

Peaceful Purposes Reservations in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone

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**PEACEFUL PURPOSES RESERVATION IN THE LAW OF THE
SEA CONVENTION AND THE REGULATION OF MILITARY
EXERCISES OR MANEUVERS IN THE EXCLUSIVE
ECONOMIC ZONE**

HENRIQUE MARCOS* & EDUARDO CAVALCANTI DE MELLO FILHO**

ABSTRACT

The definition of peaceful purposes reservations (PPRs) in the Law of the Sea Convention (LOSC) is still elusive. Some scholars argue that its meaning is similar to the content of Article 301, LOSC, the prohibition of the use of force. Another group claims that such a narrow interpretation is inadequate and instead argues for a broader understanding that includes more than just the prohibition of the use of force. Whereas broad interpretations regarding PPRs in the international seabed area (Area) and on the high seas do not seem to prosper, the broad interpretations of PPRs in the exclusive economic zone (EEZ) are still worth discussing; many developing states restrict foreign military exercises or maneuvers (MEMs) in their EEZs by claiming that such activities are non-peaceful. Against this background, this Article asks whether the PPR restricts third states' abilities to conduct MEMs in their EEZs. This investigation analyzes whether a broad interpretation of PPRs (especially regarding the EEZ) can be justified considering contemporary international law.

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To provide a comprehensive answer, this Article also examines the prohibition of the use of force in the EEZ as contained in Article 301, LOSC, and its influence on the lawfulness of MEMs. By tackling these topics, this Article aims to help understand the nature of military activities in EEZs, which are still controversial today and bear great political relevance to American foreign policy, including but not limited to activities in the South China Sea.

TABLE OF CONTENTS

I. Introduction.....	420
II. Peaceful Purposes Reservations in the LOSC	427
III. “The Area Shall Be Open to Use Exclusively for Peaceful Purposes by all States”	428
IV. “The High Seas Shall Be Reserved for Peaceful Purposes”	430
V. The Exclusive Economic Zone Shall Be Reserved for Peaceful Purposes	432
VI. The Prohibition of the Use of Force in the Exclusive Economic Zone and Military Exercise or Maneuvers..	440
<i>a. Sovereign Rights and Jurisdiction as Part of the Coastal State’s Territorial Integrity</i>	<i>441</i>
<i>b. Coastal State’s Political Independence in Cases Concerning MEMs in the EEZ.....</i>	<i>444</i>
<i>c. The Obligation to Peacefully Settle Disputes Concerning MEMs in the EEZ.....</i>	<i>447</i>
VI. Conclusion.....	452

I. INTRODUCTION

In 1985, Francioni stated that “military operations and the use of force remain in the shadows of the new law of the sea.”¹ His words still ring true. Beyond the territorial sea, military activities are barely regulated.² Unlike the mentions of “peaceful purposes” made by the Antarctic Treaty or the Outer Space Treaty, the references in the 1982 Law of the Sea Convention (LOSC) have no further specification.³ The relevant provisions simply state that the international seabed area (Area),⁴ the high seas,⁵ and the exclusive economic zone (EEZ)⁶ are reserved⁷ for peaceful purposes.⁸ Also, LOSC prescribes that

¹ Francesco Francioni, *Peacetime Use of Force, Military Activities, and the New Law of the Sea*, 18 CORNELL INT'L L.J. 203, 203 (1985). By “the new law of the sea,” Francioni refers to the UN Convention on the Law of the Sea and the systemic changes it brought about. Commonly called the “constitution of the oceans,” the convention has 168 State parties, and most of its provisions codified or gave rise to corresponding rules of customary international law. This is generally true for all the provisions mentioned in this Article. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]; ROBIN CHURCHILL & ALAN LOWE, *THE LAW OF THE SEA* 161-62 (3d ed. 1999).

² LOSC, *supra* note 1. According to Article 2(1) of LOSC, a coastal state’s sovereignty extends beyond its land territory to the territorial sea. The meaningful difference between the sovereignty enjoyed by the coastal state in both land and territorial sea is that the latter is restricted by the right of innocent passage. Nevertheless, Article 19 defines non-innocent passages broadly, to the extent that every foreign military activity in the territorial sea depends on the consent of the coastal State.

³ Antarctic Treaty art. 1, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 4, Oct. 10, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

⁴ LOSC, *supra* note 1, art. 141.

⁵ *Id.* art. 88.

⁶ *Id.* arts. 58(2), 88.

⁷ *Id.* The term “reserved” is used by Article 88. Article 141, on the Area, and Article 240, on MSR, adopt the expressions “is open to use exclusively for peaceful purposes” and “shall be conducted exclusively for peaceful purposes.” Despite the difference in terminology, there is no semantic discrepancy between them—this conclusion is clear from the negotiations of the Convention and the ordinary meaning of both expressions. Adam Boczek, *Peaceful Purposes of the United Nations Convention on the Law of the Sea*, 20 OCEAN DEV. & INT’L L. 359, 374 (1989).

⁸ Boczek, *supra* note 7. Part VI of LOSC, on the continental shelf, is not directly relevant in both possible scenarios: (a) if an EEZ is also claimed, Part V, on the EEZ, also governs the seabed and the subsoil (Article 56 (3)) or (b) if no EEZ is claimed or an extended continental shelf is claimed, Part VI governs coastal States rights on the continental shelf, which concerns the resources on the shelf and activities related to them. Everything else, i.e., military activities, is governed by the high sea’s regime.

marine scientific research (MSR) shall be conducted exclusively for peaceful purposes.⁹

The prevailing perspective in scholarly literature, referred to by this Article as the “*narrow interpretation*,” claims that the content of the peaceful purposes reservations (PPRs) in the LOSC is best ascertained through a contextual interpretation. This leads to a reading of PPRs exclusively under the lens of Article 301, LOSC, on the “peaceful uses of the seas,”¹⁰ which thus prohibits the use of force with words like Article 2(4) of the United Nations (U.N.) Charter.¹¹ In practice, the narrow interpretation is mainly advanced

⁹ LOSC, *supra* note 1, art. 238. The peaceful purposes clause on MSR seems to be the least important. The high seas, the EEZ, and the Area are already reserved for peaceful purposes, and the territorial seas and maritime spaces landward have more specific stipulations regarding military activities. Thus, the relevant maritime space in which an MSR is conducted is, at the very least, already reserved for peaceful purposes.

¹⁰ Rüdiger Wolfrum, *Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being*, 24 GER. Y.B. INT’L L. 200, 203 (1981); Bernard Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT’L L. 809, 832 (1984); Adam Boczek, *Peacetime Military Activities in the Exclusive Economic Zone of Third Countries*, 19 OCEAN DEV. & INT’L L. 445, 457 (1988); Francioni, *supra* note 1; CTR. FOR OCEANS L. & POL’Y, UNIV. OF VA., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA COMMENTARY 1982 ONLINE 115 (2013), https://referenceworks.brillonline.com/entries/united-nations-convention-on-the-law-of-the-sea/article-301-peaceful-uses-of-the-seas-v-LAOS_9789024737192_153_155#book [<https://perma.cc/Z8EU-567V>]; CHURCHILL & LOWE, *supra* note 1, at 411; Moritaki Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MARINE POL’Y 123, 125 (2005); JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA: EXPEDITIONARY OPERATIONS IN WORLD POLITICS 257 (2011); THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1617-24 (Alexander Proelss ed., 2017).

¹¹ Instead of the language adopted by Article 2 (4), “inconsistent with the Purposes of the United Nations,” Article 301 reads “inconsistent with the principles of international law embodied in the Charter.” Presumably, States parties to the LOSC are already bound by these principles of international law, including the self-defense exception. Nevertheless, bringing it in Article 301 broadens the material jurisdiction of courts and tribunals in Article 287, LOSC, since their compulsory jurisdiction is limited to the interpretation or application of the Convention under Article 288. One should note that the use of force as contained in Articles 2 (4) and 301 differs from the use of force *lato sensu*.

The latter, for example, has been referred to by the International Tribunal for the Law of the Sea (ITLOS) in the context of law enforcement operations, with the so-called Saiga Principles (addressed in Section V.b). Matteo Tondini, *The Use of Force in the Course of Maritime Law Enforcement Operations*, 4 J. ON USE FORCE & INT’L L. 253, 256-58 (2017); Henrique Marcos & Eduardo Mello Filho, *Complexidades Jurídicas Relativas à Execução da Lei e ao Uso da Força no Mar* [Legal Complexities Concerning Law Enforcement and the Use of Force at Sea: Analysis of the Ukraine v. Russia Case of the International Tribunal for the Law of the Sea], in 3 DIREITO DO MAR: REFLEXÕES,

by naval powers who consider naval mobility throughout the oceans a critical strategic interest.¹²

Yet, some have proposed “*broad interpretations*” by claiming that PPRs’ scope is broader than just the general prohibition on the use of force. While broad interpretations of PPRs in the Area and on the high seas do not seem to prosper,¹³ broad interpretations of PPRs in EEZs are still a source of controversy. Many developing states restrict foreign military activities in their EEZs by claiming that such activities are non-peaceful.¹⁴ For instance, in the Third U.N. Conference on the Law of the Sea (1973-1982), Ecuador voiced a position held by several developing states: reserving the ocean for peaceful purposes must mean complete demilitarization.¹⁵ In the same vein, China criminalizes survey activities by foreign entities in its EEZ.¹⁶ Iran prohibits “foreign military activities and practices”¹⁷ and Venezuela requires prior permission for military operations in its EEZ.¹⁸ One can see that state practice varies with respect to what specific foreign military activities are restricted in the EEZ. Still, a

TENDÊNCIAS E PERSPECTIVAS 237 (André Toledo, Leonardo Subtil, Thiago Carvalho Borges & Tiago V. Zanella eds., 2019).

¹² For a broader perspective on the influence of the new law of the sea on naval mobility, see Kenneth Booth, *The Military Implications of the Changing Law of the Sea*, in *LAW OF THE SEA: NEGLECTED ISSUES* 328, 328-97 (John Gamble ed., 1979).

¹³ The interpretation of the application of PPRs in the Area and on the high seas will be analyzed in Sections III and IV. Briefly put, the history of negotiation on disarmament in the Area is evidence that peaceful purposes could not mean anything further than other treaties providing for such disarmament, which was knowingly limited. As to the high seas, the efforts to specify the content of LOSC Article 88, which reserves the high seas for peaceful purposes, point towards precisely the prohibition of the use of force. PPRs in the Area and on the high seas have a more goal-oriented aspect than robust normativity.

