Responding to Law of the Sea Violations

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***Abstract**: The oceans have long been a space of contestation between States. States assert and defend claims related to ocean space, use and resources to promote and protect military, economic, social and strategic interests. States' claims may prompt diverse reactions that hold both political and legal significance. This article examines State responses to perceived violations of the law of the sea, highlighting the legal parameters and thresholds that are in place to guide State decision-making in their reactions to those alleged violations. The responses discussed include those set out in the UN Convention on the Law of the Sea, protests and retorsion, countermeasures, using force, treaty suspension and alternative agreements. It is argued that adhering to legal standards in responding to law of the sea violations is essential to support a rules-based order of the oceans and may reduce the normative ambiguity that is inherent in 'grey zone' strategies.*

1. Introduction

Since its early history, the law of the sea has encompassed diverse claims and counterclaims among the key actors.[1] Although the law of the sea has significantly

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[1] As evident in the so-called 'battle of the books' between Hugo Grotius, who supported *mare liberum*, and John Selden, who advocated for *mare clausum*, in the 1600s. See Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Bloomsbury, 2nd ed, 2016) 3.

evolved to a dense complex of rules governing all activities in maritime areas across 70% of the Earth's surface, claims and counterclaims persist. What is notable is that the key constitutive document for the law of the sea, the *UN Convention on the Law of the Sea* (UNCLOS or Convention),[2] anticipates varied circumstances where its rules will be violated and provides for the lawful responses that may follow a rule violation. This phenomenon is not unique to the law of the sea—the inevitability of international law disputes arising is manifest in the inclusion of dispute settlement procedures in many treaties. UNCLOS is exceptional in the latter regard for including compulsory jurisdiction for disputes arising that concern the interpretation or application of the Convention.[3] However, even before resort to dispute settlement procedures occurs, other actions may be contemplated, including those set out in UNCLOS itself. These responses are the focus of the current article.

How a State responds to perceived violations of the law of the sea is an increasing source of tension in international relations and is manifest in many contemporary settings. For example, the United States continues its Freedom of Navigation program throughout the world as a means of demonstrating its disagreement with certain claimed rights to maritime space that potentially impinge on navigational rights.[4] During 2019, Iran and other States engaged in diverse confrontations in the Strait of Hormuz, resulting in vessel and crew detentions.[5] China has deployed its maritime militia, coast guard and naval

[2] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('*UNCLOS*').
[3] See ibid pt XV.
[4] See, eg, James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers, 2013) 201–14; U.S. Department of Defense, *Annual Freedom of Navigation Report Fiscal Year 2019* (Report to Congress, 28 February 2020).
[5] See, eg, 'Iranian Tanker Seizure: Radio Exchanges Reveal Iran–UK Confrontation', *BBC News* (online, 21 July 2019) <https://www.bbc.com/news/uk-49061675>; Jon Gambrell, 'US Says Iran Briefly Seizes Oil Tanker Near Strait of Hormuz', *Associated Press* (online, 14 August 2020) <https://apnews.com/3f1f

assets in response to perceived resource violations in the South China Sea and East China Sea, which partly aligns with China's disputed territorial sovereignty claims but also its disputed rights over maritime space.[6] There are thus many examples where State authorities are acting to preserve their rights in maritime space but the legal frame for assessing these responses varies.

One purpose of this article is to highlight the available legal options for responding to law of the sea violations, other than turning to formal dispute settlement procedures.[7] Another purpose is to consider the legal and political ramifications for the chosen responses. For the legal perspective, it will be seen that there are lawful parameters for actions taken in response to a perceived violation of the law of the sea. From a political perspective, the consequences may have strategic or military dimensions, especially where the responses are considered as falling within a 'grey zone' between war and peace.[8] The claims and reactions between States may be cast as grey zone strategies, whereby goals are sought '*without* escalating to overt warfare, *without* crossing established red lines, and thus *without* exposing the practitioner to the penalties and risks

614a05e9ad1efce8f422cfee3189>; Jon Gambrell, 'Armed Men Seize, Release Tanker off Iran by Strait of Hormuz', *Associated Press* (online, 15 April 2020) <https://apnews.com/dee8b 344a29eb6d3fe512e67697a79c1>.

[6] See, eg, Derek Grossman and Logan Ma, 'A Short History of China's Fishing Militia and What It May Tell Us', *The RAND Blog* (online, 6 April 2020) <https://www.rand.org/blog/2020/04/a-short-history-of-chinas-fishing-militia-and-what.html>.

[7] By 'formal' dispute settlement procedures, I am referring to the availability of compulsory procedures entailing binding decisions or conciliation processes available under *UNCLOS*, or other third-party mechanisms, such as resolution at the International Court of Justice or through other international courts, tribunals or bodies that may have jurisdiction to follow a designated procedure to resolve a dispute.

[8] The grey zone has been variously defined in the literature. Morris et al suggest:

> The gray zone is an operational space between peace and war, involving coercive actions to change the status quo below a threshold that, in most cases, would prompt a conventional military response, often by blurring the line between military and nonmilitary actions and the attribution for events.

Lyle J Morris et al., *Gaining Competitive Advantage in the Gray Zone: Response Options for Coercive Aggression Below the Threshold of Major War* (RAND Corporation, 2017) 8.

that escalation may bring'.[9] The latter dimension has been examined in security studies literature and while necessary to acknowledge in the present analysis, the focus is more so on legal consequences. Indeed, Australia has observed the increased use of 'measures short of war' and observed the need to 'prevent the erosion of hard-won international rules and agreed norms of behaviour that promote global security'.[10] The challenge thus presented in this article is how to maintain a robust rules-based approach in responding to law of the sea violations so as to ensure a minimum public order in the oceans.

To this end, the article proceeds as follows. In Part 2, I will address the responses that are set out in UNCLOS itself. Two examples are presented in this regard: the first addresses passage in the territorial sea and the second is concerned with fishing in the Exclusive Economic Zone (EEZ). As there are other examples of where UNCLOS provides for the responses that States have available when there is a perceived violation of an UNCLOS requirement,[11] I also consider the question of whether UNCLOS should be viewed as a 'self-contained regime', as occurred in the *Tehran Hostages* case.[12] In Part 3, I assess one of the more common responses to law of the sea violations, which entail protests and acts of retorsion. Protests are important for demonstrating a lack of acquiescence and are most typically communicated in written form. Retorsion refers to reactions of a State to the actions of another State where that reaction is not unlawful.[13] Where the reaction of

[9] Hal Brands, 'Paradoxes of the Gray Zone' (E-Notes, Foreign Policy Research Institute, 5 February 2016) <https://www.fpri.org/article/2016/02/paradoxes-gray-zone/> (emphasis in original).
[10] Australian Government, *Foreign Policy White Paper* (Report, 2017) 24.
[11] There are many other examples, such as the rules relating to enforcement for pollution of the marine environment or for the suspension or cessation of marine scientific research in the EEZ. See *UNCLOS* (n 2) pt XII s 6 (in relation to marine pollution) and art 253. See further *UNCLOS* (n 2) arts 92(2), 94(7), 97, 110, 111.
[12] *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Judgment)* [1980] ICJ Rep 3 ('*Tehran Hostages*').
[13] Thomas Giegerich, 'Retorsion' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) [1].

a State to an unlawful act is unlawful in its own right then it may constitute a countermeasure. Part 4 examines the requirements for countermeasures as a circumstance precluding wrongfulness under the law of State responsibility. Resort to countermeasures has been contemplated as a means of responding to illegal fishing on the high seas as well as the transport of weapons of mass destruction in the face of flag State failures to exercise effective jurisdiction over their vessels.[14] In Part 5, I briefly address other responses to law of the sea violations that draw from general international law: using force; suspension or termination of treaties; and, alternative agreements, either relevant in relation to treaty interpretation or as another means of augmenting the actions available to States for responding to actual or suspected law of the sea violations. The variety of responses available underlines the important role for international law in regulating State decision-making over maritime activities and in reducing the 'grey zones' of operation at sea.

