pdf>].

18 For a discussion on the history of the status of the Kerch Strait, see Valentin J Schatz and Dmytro Koval, 'Ukraine v Russia: Passage through Kerch Strait and the Sea of Azov', *Völkerrechtsblog* (Blog Post, 10 January 2018) <https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/>.

Figure 1: Kerch Strait[19]

behind it were now bordered by two States: Russia and Ukraine. Applying the rules of *UNCLOS* and taking into account the size of the Sea of Azov, which leaves sufficient room for territorial seas and exclusive economic zones ('EEZs'), it could be argued that the Kerch Strait thus became a strait used for international navigation as covered by pt III of *UNCLOS*.[20] This view is not shared by Russia, however, which insists that the dissolution of the USSR did not change the status of the waters in question as being internal waters of both Russia and Ukraine.[21]

In 2003, Russia and Ukraine concluded the *Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait* ('*2003 Agreement*').[22] Article 1 of the *2003 Agreement* declares that

19 Jeff Seldin, 'US, NATO Slam Russian Plan To Block Parts of Black Sea', *VOA* (online, 16 April 2021) <https://www.voanews.com/a/europe_us-nato-slam-russian-plan-block-parts-black-sea/6204673.html>.

20 See also Alexander Lott, 'The Passage Regimes of the Kerch Strait: To Each Their Own?' (2021) 52(1) *Ocean Development and International Law* 64, 65–7.

21 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation) (Award Concerning the Preliminary Objections of the Russian Federation)* (Permanent Court of Arbitration, Case No 2017–06, 21 February 2020) [205]–[211].

22 Договор между Россйской Федерацией и Украной о Сотрудничестве в Использовании Азовского Моря и Керченского Пролива [Agreement between the Russian Federation and the Ukraine on Cooperation in the Use of the Sea of Azov and the Strait of Kerch], signed 24 December 2003 (entered into force 22 April 2004) <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC045795/>. An unofficial published translation of this agreement is also available and will be referred to in this article: see *Agreement between the Russian Federation and Ukraine on Cooperation*

both the Kerch Strait and the Sea of Azov historically constituted internal waters of both Russia and Ukraine. Article 2(1) of the *2003 Agreement* also stipulates that '[m]erchant ships and warships, as well as other State ships flying the flag of the Russian Federation or Ukraine, operated for non-commercial purposes, enjoy freedom of navigation in the Sea of Azov and the Kerch Strait'.[23]

Following the annexation of Crimea by Russia in 2014, the Russian view became that the Kerch Strait was now bordered on both sides by Russia, a view emphasised by the building of a bridge across the strait.[24] In spite of this view, however, Russia did not terminate the *2003 Agreement* with Ukraine. Ukraine, on the other hand, does not acknowledge that the *2003 Agreement* definitively establishes the status of the Kerch Strait or the Sea of Azov, as the *2003 Agreement* is, in the Ukrainian view, a framework for further agreements on demarcation of the maritime boundaries between the two States.[25] Moreover, Ukraine insists that the term 'historically' or 'historical' modifies the word 'constitutes' and does not modify 'internal waters', and thus refers to a historical point of view and not the current legal status of the waters in question.[26] Russia disagrees with this interpretation.[27]

---

in the Use of the Sea of Azov and the Kerch Strait, signed 24 December 2003 (entered into force 22 April 2004) [tr Dmytro Koval and Valentin J Schatz, 'Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait' (Research Paper) <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/proelss/dateien valentin/agreement-sea-of-azov>] ('*2003 Agreement*').

23 *2003 Agreement* (n 22) art 2(1), quoted in *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Memorandum of the Government of the Russian Federation)* (International Tribunal for the Law of the Sea, Case No 26, 7 May 2019) n 8 ('*Memorandum*').

24 See, eg: Jess McHugh, 'Putin Eliminates Ministry of Crimea, Region Fully Integrated into Russia, Russian Leaders Say', *International Business Times* (online, 15 July 2015) <https://www.ibtimes.com/putin-eliminates-ministry-crimea-region-fully-integrated-russia-russian-leaders-say-2009463>; 'Ukraine Crisis: Putin Signs Russia-Crimea Treaty', *BBC News* (online, 18 March 2014) <https://www.bbc.com/news/world-europe-26630062>.

25 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation) (Written Observations and Submissions of Ukraine on Jurisdiction)* (Permanent Court of Arbitration, Case No 2017–06, 27 November 2018) [81]–[86] ('*Written Observations and Submissions of Ukraine*'). Note that the *Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State Border*, signed 28 January 2003, 3161 UNTS 1 (entered into force 23 April 2004) similarly refers to the Sea of Azov and the Kerch Strait as internal waters: at art 5. However, Ukraine maintains that this provision was merely 'a reservation of each party's positions without clarifying exactly what those positions are; it evinces no common agreement on the status of the Sea of Azov and Kerch Strait': *Written Observations and Submissions of Ukraine* (n 25) n 130.

26 *Written Observations and Submissions of Ukraine* (n 25) [80]–[83].

27 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation) (Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction)* (Permanent Court of Arbitration, Case No 2017–06, 28 January 2019) [100]–[103] ('*Reply of the Russian Federation*').

As regards the Sea of Azov behind the strait, it is clear that this sea is not bordered exclusively by one State, being clearly bordered by Ukraine as well, including the port of Berdyansk. Although Russia appears intent on capturing and occupying the entire Ukrainian side of the Sea of Azov in its current (2022) operations,[28] the territory in question is nonetheless part of Ukraine. That means that any claim of the Sea of Azov being historic internal waters by either State to the exclusion of the other, or any return to the pre-1991 situation, is impossible. In fact, Russia has made its position clear — that the Sea of Azov constitutes internal waters of both States (leaving aside for the moment whether the Sea of Azov truly constitutes internal waters).[29]

Based on these observations, the status of the Kerch Strait depends in part on the status and meaning of the *2003 Agreement*, including its provision as regards the Kerch Strait and the Sea of Azov being historically (or historical) internal waters of both States. If the claim for historic internal waters is rejected, then the Kerch Strait is a strait used for international navigation as covered by arts 37–44 of *UNCLOS*. Passage through the strait is then governed by the rules regarding transit passage — this being the position of Ukraine as regards the strait.[30] If the claim is accepted, however, the status of the Kerch Strait becomes more complex and it would no longer constitute a strait used for international navigation. In this view, supported by Russia,[31] the strait itself is also considered internal waters and passage is subject completely to the rules and conditions set forth by the coastal State(s) in question. As regards Ukrainian vessels, however, given that Russia considers the agreement to be applicable, this view would not negate the right of access to the strait by Ukraine on the basis of art 2(1) of the *2003 Agreement*.[32]

---

28 Although clearly Russia has not announced its strategy or military plans, the shift from attacking Kiev to focusing on the southern and eastern regions clearly demonstrates the observation above. See, for a visual representation of the course of the war: 'Ukraine in Maps: Tracking the War with Russia', *BBC News* (online, 28 October 2022) <https://www.bbc.com/news/world-europe-60506682>.

29 *Reply of the Russian Federation* (n 27) [80]–[112].

30 See: *Written Observations and Submissions of Ukraine* (n 25) [78]; *UNCLOS* (n 6) arts 37–44.

31 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation) (Preliminary Objections of the Russian Federation)* (Permanent Court of Arbitration, Case No 2017–06, 19 May 2018) [98].

32 Note that *UNCLOS* (n 6) art 45, applying the regime of innocent passage to straits used for international navigation which either do not meet the criteria outlined in art 37 or to such straits connecting the high seas or an exclusive economic zone to the territorial waters of a State, does not refer to internal waters. While art 45(1)(a) would appear to allow a broad interpretation on the basis of its wording, thus allowing application to straits connecting the high seas or an exclusive economic zone with the internal waters of a State, the fact remains that Russia does not consider the strait to be covered by *UNCLOS* (n 6) at all and considers both the strait and the Sea of Azov behind it as internal waters.

2 *LOTS*

Both Ukraine and Russia are State parties to *UNCLOS*.[33] Upon ratification, both States have, to the extent relevant to the present discussion, entered a reservation under art 298 of *UNCLOS* regarding binding decisions in relation to sea boundary delimitations, including those concerning historic bays or titles, and in relation to military activities.[34]

(a) Sovereign Immunity of Warships

Article 32 of *UNCLOS* specifies and confirms the (sovereign) immunity of warships, subject to certain exceptions,[35] only one of which is relevant to the present discussion. This exception is set forth in art 30, granting coastal States the right to 'require' a foreign warship to leave its territorial sea if the warship fails to adhere to the laws and regulations of that coastal State regarding passage in its territorial sea. The authority in question is, however, limited to requiring the warship in question to leave the territorial sea but does not extend to any right of seizure, capture or other activity. This authority will also be discussed further below in Part II(B)(2)(b).

The Ukrainian vessels involved in the incident were the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*. As set forth in the order of the International Tribunal for the Law of the Sea ('ITLOS') — *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Order)* ('*Order*') [36] — the first two vessels are artillery boats in service with the Ukrainian navy and the third vessel is a tugboat operated by the Ukrainian navy as a naval auxiliary. The *Order* makes it clear that '[t]heir status as Ukrainian naval warships and an auxiliary vessel is not disputed'.[37] Indeed, the *Memorandum of the Government of the Russian Federation* ('*Memorandum*') submitted by the Russian authorities to the ITLOS also clearly recognises the military (naval) status of the vessels in question.[38] Consequently, and regardless

---

33 For a list of ratifications of, accessions and successions to *UNCLOS* (n 6), see 'Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements: The United Nations Convention on the Law of the Sea of 10 December 1982', *Oceans & Law of the Sea: United Nations* (Web Page, 14 May 2022) <https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> ('Chronological Lists: United Nations Convention on the Law of the Sea').

34 '6. United Nations Convention on the Law of the Sea', *United Nations Treaty Collection* (Web Page, 1 October 2022) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en>.

35 *UNCLOS* (n 6) arts 17–26, 30–2.

36 *Order* (n 15). See discussion of the case below in Part II(B)(2)(c).

37 *Order* (n 15) [30].

38 *Memorandum* (n 23) [13]–[19], [28]–[29]. The vessels are referred to as 'naval warships and auxiliary vessels, manned by Ukrainian naval personnel': at [29(a)]. Clearly, then, there is no dispute as regards the status of the ships under *UNCLOS* (n 6) arts 29, 32.

of the further aspects regarding the incident as will be discussed below, all three vessels enjoyed sovereign immunity under the international LOTS.[39]

(b) Transit Passage and Innocent Passage

If reasoned that the Kerch Strait is a strait used for international navigation and that the Sea of Azov does not form historic internal waters (regardless of which State those waters belong to), then passage through the strait is subject to the regime of transit passage. In that case, passage may not be impeded, according to art 38(1) of *UNCLOS*, and is to be enjoyed by all ships and aircraft. Contrary to the regime of innocent passage discussed below, transit passage, as indicated by the reference to aircraft in art 38(1) of *UNCLOS*, includes the right of overflight.[40] In all cases, however, passage must be 'continuous and expeditious'.[41]

As regards the rights, duties and obligations of the States involved, coastal States may impose laws and regulations related to safety of navigation — including the designation of lanes and traffic separation schemes[42] — amongst other measures not relevant to the present discussion. Conversely, vessels and aircraft exercising the right of transit passage must, in addition to the requirements of continuous and expeditious passage, carry out the passage in normal modes of navigation, without any threat or use of force against the coastal States or engagement in any other activities which are not part of such normal modes of navigation.[43]

If, on the other hand, the regime of innocent passage applied,[44] somewhat different rules would apply to such passage. First, in innocent passage there is no right of 'innocent overflight' and the regime applies only to vessels.[45] Second, the list of activities prohibited for vessels exercising the right of innocent passage as set forth in art 19 is more detailed than the general obligations of vessels during transit

---

39 A warship is defined in *UNCLOS* (n 6) art 29 as

> a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Consequently, the category of warships includes both vessels capable of combat and auxiliary vessels, provided they meet these criteria.

40 Although not relevant to the incident, submarines may carry out transit passage (but not innocent passage) while submerged: ibid arts 20, 37–44.

41 Ibid art 38(2).

42 Ibid art 41.

43 Ibid art 39(1)(c). As regards warships and normal modes of navigation, see *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 30–1 ('*Corfu Channel*').

44 See the discussion of the *Memorandum* (n 23) below in this section.

45 This follows from *UNCLOS* (n 6) art 17, which refers only to ships, while art 38 specifically includes aircraft. Note also the differences as regards the passage of submarines: see above n 40.

passage set forth in art 39 of *UNCLOS*. Leaving aside the provisions regarding innocent passage by merchant vessels, the prohibitions (or more precisely, the activities which render the passage no longer innocent) under art 19 of *UNCLOS* include the threat or use of force against the coastal State, exercising or practicing with weapons, and collecting information 'to the prejudice of the defense or security of the coastal State'.[46] Coastal States may adopt and apply laws and regulations related to the safety of navigation, among other things, and may impose traffic separation schemes and lanes of navigation.[47] None of the measures imposed by the coastal State may, however, have the effect of hampering innocent passage or suspending innocent passage through straits, except in the situations set forth in art 25(3) of *UNCLOS*. This provision allows the coastal State to suspend innocent passage 'temporarily in specified areas of its territorial sea' if such suspension is 'essential for the protection of its security, including weapons exercises'.[48] Any such suspension must be 'duly published' before it takes effect and may not discriminate 'in form or fact' between foreign vessels so excluded from innocent passage.[49]

Warships enjoy the rights of transit passage and innocent passage, although the right of warships to exercise innocent passage in territorial waters, other than straits covered by art 45 of *UNCLOS*, is disputed (or in any case not recognised) by several States.[50] The right of warships to exercise both of these rights follows, however, from the use of the phrase 'all ships' in art 38 and the phrase 'ships of all States' in art 17 of *UNCLOS*. The right of warships to transit through straits used for international navigation was also clearly recognised by the International Court of Justice ('ICJ').[51] As regards innocent passage, the right of warships to exercise such passage

---

46 *UNCLOS* (n 6) art 19(2)(c).

47 Ibid arts 21–2.

48 Ibid art 25(3).

49 Ibid.

50 For a collection of the national laws of coastal States notified to the United Nations, see 'Maritime Space: Maritime Zones and Maritime Delimitation', *United Nations* (Web Page) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm>. For declarations by States upon ratification or accession to *UNCLOS* (n 6) see '6. United Nations Convention on the Law of the Sea', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> which shows that the following States require prior permission for warships to enter their territorial waters: Albania, Algeria, Antigua and Barbuda, Bahrain, Bangladesh, Barbados, China, Ecuador, Georgia, Iran, Latvia, Maldives, Myanmar, Oman, Pakistan, Romania, Russia, Saint Vincennes and the Grenadines, Seychelles, Sierra Leone, Somalia, Sri Lanka, Sudan, Sweden (except for certain specific maritime areas in which no prior permission is required), Syria, United Arab Emirates and Yemen. The following States require prior notification for warships to enter their territorial seas: Croatia, Egypt, Estonia, Guyana, India, Mauritius, Republic of Korea, Slovenia and Vietnam. Three States, Chile, Lithuania and Mexico, have officially notified a system of reciprocity, applying the same rules to other States' warships as those States apply to foreign warships in their territorial waters.

51 See *Corfu Channel* (n 43) 28.

may — in addition to the phrases in arts 17 and 38 of *UNCLOS* — be inferred from the existence of sub-s C, regarding warships and other government ships, in pt II(3) of *UNCLOS* which regulates innocent passage in the territorial sea. As regards sub-s C, art 30 of *UNCLOS*, as discussed above, allows coastal States to 'require' warships to leave the territorial sea if the warships do not comply with the laws and regulations of the coastal State regarding passage in its territorial sea, and the warship does not comply with requests to do so. *UNCLOS* does not specify which types of enforcement actions may be included under the term 'require', leaving it to other rules of international law to govern that aspect. While the authority to use force in such cases would depend on whether the activities carried out by the warship in question provide sufficient gravity and legal cause to do so, forcible means short of the use of force would in any case be justified.[52]

Relating these observations on the law to the Kerch Strait incident, the *Memorandum* states that innocent passage in Russian territorial waters in the Kerch Strait had temporarily been suspended for reasons of security following a storm.[53] Additionally, the *Memorandum* states that the Ukrainian vessels had not complied with the regulations regarding passage through the strait by 'foreign military vessels',[54] and that the Ukrainian vessels threatened to use military force and attempted to break through into the strait.[55] Following the events as described in Part II(A) above, the vessels were subsequently seized by the Russian coast guard vessels. Leaving an overall analysis for Part II(C) below, a few observations are in order regarding these statements.

The reference to innocent passage in territorial waters is relevant when determining which regime applies to the Kerch Strait according to Russia. Clearly the Russian claim to territorial waters surrounding Crimea is related to the issue of the legality of the Russian annexation of that territory. The reference to (the regime regarding) innocent passage as a basis for acting against the Ukrainian vessels would appear to indicate that, as far as Russia is concerned, the strait is subject to art 45 of *UNCLOS*. However, as was stated above in Part II(B)(1), this is not the Russian view and the reference to innocent passage is therefore confusing. The reference to the (non-adherence to) regulations governing the passage of the strait is partly relevant. While regulations regarding navigational safety are permitted under the regime of transit passage, if that regime is considered applicable, it remains questionable as to how forcefully such regulations may be enforced,[56] and such regulations may, in any

52 See, eg: TD Gill, 'The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law' (1992) 23(1) *Netherlands Yearbook of International Law* 105, 131–40 ('The Forcible Protection, Affirmation and Exercise of Rights'), including the discussion as to when the use of force is justified, such as regarding submarines.

53 *Memorandum* (n 23) [12(c)].

54 Ibid [14].

55 Ibid [16]–[17].

56 Note that in the Russian view, such regulations do not in and of themselves constitute a violation of the *2003 Agreement* (n 22): ibid [10].

case, not have the effect of suspending passage. If the regime in the *2003 Agreement* were to apply, it is interesting to note that this part of the Russian explanations refers to 'foreign' military vessels.[57] While Ukrainian vessels are indeed 'foreign' to (claimed) Russian territorial waters, Ukrainian vessels still enjoy a privileged status as regards passage through the Kerch Strait under the *2003 Agreement* as opposed to military vessels of 'third countries'. [58] Next, the statements regarding the threat of the use of force and the description thereof in the *Memorandum*[59] are relevant, as such actions would constitute a breach of the obligations imposed by the regime of transit passage and would thus authorise some response by the Russian coast guard vessels (although not necessarily the response actually carried out).[60] Turning to the temporary suspension of passage through the strait, it should be noted that this measure was imposed in the interest of security of navigation but does not appear to be a suspension of innocent passage as referred to in art 25 of *UNCLOS*.[61] Finally, as regards the seizure of warships, the *Memorandum* does not discuss this element or provide any justification thereof.

In its statements before the ITLOS, Ukraine rejected the Russian statements discussed above.[62] As regards the temporary closure of the strait, Ukraine rejected the legality and the necessity of such closure as well as denied receipt of any notification to that effect.[63] As regards the threat of the use of force, Ukraine asserted that sailing with uncovered guns was normal operating procedure and that the angle of the guns (claimed by both sides as being 45 degrees elevation) would have made any use of force against the Russian vessels impossible.[64] It also asserted that the difference in military power (two gunboats opposing the numerous Russian military assets in the area) would presuppose any threatening intentions.[65] Finally, Ukraine provided extensive argumentation and substantiation as regards the sovereign immunity of warships and its assertion that the Russian actions were in violation of that immunity.[66]

---

57 *Memorandum* (n 23) [14].