¹⁴ A relevant ground for this position is the reservation of the EEZ for peaceful purposes. It is a relevant ground, but not the only one. For example, a promising interpretation relies on the non-attribution of the freedom/jurisdiction over some military activities. Thus, by applying Article 59, the residual rights would be attributed to the coastal state. Sienho Yee, *Sketching the Debate on Military Activities in the EEZ: An Editorial Comment*, 9 *CHINESE J. INT’L L.* 1, 3 (2010); J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* 379-91 (3d ed. 2012).

¹⁵ *CTR. FOR OCEANS L. & POL’Y*, *supra* note 10, at 88-89.

¹⁶ U.S. DEP’T OF DEF., *REPORT TO CONGRESS: ANNUAL FREEDOM OF NAVIGATION REPORT, FISCAL YEAR 2019*, at 3 (2020).

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 6. Iran and Venezuela are not parties to the LOSC. However, their practice is pertinent because they are still bound by customary international law rules governing the EEZ and the prohibition of the use of force. For the purposes of the present investigation, all the relevant LOSC rules have negligible differences from customary international law rules. CHURCHILL & LOWE, *supra* note 1, 161-62.

recurrent contention is that foreign military exercises or maneuvers (MEMs)¹⁹ may only be conducted in the EEZ with the coastal state's consent. That is Bangladesh, Brazil, India, and Pakistan's position.²⁰

Those who defend the narrow interpretation generally understand that the prohibition of the use of force does not *ipso jure* prohibit MEMs in the EEZ.²¹ In contrast, those claiming a broad interpretation affirm that PPRs go beyond the prohibition of the use of force to the extent of explicitly considering some military activities, particularly MEMs, non-peaceful.²² While it is true that since the 1980s the narrow interpretation has attracted significantly more support in scholarship,²³ the unsurmountable fact is that state practice does not seem to clearly reflect such an interpretation. Moreover, most arguments in support of the narrow interpretation heavily rely on the outcome of the negotiations in the Third Conference, which ended in 1982. The difficulty, however, is that state practice restricting foreign military activities in the EEZ has only proliferated in the last forty years.²⁴ The importance of this discussion in current international politics is also undisputed,

¹⁹ It is worthwhile to clarify what is meant by MEMs. According to Stephens and Skougaard, MEMs involve "warships undertaking navigational and operational exercises either exploring the effects of weaponry or testing strategies without actual combat." See Dale Stephens & Tristan Skousgaard, *Naval Demonstrations and Maneuvers*, in MAX PLANCK ENCYCLOPEDIA OF INT'L L. ¶ 2 (2009). They also include "activities such as task force maneuvering, flight operations, man overboard drills, intelligence collection, weapons testing and firing, anti-submarine and air warfare evolutions, and other associated naval drills." *Id.* ¶ 12. Stephens and Skougaard propose the figure of "naval demonstration," as the "non-combat exercise with the primary objective being to shape the strategic political, economic, or military environment." *Id.* ¶ 1. Very frequently, naval demonstrations have a coercive aspect directed at another State. See *id.* ¶ 16. It is, thus, a kind of MEM.

²⁰ See U.S. DEP'T OF DEF., *supra* note 16, at 3-5.

²¹ See L. OF THE SEA INST., CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 303-04 (Jon M. Van Dyke ed., 1985) (quoting Tommy Koh, second president of the Third Conference: "[n]owhere is it clearly stated whether a third state may or may not conduct military activities in the exclusive economic zone of a coastal state. But, it was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted. I therefore would disagree with the statement made in Montego Bay by Brazil, in December 1982, that a third state may not conduct military activities in Brazil's exclusive economic zone").

²² Ren Xiaofeng & Senior Colonel Cheng Xizhong, *A Chinese Perspective*, 29 MARINE POL'Y 139, 143-44 (2005).

²³ See Wolfrum, *supra* note 10, at 201.

²⁴ Interpretation of the PPR in the EEZ and state practice will be extensively examined in Part V.

particularly regarding the South China Sea.²⁵ In light of this debate, this Article's first objective is to analyze the content of the broad interpretation of the PPR in the EEZ and whether there is a place for such an interpretation in contemporary international law.

Moreover, even if this Article concludes that the broad interpretation is unjustified and that the narrow interpretation prevails (i.e., the PPR in the EEZ merely prohibits the use of force), the discussion would not be over. One will not be warranted to conclude that MEMs are allowed in foreign EEZs.²⁶ As seen above, some prominent positions by developing states based on PPRs recognize that third states conducting MEMs in foreign EEZs must ask for the coastal state's consent.²⁷ While some of these states base their positions on a broad interpretation by defining MEMs as non-peaceful,²⁸ other states seem to adopt a narrow interpretation based

²⁵ The disputes in the South China Sea, which also involve American Freedom of Navigation Operations (FONOPs) in the Chinese-claimed EEZ, are now the *locus classicus* of the present discussion. But they are by no means the only examples. For instance, according to the 2020 Freedom of Navigation Annual Report, made by the United States Department of Defense, the United States has exercised multiple operational challenges to claims related to the restrictions of MEMs in EEZs in the following maritime regions: Persian Gulf (Iran), South China Sea (Malaysia), Indian Ocean (Maldives), North Arabian Sea (Pakistan), and Caribbean Sea (Venezuela). It is important to highlight that the United States also exercises operational challenges against other countries, including allies, but less intensively. See U.S. DEP'T OF DEF., *supra* note 16, at 4-6.

Of course, the United States is not the only active country in conducting MEMs in foreign EEZs, but it is undeniably the State with most relevant practice in that regard. For a recent example of Chinese operations in the American EEZ, see *infra* note 96.

²⁶ See CTR. FOR OCEANS L. & POL'Y, *supra* note 10, at 91 ("In 1985, a report of the Secretary-General of the United Nations concluded that 'military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51, are not prohibited by the Convention on the Law of Sea.'").

²⁷ See U.S. DEP'T OF DEF., *supra* note 16, at 3-5.

²⁸ For instance, Cape Verde's interpretative declaration under Article 310, LOSC, clearly separates the prohibition of the use of force from the exclusion of any "non-peaceful use." United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [https://perma.cc/6UAC-79W9] (follow "Cape Verde" hyperlink; then view "Declarations and Reservations") ("In the exclusive economic zone, the enjoyment of the freedoms of international communication, in conformity with its definition and with other relevant provisions of the Convention, excludes any non-peaceful use without the consent of the coastal State, such as exercises with weapons or other activities which may affect the rights or interests of the said state; and it also excludes the threat or use of force against the territorial integrity, political independence, peace or security of

on Article 301, LOSC.²⁹ Consequently, this Article's second objective focuses on MEMs and addresses the prohibition of the use of force in the EEZ in light of the narrow interpretation of "peaceful purposes," as contained in Article 301.³⁰ In this respect, this Article aims to ascertain whether MEMs in the EEZ violate the prohibition of the use of force, which is the content of the PPR in the EEZ under the narrow interpretation.³¹

With these two objectives, the present investigation aims to answer the following question: does the PPR restrict third states' abilities to conduct MEMs in the EEZ in any capacity? In answering this question, this Article delivers both practical and theoretical contributions. Military activities in the EEZ (in general) and MEMs (in particular) were among the most controversial issues in the Third U.N. Conference on the Law of the Sea, which resulted in the LOSC. Their controversial nature endures to this day, but they now bear

the coastal State."). Uruguay and Thailand adopted similar declarations. *Id.* (follow "Uruguay" and "Thailand" hyperlinks, respectively; then view "Declarations and Reservations").

²⁹ For example, Brazil's interpretative declaration to the LOSC, under Article 310, relies on Article 301, not on Article 88. *Id.* (follow "Brazil" hyperlink; then view "Declarations and Reservations"). Anticipating its declaration, Brazil spelled out its position on December 7, 1982, at the closing plenary session on the Third Conference on the Law of the Sea. See ROACH & SMITH, *supra* note 14, at 379-80 ("[I]t is our understanding [that] the provisions of article 301, which prohibit the threat or use of force on the sea against the territorial integrity or independence of any State, apply particularly to the maritime areas under the sovereignty or jurisdiction of the coastal State. In other words, we understand that the navigation facilities accorded third world countries within the exclusive economic zone cannot in any way be utilized for activities that imply the threat or use of force against the coastal State. More specifically, it is Brazil's understanding that the provisions of the Convention do not authorize other States to carry out military exercises or maneuvers within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives . . .").

³⁰ See LOSC, *supra* note 1, art. 301 ("In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."). Here, the offended state is the coastal state, which holds sovereign rights in the EEZ. A flag state can be a victim of illegal use of force in any maritime space, and the legal regime regulating it is generally the same. In the territorial sea, the offended state can also be the coastal state, but the coastal state enjoys sovereignty over that space; the prohibition of the use of force applies in a like manner to the land territory. The uncharted waters are indeed those of the sovereign rights in the EEZ.

³¹ The content of the narrow interpretation (prohibition of the use of force) is within the larger circle of the broad interpretation, which proposes further prohibitions for purportedly non-peaceful activities. As such, the second objective is also pertinent if a broad interpretation is adopted.

greater political importance. This is true, of course, for American Freedom of Navigation Operations (FONOPs), which went from a means of guaranteeing the rule of law at sea to one of the central elements of American foreign policy.³² More recently, however, American interests have been on the receiving end of foreign military activities by China, Russia, and North Korea. From a theoretical perspective, there appears to be a gap in mainstream scholarship. In general, authors who engage this topic affiliate themselves with the narrow interpretation by understanding that third states conducting MEMs in foreign EEZs only need to have due regard for the coastal state's rights and duties. The problem is that a summary adoption of the narrow interpretation based on negotiations from more than forty years ago risks ignoring current practice, especially practice originating from developing states.

