Freedom of Navigation Operations in the South China Sea:

Legal or Illegal Under International Law?

Jaq James

GEO-LAW NARRATIVES

Working Paper
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Geo-Law Narratives is a platform for the exploration of competing rhetorical narratives between the Global North and Global South on matters involving international law and geo-politics.

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1. WHAT'S GOING ON IN THE SOUTH CHINA SEA?

The South China Sea is a strategic and resource-rich body of water in south-east Asia. It has been the focus of geopolitical tensions, including overlapping territorial claims by surrounding countries, the construction of artificial islands and the militarisation of those islands, competition over extraction of natural resources and their management, and 'freedom of navigation' exercises. It is the latter issue with which this paper is focused, namely, the Freedom of Navigation Operations (known as FONOPs) led by the United States' Navy in the South China Sea, and China's opposition to them.

The United States began its FONOPs worldwide in 1979 to challenge maritime claims made by various nations that it considered a violation of customary international law at the time, since reflected in the *United Nations Convention on the Law of the Sea* (UNCLOS) from 1982.[1] China has signed and ratified UNCLOS, while the United states has not.

The United States has asserted that preserving the freedom of the seas everywhere is a vital national interest. The United States is on the record for making the following statement explaining the policy justification for its FONOPs:

> *One of the first missions of the U.S. Navy was to defend U.S. commercial vessels in the Atlantic Ocean and Mediterranean Sea from pirates and other maritime threats. Similarly, President Woodrow Wilson told Congress during his Fourteen Points speech that* ***one of the universal principles for which the United States and other nations were fighting World War I was "absolute freedom of navigation upon the seas."*** *Likewise,* ***months before entering World War II, President Franklin Roosevelt declared "upon our naval and air patrol…falls the duty of maintaining the American policy of freedom of the seas."*** *More recently, President Barack Obama added that the United States "will continue to fly, sail, and operate wherever international law allows." As history shows, the U.S. national interest in preserving the freedom of the seas is long-standing in nature and global in scope.*[2] [Emphasis added.]

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[1] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994); Department of Defense (US), *Annual Freedom of Navigation Report, Fiscal Year 2023* (Report, 2023).

[2] Department of Defense (US), 'Department of Defence Freedom of Navigation Program' (Information Sheet, 28 February 2017) <online>.

As can be seen from this statement, freedom of the seas is such a significant national interest to the United States that it has been prepared to go to war over its position. The United States' position reflects the Grotius's position on freedom of the seas. Hugo Grotius is considered the father of international sea law with his publication *Mare Liberum (The Free Sea)* in 1609, in which he argued the sea is common to all because it is so vast that it cannot be possessed or enclosed, unlike land.

Since 1993, the United States has published records of its FONOPs. **The records demonstrate that the United States' FONOPs have been directed at both Global South and Global North countries, including allies of the United States.**[3] Reasons for conducting FONOPs have included matters such as countries claiming a 200 nautical mile territorial sea, excessive straight baselines, and requiring permission for warships to enter territorial seas (these concepts will be explained in section 3).[4]

1993 was also the first year the United States publicly recorded FONOPs targeting China, before the maritime disputes escalated amongst countries bordering the South China Sea.[5] At that stage, the United States was challenging China's requirement of prior permission for warships entering its 12 nautical mile territorial sea. Since then, the United States has challenged more of China's claims, but only since 2015 has there really been widespread media reporting on FONOPs, after the United States Navy's guided-missile destroyer - the USS Lassen - navigated within 12 nautical miles of at least one of the artificial islands built by China in the South China Sea's Spratly/Nansha archipelago.[6] China's response was as follows:

> *The Chinese side hereby expresses its strong discontentment and resolute opposition. … China has indisputable sovereignty over the [Spratly/]Nansha Islands and their adjacent waters.* ***The Chinese side always respects and safeguards the freedom of navigation and overflight in the South China Sea all countries enjoy under international law, but firmly opposes any action harming China's sovereignty and security interests under the cloak of freedom of navigation and overflight.*** *… We strongly urge the U.S. side to*

[3] Department of Defense (US), 'DoD Annual Freedom of Navigation (FON) Reports' (Web Page) <online>.
[4] Department of Defense (US), *Annual Report to the President and the Congress* (Report, 1993). The countries were Algeria, Brazil, Burma, Cambodia, Carpe Verde, China, Congo, Djibouti, Dominican Republic, Ecuador, India, Iran, Liberia, Maldives, Nicaragua, Nigeria, Oman, Pakistan, Peru, Sierre Leone, Somalia and Sudan.
[5] Ibid.
[6] Sam LaGrone, 'U.S. Destroyer Comes Within 12 Nautical Miles of Chinese South China Sea Artificial Island, Beijing Threatens Response', *USNI News* (27 October 2015) <online>.

> *conscientiously handle China's serious representations, immediately rectify its wrongdoing, and not take any dangerous or provocative acts that threaten China's sovereignty and security interests.*[7] [Emphasis added.]

As can be seen from this statement, China is concerned about aspects of freedom of navigation that it sees threatening its sovereignty and security; **China is not objecting to freedom of navigation itself**.

Since 2015, more incidents have occurred between the United States and China in the South China Sea, with the global media increasing its focus on the region, treating it as a potential flashpoint for war.[8]

To be clear, China has never impeded commercial shipping in the South China Sea, and the official position of the United States for its FONOPs is not associated with commercial shipping, only its military activities.[9] The main sticking point is the different interpretations of UNCLOS in respect of the legality of FONOPs in the South China Sea.

People in Global North nations are continually exposed to the United States' legal position through Western legacy media, believing FONOPs in the South China Sea to be unequivocally allowable under UNCLOS. However, they may not have been exposed to countering legal interpretations that exist in favour of China. As such, this paper aims to restore the balance of information exposure for such readers wanting to understand the legal situation from both sides and make up their own mind as to which legal interpretation could best achieve the United Nations' foundational objective of world peace.

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[7] Chinese Ministry of Foreign Affairs, *Foreign Ministry Spokesperson Lu Kang's Remarks on the US Warship USS Lassen Entering Waters near China's Islands and Reefs in the Nansha Islands* (Press Release, 27 October 2015) <online>.

[8] See, for example, Karishma Vaswani, 'The South China Sea Is the World's Next Flashpoint', *Bloomberg* (9 April 2024) <online>.

[9] James Goldrick, 'Freedom-of-Navigation Operations Aren't All About the South China Sea', *ASPI: The Strategist* (Blog Post, 9 October 2018) <online>.