2. Responses within UNCLOS

To understand the contours of the permissible responses that a State (often the coastal State) may take in responding to transgressions against the rights held by that State, one question is the extent that a State is constrained by the designated course of conduct anticipated within UNCLOS. Within UNCLOS, ocean space is divided into a series of maritime zones and States have different rights and duties within each of those zones. Where a coastal State has prescriptive jurisdiction in its territorial sea or EEZ,[15] UNCLOS usually anticipates enforcement jurisdiction so that the coastal State can police and

[14] See below notes 153-154 and accompanying text.
[15] See *UNCLOS* (n 2) arts 21, 56.

enforce its laws.[16] However, UNCLOS also prescribes and proscribes coastal State conduct within its maritime areas in response to perceived violations of its laws. These conditions emerge because of the more limited coastal State rights and authority over maritime areas compared to the plenary sovereignty enjoyed over land territory.

The discussion in this Part addresses two examples of coastal States' permissible responses to perceived violations of their rights. First, in the territorial sea, the coastal State has sovereignty, but that sovereignty is subject to the right of vessels flagged to other States to traverse the territorial sea in innocent passage. UNCLOS anticipates that the right of innocent passage will be violated on occasions and provides for the response of coastal States in this situation. Second, in the EEZ, coastal States have sovereign rights over living marine resources and enforcement jurisdiction over foreign-flagged vessels for violations of fisheries laws and regulations. UNCLOS again thus anticipates that coastal States' fisheries laws will be violated and it creates procedures and limitations on the coastal State's exercise of enforcement jurisdiction. The final section of this Part contemplates whether the permissible responses under UNCLOS indicate the *only* permissible responses. In this section, I answer the questions of whether or when UNCLOS should be considered a 'self-contained regime'.

a. Passage within the Territorial Sea

[16] See, eg, ibid, pt XII s 6 and art 73. However, enforcement jurisdiction is not expressly recognised in relation to sovereign rights over the seabed. Nonetheless, the *Arctic Sunrise* Tribunal confirmed its existence. See *Arctic Sunrise Arbitration (Netherlands v Russia) (Award on the Merits)* (2015) 32 RIAA 183, 285 [283] ('*Arctic Sunrise, Merits*').

Under UNCLOS and customary international law, the coastal State has sovereignty over the water column, seabed, subsoil and above air space in the territorial sea.[17] Pursuant to Article 2 of UNCLOS, that sovereignty is exercised subject to the Convention and to other rules of international law.[18] UNCLOS contains provisions setting out coastal State rights and responsibilities in relation to the passage of vessels through the territorial sea.[19] The vessels of other States have the right of innocent passage through the territorial sea.[20] The right of innocent passage requires foreign vessels to proceed continuously and expeditiously through the coastal State's territorial sea and refrain from actions that threaten the peace, good order or security of the coastal State.[21] It is generally accepted that merchant vessels engaged in non-innocent passage fall within the plenary jurisdiction of the coastal State.[22]

The right of innocent passage must be exercised in conformity with the Convention 'and with other rules of international law.'[23] Where the coastal State considers that passage is not innocent, UNCLOS provides for a response: the coastal State 'may take the necessary steps in its territorial sea to prevent passage'.[24] The question necessarily arises as to what conduct constitutes 'necessary steps'. This term is not defined in the Convention, nor generally in the domestic legislation of States.[25]

[17] *UNCLOS* (n 2) arts 2(1)–(2).
[18] Ibid art 2(3).
[19] See ibid arts 18–26.
[20] Ibid art 17. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, 111–12 [214] ('*Nicaragua*') (recognising the customary law right of innocent passage through the territorial sea).
[21] *UNCLOS* (n 2) arts 17–19.
[22] Robin R Churchill and Alan V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 87.
[23] *UNCLOS* (n 2) art 19(2).
[24] Ibid art 25(1).
[25] Richard Barnes, 'Article 2' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, 2017) 27, [6], referring to Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (Kluwer, 1998) 268 ff.

Barnes has observed that the 'necessary steps' most likely involve the following:

> A logical first step is for the State to verify the exact nature or character of the passage so that it is fully appraised of the situation. It can then decide what further necessary measures are appropriate. This may include requesting information from the ship about, *inter alia*, its flag status, route, and purposes. … Subsequent measures may include warning communications, warning shots, interdiction, boarding and inspection. Vessels may then be denied passage, diverted, expelled from the territorial sea or ordered into port.[26]

Astley and Schmitt have further suggested that the right to employ the minimum necessary force is a reasonable derivation of State sovereignty over the territorial sea.[27] In a similar vein, Stephens has commented that 'the use of necessary and proportionate force to seize or finally even sink such vessels may be justified.[28] Generally, it is considered that coastal States enjoy wide discretion in responding to non-innocent passage.[29] The scope of 'necessary steps' envisaged by these commentators allows the coastal State broad authority in deciding how to respond to non-innocent passage.

Coastal States have further options too. A coastal State is entitled to suspend temporarily innocent passage in specified areas of its territorial sea if 'essential for the protection of

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[26] Ibid [7].
[27] John Astley III and Michael N Schmitt, 'The Law of the Sea and Naval Operations' (1997) 42 *Air Force Law Review* 119, 131.
[28] Dale G Stephens, 'The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations' (1999) 29(2) *California Western International Law Journal* 283, 309.
[29] Barnes (n 25) 27 [7].

its security, including weapons exercises'.[30] Although it may be in response to another State's transgression within the coastal State's territorial sea, the temporary suspension must not discriminate 'in form or in fact among foreign ships'.[31] Any suspension would seemingly last for as long as needed to protect the security interests at issue that warranted the suspension in first instance.[32]

Beyond non-innocent passage, a coastal State may also exercise criminal jurisdiction over foreign vessels in its territorial sea if the criteria set out in Article 27 of UNCLOS are met. These criteria include:

(a) if the consequences of the crime extend to the coastal State;
(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.[33]

Thus, if a vessel is in non-innocent passage, it may also be the case that the vessel is in violation of laws of the coastal State that would warrant the exercise of criminal jurisdiction. Whether the coastal State would be able to exercise such jurisdiction would depend on the domestic laws in place establishing the relevant criminal offences.

[30] *UNCLOS* (n 2) art 25(3).
[31] Ibid.
[32] Barnes (n 25) 27 [14].
[33] *UNCLOS* (n 2) art 27(1).

Where a foreign vessel is considered in violation of the right of innocent passage in the territorial sea but is a warship or other government vessel on non-commercial service, the steps that a coastal State may take are more limited. The options are limited because of the sovereign immunity enjoyed by these vessels.[34] Article 30 of the Convention provides: 'If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.' Oxman has noted that '[t]he power to require departure from its territory is of course the classic remedy for a State that lacks enforcement jurisdiction over the sovereign agent or instrumentality of a foreign State, be it a diplomat or a warship'.[35] In the event of non-compliance by a warship or other government vessel operated on non-commercial service, the flag State is then responsible for any loss or damage caused to the coastal State.[36]

UNCLOS thus anticipates a regime for the exercise of coastal State powers in the event a foreign-flagged vessel violates coastal State rights within that State's territorial sea. Within the powers accorded to the coastal State for its responses, there is considerable scope of action permitted, which is consistent with the sovereignty enjoyed over this maritime area. The flexibility of the responses envisaged under Article 25 is also consonant with this sovereignty, but, as will be discussed further below,[37] might be bounded by limitations on the resort to force. Further restrictions emerge when the

[34] Ibid art 32.
[35] Bernard H Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea' (1984) 24(4) *Virginia Journal of International Law* 809, 817.
[36] UNCLOS (n 2) art 31.
[37] See below Section 5(a).

foreign-flagged vessel in question is a warship or other government vessel on non-commercial service. The more limited response of requiring a warship to leave, rather than taking 'necessary steps … to prevent passage' respects the sovereign immunity enjoyed by such vessels.[38]

While a violation of the right of innocent passage is thus anticipated under the Convention and designates the permissible response, the scope of action allowed for the coastal State is quite broad. When a warship is involved, there is a more definite and limited response. The difficulty is where the coastal State response escalates in its aggressiveness and risks going beyond the bounds of a lawful response. The strictures of UNCLOS may then be insufficient in setting the legal parameters for State action.

b. Exclusive Economic Zone and Fisheries

Within the EEZ, the coastal State has sovereign rights to conserve and manage living marine resources. In some instances, where differences might emerge between a coastal State and another State stakeholder, the Convention establishes an expectation that cooperation will be the fall back response between the concerned States.[39] It may also be argued that the requirement of due regard found in Article 56 may apply equally to any

[38] The International Tribunal for the Law of the Sea (ITLOS) recognised the importance of sovereign immunity of warships in *ARA Libertad*. *'ARA Libertad' (Argentina v Ghana) (Provisional Measures)* (2012) ITLOS Reports 332. See also *Three Ukrainian Vessels*, as the Tribunal considered it as founding the plausibility of the claim. *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Request of Ukraine for the Prescription of Provisional Measures under Article 290, Paragraph 5, of the United Nations Convention on the Law of the Sea of 16 April 2019)* (International Tribunal for the Law of the Sea, Case No 26, 2 May 2019) [97]–[99].