This Article proceeds as follows: Part II focuses on PPRs as laid down in the LOSC. Part III deals with the PPR in the Area. Part IV shifts its attention to the high seas and elaborates on the narrow interpretation. Part V addresses the PPR as applied to the EEZ, considering the specific context of the EEZ regime and the relevant subsequent practice.³³ Part VI examines the prohibition of the use of force in the EEZ and its influence on the lawfulness of MEMs. Section VI.a seeks to answer whether the coastal state's sovereign rights and jurisdiction in the EEZ are considered part of its territorial integrity to be protected by the prohibition. Section VI.b concentrates on "political independence," also protected by such prohibition, focusing on MEMs exercising political pressure over the coastal state (EEZ). Section VI.c emphasizes the obligation to settle disputes peacefully within the context of the prohibition of the use of force, as this obligation plays a relevant role given that the coastal and third states may reasonably disagree on whether an intended MEM violates the coastal state's sovereign rights and jurisdiction in the EEZ.³⁴ Part VII briefly concludes.

³² Dennis Mandsager, *The U.S. Freedom of Navigation Program: Policy, Procedure, and Future*, 72 INT'L L. STUD. 113, 115-17 (1998).

³³ As such, Parts II-V will be instrumental in addressing the first objective.

³⁴ Part VI addresses the second objective.

II. PEACEFUL PURPOSES RESERVATIONS IN THE LOSC

At the second session of the Third U.N. Conference on the Law of the Sea, Item 22 of a list prepared by the Seabed Committee (functioning as the Preparatory Committee) was allocated to the Plenary. Item 22, on “peaceful uses of the ocean space: zones of peace and security,” was also discussed by each of the Main Committees regarding their individual competences.³⁵ Briefly, the First Committee was devoted to the Area. The Second Committee dealt with other maritime spaces. The Third Committee addressed the marine environment, MSR, and the transfer and development of marine technology.³⁶ Consequently, PPRs were dealt with by all the Committees and aligned by the Plenary. As a result, Articles 88, 141, 143(1), 147(2)(d), 155(2), 240(a), 242(1), and 246(3) all contain PPRs.³⁷

It has been suggested that peaceful purposes should have a single meaning across the Convention due to the contextual interpretation under Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).³⁸ Under a contextual interpretation, one should consider the specific context and circumstances in which a concept is used within a treaty, without importing meanings constructed in different contexts (such as the Antarctic Treaty or the Outer Space Treaty).³⁹ For PPRs in the LOSC, the single meaning is usually built around Article 301, leading to a narrow interpretation.⁴⁰

As demonstrated below, this proposition is compelling. Nevertheless, it is still theoretically conceivable for a broad interpretation beyond Article 301 to be sustained. This is the case for at least four reasons: First, subsequent state practice is not uniform

³⁵ CTR. FOR OCEANS L. & POL’Y, *supra* note 10, at 88.

³⁶ ALEXANDRE PEREIRA DA SILVA, O BRASIL E O DIREITO INTERNACIONAL DO MAR CONTEMPORÂNEO: NOVAS OPORTUNIDADES E DESAFIOS 61 (2015).

³⁷ Despite the variety of provisions containing a PPR, determining the legal content of the general provisions is enough since other provisions do not deviate from them.

³⁸ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

³⁹ Boczek, *supra* note 7, at 363; Hayashi, *supra* note 10, at 124; Oxman, *supra* note 10, at 832.

⁴⁰ Hayashi, *supra* note 10, at 125.

regarding the application of the PPR to each maritime space.⁴¹ Second, “even in the Convention, the term is used in different contexts.”⁴² Third, per Article 32 of VCLT, supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, are also relevant to confirm the meaning resulting from the application of Article 31 or to determine a different meaning if following Article 31 would lead to ambiguity, obscurity, or a manifestly absurd or unreasonable result. Fourth, versions of the LOSC authenticated in other languages should also be opportunely examined, following Article 33 of VCLT. For these reasons it does not seem proper to disregard a broad interpretation, summarily adopting a single interpretation for peaceful purposes across the Convention. The following Parts focus on PPRs in specific maritime spaces: the Area, the high seas, and the EEZ.

III. “THE AREA SHALL BE OPEN TO USE EXCLUSIVELY FOR PEACEFUL PURPOSES BY ALL STATES”

The efforts on the demilitarization of the international seabed (the Area) transpired in the context of the Cold War.⁴³ After Arvid Pardo’s remarkable speech at the U.N. General Assembly (UNGA) in 1967, the Seabed Committee was created.⁴⁴ It then prepared a draft approved by UNGA Resolution 2749 called the “Declaration of Principles Governing the Seabed and the Ocean Floor, and the

⁴¹ “It seems doubtful, however, that the limited approach taken by the Convention on the issue of military activities can be regarded as the final word, taking into account the growing body of State practice requiring consent for the performance of naval military exercises.” Alexander Proelss, *Article 58*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 444, 453 (Alexander Proelss ed., 2017). Among the primary rules contained in Article 31, VCLT, following the object and purpose of the Convention is not helpful. As contained in its preamble and elsewhere, the Convention seeks to promote peaceful uses of the oceans, but defining peaceful uses and purposes is precisely the task.

⁴² Silja Vöneky & Anja Höfelmeier, *Article 141*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 982, 984 (Alexander Proelss ed., 2017); see also Jean-Pierre Quéneudec, *The Peaceful Use of the International Maritime Areas*, in THE NEW LAW OF THE SEA: SELECTED AND EDITED PAPERS OF THE ATHENS COLLOQUIUM ON THE LAW OF THE SEA, SEPTEMBER 1982, at 187, 189 (Christos L. Rozakis & Constantine A. Stephanou eds., 1983).

⁴³ James A. Barry, *The Seabed Arms Control Issue: 1967-1971: A Superpower Symbiosis?*, 25 NAVAL WAR COLL. R. 87, 88 (1972).

⁴⁴ Alexandre-Charles Kiss, *La notion de patrimoine commun de l’humanité* (Volume 175), COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L. 201-202 (1982).

Subsoil Thereof, beyond the Limits of National Jurisdiction.”⁴⁵ Its principles 5 and 8 read:

[Principle 5] The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or landlocked, without discrimination, in accordance with the international regime to be established.

[Principle 8] The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area⁴⁶

Principle 5 is important because it is the basis of Article 141, LOSC.⁴⁷ Principle 8 is relevant because it points to how the PPR in the Area should be understood. It contains a without-prejudice clause referring to international negotiations undertaken in the field of disarmament. This clause indirectly references the 1963 Nuclear Tests Ban Treaty⁴⁸ and nudges at the future 1971 Seabed Arms Treaty,⁴⁹ which achieved great adherence.⁵⁰ Thus, it does not seem adequate to read the PPR in the Area as complete demilitarization.

There were some attempts to specify the PPR as applied to the Area in the Seabed Committee. Malta proposed prohibiting placing nuclear weapons and other weapons of mass destruction and nuclear weapon tests in the Area. The Soviet Union and Tanzania proposed the prohibition of the use of the seabed for military purposes. These propositions were contemplated in a draft made by

⁴⁵ G.A. Res. 2749 (XXV), Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (Dec. 17, 1970).

⁴⁶ *Id.* ¶¶ 5, 8.

⁴⁷ LOSC, *supra* note 1, art. 141 (“The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part.”).

⁴⁸ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 480 U.N.T.S. 43 (1963) [hereinafter “Nuclear Weapon Tests”].

⁴⁹ Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, *opened for signature* Feb. 11, 1971, 955 U.N.T.S. 115.

⁵⁰ CTR. FOR OCEANS L. & POL’Y, *supra* note 10, 145-50.

the Committee. However, in the end, the Third Conference adopted Article 141 under terms similar to Principle 5's.⁵¹

The interpretation extracted from Principle 8 and the adherence achieved by treaties in the field of disarmament on the Area leads to the conclusion that the PPR, as applied to the Area concerns a policy goal for international law.⁵² "It reflects the language of the preamble to the Convention, which recognizes the desirability of establishing a Convention that will 'promote the peaceful uses of the seas and oceans.'"⁵³ Boczek understands that it is an example of "soft law" under the meaning proposed by Weil.⁵⁴ In that regard, many scholars read Article 141 through Article 301, thus concluding that Article 141 also prohibits the use of force at sea.⁵⁵

IV. "THE HIGH SEAS SHALL BE RESERVED FOR PEACEFUL PURPOSES"

Unlike the Area, the high seas host many military activities.⁵⁶ One should also note that there was no provision similar to Article 88 in the 1958 Convention on the High Seas.⁵⁷ In the Third Conference at the second session (1974), copying a proposal made by the Latin-American States in the Seabed Committee, the *Main*

⁵¹ For the proposals made by Malta, the Soviet Union, and Tanzania and the outcome of the issue in the Committee, see Vöneky & Höfelmeier, *supra* note 42, at 983.

⁵² The *effet utile* principle, derived from an interpretation according to the object and purpose of the treaty (Article 31 of VCLT), is deemed to be satisfied with such a content, which does not deprive the provision of any effect. Quéneudec, *supra* note 42, at 192.

⁵³ CTR. FOR OCEANS L. & POL'Y, *supra* note 10, 145-50.

⁵⁴ Boczek, *supra* note 7, at 380. Weil observes that whereas some rights and obligations under international law are precise (hard law), other provisions are so vague and un compelling that they may be characterized as soft, fragile, or weak law, even though they come from formal sources of international law. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414 (1983).

⁵⁵ Rüdiger Wolfrum, *The Principle of the Common Heritage of Mankind*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 312, 320 (1983); Michael Lodge, *The Common Heritage of Mankind*, 27 INT'L J. MARINE & COASTAL L. 733, 736 (2012); Vöneky & Höfelmeier, *supra* note 42, at 985.

⁵⁶ Military activities on the high seas are sparsely regulated. One example is found in the scope of application of the Treaty Banning Nuclear Weapon Tests, Article I, which contains an obligation "to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion." Nuclear Weapon Tests, *supra* note 48, at 45.

⁵⁷ Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11.