2. BUT FIRST, WHAT IS INTERNATIONAL LAW?

Before delving into an analysis of UNCLOS, it is important to take a bird's eye view of international law. Yuval Noah Harari, a professor of history known for his worldwide best-selling book *Sapiens,* explains best what law is in its essence: **a set of principles that has no objective reality, but merely exists in our imaginations.** It is an 'imagined order' that enables large numbers of humans to cooperate effectively together. Whilst a natural order is stable (for example, there is no chance gravity will cease existing tomorrow if people stopped believing it), an imagined order "is always in danger of collapse, because it depends upon myths, and myths vanish once people stop believing in them".[10] Knowing this, nation-states have mechanisms in place to maintain the imagined order: state violence and coercion being one mechanism, and propaganda being another. Harari goes on to explain that it is propaganda that creates the true believers, which the imagined order needs most. The fundamental rule of the propaganda game is to never admit the order is imagined, but to pretend it is a type of natural universal law. An example of how this 'game' is played is when Global North countries talk about the 'rules-based international order', and China plays this game when they say the South China Sea is its 'inherent territory': these are both products of the human imagination. If humans died out tomorrow, there would be no more rules, and whilst there would still be the sea, it would be nothing more than a body of water obeying physics and gravity.

Harari explains that if one manages to free themselves from the grips of an imagined order, it will not matter, because they are just one person. A person is only a threat to the imagined order if they convince millions of others to follow their path because of the imagined order's inter-subjective nature. Even then, as Harari points out, there is no real way out of imagined orders: "When we break down our prison walls and run towards freedom, we are in fact running into the more spacious exercise yard of a bigger prison."[11]

We can roughly divide the imagined order of international law down the line of Global North and Global South positions, with the United States and its military allies falling into the former category and China falling into the latter category. In the case of the South China Sea, it is the Global North's imagined order that dominates the

[10] Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Harvill Secker, 2014) 124.
[11] Ibid 133.

world. Yet, as readers will learn in this paper, **the Global South's imagined order may be one that is preferable**.

There is another facet to international law that needs to be explained, which is that some scholars argue **international law is not truly law as the ordinary person understands the term**.[12] This is because there is no single centralised world government with authority to issue commands and punishment. Rather, international law is a mixture of explicit and implicit agreements between nations in the forms of treaties, customs and consensual practices, in which compliance rests more with diplomatic or economic pressures as opposed to a universal enforcement body with coercive power. Even when international courts exist (for example, the International Court of Justice and the International Criminal Court), their jurisdiction often depends on states' consent, meaning states can withdraw or fail to comply with judgments. The consent-based nature of international law is what gives it the elasticity that domestic laws lack.

Having said this, international law still holds greater legitimacy than the Global North's imagined order of 'rules-based international order', which is often a flexible rhetorical tool used to accommodate the Global North's policy preferences that may not strictly align with international treaty law, international court judgments, or authorisations from the United Nations Security Council.[13] Indeed, one Global North member's head of state, Mark Carney, said in 2026, to widespread approval, that the 'rules-based international order' was a "pleasant fiction".[14] The consent-based nature of international law and its greater legal legitimacy than the Global North's 'rules-based international order' need to be kept in mind when discussing legal issues around the South China Sea.

One last matter to note, for lay readers of this paper, is that international treaty law (which is what UNCLOS is) is not the only source of international sea law. Operating

[12] See, for example: John Austin, *The Province of Jurisprudence Determined* (Hackett Publishing Company, 1995) (first published 1832); Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) (first published 1934); Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press, 1977); H L A Hart, *The Concept of Law* (Clarendon Press, 1961); Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005); Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed, Columbia University Press, 1979).

[13] See, for example: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005); G John Ikenberry, 'The End of Liberal International Order?' (2018) 94(1) *International Affairs* 7.

[14] Mark Carney, 'Davos 2026: Special Address by Mark Carney, Prime Minister of Canada' (Speech transcript, World Economic Forum, 20 January 2026) <online>.

simultaneously is customary international law (which is general state practice accepted as law), general legal principles common to many legal systems, international judicial decisions and influential legal scholars' opinions.[15] Thus, whilst critics attack the United States for not ratifying UNCLOS (claiming the United States has no standing to seek enforcement of UNCLOS), **it must be counter-argued that, by the United States accepting most of UNCLOS as customary international law (with the main objection being UNCLOS's seabed mining provisions),[16] such criticisms of double standards made against the United States ring somewhat hollow.**

Having said this, the other objection by the United States to ratifying UNCLOS is the concern that states hostile to the United States would be in a position to judge its actions under the dispute settlement provisions of UNCLOS. In this respect, all states would be in the same boat, including China. This 'cost' of UNCLOS, however, did not stop China ratifying it. As such, it can be legitimately argued that **the United States has no standing to make any public commentary on any tribunal, court or arbitration decision made under UNCLOS when it does not subject itself to such dispute resolution bodies, and therefore, more specifically, the United States has no standing to call for enforcement of the South China Sea Arbitration Decision of 2016 brought against China by the Philippines.**

[15] Article 38(1) of the *Statute of the International Court of Justice.*
[16] Julian Ku, 'What Are the U.S. Objections to the Law of the Sea Treaty?' (Web Page, 19 September 2011) *Opinio Juris* <online>.

3. BRASS TACKS OF THE SOUTH CHINA SEA

Below is some background information pertaining to maritime zones under UNCLOS, how they map onto the South China Sea, and the controversial South China Sea Arbitration Decision of 2016 brought against China by the Philippines.

3.1. What are the Maritime Zones under UNCLOS?

Before understanding the legal issues around FONOPs in the South China Sea, one needs to understand some basic maritime zones under UNCLOS.

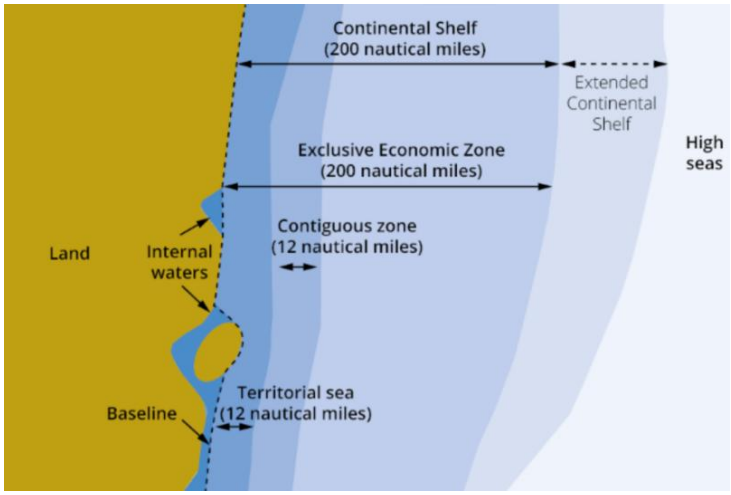

Image: Select Committee on International Relations and Defence, House of Lords, United Kingdom <online>

The first 12 nautical miles from a state coast's baseline is **Territorial Sea**, and a coastal state has **sovereignty** over the waters and the airspace above it.[17] However, there is an exception to that sovereignty, which is foreign ships (but not aircraft) are allowed "innocent passage",[18] as long as it is "continuous and expeditious",[19] and "not prejudicial to the peace, good order or security" of the coastal state, with a list explaining what amounts to such prejudice.[20]

[17] Article 2.
[18] Article 17.
[19] Article 18.
[20] Article 19.