[39] See, eg, *UNCLOS* (n 2) arts 66, 67 (dealing with anadromous and catadromous species, respectively) and arts 69, 70 (dealing with the rights of land-locked States and geographically disadvantaged States, respectively).

response to an alleged violation as well as serving as a standard of behaviour in relation to activities in the EEZ.

Most relevant for present purposes are the enforcement powers granted to coastal States in Article 73. Yet given that the coastal State exercises sovereign rights, and not sovereignty within the EEZ, this power has various limitations also set out in Article 73.[40] Notably, the enforcement power of the coastal State is balanced by an obligation to promptly release the vessel and its crew upon the posting of a reasonable bond or other security.[41] This restriction on coastal States was intended to protect the navigational rights of the fishing vessels concerned. Article 292 sets out a procedure upon which flag States can rely to enforce the obligation of prompt release in Article 73. Hence any enforcement response contemplated by the coastal State must not thwart the entitlement of a flag State to secure the prompt release of the vessel upon payment of a reasonable bond.

The powers initially granted to the coastal State under Article 73(1) are broad in that the coastal State may 'take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance'. The question emerging from this provision is the scope of measures that 'may be necessary to ensure compliance'. The permissive language indicates that the coastal State has flexibility in deciding what enforcement measures may be required. Nonetheless, some of the case law addressing enforcement of fisheries laws and regulations has contemplated possible boundaries on the responses allowed by coastal States.

[40] See James Harrison, 'Article 73' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, 2017) 556, [2]–[5].
[41] *UNCLOS* (n 2) art 73(2).

In *Virginia G*, Panama instituted proceedings against Guinea-Bissau challenging its arrest and detention of the M/V Virginia G, a bunkering vessel that had been supplying fuel to fishing vessels in the EEZ of Guinea-Bissau. Among its claims, Panama challenged the confiscation of the Virginia G as a sanction for violating Guinea-Bissau's laws. The Tribunal noted that coastal States frequently use confiscation as a penalty for violating fisheries laws and regulations.[42] Yet under Article 73(1), as noted above, any enforcement measures must be considered 'necessary to ensure compliance' with the coastal State's laws and regulations. The *Virginia G* Tribunal considered that confiscation of fishing vessels may be necessary *per se* but the question ultimately depends on the circumstances of each case.[43] The Tribunal suggested that confiscation without regard to the severity of the violation and without possible judicial recourse may not comply with Article 73(1).[44] In this case, Guinea-Bissau's legislation provided for some discretion as well as possibilities for legal challenge.[45] Nonetheless, on the facts before it, which reflected a misunderstanding rather than an intentional violation of Guinea-Bissau's laws,[46] the Tribunal concluded that Guinea-Bissau violated Article 73(1) because the confiscation of the Virginia G was not accepted as 'necessary' to ensure compliance.[47] The Tribunal further considered that a test of reasonableness may be apt when assessing the measures taken under Article 73.[48]

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[42] *M/V 'Virginia G' (Panama v Guinea-Bissau) (Judgment)* [2014] ITLOS Reports 4, 77 [253], 196 [5] (Judge Paik) ('*Virginia G, Judgment*'). See also *'Tomimaru' (Japan v. Russian Federation) (Prompt Release, Judgement)* [2005–2007] ITLOS Reports 74, 96 [72] ('*Tomimaru'*).
[43] *Virginia G, Judgment* (n 42) 78–9 [257].
[44] Ibid.
[45] Ibid.
[46] Ibid 81 [269].
[47] Judges in dissent would have granted more latitude to the coastal State in deciding what was necessary. See *Virginia G, Judgment* (n 42) 227 [54] (Vice-President Hoffman and Judges Chandrasekhara Rao, Marotta Rangel, Kateka, Gao and Bougeutaia)
[48] Ibid 81 [270].

A further consideration as to whether confiscation will be considered 'necessary to ensure compliance' is whether a proper balance is achieved between the navigational rights of flag States and the sovereign rights of the coastal State.[49] In the *Tomimaru* prompt release decision,[50] ITLOS stated that any confiscation of a fishing vessel pursuant to Article 73(1) must remain consistent with the balance of interests as between coastal States and flag States in the EEZ.[51] To achieve this balance, considerations as to the legality of the confiscation would include whether it was consistent with international due process, whether it still allowed for the prompt release proceedings under UNCLOS to occur, and whether the shipowner would still have recourse to available domestic judicial remedies.[52] Confiscation may extend to the vessel, the catch as well as equipment.[53]

Article 73 further limits the response options of coastal States in excluding imprisonment or any other form of corporal punishment as penalties for violations of fisheries laws and regulations.[54] Generally, States do not include imprisonment as a punishment for violating national fisheries laws.[55] The coastal State must notify the flag State promptly of the arrest and detention of a vessel and crew.[56] This requirement facilitates the flag State's ability to take action to secure the prompt release of its vessel and crew upon

[49] See *'Monte Confurco' (Seychelles v France) (Prompt Release, Judgment)* [2000] ITLOS Reports 86, 108 [70].
[50] *Tomimaru* (n 42) 96 [72].
[51] Ibid 96 [75].
[52] Ibid 96 [76].
[53] Bernard H Oxman, 'The "*Tomimaru*" (Japan v Russian Federation). Judgment. ITLOS Case No. 15.' (2008) 102 *American Journal of International Law* 316; Abdul Ghafur Hamid and Khin Maung Sein, 'Prompt Release of Vessel and Crew under Article 292 of the UNCLOS: Is It an Adequate Safeguard against the Powers of Coastal States?' (2011) 7 *Journal of Applied Sciences Research* 2421, 2426.
[54] *UNCLOS* (n 2) art 73(3).
[55] Harrison (n 40) [16].
[56] UNCLOS (n 2) art 73(4).

payment of a reasonable bond. If a coastal State is imposing a bond for release of the vessel and crew, the bond must not include non-financial conditions or requirements.[57]

It may finally be noted that some coastal States mandate the destruction of fishing vessels as a sanction for violating fisheries laws and regulations.[58] This specific penalty has not yet been assessed in prompt release proceedings under Article 292 or on the merits. It could, though, be foreshadowed that some of the considerations relating to confiscation of vessels would apply equally (if not more so) to a penalty of destruction.