*Trends Working Paper*⁵⁸ stated the following: “The international seas shall be open to all States, whether coastal or land-locked, and their use shall be reserved for peaceful purposes.” Later, the term “high seas” replaced “international seas.”⁵⁹

At the ninth session, an attempt was made to clarify the meaning of “peaceful purposes.” A group of ten states presented a paragraph to be added to Article 88.⁶⁰ Rejected as part of this Article,⁶¹ the content of that proposal, based on Articles 19(2)(a) and 39(1)(b) of LOSC,⁶² later became Article 301, a general provision applicable to all maritime spaces on the “peaceful uses of the seas.” Article 301’s text reads: “[All] States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”⁶³

Despite the different terminology, there appears to be no difference between “purposes” and “uses.” As highlighted before, the Item originating PPRs reads “Peaceful Uses of the ocean space: zones of peace and security.” The authentic French and Spanish versions of Article 301, if freely translated, read “use of the sea(s) with peaceful purposes” (“*utilización del mar con fines pacíficos*” and “*utilisation des mers à des fins pacifiques*”).⁶⁴ For this reason, Article 88 may be interpreted through Article 301, as most scholarship

⁵⁸ CTR. FOR OCEANS L. & POL’Y, *supra* note 10, at 12 (“The Main Trends Working Paper is a compendium reflecting the different approaches to particular subjects and issues which the Second Committee addressed. It was a procedural device designed to set in motion the task of reducing to manageable proportions the enormous quantity of proposals which had accumulated.”).

⁵⁹ *Id.* at 88.

⁶⁰ This group is mainly made of developing states: Costa Rica, Ecuador, El Salvador, Pakistan, Peru, Philippines, Portugal, Senegal, Somalia, and Uruguay. *Id.* at 87.

⁶¹ *Id.* at 90.

⁶² Article 19(2)(a) considers as non-innocent the use of force against the sovereignty, territorial integrity, or political independence of the coastal State, or in any manner in violation of the principles in the UN Charter. LOSC, *supra* note 1, art. 19(2)(a). Article 39(1)(b) prohibits the use of force in the exercise of the right of transit passage in straits used for international navigation. *Id.* art. 39(1).

⁶³ *Id.* art. 301.

⁶⁴ According to Article 33(3) of the VCLT, “the terms of the treaty are presumed to have the same meaning in each authentic text.” Vienna Convention on the Law of Treaties, *supra* note 38, art. 33(3).

claims.⁶⁵ Once again, if it means anything beyond Article 301, the high seas PPR is also a policy goal, like Article 141 on the Area.⁶⁶

V. THE EXCLUSIVE ECONOMIC ZONE SHALL BE RESERVED FOR PEACEFUL PURPOSES

The opinion proposed by the majority of scholars and by the naval powers is that the application of Article 88 to the EEZ should also be guided by Article 301.⁶⁷ Nonetheless, there are such remarkable differences between the high seas and the EEZ that a particular contextual interpretation should be carefully handled before simply adopting one single interpretation for both.⁶⁸

One would be correct to say that under Article 56, LOSC,⁶⁹ the coastal state does not enjoy full sovereignty over its EEZ, but only some sovereign rights and jurisdiction. Still, the powers to which these sovereign rights entitle coastal states do not fall short of sovereignty on the subject matter addressed by Article 56 (economic resources and economic potentiality).⁷⁰ Therefore, it would not be

⁶⁵ See Wolfrum, *supra* note 10, at 201.

⁶⁶ Oxman, *supra* note 10, at 832. A possible limitation to the freedom to conduct military activities would not be found directly in Article 88, but in the criterion of reasonable use in LOSC Article 87(2). Quéneudec, *supra* note 42, at 195; LOSC, *supra* note 1, art. 87(2).

⁶⁷ Oxman, *supra* note 10, at 832; Francioni, *supra* note 1, at 223; Boczek, *supra* note 10, at 457; KRASKA, *supra* note 10, at 257.

⁶⁸ Some of these significant differences are highlighted in Subsection V.A. See LOSC, *supra* note 1, arts. 55-75.

⁶⁹ *Id.* art. 56 ("Rights, jurisdiction and duties of the coastal State in the exclusive economic zone. 1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention. 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.")

⁷⁰ Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgment, 1986 I.C.J. 157, 230 (Feb. 24) (Oda, J., dissenting) ("The mode of exercise of jurisdiction [in the

wrong to understand that the coastal state has *ratione materiae* limited sovereignty over the EEZ. Moreover, it should be noted that many states have increasingly seen the EEZ through a “quasi-territorial” lens.⁷¹

Thus, while the two earlier analyzed maritime spaces are *res communis*,⁷² the EEZ is not. In this regard, a comparison to the regime of the territorial sea seems fitting. There are two opposite readings of the PPR in the EEZ in light of the territorial sea regime that deserve attention. The first one points out that the legal text equivalent to PPRs in the territorial sea defines what is not considered innocent passage.⁷³ Some authors propose a contextual interpretation that relies on the absence of similar provisions in the EEZ’s regime to conclude that had the negotiating states wanted to include comparable provisions in Part V, they would have done so.⁷⁴ Consequently, only military activities inconsistent with Article 301 would be forbidden. A second, opposite reading linking both EEZ and territorial sea regimes has also been raised. Xiaofeng and Xizhong have proposed to use the definition of non-innocence in the territorial sea by analogy to define non-peaceful purposes in the EEZ. They argue that with the technological development in the last

EEZ] is no different from that exercised by the coastal State within its territorial sea and, so far as the development of the natural resources of the sea is concerned, its competence in the Exclusive Economic Zone is equivalent to that it enjoys in the territorial sea.”); YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 154 (3d ed. 2019) (“The sovereign rights of the coastal State are limited to the matters defined by international law (limitation *ratione materiae*). On this point, sovereign rights must be distinguished from territorial sovereignty.”). Francioni called it “economic sovereignty.” Francioni, *supra* note 1, at 226.

⁷¹ Bernard Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT’L L. 830, 839 (2006).

⁷² The Area can be easily considered *res communis*, especially considering the common heritage of humankind principle and the regime contained in Part XI of LOSC. See LOSC, *supra* note 1, arts. 76-85. Regarding the high seas, this contention requires some qualifications. Alongside *res communis*, commentators have also seen the high seas through other lenses, such as *res nullius*, public domain, the theory of jurisdiction, and the theory of reasonable use. Similar and divergent implications and emphasis stem from adopting each of them. In referring to the high seas as *res communis* here, this Article emphasizes a particular difference from the EEZ: there is no privileged (coastal) state in the high seas. Formally, all states benefit from the high seas on the same footing as a common space. Also, “[t]he mainstream of the Grotian theory was that the sea is *res communis*.” D. P. O’CONNELL & I. A. SHEARER, 2 *THE INTERNATIONAL LAW OF THE SEA* 792-93 (1988).

⁷³ LOSC, *supra* note 1, art. 19.

⁷⁴ Raul Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone*, 9 CHINESE J. INT’L L. 9, 11 (2010).

decades, traditional non-innocent activities in the territorial sea are now conducted in the EEZ to achieve similar goals.⁷⁵

However, the two readings mentioned above, based on comparisons to the law regulating the territorial sea, are untenable. The first one is an *a contrario* interpretation. It is an interpretation by implication, and such implication is not logically necessary. In this connection, it is worth noting that the United States' strategy in negotiating Article 58 – containing all states' freedoms in the EEZ – was to insert a “constructive ambiguity,” enabling them to advance their interests concerning military activities in foreign EEZs.⁷⁶ Such silence in Part V on military activities makes it difficult to adopt a contextual interpretation of peaceful purposes based on the differences between the law governing the territorial sea and the legal regime of the EEZ.

As to the second reading, Xiaofeng and Xizhong propose an analogy. Analogies tend to be convincing in (international) law⁷⁷ because they fundamentally rely on the general principle of formal justice, that is, like cases must be treated alike.⁷⁸ Once two cases are considered like, the applicable rule for the regulated case may be applied to the unregulated case. Still, analogies are subject to some fragilities. First, it is not always clear what cases are indeed alike. Second, the case-based justification needed for reasoning by analogy is far more contestable in light of applying non-applicable rules to such cases.⁷⁹ This is particularly true for the second reading.

⁷⁵ Xiaofeng & Xizhong, *supra* note 22, at 142-43.

⁷⁶ Robert Beckman & Tara Davenport, *The EEZ Regime: Reflections After 30 Years*, in PAPERS FROM THE LAW OF THE SEA INSTITUTE 2, 45-46 (Harry N. Scheiber, Moon S. Kwon & Emily Gardner eds., 2012); Kenneth Booth, *Historic Compromise or Paradigm Shift? Naval Mobility Versus Creeping Jurisdiction*, in THE 1982 CONVENTION ON THE LAW OF THE SEA 312, 325 (Albert Koers & Bernard Oxman eds., 1983) (“In relation to one of the earlier drafts of the Convention, the silence of the document hides a number of rights for navies, such as the right to conduct naval exercises within the EEZ of other States and the right to hold weapons tests there.”).

⁷⁷ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 2011 ITLOS Rep. 10, ¶ 60; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), Judgment, 2007 I.C.J. 43, ¶¶ 217-18 (Feb 26); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 22 (Feb 14); *see also*, Fernando L. Bordin, *Analogy*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 25, 29-30 (Jean D'Aspremont & Sahib Singh eds., 2019).

⁷⁸ *See* ARISTOTLE, 3 NICOMACHEAN ETHICS 84-86 (W. D. Ross & Lesley Brown trans., Oxford Univ. Press. rev. ed. 2009) (c. 384 B.C.E.); *see also* Bordin, *supra* note 77, at 34, 36.

⁷⁹ Jaap Hage, *Comparing Alternatives*, in STUD. IN LEGAL LOGIC 101, 101 (2005).

The EEZ is still very different from the territorial sea. Moreover, to infer that non-peaceful purposes in the EEZ should be equated to non-innocent activities in the territorial sea because they aim at similar goals is unpersuasive. The move to the EEZ is more likely a consequence of the strengthened territorial sea regime than an unrelated like case. Finally, international law's decentralized nature calls for a more careful analysis of analogical reasoning, especially regarding the legitimacy of those putting it forward.⁸⁰ Bordin considers in this sense that "an objection that can be made to the carrying out of codification projects [or interpretation and progressive development] on the basis of analogy is that the topic may not be ripe for codification if practice and precedent are scant."⁸¹ In other words, practice and precedent may point toward a legitimate analogy in the international legal order. Bearing in mind the particularities of LOSC as an extensively negotiated "package deal,"⁸² an analogy that extrapolates the deal's boundaries would need evident and legitimate support.