58 Ibid [10].

59 Ibid [16].

60 Note that Ukraine's forcing of its right to passage through the strait could be argued as constituting forcible affirmation of rights as that concept is described in Gill, 'The Forcible Protection, Affirmation and Exercise of Rights' (n 52), but that the Russian description of the events (partly disputed by Ukraine) would go beyond the constraints set forth by the ICJ in *Corfu Channel* (n 43) 34–5.

61 *Memorandum* (n 23) [12(c)], [16].

62 *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Verbatim Record)* (International Tribunal for the Law of the Sea, Case No 26, 10 May 2019) 4, 10–14 ('*Verbatim Record*').

63 Ibid 9.

64 Ibid 9–10.

65 Ibid 9.

66 Ibid 9–15.

As regards the (illegality of) closure or suspension of passage through the strait, Ukraine challenged the Russian claim that safety of navigation was the underlying justification for that closure.[67] The Russian claim is indeed not particularly convincing, given that art 42(2) of *UNCLOS* regarding transit passage specifies that passage may not be denied or suspended and the *2003 Agreement* does not contain any right for either party to suspend or deny passage through the strait to the other party. Furthermore, the Russian claim that passage was suspended for naval vessels specifically appears at odds with the Russian justification,[68] as it is not clear why naval vessels would pose a greater risk of accidents among any other vessels waiting to pass through the strait. More to the point, such a specific injunction would appear at odds with the prohibitions set forth in *UNCLOS*, as regards limitations on transit passage, and is not consistent with the provisions of the *2003 Agreement*.[69] As regards the uncovered guns on board the *Berdyansk* and the *Nikopol*, the statement by Ukraine that sailing with uncovered guns is part of normal operating procedure appears generally reasonable from an operational point of view.[70] The issue as to whether the guns were aimed (in terms of azimuth) at the Russian vessels remains unclear from the statements by both parties and none of these aspects were addressed by the ITLOS itself in its *Order*.[71] Consequently, it is not possible on the basis of available information to determine whether the conduct of the Ukrainian vessels constituted a threat in violation of the regime of transit passage — even leaving aside the question of whether the Russian response would be justified if the conduct had constituted such a threat.[72]

(c) The Military Activities Exception to Arbitration under UNCLOS and the ITLOS Order

A few comments on the exception of military activities in regards to arbitration and binding decisions under *UNCLOS* are in order, as this topic relates to the question as to which law was applicable to the incident and the aftermath.

---

67 Ibid 9.

68 *Memorandum* (n 23) [12]–[14].

69 *2003 Agreement* (n 22) art 2(1); *UNCLOS* (n 6) arts 38–44.

70 *Verbatim Record* (n 62) 9–10.

71 The ITLOS merely refers to the overall tensions between Russia and Ukraine: *Order* (n 15) [69]. Note that the Ukrainian assertion that two gunships facing multiple Russian military assets would in and of itself be indicative of the absence of hostile intentions is not convincing. Indeed, incidents in the past have shown that State vessels may take rather extreme measures even when facing overwhelming opposition. See, eg, the *Lido II* incident during Operation Sharp Guard: Stephen Prince and Kate Brett, 'Royal Navy Operations off the Former Yugoslavia: Operation Sharp Guard, 1991–1996' in Sandra J Doyle (ed), *You Cannot Surge Trust: Combined Naval Operations of the Royal Australian Navy, Canadian Navy, Royal Navy, and United States Navy, 1991–2003* (Naval History and Heritage Command, 2013) 45, 62–3.

72 See below Part II(C).

As was stated above in Part II(B)(2),[73] both parties have excluded military activities from arbitration under application of art 298(1)(b) of *UNCLOS*. In the case before the ITLOS, one of the central questions was therefore whether the incident involved military activities (thus excluding the incident from arbitration and binding decisions) or other types of activities.[74] While Russia claimed the incident involved military activities, Ukraine argued that the incident was clearly of a law enforcement nature.[75]

In its *Memorandum*, Russia provided several arguments as to why the incident had been a case of military activities. It pointed out that the vessels and personnel involved were all military and pointed to the 2016 ruling by the Arbitral Tribunal, set up by the Permanent Court of Arbitration under annex VII to *UNCLOS*, in the *South China Sea Arbitration* case,[76] describing military activities as those 'involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another'.[77] Russia also pointed to the statements made by Ukraine on previous occasions,[78] such as the ones referred to below.[79] Finally, Russia stated that the Ukrainian claim that Russia had treated the incident as a law enforcement matter and that the servicemen were being subjected to civilian prosecution was 'an attempt to cast doubt on the plainly military nature of the activities'.[80]

In its statements before the ITLOS, however, Ukraine argued that art 298(1)(b) of the *UNCLOS* makes a clear distinction between military activities and law enforcement activities.[81] Notwithstanding that Ukraine has described the actions carried out by the Russian authorities during the incident as 'aggressi[ve]' and 'belligerent'.[82] It argued before the ITLOS that the mere fact that military vessels were involved did not in and of itself make the incident a military activity as intended by art 298.[83] The statements made by Russia and the subsequent actions undertaken by the Russian authorities made it clear, according to Ukraine, that this had been a law enforcement activity.[84]

---

73 See especially n 34 and accompanying text.

74 *Order* (n 15) [50].

75 Ibid.

76 See *South China Sea Arbitration (Republic of the Philippines v People's Republic of China) (Award)* (Permanent Court of Arbitration, Case No 2013–19, 12 July 2016) ('*South China Sea Arbitration*'). See also Part IV below.

77 *Memorandum* (n 23) [30], quoting *South China Sea Arbitration* (n 76) [1161].

78 *Memorandum* (n 23) [32].

79 See below n 85–6 and accompanying text.

80 Ibid [33]. The reference to IHL will be discussed below in Part II(B)(3).

81 *Verbatim Record* (n 62) 18.

82 See, eg, Security Council, 73rd sess, 8410th Meeting, UN Doc S/PV.8410 (26 November 2018) 11–12.

83 *Verbatim Record* (n 62) 18–19, 23.

84 Ibid 18–25.

The Russian statements on this aspect appear somewhat difficult to reconcile with other paragraphs of the *Memorandum*, in which Russia states that the Ukrainian personnel 'were formally apprehended under Article 91 of the Code of Criminal Procedure of the Russian Federation as persons suspected of having committed a crime of aggravated illegal crossing of the State border of the Russian Federation',[85] and that '[b]y separate decisions of 27 and 28 November 2018 delivered by the Kerch City Court and the Kievskiy District Court of Simferopol, the Military Servicemen were placed in detention'.[86] Although Russia states that these (clearly law enforcement) actions are not relevant to the nature of the interaction between the vessels during the incident, that would appear to be a rather difficult distinction given that the nature of the incident clearly determines applicable law, including the law as regards the status of the detained persons.

In its *Order*, the ITLOS made it clear that in its view 'the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed',[87] observing that the use of naval vessels for law enforcement is common practice and emphasising that the nature of the activity in question is the determining factor.[88] While this does not contradict the Arbitral Tribunal's ruling to which the *Memorandum* refers,[89] it does appear to limit the scope of the exception of military activities slightly. In applying this general view to the case in question, the ITLOS first stated that the underlying contentious issue concerned passage through the Kerch Strait and that passage through straits was not a military matter.[90] Next, the ITLOS stated that the cause of the incident in question resulted from the Ukrainian attempts to enter the strait and the Russian actions to prevent that, pointing out that this indicates a difference of opinion regarding the applicable regime in the strait and that such a difference of opinion is not a military matter.[91] Finally, the ITLOS stated that the force used by Russia was related to arresting the Ukrainian vessels and, given the circumstances of that use of force, was of a law enforcement nature.[92] Based on the sum of these considerations, the ITLOS concluded that the incident 'took place in the context of a law enforcement operation' and that the military activities exclusion was not applicable.[93]

85 *Memorandum* (n 23) [21].

86 Ibid [22].

87 *Order* (n 15) [64].

88 Ibid.

89 *Memorandum* (n 23) [30].

90 Ibid [68]–[70].

91 Ibid [71]–[72].

92 Ibid [73]–[74].

93 Ibid [75].

Although the reasoning of the ITLOS has been met with some criticism,[94] the effects of the ITLOS's *Order* on the overall applicability of the military activities exclusion should not be overstated. First, the reasoning of the ITLOS, including para 75 as a summation of its reasoning in this part, suggests that the conclusion was based on the sum of the three elements (cumulatively rather than alternatively or individually) in relation to the specific circumstances of the incident. That would suggest that not every incident related to a difference of opinion on the applicable regime in a strait would thus automatically be considered a law enforcement incident rather than a military activity. Second, the ITLOS points to the subsequent criminal law charges brought against the crew of the vessels as indication that its reasoning is correct as regards the law enforcement nature of the activities.[95] This observation is in keeping with the observation made above in this Part regarding the link between the nature of the incident and the subsequent nature of the applicable law. The author therefore respectfully disagrees with James Kraska as regards his statement that the decision indicates 'outcome-based legal reasoning' on the part of the ITLOS.[96] While the outcome, in this case the charges brought against the Ukrainian personnel, is certainly relevant for the reasons just mentioned, the reasoning of the ITLOS is not based primarily on that aspect.

The observation of the ITLOS that the mere fact that the vessels were military in nature does not exclude a law enforcement context is, of course, correct.[97] Furthermore, the Russian description of the sequence of events as set forth in the *Memorandum* clearly indicates a law enforcement approach to the pursuit, use of force and subsequent detention of the vessels and the crew, once again contradicting itself as regards the purpose and nature of the conduct in question.[98] While the *Memorandum* emphasises that the conduct was military in nature, it also points out that the pursuit and capture were related to the illegal conduct (in the Russian view) of the Ukrainian vessels as regards entry into Russian territory.[99] Given that the Ukrainian warships were already leaving the territorial waters in question (leaving

94 See, eg, James Kraska, 'Did ITLOS Just Kill the Military Activities Exemption in Article 298?', *EJIL: Talk!* (Blog Post, 27 May 2019) <https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/> ('Military Activities Exemption').

95 *Order* (n 15) [76].

96 Kraska, 'Military Activities Exemption' (n 94).

97 See, eg: Rob McLaughlin, 'Authorizations for Maritime Law Enforcement Operations' (2016) 98(2) *International Review of the Red Cross* 465; 'HMS Defender Makes Second Gulf Drugs Bust', *Royal Navy* (Blog Post, 4 February 2020) <https://www.royalnavy.mod.uk/news-and-latest-activity/news/2020/february/04/200204-defender-drugs-bust>; 'French Navy Frigate Seizes $5.2 Million Worth of Narcotics', *US Central Command* (Blog Post, 23 September 2021) <https://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/2786751/french-navy-frigate-seizes-52-million-worth-of-narcotics/>.

98 *Memorandum* (n 23) [12]–[19], [21]–[23].

99 Ibid [28].

aside the question as to which State could claim them as territorial waters),[100] and given that Russia denies, also in the *Memorandum*, that the actions were carried out as part of an armed conflict,[101] there is no legal basis for the Russian actions other than a law enforcement context. The question of whether the Russian denial of a state of armed conflict is legally accurate will be addressed in Part II(B)(3) below.

It follows from the above that — notwithstanding discussions regarding applicability of IHL — the reasoning of the ITLOS as regards the military activities exception is legally sound in relation to the arguments presented by Russia and Ukraine. In combination with the specific reasoning regarding each of the elements selected by the ITLOS, it may also be concluded for the present discussion that the applicability of the exception will be considered on a case-by-case basis and applied to the specific circumstances of each case.

3 *IHL and the LONW*

Although the distinction between *jus ad bellum* and *jus in bello* may be considered a point of general knowledge,[102] it cannot be emphasised enough when discussing both the conduct of the parties involved and the law applicable to that conduct in the context of a politically and legally volatile situation. This article will not address the *ad bellum* aspects of the annexation of Crimea by Russia, nor the current situation in Ukraine following the Russian invasion in February 2022. As regards the *in bello* aspects, IHL is clear as regards its applicability. Common art 2 of the four *Geneva Conventions*[103] and art 1(3) of the *Protocol I*[104] make it clear that IHL applies in all (factual) situations of armed conflict, regardless of the recognition of that situation by the parties involved, as well as all situations of belligerent occupation. As regards occupation, it is not relevant whether the occupation came about peacefully or through the use of force.

---

100 *Order* (n 15) [59].

101 *Memorandum* (n 23) [33(b)].

102 *Jus in bello*, also referred to as IHL, refers to the law regulating the conduct of parties engaged in an armed conflict: 'What Are Jus Ad Bellum and Jus In Bello?' (n 5).

103 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 2 ('*First Geneva Convention*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 2; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 2 ('*Third Geneva Convention*'); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 2.

104 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 1(3) ('*Protocol I*').

In spite of the intention behind the provisions of removing the political aspect of recognising the existence of an armed conflict,[105] many States still appear inclined to avoid acknowledgment of situations of armed conflict for various reasons and may choose to dismiss situations involving the use of force as 'incidents'.[106] However, and leaving aside the current situation between the two States, there can be little legal doubt that at the time of the incident, the continuing occupation of Crimea by Russia constituted grounds for applicability of IHL in the interaction between the two parties.[107]

The applicability of IHL to the incident under discussion has significant impact on the legal evaluation of the actions carried out by Russia and on the ITLOS's analysis of the case. That includes, first of all, the question of whether the incident can be evaluated on the basis of *UNCLOS* and whether the ITLOS had jurisdiction over the matter.[108] Given the *lex specialis* nature of IHL in situations of armed conflict,[109] it would appear logical to conclude that under the present circumstances, the legality of the incident and the legal status of the captured Ukrainian crew would need to be determined on the basis of IHL rather than peacetime LOTS. As will be discussed in Parts II(B)(3)(a)–(b), applying IHL to the incident provides a very different

105 Jean S Pictet (ed), *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross, 1952) vol 1, 28. See also Tristan Ferraro and Lindsey Cameron, 'Article 2: Application of the Convention' in International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ed Knut Dörmann et al (Cambridge University Press, 2016) 68, 69 [193], 73–80 [201]–[219].

106 JFR Boddens Hosang, *Rules of Engagement and the International Law of Military Operations* (Oxford University Press, 2020) 117–19 ('*Rules of Engagement*'). See also at 112–21.

107 Note that the factual criteria for establishing the existence of an armed conflict would also provide grounds for the applicability of IHL if one focuses exclusively on the acts carried out during the incident. The International Criminal Tribunal for the Former Yugoslavia has made it clear, after all, that 'an armed conflict exists whenever there is a resort to armed force between States': *Prosecutor v Duško Tadić* (*Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT–94–1, 2 October 1995) [70]. The use of force by Russian military vessels against Ukrainian military vessels would fall under that description.

108 See *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Declaration of Judge Lijnzaad)* (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019). See also James Kraska, 'The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?', *EJIL: Talk!* (Blog Post, 3 December 2018) <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/> ('The Kerch Strait Incident').

109 As confirmed by the ICJ: see, eg, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240 [25] ('*Legality of the Threat or Use of Nuclear Weapons*').

outcome compared to the one presented in the discussion of the ITLOS approach and the Russian explanations.

(a) Military Objectives

The LONW is part of IHL and consists of a combination of treaty provisions and (primarily) customary international law. The rules of naval warfare — commonly considered the core principles and part of customary law — are set out in the *San Remo Manual*.[110]

Like other forms of armed conflict, attacks under the LONW are permitted only against valid military objectives. While this includes attacks against some types of civilian vessels in certain circumstances, enemy warships and naval auxiliaries are in any case military objectives and may be attacked subject only to application of the rules of IHL — including precautions in attack and methods and means of warfare.[111] As regards capture and seizure of vessels, enemy vessels may be captured anywhere outside neutral waters, meaning outside the internal or territorial waters of neutral States.[112]

As stated above in Part II(B)(2)(a), the Ukrainian vessels involved in the incident were two warships and a naval auxiliary.[113] Under application of the LONW — in light of the existence of an armed conflict and/or state of belligerent occupation between Russia and Ukraine at the time — both the attack on and the seizure of the Ukrainian vessels were justified. Reference to the sovereign immunity of warships under *UNCLOS* and all related considerations would thus be irrelevant, given the *lex specialis* priority of IHL. An interesting contradiction exists, in that respect, in the *Memorandum*. While the arguments just presented would validate the Russian claim regarding military activities and would render the Ukrainian arguments on the immunity of the vessels invalid or irrelevant, the *Memorandum* appears to deny the applicability of IHL to the situation.[114] As Russia also denies that the incident took place in a law enforce-

110 See International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, ed L Doswald-Beck (Cambridge University Press, 1995) ('*San Remo Manual*'). See also 'San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994', *International Committee of the Red Cross* (Web Page) <https://ihl-databases.icrc.org/ihl/INTRO/560>. See generally: Wolff Heintschell von Heinegg, 'The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century: Some Select Issues' in Terry D Gill (ed), *Yearbook of International Humanitarian Law: Volume 17, 2014* (Asser Press, 2014) 69; J Ashley Roach, 'The Law of Naval Warfare at the Turn of Two Centuries' (2000) 94(1) *American Journal of International Law* 64; Wolff Heintschell von Heinegg, 'The Law of Military Operations at Sea' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 375.

111 *San Remo Manual* (n 110) rr 65–6.

112 Ibid r 135. For the full definition of neutral waters, see rr 14–15.

113 See above n 37 and accompanying text.

114 *Memorandum* (n 23) [33(b)].

ment context, it remains, perhaps deliberately, unclear as to how Russia would seek to categorise the acts in question in terms of applicable international law.

(b) Prisoners of War

The rules pertaining to naval warfare make it clear that the crews of warships and naval auxiliaries, as members of the armed forces, are entitled to prisoner of war status following capture by the enemy.[115] Similar to the discussion regarding military objectives, applying IHL and the LONW to the incident under discussion leads to a disparate outcome as compared to the arguments presented before (and by) the ITLOS.[116] Given once again the status and nature of the Ukrainian vessels, the crew should have, following capture by Russia, been granted prisoner of war status.[117] However, while Ukraine referred to the crew at some points as being entitled to prisoner of war status, the arguments Ukraine presented before the ITLOS pertaining to the release of the crew were related to the sovereign immunity of warships under *UNCLOS*.[118] Those latter arguments would not be relevant under application of IHL and the LONW. Conversely, while Russia, as has been stated several times, considers the incident to have taken place as part of military activities, it denies that the captured crew is entitled to prisoner of war status and has sought to prosecute the personnel in question before civilian courts for illegal trespass into Russian territory.[119] As was stated in Part II(B)(3)(a), it is not entirely clear which parts of international law Russia would consider to apply to the incident or how it would categorise the status of the crew under international law — as prosecution of the crew on those grounds would clearly contravene the rules regarding the treatment of prisoners of war.[120]

---

115 *Third Geneva Convention* (n 103) art 4(A)(1); *Protocol I* (n 104) arts 43(1)–(2), 44(1); *San Remo Manual* (n 110) r 165.

116 *Order* (n 15) [50]–[59], [68]–[74], [97]–[99], [118].

117 See also Kraska, 'The Kerch Strait Incident' (n 108).

118 See, eg, 'Ukraine Leader Vows To Bring Home Sailors Captured by Russia', *France 24* (online, 4 December 2018) <https://www.france24.com/en/20181204-ukraine-leader-vows-bring-home-sailors-captured-russia>.