In sum, it must be observed that the enforcement powers of the coastal State are generous so that the coastal State may fulfill its obligations to conserve and manage living marine resources in the EEZ. The coastal State responses to violations of its fisheries laws and regulations adopted under the Convention are tempered in different ways to accommodate the interests of the flag State in ensuring the ongoing navigational rights of its fishing vessels and to recognise that the coastal State does not have sovereignty in the EEZ. UNCLOS thus defines the allowed responses to perceived fisheries violations, albeit not in full detail.

c. UNCLOS as a Self-Contained Regime

Given that there are a range of instances where UNCLOS sets out the permissible response for States parties when their rights under the Convention are perceived to be violated, it

[57] *'Volga' (Russian Federation v Australia) (Prompt Release, Judgment)* [2002] ITLOS Reports 10, 34–6 [77]–[80].
[58] See, eg, Dita Liliansa, 'The Necessity of Indonesia's Measures to Sink Vessels for IUU Fishing in the Exclusive Economic Zone' (2020) 10(1) *Asian Journal of International Law* 125.

must be asked whether those responses are all that a State may do in response. The answer to this question largely depends on whether UNCLOS counts as a 'self-contained regime'. The concept of a self-contained regime was discussed in the *Tehran Hostages* case.[59] The background to this case between the United States and Iran concerned Iranian revolutionaries seizing the US Embassy and two US consulates in Iran and holding over 50 US nationals hostage. Iran claimed that the United States had used its embassy to spy on Iran,[60] especially since it had served as the base for Operation AJAX, a CIA-led initiative to overthrow the Iranian Prime Minister and return the Shah of Iran to power.[61]

The United States instituted a case against Iran at the International Court of Justice (ICJ or Court) further to the dispute settlement provisions available under the *Vienna Convention on Diplomatic Relations*,[62] the *Vienna Convention on Consular Relations*[63] and their Optional Protocols,[64] in addition to other applicable treaties.[65] Iran refused to participate in the Court proceedings, limiting itself to sending a communication to the Court.[66] Iran did not elaborate on claims that the United States had conducted criminal

[59] *Tehran Hostages* (n 12).
[60] *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Provisional Measures)* [1979] ICJ Rep 7, 8.
[61] See James P Terry, 'The Iranian Hostages Crisis: International Law & United States Policy' (1982) 32 *JAG Journal* 31, 33–6; Valerie J Munson, 'The Case Concerning United States Diplomatic and Consular Staff in Tehran' (1981) 11(3) *California Western International Law Journal* 543, 546 n 19.
[62] *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 241 (entered into force 24 April 1964).
[63] *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).
[64] *Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes*, opened for signature 18 April 1961, 500 UNTS 241 (entered into force 24 April 1964); *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, opened for signature 24 April 1963, 596 UNTS 487 (entered into force 19 March 1967).
[65] *Treaty of Amity, Economic Relations, and Consular Rights*, United States–Iran, signed 15 August 1955, 284 UNTS 93 (entered into force 16 June 1957); *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents*, opened for signature 14 December 1973, 1400 UNTS 231 (entered into force 20 February 1977).
[66] *Tehran Hostages* (n 60) 8 [10].

activities through its Embassy, but the Court commented that even if Iran had established such activities, they were not necessarily justification for Iran's actions in seizing the embassy and consular premises, diplomatic bags and personnel. The Court instead observed that 'diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'.[67] There was no language in the *Vienna Convention on Diplomatic Relations* or the *Vienna Convention on Consular Relations* that specifically indicated that the only remedies available to a State in responding to abuses of functions by diplomatic or consular staff were those set out in those treaties. The Court reached this conclusion based on the availability of the remedy within the terms of the treaty itself.

The Court justified this view as follows:

> The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[68]

The Court further noted that Iran did not avail itself of the remedies available under either of the Vienna Conventions.[69] As such, the Court concluded that 'Iran did not have

[67] *Tehran Hostages* (n 12) 38 [83].
[68] Ibid 40 [86].
[69] Ibid 40–41 [87].

recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff'.[70]

The implication from the Court's views on this point was that there was no justification for Iran's unlawful acts because Iran had not utilised the remedy set out within the Vienna Conventions. Furthermore, Iran was precluded from utilising any other measures in response to the alleged criminal activities of the United States; Iran had to turn to the responses in the Vienna Conventions. At most, the alleged criminal activities would have 'some relevance' in determining the consequences of Iranian responsibility for its wrongful conduct.[71]

Turning to UNCLOS, we can ask whether that Convention defines the universe of responses for States when violations emerge. Arguably, there are many instances of UNCLOS setting out permissible responses and when these are coupled with the availability of compulsory jurisdiction for resolving disputes, UNCLOS could seem to be 'self-contained'. Adopting such a position would necessarily limit the available responses for States party to the Convention in their decision-making in relation to maritime activities.

Nonetheless, there are many instances where UNCLOS looks beyond the confines of its own rules. It does so both in establishing the relevant standards in first instance,[72] and in anticipating the lawful responses for violations of those standards. UNCLOS is not

[70] Ibid.
[71] Ibid 41 [89].
[72] An obvious example are the references to 'generally agreed international rules and standards'. See, eg, *UNCLOS* (n 2) arts 21(2), 211(2), 211(5), 211(6)(c), 226(1)(a).

comparable to the Vienna Conventions in this regard. Notably for the examples considered in the previous two sections, coastal State rights in the territorial sea are subject to other rules of international law further to Article 2(3) of the Convention.[73] In the *Chagos Marine Protected Area* arbitration, the Tribunal closely examined the original formulation of Article 2(3) from its counterpart in the 1958 *Territorial Sea Convention* and discussions within the International Law Commission and at conference negotiations.[74] The indication drawn by the Tribunal from these materials was that the interpretation of 'other rules of international law' was intended to reference general international law rather than specific bilateral commitments between States.[75] General international law required the United Kingdom to act in good faith in its relations with Mauritius with regard to the exercise of sovereignty over the territorial sea.

Further, the freedom of navigation is enjoyed in the EEZ consistent with other rules of international law.[76] Under Article 56 of UNCLOS, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the living and non-living natural resources of the EEZ.[77] The coastal State may adopt laws and regulations consistent with UNCLOS and 'other rules of international law' so long as they are compatible with the UNCLOS provisions on the EEZ.[78] Under Article 58, coastal States as well as other States, enjoy the freedoms of navigation, overflight and the laying of submarine cables and pipelines and 'other internationally lawful uses of the sea related

[73] *UNCLOS* (n 2) art 2(3).
[74] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (2018) 31 RIAA 359.
[75] Ibid 570–71 [516]. Judges Kateka and Wolfrum dissented on this limitation to Article 2(3) on their review of the International Law Commission's commentaries. See ibid 606 [94] (Judges Kateka and Wolfrum).
[76] *UNCLOS* (n 2) art 58(3).
[77] Ibid art 56(1)(a).
[78] Ibid art 58(3).

to these freedom'.[79] In relation to passage in the EEZ, the freedom of navigation is enjoyed by all States in that zone consistent with the provisions in Part VII of the Convention 'and by other rules of international law'.[80]

The ongoing relevance of other rules of international law in responding to alleged UNCLOS violations is reinforced in Article 304, which provides that '[t]he provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.' This 'without prejudice' clause ensures that the provisions of UNCLOS do not preclude resort to the general rules on State responsibility, either as they existed at the time the Convention was adopted or as the rules developed subsequently.[81] Tams and Devaney have suggested that under Article 304, the general rules of State responsibility apply with the specific rules in the Convention 'fine-tuning' these general rules.[82] Alternatively, it should be more the case that the specific rules of the Convention should apply with the general rules of State responsibility filling any gaps in the operation of the rules.[83]

d. Conclusion

In first instance, it may well be the case, and should be the case, that when a State seeks to respond to an alleged violation of its rights under UNCLOS that it has regard to what

[79] Ibid art 58(1).
[80] Ibid art 87(1).
[81] Christian Tams and James Devaney, 'Article 304' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, 2017) 1961, [8].
[82] Ibid [15].
[83] Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483, 508–9.

may be expected or required under the Convention as a lawful response. Nonetheless, it seems unlikely that the responses set out in UNCLOS are the only possible responses allowed; that is, it seems improbable that UNCLOS should be considered as a 'self-contained regime' in its entirety similar to the situation of the Vienna Conventions as discussed in the *Tehran Hostages* case. Potentially this sort of argument could be made in relation to specific aspects of the Convention, such as the innocent passage regime or fisheries enforcement. However, this approach is not borne out in the case law to date, which has considered responses that go beyond what is expressly covered in the Convention. It remains an open question as to whether the responses within UNCLOS should take priority over other responses that may be available to State parties. This debate is likely best resolved on a case-by-case basis depending on the obligations in question and the responding conduct at issue. In this situation, adherence to legal standards should be an important policy consideration if normative ambiguity is not to be exploited as part of grey zone tactics.[84]

3. Use of Protests and Retorsion

Where a State objects to another State's conduct and considers that conduct in violation of international law, the first diplomatic response that may ensue is a formal protest. Protests may be issued through diplomatic demarches, where one State communicates through formal channels its views on actions taken by another State. A written protest may be sufficient in many contexts to note a State's disagreement to the claimed rights of another State. Raising concerns through a formal protest may initiate negotiations

[84] For a description of normative ambiguity as a feature of grey zone strategy, see Michael Green et al., *Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence* (Rowman and Littlefield, 2017) 32.

between the States concerned as to their conflicting views and how those differences might be resolved. A protest may thus form the first step in peacefully resolving the dispute.

