



UIT

THE ARCTIC
UNIVERSITY
OF NORWAY

Faculty of Law

Threat or Use of Force at Sea

Assessing the Adequacy of the Convention on the Law of the Sea

—
Sarah Goyette

Master thesis in Law of the Sea ... August 2014



TABLE OF CONTENTS

ABBREVIATIONS	
1 Chapter I – Introduction	
1.1 Introduction.....	
1.2 Legal Sources.....	
1.3 Method.....	
2 Chapter II – Protection provided under Article 301	
2.1 Introduction.....	
2.2 Method.....	
2.3 A primary interpretation of Article 1.....	
2.4 The ordinary meaning of Article 301: the context, object and purpose.....	
2.5 Article 301 in a broader context – Relevant rules of international law, special meaning of terms and supplementary means of interpretation.....	
2.5.1 Introduction.....	
2.5.2 Method.....	
2.5.3 Relevance of the Charter of the United Nations.....	
2.5.4 Relevant rules of international law: Article 2(4).....	
2.5.4.1 Special meaning – Literature on Article 2(4).....	
2.5.5 Relevant Rules of International Law – Article 51.....	
2.5.5.1 Special meaning – Literature on Article 51.....	
2.6 Conclusion	
3 Chapter III – LOSC regimes and the ‘threat or use of force’	
3.1 Introduction.....	
3.2 Method.....	
3.3 Regime of innocent passage.....	
3.4 Regime of transit passage.....	
3.5 Regime of archipelagic sea lanes passage.....	
3.6 Conclusion.....	
4 Chapter IV – Discussion	
5 Chapter V – Conclusion	
Bibliography	

ABBREVIATIONS

Article 301	Article 301 of the United Nations Convention on the Law of the Sea
Article 2(4)	Article 2(4) of the Charter of the United Nations
Article 51	Article 51 of the Charter of the United Nations
Friendly Relations Declaration	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations
GA	United Nations General Assembly
ICJ/the Court	International Court of Justice
LOSC	United Nations Convention on the Law of the Sea
SC	United Nations Security Council
UN	United Nations
UN Charter	Charter of the United Nations
Vienna Convention	1969 Vienna Convention on the Law of Treaties

1 Chapter I – Introduction

1.1 Introduction

The 1982 United Nations Convention on the Law of the Sea (LOSC) puts forward the peaceful uses of the seas and oceans in its preamble. In Article 301 which titles *Peaceful uses of the seas*, it codifies what are not peaceful uses of the seas, prohibiting the ‘threat and use of force’ against territorial integrity and political independence. The issue about peaceful uses of the seas seems today not to be that much discussed. Articles were found on the subject, however, they date back in the 1980’s some years after the Law of the Sea Convention was concluded. Moreover, the few articles on the subject such as ‘The Principle of Peaceful Uses in the Law of the Sea and Space Law’¹, and ‘Peaceful Uses of the Seas: Principles and Complexities’², both from 1988, ask more questions than they give answers. On, the interpretation of Article 301, not much has been said. Can we say more today? What about the ‘peaceful uses of the seas’ idea? What does it entail?

Article 301 is not the only provision using the idea of ‘threat or use of force’. Indeed this expression appears in two navigational regimes: the innocent passage and the transit passage. By prohibiting the ‘threat or use of force’, the three articles constitute some kind of protection against it. However, what type and what level of protection do they provide to States facing situations of ‘threat or use of force’ against their territorial integrity or political independence? Is it different for each provision? Is it sufficient?

The general issue here is whether the LOSC is adequate and sufficient to protect a State against a ‘threat or use of force’ at sea. To shed more light on this issue, the relevant provisions will be addressed. That way, it will be possible to understand their scope, differences and limits.

The analysis will start with the interpretation of Article 301. In the next section will be addressed the navigational regimes under the LOSC that is the innocent passage, the transit passage and the regime of archipelagic sea lanes passage. Then, will follow a discussion on the limits of protection provided under these regimes and Article 301.

¹ R. V. Dekanozov, "The Principle of Peaceful Use in the Law of the Sea and Space Law," *Marine Policy* 12, no. 3 (1988).

² V. F. Tsarev, "Peaceful Uses of the Seas: Principles and Complexities," *Marine Policy* 12, no. 2 (1988).

1.2 Legal Sources

The basic and most relevant sources used will be the 1982 Law of the Sea Convention, the 1945 Charter of the United Nations, and the 1969 Vienna Convention on the Law of Treaties. Another relevant treaty will be referred to that is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations and references will be made to resolutions from the Security Council. The Commentaries on the Law of the Sea Convention and on the Charter of the United Nations will be used. Case Law, relevant books on the Law of the Sea and International Public Law, and Articles from scholars will also be employed.

1.3 Method

To understand the meaning and scope of the relevant provisions, they will be interpreted, using the principles of interpretation of treaties under Articles 31 to 33 of the Vienna Convention. The first step will be the interpretation of Article 301. This process will go through many steps, starting with a primary interpretation, followed by the assessment of the ordinary meaning of terms through the context, object and purpose. Then, the specific meaning of the terms contained in Article 301 will be evaluated to gain a better precision on the scope of the Article.

Afterwards, the navigational regimes will be addressed. Since they contain the same prohibition of 'threat or use of force' as under Article 301, the idea will be to determine what supplementary protection they can offer to a State facing a 'threat'.

2 Chapter II – Protection provided under Article 301

2.1 Introduction

Article 301 of the LOSC is the core element of this analysis. This Article states:

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.

To determine what permits this Article, that is the protection it provides and its limits, a better understanding of what this Article implies is necessary. To understand its meaning, it must be interpreted.

The rules of interpretation of treaties are set out in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention). In Section 3, titled Interpretation of Treaties, and consisting of Articles 31 to 33, are established these rules that are to be applied in the process of interpretation. However, all the rules are not necessarily relevant in interpreting Article 301. Here are the ones, in their order of appearance, that give guidance to go through the interpretation process in the present case.

“A treaty shall be interpreted ... 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.”³

“The context ... shall comprise ... the text, including its preamble and annexes...”⁴

“There shall be taken into account, together with the context ... [of] [a]ny relevant rules of international law applicable in the relations between the parties.”⁵

“A special meaning shall be given to a term if it is established that the parties so intended.”⁶

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion...”⁷

2.2 Method

In accordance with these international rules of interpretations, Article 301 will be addressed taking into consideration the ‘context’ of the LOSC and the ‘object’ and ‘purpose’ of the treaty. Further, the relevant rules of international law in conjunction with the ‘special meaning of terms’ ‘supplementary means of interpretation’ will be used to

³ Vienna Convention, Article 31(1).

⁴ Vienna Convention, Article 31(2).

⁵ Vienna Convention, Article 31(3)(c).

⁶ Vienna Convention, Article 31(4).

⁷ Vienna Convention, Article 32.

assess the meaning of Article 301. However, the interpretation process will begin with the assessment of a personal primary meaning of Article 301.

2.3 A *primary* interpretation of Article 301

This first or pre- step of interpretation is intended to give a primary sense to the wording of Article 301. The general meaning of Article 301 will be done by dividing the text of the provision in different parts that will be evaluated using common words.

Article 301 begins with: “In exercising their rights and performing their duties under this Convention”. The rights and duties referred to here can be understood as constituting ‘benefits’ and ‘obligations’ contained in the LOSC. They will be addresses in a more detailed manner in the next chapter where the maritime zones regimes under the LOSC will be discussed.

The next phrasing of Article 301 is: “States Parties shall refrain from any threat or use of force”. In using the expression ‘Sates Parties’, one understands that Article 301 is aimed at the ‘countries’ that ratified the LOSC. It is followed by “shall refrain from” which means that those countries should avoid or abstain doing something. The term ‘any’, in connection with the previous “shall refrain from”, can be understood as meaning ‘none’ of the following. In the expression ‘threat or use of force’, the term ‘force’ can be assumed as generally mean coercion and representing aggressiveness or even violence. The term ‘threat’ may be seen as generally meaning a menace, or imminent danger. Thus, the ‘threat or use of force’ may be assumed to represent the possibility or actual use of aggressive or violent actions. Thus, the main idea is that nothing entering in this category of actions should be done. The more general idea of the phrasing “States Parties shall refrain from any threat or use of force” can thus be seen as meaning that countries that ratified the LOSC should abstain to engage in possible or actual aggressive or violent actions.

In the following phrasing, “against the territorial integrity or political independence of any State”, the term ‘against’ can be understood as meaning ‘in opposition with’, ‘contrary to’ or ‘in violation of’. The following expressions ‘territorial integrity’ and ‘political independence’, without searching, for now, to understand their actual meaning, can be assumed to generally representing bigger concepts than the common meaning of the words composing them. They cannot be replaced by synonyms. However, in association with “of...State”, they can be assumed to represent notions associated to the concept of ‘country’ that is a functional unit or structure. As such, they can be assumed to relate to the

‘state’ or ‘specific conditions’ of this structure. The term ‘any’ in the expression ‘of any State’ would mean here ‘none’ of the countries. In sum, the expression “against the territorial integrity or political independence of any State” can be assumed to mean: in violation of specific states of a country’s structure of none of the countries.

The last part of the wording of Article 301 is: “or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations”. Here, the term ‘or’ links the previous “shall refrain from any threat or use of force” to “in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations”. This could be seen as the third element against which countries that are bound by the Convention shall abstain to possibly or actually engage in aggressive or violent actions. The use of the term ‘any’ in “any other manner”, can be seen here as meaning ‘all other possible ways’. The next expression, “inconsistent with”, may be seen as meaning ‘incompatible with’ or ‘contrary to’. In the following “principles of international law embodied in the Charter of the United Nations”, the term ‘embodied’ can be replaced by ‘included in’. The other words here are clear in their primary sense. However, these ‘principles of international law’ constitute elements of a certain category of law. They need to be pointed out, but will be given more attention in the following sections. The phrasing “or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations” can thus be seen as meaning: none of all the possible ways contrary to elements of a certain category of law included in the Charter of the United Nations.

In using the common meaning of words, Article 301 could be read as: countries that ratified the LOSC should abstain to engage in possible or actual aggressive or violent actions in violation of specific states of a countries’ structure of none of the countries or abstain to engage in none of all the possible ways contrary the elements of a certain category of law included in the Charter of the United Nations.