119 *Memorandum* (n 23) [21]–[22], [33(b)]. See above Part II(B)(2)(c).

120 While arts 85 and 99 of the *Third Geneva Convention* (n 103) allow prosecution of prisoners of war for acts punishable under the domestic law of the detaining power, including acts committed prior to capture, the authority to do so is limited by the combatant privilege for combatants, for acts related to the armed conflict: see 'Commentary of 2020: Article 85', *International Committee of the Red Cross* (Web Page) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3A23C27AF17D2326C1258585005366D3>. If illegal border crossings were not to be so excluded, this would lead to the somewhat curious situation whereby combatants captured on enemy territory during an armed conflict could be tried under domestic immigration laws of the State in question, which is clearly not in keeping with IHL. Finally, note that prisoners of war prosecuted by the detaining power retain their rights and privileges under the *Third Geneva Convention* (n 103), while Russia denies such status applied to the crew in the situation under discussion: see *Memorandum* (n 23) [21]–[22], [33(b)].

C *Analysis and Conclusion*

There are not many lacunae in international law regarding the use of force and deprivation of liberty. Essentially, only two paradigms apply to the use of force by government agents: either (1) the use of force was part of, and related to, an armed conflict; or (2) the use of force was not so related.[121] In the first case, such use of force is governed principally by IHL as well as those elements of international human rights law that complement IHL.[122] In the second case, including law enforcement, the use of force is, as regards international law, governed by international human rights law. In both cases, the use of force in self-defence, whether national, unit or personal, is authorised as an inherent authority or right and subject to the requirements of necessity and proportionality.[123]

If peacetime law, including LOTS and law enforcement, is applied to the incident under discussion, then the applicable law leads to the conclusion that the use of force against the Ukrainian vessels was illegal. This conclusion is based on the following observations: (1) the law enforcement activities by Russia against the vessels, including their capture and seizure, would be a violation of the sovereign immunity of the Ukrainian warships under art 95 of *UNCLOS*; and (2) the use of force commenced after the vessels had begun to leave the (claimed) Russian territorial waters, thus negating any claim that the acts were necessary in the context of art 30 of *UNCLOS*.[124] Finally, while the arrest of the crew would also be illegal by extension, the crew would be subject to protection on the basis of human rights law but would not be immune from prosecution if the Russian courts adopt the principle of *male captus, bene detentus*.[125]

---

121 See JFR Boddens Hosang, 'The Effects of Paradigm Shifts on the Rules on the Use of Force in Military Operations' (2017) 64(2) *Netherlands International Law Review* 353, 354–5.

122 For further discussion of the interaction between IHL and human rights law, see Terry D Gill, 'Some Thoughts on the Relationship between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach' in Terry D Gill (ed), *Yearbook of International Humanitarian Law: Volume 16, 2013* (Asser Press, 2013) 251.

123 See Boddens Hosang, *Rules of Engagement* (n 106) 76–94. Note that 'necessity' and 'proportionality' have different meanings in different legal contexts: see generally Boddens Hosang, 'The Effects of Paradigm Shifts on the Rules on the Use of Force in Military Operations' (n 121).

124 See above Part II(B)(2)(a)–(b).

125 The doctrine of *male captus, bene detentus* (wrongly captured, well kept) expresses the principle that although jurisdiction over a defendant may have been acquired by the forum State through a violation of international law, the wrongful arrest or abduction does not negate the validity of detention or imprisonment. The forum State may nonetheless exercise its jurisdiction lawfully over the defendant once they come within its judicial jurisdiction: Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2nd ed, 2021) 183.

If, on the other hand, IHL and the LONW are applied to the incident under discussion, then the applicable law would lead to the conclusion that the use of force against the Ukrainian vessels was legal and the capture and seizure of those vessels would equally be legal. However, while the capture and detention of the crew would be legal under applicable law in this case, the status of the detention of the crew members would then be prisoner of war rather than criminal. Prosecution of the crew for 'illegal border crossing' would not be possible, given the combatant immunity of the crew in this context.

On the basis of this analysis, both Russia and Ukraine appear to have mixed elements of the applicable disciplines of international law in their arguments — although on the basis of available documentation it would appear that in the case of Ukraine this was more a change of approach between earlier statements and those made before the ITLOS. As regards the *Memorandum*, however, there appears to be not only internal contradiction,[126] but also the introduction of a third paradigm not supported by contemporary international law — military activities — which are neither law enforcement in nature, nor part of an armed conflict.[127] It remains to be seen how this aspect will be handled in the further treatment of this case before the ITLOS.

III The Mediterranean Situation

Two relatively recent situations in the Mediterranean deserve closer attention in the context of this analysis. The first concerns an incident between a French frigate and Turkish warships in the context of enforcing the arms embargo imposed by the United Nations against Libya. The second situation concerns the tensions between Greece and Turkey over the exploration and exploitation of natural resources in disputed maritime areas.

A *Enforcing the Libyan Arms Embargo*

1 *The Incident*[128]

On 10 June 2020, the Greek frigate HS *Spetsai*, operating as part of the European Union Naval Force Mediterranean Operation IRINI,[129] was tasked to send its helicopter towards the cargo vessel MV *Çirkin* sailing in the Mediterranean Sea. The purpose of this action was to initiate an inspection of the vessel in the context of enforcing the weapons embargo against Libya on the basis of the

126 See above n 119 and accompanying text.

127 See generally *Memorandum* (n 23).

128 At the time of writing, additional incidents have taken place since the incident under discussion. However, since the relevant information regarding those incidents is not yet publicly available, they will not be discussed.

129 'Welcome to the HS Spetsai', *EUNAVFOR MED Operation IRINI* (Web Page, 4 June 2020) <https://www.operationirini.eu/welcome-hs-spetsai/>.

UNSC Resolution 2292 (2016) ('Resolution 2292').[130] The MV *Çirkin* was under escort by three Turkish naval vessels and on its way to Libya. Upon approaching the MV *Çirkin*, the Greek helicopter was informed by the Turkish vessels that the MV *Çirkin* was under charter of the Turkish government and under the protection and control of the Turkish navy and not to approach any further.[131] The HS *Spetsai* subsequently recalled its helicopter. Later that day, the French frigate *Courbet* similarly attempted to approach the MV *Çirkin*. The *Courbet* was operating as part of the North Atlantic Treaty Organization's ('NATO') Operation Sea Guardian[132] with, inter alia, the same task of enforcing the weapons embargo against Libya. Although the details as to what transpired between the *Courbet* and the Turkish vessels differ between the French view and the Turkish view, the common ground is that a confrontation ensued in which the Turkish vessels prevented the *Courbet* from approaching the MV *Çirkin* and that the Turkish vessels subsequently continued to escort the MV *Çirkin* to Libya.[133]

2 *Applicable Law*

(a) LOTS

Given that, clearly, there is no situation of armed conflict between either Greece and Turkey, or between France and Turkey, and the incident occurred outside the territorial waters of any State, peacetime LOTS regarding freedom of navigation on the high seas applies to the situation. Greece is a party to *UNCLOS*, and France is a party to both *UNCLOS* and the *Convention on the High Seas*,[134] but Turkey is

130 SC Res 2292, UN Doc S/RES/2292 (14 June 2016) ('Resolution 2292').

131 Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011), *Final Report of the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011)*, UN Doc S/2021/229 (8 March 2021) 172–3 ('*Final Report*').

132 See 'Operation Sea Guardian', *NATO* (Web Page) <https://mc.nato.int/missions/operation-sea-guardian>.

133 See: John Irish, 'NATO Must Deal with, Not Ignore Turkish Problem: French Official', *Reuters* (online, 17 June 2020) <https://www.reuters.com/article/us-nato-france-turkey-idUSKBN23O1OR>; John Irish and Robin Emmott, 'France-Turkey Tensions Mount after NATO Naval Incident', *Reuters* (online, 7 July 2020) <https://www.reuters.com/article/us-nato-france-turkey-analysis-idUSKBN2481K5>; 'Libya Crisis: France Suspends Nato Mission Role amid Turkey Row', *BBC News* (online, 2 July 2020) <https://www.bbc.com/news/world-europe-53262725>; Robin Emmott and John Irish, 'NATO To Investigate Mediterranean Incident between French, Turkish Warships', *Reuters* (online, 19 June 2020) <https://www.reuters.com/article/us-libya-security-france-turkey-idUSKBN23P2SJ>.

134 *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

not a party to either treaty. However, the provisions regarding the high seas that are relevant to a discussion of this incident can be considered part of customary law.[135]

(i) Flag State Jurisdiction

Vessels on the high seas are subject to the exclusive jurisdiction of their flag State, although a few exceptions apply on the basis of *UNCLOS* and other rules of international law.[136] The MV *Çirkin* was operated by Avrasya Shipping International, a Turkish shipping company, but registered under the flag of Tanzania.[137] That means that regardless of the vessel's (factual, rather than registered) home port in Turkey, and its operation by a Turkish shipping company, it is not a Turkish ship and is subject to the jurisdiction of Tanzania.[138] Based on the information currently available, however, Tanzania has not commented on either of the two incidents. Whether the HS *Spetsai* or the *Courbet* sought authorisation from Tanzania to inspect the vessel, as required by para 3 of Resolution 2292, is similarly not clear.

While the authority to board and inspect vessels on the basis of authorisation by the UNSC will be discussed below in Part III(A)(2)(b), other authorisations to board and inspect vessels, in this case without prior authorisation by the flag State, are set forth in art 110 of *UNCLOS*. Without discussing those authorisations in detail, it would seem that none of the situations described in those provisions are applicable in this case, nor do any other parts of *UNCLOS* appear to provide a basis for boarding in the context of this particular case.

The authority of the master in terms of all aspects of safety, operation and access, among other things, regarding their vessel is clearly established in both international law and national laws and also has a firm historical basis in customary law.[139] Consequently, some States consider consent by the master of a vessel as sufficient basis to carry out a boarding and search of a vessel without also seeking authorisation from the flag State.[140] Although such an approach does not create jurisdiction over the vessel, is subject to conditions and the (continued) consent of the master, and cannot include actual law enforcement, it does create a fast and simple method to determine if a ship warrants further action, in which case flag State consent would be required. However, given the rights, duties and obligations of the flag State,

135 See: J Ashley Roach, 'Today's Customary International Law of the Sea' (2014) 45(3) *Ocean Development and International Law* 239, 248–9; John A Duff, 'The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification' (2005) 11(1–2) *Ocean and Coastal Law Journal* 1, 10–12.

136 *UNCLOS* (n 6) art 92.

137 *Final Report* (n 131) 19–20, 153, 171–3.

138 *UNCLOS* (n 6) arts 91, 94.

139 See, eg: John AC Cartner, Richard P Fiske and Tara L Leiter, *The International Law of the Shipmaster* (Informa London, 2009); Marcus Toremar, 'The Legal Position of the Shipmaster' (LLM Thesis, Göteborg University, 2000).

140 See Department of the Navy et al, *The Commander's Handbook on the Law of Naval Operations* (Handbook, July 2007) 3-11–3-12 [3.11.2.5.2].

not all States recognise the authority of the master of a vessel as being sufficient for such boarding operations by State vessels and agents of another State in their official capacity.[141]

Finally, some States have adopted the practice, especially in the context of maritime military operations, of carrying out so-called 'friendly approaches'.[142] The difference between such approaches and consensual boarding is tenuous, although theoretically, a friendly approach is intended to elicit an invitation to come aboard the vessel being approached rather than outright requesting permission or stating an intention to board the vessel. As such, a friendly approach also requires further invitation by the master of the vessel to carry out any further activities on board, such as inspection of the ship's papers or cargo.[143]

Both consensual boarding and friendly approaches are instruments which allow, insofar as States acknowledge the right to carry out such activities, boarding of a vessel prior to, or absent of, flag State consent. However, the authority once on board the vessel in question is subject to the conditions and consent, among other things, of the master of the vessel. Neither instrument allows activities which would require jurisdiction over the vessel nor allows either the use of force or exercising control over the vessel.[144] In terms of carrying out enforcement operations — such as in the context of a weapons embargo — such instruments would only serve to ascertain whether a vessel should be considered for further enforcement action and therefore initiating the process of acquiring flag State consent. As both instruments rely on the free consent or invitation of the master of the vessel,[145] it would seem that neither of these instruments provide a viable option when the subject vessel is under escort by warships of another State, as was the case with the MV *Çirkin*.

---

141 See McLaughlin (n 97) 475–6. See also James Kraska, 'Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure' (2010) 16(1) *Ocean and Coastal Law Journal* 1, 16–17.

142 'Friendly Approaches: How Operation Irini Cooperates with Merchant Vessels', *EUNAVFOR MED Operation IRINI* (Web Page, 28 September 2020) <https://www.operationirini.eu/friendly-approaches-operation-irini-cooperates-merchant-vessels/>.

143 For a more detailed discussion of the various forms of maritime interception and associated legal aspects, see MD Fink, 'Maritime Interception and the Law of Naval Operations: A Study of Legal Bases and Legal Regimes in Maritime Interception Operations, in Particular Conducted Outside the Sovereign Waters of a State and in the Context of International Peace and Security' (PhD Thesis, University of Amsterdam, 2016) 39–50, 155–70.

144 See ibid.

145 This aspect provides another reason why some States do not recognise the validity of these instruments: it may be questioned how voluntary the consent or invitation of the master of a vessel truly is when approached or contacted by a warship or armed military personnel.

(ii) Immunity of State Vessels

The immunity of warships discussed above in Part II(B)(2)(a) applies equally to State vessels which are operated for non-commercial purposes, as expressed in art 32 of *UNCLOS*. While *UNCLOS* defines 'warship' specifically in art 29, no specific definition is provided for 'State vessels' or 'government vessels'. Instead, recourse must be had to other instruments to determine the scope of the sovereign immunity as it applies to such vessels.

Article 3(1) of the *International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels* refers to 'Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on Government and non-commercial service'.[146] Similarly, art 16(2) of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* refers to 'vessels owned or operated by a State and used, for the time being, only on government non-commercial service'.[147] Although the convention has not yet entered into force, as at the time of writing, it is also of particular relevance to note that the International Law Commission's 'Draft Articles on Jurisdictional Immunities of States and Their Property and Commentaries thereto'[148] — which formed the foundation of the convention — express clearly, when referring back to the *Convention for the Unification of Certain Rules*,[149] that the term 'operate' extends equally to '"possession", "control", "management" and "charter" of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise'.[150]

All of the relevant provisions refer to vessels owned *or* operated by States.[151] Consequently, although the treaties just referred to focus primarily on State property, meaning both vessels and cargo (including State cargo on board non-State vessels), the various provisions in international law regarding State vessels and their immunity, at least appear to, imply that sovereign immunity may be enjoyed by merchant vessels which are not owned, but merely operated by a State. This does not appear particularly problematic or expansive in terms of interpreting the law regarding sovereign immunity when applied to merchant vessels sailing under the flag of the State in question and operated exclusively by that State. The question remains,

146 *International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels*, opened for signature 10 April 1926, 176 LNTS 199 (entered into force 18 February 1937) art 3(1) ('*Convention for the Unification of Certain Rules*').

147 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res 59/38, UN Doc A/RES/59/38 (2 December 2004) art 16(2).

148 *Report of the International Law Commission on the Work of Its Forty-Third Session (29 April–19 July 1991)*, UN Doc A/46/10 (1991) ch II(D) ('*Report of the International Law Commission*').

149 *Convention for the Unification of Certain Rules* (n 146).

150 *Report of the International Law Commission* (n 148) 52.

151 See above nn 146–9 and accompanying text.

however, whether this approach would also apply to merchant vessels sailing under a different flag. The former approach is applied in practice, including by the United States Military Sealift Command.[152] The latter would expand the interpretation of the law regarding sovereign immunity, although the legal provisions, including the definitions of 'operate', do not exclude such interpretation provided the 'operation' is exclusively governmental and non-commercial in nature.[153]

Applying these conditions and provisions to the case under discussion, it should be noted that Turkey has stated that: (1) the MV *Çirkin* was carrying medical supplies; (2) the vessel was chartered by the Turkish State; and (3) the vessel was under the control and protection of the Turkish naval vessels during the incidents with the HS *Spetsai* and the *Courbet*.[154] No public information is available regarding the full exchange between the Greek and French vessels on the one hand and the Turkish vessels escorting the MV *Çirkin* on the other hand. However, the statements which are publicly available appear to indicate, at least, that it is possible that the MV *Çirkin* was, at the time, operated by the Turkish Government for exclusively non-commercial purposes.[155] If that was the case, applying the interpretation of the law as just outlined would mean that the MV *Çirkin* enjoyed sovereign immunity for the duration of that operation by the Turkish Government and was, at the time, a State vessel covered by art 32 of *UNCLOS*. Ironically, this would even be the case if the vessel was carrying weapons in contravention of the United Nations arms embargo,[156] provided that the weapons were being transported on behalf of the Turkish government and the vessel was under the direction and control of the Turkish government. While this scenario would mean a clear violation of the arms embargo by Turkey, it does not alter the vessel's status as a State vessel under applicable law, with all attendant consequences in terms of the authority to take action against the vessel.

152 See: 'Voluntary Intermodal Sealift Agreement (VISA)', *US Department of Transportation Maritime Administration* (Web Page, 20 October 2020) <https://www.maritime.dot.gov/national-security/strategic-sealift/voluntary-intermodal-sealift-agreement-visa>; 'Sealift', *United States Transportation Command* (Web Page) <https://www.ustranscom.mil/mov/sealift.cfm> ('*Sealift Command*'). The latter also specifies the immunity of the vessels while chartered by the Military Sealift Command and under operational control of the Military Sealift Command.

153 See also 46 USC § 2101(24) (1988) which limits the 'operation' by a foreign State to demise charter (also known as 'bare boat' charter).

154 *Final Report* (n 131) 172–3 [10].

155 See above nn 131–3 and accompanying text.

156 Note that the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011) concluded that the Turkish claims regarding the cargo of medical supplies were 'totally unconvincing' and that the MV *Çirkin* and accompanying naval vessels violated the arms embargo set forth in Resolution 1970 (2011): *Final Report* (n 131) 173 [12].

(b) UNSC Authority

The authority of the UNSC to determine the existence of threats to, or breaches of, international peace and security is firmly established in the provisions of the *Charter of the United Nations* ('*UN Charter*'), most notably in art 39.[157] The authority of the UNSC to establish embargoes in response to such situations is specified in art 41 of the same chapter of the *UN Charter*. Member States are required to carry out the decisions of the UNSC, as set forth in art 25 of the *UN Charter*. Should a conflict arise between a State's obligations under the *UN Charter* and those under any other treaty or convention, art 103 of the *UN Charter* makes it clear that the obligations under the *UN Charter* take precedence. Although there are limitations to the ability of the UNSC to set aside other obligations, especially as regards peremptory norms of international law,[158] the authority of the UNSC would in any case include setting aside normal rules of peacetime LOTS when authorising actions on the basis of ch VII of the *UN Charter*.

In Resolution 2292, recently extended through UNSC Resolution 2635 (2022),[159] the UNSC refers to its responsibility regarding international peace and security and to its determination that terrorism constitutes 'one of the most serious threats to peace and security'.[160] In paras 3 and 4 of Resolution 2292, the UNSC authorises the Member States to carry out inspections of vessels bound to or from Libya if there are 'reasonable grounds to believe [they] are carrying arms or related materiel to or from Libya',[161] subject to:

1. 'good-faith efforts' to obtain flag State consent prior to inspections (calling upon flag States to 'cooperate with such inspections');[162]

---

157 *Charter of the United Nations* art 39 ('*UN Charter*').