Protests may not only be communicated directly between States but also transmitted in the course of the work of an international organisation. In the context of the South China Sea, submissions to the Commission on the Limits of the Continental Shelf have provided opportunities for States to record their views on claimed sovereignty and sovereign rights in the disputed area.[85] Australia has also circulated correspondence at the United Nations in relation to China's claims in the South China Sea.[86]

Beyond the political sphere,[87] protests may be relevant in a legal context in preventing acquiescence to the formation or interpretation of legal rules. This dimension is first addressed below. States may also go beyond written communications in responding to perceived violations of the law of the sea and take action in a way that still aligns with the acting States' obligations. The latter conduct may be understood as retorsion. These actions are discussed in the second section and considers the US Freedom of Navigation program in this context. The final section focuses on the legal limitations that may be

[85] See Nguyen Hong Thao and Ramses Amer, 'Coastal States in the South China Sea and Submissions on the Outer Limits of the Continental Shelf' (2011) 42(3) *Ocean Development and International Law* 245, 254–5.

[86] Letter from the Permanent Mission of the Commonwealth of Australia to the United Nations to the Secretary-General of the United Nations (23 July 2020), reproduced in Andrew Greene, 'Australian Government Declares Beijing's South China Sea Claims Illegal in Letter to United Nations', *ABC News* (online, 25 July 2020) <https://www.abc.net.au/news/2020-07-25/federal-government-joins-rejects-china-maritime-claims-at-un/12492070>. For discussion, see Sam Bateman, 'Demystifying Australia's South China Sea stance', *East Asia Forum* (online, 12 August 2020) <https://www.eastasiaforum.org/2020/08/12/demystifying-australias-south-china-sea-stance/>.

[87] Protests may 'involve pure acts of policy not purporting to involve legal characterizations of other states' conduct'. James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 144. Eick has also observed, 'in actual practice, the distinction between a protest in the legal sense and a mere political declaration may be less than clear'. See Christophe Eick, 'Protest' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) [9].

imposed on these actions and how they may cross over into unlawful conduct. To reduce the occurrence of 'grey zone' activities, these limitations may need clearer articulation in State practice to demonstrate the boundaries of retorsion in responding to law of the sea violations.

a. Preventing Acquiescence

The role of protest in international law has commonly been examined in the context of the formation of customary international law. Protest may prevent the formation of a new rule or at least the application of an emerging customary rule from applying to the protesting State.[88] A key example emerges in the law of the sea context from the *Anglo-Norwegian Fisheries* case.[89] In that case, the United Kingdom's failure to protest Norway's method of drawing straight baselines meant it was bound by this new rule of maritime delimitation.[90] In assessing the factors that led to this conclusion, the Court emphasised the following:

> The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.[91]

[88] Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 89–90.
[89] *Fisheries (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116 ('*Fisheries*').
[90] Ibid, 137–9
[91] Ibid, 139.

These elements contribute to establishing that a State acquiesces in another State's action. Protesting is thus an important response. As Eick observes, the 'main function of a protest is the preservation of rights, or of making it known that the protestor does not acquiesce in, and does not recognize certain acts'.[92] Therefore, as was evident in the development of straight baselines, in the absence of protest, new rules of customary international law may emerge.[93]

In the context of the interpretation or application of a treaty provision, protest may prevent the legitimation of a specific interpretation. Again in the context of straight baselines, States and commentators have raised concerns about how States have interpreted Article 7 of the Convention in determining straight baselines along their coasts.[94] Shaw has observed that as a general matter, 'where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate'.[95] Protest is thus an important response to law of the sea violations, even if protests alone do not resolve the issue of concern.

b. Example of Retorsion: Freedom of Navigation Operations

[92] Eick (n 87) [13].
[93] See *Fisheries* (n 89) 139.
[94] The diversity of views has been captured in the work of the International Law Association's Committee on Baselines. See Committee on Baselines under the International Law of the Sea, International Law Association, *Baselines under the International Law of the Sea* (Final Report, 2018) 18–27. See also Robin R Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention' in Alex G Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff, 2005) 91, 108; Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2nd ed, 2012) 49–50; J Ashley Roach and Robert W Smith, *United States Reponses to Excessive Maritime Claims* (Martinus Nijhoff, 3rd ed, 2012) 72–133.
[95] Shaw (n 88) 89 (citations omitted).

States may not limit their responses to alleged unlawful activities to paper protests but take action as a means of asserting rights. As noted at the outset, retorsion refers to reactions of a State to the actions of another State where the reaction does not interfere with the rights of the target State under international law.[96] The act complained of may or may not be unlawful in its own right.[97] Measures of retorsion may constitute unfriendly acts but not amount to unlawful conduct under international law.[98]

Naval demonstrations may be utilised as a means of political pressure or demonstrating particular security interests.[99] Those demonstrations must be consistent with the rights of navigation under UNCLOS to be lawful. The ICJ assessed one early challenge to navigational rights that prompted a naval demonstration in the *Corfu Channel* case.[100] There, the Court examined the legality of a British mission through the Corfu Channel after Albania sought to deny the passage of British warships. The British warships struck mines while passing through the Corfu Channel. The Court noted,

> The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with

[96] Giegerich (n 13) [1].
[97] Oppenheim envisaged that retorsion would be a response to a lawful albeit 'discourteous', 'unkind', 'unfair' or 'inequitable' act: L Oppenheim, *Oppenheim's International Law*, ed Robert Jennings and Arthur Watts (Oxford University Press, 9th ed, 2008) vol II, 134, cited in John P Grant and J Craig Barker, *Encyclopaedic Dictionary of International Law* (3rd ed, 2009) 'retorsion'. However, in the Commentary to the ILC Articles on State Responsibility, Crawford noted that retorsion is an unfriendly act that 'may be a response to an internationally wrongful act': James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 281, quoted in John P Grant and J Craig Barker, *Encyclopaedic Dictionary of International Law* (3rd ed, 2009) 'retorsion'.
[98] Giegerich (n 13) [2].
[99] Dale Stephens and Tristan Skousgaard, 'Naval Demonstrations and Manoeuvres', in *Max Planck Encyclopedia of International Law* (Oxford University Press, 2009) [1].
[100] *Corfu Channel (United Kingdom v Albania) (Merits Judgment)* [1949] ICJ Rep 4 *('Corfu Channel*').