Then the **Exclusive Economic Zone (EEZ)** effectively extends 188 nautical miles from the edge of a state's territorial sea.[21] A state has **sovereign rights** (which is different to sovereignty) in its EEZ to explore, exploit, conserve and manage the natural resources (living and non-living), and the seabed and its subsoil.[22] A state also has **jurisdiction** in its EEZ over artificial islands and installations, marine scientific research, and environmental protection.[23] All states generally enjoy freedom of navigation in EEZs.[24] The way such freedom of navigation in EEZs is worded under UNCLOS is that the freedom of navigation that is allowed in the **High Seas** under article 87 (the areas seawards of EEZs) is also allowed in EEZs under article 58(1). Notably, **freedom of navigation is not defined in UNCLOS.**

There are also **Contiguous Zones** and **Continental Shelves** under UNCLOS, but they are not key concepts for this paper.

3.2. What are the Claimed Maritime Zones in the South China Sea?

The following map shows the overlapping UNCLOS maritime claims of surrounding countries of the South China Sea, as well as the historical U-shaped line claim of China (and Taiwan) that predates UNCLOS. **China has said that it has "sovereignty, sovereign rights, and jurisdiction" within the U-shaped line,[25] which mixes concepts of territorial sea and EEZ without declaring its actual legal status in international law.**

[21] Article 57.
[22] Article 56(1)(a).
[23] Article 56(1)(b).
[24] Articles 58(1) and 87.
[25] Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009).

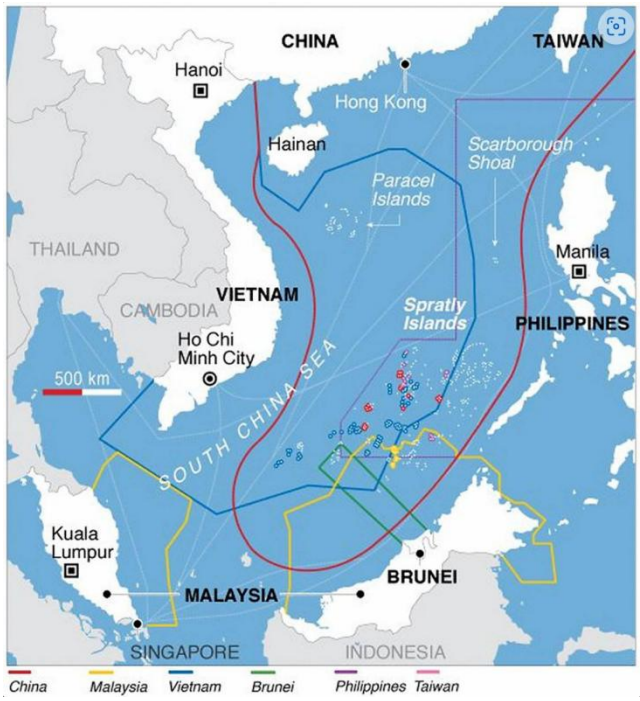

Image: Scott Stearns, 'Challenging Beijing in the South China Sea', VOA News (Blog Post, 31 July 2012) <online>.

The U-shaped line originated in 1947, first starting with the Republic of China (Taiwan), then inherited by the People's Republic of China (mainland China). In official Chinese records, it is thick-dash lines drawn on a map. It has been criticised for having no co-ordinates and being inconsistently drawn in different official depictions.[26] This makes the line more of an art than a science, which is arguably sufficient given that China's Foreign Ministry clarified in 2024 what the U-shaped line means:

> *"China's territorial sovereignty and maritime rights and interests in the South China Sea include: China's sovereignty over the South China Sea Islands, which have internal waters, territorial waters and contiguous zones, … exclusive economic zones and continental shelves, as well as China's historic rights in the South China Sea. …* ***China has never claimed that the entire South China Sea belongs to China****"* (emphasis added).[27]

In 1958, China passed laws claiming the four islands groups in the South China Sea as its territory, and "are separated … by the high seas" (that is, the Spratly/Nansha

[26] *South China Sea Arbitration (Republic of Philippines v People's Republic of China)* (Award) (Permanent Court of Arbitration, Case No 2013-19, ICGJ 495 (PCA 2016), 12 July 2016).
[27] Foreign Ministry of the People's Republic of China, *Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference* (Press Conference, 14 March 2024) <online>.

archipelago, the Paracel/Xisha archipelago, Scarborough/Huangyan Shoal and Macclesfield/Zhongsha Bank).[28] There would have been no mention of the legal concepts of internal waters, territorial sea, contiguous zone, EEZ and continental shelf since the Chinese law predated UNCLOS.

There was confusion in the international community for some time as to whether China was claiming all of the waters of the South China Sea to be its territory. This may be because of its 2009 submission to the United Nations that confirmed the U-shaped line, but used the words "China has indisputable sovereignty over the islands in the South China Sea and **the adjacent waters** and enjoys sovereign rights and jurisdiction over **the relevant waters as well as the seabed and subsoil thereof** (see attached map)" (emphasis added).[29] However, a key sentence in the 2009 submission that should have made China's position clear to the international community (and is definitely clearer in light of the Foreign Ministry's 2024 statement) is the following: "The above position is consistently held by the Chinese Government". This meant it was not deviating from its 1958 domestic law position, accept that with the advent of UNCLOS in 1982, some of the high seas around the island groups would have converted to UNCLOS maritime zones, which is what China would have meant by "adjacent waters", "relevant waters" and "seabed and subsoil".

In 2024, China's Foreign Ministry also clarified its legal basis for China's territorial and maritime zone claims over the four island groups:

> *"China was the first to discover, name, develop and utilise the South China Sea islands and related waters, and was the first to begin and exercise sovereignty and jurisdiction over the South China Sea islands and related waters in a continuous, peaceful and effective manner. After World War II, the Chinese government regained the South China Sea islands that, were illegally occupied by Japan, in accordance with the provisions of the **Cairo Declaration** and the*

[28] People's Republic of China, 'Declaration of the Government of the People's Republic of China on China's Territorial Sea' (4 September 1958) in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed, 2001), cited in *South China Sea Arbitration (Republic of Philippines v People's Republic of China)* (Award) (Permanent Court of Arbitration, Case No 2013-19, ICGJ 495 (PCA 2016), 12 July 2016).

[29] Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) <online>.

***Potsdam Proclamation**, and resumed the exercise of sovereignty"* (emphasis added).[30]

The *Cairo Declaration 1943*[31] and *Potsdam Proclamation 1945*[32] came out of World War II that set out what would happen to Japanese-held territories by the allied forces after Japan's defeat. The *Cairo Declaration* stated that "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China." The words "such as" in the *Cairo Declaration* shows the list is inexhaustive, so that if the four island groups were stolen by Japan from China, they would be implicitly included in the *Cairo Declaration*. The *Potsdam Proclamation*, which defined the terms of Japan's surrender, contained the words "[t]he terms of the Cairo Declaration shall be carried out".