Concerning its heading, Article 301 titles ‘Peaceful uses of the seas’, its primary meaning is quite obvious. In fact, ‘peaceful’ is related to the absence of violence and the idea of respect could be replaced by the terms ‘pacific’ or ‘non-violent and respectful’. The term ‘uses’ may be replaced with usage or utilization. However, to be more precise, the use or utilization of something describes the action of doing something with a specific thing and in a particular goal which may be regarded as an activity. As a whole, ‘Peaceful uses of the seas’ means: activities taking place in the seas conducted in a non-violent and respectful manner.

In generalizing the wording of Article 301 using common vocabulary, it gives a global sense to it but removes its precision and thus does not give more insight on its scope. However, this work helps to categorize and identify what needs to be more investigated.

The larger concepts included in Article 301 because they cannot be understood primarily are causing some questioning about their actual meaning. Indeed, how to identify the unambiguous and precise meaning of expressions such as: “threat or use of force”, “territorial integrity”, “political independence”, and “any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations”? As Linderfalk writes it when talking about what he calls “this (very first) introductory act of interpretation” using conventional language, “[w]here the ordinary meaning of a treaty provision is vague, using the context will make the text more precise” and “[w]here the ordinary meaning is ambiguous, using the context will help to determine which one of several possible meanings is correct, and which one is not”⁸. Thus, to have a more precise understanding of Article 301, one must replace it in its “context”.

2.4 The ordinary meaning of Article 301: the context, object and purpose

“A treaty shall be interpreted ... 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.”⁹

The concept of ‘ordinary meaning’ is not defined in the Vienna Convention and does not have a unique definition. However, the purpose of the doctrine can help to seize the concept. In fact, the idea of this doctrine is that “texts should be understood by different people in the same way” that is “legal texts should be understandable to the general public, as well as to judges and sophisticated practitioners”¹⁰. It follows that the ordinary meaning of a term can be understood as its general or common meaning as it has been done above. However, here this ordinary meaning must be determined through the context, object and purpose of the treaty.

⁸ Ulf Linderfalk, "On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties," ed. SpringerLink (Dordrecht: Springer Netherlands, 2007).

⁹ Vienna Convention, Article 31(1).

¹⁰ Brian G. Slocum, "The Ordinary Meaning of Rules," *In Problems of Normativity, Rules and Rule-Following. Book to be released.* vol. 111(2014).
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435462 (accessed 21 August 2014).

As described in Article 31(2) of the Vienna Convention, the context of a treaty comprises its text which includes its preamble and annexes. That way, one may consider the place occupied by the article in the text, but also the concepts and expressions it includes and that can be found elsewhere in the text of the treaty. Also, in addition to the context, Article 31(1) states that the interpretation must also be done “in the light of its object and purpose”. In its ordinary meaning, the object of a treaty can be assumed to refer to the ‘thing’ in question or what the treaty is about and the purpose may be seen as the reason or objective of the treaty. Here will be added the ‘subject’ of the treaty which is a concept that comes between the object and purpose and can be understood as the concern of the treaty. Since the object, subject, and purpose of a treaty are present in its text, these will be addressed together with the context.

The object, subject, and purpose of the LOSC are presented in its Preamble. The object around which the Convention is centred is the law of the sea. The subject is well established in the Preamble: the codification of the law of the sea by addressing as a whole “all issues relating to [it]” since these problems are closely interrelated.¹¹ The purpose of the LOSC is the “desire to settle” those issues and “[contribute] to the maintenance of peace, justice and progress for all peoples of the world” or said differently to “[strengthen] ... security, cooperation, and friendly relations among all nations”¹².

As seen above, the text describing Article 301 expresses that countries bounded by the Convention shall abstain from engaging in some types of violent actions against other countries. Put in relation with its heading, non-violent and respectful activities conducted in the seas, and recalling the use of a negative verb ‘abstain from’, Article 301 could be understood as codifying what are not peaceful uses of the seas. What one could call ‘non-peaceful uses of the seas’ can be defined as “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.” There is only a second occurrence of the principle of ‘peaceful uses’ in the Convention. In the Preamble is stated the “desirability of establishing through this Convention... a legal order for the seas and oceans which [among others] will promote the *peaceful uses of the seas* and oceans”¹³. It can be assumed that the ‘peaceful uses of the seas’ is one of the goals of the Convention.

¹¹ LOSC, Preamble, paras. 2, 4, 5, and 8.

¹² LOSC, Preamble, para. 2 and 8.

¹³ LOSC, Preamble, para. 5.

The LOSC also refers to 'peaceful purposes' of the seas in its sections describing the regime of the high seas, Article 88: "[t]he high seas shall be reserved for peaceful purposes", and the regime of the Area, Article 141: "[t]he Area shall be open to use exclusively for peaceful purposes". The expressions 'reserved for' and 'use exclusively for', describing the 'peaceful purposes', may be primarily understood as meaning, in order, 'restricted to' or 'limited to' and 'utilization only for' or 'solely for'. Both express the idea of 'for nothing but' what follows. To assess the primary meaning of "shall be" it must be considered that those two maritime zones are opened to all States, one under the principle of the freedom of the high seas (Article 87) and the other one under the common heritage of mankind (Article 136). Keeping in mind this idea, the expression 'shall be' should be seen here as expressing an aspiration for these zones to stay peaceful since they are not under any State jurisdiction and thus remain subject to the good faith of States for the application of the rules governing them under the LOSC. The ordinary meaning of the expression 'peaceful purposes' could be seen as non-violent goals, aims or objectives. However, put in connection with 'shall be', 'peaceful purposes' could be seen as expressing more specifically the idea of an intention, finality or ends. In this regard, Articles 88 and 141 may be seen as meaning that the high seas and the Area 'are meant to be used for nothing but non-violent and respectful ends'. Thus, in comparison to the ordinary meaning of 'peaceful uses', non-violent and respectful activities, 'peaceful purpose', non-violent and respectful ends, is of a less practical character and more the expression of a global character that should define the high seas and Area. However, in a general way, they express pretty much the same thing.

As discussed earlier, the description under Article 301 is codifying the prohibition of the 'threat or use of force' at sea and may be understood as the opposite idea expressed in its heading which titles 'Peaceful uses of the seas'. As this last principle constitutes one of the goals of the LOSC, the threat or use of force at sea may thus be assumed to be an issue the Convention is meant to settle. The expression 'threat or use of force' is also related to three of the regimes set out in the Convention. More specifically, it is codified in the provisions relating to the innocent passage in the territorial sea (LOSC A19(2)(a)) and in the transit passage regime in straits used for international navigation (LOSC A39(1)(b)). Also, Article 54 associated to the regime of archipelagic sea lanes passage states that Article 39 applies to that regime. The wording between these provisions is quite similar. However, in comparison with Article 301, there is an important difference. Indeed, in addition to the prohibition of the threat or use of force against the 'territorial integrity' and

‘political independence’, Articles 19(2)(a) and 39(1)(b) also prohibits the threat or use of force against the ‘sovereignty’. These principles do not appear elsewhere than in these three provisions. As a general provision, Article 301 applies to all the regimes set out in the Convention, and it could be said that it applies particularly to those that do not include a specific prohibition of the threat or use of force. Adding to that remark, we observe that the maritime zones containing a specific provision relating to the prohibition of threat or use of force, that is the territorial sea, archipelagic waters, and straits used for international navigation, are those under which States enjoy or may enjoy sovereignty. That way, Article 301 would thus particularly apply to the other maritime zones where the jurisdiction of the State is restricted or where the freedom of the seas applies. That way, it would have been irrelevant or even a mistake to include the principle of ‘sovereignty’ in Article 301. However, Article 301, as the two others, contains a third element against which the threat or use of force may not be directed: ‘in any other manner inconsistent with the principles of international law’. This would thus replace the principle of sovereignty.

On the ordinary meaning in light of the purposes and object of the treaty, the expressions ‘territorial integrity’, ‘political independence’ and ‘in any other manner inconsistent with the principles of international law’, not much more can be said. Indeed, as seen above, they seem to be elements against which State shall not engage in the ‘threat or use of force’.

2.5 Article 301 in a broader context – Relevant rules of international law, special meaning of terms and supplementary means of interpretation

2.5.1 Introduction

Since the previous steps did not give that much insight on the scope of the Article 301, other rules of interpretation will be used.

Under the expression ‘Article 301 in a broader context’, the author refers to two other principles of interpretation set out in the Vienna Convention, that is the relevant rules of international law, Article 31(3)(c), the special meaning of terms, Article 31(4), and the supplementary means of interpretation, Article 32, which, in order, can be read as follows:

“There shall be taken into account, together with the context... any relevant rules of international law applicable in the relations between the parties.”¹⁴

“A special meaning shall be given to a term if it is established that the parties so intended.”¹⁵

¹⁴ Vienna Convention, Article 3(c).

¹⁵ Vienna Convention, Article 31(4).

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.”¹⁶

These techniques will be addressed at the same time because it may be difficult to discuss them separately. In fact, in the present context, the special meaning of terms will be discussed through these principles of international law by using supplementary means of interpretation.

2.5.2 Method

In order to apply these techniques of interpretation, one has to understand their wording. The ordinary meaning of Article 31(3)(c) is quite obvious, it refers to those rules that apply between the countries that are members of the treaty interpreted. Here, the relevant rules of international law are set out in the UN Charter as we will see later.

Article 31(4) seems also clear, but in order to gain a better understanding, its French version¹⁷ was consulted. This other interpretation technique refers to Article 33 of the Vienna Convention. In its third paragraph, Article 33 states: “The terms of the treaty are presumed to have the same meaning in each authentic text” and as the French version is considered “equally authentic”¹⁸ to the English one, one may refer to it. The precision gained this way refers to the expression “A special meaning shall be given to a term” of Article 31(4). In referring to the French version, “[u]n terme sera entendu dans un sens particulier”, this part of Article 31(4) may be literally translated into: ‘a term will be understood in a special meaning’. The ordinary meaning of the last part of Article 31(4) “if it is established that the parties so intended” is quite clear. As a whole, Article 31(4) means that it must be demonstrated that the parties attributed a special meaning to a term for this term to correspond to that special meaning. However, the assessment of the special meaning of the terms included in Article 301 is not directly feasible. Indeed, the LOSC does not contain any definition of these and the documents that could constitute supplementary means of interpretation¹⁹ such as the conferences records and the

¹⁶ Vienna Convention, Article 32.