So, considering that the context (the other provisions of the Convention)⁸³ offers little guidance to interpreting the PPR in the EEZ, one should ask whether subsequent state practice supports the broad or the narrow interpretation. Some developing states have claimed that the conduct of MEMs in the EEZ, especially if they involve weapons or explosives, is only possible with the consent of the respective coastal state. Among those states are India, Brazil, Pakistan, Bangladesh, Ecuador, and Malaysia. With similar declarations referring to MEMs as non-peaceful, one can point to

⁸⁰ For an example, see Kevin Jon Heller, *The Use and Abuse of Analogy in IHL*, in *THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS* 232, 233 (Jens David Ohlin ed., 2016) ("Since 9/11, however, the United States has consistently taken the position that certain IAC-based rules of IHL can be applied in NIAC via a third method: analogy. The U.S. has argued, for example, that it can target members of any organized armed group that would qualify as a 'co-belligerent' of al-Qaeda under IAC rules. Similarly, by analogizing to the 'persons accompanying' provision of the Third Geneva Convention (GC III), the U.S. has argued that it can detain individuals who are not members of al-Qaeda but substantially support it . . . Where does the U.S.'s authority to analogize between IAC and NIAC come from?").

⁸¹ Bordin, *supra* note 77, at 37.

⁸² The rules of procedure adopted by the Third Conference on the Law of the Sea, which culminated with LOSC, were consensus-based and aimed at a "package deal." In other words, nothing is agreed upon until everything is agreed. The end result should be a comprehensive agreement minimally satisfactory for all parties. The Convention does not admit reservations to preserve its comprehensiveness under Article 309. Hugo Caminos & Michael R. Molitor, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871, 875-76 (1985).

⁸³ See *supra* Part II (discussing contextual interpretations).

Uruguay, Cape Verde, and Thailand.⁸⁴ Moreover, during the Third Conference, Peru, Albania, the Khmer Republic, North Korea, Costa Rica, El Salvador, the Philippines, Portugal, Senegal, and Somalia also showed concerns with foreign military activities in the EEZ.⁸⁵ Beyond the positions held in the context of the Conference, Iranian practice also supports this perspective.⁸⁶ In fact, as early as 1990, the United States Navy has reported that at least thirty nations restricted foreign military activities in the EEZ in one way or another.⁸⁷ Finally, the Chinese position is also in support of a broad interpretation.⁸⁸

On the other side, the Netherlands, Germany, and Italy have made interpretative declarations stating that under Article 56 or in virtue of Article 59, LOSC,⁸⁹ the coastal state does not have the right to require its consent for foreign military activities to be conducted in its EEZ. The United Kingdom simply declared that requiring consent does not conform with the Convention.⁹⁰ As one can see, none of these declarations addressed the PPR.

In scholarship, Pedrozo affirms that state practice favors the narrow interpretation. However, he does not seem to offer any proof,⁹¹ which Zhang critiques in a paper responding to Pedrozo.⁹²

⁸⁴ The interpretative declarations can be found on the United Nations Treaty Collection. See *supra* note 28 and accompanying text.

⁸⁵ Jon M. Van Dyke, *Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country*, 28 MARINE POL'Y 29, 31 (2004).

⁸⁶ Alongside Iranian practice, Brazil, Malaysia, Cape Verde, India, Uruguay, Pakistan, and China's practices are well-documented. See Sophia Kopela, *The "Territorialisation" of the Exclusive Economic Zone: Implications for Maritime Jurisdiction* 4 (Apr. 03, 2009) (unpublished manuscript) (on file with the University of Pennsylvania Journal of International Law).

⁸⁷ Stephen Rose, *Naval Activity in the Exclusive Economic Zone – Troubled Waters Ahead?*, 20 OCEAN DEV. & INT'L L. 123, 134-35 (1990).

⁸⁸ Xiaofeng & Xizhong, *supra* note 22.

⁸⁹ LOSC, *supra* note 1, art 59 ("In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.").

⁹⁰ The interpretative declarations can be found on the United Nations Treaty Collection. See *supra* note 28 and accompanying text.

⁹¹ Pedrozo, *supra* note 74, at 11.

⁹² Haiwen Zhang, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? – Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ*, 9 CHINESE J INT'L L. 31, 37 (2010).

On the same topic, Kraska does not provide an extensive listing of evidence, mentioning only Australia, Russia, Canada, and Japan as examples of states carrying out these activities in foreign EEZs.⁹³ In fact, as Zhang pointed out in 2010, “only the United States has engaged in military activities such as military surveys in the EEZ of China without its approval, and there is no other country that has done so in recent years.”⁹⁴ In August 2021, however, four Chinese warships were spotted conducting military operations in American EEZ near the Aleutian Islands. While these operations might be seen as a response to American FONOPs in the South China Sea, the “U.S. Navy appears to welcome the activity as it validates its own freedom of navigation operations.”⁹⁵ At the time of writing, the United States has consistently adopted this position.⁹⁶

Yet, as David Attard had already stated in 1987, “the feeling has been expressed that many States will in future be inclined to restrict military uses of the EEZ.”⁹⁷ Addressing concrete cases, Van Dyke asserted in his concluding remarks that:

[I]n light of the creation and acceptance of the EEZ and the recognition of coastal state resource rights, “further limitations on the said freedoms [of navigation and overflight] must be accepted”. These limitations are both “of a political nature” related to the security concerns of coastal states and “are derived from economic rights” stemming

⁹³ KRASKA, *supra* note 10, at 269. The main evidence of state behavior in support of a narrow interpretation is coastal states’ passivity in the face of FONOPs conducted by the United States. The notable exceptions are China, Peru, and North Korea, who challenged FONOPs operationally (beyond diplomatic protests); Pedrozo, *supra* note 74, at 13. It is not clear, however, how this alleged passive behavior impacts state practice.

⁹⁴ Zhang, *supra* note 92, at 47.

⁹⁵ Joseph Trevithick, *Chinese Warships Sailing Near Alaska’s Aleutian Islands Shadowed By U.S. Coast Guard (Updated)*, WARZONE (Sept. 14, 2021 10:53 AM), <https://www.thedrive.com/the-war-zone/42352/chinese-warships-sailing-near-alaskas-aleutian-islands-shadowed-by-u-s-coast-guard> [<https://perma.cc/3EJY-6D67>]. Even if one considers that the Chinese operations are legal in themselves – thus possibly qualifying as retorsions – they might aggravate an ongoing dispute and, as such, violate article 2(3) of the UN Charter and Article 279 of LOSC. For a discussion on the obligation to settle international disputes peacefully, see *infra* Section VI.c.

⁹⁶ *Chinese and Russian Warships Located near Alaska in Bering Sea*, ABC NEWS (Sept. 27, 2022), <https://www.abc.net.au/news/2022-09-27/chinese-and-russian-warships-spotted-near-alaska/101477148> [<https://perma.cc/46N8-BNFW>].

⁹⁷ DAVID ATTARD, *THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW* 68 (1987).

from coastal state sovereignty over the resources of the EEZ.⁹⁸

Therefore, it is possible to conclude that substantial practice supports certain restrictions on certain foreign military activities in the EEZ.⁹⁹ Notwithstanding, that does not entail the conclusion that subsequent practice supports a broad interpretation of Article 88 as applied to the EEZ. First, the contextual interpretation around Article 301 still carries some weight and, a priori, should be deemed applicable to the EEZ. As seen in the preceding Section, the content of Article 301 was especially proposed to clarify Article 88.¹⁰⁰ Second, there is no specification on what a broad interpretation of PPRs entails. In short, there seems to be no place yet for a broad interpretation of the PPR in the EEZ.

In the future, state practice might solidify to consider certain military activities in the EEZ as non-peaceful. Today, there is growing practice restricting foreign military activities in the EEZ, but the legal grounds for that are diverse. Some declarations simply state that the Convention's provisions do not authorize foreign MEMs without the coastal state's consent.¹⁰¹ Some states, like Uruguay and Cape Verde, understand that those specific military

⁹⁸ Van Dyke, *supra* note 85, at 38.

⁹⁹ U.S. DEP'T OF DEF., *supra* note 16.

¹⁰⁰ In the *Enrica Lexie* case, India adopted the narrow interpretation through an interpretative declaration requiring consent for foreign military exercises or maneuvers. Among other arguments, it raised that Article 301 was initially a part of Article 88, which intended to clarify the meaning of peaceful purposes. The "Enrica Lexie" Incident (It. v. India), Award, PCA Case No. 2015-28, ¶ 1047 (Permanent Ct. of Arb. 2020), <https://www.pcacases.com/web/sendAttach/16500> [<https://perma.cc/HPD8-ACD6>]; see *infra* Part VI.a.

¹⁰¹ For example, India and Bangladesh made the exact same declaration without reference to any provision in particular: "The Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State." United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [<https://perma.cc/6UAC-79W9>]. (follow "India" hyperlink; then view "Declarations and Reservations"). Bangladesh included a nearly identical statement in its declaration. *Id.* (follow the "Bangladesh" hyperlink; then view "Declarations and Reservations"). The interpretative declarations can be found on the United Nations Treaty Collection. See *supra* note 28.

activities are non-peaceful due to a broad interpretation of PPRs.¹⁰² Others, like Brazil and Malaysia, seem to understand that a narrow interpretation of the provision, based on Article 301, already entitles it to require its consent from third states to conduct MEMs in its EEZ.¹⁰³ Another justification is based on the non-attribution of said right or freedom and the residual attribution to the coastal state under Article 59.¹⁰⁴ In other words, the reason for such a position does not necessarily rely on a broad interpretation of the PPR.

According to Article 31(3)(b) of the VCLT, “the subsequent practice,” if it is to be considered, must establish the agreement of the parties regarding a particular treaty interpretation.¹⁰⁵ While it might be controversial what kind of practice is required to establish an agreement between the parties or even whether *all* the parties to the treaty must establish such an agreement,¹⁰⁶ the case at hand is in many ways far from reflecting an agreement between parties to the LOSC.

At a first level, it should be observed that important and representative groups of member states to the LOSC have different opinions and practices regarding the issue—in favor or against requiring restriction on foreign military activities in the EEZ. At a second level, among those defending restrictions on foreign military activities in the EEZ, the specific restriction is not always the same in light of what was alluded to in Part I of this Article.¹⁰⁷ Finally, even in cases where the restriction defended is similar, the supporting legal argument is not always based on a broad interpretation of the PPR. Therefore, subsequent practice is not sufficient to turn the interpretation of the PPR as applied to the EEZ away from Article 301.

¹⁰² They adopted the very same declaration. To access these declarations, see *supra* notes 28, 101 and accompanying text.