A key issue to determining whether the four island groups belong to China in accordance with the *Cairo Declaration* and *Potsdam Proclamation* would be a **factual assessment** of whether Japan "stole" the four island groups from China. This means Japan would have either had to have physically occupied the island groups, lay administrative claim to the island groups, or otherwise exercised some type of sovereign authority before 1945. Another key issue to determining whether China's interpretation of the declaration and proclamation is fair would be the **contemporaneous interpretation** by the signatories (who were in the same room) at the time: the *Potsdam Proclamation* was not just signed by then United States President Harry Truman and then British Prime Minister Winston Churchill, it was also signed by then Republic of China's President Chiang Kai-shek. This means Kai-shek's interpretation of "territories Japan has stolen from the Chinese" would be included as evidence of the interpretation of this sentence. A further key issue is Kai-shek's **implementation actions** after Japan's surrender, which would include newly drawn maps, dispatched naval missions and administration of the island groups, as well as any **lack of objection** by the signatory nations during Kai-shek's

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[30] Foreign Ministry of the People's Republic of China, *Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference* (Press Conference, 14 March 2024) <online>.

[31] Cairo Declaration, 1 December 1943, in Foreign Relations of the United States: Diplomatic Papers, The Conferences at Cairo and Tehran 1943 (US Government Printing Office, 1961) 448.

[32] Proclamation Defining Terms for Japanese Surrender (Potsdam Declaration), 26 July 1945, in *Foreign Relations of the United States: Diplomatic Papers, The Conference of Berlin (Potsdam) 1945* (US Government Printing Office, 1960) vol II, 1474.

implementation (if known by the signatories). These are issues that will be assessed in detail in a future *Geo-Law-Narratives* paper.

3.3. The 2016 South China Sea Arbitration Decision

What has been considered to be a landmark decision in sea law was the 2016 award decision of the Permanent Court of Arbitration (PCA), brought by the Philippines against China over its claims in the South China Sea under Annex VII of UNCLOS.[33] The PCA ruled that China's claim to historic rights or maritime entitlements in the South China Sea based on the U-shaped line was invalid under UNCLOS. It found China's claims had no legal basis, and there was no evidence of exclusive historical use by China. Moreover, even if historic rights had existed, they were extinguished by UNCLOS. The PCA also classified certain maritime features in the Spratly/Nansha Islands as rocks and low-tide elevations (including those on which China built artificial islands), which therefore did not generate maritime zones under UNCLOS because they fail the definition of an island under article 121.

The effect of the PCA's decision is that there are less waters in the South China Sea that can be declared EEZs because there are fewer maritime features that can pass the island definition test entitled to maritime zones under UNCLOS. This would mean there would be more high seas in the South China Sea, freeing up the United States to conduct FONOPs without coming up against as many Chinese (or Vietnamese) maritime zone claims. However, in practice, China has dismissed the PCA decision as invalid and has not reneged on its maritime zone claims.[34] Although the PCA decision is legally binding,[35] there has not been sufficient international pressure put on China to make it effectual.

However, there is persuasive legal academic critique to suggest the PCA decision is actually invalid because the PCA had no jurisdiction to decide on the matter in the first place. More importantly, it misrepresented one of China's (and Vietnam's) key

[33] *South China Sea Arbitration (Republic of Philippines v People's Republic of China)* (Award) (Permanent Court of Arbitration, Case No 2013-19, ICGJ 495 (PCA 2016), 12 July 2016).
[34] The State Council Information Office (China), 'Spokesperson: China Neither Accepts nor Recognizes So-Called Award on South China Sea Arbitration' (Press Release, 13 July 2023) <online>.
[35] Article 296(1).

claims by treating the Spratly/Nansha and Paracel/Xisha archipelagos as being made up of individual features instead of an indivisible whole, based on historical treatment.[36] As such, the PCA decision could be characterised as meaningless because it was based on an erroneous foundation. A future *Geo-Law Narratives* paper will analyse this academic legal commentary.

Still, China's opposition to the United States' FONOPs in its EEZs is relevant to the South China Sea matter regardless of whether the PCA's decision is valid or invalid, as China still has undisputed EEZs in the South China Sea related to, at minimum, its mainland territories.

[36] See, for example: Stefan Talmon, 'The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility' (2016) 15(2) *Chinese Journal of International Law* 309. For historical evidence, see Bill Hayton, 'Strategic Forgetting: Britain, China, and the South China Sea, 1894–1938' (2023) 57 *Modern Asian Studies* 966–985; Anthony Carty, 'Archives on Historical Titles to South China Sea Islands: The Spratlys' (2019) 4(1) *Jus Gentium: Journal of International Legal History* 7; Anthony Carty, 'British and French Archives Relating to Ownership of the Parcel Islands 1900-1975' (2019) 4(2) *Jus Gentium: Journal of International Legal History* 301.

4. CHINA'S POSITION ON UNITED STATES' FONOPS

Upon signing or ratifying UNCLOS, several Global South nations made declarations that unauthorised foreign military activities were prohibited in their EEZs, and some of those nations passed domestic legislation to this effect.[37] China did not make a declaration regarding its EEZ, but did **enact domestic law** that stipulates surveying and mapping in sea areas under China's jurisdiction requires prior approval (which, by implication, includes China's EEZs),[38] which China may see as applicable to United States' FONOPs. On top of this, China's **state practice** of confronting United States navy vessels in the South China Sea indicates China seeks to restrict foreign military activities in its EEZ.[39] There are also **Chinese scholars** who argue foreign military activities are illegal in EEZs.[40]

One problem, however, is that **China has not always been consistent with its position**. For example, in 2021, China's navy entered Australia's EEZ and monitored Australian navy military training.[41] This may have an impact on how the freedom of navigation provisions under UNCLOS could be interpreted, as **subsequent state practice is a relevant factor in treaty interpretation** under the *Vienna Convention on the Law of Treaties* ('Vienna Convention').[42] In effect, **China may have risked undermining its legal position through its own actions towards Australia and any other nation towards which it conducts similar activities**. However, China could try to reconcile the apparent inconsistency by framing its monitoring as passive observation - analogous to transit - distinct from the surveillance style of the United States navy. It is important to note here, due to the controversy at the time, that the Chinese navy did not engage in military weapons exercises in Australia's EEZ in 2025, as claimed by certain Australian politicians and journalists. It conducted such

[37] Arie Afriansyah, Leonardo Bernard and Christou Imanuel, 'Should Indonesia Regulate Foreign Military Activities in its EEZ?' (2024) 159 *Marine Policy* 1, 1.
[38] *Surveying and Mapping Law of the People's Republic of China* (People's Republic of China) Order of the President No.75, 29 Aug 2002.
[39] Department of Defense (US), *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China* (Report, 2022) <online>; Department of Defense (US), *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China* (Report, 2019) <online>.
[40] Ren Xiaofeng and Cheng Xizhong, 'A Chinese Perspective' (2005) 29 *Marine Policy* 139; Xinjun Zhang, 'The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-Balance?' (2016) 9(1) *Journal of East Asia and International Law* 167.
[41] Ben Werner, 'Australian Prime Minister: Chinese Navy Has "Every Right" to Operate In Our Exclusive Economic Zone', *USNI News* (Web Page, 26 November 2021) <online>.
[42] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), article 31(3)(b).