¹⁷ Vienna Convention, Article 31(4) in its French version: "Un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties." The writer of this paper native language is French.

¹⁸ Vienna Convention, Article 85.

¹⁹ This technique refers to Article 32 - Supplementary means of interpretation of the Vienna Convention.

commentaries are limited in such a way that “there is no interpretation of the article on the record”²⁰ and there are few commentaries on Article 301. Thus, we will see that giving the fact that the LOSC and Article 301 demonstrates a direct link to the UN Charter, and considering that the rules of international law relating to Article 301 are codified in the UN Charter, the special meaning of the terms included in Article 301 will be assessed through these relevant rules of international law.

Article 32 may not be as clear as the previous rules of interpretation. In fact, when reading it, one understands that it is non-exclusive since the term ‘including’, since it presupposes that the two elements that follows in the wording constitute examples of what a ‘supplementary mean of interpretation’ may be. The term ‘including’ can thus be read as ‘not limited to’. But, from the wording that follows “in order to confirm... or to determine...” and the link to Article 31, one clearly understands that the utility of supplementary means is to validate the interpretation developed using Article 31 or to clarify or replace the meaning found with Article 31 if it does not give any sense. About the term ‘circumstances’, one of the examples given in the article, it relates to the “*general conditions under which a treaty was concluded; the states-of-affairs by which the conclusion of a treaty was affected or influenced.*”²¹ In the present case, the supplementary means of interpretation will be used to interpret the rules of international law contained in the UN Charter. The sources will consist of the literature written about these.

The three techniques of interpretation will be used in connection.

2.5.3 Relevance of the Charter of the United Nations

To interpret the UN Charter, the same rules of interpretation apply. Let’s start with the interpretation of its context, and object and purposes and compare with Article 301 of the LOSC to establish their linkage.

Both documents are under the auspices of the United Nations, one from 1945 creating the Organization and establishing its rules, the UN Charter, and the other one concluded later, in 1982, by the same Organization.

In its Preamble, the LOSC refers directly to the UN Charter: “the codification and progressive development of the law of the sea achieved in this Convention will contribute

²⁰ University of Virginia Center for Oceans Law and Policy, "Article 301 - Peaceful Uses of the Seas (V)," in *UN Convention on the Law of the Sea Commentary 1982 Online* (Martinus Nijhoff Publishers, 2013), 154.

²¹ Linderfalk. The original text is in italic.

to [the purposes of the LOSC] ... in accordance with the Purposes and Principles of the United Nations as set forth in the Charter".²² When referring to the Principles of the UN, the LOSC refers to Article 2²³ of the Charter that establishes the rules of international law governing the Organization's action, but also to other rules of international law included in the text of the Charter. In addition to these rules of international law, the LOSC also applies the Organization's purposes. In fact, the principles of the UN Charter are directly linked to the purposes of the Organization as stated in Article 2: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles". As such, the LOSC would constitute a subsequent agreement to the UN Charter applying its provisions to a particular area which are the seas.

Article 301 also makes a direct reference to the UN Charter when it says: "or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations". Those principles that are relevant in the interpretation of Article 301 are the prohibition of the threat or use of force and the inherent right of self-defence of States, set out respectively in Article 2(4) and Article 51 of the Charter.

This direct reference to the UN Charter in Article 301 of the LOSC, the more general reference in its Preamble, and the fact that the Convention was concluded by the UN make the Charter relevant in the interpretation of Article 301.

In addition, it is recognized that Article 301 was "inspired by Article 2, paragraph 4 of the UN Charter",²⁴ which states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.²⁵

2.5.4 Relevant rules of international law: Article 2(4)

Article 2(4), commonly known as the principle of prohibition of the threat or use of force, has the status of rule of international law, but is also considered "to be part of customary

²² LOSC, Preamble, para. 8.

²³ LOSC, Article 2, is introduced by: "[t]he Organization and its Members ... shall act in accordance with the following Principles.", followed by seven paragraphs.

²⁴ Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)," *American Journal of International Law* 75, (1981): 237.

²⁵ "Charter of the United Nations," ed. United Nations (United Nations, 24 October 1945), Article 2(4).

international law”²⁶ and was recognised that way by the ICJ in the Nicaragua Judgement of June 27, 1986²⁷. Except for some wording differences, Article 301 of the LOSC is essentially reaffirming Article 2(4) for the sea areas. Thus it may be assumed that Article 301 of the LOSC also codifies that prohibition more specifically applied to the seas.

Article 2(4) is, as the other principles included in the UN Charter, linked to the purposes of the United Nations stated in Article 1 of which “to maintain international peace and security... [in taking, among others] measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace...”²⁸. One can make a parallel here to the purposes of the LOSC found in its preamble: “the maintenance of peace”, the “strengthening of peace, security” to which Article 301 as a description of one of the issue of the law of the sea and its prohibition is answering. As such, Article 301 also intended to maintain and strengthen international peace and security.

In their wording, Article 2(4) and Article 301 use a different expression to designate States that are bound by the principle. In using the expression ‘States Parties’, Article 301 refers to the States and entities²⁹ that signed and ratified or confirmed, or accessed the Convention as can be understood from its final provisions. It thus relates to the more general idea or ordinary meaning of ‘members’ of the Convention. The expression ‘[a]ll members’ in Article 2(4) relates to those States that follows the process of signature and ratification of the treaty, set out in Article 110. As stated in the Charter, the members are composed by the original members³⁰ and the States that will be admitted after the GA has decided to “upon the recommendation of the Security Council”³¹. The expressions ‘State Parties’ and ‘[a]ll members’ are thus referring to the same general idea of members of the treaties.

In using “inconsistent with the principles of international law embodied in the Charter of the United Nations” (Article 301) and “inconsistent with the Purposes of the United Nations” (Article 2(4)), both articles refer to the same thing: the principles of

²⁶ Albrecht Randelzhofer, "Article 2(4)," in *The Charter of the United Nations: A Commentary*, ed. Bruno Simma (New York: Oxford University Press, 1995), 133, para. 61. See fn. 176 of this page for references from authors sharing the same view.

²⁷ Ibid., 133, para 61. See ICJ report 1986...

²⁸ UN Charter, Article 1(1)

²⁹ The term entities is meant to represent the parties that are not States but are authorized to sign the LOSC, as state in Article 305.

³⁰ UN Charter, Article 3.

³¹ UN Charter, Article 4(2).

international law included in the Charter. In fact, as seen above, the purposes of the UN listed in Article 1 of the Charter are directly linked to the principles or rules of international law of Article 2. Thus, Article 2(4), one of these principles, in referring to the purposes in Article 1 also refers to all the other principles listed with it in Article 2, but also to other rules of international law included in the Charter such as the recognized inherent right of self-defence. In fact, Article 51, the inherent right of self-defence, part of Chapter VII, constitutes as the title of the section indicates, an ‘[a]ction with respect to threats to the peace, breaches of the peace and act of aggression’, thus one of the measures referred to in Article 1(1), the purposes of the UN to which Article 2(4) is linked. Thus, Article 301 becomes a mean to respond to the breach of the rule of international law of Article 2(4). In addition to Article 2(4), Article 301 also refers to all the principles of international law that can be found in the UN Charter, meaning not only those in Chapter I³².

The ordinary meaning of “in their international relations”, an additional element of Article 2(4) in comparison to Article 301, can be assumed to express that the principle of prohibition of threat or use of force concerns the conduct of States amongst themselves. It follows that the article does not apply to States internal affairs³³. Even though nothing in this matter is written in Article 301, it can be assumed to already being clearly stated within the phrasing “States Parties shall refrain from ... against ... any State”, which expresses States to States relations. Moreover, since Articles 2(4) and 301 are expressing the same rule of international law, we may assume that it is also only applicable to States relations within Article 301.

The differences in wording do not account for much between articles 301 and 2(4), as seen above, and the ordinary meaning of these expressions is clear. As such, both articles are meant to regulate the conduct of States amongst themselves in relation to the threat or use of force and refer to the principles of international law included in the Charter.

However, about their similarities, it is a different story. In fact, the ordinary meaning of such terms as ‘threat or use of force’, ‘territorial integrity’, and ‘political independence’, as seen earlier, is not sufficient to understand the scope of these concepts. Also, the UN Charter does not contain any description or definition of the terms employed in the principles of prohibition of the threat or use of force. Their object is different and

³² Center for Oceans Law and Policy, 154, para. 301.5.

³³ Randelzhofer, 121, para. 29.

knowing that the UN Charter's object is the UN Nations does not give any clue in interpreting Article 301.

Thus, to further the process, the special meaning of these terms will now be discussed by using subsequent agreement and the literature associated with Article 2(4) such as commentaries. That would account for the use of both the rules of interpretation of Article 31(4), special meaning, and Article 32, the supplementary means of interpretation, of the Vienna Convention applied to the UN Charter.

2.5.4.1 Special meaning – Literature on Article 2(4)

The core element of Article 301 is this concept of 'force' to which are related two different concepts: the threat of force and the use of force. In the literature written about Article 2(4), the concept of 'force' is, in the general view, "limited to armed forces"³⁴, the term 'armed forces' being employed in the preamble of the UN Charter, paragraph 7, and Articles 41, 43, 44, 46 and 47 of Chapter VII – Action with respect to the threats to the peace, breaches of the peace, and acts of aggression. The reading of these five articles makes it clear that the use of armed forces constitutes one of the measures to be employed against the breach of the prohibition of the threat or use of force. More interestingly, Article 44 links 'force' to 'armed forces' when it states "When the Security Council has decided to use force it shall, before calling upon a Member not represented on it [Security Council] to provide armed forces..."³⁵. Moreover, 'armed forces' relates to military forces³⁶, it is thus difficult to associate the 'threat or use of force' to other organisations than the army which is under the State's control.

It is not clear what "forms of participation in acts of violence committed by military organized groups can be said to constitute 'force'"³⁷. However, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration) gives some examples of forms both the threat and the use of force could take: "[violating] the existing international boundaries of another State" or "[violating]

³⁴ Ibid., 117. See fn. 25 of the page of this reference for concurring views.

³⁵ Ibid., 118. See fn. 27 on the page of the document referred to here for concurring views.

³⁶ Ibid., 118, para. 18. The author refers to the travaux préparatoire without giving any precision and to the Friendly Relations Declaration (para. 19).