158 See generally: Jann K Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 35; Aristotle Constantinides, 'An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq' (Conference Paper, European Society of International Law Conference, 13 May 2004) <https://esil-sedi.eu/wp-content/uploads/2018/04/Constantinides_0.pdf>; Christian Tomuschat, 'The Security Council and *Jus Cogens*' in Enzo Cannizzaro (ed), *The Present and Future of Jus Cogens* (Sapienza Università Editrice, 2015) 7 <http://crde.unitelmasapienza.it/sites/default/files/GMLS_1_2015_3_Christian_Tomuschat.pdf>; Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16(1) *European Journal of International Law* 59; Marten Coenraad Zwanenburg, 'Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations' (PhD Thesis, University of Leiden, 2004) 144–52.

159 SC Res 2635, UN Doc S/RES/2635 (3 June 2022).

160 Resolution 2292 (n 130) 3.

161 Ibid 3 [3].

162 Ibid.

2. compliance with IHL and human rights law as applicable;[163]

3. the limitation of such interceptions to 'the high seas off the coast of Libya';[164] and

4. causing no 'undue delay to or undue interference with the exercise of freedom of navigation'.[165]

Of final relevance to the present discussion, para 7 of Resolution 2292 '[u]nderscores that these authorizations do not apply with respect to vessels entitled to sovereign immunity'.[166]

While there is no publicly available evidence as to what the MV *Çirkin* was carrying,[167] it is in any case clear that the vessel was heading to Libya and that both the European Union and NATO operations felt they had sufficient cause to seek to inspect the vessel. Whether a good faith effort was made by the European Union or NATO commands in charge of the HS *Spetsai* and the *Courbet*, respectively, to obtain authorisation from Tanzania, as the flag State of the MV *Çirkin* is not clear from the publicly available information. However, it should be noted that the wording of the requirement in Resolution 2292 leaves room for interpretation by the States acting under the authority it grants — including the time to be taken into account for receiving any reply to any request sent to the flag State.

As regards para 7 of Resolution 2292, the question as to the status of the MV *Çirkin* at the time of the incidents becomes particularly relevant. As was argued above in Part III(A)(2)(a), if the MV *Çirkin* was, at the time, under charter by and control of the Turkish Government and operated by Turkey exclusively for non-commercial purposes, then it can be argued that the MV *Çirkin* fell, at the time, under the category of ships enjoying sovereign immunity. If that interpretation of the law regarding sovereign immunity is applied, then para 7 of Resolution 2292 would exclude the MV *Çirkin* from the authorisations granted in the resolution and there would have been no legal authority for either the HS *Spetsai* or the *Courbet* to seek inspection of the vessel. If, on the other hand, the MV *Çirkin* was not being operated by the Turkish Government, or if the law regarding sovereign immunity does not extend to merchant vessels flying a different flag than the State operating the vessel, then the interference by the Turkish warships becomes more problematic. Given the obligations set forth in art 25 of the *UN Charter*, Turkey would then have failed to meet its obligations by actively preventing the European Union and NATO vessels from carrying out Resolution 2292. While Resolution 2292 does not contain an *obligation* to inspect, adhering to the arms embargo itself is an obligation and interfering with inspections carried out by States pursuant to the embargo, and

163 Ibid 3 [4].

164 Ibid 3 [3].

165 Ibid 3 [4].

166 Ibid 4 [7].

167 See *Final Report* (n 131) 171–3. See above n 156.

the authorisations set forth in Resolution 2292, would thus at least undermine the overall obligations in that regard.

3 *Analysis and Conclusion*

At present, the information publicly available is limited. Nonetheless, this incident illustrates that issues regarding the interpretation of the law or the applicability of various parts of international law to military operations are not limited to situations of adversarial or competitive relations between States, but can also arise between members of the same Alliance. Furthermore, the incident demonstrates that even in situations covered by a UNSC mandate, conflicts or incidents can arise as a result of the actual implementation of the mandate.

The description of the incidents and the analysis presented in this article lead to the very basic conclusion that the legitimacy of the actions undertaken by Greece (in the context of the European Union operation), France (in the context of the NATO operation), and Turkey depends on the status of the MV *Çirkin* at the time the incidents occurred. If the MV *Çirkin* was being operated by Turkey at the time, and an expansive view of the law regarding sovereign immunity is applied, then the vessel was a State vessel and was excluded from the authorisations granted by the UNSC for States to stop and inspect vessels on the high seas. Note that this exclusion is the result of the specific wording of the resolution in question, although it seems doubtful that the UNSC would issue broad authority to stop and inspect State vessels[168] in any case. While there is no legal reason why the UNSC would not be authorised to grant the authority to inspect State vessels, it seems, at least in practice, more likely that such authority would only be granted in the context of specific security measures targeted at a specific State. The present resolution, however, targets terrorist groups and the authorisations extend to any vessel (other than State vessels) sailing under any flag.

Based on the analysis above, it seems clear that in the event that the MV *Çirkin* was, at the time, a State vessel, the attempts by the European Union and NATO vessels to stop and inspect the vessel would not be covered by the authorisations granted by the UNSC and would therefore be in violation of the immunity of State vessels. If, on the other hand, the MV *Çirkin* was not a State vessel at the time of the incidents, then the actions taken by the Turkish warships to prevent the inspection of the MV *Çirkin* are questionable. While preventing other States from exercising the type of authorisations as set forth in the resolution is not in and of itself a violation of art 25 of the *UN Charter*, since authorisations are in themselves not mandatory actions, such a prevention would at least contravene the object and purpose of the resolution in question. Should such actions have the effect of undermining or contravening the weapons embargo, then the actions would constitute a violation of art 25 of the *UN Charter*. Obviously, the same would be the case if a State were to ship goods covered by the embargo directly to Libya.

---

168 Note that ‘State vessels’ as a term includes warships, which are always State vessels, and vessels operated by a State for non-commercial purposes, which are State vessels for as long as they are so operated.

B *The Tensions over Natural Resources*

1 *The Incident*

Although tensions over the delimitation of maritime zones and rights to natural resources in the area have arisen periodically over much longer periods of time, the tensions between Greece and Turkey, and by extension between the European Union and Turkey, in the Eastern Mediterranean have increased since August 2020. In that month, Turkey sent the research and survey vessel *Oruc Reis*, accompanied by Turkish naval vessels, to explore deposits of natural gas in an area between Crete and Cyprus.[169] That area forms part of disputed claims concerning the delimitations of the EEZs of Greece and Turkey. Furthermore, the Turkish intentions regarding the exploitation of natural gas deposits in the area would place those activities within maritime areas claimed by Greece as part of the EEZ of, inter alia, the (Greek) island of Kastellorizo just a few miles off the coast of Turkey.[170]

The incident of August 2020 follows from an earlier controversial development regarding the rights to the natural resources in the area in question. In 2019, Turkey and Libya entered into an agreement delineating the EEZs of both countries.[171]

---

169 See: 'EU Warns Turkey of Sanctions over "Provocations" in Mediterranean', *BBC News* (online, 2 October 2020) <https://www.bbc.com/news/world-europe-54381498>; Andreas Kluth, 'International Law Can't Solve the Greco-Turkish Island Problem', *Bloomberg* (online, 20 October 2020) <https://www.bloomberg.com/opinion/articles/2020-10-17/international-law-can-t-solve-greece-and-turkey-s-kastellorizo-island-problem?leadSource=uverify%20wall>; 'Turkey-Greece Tensions Escalate over Turkish Med Drilling Plans', *BBC News* (online, 25 August 2020) <https://www.bbc.com/news/world-europe-53497741> ('Turkey-Greece Tensions'); Alex Gatopoulos, 'Project Force: Battle for Resources in the Eastern Mediterranean', *Al Jazeera* (online, 13 August 2020) <https://www.aljazeera.com/features/2020/8/13/project-force-battle-for-resources-in-the-eastern-mediterranean> ('Project Force'); Sam Meredith, 'Turkey's Pursuit of Contested Oil and Gas Reserves Has Ramifications "Well beyond" the Region', *CNBC* (online, 18 August 2020) <https://www.cnbc.com/2020/08/18/turkey-greece-clash-over-oil-and-gas-in-the-eastern-mediterranean.html?&qsearchterm=Turkey%E2%80%99s%20pursuit%20of%20contested%20oil%20and%20gas%20reserves%20has%20ramifications%20%E2%80%98well%20beyond%E2%80%99%20the%20region>; Elena Becatoros, 'Greece Slams Turkish Move on Gas Exploration in Eastern Med', *The Washington Post* (online, 10 August 2020) <https://www.washingtonpost.com/world/europe/greek-national-security-council-to-meet-amid-turkey-tension/2020/08/10/a24ef7be-dae1-11ea-b4f1-25b762cdbbf4_story.html>.

170 See below Figure 2. The Greek island of Kastellorizo is marked with a small circle.

171 The agreement was concluded as a Memorandum of Understanding ('MOU') which is usually considered to be an instrument other than a treaty and not legally binding: see, eg, Office of Legal Affairs, *Treaty Handbook* (United Nations, 2012) 68. However, the MOU was registered with the United Nations under art 102 of the *UN Charter* (n 157) and the wording seems to indicate an intention for the document to form a treaty: *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on Delimitation of the*

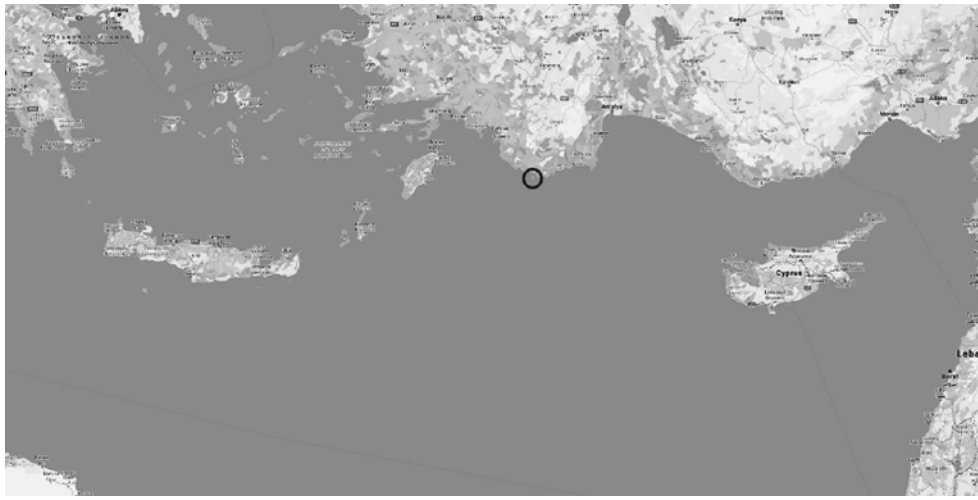

Figure 2: Eastern Mediterranean[172]

The boundary thus established, however, would cause the Turkish EEZ to overlap with any zone Greece could possibly claim in connection with, inter alia, the island of Kastellorizo and eastwards of the island of Crete. Consequently, the agreement has been met with considerable criticism from other States in the region and from the European Union but nonetheless appears to form the basis for the Turkish decisions regarding the activities in August 2020.[173]

With the exception of a collision between a Greek naval vessel and (one of) the Turkish vessels escorting the *Oruc Reis* in August 2020, the confrontation appears to have been minor. Turkey decided to withdraw the *Oruc Reis* from the disputed area and in spite of diplomatic offensives and public statements from the various States and organisations involved, the issue did not lead to an actual military

Maritime Jurisdiction Areas in the Mediterranean, signed 27 November 2019 <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/Turkey_11122019_%28HC%29_MoU_Libya-Delimitation-areas-Mediterranean.pdf>.

172 'Kastellorizo', *Google Maps* (Web Page) <https://www.google.com/maps/place/%CE%9A%CE%B1%CF%83%CF%84%CE%B5%CE%BB%CE%BB%CF%8C%CF%81%CE%B9%CE%B6%CE%BF+851+11,+Greece/@36.1495016,25.1099116,6z/data=!4m5!3m4!1s0x14c1d7ae617d4301:0x400bd2ce2b9b320!8m2!3d36.1495227!4d29.5934415>.

173 See, eg: 'EU Leaders to Reject Turkey-Libya Deal: Draft Statement', *Reuters* (online, 12 December 2019) <https://www.reuters.com/article/us-eu-summit-greece-turkey-idUSKBN1YF228>; Daren Butler and Tuvan Gumrukcu, 'Turkey Signs Maritime Boundaries Deal with Libya amid Exploration Row', *Reuters* (online, 28 November 2019) <https://www.reuters.com/article/us-turkey-libya-idUSKBN1Y213I>.

confrontation.[174] Furthermore, the earthquake in the region in October 2020 reduced tensions between the two principal States to a certain degree.[175] Nonetheless, the escort of the research vessel by military vessels, increased military readiness in the area, and the (implicit) references to national self-defence and mutual defence clauses,[176] raises a number of issues relevant in the context of ILMO.

2 *Applicable Law*

(a) LOTS

As was noted above in Part III(A)(2)(a), Greece is a party to *UNCLOS* but Turkey is not. It is therefore essential to determine whether the relevant provisions of *UNCLOS* are part of customary law and how their application would reflect on the positions taken by the States involved. Such relevant provisions include those regarding the EEZ, the continental shelf, and the regime regarding islands in connection to those zones. It should be noted that as regards the situation under discussion, Turkey has stated that islands (either categorically or those close to the coastline of Turkey depending on the report) cannot have an EEZ or continental shelf.[177] Greece, on the other hand, has referred to its rights to such zones in connection with the Greek islands, including Kastellorizo.

The provisions of *UNCLOS* in question are arts 74 ('Delimitation of the exclusive economic zone between States with opposite or adjacent coasts'), 76 ('Definition of the continental shelf'), 83 ('Delimitation of the continental shelf between States with opposite or adjacent coasts') and 121 ('Régime of islands').[178] All of these provisions have been subject to consideration by the ICJ in various cases.

---

174 See Ali Kucukgocmen and George Georgiopoulos, 'Turkey's Oruc Reis Survey Vessel Back Near Southern Shore, Ship Tracker Shows', *Reuters* (online, 13 September 2020) <https://www.reuters.com/article/uk-turkey-greece-idUKKBN2640F1>.

175 'Turkey-Greece Quake: Search for Survivors under Rubble', *BBC News* (online, 31 October 2020) <https://www.bbc.com/news/world-europe-54759443>; 'Deadly Earthquake Strikes Turkey and Greece, Both Countries "Ready To Help Each Other"', *France 24* (online, 30 October 2020) <https://www.france24.com/en/europe/20201030-deadly-earthquake-strikes-turkey-and-greece>.

176 See, eg: Steven Erlanger, 'Rising Tensions between Turkey and Greece Divide EU Leaders', *The New York Times* (online, 27 August 2020) <https://www.nytimes.com/2020/08/27/world/europe/greece-turkey-eu.html>; Helena Smith, 'Mike Pompeo in Greece amid Tensions with Turkey over Gas Reserves', *The Guardian* (online, 28 September 2020) <https://www.theguardian.com/world/2020/sep/28/mike-pompeo-due-in-athens-amid-spiralling-tensions-between-greece-and-turkey>; 'Greece To Boost Military amid Tension with Turkey', *Al Jazeera* (online, 7 September 2020) <https://www.aljazeera.com/news/2020/9/7/greece-to-boost-military-amid-tension-with-turkey>; Letter from Nikos Dendias to Josep Borrell, 19 October 2020 <https://club.bruxelles2.eu/wp-content/uploads/let-art42-7turquie@gre201019.pdf>.

177 'Turkey-Greece Tensions' (n 169); 'Project Force' (n 169).

178 *UNCLOS* (n 6) arts 74, 76, 83, 121. For further discussion of art 121 of *UNCLOS* regarding the South China Sea, see below Part IV.

As regards the EEZ, the ICJ has ruled several times that the provisions of art 74 of *UNCLOS* are part of customary law, most notably in 2001,[179] 2012,[180] and 2014.[181] While art 74 concerns the delimitation of the EEZ, it should be noted that the ICJ has similarly ruled that the provisions regarding the EEZ itself also represent customary law.[182] In spite of the public statements by Turkey in the specific context of the natural resources in the area in question, there are no indications that Turkey has consistently rejected the customary law status of the provisions and Turkey cannot therefore be considered a 'persistent objector' in this case. Consequently, the provisions set forth in art 74 must be considered to apply to Turkey regardless of the fact that Turkey is not a party to *UNCLOS*.

In terms of the continental shelf, the ICJ has ruled on several occasions that art 76 of *UNCLOS*, regarding the continental shelf itself, and art 83 of *UNCLOS*, regarding the delamination between States with opposite or adjacent coasts, are part of customary international law.[183] Similarly, in this case there do not appear to be any indications that would render Turkey a persistent objector regarding the customary law status of these provisions. Consequently, these provisions must equally be considered to apply to Turkey regardless of whether Turkey is a party to *UNCLOS* itself.

Finally, and as will also be discussed below in Part IV, the customary law status of the provisions of *UNCLOS* regarding the regime of islands is relevant. It should be noted that art 121(2) of *UNCLOS* declares the provisions regarding the territorial sea, the EEZ and the continental shelf to be applicable to islands,[184] meaning that ascribing a customary law status of art 121 — in combination with the customary law status of the provisions regarding the EEZ and continental shelf — would render all of the previous elements equally applicable to the islands in question. This indeed appears to be the case, as the ICJ has ruled that art 121 is part of customary law.[185]

---

179 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits) (Judgement)* [2001] ICJ Rep 40, 91–3 [167]–[173] ('*Maritime Delimitation and Territorial Questions*').

180 *Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment)* [2012] ICJ Rep 624, 674 [139] ('*Territorial and Maritime Dispute*').

181 *Maritime Dispute (Peru v Chile) (Judgement)* [2014] ICJ Rep 3, 65 [179] ('*Maritime Dispute*').

182 *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)* [1985] ICJ Rep 13, 33 [34] ('*Continental Shelf*').

183 Ibid 46–7 [77]; *Territorial and Maritime Dispute* (n 180) 666 [118], 674 [139]; *Maritime Dispute* (n 181) 65 [179].

184 With the (sole) exception set forth in art 121(3), regarding the absence of an EEZ or continental shelf for rocks which cannot sustain human habitation or economic life of their own. This exception is particularly relevant in the context of the discussion below in Part IV.

185 See, eg: *Maritime Delimitation and Territorial Questions* (n 179) 97 [185]; *Territorial and Maritime Dispute* (n 180) 674 [139].

Based on the decisions of the ICJ, it would appear that the Turkish statements regarding the rights of islands to an EEZ and/or a continental shelf are not compatible with customary international LOTS. Furthermore, given the customary law status of the relevant provisions of *UNCLOS*, the activities carried out by Turkey — as regards exploration and intended exploitation of natural resources in the area under dispute — would similarly appear to be incompatible with applicable customary international LOTS. This, in turn, influences the discussion regarding the use of military assets to protect those activities and defend against those activities.