exercises in the high seas off Australia, and only transited through Australia's EEZs, which were both lawful under UNCLOS.[43]

Stuart Kaye, a professor of law, effectively sums up an essential reason behind different legal interpretations of whether or not FONOPs in EEZs are lawful under UNCLOS. While UNCLOS prohibits certain military exercises and weapons testing in territorial seas,[44] **there are no such restrictions in EEZs**; while, at the same time, "neither is there any authorisation with respect to such exercises, with there being **no inclusion of military exercises or related activities in the list of [EEZ] freedoms**" (emphasis added).[45] **It is this silence in UNCLOS that both the United States and China are exploiting to serve their national interests**. As such, it is necessary to read UNCLOS as a whole to determine whether or not legal arguments can be made that military activities, such as the United States' FONOPs, can be excluded from freedom of navigation in EEZs. This holistic study is carried out in the next section.

Before moving on to the next section, it is necessary to note that, whilst it is the military nature of FONOPs that creates the point of contention between China and the United States, this paper only deals with military activities in a generic sense. It is acknowledged that there are finer points of contention between China and the United States about what amounts to military activities in terms of surveillance and research operations, marine scientific research, and hydrographic surveys,[46] but this paper does not explore those finer points.

[43] Australian Associated Press, 'Coalition MPs Falsely Claim China's Live-Fire Drill Was in Our Waters' (*Fact Check*, 2025) <online> (Professor Donald Rothwell's comments).
[44] Article 19(2).
[45] Stuart Kaye, 'Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral' (2005) 24 *Australian Year Book of International Law* 93, 100.
[46] Silvia Menegazzi, 'Military Exercises in the Exclusive Economic Zones: The Chinese Perspective' (2015) 1 *Maritime Safety and Security Law Journal* 56.

5. CONSTRAINTS ON FREEDOM OF NAVIGATION

There are a number of provisions in UNCLOS that constrain freedom of navigation. These provisions relate to: **(1) peaceful purposes** (see discussion at 5.1); **(2) refraining from threat or use of force** (see discussion at 5.2); **(3) acting in good faith and refraining from abuse of rights** (see discussion at 5.3); **(4) and giving due regard to coastal states** (see discussion at 5.4).

Marcos and Cavalcanti de Mello Filho are the pre-eminent scholars on this topic that critically challenge the United States' legal position on freedom of navigation, that is, high seas' freedom of navigation applies in the same way to EEZs.[47] Therefore the scholars' work will be drawn on heavily in this section.[48]

5.1. Peaceful Purposes - Article 88

Article 88 (via article 58(2)) of UNCLOS stipulates EEZs shall be "reserved for peaceful purposes". The term is not explicitly defined in UNCLOS. There are two interpretations of what it could mean in the literature: a narrow and a broad interpretation. The narrow interpretation is the "prevailing interpretation" in the literature, and favoured in practice by "naval powers who consider naval mobility throughout the oceans a critical strategic interest", which includes the United States.[49]

[47] Raul Pedrozo, 'Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone: U.S. Views' in Peter Dutton (ed), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (Naval War College Press, 2010) 23.
[48] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417. As the majority of this paper was written in 2024, there may have been other major works published in between then and the time this paper was re-published in 2026. The author of this paper would appreciate being made aware of more recent publications, if they exist.
[49] Ibid 422.

5.1.1. Narrow Interpretation

The narrow interpretation uses a contextual and supplementary means of interpretation under articles 31(1) and 32 of the Vienna Convention, respectively. Article 31(1) requires ordinary meanings to be given to terms of a treaty "in their context and in the light of its object and purpose". Article 32 states "[r]ecourse 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". Accordingly, the definition of 'peaceful purposes' in other treaties - such as the Antarctic Treaty[50] or Outer Space Treaty[51] - cannot be imported into UNCLOS. Instead, scholars normally turn to article 301 within UNCLOS - titled "Peaceful uses of the sea" - for two reasons. The first is the "association of ideas" between 'peaceful purposes' and 'peaceful uses'.[52] The second is that article 301 was initially drafted by ten states to be a part of article 88 as clarifying the meaning of 'peaceful purposes', but was later moved to a separate general provision.[53]

Article 301 makes clear that, when state parties are exercising their rights or duties under UNCLOS, they must "refrain from any threat or use of force against the territorial integrity or political independence of any State", and refrain from violating any "principles of international law embodied in the Charter of the United Nations". Since 'peaceful use' is narrowly defined, as long as any foreign military activities in an EEZ do not involve the threat or use of force against a state's territorial integrity or political independence, then such freedom of navigation would accordingly be considered peaceful within this narrow interpretation.

Another reason for this narrow interpretation is that the territorial sea provision under UNCLOS lists all activities declared non-innocent because they prejudice the "peace, good order or security" of a state. The list goes beyond "threat or use of force" to include such activities as weapons practice, interfering with communication systems of the coastal state, and information collection that prejudices the defence

[50] *Antarctic Treaty*, signed 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).
[51] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967).
[52] Killian O'Brien, 'Part XVI General Provisions' in Alexander Proelss, Amber Rose Maggio, Eike Blitza and Oliver Daum (eds), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck Hart Nomos, 2017) 1937, 1944.
[53] *'Enrica Lexie' Incident (Italy v India)* (Award) (2020) PCA Case No 2015-28, [1047].

or security of the coastal state.[54] Using a *contrario* interpretation (meaning interpreting a law by looking at what a law does not say), some scholars reach a conclusion that if such territorial sea prohibitions were also meant to apply to EEZs, then the same list would also be included under the EEZ provisions. Therefore the absence of a similar list means that 'peaceful purposes' does not take on a broader definition beyond article 301.[55]

5.1.2. Broad Interpretation

A broad interpretation of 'peaceful purposes', on the other hand, is reached through analogous reasoning. Whilst not a source of international law under article 38 of the *Statute of the International Court of Justice*, analogy is used by international courts and tribunals as a form of legal reasoning that allows international law to adapt to changing circumstances.[56] Two Chinese legal scholars, Ren Xiaofeng and Cheng Xizhong, have proposed 'peaceful purposes' be understood more broadly than article 301 by analogising the meaning of non-innocent passage in the territorial sea to non-peaceful purposes in the EEZ. Their argument is based on technological advancements that have occurred since UNCLOS came into force, in which the impacts on a state from non-innocent activities in a territorial sea can today be achieved at a distance of EEZs.[57] To expand on this point, technology today permits states to engage in surveillance, intelligence-gathering, and even certain forms of offensive cyber or electronic warfare from well beyond the 12 nautical mile limit compared to technology in 1982 when UNCLOS was drafted. Because modern technology can project power and gather sensitive information at great distances, the impact of these activities on a coastal state's security may be comparable to (or even exceed) the security risks posed by 'non-innocent' acts in a territorial sea.