³⁷ Ibid., p. 120, para. 24.

international lines of demarcation”³⁸. One of the purposes of this Declaration of 1970 was to “contribute to the strengthening of world peace”³⁹ by recalling the principles of international law embodied in the UN Charter of which the prohibition of the threat or use of force of Article 2(4).

The use of force can be direct or indirect. The use of direct force constitutes an “open[ed] incursion of regular military forces into the territory of another State or cross-border shooting into that territory”⁴⁰. The Friendly Relations Declaration gives some specific examples of forms the direct use of force could take: war of aggression, acts of reprisal, “forcible action which deprives peoples ... of their right to self-determination and freedom and independence”, military occupation⁴¹.

On the other hand, indirect forces is “the participation of one State in the use of force by another State...” and a “State’s participation in the use of force by unofficial bands organized in a military manner”⁴² such as “mercenaries or [giving] assistance to rebels who perpetrate acts of violence in another State’s territory”⁴³. The Friendly Relations Declaration gives some examples of forms the indirect use of force could take⁴⁴: “organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State” or “organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts...”⁴⁵.

³⁸ "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations," in *GA Res. 2625 (XXV)*, ed. UN GAOR (1970), p.122.

³⁹ *Ibid.*, p. 121.

⁴⁰ Randelzhofer, 119, para. 22. See fn. 40 of the page referred to here where the author refers to concurring references.

⁴¹ "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations," p. 122-3.

⁴² Randelzhofer, 119, para. 22. See fn. 42 on the page referred to here where the author makes a reference to another text to compare. The author also refers to the Friendly Relations Declaration on p. 120, para. 25 in which a description of indirect forces is made.

⁴³ *Ibid.*, p. 119, para. 22.

⁴⁴ *Ibid.*, p. 120, para. 25.

⁴⁵ "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations," p. 123.

From the examples presented before, we may extract some of the characteristics of the use of force, regardless of its direct or indirect character. The 'use of force' constitutes an organized coercive action against another State, breaching the principles of international law. The fact that it is organized implies that it has a definite goal which is to be reached by the use of violence. Also, in using violence, it is fully assumed that it would cause damage. Since it is realized by the armed forces or 'in a military manner', it means that the action will reach a certain scale in size, damage or violence or any combination of these elements.

The expression 'threat of force' may also be replaced by 'threat to the peace'⁴⁶. It is also an organized action, but compared with the 'use of force', it expresses the possibility to use force, or even more the intention to use force or to violate the peace. It has been less studied and considered than the 'use of force'. Many factors can explain it such as the high tolerance of States, the fact that threat of force has not, in itself, been invoked in the practice, and that the threat of force constitutes often the first step before the actual 'use of force' which then becomes the issue. Also, a threat may be used instead of force to "speed up the peaceful settlement of dispute"⁴⁷. Another difficulty may be that it is difficult to qualify an act as a threat. In fact, "[o]nly a threat directed towards a specific reaction on the part of the target State is unlawful under the terms of Art. 2(4)⁴⁸. Thus, to constitute a threat of force, the action of threatening must clearly demonstrate the intention to make use of coercion to attain a particular objective and must be understood as such by the target State. Examples of forms that the threat of the use of force could take are given in the Friendly Relations Declaration: propaganda for wars of aggression⁴⁹.

'Territorial integrity', 'political independence' and 'any other manner inconsistent with the Purposes of the United Nations' (Article 2(4)) or 'principles of international law embodied in the Charter of the United Nations' (Article 301) can be considered as the

⁴⁶ As seen above, 'peaceful' relates to the absence of violence and 'force' to violence. That way, 'peaceful' relates to the absence of force so 'peace' is the absence of force. Thus, 'threat of force', positive, may be replaced by 'threat against peace', negative, or, shorter, 'threat to the peace'.

⁴⁷ Randalzhofer, p. 124, para. 38. The author refers to Sarduska, R. 'Threats of force', AJIL 83 (1988), pp. 246-7.

⁴⁸ Ibid.

⁴⁹ "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations," p. 122.

forms of prohibition of force⁵⁰. The two firsts forms “are not intended to restrict the scope of the prohibition of the use of force”⁵¹, they are not limited to those cases “when a State’s territorial existence or the status of its political independence is altered or abolished”, but “cover any possible kind of transfrontier use of armed forces”⁵². Here integrity means inviolability⁵³. These two forms of prohibition of force cover most of the cases. The third may be seen as filling the gaps of the 2 previous ones.⁵⁴

The UN Charter provides for three exceptions to the prohibition of use of force which means that force is lawful in those particular cases. Articles 53 and 107 refers to States enemies to States signatories to the UN Charter during the Second World War. As all of these enemy States have now signed the Charter, this exception is thus outdated⁵⁵. The second exception is related to the role of the SC to maintain peace and security and its right to decide to engage in the use of force when it deems necessary⁵⁶. In fact, the SC has the “primary responsibility for the maintenance of international peace and security”⁵⁷ which refers to the first purpose of the United Nations: “to maintain international peace and security”, Article 1(1). This article further states that in this objective, the United Nations may “take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace...”⁵⁸. This refers to Chapter VII that titles ‘Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression of the UN Charter’, chapter under which the SC has the responsibility to “determine the existence of a threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 41 [the use of armed forces]...”⁵⁹.

The third exception, and the most important in the framework of this analysis is the ‘inherent right self-defence’ covered by Article 51 of the Charter:

⁵⁰ Randelzhofer, 123, para. 36. Expression used by the author.

⁵¹ Ibid., 123, para. 35. See fn. 87 of this page for references of this dominant view.

⁵² Ibid., 123, paras. 35-36. See fn. 88 on this page for references and notes.

⁵³ Ibid., 123, para. 36. See fn. 89 of this reference page for notes from the author.

⁵⁴ Ibid., p. 123, para. 36.

⁵⁵ Ibid., p. 125, para. 40. See fn. 104 on the page referred here for further referrences on the subject.

⁵⁶ Ibid., p. 125, para. 41.

⁵⁷ UN Charter, Article 24(1).

⁵⁸ UN Charter, Article 1(1).

⁵⁹ UN Charter, Article 39.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

This right applies under Article 301 since it is one of the principles of international law the Charter covers⁶⁰.

2.5.5 Relevant Rules of International Law – Article 51

The prohibition of the use of force codified in Article 2(4) is associated to a certain number of collective measures covered by Articles 39 to 51 of the UN Charter and thus Article 2(4) must be understood in this larger context⁶¹. In fact, as seen above, Article 2(4), the prohibition of the threat or use of force, is related to the purposes of the Organization in Article 1(1), to maintain international peace and security, that refers to measures set out in Chapter VII, ‘Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’. Articles 39 to 50 explain the process if a State relies directly on the SC to take the situation in charge. The SC is then the one that will define the situation and decide what measures will be undertaken. On the contrary, Article 51 codifies the inherent right of self-defence by States which is the natural right of all States to rely on themselves to respond to an offensive situation. It can take the form of a collective or individual response. However, the latter, regarded as the unilateral use of force, is more present in State practice than is used the system of collective defence⁶² since the SC may decide, in certain cases, not to use force (Article 41) or when unanimity is not reached between the five permanent members, each having a veto⁶³. Here, only Article 51 will be addressed since the procedures under which the SC council take a decision is on a case-by-case basis and may, as such, be complex to analyse.

Regarding the conditions for exercising the inherent right of self-defence “the State concerned [must have] been the victim of an armed attack” and “it is the State which is the victim of an armed attack which must form and declare the view that it has been so

⁶⁰ Center for Oceans Law and Policy, 154, para. 301.5.

⁶¹ Randelzhofer, 117.

⁶² Albrecht Randelzhofer, "Article 51," in *The Charter of the United Nations: A Commentary*, ed. Bruno Simma (New York: Oxford University Press, 1995), 789-90. See also...

⁶³ Randelzhofer, "Article 2(4)," 126, para. 43.

attacked”⁶⁴ which means that the act of which the State is victim must meet the criteria of an armed attack. Other conditions may be considered: the principles of proportionality and necessity in the response by the victim State to the aggressor State, and the SC control⁶⁵. In relation with this last element, Article 51 clearly states that when the State exercise its inherent right of self-defence and takes measures, those “shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council ... to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

2.5.5.1 Special meaning – Literature on Article 51

No definition has been agreed for the term ‘armed attack’⁶⁶. However, the ICJ set out a description in its 1986 Nicaragua v. United States Judgement. The Court considers this definition be a “general agreement on the nature of the acts which can be treated as constituting armed attacks”:

...an armed attack must be understood as including not merely action by regular armed forces across an international border, but also **‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’**. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes ... assistance ... in the form of the provision of weapons or logistical or other support...⁶⁷

The term ‘aggression’ is defined as follows: “the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”⁶⁸. It is quite similar to what prohibits Article 2(4). In fact, the ‘use of armed forces’ is similar to ‘the use of force’ of Article 2(4), the term ‘force’ being associated to the armed forces. However, the main

⁶⁴ Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, pp. 103-4 (International Court of Justice 1986).

⁶⁵ J.-Maurice Arbour and Geneviève Parent, *Droit International Public [International Public Law]*, 5th ed. (Cowansville, Canada: Éditions Yvon Blais, 2006), p. 704.

⁶⁶ Nicaragua V. United States of America, pp. 794-6.

⁶⁷ Ibid., p. 103, para. 195.

⁶⁸ UN GAOR, "Resolution 3314 (Xxix). Definition of Aggression," 19 (1974), p. 143, Article 1.

differences are that the definition of ‘aggression’ does not include the ‘threat or use of force’ and adds the principle of ‘sovereignty’. As such, it may be said that an ‘aggression’ is a form of ‘use of force’ and thus a example of it.

Regarding the specific characteristics of an armed attack, it “always presupposes a violation of Article 2(4)”, thus a breach of the prohibition of the threat or use of force, and involves the use of force “on a relatively large scale and with substantial effect”⁶⁹, thus “a certain level of violence”⁷⁰. To differentiate between an ‘armed attack’ and an ‘act of aggression’, it is recognized that the former is narrower than the later⁷¹. From what precedes, it could be said that an ‘armed attack’ constitutes an aggression of high intensity, without having any clear legal references to precise what this level refers to exactly.