> the requirements of international law. The "mission" was designed to affirm a right which had been unjustly denied.[101]

It is generally recognised that a failure to respond to a denial of rights might be interpreted as a tacit acceptance of the purported lack of rights.[102] Kraska and Pedrozo have asserted: 'Left unused, navigational rights and freedoms atrophy over time.'[103] Views differ as to the validity of actions asserting rights when diplomatic (written) acts may suffice. For example, D'Amato has argued 'acts are visible, real and significant; it crystallises policy and demonstrates which of the many possible rules of law the acting State has decided to manifest'.[104] A Committee of the International Law Association has instead asserted that verbal acts can instead be sufficient as a form of protest and physical acts are not essential.[105] The International Law Commission has also endorsed this perspective.[106]

Freedom of Navigation programs have been undertaken as a means for States to demonstrate their position on navigational rights that are perceived to be infringed by

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[101] Ibid 30.
[102] See Committee on Formation of Customary (General) International Law, International Law Association, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (Report, 2000) 10 ('*Formation of General Customary International Law*').
[103] James Kraska and Raul Pedrozo, *The Free Sea: The American Fight for Freedom of Navigation* (Naval Institute Press, 2018) 282.
[104] Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) 88. See also Dale Stephens and Timothy Quadrio, '"Do as I Do, Not as I Say": Navigational Freedom and the Law of the Sea Convention' in Donald R Rothwell and David Letts (eds) *Law of the Sea in South East Asia: Environmental, Navigational and Security Challenges* (Routledge, 2020) 163, 175–9.
[105] *Formation of General Customary International Law* (n 102) 28. See also Ryan Santicola, 'Legal Imperative? Deconstructing Acquiescence in Freedom of Navigation Operations' (2016) 5(1) *National Security Law Journal* 59, 74–5, 83.
[106] Michael Wood, Special Rapporteur, *Third Report on the Identification of Customary International Law*, UN GAOR, 67th sess, UN Doc A/CN.4/682 (27 March 2015), 65 (citing the work of the International Law Association Committee); *Report of the International Law Commission on the Work of its Seventieth Session*, UN GAOR, 73rd sess, Supp No 10, UN Doc A/73/10 (30 April–1 June and 2 July–10 August 2018), 153 [7] (in commentaries relating to the persistent objector rule).

coastal State decision-making. The US Freedom of Navigation program 'combines diplomatic action and operational assertion of our navigation and overflight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate US resolve to protect navigational freedoms'.[107] The origins of this program may be traced to the late 1970s,[108] but with the adoption of UNCLOS and the US decision not to become a party to the Convention, the United States still insisted that it would 'not … acquiesce in unilateral acts of other states designed to restrict the rights and freedom of the international community'.[109] The United States has pursued its interests in the freedom of navigation through diplomatic protests and other communications, as well as through consultations with other governments.[110]

Of interest here as retorsion is the Freedom of Navigation Operations (FONOPS), which are operational assertions by US naval ships, aircraft and submarines. Kraska and Pedrozo write, '[s]ince its inception, hundreds of operational challenges and diplomatic protests have been conducted to demonstrate U.S. non-acquiescence in excessive maritime claims'.[111] These protest actions can underline the US viewpoint on the status and meaning of law of the sea principles relating to the freedom of navigation.[112] Provided the United States conducts the FONOPS consistent with international law, those operations may constitute an act of retorsion.

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[107] 'The program combines diplomatic action and operational assertion of our navigation and overflight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate US resolve to protect navigational freedoms': US Department of State Bureau of Public Affairs, *US Freedom of Navigation Program* (GIST, December 1988), cited in William J Aceves, 'The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics' (1996) 19(2) *Hastings International and Comparative Law Review* 259, 263.
[108] Kraska and Pedrozo (n 4) 202.
[109] Ronald Reagan, *Statement on United States Oceans Policy: March 10 1983* (Office of the Federal Register, 1983).
[110] Kraska and Pedrozo (n 4) 202.
[111] Ibid 203.
[112] Aceves (n 106) 307.

c. Parameters to Protests and Retorsion: Threats of Use of Force and Abuse of Rights

When deciding on a protest or retorsion as a response to a possible law of the sea violation, the actions taken may be violations of international law if they constitute an abuse of right or are so coercive that they amount to an unlawful threat of the use of force.[113] The difficulty is establishing the threshold for an abuse of right or determining when a threat is unlawful. In respect of the latter, the ICJ has suggested that when the use of force itself would be unlawful then the threat to use that force would also be unlawful.[114]

The threshold for determining an unlawful threat of the use of force was examined in relation to Suriname's threat to a Guyanese licensee, CGX, in a disputed maritime area in *Guyana v Suriname*.[115] In this case, two Surinamese patrol boats approached the CGX drilling rig, advised it was unlawfully operating in Surinamese waters and had to leave within a set time or the 'consequences would be theirs'.[116] Suriname argued that the actions reflected reasonable and proportionate law enforcement.[117] However, the

[113] In *Nicaragua* (n 20), the ICJ determined that the laying of mines in proximity to Nicaraguan ports infringed the freedom of maritime communication and commerce: at 101 [214], 118–19 [253]. From this case, Stephens and Skousgaard argue that maritime assertions are not to be 'coercive': Stephens and Skousgaard, 'Naval Demonstrations and Manoeuvres' (n 99) [11]. They have further observed that naval demonstrations may violate the prohibition against intervention even if the actions do not have sufficient gravity to constitute a threat of the use of force in violation of Article 2(4): at [11].
[114] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 246 [47].
[115] *Maritime Boundary (Guyana v Suriname) (Award)* (2007) 30 RIAA 1, 126 [445] ('*Guyana v Suriname*'). See further Patricia Jimenez Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the *Guyana/Suriname* Award' (2008) 13(1) *Journal of Conflict and Security Law* 49.
[116] *Guyana v Suriname* (n 114) 142–3 [433]–[439].
[117] Ibid 145 [441].

Tribunal considered that this comment reflected a threat that force would be used against the drilling rig.[118] The Tribunal determined that this threat of military action was an unlawful threat of the use of force.[119] The rationale for this conclusion is not provided, although it would have been helpful given that, as discussed further below,[120] some amount of force is legally acceptable for law enforcement. It might instead appear that the Tribunal was motivated to establish a legal threshold that reduced coercive or aggressive actions at sea.

There are important lessons from this incident in *Guyana v Suriname* when it is recalled that China has reacted negatively to several attempts by Viet Nam to engage in exploration and exploitation of the continental shelf near the disputed Paracel Islands.[121] For example, in 2017, an oil company left the area after the Vietnamese government advised it that 'China had threatened to attack Vietnamese bases in the Spratly Islands if the drilling did not stop'.[122] If true, China's actions would constitute an unlawful threat of the use of force, especially in light of the holding in *Guyana v Suriname*.

Even if a response does not constitute a threat of the use of force, the actions may still be construed as an abuse of right.[123] An abuse of right refers to 'the prohibition of the

[118] Ibid 143 [439].
[119] Ibid 147 [445].
[120] See further below notes 163-170 and accompanying text.
[121] See generally Bill Hayton, 'China's Pressure Costs Vietnam $1 Billion in the South China Sea', *The Diplomat* (online, 22 July 2020) <https://thediplomat.com/2020/07/chinas-pressure-costs-vietnam-1-billion-in-the-south-china-sea/>.
[122] Bill Hayton, 'South China Sea: Vietnam Halts Drilling After "China Threats"', *BBC News* (online, 23 July 2017) <https://www.bbc.com/news/world-asia-40701121>.
[123] In discussing the protection of high seas fisheries, the ILC observed: '…enlightened States should consider themselves bound, even if it by way of a mere imperfect legal obligation, to act on the view that it may be contrary to the very principle of freedom of the sea to encourage or permit action which amounts to an abuse of a right'. Report of the International Law Commission Covering the Work of its Fifth Session, UN GAOR, 8th sess, UN Doc A/2456 (1 June–14 August 1953), 219 [100].

exercise of a right for an end different from that for which the right was created, to the injury of another person or the community.'[124] This possibility emerged in the *Corfu Channel* case,[125] where the United Kingdom sought to respond to Albania's denial of its rights to transit the Corfu Channel. While the ICJ endorsed the United Kingdom's actions in sending its warships through the Corfu Channel,[126] Judge Alvarez observed in his separate opinion in *Corfu Channel* that States should not misuse their rights.[127] This position reflected an early judicial articulation of the abuse of rights doctrine.[128] A prohibition on abuse of rights could provide a boundary to what is acceptable retorsion.