Yet, this broad interpretation has been challenged by Marcos and Cavalcanti de Mello Filho.[58] They raise two notable issues. Firstly, based on the *travaux*

[54] Article 19(2).
[55] See, for example, Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9 *Chinese Journal of International Law* 9, 11.
[56] Seyed Ghasem Zamani, Heidar Piri and Seyed Hadi Mahmoody, 'Discovery of Legal Rule through Analogy by the International Court of Justice' (2020) 49(4) *Public Law Studies Quarterly* 1149.
[57] Ren Xiaofeng and Cheng Xizhong, 'A Chinese Perspective' (2005) 29 *Marine Policy* 139, 142-43.
[58] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417.

preparatoires (the official records and documents produced during the negotiation and drafting of a treaty), ambiguity surrounding the EEZ provisions was a deliberate strategy taken by the United States when negotiating UNCLOS so it could later argue military activities are allowed in EEZs.[59] Secondly, the EEZ is "very different from the territorial sea", and to "infer that non-peaceful purposes in the EEZ should be equated to non-innocent activities in the territorial sea because they aim at similar goals is unpersuasive".[60] Unfortunately, Marcos and Cavalcanti de Mello Filho do not elaborate on why Ren and Cheng's reasoning is unpersuasive.

It is submitted that perhaps Ren and Cheng's reasoning should not be dismissed so easily. The fact is international courts and tribunals have recognised that rapid technological developments can transform the nature and impact of certain activities, prompting a corresponding evolution in the application and interpretation of existing legal norms. For example, in the *Nuclear Weapons Advisory Opinion*,[61] the International Court of Justice affirmed that it must consider modern realities and potential humanitarian consequences when interpreting the legality of nuclear weapons—an issue that had not been foreseen by drafters of the treaty decades prior. Consequently, there is reason to argue that UNCLOS should be interpreted in line with technological evolutions.

5.1.3. State Practice

As mentioned earlier, subsequent state practice can also be another source of international law when it reaches the threshold of custom. There is growing practice among states restricting foreign military activities in EEZs, but the legal bases are varied.[62] Marcos and Cavalcanti de Mello Filho divide the practice into three groups, notably made up of Global South nations. One group has declared UNCLOS does not authorise foreign military activities in EEZs without consent, while making no mention of the term 'peaceful purposes'. A second group takes a broad

[59] Ibid 434; James W Houck and Nicole M Anderson, 'The United States, China, and Freedom of Navigation in the South China Sea' (2014) 13 *Washington University Global Studies Law Review* 441, 446-7.
[60] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417, 435.
[61] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.
[62] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417.

interpretation of the term ‘peaceful purposes’ and has declared military activities to be non-peaceful in EEZs. A third group of states seem to interpret ‘peaceful purposes’ through article 301, but understands ‘peaceful uses’ to mean consent is required from coastal states for foreign military activities conducted in EEZs. A fourth group could also be added to Marcos and Cavalcanti de Mello Filho’s groupings, which is states that have demonstrated a willingness to take physical action against foreign military vessels in their EEZs, within which China falls.

Marcos and Cavalcanti de Mello Filho note that, on the opposite side, some Global North nations have made declarations under UNCLOS that coastal states have no rights to require consent for foreign military activities in EEZs. They base this on their interpretations of article 56 (which limits a coastal state’s sovereign rights and jurisdiction to economic, infrastructure and environmental matters only in EEZs) and article 59 (which only allows equitable resolution of conflicts on matters not covered by rights and jurisdiction stipulated under UNCLOS). None of these Global North countries, however, address the meaning of ‘peaceful purposes’.[63]

There are between 35 to 50 countries that limit foreign military activities in their EEZs in varying ways.[64] There are 168 parties to UNCLOS.[65] This means nations that take a stance against foreign military activities in EEZs are in the minority, not enough to say there is international consensus on the issue, and definitely no consensus on what ‘peaceful purposes’ means. Accordingly, Marcos and Cavalcanti de Mello Filho conclude that “subsequent practice is not sufficient to turn the interpretation of [‘peaceful purposes’] as applied to the EEZ away from Article 301”.[66]

5.1.4. Summary

UNCLOS states that EEZs must be used for “peaceful purposes”, but because the term remains undefined in UNCLOS, a debate has emerged between those who adopt a narrow interpretation (backed by Article 301, which prohibits only actions

[63] Ibid.
[64] Department of Defense (US), *Maritime Claims Reference Manual* (18 August 2017) <online>.
[65] International Seabed Authority, ‘The United Nations Law of the Sea Convention at 40’ (Web Page) <online>.
[66] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417, 439.

of force or threats of force) and those who advocate a broader reading (drawing analogies from territorial sea prohibition rules and advancements in technology since UNCLOS was drafted). There is no international consensus in terms of legal interpretation or state practice on which approach should prevail, and countries that challenge foreign military activities in their EEZs are still in the minority.

5.2. Threat or Use of Force Against Territorial Integrity or Political Independence - Article 301

As mentioned earlier, article 301 of UNCLOS makes clear that, when state parties are exercising their rights or duties under UNCLOS, they must "refrain from any threat or use of force against the territorial integrity or political independence of any State", and refrain from violating any "principles of international law embodied in the Charter of the United Nations". To understand whether foreign military activities can constitute a threat or use of force in a coastal state's EEZ, three concepts need to be understood: **territorial integrity, political independence,** and **threat or use of force**. These are not defined in any United Nations' instruments, but there is scholarly work that helps illuminate their meanings, as outlined below.

5.2.1. Territorial Integrity

Marcos and Cavalcanti de Mello Filho argue that the EEZ regime's sovereign rights and jurisdiction give an EEZ territorial integrity, which is protected by the prohibition of threat or use of force. They cite a number of cases to support their position. First, the dominant legal principle of 'land dominates the sea' was explicitly recognised as also belonging to EEZs by the International Court of Justice in the *Maritime Delimitation in the Black Sea Case*.[67] Second, the International Court of Justice in the *North Sea Continental Shelf Case* held that "the contiguous zone and the continental shelf are … concepts of the same kind … the land is the legal source of the power which a state may exercise territorial extensions to seaward".[68] Third, the dissenting judgment in the *North Sea Continental Shelf Case,* where Vice-President Koretsky

[67] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61.
[68] *North Sea Continental Shelf (Federal Republic of Germany/Denmark*) (Judgment) [1969] ICJ Rep 3 [96].

asserted that "not only the territorial sea but also the continental shelf may now be considered as 'accessories' of or, in the words of the judgment in the *Fisheries Case*,[69] as 'appurtenant to the land territory'".[70] Fourth, the International Court of Justice in the *Aegean Sea Continental Shelf Case* commented that continental shelf rights were "an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State".[71]