¹⁰³ To access these declarations, see *supra* notes 28, 101 and accompanying text.

¹⁰⁴ Beckman & Davenport, *supra* note 76, at 12, 36.

¹⁰⁵ Vienna Convention on the Law of Treaties, *supra* note 38, art. 31(3)(b).

¹⁰⁶ Luigi Crema, *Subsequent Agreements and Subsequent Practice Within and Outside the Vienna Convention*, in TREATIES AND SUBSEQUENT PRACTICE 13, 17-21 (Georg Nolte ed., 2013).

¹⁰⁷ U.S. DEP'T OF DEF., *supra* note 16, at 3-5.

VI. THE PROHIBITION OF THE USE OF FORCE IN THE EXCLUSIVE
ECONOMIC ZONE AND MILITARY EXERCISE OR MANEUVERS

Under Article 19(2)(b), an unauthorized military exercise¹⁰⁸ on the territorial sea is non-innocent, potentially configuring a violation of the prohibition of the use of force. Unauthorized military exercises would be peaceful on the high seas or in the Area as long as they do not violate Article 301. The same rule applies to the EEZ. However, while any state can be a victim of an illegal threat or use of force in the capacity of a flag state on the high seas and in the EEZ, it is controversial whether a state can be a victim in the capacity of a coastal state in the EEZ.¹⁰⁹

As mentioned in Part V, differently from the territorial sovereignty enjoyed over the territorial sea, the coastal state only has limited sovereign rights and jurisdiction in the EEZ. Bearing this in mind, an initial point that needs to be addressed by this Part is whether the coastal state can be a victim of an illegal threat or use of force in the EEZ at all, particularly in cases involving MEMs. Therefore, Section VI.a asks whether the sovereign rights and jurisdiction enjoyed in the EEZ can be considered within a state's territorial integrity, which is protected by the prohibition. Considering the strong political content involved in the conduct of MEMs, Section VI.b is devoted to examining how the political independence of the coastal state is protected by the prohibition of the use of force in the EEZ. Finally, bearing in mind the potential for disputes¹¹⁰ involving the lawfulness of MEMs, Section VI.c will analyze the obligation to settle international disputes peacefully, as

¹⁰⁸ It seems that there is not a minimum threshold that the force used must have to be framed under Article 2(4). Nevertheless, while the use of substantial force reveals by itself the hostility of the conduct, it is true that small-scale forcible acts per se do not represent hostility. Other facts must lead to such a conclusion. For further discussion, see Tom Ruys, *The Meaning of 'Force' and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT'L. L. 159 (2014).

¹⁰⁹ This particular issue will be addressed in Section VI.a.

¹¹⁰ The Permanent Court of International Justice's (PCIJ) traditional definition of dispute will be adopted in this Article: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." *The Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment, 1924 P.C.I.J. (ser. B) No. 3, at 11 (Aug. 30).

contained in Article 279 of LOSC and Article 2(3) of the U.N. Charter, and contemplated in Articles 301 and 2(4).¹¹¹

a. Sovereign Rights and Jurisdiction as Part of the Coastal State's Territorial Integrity

The Netherlands appears to take the position that a coastal state cannot be the victim of an illegal threat or use of force in the EEZ. Its interpretative declaration under Article 310 contends that “Article 301 must be interpreted, in accordance with the Charter of the United Nations, as applying to the territory and the territorial sea of a coastal state.”¹¹² One cannot read the Dutch declaration as excluding the EEZ and the high seas from the spatial scope of application of Article 301, a general provision of the LOSC that restates a rule of customary international law. The adequate reading seems to understand that beyond the territorial sea, there is no territory to be protected by the territorial integrity principle contained in Article 301. Such a suggested reading is further reinforced by the fact that the Dutch interpretative declaration specifically contradicts the Brazilian one. According to Brazil, Article 301 “appl[ies], in particular, to the maritime areas under the sovereignty or the jurisdiction of the coastal State.”¹¹³

One could address this debate by saying that the coastal state does not enjoy territorial sovereignty over the EEZ. Consequently, the application of Article 301 to the EEZ would not, in that respect, differ from the one to the high seas (the victim state can only be a flag state). Nonetheless, that answer appears to be shallow and unsatisfactory since the EEZ may also be considered part of the coastal state’s territorial status as an emanation of the land territory.

¹¹¹ LOSC, *supra* note 1, arts. 2(4), 141, 301; U.N. Charter art. 2(4). Article 301 of LOSC refers to “principles of international law embodied in the United Nations Charter,” including the principle of peaceful settlement of international disputes. Article 2(4) of the U.N. Charter refers to the “Purposes of the United Nations,” which include the maintenance of international peace and security. This will be elaborated in Section V.c.

¹¹² This interpretative declaration was only filed in 2009. The Netherlands had ratified the Convention in 1996 when it filed an interpretative declaration stating that Article 56 does not authorize the coastal State to prohibit military exercises in its EEZ. The interpretative declarations can be found on the United Nations Treaty Collection. *See supra* notes 28, 101 and accompanying text.

¹¹³ Malaysia filed a similar declaration. To access the declaration, see *supra* notes 28, 101 and accompanying text.

Indeed, in the law of the sea, few principles are as consolidated as the principle of the domination of the land over the sea.¹¹⁴ In the famous *North Sea Continental Shelf Cases*, the International Court of Justice (ICJ) held that “the contiguous zone and the continental shelf are in this respect concepts of the same kind [. . .] the land is the legal source of the power which a State may exercise over territorial extensions to seaward.”¹¹⁵ In a dissenting opinion, Vice-President Koretsky also asserted that “not only the territorial sea but also the continental shelf may now be considered as ‘accessories’ of or, in the words of the Judgment in the *Fisheries* case, as ‘appurtenant to the land territory.’”¹¹⁶

Later, in the *Aegean Sea Continental Shelf Case*, the ICJ had to rule on its jurisdiction in the maritime delimitation case between Greece and Turkey. Considering that the submitted matter excluded Greece’s “territorial status,” the Court understood that the continental shelf rights were “an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.” Therefore, “the territorial régime—the territorial status—of a coastal State comprises, *ipso jure*, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law.”¹¹⁷

At the time of these judgments, the EEZ did not have an undisputed legal regime.¹¹⁸ Nevertheless, it should be considered a “concept of the same kind” (of the continental shelf and contiguous

¹¹⁴ This has been clear in international judicial practice since at least 1969 when the ICJ affirmed that “the principle is applied that land dominates the sea.” Ever since, it has been widely referenced. *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 96 (Feb 20); *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 303, ¶ 295 (Oct 10); Bing Bing Jia, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 57 GERMAN Y.B. INT’L L. 63, 66 (2014); STEPHEN FIETTA & ROBIN CLEVERLY, *A PRACTITIONER’S GUIDE TO MAR. DELIMITATION* 17 (2016).

¹¹⁵ *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 96 (Feb 20).

¹¹⁶ *Id.* at 159 (Koretsky, J., dissenting).

¹¹⁷ *Aegean Sea Continental Shelf* (Greece v. Turk.), Judgment, 1978 I.C.J. 3, ¶ 86 (Dec. 19).

¹¹⁸ However, in 1982, in the *Tunisia v. Libya* case, the ICJ considered the EEZ “[a] part of modern international law.” *Continental Shelf* (Tunis. v. Libya), Judgment, 1982 I.C.J. 18, ¶ 100 (Feb. 24). In 1985, in the *Libya v. Malta* case, it was the Court’s view that it was “incontestable that, [. . .] the institution of the exclusive economic zone[. . .] is shown by the practice of States to have become a part of customary law.” *Continental Shelf* (Libya v. Malta), Judgment, 1985 I.C.J. 13, ¶ 34 (June 3).

zone); a set of rights and jurisdiction which emanates from territorial sovereignty and, just like the territorial sea, an accessory of, an appurtenant to, or an adjunct of the land territory. Hence, the EEZ is part of the territorial status of the state.¹¹⁹ In 2009, the ICJ explicitly mentioned the EEZ as an emanation of the “land dominates the sea” principle.¹²⁰ Finally, as argued in Part V, the sovereign rights and jurisdiction of the coastal state in the EEZ are *ratione materiae* limited sovereignty.¹²¹

Given the above, one may conclude that the EEZ is protected by the general prohibition of the use of force by foreign states in the capacity of part of the coastal state’s territorial integrity. In this sense, one should agree with Judge Attard:

While territorial integrity may require the containment of the EEZ’s military uses, international security may require a certain military use of the sea. It is the balance between these contradictory realities which international law must achieve with regard to the EEZ’s use for peaceful purposes.¹²²

Attard’s is not a bold assertion. One can notice similar poise in the *Enrica Lexie Case*. There, the Arbitral Tribunal understood that Italy had not violated Article 88 (on the prohibition of the use of force) because its jurisdiction over pirate ships and its duty to repress piracy “cannot be viewed as a violation of Article 88 of the Convention or as an infringement on the rights of the coastal State in its exclusive economic zone.”¹²³ Mentioning the coastal state’s sovereign rights was unexpected because India’s claim under Article 88 was entirely made in the condition of flag state of the *St.*

¹¹⁹ Note that here the reference is not to territorial sea but to territorial *status*, a concept within which the ICJ found rights in the continental shelf to be encompassed. Following the same reasoning, sovereign rights in the EEZ should also be understood as part of a State’s territorial status. The EEZ is still a *sui generis* area *vis-à-vis* the territorial sea.

¹²⁰ Maritime Delimitation in the Black Sea (Rom. v Ukr.), Judgement, 2009 I.C.J. 61, ¶ 77 (Feb. 3).

¹²¹ See discussion *supra* Section V.a.

¹²² ATTARD, *supra* note 97, at 69.

¹²³ The “Enrica Lexie” Incident (It. v. India), Award, PCA Case No. 2015-28, ¶ 1074 (Permanent Ct. of Arb. 2020), <https://www.pccases.com/web/sendAttach/16500> [<https://perma.cc/HPD8-ACD6>]. Some believe that an illegal use of force, under Article 2 (4), UN Charter, does not disfigure a law enforcement operation as law enforcement. A particular activity may be an illegal use of force and an illegal law enforcement operation simultaneously, i.e., they are not mutually exclusive categories. See Marcos & Filho, *supra* note 11.