(b) Jus ad Bellum

Given that the activities carried out by Turkey as regards exploration and intended exploitation of natural resources in the area in question would appear to be incompatible with applicable international LOTS, there equally appears to be no basis for the use of force to enable those activities to take place. While it is, of course, permitted under international law to provide military escorts to civilian vessels, provided all vessels comply with applicable law, there is no rule or principle authorising the use of force by those vessels unless authorised by a resolution of the UNSC (of which there is none to this effect in the present case) or on the basis of the right of self-defence. Additionally, while not constituting a legal basis for the use of force, the forcible affirmation of rights referred to in Part II(B)(2)(b) above appears relevant.[186]

(i) Self-Defence

Notwithstanding the collision between (at least) two of the naval vessels involved, there has not been any actual use of force between the States involved in the present case. Nonetheless, forceful language has been used in the public statements made by both States with regard to the situation in general.[187] It is therefore relevant to examine whether those statements should be construed as (political) rhetoric or whether a basis exists for the use of force in the present situation. As regards the right of self-defence, such an examination can be divided into two levels: (1) national self-defence; and (2) unit self-defence.

The right of States to defend themselves against an (imminent) armed attack is recognised under art 51 of the *UN Charter* and is part of customary international law as an inherent right of States.[188] The right to national self-defence covers both

186 See above n 52 and accompanying text.

187 See above nn 169 and 176.

188 See, eg: Terry D Gill, 'Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 213, 213–24; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011) 187–93; *Legality of the Threat or Use of Nuclear Weapons* (n 109) 263 [96]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (Judgment)* [1986] ICJ Rep 14, 94 [176] ('*Military and Paramilitary Activities*'); Albrecht Randelzhofer and

attacks and imminent attacks and may be exercised individually or collectively — such as through pre-arranged alliances.[189] Two of those alliances are relevant in this case. Both Greece and Turkey are members of NATO, for which the founding *North Atlantic Treaty* contains the mutual defence clause set forth in art 5.[190] Additionally, Greece is a member of the European Union and can have recourse to art 42(7) of the *Treaty on European Union* ('*EU*').[191] Both provisions refer to the *UN Charter* as the basis for collective self-defence.

Notwithstanding the self-evident legal and political complexities that would arise if armed conflict were to erupt between two members of the same alliance, the present situation cannot qualify as justification for invoking art 5 of the *North Atlantic Treaty* or art 51 of the *UN Charter*. This follows from the simple observation that an (imminent) armed attack is a required precondition in both of those provisions. While there is no formal definition of the term 'armed attack',[192] it is generally accepted that the notion requires a considerable degree or scale of force to be (imminently) used against the State invoking the right of self-defence.[193] It would seem that a collision between naval vessels of two States and the sending of a survey vessel accompanied by naval vessels into disputed maritime areas outside the territorial waters of the affected State would in any case not amount to — even under a generously wide definition of the notion — an 'armed attack'. Similarly, while the various public statements made by both States are, at least, firm of tone from a diplomatic perspective, they do not as such provide indications of an imminent armed attack from either State against the other.

As regards art 42(7) of the *EU*,[194] it should be noted that the wording of this provision differs from that of art 5 of the *North Atlantic Treaty* and art 51 of the *UN Charter*

Oliver Dörr, 'Article 2(4)' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford, 3rd ed, 2012) vol 1, 200. Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford, 3rd ed, 2012) vol 2, 1397.

189 Though it is acknowledged that the debate is ongoing as to whether the right of anticipatory self-defence exists subsequent to the opinion of the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

190 *North Atlantic Treaty*, opened for signature 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 5 ('*North Atlantic Treaty*').

191 *Treaty on European Union*, opened for signature 7 February 1992, [2016] OJ C 202/1 (entered into force 1 November 1993) art 42(7) ('*EU*').

192 As noted by the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (n 188) 94 [176].

193 Ibid 103–4 [195]. See Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (Working Paper, Chatham House, October 2005) 6, 13.

194 For a detailed discussion of art 42(7) of the *EU* (n 191), see, eg: JFR Boddens Hosang and PAL Ducheine, 'Implementing Article 42.7 of the Treaty on European Union: Legal Foundations for Mutual Defence in the Face of Modern Threats' (Research

in that it refers to 'armed aggression' as a prerequisite rather than an 'armed attack'. The relevance of this difference depends upon which of the various interpretations is considered convincing. While Aurel Sari points to a linguistic origin without normative or substantive meaning,[195] it has also been argued that the phrase is a deliberate choice providing a broader scope of application than art 5 of the *North Atlantic Treaty*.[196] However, regardless of the scope attached to these specific words in the provision, it is in any case clear that art 42(7) limits its application to 'armed aggression' against the territory of a Member State. As neither the EEZ nor the continental shelf are part of the territory of a State, the activities in the case under discussion cannot be cause to invoke art 42(7) of the *EU*. While attacks on the naval forces of a State by another State fall under the definition of aggression,[197] and would therefore fall within the broad interpretation of art 42(7) of the *EU* if so applied, this still does not remove the territorial requirement in the provision.

Based on these observations, it may be concluded that the situation in question does not give rise to a legal recourse as to the right of (collective) national self-defence. While art 6 of the *North Atlantic Treaty* provides that the vessels of the Member States fall within the scope of art 5, there simply was no 'armed attack' in the situation under discussion. As regards the *EU*, even if one were to accept a broader scope by virtue of the wording of art 42(7) of the *EU*, it does not include vessels in the scope and limits the application to the territory of the Member States.

(ii) Unit Self-Defence

Although there is some debate regarding the legal basis and conceptual framework, it is nonetheless recognised that military units have an inherent right to defend themselves against an (imminent) attack. It is recognised that this right, which is exclusive to military units, can most accurately be considered as a tactical level application of the right of national self-defence without invoking a nation-wide response

Paper No 2020–71, Amsterdam Center for International Law, Amsterdam Law School Legal Studies, 14 December 2020); Mattias G Fischer and Daniel Thym, 'Article 42 [CSDP: Goals and Objectives, Mutual Defence]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer, 2013) 1201; Aurel Sari, 'The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats' (2019) 10(2) *Harvard National Security Journal* 405; Niklas IM Nováky, 'The Invocation of the European Union's Mutual Assistance Clause: A Call for Enforced Solidarity' (2017) 22(3) *European Foreign Affairs Review* 357.

195 See, eg, Sari (n 194) 418.

196 See, eg, Anne Bakker et al, *Spearheading European Defence: Employing the Lisbon Treaty for a Stronger CSDP* (Report, Clingendael Netherlands Institute of International Relations, September 2016). See also ibid 418–19.

197 *Definition of Aggression*, GA Res 3314 (XXIX), 6th Comm, 29th sess, 2319th plen mtg, UN Doc A/RES/29/3314 (14 December 1974, adopted 14 December 1974) art 3(d).

by the flag State of the defending unit against the flag State of the attacking unit.[198] In addition to the requirement of an (imminent) attack, the use of force in this context must be considered as a last resort and meet the requirements of necessity and proportionality.[199] A collision between two naval vessels, even if it was the result of forceful posturing and provocation, would not necessarily be sufficient for the use of force in unit self-defence absent any further threats of, or actual use of, force against the vessel in question. However, the right to unit self-defence would apply if sufficiently threatening behaviour by one side could reasonably be interpreted by the other side as constituting an imminent or actual attack. As pointed out by Yoram Dinstein,[200] and referred to by Christopher Greenwood,[201] such an incident need not give rise to a full armed conflict with concomitant (legal) consequences, provided both sides treat the event as an 'incident' and no further use of force arises between them.[202] Obviously, however, such a development would not contribute to the overall safety and stability in the region.

(iii) Forcible Affirmation of Rights

As briefly referred to in Part II(B)(2)(b) above, and as analysed by Terry Gill,[203] and Dale Stephens,[204] the use of forceful means short of the actual use of force may be justified in exercising a right granted under international law, provided all attendant criteria and conditions set forth in the law are observed. This includes the use of warships to sail in areas where such ships have a right to sail. As regards observance of the rules of international law during such activities, special attention is required as regards compliance with the *UNCLOS* provisions regarding innocent passage and transit passage as well as compliance with art 2(4) of the *UN Charter*, regarding the

198 See, eg: Boddens Hosang, *Rules of Engagement* (n 106) 83–9; Charles P Trumbull IV, 'The Basis of Unit Self-Defense and Implications for the Use of Force' (2012) 23(1) *Duke Journal of Comparative and International Law* 121; EL Gaston, 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege' (2017) 8(1) *Harvard National Security Journal* 283. Dinstein refers to this as an 'on the spot reaction': Dinstein (n 188) 242–4. Finally, the ICJ has not 'exclude[d] the possibility' that an attack on 'a single military vessel might be sufficient to bring into play the "inherent right of self-defence"': *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 195 [72].

199 In other words, the criteria established in the *Caroline* incident: RY Jennings, 'The Caroline and McLeod Cases' (1938) 32(1) *American Journal of International Law* 82. See, eg: Dale Stephens, 'Rules of Engagement and the Concept of Unit Self-Defense' (1998) 45(1) *Naval Law Review* 126; Dinstein (n 188) 244.

200 Dinstein (n 188) 244.

201 Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008) 45, 48.

202 Note also the territorial requirement for invoking art 42(7) of the *EU* (n 191) mentioned in Part III(B)(2)(b)(i).

203 Gill, 'The Forcible Protection, Affirmation and Exercise of Rights' (n 52).

204 Ibid; Dale G Stephens, 'The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations' (1999) 29(2) *California Western International Law Review* 283.

prohibition of the (threat of the) use of force. In other words, the use of warships to threaten the coastal State or in a manner which does not constitute normal modes of navigation would not be permissible on this basis.

One of the essential elements of the theory of 'forcible affirmation of rights' is the existence of a 'right' under international law to be 'affirmed'.[205] Mere show of military force or aggressive behaviour as part of international relations without the purpose of 'affirming' a (contested) right does not fall under the aegis of this approach, and touches on different elements of the rules related to legitimacy and legality. In other words, the approach requires the unequivocal existence of a right under international law, a perceived necessity to affirm that right, and subsequent adherence to (other elements of) international law in the actual conduct related to that affirmation of the right. Moreover, the forcible affirmation of rights does not authorise the use of force absent an (imminent) armed attack, nor does it negate the law as regards peaceful settlement of disputes, whether under treaty law or general international law.[206]

Applying this approach and these principles to the situation under discussion, and applying the observations and conclusion presented in Part III(B)(2)(a) above, there would seem to be no basis for the use of warships by Turkey in terms of forcibly affirming any rights in this case. A protective escort of the Turkish exploratory vessel is, of course, generally permitted, provided the rules of international law applicable to warships are observed. Forcibly affirming rights through the deployment of such warships, however, does not appear applicable as there is no right for the exploratory vessel in question to carry out any activities related to exploration of natural gas deposits in the areas in which the incidents took place.

On the other hand, the deployment of Greek warships can be seen as a legitimate use of the principle under discussion, provided that: (a) the use of force is limited to situations of self-defence; and (b) the deployment is carried out to supervise or monitor the situation or to prevent the exploratory vessel from carrying out activities incompatible with Greek rights in the area. The use of such warships is not permitted, however, as a means of interfering with the freedom of navigation of any vessel in the area in question.

3 *Analysis and Conclusion*

As will become apparent in Part IV, the presence of natural resources can be a catalyst for geopolitical tensions. In the case of Greece and Turkey, those tensions are part of the long history between the two nations and the current situation regarding natural resources in disputed areas has exacerbated the bilateral relations. At the same time, it would appear that external crises, such as the earthquake in 2020, can inspire both States to transcend the bilateral difficulties and seek cooperation in times of mutual crisis.[207] That complex dynamic appears, at least for the time being, to offer hope that the dispute over maritime zones and the exploration and exploitation of natural resources in the area will not escalate to actual conflict in the region.

---

205 Gill, 'The Forcible Protection, Affirmation and Exercise of Rights' (n 52) 125–6.

206 Ibid 119–25.

207 See above n 175 and accompanying text.

Turning to the aspects of international law, especially ILMO, as they apply to the situation under discussion, the analysis presented in this Part demonstrates that the tensions regarding maritime zones and natural resources do not provide a legal basis for the use of force on a national level, nor for invoking treaty provisions related to the right of national self-defence. Notwithstanding the diplomatic rhetoric employed,[208] the activities are related to maritime zones other than the territorial sea and consequently do not constitute any (imminent) armed attack against any State.

As regards the right of personal and unit self-defence, such rights attach to individuals and to military units at all times but only in the event of an (imminent) attack. While it is possible in theory that future confrontations may give rise to such a situation, it is of course to be hoped that this will not be the case and that tensions do not increase further. However, should a situation of unit self-defence arise, international law dictates that any response must adhere to the principles of necessity and proportionality and that the use of force be considered a measure of last resort.

Finally, as regards the forcible affirmation of rights, it should be emphasised first that this approach does not authorise the use of force. While situations authorising the use of force in self-defence may arise as a result of forcibly affirming rights, the approach itself cannot be considered a legal basis for the use of force. In the situation under discussion, the rights in question are Greek rights in relation to the maritime zones surrounding the Greek islands and to the right of Turkey regarding freedom of navigation in maritime areas outside the territorial waters of any State. Given the decisions of the ICJ discussed above in Part III(B)(2)(a), there can be no doubt that the Greek islands in question are entitled to a territorial sea, EEZ and continental shelf. Given the rights of coastal States in relation to such zones as set forth in *UNCLOS*, it would appear that Greece would be justified in affirming those rights when faced with possible infringements by other States and would be justified in forcibly affirming those rights in reaction to forcible infringements. While the right of Turkey to freedom of navigation in the areas under dispute is undeniable, there is clearly no right for Turkey to carry out exploration regarding natural gas deposits in the disputed areas and, consequently, no justification for forcibly protecting such actions.

IV Freedom of Naval and Air Navigation and Operations in the South China Sea

A *The Context*

Given the scope and history of international relations and concomitant challenges in the South China Sea and the wealth of academic writing on these topics, the analysis presented below will focus on the aspects which are relevant to the discussion of ILMO. Even with such a delimitation, however, the situation in the South China Sea provides a complex mixture of legal aspects, including historic claims and titles, claims to various maritime and air zones, and the freedom of navigation and military operations within such zones, all of which will be discussed below.

208 See above nn 169–76 and accompanying text.

As was observed in Part III, the presence of natural resources can cause additional incentives for disputes regarding maritime zones as well as divergent interpretations of applicable international law. This observation also applies to the South China Sea, with an estimated presence of large deposits of natural gas and oil as part of the situation.[209] Of the two island groups most heavily disputed in the area, the Spratly Islands are an area of interest for the exploration and exploitation of those resources.[210] Additionally, dependency on, and disputes over, fishery in the South China Sea contribute to tensions in the area as well.[211]

Although natural resources play a role in the tensions in the South China Sea, the actual disputes in the area primarily concern claims under the LOTS and the concomitant aspects of jurisdiction and rights related to maritime areas. In order to provide a logical structure to the discussion of these disputes, the following approach will be applied. Since the disputes relate in part to historic claims and in part to interpretations of applicable international law related to the status of islands, those two elements will be discussed first. That analysis and evaluation in turn leads to an analysis of applicable (claims regarding) maritime zones and the rights and obligations related to those zones. That part of the analysis focuses more specifically on the freedom of navigation and the rights related to military operations at sea, including air navigation and operations in the area.

B *Applicable Law*

1 *LOTS*

(a) Historic Rights

All of the relevant regional[212] States are parties to *UNCLOS*,[213] while non-regional States which play an active role in the issues in the South China Sea are parties to: *UNCLOS*;[214] the *Convention on the Territorial Sea and the Contiguous Zone*;[215] the

209 See, eg, Tim Daiss, 'Why the South China Sea Has More Oil than You Think' (22 May 2016) *Forbes* <https://www.forbes.com/sites/timdaiss/2016/05/22/why-the-south-china-sea-has-more-oil-than-you-think/>.

210 Richard Manley, 'Rocks and Shoals Ahead' (2020) 146(6) *Proceedings* 1408.

211 Pablo Valerín et al, 'FONOPs: Not the Only Option' (2020) 146(5) *Proceedings* 1407; Kevin Varley et al, 'Fight over Fish Fans a New Stage of Conflict in South China Sea', *Bloomberg* (Web Page, 2 September 2020) <https://www.bloomberg.com/graphics/2020-dangerous-conditions-in-depleted-south-china-sea/>; John Reed, 'South China Sea: Fishing on the Front Line of Beijing's Ambitions', *Financial Times* (online, 24 January 2019) <https://www.ft.com/content/fead89da-1a4e-11e9-9e64-d150b3105d21>.

212 The term regional as used in this section refers to the South China Sea region, not to Asia or the Asia–Pacific region as a whole.

213 This includes China, Indonesia, Malaysia, the Philippines and Vietnam: see 'Chronological Lists: United Nations Convention on the Law of the Sea' (n 33).

214 This refers specifically to Australia, France, and the United Kingdom.

215 *Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

Convention on the Continental Shelf;[216] and/or are at least not considered persistent objectors to the customary law status of the rules set forth in *UNCLOS* regarding the territorial sea, EEZ or continental shelf.[217]

Although *UNCLOS* recognises historic claims and titles in relation to certain bays and issues related to (the delimitation of) the territorial sea,[218] it does not contain any provisions addressing historic claims or titles to other maritime zones. As regards rights or obligations in such zones, art 62 of *UNCLOS* requires coastal States, in relation to the EEZ, to take into account 'the requirements of developing States' in the area and to minimise 'economic dislocation in States whose nationals have habitually fished in the zone'.[219] While this provision is relevant as regards the interests of other States in the South China Sea should the Chinese claims discussed below be considered valid, it does not, conversely, provide a legal basis for claims to (rights within) any zones. The question is therefore whether ratification of *UNCLOS* or the customary law status of the relevant provisions thereof has affected (prior) historic claims and titles if such claims and titles are incompatible with the provisions of *UNCLOS*. This question was one of the central issues addressed by the Arbitral Tribunal in the *South China Sea Arbitration* between the Philippines and China.[220]

Since 1958, China has claimed territorial seas in general conformity with international law as regards the width of the territorial sea.[221] However, it has consistently included the Paracel Islands (also known as the Xisha Islands) and Spratly Islands (also known as the Nansha Islands) in its claims despite the disputed ownership of those islands. In 1996, China claimed an EEZ in conformity with *UNCLOS* while 'reaffirming' its claim over the Paracel and Spratly islands, and in 1998 added a claim to a continental shelf in conformity with *UNCLOS*. Article 14 of the *Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf* contains a somewhat cryptic reference to the 'historical rights of the People's Republic of China'.[222] Those rights were detailed in two Notes Verbales sent by China to the United Nations in 2009, in which China claimed 'indisputable sovereignty over the islands in the South China Sea' as well as 'sovereign rights and

---

216 *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

217 This refers specifically to the United States.

218 See, eg, *UNCLOS* (n 6) arts 10(6), 15, 298(1)(a)(i).

219 Ibid art 62(3).

220 *South China Sea Arbitration* (n 76).

221 Note that the method of establishing baselines for the territorial sea as applied by China is heavily disputed and that the Chinese law diverges from international law as regards innocent passage by warships.

222 «中華人民共和國專屬經濟區和大陸架法» [Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf] (People's Republic of China) National People's Congress, Order No 6, 26 June 1998, art 14 [tr author] ('*Law of the People's Republic of China on the EEZ and the Continental Shelf*').

jurisdiction over the relevant waters as well as the seabed and subsoil thereof".[223] As substantiation thereof, China attached a map showing the so-called 'nine dash line'.