Based on these judicial commentaries, Marcos and Cavalcanti de Mello Filho argue, firstly, that EEZs are an "emanation of the land territory" and therefore form part of "territorial status".[72] Secondly, they argue the continental shelf and contiguous zone are a "concept of the same kind" to EEZs, in that they present as a "set of rights and jurisdiction which emanates from territorial sovereignty and, just like the territorial sea, an accessory of, an appurtenant to, or an adjunct of the land territory", and therefore "the EEZ is part of the territorial status".[73] This reasoning makes sense when considering EEZs are measured under UNCLOS from coastal baselines, so that an EEZ's existence is inextricably linked to its land territory. It is noted, however, that there is extensive literature on the phenomenon of 'creeping jurisdiction' and 'territorialisation of EEZs', with some scholars cautioning against these (as it undermines the compromises made in negotiating UNCLOS), while other scholars accept that customary legal norms can evolve over time.[74]

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[69] *Fisheries Case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116.
[70] *North Sea Continental Shelf (Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3 [159] (Koretsky, J., dissenting).
[71] *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3 [86].
[72] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417, 441.
[73] Ibid 443.
[74] See, for example: Barbara Kwiatkowska, 'Creeping Jurisdiction in the Law of the Sea: Some Examples from State Practice' (1983) 1(2) *International Journal of Marine and Coastal Law* 129; Douglas M Johnston, 'Creeping Jurisdiction from the Perspective of Coastal/Archipelagic States: The Case of Southeast Asia' (1986) 17(2) *Ocean Development & International Law* 163; Ted L McDorman, 'The Creeping Jurisdiction of the Coastal State over Vessel-Source Pollution in the Exclusive Economic Zone' (1997) 8(3) *Georgetown International Environmental Law Review* 139; Erik Franckx, 'Fisheries Enforcement and the "Territorialization" of the Exclusive Economic Zone: The Case of the North-West Atlantic' (1998) 13(3) *International Journal of Marine and Coastal Law* 315; David Anderson, 'Future Influence of the LOS Convention on State Practice' (2000) 49(3) *International and Comparative Law Quarterly* 301; Ivan Shearer, 'Navigation under the UN Convention on the Law of the Sea: The "Creeping" of Coastal State Jurisdiction' (2001) 22(4) *Australian Year Book of International Law* 327; Natalie Klein, 'Dispute Settlement in the UN Convention on the Law of the Sea: The Exclusion of Maritime Delimitation Disputes and "Creeping Jurisdiction"' (2003) 6(1) *Cambridge Journal of International and Comparative Law* 7; J Ashley Roach, 'Today's Customary International Law of the Sea' (2014) 45(3) *Ocean Development & International Law* 239; Donald R Rothwell, 'The EEZ Concept: Implications for 'Territorialization' of the Seas' (2016) 11(2) *Asian Journal of International Law* 312; Akiho Shibata, 'UNCLOS as a Living Treaty? Creeping Jurisdiction and Evolving Norms' (2019) 10(1) *Cambridge International Law Journal* 51.

5.2.2. Political Independence

When drafting the Charter of the United Nations, it was the smaller states that wanted to include reference to political independence so that "a State was protected not only from physical acts of violence… but also from threats which could be autonomously directed against and eventually influence the freedom of decision-making and the normal operation of its organs".[75] Based on this, an argument could be made that states' decisions to interpret UNCLOS as allowing the prohibition of foreign military activities in their EEZs without consent are decisions that form part of their political independence over the 'appurtenant' to, or 'emanation' from, their land territory.

5.2.3. Threat or Use of Force

Marcos and Cavalcanti de Mello Filho submit that United States' FONOPs in EEZs of coastal states can be interpreted as threats of force against the territorial integrity or political independence of coastal states that resemble gunboat diplomacy, prevalent during the West's colonial era of the 19th and early 20th century.[76] 'Gunboat diplomacy' is defined as "the use or threat of limited naval force, otherwise than as an act of war, in order to secure advantage, or to avert loss, either in the furtherance of an international dispute or else against foreign nationals within the territory or the jurisdiction of their own status quo".[77]

Marcos and Cavalcanti de Mello Filho attempt to differentiate their position from the statements made in the *Corfu Channel Case*[78] and the *Case concerning Military and Paramilitary activities in and against Nicaragua*,[79] in which both cases found no threat of force existed. In the second case in particular, the International Court of

[75] Ibid 482.
[76] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417, 444.
[77] James Cable, *Gunboat Diplomacy: 1919-1991* (International Institute for Strategic Studies, 1994) 21.
[78] *Corfu Channel (United Kingdom v Albania)* (Judgment) [1949] ICJ Rep 4.
[79] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392.

Justice found that United States' military activities just outside Nicaragua's territorial sea "formed part of a general and sustained policy of force intended to intimidate the Government of Nicaragua into accepting the political demands of the United States Government";[80] however, the International Court of Justice held that the military activities "in the circumstances in which they were held" did not amount to a threat or use of force.[81]

It is this 'case-by-case' qualification that Marcos and Cavalcanti de Mello Filho use to suggest FONOPs may be sufficiently different to warrant a different finding that they are a threat of force to exert political pressure on states to abandon their "excessive maritime claims".[82] The scholars acknowledge that the United States may counter-argue FONOPs are "assertions of existing rights, and not of political pressure or dissuasion" on states to abandon their legal positions; however, the scholars suggest such a counter-argument may not hold up because of the difficulty of dissociating FONOPs from their "political contentions".[83]

5.2.4. Summary

EEZs may constitute an 'emanation' of a state's land territory (thereby falling under the protection of article 301 of UNCLOS), so that a coastal state prohibiting foreign military activities without consent in its EEZ is part of protecting that coastal state's territorial integrity and political independence. As such, United States' FONOPs in EEZs may constitute an illegal threat of force under article 301 if the FONOPs are designed to coerce coastal states into abandoning what the United States deems "excessive maritime claims".

[80] Ibid [92].
[81] Ibid [227].
[82] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417, 446.
[83] Ibid.

5.2. Good Faith and Abuse of Rights - Article 300

Article 300 of UNCLOS stipulates state parties shall "fulfil in good faith" their obligations under UNCLOS and shall not act in a manner that constitutes "an abuse of rights" when exercising their rights, jurisdiction or freedoms under UNCLOS. As such, coastal states may argue that, under article 300, freedom of navigation in their EEZs are not carried out in good faith or are an abuse of freedom of navigation when they involve military activities. These concepts will be examined separately.

5.3.1. Good Faith

There is a "dearth of legal pronouncements" concerning how 'good faith' in article 300 should be interpreted,[84] and there is little interpretation guidance available in the *travaux preperatoires*.[85] There are, however, some useful scholarly discussions. The definition most often quoted is by law professor Bin Cheng. He wrote that 'good faith' entails the owner of a right "to use the discretion in a reasonable, honest and sincere manner in conformity with the spirit and purpose, as well as the letter, of the law".[86]

How 'good faith' should be interpreted in the context of foreign military activities in EEZs would be highly dependent on the types of military activities conducted. In the case of the South China Sea, are United States' FONOPs a cover for a sea power supremacy rivalry against a rising power, and perhaps the laying of offensive battleground preparations, as suggested by some Chinese scholars?[87] If compelling evidence is submitted to this effect, it could be said that the basis for such FONOPs are not "reasonable, honest and sincere", and therefore are not carried out in good faith.