Provision 3 of the definition of ‘act of aggression’ in the Annex of GA Resolution 3314 presents some examples of acts that could also be considered an ‘armed attack’ if one keeps in mind the specific character of an ‘armed attack’⁷² which is that it happens on a larger scale and have important effects in comparison with an ‘act of aggression’. These examples are: invasion, bombardment, cross-border shooting, blockade, attack on State position abroad, breach of stationing agreements, placing territory at another state’s disposal, and participation in the use of force by military organized unofficial groups⁷³. The former elements refer to acts committed by armed forces and the latter refers to non regular forces. This last element is described in Article 3(g) of the Annex of GA Resolution 3314 that states:

The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or it substantial involvement therein.

It constitutes an indirect use of force⁷⁴ and the *Nicaragua v. United States* Judgement refers to it when it says that an ‘armed attack’ is understood as “not merely actions by regular

⁶⁹ Randelzhofer, "Article 51," p. 796, para. 20.

⁷⁰ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge : Cambridge University Press, 2004), p. 144.

⁷¹ Randelzhofer, "Article 51," p. 795, para. 17. See fn 53 of this page reference for more information and concurring references from other authors.

⁷² *Ibid.*, p. 796, para. 21.

⁷³ For more information on these acts, see *ibid.*, pp. 796-802. The author refers here to the different acts listed in the definition of an 'act of aggression' set out in Article 3 of the Annex of GA Resolution 3314 which is not an exhaustive list as stated in Article 4 of the same document.

⁷⁴ *Ibid.*, p. 800.

armed forces”⁷⁵. Thus, in the understanding of the court, the groups referred to in that provision conducting any of the acts described under the other provisions of Article 3 of the Annex of GA Resolution 3314, and acting in the manner regular armed forces would have, conduct an ‘armed attack’. It is important to underline as stated in Article 3(g) that these groups must be sent “by or on behalf of a State” so they are non-State actor with private aims but employed to act for one State. The Court adds about what is not considered as an ‘armed attack’ but as a ‘threat or use of force’: “assistance to rebels in the form of the provision of weapons or logistical or other support”⁷⁶.

The expression ‘armed attack’ of Article 51 is a narrower expression than the ‘threat or use of force’ of Article 2(4), since “an ‘armed attack’ always presupposes a violation of Article 2(4)”, contrary to the ‘threat or use of force’ that does not necessarily imply a breach of Article 2(4).⁷⁷

To sum up, an ‘armed attack’ is “an attack of one State against another of some gravity and magnitude”⁷⁸ that can be direct or indirect, but always violates the prohibition of threat or use of force.

When it has been established that the action was actually an ‘armed attack’, then the State victim of the attack may use its inherent individual or collective right of self-defence. However, some conditions apply of which the necessity and proportionality of the response in comparison with the characteristics of the armed attack.

The principles of proportionality and necessity are the twin concepts⁷⁹ that is they go together. They are part of customary international law. They are “essential components” to legitimate the use of force⁸⁰. In the Judgement of the Nicaragua v. United States Case, the “Parties... agree...that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence”⁸¹. Also, the Court states that “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well

⁷⁵ Nicaragua V. United States of America, p. 103, para. 195.

⁷⁶ Ibid., p. 104, para. 195.

⁷⁷ Randelzhofer, "Article 51," p. 796, para. 20.

⁷⁸ Gardam, pp. 142-3. Gardam refers to Y. Dinstein, "War, Aggression, and Self-Defence" (2nd edn, Grotius, Cambridge, 1994), pp. 187-202.

⁷⁹ Ibid., p. 1. Expression used by the author.

⁸⁰ Ibid., p. 140.

⁸¹ Nicaragua V. United States of America, p. 103, para. 194.

established in customary international law”⁸². Thus for self-defence measures to be lawful and justified, they must be proportional to the armed attack of which the State is victim and necessary as they are the only solution for the State to defend itself.

Three conditions may be applied for the state of necessity to be fulfilled: “the existence of an essential interest; this essential interest must be threatened by an imminent grave danger; the measure taken in the name of necessity must have been the only way to safeguard this essential interest and shall not detract another State essential interest”⁸³. It may be considered that this ‘interest’ refers to those against which the threat or use of force is prohibited, that is to say the ‘territorial integrity’, the ‘political independence’, and ‘any other manner inconsistent with the Purpose of the United Nations’, as self-defence (Article 51) being a measure to answer a breach of the prohibition of threat or use of force (Article 2(4)). On the second element, the term ‘imminent’ must be understood as meaning immediacy or proximity⁸⁴, “the requirement of immediacy is in fact inherent to the text of Article 51”⁸⁵. However, the immediacy of an ‘armed attack’ is determined by the State victim, which may entail a bias. On the third requirement, it is understood that the use of force as a measure of self-defence must be a last resort⁸⁶, “after all peaceful means have failed”⁸⁷. Concerning the ‘proportionality’ of countermeasures, they must be equivalent to the seriousness of the armed attack that is the damage must be equivalent. This equivalence must be considered in the means used to respond to the attack⁸⁸, but also in light of the aims of this response⁸⁹.

There exists no such right as of anticipatory or preventive self-defence, it is prohibited by Article 51⁹⁰. However, “the right of self-defence... frequently has a

⁸² Ibid., p. 94, para. 176.

⁸³ Arbour and Parent, p. 707. The two authors refer to para. 52 of the Gabcikovo-Nagymaros Project where the Court establishes the conditions describing the state of necessity. Personal translation from French to English by the author of this paper.

⁸⁴ Ibid., pp. 707-8.

⁸⁵ Gardam, p. 150.

⁸⁶ Ibid., pp. 4-7.

⁸⁷ Ibid., p. 5.

⁸⁸ Arbour and Parent, pp. 708-9.

⁸⁹ Gardam, pp. 138-9, 142.

⁹⁰ Randelzhofer, "Article 51," pp. 803-4. See also Gardam, p. 146.

preventative element” and “is most commonly asserted in the face of a prior attack or series of armed attacks”⁹¹.

Article 51 restates the authority of the SC in maintaining the international peace and security conferred by the member States under Article 24(1). Indeed, the right of self-defence can be used “until the Security Council has taken the measures necessary” and while exercising this right of self-defence, the “measures taken by Members ... shall be immediately reported to the Security Council”⁹². Self-defence is thus a temporary measure⁹³ that becomes illegal when the SC takes in charge the situation⁹⁴. Moreover, the SC must be free to act whenever it wants and the way it considers to be necessary⁹⁵ and the Members cannot impair the process and decisions thus taken since the SC is the organ that has the “primary responsibility for the maintenance of international peace and security” conferred by the member States⁹⁶. However, as the SC is not as much efficient as it should be in taking in charge those measures, the requirement of reporting the measures undertaken by a State as self-defence and the requirement to stop those measures have lost of their significance. As such, self-defence is in practice more than a temporary action.⁹⁷

2.6 Conclusion

Article 301 interpretation process went through many steps that brought us to the UN Charter as a major tool of interpretation to further the understanding of its meaning. Through the lens of first Article 2(4) and then Article 51, the UN Charter enabled us to widen our understanding of the scope and extent of Article 301 which falls within a larger dynamic. Indeed, Article 2(4) provided a better understanding of the meaning and implication of Article 301 and Article 51 provided a way of action for States to individually answer to breaches of the prohibition of threat or use of force. As such, Article 301 prohibits the threat or use of force by member States against any other States, but authorize a State to rely on the SC or to use self-defence if it is victim of a breach of the prohibition

⁹¹ Gardam, p. 146.

⁹² Article 51.

⁹³ Randelzhofer, "Article 51," p. 804.

⁹⁴ Arbour and Parent, p. 709.

⁹⁵ UN Charter, Article 51: "Measures taken by Members in the exercise of this right of self-defense ... shall not in any way affect the authority and responsibility of the Security Council ... to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

⁹⁶ UN Charter, Article 24(1).

⁹⁷ Randelzhofer, "Article 51," p. 804, para. 41.

of 'threat or use of force'. However, this response must respect the conditions that come with the right of self-defence and which constitute the limits of its exercise. First, it must be used in response to an 'armed attack', which implies large scale acts with substantive impacts, and cannot be used to prevent an anticipated one. Also, it cannot be used as a preventive act. Secondly, the measures taken must be proportional and necessary. Thirdly, States must inform the SC of the measures taken, and when the SC takes in charge the measures against the attack, self-defence measures must come to an end. Finally, the SC must be free to act the way it considers to be necessary and the Members cannot impair the process and decisions thus taken. Even though the SC is not fulfilling these duties as it should be, it is clear that the inherent right of self-defence is not absolute.

3 Chapter III – LOSC regimes and the ‘threat or use of force’

3.1 Introduction

This chapter is intending to assess the specific protection provided to States by specific regimes codified under the LOSC against the ‘threat or use of force’ by foreign armed forces at sea. These regimes are the innocent passage, the transit passage and the archipelagic sea lanes passage. They apply to navigation in certain maritime zones, but not all the maritime zones are covered. Nevertheless, for these other maritime zones Article 301 applies.

The codification of these regimes includes a provision prohibiting the ‘threat or use of force’ which means that all that Article 301 implies, such as the right to resort to the SC or self-defence, applies here too. Also, since the ‘use of force’ results in damages, as seen above, it asks for an urgent response from the victim State. It is doubtful that the victim State would rely on its national law to settle the problem.

However, in front of a ‘threat’, even though it would be in breach of international, as state practice demonstrates that it is rarely if never denounced, we may assume that the victim State will act in another manner. As such, the State may rely on the protection provided under the regimes of the LOSC.

3.2 Method

Under each regime, the provisions relating to activities that could represent a threat will be assessed. The associated legal enforcement actions a State may employ will then constitute these protections.

The relevant provisions will be interpreted by assessing their ordinary meaning through their context and purpose. This technique will be complemented by the use of supplementary means of interpretation such as commentaries. Also the French version of the Convention may be used to give some precision about the meaning of terms.

3.3 Regime of innocent passage

The regime of innocent passage is codified under Section 3 of Part II of the Convention that is under the regime of the territorial sea. The innocent passage regime also applies to other maritime zones in specific cases. It applies to the archipelagic waters of an

archipelagic State as “the general rule for passage through [these] waters”⁹⁸, but not to archipelagic sea lanes for which a specific regime applies. In the case of straits used for international navigation, the regime of innocent passage applies where the regime of transit passage does not apply⁹⁹ or to straits that link one “part of the high seas or an exclusive economic zone and the territorial sea of a foreign State”¹⁰⁰. In internal waters, it applies “[w]here the establishment of a straight baseline ... has the effect of enclosing as internal waters areas which had not previously been considered as such”¹⁰¹.