As the Arbitral Tribunal explained in detail,[224] the 'nine dash line' has appeared on Chinese maps since 1948 and represents the extent of the area over which China either claims jurisdiction (such as regarding the Paracel and Spratly islands) or sovereign rights (as regards maritime zones, including the seabed and subsoil). The historic claims of China have been challenged by other States, including Australia,[225] France,[226] Germany,[227] Indonesia,[228] Malaysia,[229] the Philippines (both as part of the Arbitral Tribunal Arbitration and separate thereof),[230] the United Kingdom,[231] the United States,[232] and Vietnam.[233]

223 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations Secretary-General, 7 May 2009 <https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations Secretary-General, 7 May 2009 <https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf>.

224 For the history of the 'nine dash line', see *South China Sea Arbitration* (n 76) [180]–[187].

225 Note Verbale from the Permanent Mission of the Commonwealth of Australia to the United Nations Secretary-General, 23 July 2020 <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_23_AUS_NV_UN_001_OLA-2020-00373.pdf> ('Australian Note Verbale').

226 Note Verbale from the Permanent Mission of France to the United Nations Secretariat, 16 September 2020 <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_FRA_NV_UN_001_EN.pdf>.

227 Note Verbale from the Permanent Mission of the Federal Republic of Germany to the United Nations Secretary-General, 16 September 2020 <https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_DEU_NV_UN_001.pdf>.

228 Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations Secretary-General, 12 June 2020 <https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_12_IDN_NV_UN_002_ENG.pdf>.

229 Note Verbale from the Permanent Mission of Malaysia to the United Nations Secretary-General, 29 July 2020 <https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_29_MYS_NV_UN_002_OLA-2020-00373.pdf>.

230 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations Secretary-General, 6 March 2020 <https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf>.

231 Note Verbale from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Secretariat, 16 September 2020 <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_GBR_NV_UN_001.pdf>.

232 Michael R Pompeo, United States Secretary of State, 'US Position on Maritime Claims in the South China Sea' (Press Statement, 13 July 2020) <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html>.

233 Note Verbale from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations Secretary-General, 3 May 2011 <https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/vnm_2011_re_phlchn.pdf>.

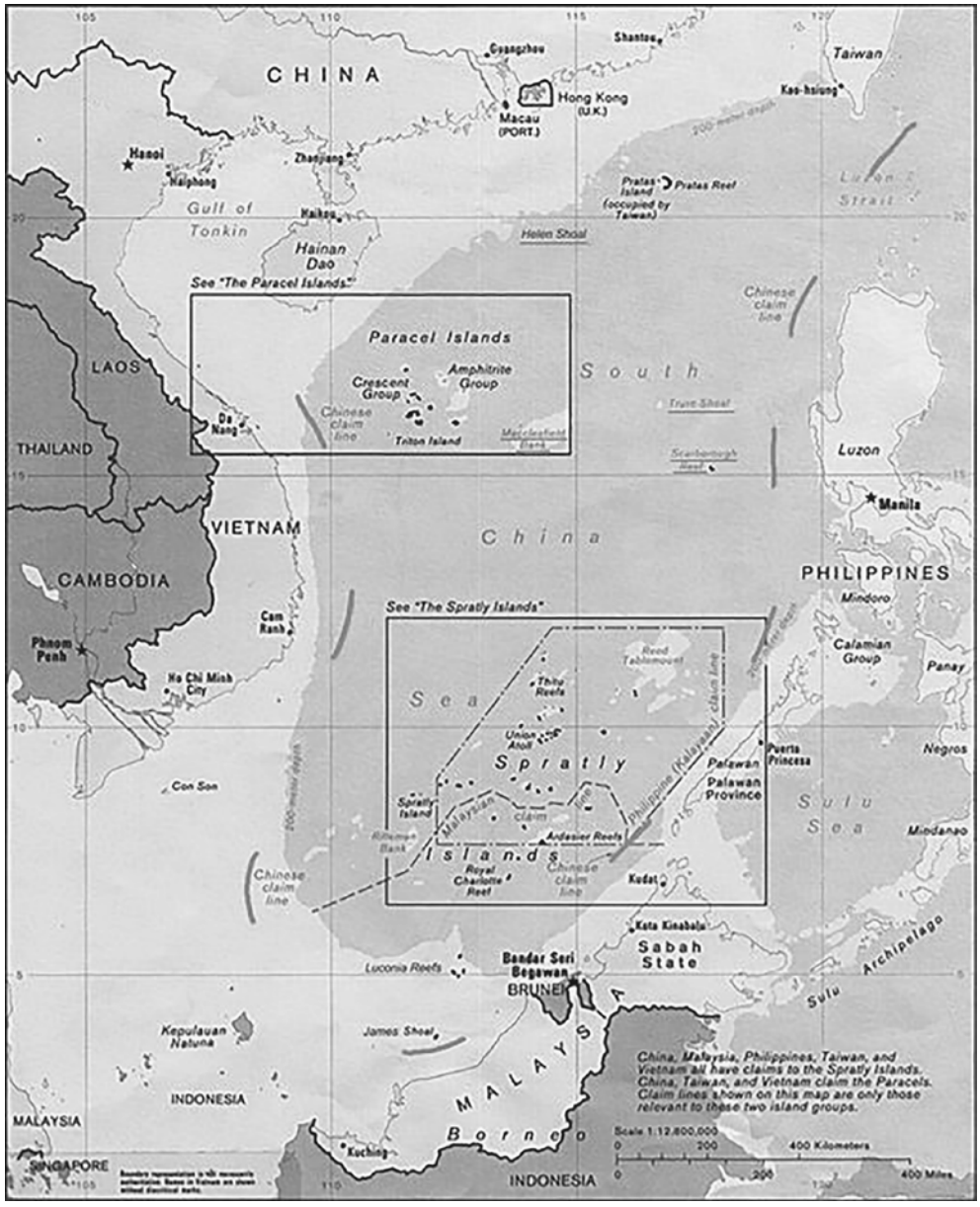

Figure 3: South China Sea and the 'Nine Dash Line'[234]

234 'South China Sea Islands', *University of Texas Libraries* (Web Page, 2021) <https://maps.lib.utexas.edu/maps/middle_east_and_asia/schina_sea_88.jpg>. This image was produced by the United States Central Intelligence Agency.

Based on the Chinese Notes Verbales and the analysis by the Arbitral Tribunal of the Chinese position in this regard, the Chinese historic claims in essence consist of claims to the Spratly and Paracel islands (and possibly other formations, such as the Scarborough Shoal) and exclusive rights to the natural (living and non-living) resources in the area enclosed by the 'nine dash line'. Leaving aside the question of ownership regarding the islands in question, the Arbitral Tribunal consequently addressed the following legal questions: (1) to what extent are historic claims which are incompatible with the provisions of *UNCLOS* valid; and (2) to what extent are the islands in the region in question entitled to maritime zones.[235]

Since *UNCLOS* does not recognise historic claims as a basis for establishing maritime zones, the Arbitral Tribunal assessed the legal effects of (ratification of) *UNCLOS* on the Chinese historic claims in the South China Sea on the basis of arts 293(1) (dispute resolution) and 311 (relation to other conventions and international agreements) of *UNCLOS* and art 30 of the *Vienna Convention on the Law of Treaties*,[236] as well as art 62 of *UNCLOS* as a basis for any *right* to harvesting natural resources.[237] On the basis of its comprehensive analysis of the various provisions, the Arbitral Tribunal concluded that there is no basis for historic rights contrary to the rights and obligations set forth in *UNCLOS*.[238] In other words, although the Arbitral Tribunal did not address the claims to sovereignty over the islands in the region, the ruling made clear that claims to natural (living and non-living) resources in areas other than a State's own territorial sea, EEZ or continental shelf are not compatible with *UNCLOS* and that the Chinese claims in that regard are invalid.[239] Given the placement of the 'nine dash line', it is clear that this ruling applies to large areas of the South China Sea that constitute the maritime zones of other States in the area, and thus cannot be the subject of Chinese historical claims.

235 The second question will be discussed below in Part IV(B)(1)(b).

236 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

237 Ibid (n 76) [235]–[239].

238 Ibid [246], [262].

239 Ibid [1203].

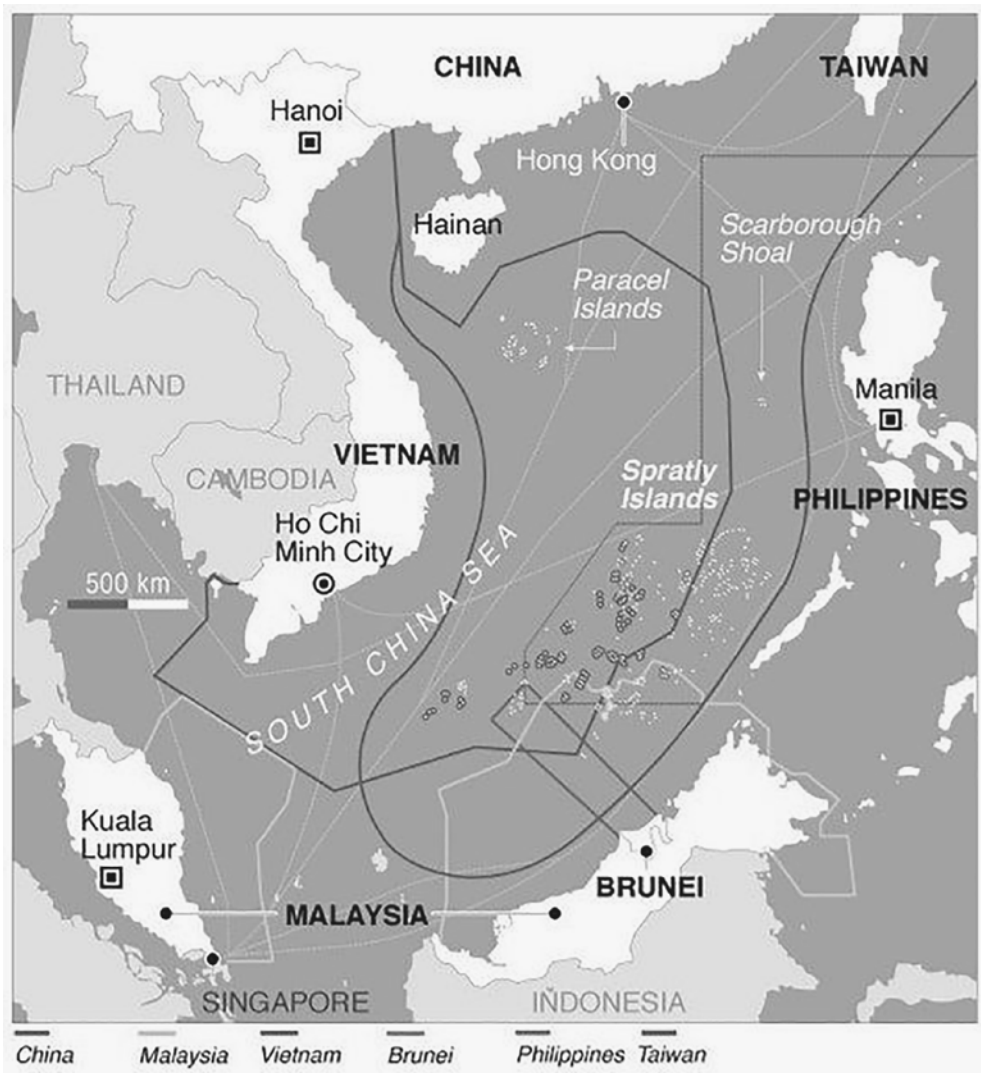

Figure 4: South China Sea EEZ claims[240]

(b) Status of Islands and Their Maritime Zones

In determining the entitlement to maritime zones in relation to formations in the disputed area, the Arbitral Tribunal extensively analysed the (history of the) law as regards the requirements for islands to be recognised as such and as regards the maritime zones to which islands are entitled. In doing so, the Arbitral Tribunal first established that the status of formations in the sea is determined by the natural state

240 Scott Stearns, 'Challenging Beijing in the South China Sea', *VOA* (online, 31 July 2012) <https://blogs.voanews.com/state-department-news/2012/07/31/challenging-beijing-in-the-south-china-sea/>.

of those formations and that man-made structures or alterations are irrelevant to the status of the formation itself.[241] The extensive construction of artificial high-tide facilities and features on and around the islands in question consequently do not alter or affect their status under international law, nor their entitlement to maritime zones under applicable law.

Next, the Arbitral Tribunal differentiated between low tide elevations, which are not entitled to any maritime zone and have no relevant status under *UNCLOS*,[242] high tide elevations without the ability to sustain life or to sustain economic activity on their own,[243] and 'fully entitled islands'.[244] Subsequently applying the provisions of art 121 of *UNCLOS*, including an analysis of the drafting history of that article,[245] the Arbitral Tribunal determined that high tide elevations which are not capable of sustaining life or their own economic life are entitled to a territorial sea, but not to an EEZ or continental shelf, leaving only the final category (fully entitled islands) as being entitled to the full range of maritime zones.

Finally, applying its extensive analysis to the situation in the area in question, including historical analysis of the most relevant formations, the Arbitral Tribunal concluded that Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, McKennan Reef and Scarborough Shoal are all rocks incapable of sustaining human life.[246] In applying art 121 of *UNCLOS*, this would mean that these formations fall under art 121(3) and would be entitled to a territorial sea but not to an EEZ or continental shelf. As regards the most relevant features of the Spratly Islands, the Arbitral Tribunal found that Itu Aba, North-East Cay, South-West Cay, Spratly Island, Thitu and West York may, as regarding all or some of these islands, (barely) sustain human life for some periods of time, but that none of these features are capable of 'sustaining an economic life of their own'.[247]

This analysis by the Arbitral Tribunal of the extent and meaning of the requirement in art 121(3) of *UNCLOS* regarding the ability to sustain an economic life was particularly noteworthy, as application of this requirement in the determination of entitlement to maritime zones was previously prone to some degree of speculation.[248] The Arbitral Tribunal ruling, on the other hand, clearly relates this requirement to the object and purpose of the two zones to which this requirement

241 *South China Sea Arbitration* (n 76) [305]–[306], [508]–[511].

242 Ibid [308]–[309]; *UNCLOS* (n 6) art 13.

243 *South China Sea Arbitration* (n 76) [280], [389]–[390].

244 Ibid [386]–[390].

245 Ibid [478]–[553].

246 Ibid [554]–[570].

247 Ibid [625].

248 See, eg, Alex G Oude Elferink, 'The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?' (2001) 32(2) *Ocean Development and International Law* 169, 173–4.

relates, both of which are, after all, related to economic activities in the sense of harvesting and exploiting the natural resources in those zones. It remains to be seen, however, to what extent artificial structures or other human intervention would be considered relevant in making this determination. While the Arbitral Tribunal was clear that man-made constructs and artificial alterations to the natural formations are not relevant for determining their status as either low tide elevation, a rock or an island, sustaining economic life requires at least some human intervention. The question therefore remains, as currently also actively being tested,[249] which degree of human influence or artificial processes is still acceptable in the determination whether an island can sustain an economic life 'of [its] own'.[250]

Consequently, although the high-tide elevations considered by the Arbitral Tribunal are entitled to a territorial sea, they are not entitled to an EEZ or continental shelf of their own. While the Arbitral Tribunal did not include the Paracel Islands in its ruling, and in spite of recent Chinese agricultural activities in that area, the criteria and requirements identified by the Arbitral Tribunal in its analysis would seem to indicate that a similar conclusion would apply to most or even all of that island group as well.[251]

(c) Freedom of Maritime Navigation and Operations

While the presence or absence of an EEZ and continental shelf does not directly impact military operations, the conclusions in Part IV(B)(1)(b) concerning the right to a territorial sea for several features in the region is relevant. As is clear from the Chinese statements and positions analysed by the Arbitral Tribunal, China has acknowledged the freedom of navigation 'in accordance with international law' in the area in question.[252] This means, first, that regardless of which State can claim sovereignty over the Spratly and Paracel islands, the regime of innocent passage rather than high seas navigation applies within (a maximum of) 12 nautical miles of the features eligible for a territorial sea. Second, if China is able to claim sovereignty over these islands, it should be noted that, contrary to China's statement regarding freedom of navigation in accordance with international law, China requires foreign warships to seek prior permission before exercising innocent passage in Chinese

249 See, eg: Drake Long, 'China Harvests Vegetables in South China Sea to Cultivate Territorial Claims', *Radio Free Asia* (online, 20 May 2020) <https://www.rfa.org/english/news/china/woody-vegetables-05202020173842.html>; Ralph Jennings, 'China Uses Cabbage To Advance Disputed Asian Sea Claim', *VOA* (online, 10 June 2020) <https://www.voanews.com/a/east-asia-pacific_voa-news-china_china-uses-cabbage-advance-disputed-asian-sea-claim/6190835.html>; Alexander Neill, 'South China Sea: What's China's Plan for Its "Great Wall of Sand"?', *BBC News* (online, 14 July 2020) <https://www.bbc.com/news/world-asia-53344449>.

250 *UNCLOS* (n 6) art 121(3).

251 This conclusion is also drawn in James Kraska, 'Vietnam Benefits from the South China Sea Arbitration', *Maritime Awareness Project* (Analysis Post, 31 August 2016) <http://23.101.187.184/wp-content/uploads/2016/08/analysis_kraska_083016.pdf>.

252 *South China Sea Arbitration* (n 76) [212], [1148].

territorial waters,[253] and consequently does not recognise the right of innocent passage within the territorial sea of any of the relevant features in these areas for warships.[254]

In addition to the concern regarding navigation in the territorial sea, the Chinese claim regarding the baselines of the territorial sea surrounding the Paracel and Spratly islands is a cause for operational and legal concern. For both island groups, China has applied straight baselines as part of treating the islands as archipelagic areas,[255] thus rendering all of the waters within both groups of islands as territorial (or archipelagic) waters subject to prior permission for warships to traverse those waters. This approach has been disputed[256] and the Arbitral Tribunal declared this

253 «中華人民共和國專屬經濟區和大陸架法» [Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone] (People's Republic of China) National People's Congress, Order No 55, 25 February 1992, art 6 [tr author] ('*Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*').

254 Given the requirements set forth in art 19(2) of *UNCLOS* (n 6) it seems self-evident that military operations or exercises in the territorial sea of another State are prohibited in any case under *UNCLOS* (n 6) without the explicit consent of the coastal State in question. Note also that while China does not recognise the right of innocent passage for foreign warships in its territorial sea, China exercised that right in the territorial sea of the United States in 2015. See, eg: 'Five Chinese Ships Seen off Alaska Coast, Pentagon Says', *BBC News* (online, 3 September 2015) <https://www.bbc.com/news/world-us-canada-34131429>; Sam LaGrone, 'Chinese Warships Made "Innocent Passage" through US Territorial Waters off Alaska', *USNI News* (online, 3 September 2015) <https://news.usni.org/2015/09/03/chinese-warships-made-innocent-passage-through-u-s-territorial-waters-off-alaska>. The Chinese views on this issue are therefore at least inconsistent.

255 *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone* (n 253) arts 2–3; *Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea*, *15 May 1996* ['Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, 15 May 1996' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf>]; Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Hua Chunying's Remarks on Relevant Issue about Taiping Dao' (Press Release, 3 June 2016) <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/201606/t20160603_696661.html>; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations Secretary-General, 14 April 2011 <https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pd>; *South China Sea Arbitration* (n 76) [573]–[575].