Aceves has suggested 'a state which engages in conduct that is confrontational in nature and uses military force to assert its rights when nonviolent forms of dispute resolution are available would appear to violate the abuse of rights doctrine'.[129] An act does not typically have to be illegal to be an abuse of right.[130] In another separate opinion, Judge Alvarez suggested that a State may abuse its lawful right of passage if it collected

[124] BO Illuyomade, 'Scope and Content of a Complaint of Abuse of Right in International Law' (1975) 16 *Harvard International Law Journal* 47, 48.
[125] *Corfu Channel* (n 100).
[126] Ibid 30.
[127] Ibid 47 (Judge Alvarez).
[128] The doctrine was also discussed before the Permanent Court of International Justice. See *Case of the Free Zones of Upper Savoy and the District of Gex* (France v Switzerland), Judgment of 7 June 1932, PCIJ, Report Series, A/B No. 46, 167; *Certain German Interests in Polish Upper Silesia* (Germany v Poland), (Merits), Judgment, 25 May 1926, PCIJ, Report Series, Series A, No. 7, 30. This jurisprudence is assessed in Illuyomade (n 124) 61-62; Alexandre Kiss, 'Abuse of Rights' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006), [12].
[129] Aceves (n 107) 323.
[130] Kaikobad writes: 'an act must, in formal terms, be a lawful act: it is when a lawful act constitutes an exercise of a right or power which is an abuse of such a right or power, that it becomes an unlawful act, not in formal terms but in terms of essential validity.' Kaiyan Homi Kaikobad, 'Non Consensual Aerial Surveillance in the Airspace over the Exclusive Economic Zone for Military and Defence Purposes' in Kaiyan Homi Kaikobad and Michael Bohlander (eds) International Law and Power: Perspectives on Legal Order and Justice (Martinus Nijhoff Publishers, 2009) 513, 556. Similarly, Triggs has observed, '[t]he concept of an abuse of right assumes that a State has a legal right to act; the relevant inquiry being whether this right has been abused'. Gillian Triggs, 'Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation' (2000) 5(1) *Asia Pacific Journal of Environmental Law* 33, 53.

information about natural resources or strategic bases during that passage.[131] A State alleging an abuse of rights has the burden of establishing the abuse and showing that it was injured by the actions in question.[132]

Under UNCLOS, Article 300 requires that parties to the Convention exercise their rights, jurisdiction and freedoms 'in a manner which would not constitute an abuse of right'.[133] ITLOS has interpreted Article 300 to mean that any State claiming that another State has abused its rights must demonstrate that the abuse has occurred in connection with the violation of another provision of UNCLOS.[134] In *M/V Norstar,* the Tribunal thus sought to identify that an obligation under UNCLOS was breached and that the breach occurred in an abusive manner for a violation of Article 300 to be established.[135] This perspective appears different to a position where a State exercises a lawful right, such as the freedom of navigation, but exercises the right in an abusive way.[136] The Tribunal is instead looking for a violation of the Convention and the violation demonstrates such *mala fides* that it will also constitute a violation of Article 300 of UNCLOS.

O'Brien suggests that under Article 300 what might constitute an abuse of right includes situations where a State's exercise of its rights hinders the exercise of another State's rights, or where a right is exercised for a purpose other than the right was intended, or an arbitrary exercise of rights resulting in an injury to another State even if that State's

[131] *Competence of the General Assembly Regarding Admission to the United Nations (Advisory Opinion)* (1950) ICJ Rep 4, 15 cited in Kaikobad (n 130) 561.
[132] Kiss (n 128) [31].
[133] *UNCLOS* (n 2) art 300.
[134] See *M/V 'Louisa' (Saint Vincent and the Grenadines v Spain) (Judgement)* [2013] ITLOS Rep 4, [137]; *'Virginia G' (Judgement)* (n 42) [396] and [398].
[135] *M/V 'Norstar' (Panama v Italy) (Judgement)* (International Tribunal for the Law of the Sea, Case No 25, 10 April 2019), [241].
[136] To this end, Illuyomade observed, '[r]esponsibility is not for a lawful act (the exercise of a right) but for an unlawful act (the abusive exercise of a right).' Illuyomade (n 124) 74.

rights are not violated.[137] This listing does not look to a violation of the Convention occurring in an abusive way but to any conduct generally and aligns more closely with the position under general international law. On this interpretation, what is helpful is that the prohibition on abuse of rights thus endeavours to 'draw[] the line where other lines do not exist'.[138]

Even where thresholds on abuse of rights or the threat of use of force are not met, physical acts of retorsion, while permissible, can clearly cause high political tension between the States concerned. In this regard, it should be noted that the US FONOPS have resulted in military confrontations between US forces and foreign naval or air force services.[139] The primary recent example in this regard is the US interactions with Chinese vessels in the South China Sea. The United States has engaged in a variety of FONOPS within the South China Sea to challenge *inter alia* China's claimed Nine-Dash line, its requirements for prior notification and authorization for the passage of warships in the territorial sea, and the status of artificial islands constructed on low-tide elevations.[140] On occasions the messaging of the United States in the course of these FONOPS has been inconsistent,[141] and in that situation risks undermining the US challenge to China's assertion of rights. Allies of the United States have similarly engaged in navigational exercises in defiance of China's claimed rights, but equally met resistance from China's defence forces.[142]

[137] Killian O'Brien, 'Article 300' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, 2017) 1937 [13].
[138] Ibid.
[139] Aceves (n 107) 294–5.
[140] For details on the US Freedom of Navigation Operations (FONOPS) in the South China Sea, see generally Eleanor Freund, *Freedom of Navigation in the South China Sea: A Practical Guide* (Special Report, Belfer Center for Science and International Affairs, Harvard Kennedy School, June 2017).
[141] See BK Wagner, 'Lessons from Lassen: Plotting a Proper Course for Freedom of Navigation Operations in the South China Sea' (2016) 9(1) *Journal of East Asia and International Law* 137.
[142] Christia Marie Ramos, 'French Navy continues to Patrol South China Sea to Ensure Freedom of Navigation: Minister', *Inquirer.Net* (online, 28 June 2019) <https://globalnation.inquirer.net/177161/french-navy-continues-to-patrol-south-china-sea-to-ensure-

Seemingly, China's choice in these situations is to reaffirm its claimed rights rather than accept any challenge that suggests a protest or non-acceptance of its position.

In sum, protest and retorsion have an important place in signalling a State's view in response to another State's claim. As noted, protest or retorsion may be formative in influencing the development or interpretation of international law. Responding to a (perceived) illegal claim through protest can also be an important first step in seeking to resolve a dispute by peaceful means and contribute to meeting requirements to institute proceedings under the UNCLOS dispute settlement regime.[143] Protests and retorsion are also a vital form of communication between the States concerned, indicating the level of tolerance for certain conduct or manifesting deterrence for future State decision-making. Given that grey zone conflicts emerge because a challenger may want to alter the status quo but not agitate a situation that triggers the superior military power of the adversary,[144] a clearly articulated response that defines acceptable legal standards will avoid, or at least reduce, the incrementalism and ambiguity that may otherwise allow these strategies to prosper.

4. Countermeasures

freedom-of-navigation-minister>; Tim Kelly, 'Exclusive: British Navy Warship Sails Near South China Sea Islands, Angering Beijing', *Reuters* (online, 6 September 2018) <https://www.reuters.com/article/us-britain-china-southchinasea-exclusive/exclusive-british-navy-warship-sails-near-south-china-sea-islands-angering-beijing-idUSKCN1LM017>. While Australia has sailed its warships through the South China Sea and encountered the Chinese navy, Australia has not sought to conduct FONOPS similar to the United States in China's claimed territorial seas. See Andrew Greene, 'China Has Won Control of the South China Sea: Now We Wait for Beijing's Next Move', *ABC News* (online, 26 July 2020) <https://www.abc.net.au/news/2020-07-26/china-has-control-south-china-sea-australia-confrontation/12491366>.

[143] Notably Article 283 of *UNCLOS* (n 2), which requires an exchange of views as to the means of dispute settlement.

[144] Green et al (n 84) 25.

Any State that engages in retorsion must consider carefully whether that response is lawful. It is entirely foreseeable that the State subject to an act of retorsion will claim that the action violates international law. For example, as discussed above, China has responded to different FONOPS on the basis that it perceives the exercise of freedom of navigation violates existing principles relating to the peaceful uses of the oceans or a failure to show due regard.[145] Yet even if the response is unlawful, that reaction may constitute a lawful countermeasure.[146]

When a State believes that its rights have been infringed, this violation of international law may entitle the injured State to engage in countermeasures to induce compliance by the State that has acted unlawfully.[147] A countermeasure entitles the injured State to take action that may itself be a violation of international law but the preceding unlawful act constitutes a circumstance precluding the wrongfulness of that State's action. The response of the injured State to the unlawful act thus falls within the domain of State responsibility.