Anthony.¹²⁴ This obiter dictum might be seen as an indication of support to the conclusion that the sovereign rights and jurisdiction enjoyed in the EEZ are part of the coastal state's territorial integrity. Yet, as a *dictum* and for well-known reasons, it is less authoritative than if it were a holding, part of the *ratio decidendi*. Furthermore, considering that the EEZ has been recently seen through a "quasi-territorial" lens, hostility is easily observable from a coastal state's standpoint.¹²⁵

b. Coastal State's Political Independence in Cases Concerning MEMs in the EEZ

Turning to the political independence of the coastal state, naval demonstrations as a particular type of MEMs are relevant.¹²⁶ In that regard, American FONOPs are the archetypal example¹²⁷ because the United States maintains active resistance to excessive maritime claims by conducting these operations. It usually resorts to demonstrations of force through MEMs in the EEZ to dissuade other states from keeping their "excessive maritime claims."¹²⁸ In practice, FONOPs "fit the concept of gunboat diplomacy, particularly the kind that uses 'purposeful force', [where] uses, displays, or threats [of] force [are] aim[ed] at a particular purpose unrelated to the direct consequences of the action."¹²⁹

In the *Case concerning Military and Paramilitary activities against and in Nicaragua*, Nicaragua argued that "the [naval] manoeuvres [conducted by the United States just outside Nicaraguan territorial sea] themselves formed part of a general and sustained policy of force intended to intimidate the Government of Nicaragua into

¹²⁴ The fishing vessel thought to be a pirate attacked by the Italian marines in the *Enrica Lexie*. See The "Enrica Lexie" Incident, PCA Case No. 2015-28, ¶ 1074.

¹²⁵ Oxman, *supra* note 71, at 839.

¹²⁶ For a discussion on MEMs, see *supra* note 19 and accompanying text.

¹²⁷ Even though the United States is not a party to UNCLOS, it is still bound by the prohibition on the use of force. Therefore, in ascertaining the content of the PPR in the EEZ, this Article's findings might also be used to evaluate the conduct of this particular naval power. In fact, this Article's relevance is closely tied to the centrality American FONOPs have acquired in the last 40 years.

¹²⁸ ELEANOR FREUND, FREEDOM OF NAVIGATION IN THE SOUTH CHINA SEA: A PRACTICAL GUIDE 18-19 (2017).

¹²⁹ JAMES CABLE, GUNBOAT DIPLOMACY: 1919-1991, at 33 (1994); Eduardo Cavalcanti de Mello Filho, *The Legal Regime of the Exclusive Economic Zone and Foreign Military Exercises or Maneuvers*, in 2 NUOVA ANTOLOGIA MILITARE 361, 381 (2021).

accepting the political demands of the United States Government.”¹³⁰ The ICJ simply stated that it “is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force.”¹³¹ While one can raise this precedent to claim that naval demonstrations, including in the EEZ, are lawful, the ICJ’s statement has an essential qualification: “in the circumstances in which they were held.” This means that under other circumstances, the findings could be different.

The *Corfu Channel Case* is probably more specific on said “circumstances.” In this case, the Court’s jurisdiction was tied to a special agreement, the second question of which was whether the United Kingdom had violated Albanian sovereignty.¹³² Consequently, the Court refused to rule on the violation of the prohibition of the use of force. It found that Operation Retail, the British minesweeping operation in the Albanian territorial sea, had violated the coastal state’s sovereignty.¹³³ Addressing the issue directly, Judge Philadelpho Azevedo, in his dissenting opinion, was explicit in referring to the British operation: “Apart from legitimate defence, a counter-stroke *confestim*, ‘hot pursuit’, or an emergency, nothing justifies the use of force, not even the pretext of reprisals.”¹³⁴ Furthermore, Judge Ečer, in his dissenting opinion, was even more categorical: “I think further that the Judgment should mention, amongst the arguments for its decision, the provisions of the United Nations Charter, in particular, Article 2, paragraph 4, and Article 42.”¹³⁵ These opinions do not diverge from the ruling’s final conclusion—that the United Kingdom violated Albanian sovereignty. They simply defend a less self-contained behavior for the Court, which could seem to fall outside the material scope of the special agreement.

Nevertheless, the Court did address the issue indirectly. The Albanian allegation that Operation Retail had “made use of an

¹³⁰ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 92 (June 27).

¹³¹ *Id.* ¶ 227.

¹³² Special Agreement concluded on March 25th, 1948, U.K.-Alb., Mar. 25, 1948, <https://www.icj-cij.org/public/files/case-related/1/1495.pdf> [<https://perma.cc/XNH8-FTZ6>].

¹³³ *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 36 (Apr. 9).

¹³⁴ *Id.* at 108 (Azevedo, J., dissenting).

¹³⁵ *Id.* at 130 (Ečer, J., dissenting).

unnecessarily large display of force, out of proportion to the requirements of the sweep” provoked the ICJ’s concluding legal analysis.¹³⁶ The Court understood that the removal of mines carried out by the United Kingdom in the Albanian territorial sea was not “a demonstration of force for the purpose of exercising political pressure on Albania.”¹³⁷ Instead, the Court deemed it understandable, given that British ships had been previously the object of severe outrages in that region.¹³⁸ Considering this passage and the “uncontained” opinions, it seems that the ICJ would consider FONOPs an illegal threat of the use of force against the political independence of the coastal state since they usually are “a demonstration of force for the purpose of exercising political pressure.” Exercising its freedom of navigation to employ political pressure would also be an abuse of rights, the prohibition of which can be derived from the general principle of good faith.¹³⁹ Similarly, the ICJ emphatically held that:

[t]he Court can only regard the alleged right of intervention [UK’s act was still found to be in violation of Albanian sovereignty] as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses [. . .] Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.¹⁴⁰

Against this background, it would seem that a reasonable balance for a legal attempt to justify FONOPs or similar activities would be that these operations consist of assertions of existing rights, and not of political pressure or dissuasion for other states to abandon their “excessive maritime claims.” Nonetheless, it is unclear whether FONOPs can be dissociated from political contentions.

¹³⁶ *Id.* at 35 (majority opinion).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ LOSC, *supra* note 1, art. 300.

¹⁴⁰ U.K v. Alb., 1949 I.C.J. at 35.

c. The Obligation to Peacefully Settle Disputes Concerning MEMs in the EEZ

Frequently, naval demonstrations presuppose a dispute.¹⁴¹ In such situations, the obligation to peacefully settle a dispute is already engaged, and the naval demonstration might represent an aggravation of the dispute in violation of that obligation.¹⁴² However, a naval demonstration might as well be a projection of force or a response to a prior act by another state.¹⁴³ That is, there might not be an underlying dispute. Considering naval demonstrations without an underlying dispute and MEMs in general, contextualization of the EEZ regime is necessary to analyze the obligation to settle disputes peacefully.

If one assumes that third states have the freedom to conduct military activities in a foreign EEZ, they should exercise this freedom with due regard to the rights and duties of the coastal state¹⁴⁴ and respect the laws and regulations adopted by the coastal state under LOSC and other compatible rules of international law.¹⁴⁵ The due regard obligation is an obligation of procedure, that is, it stipulates how substantial freedom is to be exercised. It traditionally

¹⁴¹ This is clear, for instance, in MEMs taking place in disputed maritime areas, where a particular state has an “excessive maritime claim” that is opposed by the United States.

¹⁴² “States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the Situation so as to endanger the maintenance of international peace and security.” G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970).

¹⁴³ Stephens & Skousgaard, *supra* note 19, ¶ 10.

¹⁴⁴ The due regard obligation in the EEZ could not exist before the existence of the EEZ itself. However, the due regard obligation, as contained in Articles 56, 58, and 87 (the latter applicable on the high seas), is a development made on the former “reasonable regard obligation,” which already existed in the 1958 Geneva Conventions. The International Court of Justice applied this concept to the preferential rights of Iceland to fisheries. As such, this concept can be seen as a precursor of the due regard obligation as contained in the 1982 Convention. However, as relevant to this Article, the content of the due regard obligation has been further substantially developed in only one case: the *Chagos Arbitration*, which is analyzed below. Notably, ITLOS addressed the due regard obligations under Articles 56 and 58, but only superficially. Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, ¶¶ 54, 78 (July 25); The M/V “Virginia G” (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014, 18 ITLOS Rep. 4, ¶ 347; Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, 19 ITLOS 4, ¶ 216; The M/T “San Padre Pio” (Switz. v. Nigeria), Case No. 27, Order of July 6, 2019, 23 ITLOS 375, ¶¶ 109-10.

¹⁴⁵ LOSC, *supra* note 1, art. 58(3).

means awareness of the rights and duties of other states, considering them and weighing them against one's own rights and duties.¹⁴⁶ It is also contended that the weighing should not be made just by the third state. If this were the case, the consequence would be absurd, given that the only remaining possibility for the coastal state would be to seek remedy for the violation in case the due regard obligation had not been followed. In the end, the result would be equivalent to the nonexistence of a due regard obligation.¹⁴⁷

According to the Chagos Arbitral Tribunal, in the performance of the due regard obligation, the assessment of the importance of the relevant states' rights in most cases "will necessarily involve at least some consultation with the rights-holding States."¹⁴⁸ Of course, it would not be feasible to consult the coastal state for every single maritime activity. In that connection, Prezas divides military activities into two groups: those of a more intellectual dimension and those of a more material dimension.¹⁴⁹ Among the first group would be reconnaissance operations, military surveys, and information-gathering activities. The second group would include MEMs. It does not seem reasonable to require consultation regarding intelligence-focused military activities, as it would hardly affect coastal states' rights and jurisdiction.¹⁵⁰ As to material military activities, the likelihood of jeopardizing the exercise of rights or

¹⁴⁶ Ioannis Prezas, *Foreign Military Activities in the Exclusive Economic Zone: Remarks on the Applicability and Scope of the Reciprocal 'Due Regard' Duties of Coastal and Third States*, 34 INT'L J. MARINE & COASTAL L. 96, 99 (2019).

¹⁴⁷ See *id.* at 106 (explaining that a third state should not in principle engage unilaterally in the "balancing exercise" because the procedural component of the 'due regard' duty would otherwise be violated).