256 See, eg: Australian Note Verbale (n 225); Note Verbale from the Socialist Republic of Vietnam to the United Nations Secretary-General, 30 March 2020 <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf>.

approach incompatible with the provisions of *UNCLOS*,[257] but China has so far rejected the ruling by the Arbitral Tribunal.[258]

While there is no legal requirement to adhere to illegal claims regarding maritime zones, it seems self-apparent that ignoring the claims (or purposely carrying out activities in contradiction of the claims) carries an inherent risk of escalating the already significant tensions in the region. This leaves two options for other States as regards maritime navigation and operations in the disputed areas. If States choose to abide by the Chinese claims, three possible consequences arise:

1. Navigation within the areas surrounded by the straight (archipelagic) baselines surrounding the entire Spratly and Paracel island groups is subject to prior permission from China for any warship wishing to sail through the areas;

2. Military operations or exercises are prohibited within the entire Spratly and Paracel island groups, unless explicitly authorised by China; or

3. Unless carefully-worded and consistent statements to the contrary are issued by the States in question, the adherence to the Chinese claims may be interpreted either as an official acknowledgment of those claims or as acquiescing by those States, including the baselines and delimitation of the territorial seas in the areas in question.

If, on the other hand, States choose to challenge the Chinese claims in question, two options apply as regards the method to do so:

4. States may issue diplomatic protests against the Chinese claims while avoiding the areas in question in order to avoid raising tensions; or

5. States may deliberately navigate through contested maritime zones (also referred to as Freedom of Navigation Operations) with warships, or stage exercises in contested areas in conformity with international law, but contrary to Chinese claims.

Both variations of option 5 (above) may be interpreted as forcible affirmation of rights,[259] with the latter option clearly being the more forceful version. Apart from the observation that such a course of action would increase tensions in the area and could be considered provocative if carried out by States with no (other) direct national interest in the South China Sea, it should be noted that neither of the variations in option 5 would authorise proactive use of force by the warships

257 *South China Sea Arbitration* (n 76) [573]–[576].

258 See, eg, Tom Phillips, Oliver Holmes and Owen Bowcott, 'Beijing Rejects Tribunal's Ruling in South China Sea Case', *The Guardian* (online, 12 July 2016) <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

259 See above Parts II(B)(2)(b) and III(E)(2)(c).

in question. The right to unit self-defence would, of course, apply in the event that other States were to initiate the use of force against the vessels in question, subject to the rules and requirements discussed in Part III(B)(2)(b)(ii).

2 *Air Law*

Air law and its rules and regulations form a complex system consisting of a combination of public international law set forth inter alia in various treaties, most notably the *Convention on International Civil Aviation* (as subsequently amended and updated) ('*Chicago Convention*')[260] and its annexures, rules, and regulations — related to (the distributed responsibility for) air navigational safety and search and rescue services promulgated principally by the International Civil Aviation Organization ('ICAO'). Although some regulations are not 'laws' as such, it should be noted that they implement the related provisions of the treaties, including those related to air safety, and are therefore binding in that regard.[261]

(a) Zones for Air Traffic Control and Safety

Airspace can be divided vertically into flight levels, for which air traffic control and airspace management has equally been divided between, for example, lower airspace and upper airspace, as well as horizontally. Vertical airspace differentiation is primarily related to air traffic control services, as well as differentiating between 'airspace' and 'outer space', while horizontal differentiation is considerably more relevant for ILMO.

Starting with the territory of States, national airspace consists of the airspace over the land territory and the territorial sea and is subject to the 'complete and exclusive sovereignty' of the State in question.[262] Leaving aside the complex system of civil aviation rights and agreements regarding overflight and landing rights, there is quite simply no right of entry or overflight for State aircraft, including military aircraft, in the national airspace of another State without prior authorisation of the territorial State.[263] In addition to authorisation by the State in question, as well as obviously authorising resolutions issued by the UNSC, exceptions to this general rule regarding national airspace can be found in *UNCLOS* as regards the right of

260 *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) ('*Chicago Convention*').

261 See *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) annex 2 ('*Rules of the Air*') art 2.1.

262 *Chicago Convention* (n 260) arts 1–2.

263 Ibid art 3(c). Note also that *UNCLOS* (n 6) does not contain any right of overflight in the provisions regarding (innocent passage in) the territorial sea.

overflight over straits used for international navigation[264] and overflight through passages designated for that purpose over archipelagic waters.[265]

All airspace which is not national airspace is open for air navigation by any aircraft from any State, subject only to the national jurisdiction of the flag State of the aircraft and the rules and regulations pursuant to, inter alia, the *Chicago Convention*, including the obligation to exercise this right with due regard to the interests and safety of others.[266] Given the definition of national airspace, international airspace consists of the airspace over the sea outside the territorial sea of any State.[267] The right of air navigation over the waters outside any State's territorial sea is also recognised under *UNCLOS*.[268]

In the interest of air traffic control and air safety, areas of responsibility for providing services related to those interests have been established by ICAO throughout the world. As regards air traffic control, regional cooperation in some areas has established regional air traffic control services, such as those provided or coordinated by

264 *UNCLOS* (n 6) art 38.

265 Ibid art 53. See below Part IV(B)(2)(b) as regards the application of this provision in the South China Sea.

266 Though experts have noted that there are conditions where aircraft may dispense with their rights and protections under the *Chicago Convention* (n 260). See Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge University Press, 2013) r 63.

267 Note that Greece differs from this general rule, in that it has claimed a territorial sea of six nautical miles: Νόμος Αριθμός 230/1936 Περί Επέκτασης των Χωρικών Υδάτων του Βασιλείου της Ελλάδος [Law No 230/1936 Concerning the Extension of the Territorial Waters of the Kingdom of Greece] (Greece) art 1 [tr author] <https://leap.unep.org/countries/gr/national-legislation/law-no-2301936-concerning-extension-territorial-waters-kingdom>. It also claims national airspace up to ten nautical miles off the Greek coasts: Διάταγμα της 6/18 Σεπτεμβρίου 1931 για τον καθορισμό της έκτασης των χωρικών υδάτων για τους σκοπούς της αεροπορίας και τον έλεγχο αυτών [Decree of 6/18 September 1931 to Define the Extent of the Territorial Waters for the Purposes of Aviation and the Control Thereof] (Greece) [tr author] <https://leap.unep.org/countries/gr/national-legislation/presidential-order-define-extent-territorial-waters-purposes>; Νόμος με αριθμό 5017 της 3/13 Ιουνίου 1931 περί Ρύθμισης της Πολιτικής Αεροπορίας [Law No 5017 of 3/13 June 1931 to Regulate Civil Aviation] (Greece) art 2 [tr author] <https://leap.unep.org/countries/gr/national-legislation/law-no-5017-313-june-1931-regulate-civil-aviation>. While the Greek claims remain within the maximum of twelve nautical miles for a territorial sea and its superjacent airspace, the discrepancy between the national airspace and the territorial sea of Greece is not in conformity with international law.

268 See *UNCLOS* (n 6) art 58(1) as regards overflight over the exclusive economic zone, art 78 as regards the airspace over the continental shelf, and art 87(1)(b) as regards freedom of overflight over the high seas.

EUROCONTROL.[269] Other States may provide such services within their national airspace or in cooperation with neighbouring States.

For the airspace over maritime areas which are not subject to national jurisdiction or sovereignty, coastal States have been assigned zones as well, including oceanic zones, for providing safety and air traffic guidance to aircraft traversing such zones. With the exception of the zones over certain oceans, Oceanic Control Area ('OCA'), these zones are referred to as Flight Information Regions ('FIRs'), which are defined in annex 2 to the *Chicago Convention* as '[a]n airspace of defined dimensions within which flight information service and alerting service are provided'.[270] In other words, an FIR does not provide any national (sovereign) rights for the coastal State in question and does not create any obligations for aircraft flying in such regions other than those related to air safety. This, in turn, means that while a State may deny any foreign State aircraft (including military aircraft) from entering its national airspace, a State responsible for an FIR beyond its national borders cannot deny entry or require prior permission in regard to any aircraft in those areas of the FIR which constitute international airspace. Conversely, State aircraft may not jeopardise the safety of civil aviation,[271] an obligation that reasonably includes adhering to air navigation safety guidance from the air traffic control centre responsible for the FIR in question. It seems self-apparent that this interaction between the rules in question can be subject to abuse by both State aircraft and coastal States.[272]

(b) Air Defence Identification Zones

While FIRs are regulated by, and instituted under, the rules and regulations of ICAO in the interest of flight safety, different interests and purposes apply to air defence identification zones ('ADIZs') as established by several States in various areas of the world. In the definition provided in annex 15 of the *Chicago Convention*, an ADIZ is a '[s]pecial designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional

269 'Supporting European Aviation', *EUROCONTROL* (Web Page) <https://www.eurocontrol.int/>.

270 *Rules of the Air* (n 261) ch 1 (definition of 'flight information regions'). Flight Information Service is also defined as '[a] service provided for the purpose of giving advice and information useful for the safe and efficient conduct of flights': at ch 1 (definition of 'flight information service'). Alerting Service is also defined as '[a] service provided to notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required': at ch 1 (definition of '*alerting service*'). See also *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) annex 15 ('*Aeronautical Information Services*') as regards the technical aspects, requirements, and ICAO recommendations regarding FIRs.

271 *Chicago Convention* (n 260) art 3(d). Also note the provisions regarding the use of force by State aircraft against civil aviation: at art 3 *bis*.

272 See, eg, Office of the Legal Adviser, United States Department of State, *Digest of United States Practice in International Law*, ed CarrieLyn D Guymon (2011) 407–8.

to those related to the provision of air traffic services'.[273] Annex 15 also requires that if an Aeronautical Information Publication ('AIP') is produced and made available, the en-route ('ENR') section should indicate whether and where an ADIZ has been established by the State in question and which procedures apply within an ADIZ, including interception procedures as applicable if aircraft fail to comply with the rules established for flights within an ADIZ.[274] Neither the *Chicago Convention* itself nor annex 15 authorise or regulate ADIZs beyond the stated requirements for inclusion in an AIP. It has consequently been observed that ADIZs are neither specifically authorised, nor specifically prohibited, by international law.[275]

ADIZs have existed for a long time and there is considerable — albeit divergent — State practice in relation to such zones. ADIZs were first established by the United States in the period immediately following the Second World War,[276] but have since been declared by a number of States.[277] In its most basic form, an ADIZ is a region of airspace in which a State declares certain requirements for any aircraft wishing to fly in that airspace, specifically related to identification of the aircraft and its flight plan or navigational intentions. Failure to comply with those procedures may result in interception and accompaniment of an aircraft by military aircraft of the State whose ADIZ is being traversed, as well as denial of any further, or revoking of prior, permission to enter the national airspace of the State in question.

ADIZs extending into international airspace do not violate international law, provided they meet certain conditions. First, while an ADIZ may extend (well) beyond the territory of the State in question, it may not extend into areas in which other States enjoy sovereign rights or into the territory of any other State.[278] As regards areas involving the sovereign rights of other States, meaning the EEZ and continental shelf, there is no rule of international law that would specifically

---

273 *Aeronautical Information Services* (n 270) ch 1 (definition of 'air defence identification zone (ADIZ)').

274 Ibid appendix 1, ENR 5.2.

275 Christopher K Lamont, 'Conflict in the Skies: The Law of Air Defense Identification Zones' (2014) 39(3) *Air and Space Law* 187; Ruwantissa Abeyratne, 'In Search of Theoretical Justification for Air Defence Identification Zones' (2012) 5(1) *Journal of Transportation Security* 87; Edmund J Burke and Astrid Stuth Cevallos, 'In Line or Out of Order?: China's Approach to ADIZ in Theory and Practice' (Report, Rand Corporation, 2017) <https://www.rand.org/content/dam/rand/pubs/research_reports/RR2000/RR2055/RAND_RR2055.pdf>.

276 Lamont (n 275) 189, 196; E Pépin, Director of the Institute of International Air Law, *The Law of the Air and the Draft Articles Concerning the Law of the Sea*, UN Doc A/Conf.13/4 (4 October 1957) 69 [39], 70 [47]–[49].

277 See, eg, the matrix provided in Joëlle Charbonneau, Katie Heelis and Jinelle Piereder, *Putting Air Defense Identification Zones on the Radar* (Policy Brief No 1, Centre for International Governance and Innovation, June 2015). Note, however, that the interpretations of the rules applicable in the United States and Chinese ADIZs provided in that publication differ from the interpretations provided elsewhere, including by the States in question.

278 Note that the United States and Canada share an ADIZ by mutual consent.

prohibit a foreign State from establishing an ADIZ in such an area, given that an ADIZ does not directly infringe upon the nature and subject of those sovereign rights. Nonetheless, such a situation would at least be controversial. Second, not all States adhere to the commonly accepted view that the rights of the coastal State in the EEZ are limited to those explicitly stated in *UNCLOS*,[279] and some States appear to apply a more liberal interpretation of the coastal State's rights in such zones. Consequently, imposing ADIZ obligations in another State's EEZ without that State's explicit consent could be considered a provocation in the sense of geo-political relations. Third, regardless of the interpretation of sovereign rights in the EEZ, the rights of a coastal State in its EEZ would at least include a corollary right to monitor activities in the EEZ, including by maritime patrol aircraft. Such a right to aerial surveillance of the EEZ by a coastal State would not leave much room for another State to impose identification and reporting requirements for aircraft in that area. Finally, as regards the territorial sea and land territory of another State, the situation is quite clear: the airspace over such areas is the national airspace of the State in question,[280] and imposing any obligations in such areas without the consent of the territorial State would clearly violate the national sovereignty of that State.

An analysis of the basic duties imposed in ADIZs leads to the observation that the mere requirement of identification and reporting does not infringe upon the freedom of (air) navigation as such in international airspace. Not only is identification and reporting already a standard procedure in the context of FIRs, failure to comply with the requirements in an ADIZ does not result in any denial of the freedom of navigation in international airspace but merely leads to a denial of entry into the national airspace of the State in question. Such denial of entry into national airspace is, ultimately, a right of any State in the interest of public safety.[281] Finally, while interception and accompaniment by military aircraft may be intimidating, it does not violate international law as such, provided that the safety of the civilian aircraft is ensured,[282] the freedom of navigation of aircraft not intending to enter national airspace is not hindered in any way, and that the interception is accompanied by both sufficient and professional communication to avoid unnecessary concerns on the part of the crew (and passengers, if applicable) of the aircraft being intercepted.

Consequently, it may be concluded that although ADIZs do not have a clear basis in international law, they do not violate international law, provided: (a) their location neither infringes on, or openly violates, the rights of other States; and (b) the rules applicable in an ADIZ do not negate the freedom of air navigation in international airspace.

279 See, eg: Lamont (n 275) 193–4; Peter A Dutton, '*Caelum Liberum*: Air Defense Identification Zones outside Sovereign Airspace' (2009) 103(4) *American Journal of International Law* 691, 696–8.

280 *Chicago Convention* (n 260) arts 1–2.

281 Ibid art 9(b).

282 Ibid art 3(d). See above n 271 and accompanying text.

(c) Freedom of Aircraft Navigation and Operations in the South China Sea

Applying the preceding analysis to the South China Sea leads to the following observations in terms of ILMO. First, as regards overflight of national territory, the discussion presented above in Parts IV(B)(1)(a)–(b) regarding the status of the islands under dispute in the South China Sea is relevant in this regard. Given China's claim that (inter alia) the 'land territory' of the People's Republic of China includes the Spratly and Paracel islands,[283] overflight by military or (other) State aircraft of other States over these areas would be seen by China as a violation of its sovereignty and of international law. This would also include overflight of the territorial sea surrounding those geological features within the island groups that qualify for a territorial sea.[284]

As regards the EEZ, such zones have been claimed and implemented in the national laws of Cambodia,[285] China,[286] Malaysia,[287] the Philippines,[288] Thailand,[289] and

283 In addition to the discussion in this article, see *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone* (n 253) art 2.

284 See above Part IV(B)(1)(b). It should be noted, however, that the status of the islands in terms of national ownership is in dispute, but the islands are not terra nullius or terra communis. This means that flying State aircraft, including military aircraft, over these islands is legally problematic in any case as no consent can presently be given by any State, but neither can the requirement of national consent simply be ignored.

285 *Decree of the Council of State of 13 July 1982* (Cambodia) ['Decree of the Council of State of 13 July 1982' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KHM_1982_Decree.pdf>].

286 *Law of the People's Republic of China on the EEZ and the Continental Shelf* (n 222).

287 *Exclusive Economic Zone Act (No 311) 1984* (Malaysia) ['Exclusive Economic Zone Act (No 311) 1984' *United Nations* (Web Document) <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf>].

288 *Presidential Decree No 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for Other Purposes* (Philippines) ['Presidential Decree No 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for Other Purposes' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1978_Decree.pdf>].

289 *Royal Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand*, *23 February 1981* ['Royal Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand, 23 February 1981' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA_1981_Proclamation.pdf>]; *Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand Adjacent to the Exclusive Economic Zone of Malaysia in the Gulf of Thailand* (Thailand) (16 February 1988) ['Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand Adjacent to the Exclusive Economic Zone of Malaysia in the Gulf of Thailand (Thailand) (16 February 1988)' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA_1988_1_Proclamation.pdf>].

Vietnam.[290] With the exception of the law of China, none of these laws restricts or negates the right of overflight over the EEZ and the laws of the Philippines and Thailand specifically recognise this right. The law of China, however, subjects the freedom of navigation and overflight in and over the EEZ to international law and 'the laws and regulations of the People's Republic of China'.[291] This in itself is not problematic, and is in conformity with art 58(3) of *UNCLOS*, provided that the laws and regulations in question do not have the effect of negating the freedom of navigation set forth in art 58(1) of *UNCLOS*. In public statements issued in 2001 following a mid-air collision between a United States military aircraft and a Chinese military aircraft off the coast of Hainan in the South China Sea,[292] however, the extent to which China interprets its rights regarding regulating overflight over its EEZ becomes considerably more problematic. First, the Chinese statements asserted that 'it was proper and in accordance with international law for Chinese military fighters to follow and monitor the US military surveillance plane within airspace over China's exclusive economic waters'.[293] While, as stated above,[294] the interception and accompaniment of aircraft by another State's military aircraft does not violate international law as such, it should be noted that this observation was made in relation to such activities in a zone dedicated to national security. It is not entirely clear which rule or principle of international law would provide a reason to carry out such activities in the entire EEZ of the State in question, specifically related to the EEZ itself. Next, the statements clarified that in the view of China, the right of overflight over the EEZ is subject to respecting 'the rights of the country concerned' and that reconnaissance flights aimed (in the view of China) at Chinese coastal areas would extend 'far beyond the scope of "overflight", and [would] thus abuse … the principle of overflight freedom'.[295] Finally, the statements made it clear that the reconnaissance flight in question 'posed a serious threat to China's security

290 *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977* (Vietnam) ['Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1977_Statement.pdf>].

291 See *Law of the People's Republic of China on the EEZ and the Continental Shelf* (n 222) art 11.

292 As regards the Chinese statements, see Xinhua, 'FM Spokesman Gives Full Account of Air Collision', *China.org.cn* (Web Page, 4 April 2001) <http://www.china.org.cn/english/2001/Apr/10070.htm>. See also: Elisabeth Rosenthal and David E Sanger, 'US Plane in China after It Collides with Chinese Jet', *New York Times* (online, 2 April 2001) <https://www.nytimes.com/2001/04/02/world/us-plane-in-china-after-it-collides-with-chinese-jet.html>; Shirley A Kan, *China-US Aircraft Collision Incident of April 2001: Assessments and Policy Implications* (Report, Congressional Research Service, 10 October 2001) <https://crsreports.congress.gov/product/pdf/RL/RL30946>; Frederic L Kirgis, 'United States Reconnaissance Aircraft with Chinese Jet' (2001) 6(7) *American Society of International Law* <https://www.asil.org/insights/volume/6/issue/7/united-states-reconnaisance-aircraft-collision-chinese-jet>.