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[84] Killian O'Brien in Alexander Proelss, Amber Rose Maggio, Eike Blitza and Oliver Daum (eds), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck Hart Nomos, 2017) 1937, 1940.

[85] Hyun Jung Kim and Anne Thida Norodom, 'An Appraisal of Article 300 of the United Nations Convention on the Law of the Sea' (2022) 53 (2-3) *Ocean Development & International Law* 214.

[86] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953) 135.

[87] Ren Xiaofeng and Cheng Xizhong, 'A Chinese Perspective' (2005) 29 *Marine Policy* 139; Xinjun Zhang, 'The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-Balance?' (2016) 9(1) *Journal of East Asia and International Law* 167.

5.3.2. Abuse of Rights

The way 'abuse of rights' can be understood under article 300 is not dissimilar to the requirements under general international law.[88] There are three broad categories of abuse of rights: (1) where the exercise of a right by one state results in a serious injury to another state; (2) where a right is exercised for an ulterior motive or improper purpose to the original purpose for the right; and (3) where a right is exercised in bad faith.[89]

It is difficult to see how the first category would encompass United States' FONOPs in the South China Sea, as there are no tangible injuries such as disruption of commercial shipping to or from China. Regarding the second and third categories, if FONOPs are a pretext for challenging China's maritime claims (remembering that political pressure can be exerted through diplomatic channels rather than military channels), military intelligence gathering or battleground preparation, then FONOPs may be an abuse of rights or an exercise of a right in bad faith.

5.3.3. Summary

Under Article 300 of UNCLOS, coastal states may argue that FONOPs constitute an abuse of rights or a violation of good faith if they serve ulterior motives such as political pressure (via military means instead of diplomatic means), intelligence gathering, or battleground preparation, rather than the genuine exercise of navigation freedoms.

[88] Hyun Jung Kim and Anne Thida Norodom, 'An Appraisal of Article 300 of the United Nations Convention on the Law of the Sea' (2022) 53 (2-3) *Ocean Development & International Law* 214.
[89] Ibid. Although, given 'bad faith' is an antonym of good faith, this broad category seems more applicable to understanding the term 'good faith' in article 300.

5.4. Due Regard - Article 58(3)

Articles 58(3) of UNCLOS stipulates state parties shall exercise freedom of navigation with "due regard to the rights and duties of the coastal State [under UNCLOS] and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of [UNCLOS] and other rules of international law in so far as they are not incompatible". Accordingly, if foreign military activities in EEZs were presumed allowable under UNCLOS, then foreign states would need to exercise such activities with due regard to the sovereign rights and jurisdiction of the coastal state, and its domestic laws not incompatible with international law.

One particular case that has offered some clear insight into how 'due regard' should be interpreted is the *Chagos Arbitral Tribunal Case*.[90] The tribunal indicated the exercise of 'due regard' "entails, at least, both consultation and a balancing exercise with [the coastal state's] rights and interests".[91] Marcos and Cavalcanti de Mello Filho submit that this suggests unilaterally conducting military activities in another state's EEZ without consultation would violate the due regard obligation.[92] The scholars' interpretation has some weight given UNCLOS does not stipulate a right to military activities in EEZs, and seeking prior authorisation may not always be particularly taxing on a state. As such, China's requirement for prior authorisation in its EEZs may not be unreasonable.

Additionally, when it comes to considering the interests of a coastal state, it could be argued that a state's idiosyncratic need for a sense of security should be paid 'due regard'. China, in particular, has a sensitive history, namely, the 'Century of Humiliation' from 1839 to 1949 when China was subjugated and exploited by foreign maritime powers. During that period, China was forced to cede or lease its territories, including Hong Kong to Britain, Taiwan to Japan, and parts of Shandong to Germany and then Japan. Without sea access, such land grabs would have been more difficult. It is only natural that today China would try to curtail foreign military activities at its front door by maritime powers known for their colonial history, involvement in

[90] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Final Award) (2015) PCA Case No 2011-03.
[91] Ibid 578.
[92] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone' (2023) 44(2) *University of Pennsylvania Journal of International Law* 417, 448-449.

regime change and separatist movements, and widespread modern-day warfare.[93] As Xu points out, there are "half a billion people who live within 100 miles of the South China Sea coastline".[94] Understanding China's fear for security is what Clinton Fernandes, professor of international and political studies, would describe as 'strategic empathy',[95] and should operate alongside international law to help make it workable.

5.4.1. Summary

Under Article 58(3) of UNCLOS, foreign military activities in coastal state's EEZ must be carried out with "due regard" to the coastal state's rights and interests (as interpreted by the Chagos Arbitral Tribunal to include consultation and balancing exercises), which, in China's case, may justifiably encompass its security concerns (especially given its insecure history) and requirement for prior authorisation.

[93] See, for example, Michael Pembroke, *Play by the Rules: The Short Story of America's Leadership From Hiroshima to COVID-19* (Hardie Grant, 2020).
[94] Beina Xu, 'South China Sea Tensions' (*Backgrounder*, 2014) Council on Foreign Relations <online>.
[95] Clinton Fernandes, *Sub-Imperial Power: Australia in the International Arena* (Melbourne University Press, 2022).

6. CONCLUSION

Freedom of navigation is not a straightforward 'free-for-all' concept; it is a regulated freedom, and all freedoms have corresponding responsibilities. Similarly, territory and sovereignty are not unlimited in space, especially when it comes to the seas; they must be responsibly and equitably shared with others.

One of the main purposes of UNCLOS was to establish a legal order of the seas that facilitates peaceful use. If UNCLOS is causing tension and conflict between claimant nations around the South China Sea, and between an existing superpower and rising superpower, then all parties should consider how their state practices are harming the noble purpose of UNCLOS.

On the one hand, the United States does not want to cede its status as the reigning maritime superpower and will bristle at any potential threats that curtail its widespread sea access. On the other hand, China is a country that has experienced periods of great weakness and subordination in its history because of its connection to the sea, and now takes a protectionist approach to its vulnerable frontiers.

As to what is the answer to this paper's title question - are United States' FONOPs in the South China Sea legal or illegal under international law? - this paper demonstrates there is no clear-cut answer. The Global North's position on military activities in EEZs is the majority position in the international community, but there are legal constraints on freedom of navigation in UNCLOS that China may be able to argue in its favour.

As to whether those arguments would persuade an international court, it is unlikely we will ever know. China has opted out of compulsory dispute settlement regarding military activities under article 298(1)(b), and the United States is not a party to UNCLOS. Regardless, it is unlikely a court would accept that all foreign military activities are constrained off coastal states, while also unlikely giving an absolute right to maritime states for all types of military activities. A court would be cognisant of balancing the interests of both the Global South and Global North so that both sides continue to give their consent to the international law project. In the meantime, readers of this paper can make up their own minds as to what imagined order, in

terms of interpretation of UNCLOS, may best achieve the United Nations' goal of world peace.