¹⁴⁸ Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award, PCA Case No. 2011-03, ¶ 519 (Perm. Ct. of Arb. 2011), <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf> [<https://perma.cc/2CEH-GCBB>] ("In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State."); see TANAKA, *supra* note 70, at 472 ("It can reasonably be presumed that the coastal State is normally in the best position to specify areas of the EEZ which require particular caution. Hence it will be desirable that a State intending to carry out military exercises should consult with the coastal State.").

¹⁴⁹ See Prezas, *supra* note 146, at 109.

¹⁵⁰ The controversy surrounding intellectual military activities generally concerns the definition of MSR. For instance, China considers military survey a kind of MSR and, thus, under its jurisdiction in the EEZ. See Pedrozo, *supra* note 74, at 20. Through a compelling contextual interpretation, naval powers find that military surveys do not fall within the coastal State's jurisdiction in the EEZ—in some provisions, such as Article 19 of LOSC, survey and research are considered different species. As such, it is not of direct concern to this Article, which focuses on the prohibition of the use of force. See Pedrozo, *supra* note 74, at 22-23.

jurisdiction by the coastal state is much higher.¹⁵¹ Authors have suggested that any presumption favors the need for notification and negotiation in good faith if weapons or explosives are used.¹⁵²

Given the above, consultations should precede material military activities, particularly MEMs. If the due regard obligation is not followed in this fashion, conducting material military activities may well be considered hostile¹⁵³ –especially in a situation of high political tension. If consultation happens and the coastal state consents to the intended activity, there is no illegality. However, following consultation, if the coastal state objects to the material military activity based on its sovereign rights and jurisdiction, and the third state decides to ignore this objection, such a decision would likely display a hostile intent towards the coastal state. Beyond the possibility of representing a threat to the territorial integrity of the coastal state, such an action would be inconsistent with the principles of international law embodied in the U.N. Charter.¹⁵⁴ These include maintaining peace and international security in Article 1 and the obligation to seek peaceful means of dispute settlement under Article 2(3). Indeed, in the *Guyana v. Suriname* arbitration, the Tribunal held that “a claim relating to the threat or use of force arising from a dispute under the Convention does not, by virtue of Article 2(3) of the UN Charter, have to be ‘against the territorial integrity or political independence’ of a State to constitute a compensable violation.”¹⁵⁵ Facing a similar issue, the Eritrea-Ethiopia Claims Commission understood that:

if the law were to recognise a State’s ability to use force [military exercise] in a contested area peacefully administered by another State based solely on the first State’s claim of sovereignty the international prohibition on the use of force would be significantly weakened.¹⁵⁶

¹⁵¹ See Prezas, *supra* note 146, at 106 (explaining that non consultation would likely result in a breach of the due regard obligation).

¹⁵² See e.g., Beckman & Davenport, *supra* note 76, at 47.

¹⁵³ Boczek, *supra* note 7, at 379.

¹⁵⁴ See *supra* note 11 and accompanying text.

¹⁵⁵ *Guyana v. Suriname*, 30 R.I.A.A. 1, 118-19 (Perm. Ct. Arb. 2007).

¹⁵⁶ Sean Murphy, *Obligations of States in Disputed Areas of the Continental Shelf*, in *NEW KNOWLEDGE AND CHANGING CIRCUMSTANCES IN THE LAW OF THE SEA* 183, 204 (2020); *Jus Ad Bellum - Ethiopia’s Claims 1-8* (Eri. v. Eth.), 26 R.I.A.A. 457, 463 (Eri.-Eth. Claims Comm’n 2005) (“The Commission cannot accept the legal position that seems to underlie the first of these Eritrean contentions – that recourse to force by Eritrea would have been lawful because some of the territory concerned was

Adopting similar reasoning, Kohen underscores that the prohibition of the use of force protects the attacked state's territorial integrity and its peaceful possession, mainly because of the need to seek the peaceful settlement of disputes. The perfect example is the Argentinian violation of the prohibition of the use of force against British peaceful possession over the Falklands/Malvinas Islands, despite Argentina's claims of sovereignty over the Islands. Responding to Argentina's acts, the U.N. Security Council Resolution 502 (1982) ordered the retreat of Argentinian forces. According to the British representative, who had proposed the Resolution, its purpose was not to decide who had sovereignty over the Islands but to condemn the Argentinian resort to force.¹⁵⁷ The British perspective is in line with Judge Krylov's dissenting opinion in the *Corfu Channel* case:

[f]aced with the decision of Albania to make the passage of warships conditional on a prior authorization, the United Kingdom, instead of utilizing one of the peaceful methods enumerated in Article 33 of the United Nations Charter in order to settle the dispute which had arisen between her and Albania, ordered four warships to make a passage through the Strait.¹⁵⁸

Besides the due regard obligation, Article 58(3) also contains a substantive obligation to "comply with the laws and regulations of the coastal State" if they are compatible with the LOSC and other rules of international law. As such, any domestic regulation which requires consent for military activities affecting the sovereign rights

territory to which Eritrea had a valid claim. It is true that the boundary between Eritrea and Ethiopia in the area of Badme was never marked in the years when Eritrea was an Italian colony, during Eritrea's subsequent incorporation into Ethiopia, or after Eritrean independence in 1993, and it is clear that the Parties had differing conceptions of the boundary's location. However, the practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes. In that connection, the Commission notes that border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for a territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.").

¹⁵⁷ MARCELO KOHEN, *POSSESSION CONTESTÉE ET SOUVERAINETÉ TERRITORIALE* 352-53 (1997). Other examples are India's invasion of Goa in 1961, which was under the possession of Portugal, and Iraq's invasion and occupation of Kuwait in 1990. Both "received widespread condemnation." CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW* 21 (2018).

¹⁵⁸ *Corfu Channel Case (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 108 (Apr. 9) (Krylov, J., dissenting).

or jurisdiction of the coastal state must be complied with by third states because it is internationally lawful.¹⁵⁹ The same is true for a regulation that requires consent for military activities in general, provided that the consent will be given if the intended activity does not affect the coastal state's sovereign rights or jurisdiction. Following the same line of reasoning, conducting material military activities breaching such a lawful regulation can be considered hostile, just like an unauthorized military territorial incursion.¹⁶⁰ A dispute may arise as to the lawfulness of the denial of consent if, for instance, the intended activity does not in fact affect the coastal state's rights or jurisdiction. Still, in such a situation, the third state has an obligation to settle it through peaceful means, i.e., it should not unilaterally assess the illegality of the denial and conduct military exercises over the coastal state's objection.

Lastly, according to Article 51 of the U.N. Charter, unilateral use of force is only legal as an exercise of self-defense from an armed attack. An excessive maritime claim or an illegal denial of consent is not an armed attack and, therefore, the right of self-defense is not triggered. Also, an excessive maritime claim does not preclude the wrongfulness of a naval operation to exercise political pressure over the coastal state. Faced with a denial of consent based on the rights and jurisdiction of the coastal state, the third state should seek peaceful means of resolving the dispute. It is doubtful that such a dispute would ever be taken to an international tribunal.¹⁶¹ However, if the third state seeks in good faith to peacefully settle the dispute and the coastal state does not solidly justify its denial, then the third state has complied with Article 2(3) and does not have reasons to believe that its actions will infringe the territorial integrity of the coastal state or be incompatible with the principles of international law embodied in the U.N. Charter.

¹⁵⁹ See Prezas, *supra* note 146, at 111-12.

¹⁶⁰ Ruys, *supra* note 108, at 174-76.

¹⁶¹ The United States, not a party to the LOSC, is not bound by Part XV's compulsory dispute settlement. Other naval powers have opted out of it through the military activities exception. China, Russia, France, the United Kingdom, and South Korea are prominent examples. Lori Fisler Damrosch, *Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS*, 110 AM. J. INT'L L. 273, 274 (2016).

VI. CONCLUSION

This Article asked whether the PPR restricts third states' abilities to conduct MEMs in the EEZ in any capacity. To answer this question, this Article offers a general perspective on PPRs in the LOSC. This was necessary for two interconnected reasons. First, analyzing PPRs throughout the whole Convention presents a more comprehensive outlook of the peaceful purposes reservations. Second, such an outlook is relevant because the interpretation of Article 88 as applied to the EEZ is considerably based on a contextual interpretation that necessarily considers other provisions.

We conclude that Article 301 guides the interpretation of PPRs, thus prohibiting the use of force. Apart from a contextual interpretation, having seen that "peaceful uses" (Article 301) and "peaceful purposes" mean essentially the same, we have shown that in analyzing the specific context of each PPR provision in the LOSC, the narrow interpretation still prevails. Furthermore, the subsequent practice of states – especially regarding the EEZ – is not enough yet to lead to a different understanding.

However, defending that "peaceful purposes" has a single meaning in the Convention, following Article 301, does not mean that its application is the same in every maritime space. The application of the prohibition of the use of force is different on the high seas compared to its application in a territory under state sovereignty. Likewise, the EEZ has a unique legal regime that should be considered in applying Article 301. As demonstrated, the coastal state's rights in the EEZ should be regarded as within its territorial integrity and, therefore, protected by the prohibition of the use of force. Also, the EEZ's regime does not admit that a third state unilaterally decides whether its intended act affects the coastal state's rights or jurisdiction. If one agrees that all states have the freedom to conduct military activities in the EEZ, as per Article 58(1), one must concede that it should be exercised with due regard to the rights and duties of the coastal state and respect its internationally lawful regulations.

As part of the due regard obligation, the exercise of some military activities, particularly those of a more material dimension, require prior consultation of the coastal state since it is more likely to affect its legal interests in the EEZ. The coastal state's objection grounded on its rights may create a dispute between both states.

Carrying out MEMs without prior consultation or despite an objection of the coastal state can be seen as a hostile act. It breaches the obligation to seek to resolve disputes peacefully and, possibly, the obligation to respect the coastal state's territorial integrity. Both principles are protected by the prohibition of using force, which is considered to have been violated in this case. If the third state conducts MEMs to exercise political pressure on the coastal state, then the threat is unlawful, i.e., there is no need to evaluate whether it affects the coastal state's rights. Considering the EEZ's legal regime, Article 301 privileges a procedure that should protect the coastal state against third states' arbitrariness. Finally, one must keep in mind that the analysis conveyed here presupposes that the third state has the freedom to conduct military activities in a foreign EEZ. A preliminary debate consists of ascertaining whether the third state has such freedom or whether the coastal state can regulate foreign military activities. In fact, the view proposed here assumes the worst-case scenario for coastal states.