293 Xinhua (n 292).

294 See above Part IV(B)(2)(b).

295 Xinhua (n 292).

interests, so that it was right for the Chinese military planes to monitor the US spy plane for the sake of China's state security'.[296]

Based on these statements, it appears that China interprets the right of coastal States to preserve and protect their rights in the EEZ to refer not only to the rights specifically associated with the EEZ as set forth in *UNCLOS*, but to all rights under international law, thus authorising Chinese actions within and over the EEZ to respond to a (perceived) threat to, or violation of, those rights.[297] As is clear from both the *Chicago Convention* and *UNCLOS*, however, there is no basis in international law for such an interpretation of the coastal State's rights in the EEZ. Contrary to the rules regarding innocent passage in the territorial sea, which render passage no longer innocent if activities are carried out 'aimed at collecting information to the prejudice of the defence or security of the coastal State' as well as several other activities 'considered to be prejudicial to the peace, good order or security of the coastal State',[298] there are no similar rules for navigation in or over the EEZ. China's approach would consequently have the effect of effectively turning the airspace over the entire EEZ into a form of ADIZ, but one specifically aimed at foreign State aircraft, including military aircraft, and prohibiting certain activities in that airspace. Clearly this approach would extend beyond the permissible rules in an ADIZ as discussed above,[299] and would considerably hinder both the freedom of navigation in and over the EEZ and of military operations and activities not prohibited under international law.

Turning next to FIRs, the entire airspace over the South China Sea is covered by FIRs operated by the various States in the area and coordinated by ICAO. Such regions include the, Ho Chi Minh FIR (operated by Vietnam), Hong Kong FIR (operated by the Civil Aviation Department of Hong Kong), Kota Kinabalu FIR (operated by Malaysia), Manila FIR (operated by the Philippines), Sanya FIR (since 2001 operated by China from Hainan province) and Singapore FIR.[300] Although there have not been any incidents specifically related to the duties regarding flight information services or alerting services by China in this FIR, the Sanya FIR is relevant for two reasons. First, given the discussion in this Part regarding Chinese views on the rights of coastal States in the airspace over the EEZ, it will be relevant to observe whether those views affect China's operation of the Sanya FIR. Second, and as an extension from the previous comment, it should be noted that the Sanya FIR covers

296 Ibid.

297 This observation is shared by Dutton (n 279) 704–5.

298 *UNCLOS* (n 6) art 19(2).

299 See above Part IV(B)(2)(b).

300 See, eg: Nicholas Ionides, 'ICAO Helps Rearrange South China Sea Airspace', *Flight Global* (Blog Post, 13 November 2001) <https://www.flightglobal.com/icao-helps-rearrange-south-china-sea-airspace-/40238.article>; 'General Situation of ATC Support Capability at South China Sea Area', *Civil Aviation Administration of China* (Web Page) <https://www.icao.int/APAC/Meetings/2015%20SCSMTFRG2/PPT%20-%20IP06%20GENERAL%20SITUATION%20OF%20ATC%20SUPPORT%20CAPABILITY%20AT%20SOUTH%20CHINA%20SEA%20AREA-CHINA.pdf>.

the Paracel Islands. Consequently, it will be relevant to observe whether the Chinese claims to those islands will affect China's operation of the Sanya FIR in relation to any flights by State aircraft, including military aircraft, within that FIR.

Finally, as regards ADIZs, only the Philippines currently operates an ADIZ in the South China Sea, established in 1953.[301] Based on the April 2021 version of the Philippines AIP, however, the ADIZ is not active except for one section used as a military training area.[302] The restrictions regarding air navigation in that area are consequently less related to the common purpose of an ADIZ and more related to air safety in relation to military training activities. In 2020, however, China announced its intentions to establish an ADIZ in the South China Sea to cover, inter alia, the Spratly and Paracel islands.[303] While this decision appears to have been reversed a few months later,[304] both the inclusion of disputed island groups and prior decisions made by China are cause for concern in this regard.

C *Analysis and Conclusion*

The analysis and observations regarding maritime and air navigation in the South China Sea make it clear that the area provides many complexities, both of a geo-political nature and of a legal nature. While much of the media attention on the area appears more focused on the former, the underlying legal issues are subtler and more complex. Moreover, the legal aspects provide cause for valid concern. While some of the specific, sometimes controversial, approaches to international law in the region may be driven by incentives and interests which are specific to that region, that does not, of course, change the potential for precedent as regards the interpretation of international law by other States in other regions or on a global scale.

Regarding the freedom of maritime (surface and subsurface) navigation and operations, the status of islands is of considerable importance in the South China Sea region, given both the prevalence of island groups and relevant formations and the variety of disputes over the ownership of those islands and formations. Regardless of the issue of ownership, the interpretation of international law regarding the status of islands under the regime of *UNCLOS* and customary international law, especially

---

301 *Administrative Order (No 222) 1953* (Philippines) <https://www.officialgazette.gov.ph/1953/11/21/administrative-order-no-222-s-1953/>.

302 *Aeronautical Information Publication* (Philippines) 22 April 2021, s ENR 5.2 ['Aeronautical Information Publication' *Civil Aviation Authority of the Philippines* (Web Document) <http://3.15.185.122/milais_demonstrator/milais_doc/rp/free/RP_AIP_2109_en.pdf>].

303 Minnie Chan, 'Beijing's Plans for South China Sea Air Defence Identification Zone Cover Pratas, Paracel and Spratly Islands, PLA Source Says', *South China Morning Post* (online, 31 May 2020) <https://www.scmp.com/news/china/military/article/3086679/beijings-plans-south-china-sea-air-defence-identification-zone>.

304 Minnie Chan, 'South China Sea: Beijing "Doesn't Want To Upset Neighbours" with Air Defence Identification Zone', *South China Morning Post* (online, 25 November 2020) <https://www.scmp.com/news/china/military/article/3111204/south-china-sea-beijing-doesnt-want-upset-neighbours-air>.

the issue of entitlement to maritime zones under international law, directly affects the ability to exercise freedom of navigation and the conduct of military exercises and operations in the area.

As regards military navigation and operations, it is firstly relevant which of the formations in the South China Sea are, based on their natural condition,[305] entitled to territorial waters. Under the commonly accepted views on the international LOTS, navigation by military vessels within the territorial waters of those formations would be restricted to innocent passage. However, as was discussed above,[306] not all States in the region accept this interpretation and some may require prior notification or permission for such navigation. Additionally, the Arbitral Tribunal ruling regarding archipelagic straight baselines[307] is particularly relevant in this regard, given the extent of the maritime areas which would be encompassed by such baselines if they were to be applied to (especially) the Spratly and Paracel islands.

While the EEZ is not normally considered relevant in the context of military navigation or operations, given the freedom of navigation as well as 'other internationally lawful uses of the sea related to these freedoms' as set forth in art 58 of *UNCLOS*, the views expressed by China as regards the rights of the coastal State in the EEZ,[308] makes the EEZ of, at least, China relevant in this regard. This aspect becomes even more relevant in combination with the Chinese claims to the Spratly and Paracel islands and apparent attempts to claim a status for (at least some of) the islands which would entitle them to an EEZ.[309] Clearly the expansion of a perceived or alleged right to control or limit foreign military activities in an area up to 200 nautical miles around even some of the islands in the Spratly and Paracel island groups would have a significant impact on geopolitical relations and the ability for peaceful navigation and exercising by military vessels in the area.

Finally, as regards military air navigation and operations in the South China Sea, the same concerns and observations apply as regards maritime navigation and operations. As regards the issue of (status and ownership of) territory, including territorial waters, this follows from the basic rule set forth in art 3(c) of the *Chicago Convention* requiring prior authorisation from the territorial State for entry into that State's national airspace by foreign State aircraft, including military aircraft.[310] As regards air navigation and operations over the EEZ, it should be noted that the Chinese views on the rights of coastal States in the EEZ extend to the airspace over the EEZ and have been clearly expressed in that regard.[311] Finally, as regards FIRs and ADIZs, it is to be hoped that operation of the Sanya FIR, will continue to

305 See above Part IV(B)(1)(b).

306 See above Part IV(B)(1)(c).

307 Ibid.

308 See above Part IV(B)(2)(c).

309 See above n 249 and accompanying text.

310 *Chicago Convention* (n 260).

311 See above Part IV(B)(2)(c).

comply with the rules established by ICAO for such regions and that the Chinese decision not to establish an ADIZ in the South China Sea[312] will continue to apply.

V Conclusion

As discussed in Part I, international peace and security currently face a number of challenges. In addition to rising tensions in geopolitical relations and the increase in hybrid and cyber threats,[313] the incident in the Kerch Strait and, of course, the armed conflict in Ukraine generally show that these tensions can rise to the level of military confrontations. The incidents in the Mediterranean moreover demonstrate that such tensions, including military provocations, can arise even between allies within the same international organisation aimed at mutual defence. Finally, while the situation in the South China Sea has fortunately not yet led to (major) military confrontations, that situation demonstrates that regional tensions and (political and legal) confrontations can expand beyond their own region and become significant on a global scale.

In spite of the many differences in factual circumstances, the nature of the events, and the States involved in the situations discussed in this article, all of these situations share a common theme. The common theme being the interpretation of international law, especially the LOTS, in the pursuit of political motives and with consequences for military activities and operations. In other words, all of the situations took place and, in the case of the South China Sea, are taking place in the overlap of the LOTS and ILMO. Before exploring that observation further, however, a few comments on each of the situations and how they relate to that observation will be made.

The situation in the Kerch Strait and the views expressed by Russia in the proceedings before the ITLOS most clearly demonstrate the interplay between political interests and the law, as well as the role of the LOTS in the context of ILMO. The outcome of that interplay and overlap is paradoxical. The initial acts — the use of force and capture of the Ukrainian vessels — carried out by Russia are lawful under IHL, but the subsequent treatment of the crew as (suspected) criminals would be in violation of their right to prisoner of war status under that body of law. By seeking to deny, or at least to leave unsettled, the existence of an armed conflict at the time, however, Russia essentially created its own legal challenges as the capture of the vessels and detention of the crew are both clearly illegal under peacetime LOTS. While the relevance of IHL to the situation in question was rightly observed by one of the judges, it is unfortunate that the ITLOS, in its approach at this stage of the proceedings, exclusively relied on peacetime international law.[314] It is to be hoped that the relevance of IHL, including its applicability de jure regardless of political

312 See above n 304 and accompanying text.

313 See Boddens Hosang and Ducheine (n 194).

314 On the other hand, if the ITLOS had concluded that IHL was applicable and the *lex specialis* in this case, it would subsequently (and consequently) have had to declare the case inadmissible as that would put the case outside the jurisdiction of the ITLOS.

recognition of the existence of an armed conflict by any party to that conflict,[315] will be considered in the subsequent stages.

The situation regarding enforcement of the embargo against Libya is slightly different from the other situations in that it is less related to variances in *interpretation* of the law than to the need for careful *compliance* with the law. In this situation, different bodies of international law intersect: the peacetime international LOTS and the legal power of the UNSC to mandate operations in the interest of international peace and security and, if necessary, to override other obligations under international law in doing so.[316] That intersection can complicate the vertical dimension of ILMO,[317] in which the law is 'converted' into clear instructions and guidance for the military forces in question. Given that this vertical role or dimension is dependent on the fusion of elements of international law in the horizontal role of ILMO,[318] conflicts between those elements need to be carefully assessed, including their consequences for military action and their impact on the instructions given to the military forces expected to carry out the operation in question. In the incidents in question, the political and military frustrations over the inability to intercept vessels operating as State vessels is understandable in terms of possible undermining of the arms embargo. But however understandable those frustrations may be, the immunity of State vessels under international law needs to be taken into account in the planning of military operations. The apparent impasse in the current operations in the area is, after all, not a flaw in applicable international law, but is instead part of the essential reciprocity that is ingrained in international law.

Next, the situation regarding the exploration for, and exploitation of, natural resources in the Mediterranean adds economic incentives to the motives for creative interpretation of international law. The rights of the coastal State regarding exploration and exploitation of the natural resources in the seabed of its EEZ and continental shelf are clear and unequivocal. Article 56(1)(a) of *UNCLOS* quite simply reserves the right to such exploration and exploitation to the coastal State, while art 56(3) in combination with art 77(2) of *UNCLOS* makes it clear that no other State may engage in exploration or exploitation of, in the case of the situation under discussion, natural gas or oil in the seabed of the EEZ or continental shelf of a coastal State without the consent of the coastal State. Applying the same principle of reciprocity as was just discussed to this situation, it becomes clear that it may not be expedient to deny such rights for a coastal State while simultaneously pursuing the establishment of one's own EEZ and continental shelf. On the other hand, denying the right to an EEZ or continental shelf for certain features appears futile, since the law, including the case law of the ICJ, is clear in this regard. Equally clear is that ILMO cannot

315 This applicability of IHL on the basis of the factual situation rather than the political motives of the parties is clearly expressed in common art 2 of the *Geneva Conventions*: see *First Geneva Convention* (n 103) art 2. It is also clearly expressed in *Protocol I* (n 104) art 1(4).

316 See *UN Charter* (n 157) arts 25, 103.

317 Gill, 'ILMO: The "Flux Capacitor"' (n 7).

318 Ibid.

authorise the use of (military) force against another State absent a legal basis under international law, nor can forcible affirmation of rights be applied in the absence of a right to be so affirmed. Conversely, caution is advised in the interpretation of other elements of international law, including ILMO, as regards the methods and means to prevent infringements on the rights of the coastal State. Both art 51 of the *UN Charter* and the mutual defence clauses in international treaties implementing the right to collective national self-defence are clear as regards the requirements related to territory and to an (imminent) armed attack and cannot, and should not, be invoked lightly.

Finally, as was observed at the beginning of Part V, the situation in the South China Sea differs from the other situations in that it is less related to incidents involving the actual (imminent) use of force between military units than to a subtle and long-term bending (or at least creative interpretation) of international law, leading to encroachments on the rights of other States. The motives in this case appear to be a combination of regional strategic interests, geopolitical relations and economic interests. While the risk of a major military confrontation between the States involved appears limited at the moment, caution is required as regards a more subtle, legal risk — the risk of acquiescence or, less likely, the creation of customary law.

Contrary to the creation of customary law, acquiescence need not be general,[319] but may arise between two or more States in relation to specific situations. Acquiescence arises as a result of relatively consistent behaviour by one or more States over a relevant period of time, without objections against that behaviour from the State(s) accused of having acquiesced.[320] In the situation in the South China Sea, and notwithstanding the ruling of the Arbitral Tribunal,[321] China has consistently expressed its 'historic claim' referred to as the 'nine dash line' since 1948; its claim to the Spratly and Paracel islands and the straight archipelagic baselines surrounding them since (at least) 1992; its views on innocent passage in the territorial sea since (at least) 1992; and its views on the EEZ since (at least) 1998. While clearly the ruling of the Arbitral Tribunal cannot be ignored in any dispute regarding these claims, it is nonetheless clear that objections by States affected by, or involved in, the situation in question would be advisable if they wish to avoid at least the impression of having acquiesced to these Chinese claims.

---

319 As regards the 'general' aspect as a required element for the creation of customary law, see International Law Commission, *Draft Conclusions on Identification of Customary International law, with Commentaries*, 70th sess, UN Doc A/73/10 (2018) conclusion 8, 135–6 ('*Draft Conclusions*').

320 *Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116. See: at 138 as regards relative consistency; at 138–40 as regards the relevant period of time without objection. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Judgment)* [1984] ICJ Rep 246, 305 [130], 308–10 [140]–[148]. See generally Christopher Brown, 'A Comparative and Critical Assessment of Estoppel in International Law' (1996) 50(2) *University of Miami Law Review* 369, 401.

321 See above Parts IV(B)(1)(a) and IV(B)(1)(b).

As regards customary international law, the risk of new rules arising as a result of the situation in the South China Sea seems less likely. The element of general practice was already referred to in the previous paragraph and would in any case render the 'nine dash line' and territorial claims irrelevant in this regard, as being too specifically related to the region and the limited number of States involved in those issues.[322] The interpretation of a coastal State's rights in the EEZ, however, does deserve attention in this context, as the views expressed by China on that issue are neither unique nor, given similar views by other States, limited to the South China Sea region.[323] Finally, while the emergence or creation of a rule of international customary law also requires that States consider adhering to, or accepting, the practice in question to be a legal requirement (the *opinio juris*) and not just 'mere usage or habit',[324] the *Draft Conclusions on Identification of Customary International law, with Commentaries* by the International Law Commission also indicate that '[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction'.[325] Consequently, in any case as regards the aspect of coastal State rights in the EEZ, objections by States affected by, or involved in, situations in which such issues arise would be advisable.

While objections to divergent or unwelcome interpretations of international law or to practices considered inconsistent with international law can take many forms, including simple diplomatic protests through 'quiet diplomacy', from the perspective of ILMO it might be argued that the so-called 'freedom of navigation' programs of some States can be considered a form of 'forcible affirmation of rights' as discussed above.[326] Deliberately sailing through contested areas with warships or flying through the airspace over the EEZ of certain States with military aircraft would, provided the conduct in question complies with all applicable rules of international law, not be unlawful. Whether such practices would contribute to improving geopolitical relations or international peace and security is, however, subject to debate.

As was stated in Part I, the purpose and goal of this discussion was to illustrate the interaction of elements of international law, especially the international LOTS, in the application of ILMO in practice, as well as to illustrate the interaction between the law and geopolitical considerations. As regards the first goal, the interaction between the LOTS, air law, human rights law, IHL, elements of general international law and military operations, illustrate the horizontal function of ILMO as discussed above in Part V. As each of the cases presented in this discussion illustrate, the conduct of military operations is governed, affected and influenced by

322 Although the ILC also recognises the emergence or existence of 'particular customary international law' among a limited number of States, such as in a region, this would still require general practice among those States as well as the element of *opinio juris* discussed in this section: *Draft Conclusions* (n 319) conclusion 16, 154.

323 Dutton (n 279) 706–8.

324 *Draft Conclusions* (n 319) conclusion 9.2, 138.

325 Ibid conclusion 10.3, 140.

326 See above Part II(B)(2)(b).

various aspects and elements of various components of international law, working in combination to produce the legal framework for military action and operations in all their various forms. The cases also illustrate that in translating the theoretical legal framework into clear guidelines and instructions for military units, the vertical function of ILMO, a clear understanding of the law, the context, and the possibilities and limitations of military capacities is required. In this vertical role of ILMO, the discussion on the interaction between politics and law becomes particularly relevant, as political desires and military capabilities may provide the means to an end, but violating the law or contorting the law in order to justify political opportunism is ultimately (self-) destructive and self-defeating. Perhaps that principle can be expressed more eloquently by remembering the words of J William Fulbright:

> Insofar as international law is observed, it provides us with stability and order and with a means of predicting the behavior of those with whom we have reciprocal legal obligations. When we violate the law ourselves, whatever short-term advantage may be gained, we are obviously encouraging others to violate the law; we thus encourage disorder and instability and thereby do incalculable damage to our own long-term interests.[327]

327 J William Fulbright, *The Arrogance of Power* (Random House, 1966) 96.