The ‘innocent passage’ is described under Article 19. The first paragraph constitutes a definition: “[p]assage is innocent so long as it is *not* prejudicial to the peace, good order or security of the coastal State”¹⁰², and the second paragraph constitutes a list of activities that render a passage non-innocent that is ‘prejudicial to the peace, good order or security’ of the coastal State.

The regime of innocent passage only applies to ships and not to aircrafts¹⁰³. That way, foreign armed forces in the territorial sea would manifest themselves by the presence of warships. In this regard, the regime includes a subsection dedicated to ‘warships and other government ships operated for non-commercial purposes’. To make the distinction between both terms, the definition of a warship contained under this regime may help:

a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.¹⁰⁴

⁹⁸ University of Virginia Center for Oceans Law and Policy, "Article 52 - Right of Innocent Passage (Ii)," in *UN Convention on the Law of the Sea Commentary 1982*, ed. University of Virginia Center for Oceans Law and Policy (Martinus Nijhoff Publishers, 2013), p. 456, para. 52.1.

⁹⁹ LOSC, Article 45(1)(a) referring to Article 38(1): "if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics".

¹⁰⁰ LOSC, Article 45(1)(b). The requirement of the regime of transit passage being that a strait must connect "one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone", Article 37.

¹⁰¹ LOSC, Article 8(2).

¹⁰² LOSC, Article 19(1). Emphasized by the author of this paper.

¹⁰³ University of Virginia Center for Oceans Law and Policy, "Article 17 - Right of Innocent Passage (Ii)," in *UN Convention on the Law of the Sea Commentary 1982 Online*, ed. University of Virginia Center for Oceans Law and Policy (Martinus Nijhoff Publishers, 2013), p. 156.

¹⁰⁴ LOSC, Article 29. See the Article referred to here for a complete definition.

Both are government ships, however the warship belongs to the armed forces and is under the command of an officer. As such, the ‘other government ships operated for non-commercial purposes’^{105 106} will not be considered.

The definition of a warship includes “services such as the coast guard, frontier police and the like provided they meet the substantive conditions of this article”¹⁰⁷. Also, we may assume that submarines meeting the requirements of the definition of a warship would enter in this category since they are underwater vessels, thus a type of ship.

Under Article 32, warships enjoy immunity in the territorial sea. However, this immunity is not absolute and there are three exceptions giving the coastal State more possibilities in case of threat. They are related to the application to warships of subsection A, ‘Rules applicable to all ships’, and articles 30 and 31, specific to warships¹⁰⁸. They will be discussed to determine, in each case, what could constitute a threat in those circumstances and what measures the coastal State could undertake.

Under subsection A, the rules applicable to all types of ships, warships are among others subject to the requirements of being executing a *passage*¹⁰⁹ that can be qualified as *innocent*¹¹⁰. Article 19(2) constitutes a non-exhaustive¹¹¹ list of activities that are

¹⁰⁵ See University of Virginia Center for Oceans Law and Policy, "Article 32 - Immunities of Warships and Other Government Ships Operated for Non-Commercial Purposes (Ii)," in *UN Convention on the Law of the Sea Commentary 1982 Online*, ed. University of Virginia Center for Oceans Law and Policy (Martinus Nijhoff Online, 2013), p. 264, fn 5. It is stated that this category of ships includes "uncommissioned warships, fleet auxiliaries, ... supply ships, troop ships, royal and presidential yachts, custom cutters and hospital ships".

¹⁰⁶ See Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford, United Kingdom: Hart Publishing, 2010), p. 222, fn. 103. The authors state that these ships "include government research and survey vessels, and vessels operated by head of states".

¹⁰⁷ University of Virginia Center for Oceans Law and Policy, "Article 29 - Definition of Warships (Ii)," in *UN Convention on the Law of the Sea Commentary Online 1982*, ed. University of Virginia Center for Oceans Law and Policy (Martinus Nijhoff Publishers, 2013), p. 252, para. 29.8(b).

¹⁰⁸ LOSC, Article 32. See also Center for Oceans Law and Policy, "Article 32 - Immunities of Warships and Other Government Ships Operated for Non-Commercial Purposes (Ii)," paras. 32.1 and 32.7(a).

¹⁰⁹ LOSC, Article 18. "Passage means navigation through the territorial sea for the purpose of traversing [it] without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility... [It also] includes stopping and anchoring but only ... [if] incidental ... or rendered necessary."

¹¹⁰ LOSC, Article 19.

considered not ‘innocent’ that is ‘prejudicial to the peace, good order or security’ of which the threat or use of force:

any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations¹¹²

There are differences in the wording of this provision and Article 301. However, these only constitute precisions with regard to the maritime zones the regime of innocent passage applies to. Indeed, the use of the term ‘sovereignty’ “is a reminder that innocent passage takes place through the territorial sea of a coastal State and through the archipelagic waters of an archipelagic State”¹¹³. The expression ‘in violation of’ can be replaced by ‘inconsistent with’, the one that is used in Article 301, as seen above. In the end, these differences do not change the meaning of the article that recalls the prohibition of the threat or use of force. Thus against a ‘threat or use of force’ in its territorial sea, a coastal State may always use the rights of protection discussed above under Article 301 such as the resort to the SC or inherent right of self-defence in case of armed attack. However, the regime of innocent passage provides for more protection to a coastal State facing a ‘threat’ by foreign armed forces.

Except for the ‘threat or use of force’, some non-innocent activities listed under Article 19(2) may be regarded as being possibly used as threats by armed forces. This list refers, among other, to weapons exercises, the launching, landing or taking on board of any aircraft or any military device, and propaganda¹¹⁴. These activities may be seen as carrying the expression of a wrongful intention. As such, they could be used as threats by foreign armed forces. In addition, since they are not innocent thus ‘considered prejudicial to the peace, good order or security’ they already constitute violations of the peace, good order or security of the coastal State¹¹⁵. As such, they are in contravention with the purposes of the LOSC and may be considered as possibly resulting in damages.

¹¹¹ LOSC, Article 19(2). The list ends with Article 19(2)(l) that states: "any other activity not having a direct bearing on passage."

¹¹² LOSC, Article 19(2)(a).

¹¹³ University of Virginia Center for Oceans Law and Policy, "Article 19 - Meaning of Innocent Passage (Ii)," in *UN Convention on the Law of the Sea Commentary 1982 Online*, ed. University of Virginia Center for Oceans Law and Policy (Martinus Nijhoff Publishers, 2013), p. 175.

¹¹⁴ LOSC, Article 19(2)(b), (d), (e), and (f). See Rothwell and Stephens, pp. 223 and 268. The authors refer specifically to these activities as being prohibited for warships.

¹¹⁵ Arbour and Parent, pp. 614-5.

The last element of the list: “any other activity not having a direct bearing on passage”¹¹⁶ may be assumed to mean that all other activities having nothing to do with the passage that is occurring may be considered as rendering this passage non-innocent. However, it must be remembered that to constitute a threat, the activity must meet some characteristics.

Following this idea, we may use other requirements codified under subsection A that are also relevant in the case of warships and could render its passage non-innocent. Article 20 provides that submarines and other underwater vehicles are being “required to navigate on the surface and to show their flag”¹¹⁷. Also, Article 23 states that “foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall ... carry documents and observe special precautionary measures established for such ships by international agreements.” There are no prescriptive of enforcement jurisdiction associated with the non-compliance of these requirements for the coastal. However, the passage of a submarine or warships not complying with these requirements because it is transporting some arm it intends to use could become a threat to the peace.

In those cases where the passage of a warship would constitute a threat and qualify under the non-innocent passage, the coastal State would have the right to “take the necessary steps ... to prevent passage”¹¹⁸. The general understanding of this expression is quite clear. The term ‘prevent’ in association with ‘passage’ can be assumed to mean that the passage must not occur. Thus, the whole provision means the coastal State may take the measures that are required for the non-innocent passage not to occur. However, no direct description or clear association in the section or in the Convention describes what are these measures. In the context of the regime, this provision may be assumed to constitute an exception to Article 24(1): “The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea *except in accordance with this Convention*.” Preventing a passage carry the same meaning as hampering it. Moreover, the expression of an exception means that the passage may be hampered if the convention provides for it. Thus, under Article 25(1) the passage may be hampered if not innocent by using the required measures. As the State is sovereign over its territorial sea, it means that it can decide which measures to undertake. However this sovereignty is not absolute, the

¹¹⁶ LOSC, Article 19(2)(l).

¹¹⁷ LOSC, Article 20.

¹¹⁸ LOSC, Article 25(1).

State must respect the custom and international law of which the Convention and the immunity of warships. Considering the context, the different examples of measures present in the Convention will be used to describe what measures the State could undertake. Also, since ‘necessary steps’ carries the meaning of a ‘gradual action’, but also, in the context of the whole provision, it means to take any steps until the passage of the vessel has been prevented. As such, the measures will be considered in a progressive manner. As a first measure, the coastal State could ask the warship to stop its activity while passing. If the ship does not comply, the coastal State could require the ship to leave its territorial sea or archipelagic waters. A third measure could be to send warships to escort the foreign warship outside these waters. Then, if it does not want to comply, and since it was at first recognized as a threat, the coastal State could resort to the SC and use force as self-defence as a last resort.

The second element of coastal State rights of protection, under subsection A, states: “[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.” Here the term ‘prevent’ as another meaning than above, it means ‘to avoid’. In the context of the provision, ‘necessary steps to prevent any breach of the conditions’ means to take the required actions to avoid the breaking of laws. In addition to a preventive aspect, the fact that laws could be breached is uncertain. As such, it cannot constitute a threat since no action thus no threat has happened.

The last element of the rights of protection of the coastal State, under subsection A, establishes that “[t]he coastal State may ... suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises.”¹¹⁹ The provision contains many requirements for the suspension to be applicable of which that it must be necessary to guarantee or ensure its security or for its security not to be compromised. At the difference of the two previous rights of protection, this one is not to stop or avoid something wrong but to guarantee something good. As such, it is the opposite perspective. However, the breach of this right, such as a warship passing through such area, could constitute a threat to the security if the intention is demonstrated. As such, it would constitute an “activity not having a direct bearing on passage”, that is another example of non-innocent passage.

¹¹⁹ LOSC, Article 25(3).

The second exception to warships immunity, Article 30, states that when a warship does not comply with the laws and regulations established by the coastal State and its requests of compliance with such regulations, “the coastal State may require [the warship] to leave the territorial sea immediately”¹²⁰. The laws and regulations referred to here are those that are permitted under subsection A that is Article 21, in relation to the innocent passage, and Article 22, concerning sea lanes and traffic separation schemes. The matters under these articles could constitute examples of threat to the peace by warships. For example, a warship “nuclear-powered ... required to confine [its] passage to ... sea lanes”¹²¹ for the safety of navigation but that does not comply could constitute a threat to coastal State if it is demonstrated that it does so with a coercing intention. As such, it could also enter under the non-innocent activities.

The last exception, Article 31, establishes the flag State international responsibility in case of damage by a warship inflicted to the coastal State that would be the result of the non-compliance “with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law”¹²². The State bearing international responsibility has the obligation to fix the loss or damage inflicted¹²³. This exception does not relate to protection in case of ‘threat or use of force’. However, it could constitute a following step to Article 30, or a following step after a ‘use of force’ that would have caused damage.

Under the innocent passage regime, the coastal State to protect itself against a ‘threat’ at sea by foreign armed forces may resort to different measures, apart from the resort to the SC or self-defence that can be used. The most significant is its right to “prevent passage which is not innocent” under article 25(1). As a matter of fact, this right give the State the right to “take the necessary steps” which may constitute any lawful measure to hamper the passage. Moreover, the activities under the description of the regime that could constitute threat being all non-innocent, they thus fall under this right.

In the context of the ‘necessary steps’ and considering that the ships may not comply at first, a gradual procedure could be undertaken until the ships stops: ask the warship to stop it activity while passing, require the ship to leave the waters, send warships

¹²⁰ LOSC, Article 30

¹²¹ LOSC, Article 22(2).

¹²² LOSC, Article 31.

¹²³ Arbour and Parent, p. 593.

to escort the foreign warship outside these waters, and finally, resort to the SC or use force as self-defence as a last resort.

3.4 Regime of transit Passage

The regime of transit passage, set out in Section 2 of Part III, 'Straits Used for International Navigation', only applies to straits used for international navigation. However, the archipelagic sea lanes regime, associated to the archipelagic State, refers to it under Article 54¹²⁴, through Articles 39, 40, 42 and 44.

The activity of transiting through a strait is described in Article 38(2): "[t]ransit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait". Thus, the transit passage regime, in contrary to the innocent passage regime, also applies to aircrafts. Also, the transit passage regime does not contain any specific provisions applicable to warships. However, in granting a right of transit passage to "all ships and aircrafts"¹²⁵, the regime also refers to warships and military aircrafts so their conduct while transiting is ruled by the same provisions as commercial ships¹²⁶. The immunity of ships is addressed under 42(5). However, and as for the innocent passage regime, it refers to the flag state responsibility in case of non-compliance resulting in loss or damage.

The regime definition contains two requirements for a passage to constitute a transit passage: its must be 'continuous and expeditious' but also it must be 'in accordance with this Part'. This second requirement is an important feature of this description and means: in compliance with or in conformity with the provisions under the regime. Put into the context of the whole description of the transit passage, it means that to be a transit passage, the passage must be done in compliance with the rules and regulations set out under the regime.

However, when in a strait used for international navigation, a ship do not engage in a transit passage, this "activity ... remains subject to the other applicable provisions of this

¹²⁴ LOSC, Article 54, 'Duties of ships and aircraft during their passage... relating to archipelagic sea lanes passage': "Articles 39, 40, 42 and 44 apply mutatis mutandis to archipelagic sea lanes passage." The articles referred to here are part of the transit passage regime.

¹²⁵ LOSC, Article 38(1). This provision provides for an exception which is not to be addressed here.

¹²⁶ Rothwell and Stephens, p. 272.

Convention”¹²⁷. This means that if a ship or an aircraft does not comply with rules and regulations under the transit passage regime, it is not exercising a transit passage and, thus, the regime of transit passage does not apply. However, parts of the Convention, other than Part III, will apply. This article must be read in association with Article 34(1): “The regime of passage through straits used for international navigation ... shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.” This means that applying the “straits regime is without prejudice to the sovereignty or jurisdiction of States bordering straits with respect to activities not related to passage”¹²⁸. Thus, if the waters forming the strait constitute territorial sea, then the regime of territorial sea applies to the other activities than the ‘passage’. In sum, in a strait formed by a territorial sea, if a passage does not comply with the regulation of the transit passage regime, the sovereignty of the State bordering the strait would be applicable on this activity and the passage could be hampered under the innocent passage regime if it is considered not innocent.

The rules and regulations a ship must comply with are set out under articles 39 to 43. Article 39, titled ‘Duties of ships and aircrafts during transit passage’, includes the prohibition of the ‘threat or use of force’ to foreign ships and aircrafts.

Ships and aircraft, while exercising the right of transit passage, shall ... refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.¹²⁹

The wording is also similar to Article 301 and Article 19(2)(a). The difference is also linked to the fact that it must be adapted to the regime. Indeed, instead of using ‘coastal State’ as in the innocent passage regime or ‘State’ as in Article 301, it uses expression ‘States bordering the strait’. Also, as in the transit passage regime, it uses the expression ‘in violation with’. In the eventuality of breach of this international duty by a foreign warship or military aircraft, the State bordering the strait could rely on international law and invoke the right of self-defence.

¹²⁷ LOSC, Article 38(3).

¹²⁸ University of Virginia Center for Oceans Law and Policy, "Article 34 - Legal Status of Waters Forming Straits Used for International Navigation (Ii)," in *UN Convention on the Law of the Sea Commentary 1982 Online*, ed. University of Virginia Center for Oceans Law and Policy (Martinus Nijhoff Online, 2013), p. 298, para. 34.8(a).

¹²⁹ LOSC, Article 39(b).

Another duty is that ships and aircrafts must “refrain from any activities other than those incident to their normal modes” while transiting¹³⁰. In the case of warships, ‘normal modes’ means that submarines can stay submerged when transiting and for “aircraft carriers... [it] extends to ... taking off and landing” of aircrafts which may be seen by the State bordering the strait as posing a threat¹³¹. It also includes the deployment of radar, sonar, and depth-finding devices¹³². As such, they do not constitute threats. However, under the innocent passage regime, these would be considered as non-innocent, referring here to Articles 19(2)(e) and (j) and 20.

Contrary to the innocent passage regime, the transit passage regime does not confer to the States bordering straits rights of protection as to coastal States under Article 25 of Part II. It “is not made clear in the LOSC [what] is the level of enforcement action a strait state may undertake against a delinquent vessel purportedly exercising a right of transit passage”¹³³. For example, “the conduct of weapons exercises ... would not be consistent with normal mode... and would constitute a threat of the use of force against” the States bordering the strait¹³⁴. However, against a ‘threat’ by foreign armed forces in a strait, the State bordering the strait could use the mechanism under the prohibition of ‘threat or use of force’ or go under the innocent passage regime if the waters forming the strait are territorial sea.

In sum, under the transit passage regime, the State bordering the strait is not given any enforcement jurisdiction against warships. Also, an important element of this regime limiting the strait State rights is that the transit passage “shall not be impeded”¹³⁵ which means that it cannot be hampered, nor suspended¹³⁶. However, article 38(3) permits a strait State to apply the innocent passage regime in the case of a warship or a military aircraft not exercising the right of transit passage as prescribed under the regime.

¹³⁰ LOSC, Article 39(1)(c)

¹³¹ Rothwell and Stephens, p. 240.

¹³² *Ibid.*, p. 273.

¹³³ *Ibid.*, p. 242.

¹³⁴ *Ibid.*, p. 273.

¹³⁵ LOSC, Article 38(1)

¹³⁶ LOSC, Article 44

3.5 Regime of archipelagic sea lanes passage

The right of archipelagic sea lanes passage is a specific feature of the archipelagic state, established under Articles 53 and 54 of this regime, in Part IV of the Convention. It only applies to archipelagic sea lanes and is a complement to the general innocent passage regime that applies to archipelagic waters¹³⁷.

Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.¹³⁸

This regime “is similar to the regime of transit passage in straits used for international navigation ... however, [it] is adjusted to reflect the differences between the vast expanses of ocean often included within archipelagic waters and the narrow passages that comprise most straits used for international navigation.”¹³⁹ “Articles 39, 40, 42 and 44 apply mutatis mutandis to archipelagic sea lanes passage.”¹⁴⁰ These articles, part of the transit passage regime, apply in modifying what needs to be changed to reflect the context of the archipelagic sea lanes passage regime.

The regime also applies to “all ships and aircrafts”¹⁴¹ which includes warships and military aircrafts that must pass in their normal mode. Also passage must not be hampered nor suspended. As article 39 also applies, the archipelagic sea lanes passage regime also includes the duty for ships and aircrafts to refrain from the threat or use of force. That way, in case of the threat or use of force by foreign armed forces, the archipelagic State has the same rights.

An interesting similarity is the fact that the regime of archipelagic sea lanes, similarly as the transit passage regime in Article 34(1), do not “affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed and subsoil, and the resources

¹³⁷ Center for Oceans Law and Policy, "Article 52 - Right of Innocent Passage (Ii)," p. 456, para. 52.1.

¹³⁸ LOSC, Article 53(3).

¹³⁹ University of Virginia Center for Oceans Law and Policy, "Article 53 - Right of Archipelagic Sea Lanes Passage (Ii)," in *UN Convention on the Law of the Sea Commentary 1982 Online*, ed. University of Virginia Center for Oceans Law and Policy (Martinus Nijhoff Publishers, 2013), p. 466, para. 53.1.

¹⁴⁰ LOSC, Article 54.

¹⁴¹ LOSC, Article 53(2).

contained therein.”¹⁴² However, at the difference to the transit passage regime under 38(3), the archipelagic sea lanes passage regime does not contain any provision stating that in case of an activity that would not correspond to a passage under the regime, the other applicable provision of this Convention applies. However, in the end, the result is the same. Indeed, an area where the regime applies but where the activity of a ship or aircraft would not correspond to an archipelagic sea lanes passage would make the regime not applicable on this passage. Since there is no mention of what should be done in that case under the regime, we would refer to Article 49(4) mentioned above. That way, we would rely on the status of the waters, archipelagic waters, for which the innocent passage regime under Article 52 applies.

3.6 Conclusion

The three navigational regimes are not equal. The innocent passage regime is wider than the two others that are virtually the same regime. The practical difference between them comes from the fact that the transit passage regime is less “strengthened”¹⁴³ or “more relaxed”¹⁴⁴.

The three regimes clearly demonstrate the importance of the duty to refrain from the ‘threat or use of force’ for ships navigating in foreign waters in recalling on this internationally recognized prohibition in States relations. However, it is not treated the same way. In fact, under the innocent passage regime, it is part of a list of non-innocent activities or activities ‘prejudicial to the peace, good order or security’ while in the transit passage regime, it is under the duties of ships and aircrafts. This way, it is presented as a prejudice to the coastal State in the first case, but only a responsibility for foreign ships in the other. It has the effect of rendering the action graver if occurred in the territorial sea. Also, following the prohibition of ‘threat or use of force’ under the territorial sea regime, the presence of a list of activities clearly carrying a wrongful intent reinforces this idea. Moreover, these specified activities give more weight to the states to intervene in such situations and, as such, it seem to provide the coastal State with more rights.

¹⁴² LOSC, Article 49(4).

¹⁴³ Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press, 2012), p. 96.

¹⁴⁴ J. B. R. L. Langdon, "The Extent of Transit Passage: Some Practical Anomalies," *Marine Policy* 14, no. 2 (1990): p. 132.

The innocent passage regime provides the coastal State with more possibilities to act before to resort to the SC or self-defense. Under Article 25, the 'Rights of protection of the coastal State', paragraph one provides the coastal State with more enforcement rights in case of a 'threat' constituting a non-innocent activity. In fact, the coastal State may hamper the passage, which is significant since any threat may enter the category of non-innocent activity.

In sum, the regime that provides a State with more possibilities if facing a 'threat or use of force' by armed forces is the innocent passage. The two other regimes may, at a certain point, may be replaced by this regime. However, the first steps rest upon their specific regime. That way, it may take more time for an archipelagic State or State bordering a strait to be able to take action.

4 Chapter IV – Discussion

This discussion is intended to evaluate the adequacy of the LOSC to protect States against the ‘threat or use of force’ at sea by foreign armed forces. To be adequate, it must be sufficient and fulfil the needs of States facing a ‘threat or use of force’ that is to rapidly put an end to the situation. It will be evaluated from the perspective developed above, assessing the limits of the concepts and international law.

The whole process of interpretation provided us with a better understanding of the scope of the prohibition of ‘threat or use of force’ and the limits of each term which constitutes the conditions under which they apply. As such, ‘threat’ and ‘use of force’ have been defined. They imply different situations and thus they command different responses. A ‘threat’ as understood here may be answered by relying on the SC or through the measures the navigational regimes provide the States with. A State against which the ‘use of force’ is used may resort on the SC or self-defence. However, there are requirements for self-defence to be lawfully applicable such as being victim of an armed attack.

International law through UN charter provides part of the answers and the navigational regimes under the LOSC another part, however the measures are limited. Also, everything must be evaluated before taking action and the description and understanding of an offensive situation is clearly subjective. As such an important obstacle is which measure of protection can be undertaken but the characterization of the situation itself. Also, under time pressure and the responsibility to protect the security of its population, a State may engage in the wrong direction.

Whose fault is it?

We cannot say that the LOSC is not adequate even though it is true when looking on a practical manner. However, it does not fulfil the requirements since its purpose was not to develop an international mechanism to protect States against the threat or use of force at sea. Indeed, it was developed to answer practical issues relating to the law of the sea by establishing a legal order under an overarching purpose: the maintenance and strengthening of peace and security. The LOSC was not developed with a ‘defensive’ perspective, but with a positive one and as such the effort was directed towards the idea of

the good development of States relations. The solution would thus be to conclude on treaty on the matter, however, it does not seem to be an option.

5 Chapter V – Conclusion

The LOSC is not adequate to respond to a ‘threat or use of force’ at sea by foreign armed forces. However, it must be said that it was not the intention when it was negotiated. Nevertheless, specific measures may be undertaken under the LOSC and international mechanisms exist. It may be not sufficient, however, the complexity of a ‘threat or use of force’ either as a concept or as an act renders a detailed mechanism useless because static.

Interpretation was the key in this analysis but also constitutes the main limit encountered. The definitions of the specific concepts and terms referred to in this analysis are not to be found in the treaties they are part of. The rules of interpretation established under the 1969 Vienna Convention constitute the basis for the process of interpretation but they are also unclear and must be interpreted, which complicates the interpretation process. Of course, the process of interpretation relies on the use of multiples sources of law. However, in the end, after having interpreted the terms, associated them, given a sense to their interrelations, the process may prove to be wrong. Nevertheless, this research of the ‘right’ meaning has proved to be motivating and an important source of new knowledge, concepts being wider than the words describing them.

Originally, this research was undertaken in a broader perspective that is the current one put in a specific context: the Northwest Passage and the Northern Sea Route. The idea was to test the findings about the adequacy of the LOSC in case of ‘threat or use of force’ when there is uncertainty about the applicable legal regime to a body of water. However, the interpretation process took the whole space. Still the initial issue keeps its relevance in the actual international state of affairs: the Arctic political and economical importance is growing rapidly and recent deliberate breaches of customary and international law proves to be far from adequately answered.

Bibliography

- "Charter of the United Nations." edited by United Nations, 1 UNTS XVI: United Nations, 24 October 1945.
- "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations." In *GA Res. 2625 (XXV)*, edited by UN GAOR, GA Res. 2625 (XXV), 1970.
- "Military and Paramilitary Activities in and against Nicaragua." ICJ Reports 1986, p. 14: International Court of Justice, 1986.
- Arbour, J.-Maurice and Geneviève Parent. *Droit International Public [International Public Law]*. 5th ed. Cowansville, Canada: Éditions Yvon Blais, 2006.
- Center for Oceans Law and Policy, University of Virginia. "Article 17 - Right of Innocent Passage (Ii)." In *UN Convention on the Law of the Sea Commentary 1982 Online*, edited by University of Virginia Center for Oceans Law and Policy, II: Martinus Nijhoff Publishers, 2013.
- Center for Oceans Law and Policy, University of Virginia. "Article 19 - Meaning of Innocent Passage (Ii)." In *UN Convention on the Law of the Sea Commentary 1982 Online*, edited by University of Virginia Center for Oceans Law and Policy: Martinus Nijhoff Publishers, 2013.
- Center for Oceans Law and Policy, University of Virginia. "Article 29 - Definition of Warships (Ii)." In *UN Convention on the Law of the Sea Commentary Online 1982*, edited by University of Virginia Center for Oceans Law and Policy: Martinus Nijhoff Publishers, 2013.
- Center for Oceans Law and Policy, University of Virginia. "Article 32 - Immunities of Warships and Other Government Ships Operated for Non-Commercial Purposes (Ii)." In *UN Convention on the Law of the Sea Commentary 1982 Online*, edited by University of Virginia Center for Oceans Law and Policy: Martinus Nijhoff Online, 2013.
- Center for Oceans Law and Policy, University of Virginia. "Article 34 - Legal Status of Waters Forming Straits Used for International Navigation (Ii)." In *UN Convention on the Law of the Sea Commentary 1982 Online*, edited by University of Virginia Center for Oceans Law and Policy: Martinus Nijhoff Online, 2013.
- Center for Oceans Law and Policy, University of Virginia. "Article 52 - Right of Innocent Passage (Ii)." In *UN Convention on the Law of the Sea Commentary 1982*, edited by University of Virginia Center for Oceans Law and Policy, II: Martinus Nijhoff Publishers, 2013.

- Center for Oceans Law and Policy, University of Virginia. "Article 53 - Right of Archipelagic Sea Lanes Passage (Ii)." In *UN Convention on the Law of the Sea Commentary 1982 Online*, edited by University of Virginia Center for Oceans Law and Policy, II: Martinus Nijhoff Publishers, 2013.
- Center for Oceans Law and Policy, University of Virginia. "Article 301 - Peaceful Uses of the Seas (V)." In *UN Convention on the Law of the Sea Commentary 1982 Online*: Martinus Nijhoff Publishers, 2013.
- Dekanozov, R. V. "The Principle of Peaceful Use in the Law of the Sea and Space Law." *Marine Policy* 12, no. 3 (1988): 271-275.
- Gardam, Judith. *Necessity, Proportionality and the Use of Force by States*. Cambridge: Cambridge : Cambridge University Press, 2004.
- Langdon, J. B. R. L. "The Extent of Transit Passage: Some Practical Anomalies." *Marine Policy* 14, no. 2 (1990): 130-136.
- Linderfalk, Ulf. *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*. Vol. 83, edited by SpringerLink. Dordrecht: Springer Netherlands, 2007.
- Oxman, Bernard H. . "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)." *American Journal of International Law* 75, (1981): 211-987.
- Randelzhofer, Albrecht. "Article 2(4)." In *The Charter of the United Nations: A Commentary*, edited by Bruno Simma, vol. I, 112-36. New York: Oxford University Press, 1995.
- Randelzhofer, Albrecht. "Article 51." In *The Charter of the United Nations: A Commentary*, edited by Bruno Simma, I, 788-806. New York: Oxford University Press, 1995.
- Rothwell, Donald R. and Tim Stephens. *The International Law of the Sea*. Oxford, United Kingdom: Hart Publishing, 2010.
- Slocum, Brian G. "The Ordinary Meaning of Rules." In *Problems of Normativity, Rules and Rule-Following. Book to be released*. vol. 111 (2014). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435462 [accessed 21 August 2014].
- Tanaka, Yoshifumi. *The International Law of the Sea*. Cambridge: Cambridge University Press, 2012.
- Tsarev, V. F. "Peaceful Uses of the Seas: Principles and Complexities." *Marine Policy* 12, no. 2 (1988): 153-159.

UN GAOR. "Resolution 3314 (Xxix). Definition of Aggression." UN Doc. A/9619 and
Corr. 1, 1974.