For a State to engage lawfully in countermeasures, the requirements to be followed are drawn from the International Law Commission's (ILC) work on State responsibility. Notably, Chapter II of Part III of the Articles on State Responsibility set out the conditions

[145] See generally Zhang Haiwen, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? - Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ' (2010) 9(1) *Chinese Journal of International Law* 31.
[146] While 'reprisals' is sometimes used to encapsulate countermeasures, the term 'reprisals' is now more commonly invoked in reference to the law of armed conflict and in the context of belligerent reprisals and hence is not used here.
[147] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) 2 *Yearbook of the International Law Commission* 31, 75 ('*ILC Draft Articles on State Responsibility*').

and limitations on the taking of countermeasures by an injured State. The ILC Commentary usefully summarises the limitations on countermeasures as follows:

> First, …[they] concern[] only non-forcible countermeasures (article 50(1)(a)). Secondly, countermeasures are limited by the requirement that they are directed at the responsible State and not at third parties (article 49 (1) & (2)). Thirdly, since countermeasures are intended as instrumental – in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment – they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (articles 49(2),(3), 53). Fourthly, countermeasures must be proportionate (article 51). Fifthly, they must not involve any departure from certain basic obligations (article 50(1)), in particular those under peremptory norms of general international law.[148]

There are also procedural requirements that must be met. These include the obligation that countermeasures be preceded by a demand by the injured State to the responsible State that it comply with its obligations, the demand must include an offer to negotiate and countermeasures must be suspended if the internationally wrongful act has ceased and the dispute is submitted to a court or tribunal.[149] Although the requirements are thus strict, the implication is that the resort to an unlawful act must be deliberate and fully justified on the part of the injured State in this scenario.

[148] Ibid 129 [6].
[149] Ibid 136 [3].

Kraska has suggested to the Quad alliance States that lawful countermeasures should be used in addition to FONOPS in response to China's actions in the South China Sea.[150] The Quad States comprises Australia, India, Japan and the United States as an informal strategic alliance in the Indo-Pacific with interests in balancing China (and possibly ASEAN) in the region.[151] The proposed response would entail imposing similar restrictions on Chinese vessels and aircraft as China imposes on foreign vessels in its claimed zones. The actions might further require shadowing vessels and requesting that they leave the relevant maritime area.[152] The proposal is arguably retaliatory rather than an immediate response to perceived international law violations that seeks to induce China's compliance for conduct in its own maritime zones.

Countermeasures have also been proposed as a response to unlawful fishing on the high seas,[153] and in response to the proliferation of weapons of mass destruction.[154] In these situations, the proposal is that a warship could interdict a foreign-flagged vessel on the high seas on the basis that the foreign-flagged vessel had committed an unlawful act; the arrest of the foreign-flagged vessel could be a proportionate response and the lack of flag State consent would not be relevant because the arresting State is undertaking a countermeasure. These interdictions would be permissible on the high seas (or within the EEZ in relation to the exercise of high seas freedoms under Article 58) because of the collective interests held by States in the high seas and the freedom of navigation.

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[150] Andrew Davies and Mark Thomson, "'Lawful Countermeasures" and China's South China Sea Claims', *ASPI The Strategist* (online, 16 Mar 2017) <https://www.aspistrategist.org.au/lawful-countermeasures-chinas-south-china-sea-claims/>.
[151] Richard Javad Heydarian, 'Revived "Quad" Alliance Eggs on China's Response', *Asia Times* (online, 28 February 2018) <https://asiatimes.com/2018/02/revived-quad-alliance-eggs-chinas-response/>.
[152] Davies and Thomson (n 150).
[153] See Rosemary Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) 51(1) *Netherlands International Law Review* 41, 63–4.
[154] Wolf Heintschel von Heinegg, 'The Proliferation Security Initiative: Security vs Freedom of Navigation?' (2005) 35 *Israel Yearbook on Human Rights* 181.

Guilfoyle has cast doubt, however, on the existence of any rule permitting collective interest countermeasures.[155] He has instead emphasised the requirement that there is an injured State that must be responding to the unlawful act.[156] Moreover, Guilfoyle has argued that any interdiction in the absence of flag State consent is an unlawful use of force and cannot be justified as a countermeasure for this reason, as well as the reason that alternative options to redressing the wrongful act could be available and are just as effective.[157] To consider any boarding in the absence of flag State consent a unlawful use of force appears to set the threshold for a prohibited use of force quite low in the context of law enforcement activities. Nonetheless, an assessment of proportionality would need to account for the availability of the dispute settlement procedures under UNCLOS as a peaceful alternative for States party to that Convention.

Countermeasures do not constitute a punishment for an unlawful act but rather must be undertaken with the intention of inducing the responsible State to cease its unlawful act and resume compliance with its international obligations.[158] Although the US FONOPS seemingly have this intention, they have not necessarily been successful in this regard.[159] Nonetheless, for the legality of countermeasures, it is not the result that matters, but the intention.

[155] Douglas Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force' (2007) 56(1) *International and Comparative Law Quarterly* 69, 71–3.
[156] Ibid 73.
[157] Ibid 79–81.
[158] *ILC Draft Articles on State Responsibility* (n 147) 130 [1].
[159] See Joshua L Root, 'The Freedom of Navigation Program: Assessing 35 Years of Effort' (2016) 43(2) *Syracuse Journal of International Law and Commerce* 321, 347.

A decision to utilise countermeasures thus carries risks. One is that the State may be incorrect in its view that its rights have been violated and so the action taken by that State will constitute a wrongful act in its own right with no circumstance precluding wrongfulness. Another risk is that the injured State will not be able to meet all the requirements expected in taking countermeasures, especially if the actions are not easily reversible or proportionate. Finally, as a more practical consideration, the countermeasures may not result in the cessation of the unlawful act. The injured State would then need to consider alternative responses to resolve the dispute.

5. Other Responses to Law of the Sea Violations

Other responses that may be anticipated when there is a perceived violation of the law of the sea are discussed briefly in this section. In each instance, the legality of the response would need to be assessed carefully against the requirements set out for resorting to each form of response. Given the emphasis on the peaceful settlement of disputes,[160] and on adherence to treaty obligations,[161] the restrictions on these responses are to be expected. What matters for present purposes is that these responses may all be anticipated and that they provide lawful options that should inform State decision-making to maintain the public order of the oceans. The responses addressed in this section are (1) using force; (2) suspension or termination of a treaty, and (3) alternative agreements.

a. Using Force

[160] See *Charter of the United Nations* art 2(3); *UNCLOS* (n 2) art 279.
[161] Enshrined in the principle of *pacta sunt servanda*. See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 ('*VCLT*').

The use of force against the territorial integrity or political independence of a State is prohibited under customary international law, Article 2(4) of the UN Charter and Article 301 of UNCLOS. The exceptions to this prohibition are limited to actions in self-defence and conduct taken pursuant to Security Council Resolutions adopted under Chapter VII of the UN Charter.[162] Yet policing operations frequently entail the use of force and this section thus contemplates how force may be lawfully used at sea consistent with the exercise of law enforcement jurisdiction as a response to the violation of coastal State laws.

UNCLOS does not expressly provide for law enforcement powers in all the instances that it allows for the possibility of States exercising prescriptive jurisdiction. While the exercise of enforcement jurisdiction would generally be anticipated to complement prescriptive jurisdiction as a matter of general international law, the exercise of enforcement powers will be subject to a range of constraints.[163] These limitations will include consideration of where an activity is occurring, what activity is occurring and the relationship of the State wishing to exercise enforcement jurisdiction to the actor concerned. Generally, States consent to law enforcement action against their vessels in prescribed instances.[164]

In the *Arctic Sunrise* arbitration, the tribunal observed that UNCLOS did not contain a provision allowing for the exercise of enforcement jurisdiction in relation to the non-living resources of the continental shelf comparable to Article 73 in relation to the living

[162] *Charter of the United Nations* arts 42, 51.
[163] Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 62–3.
[164] Guilfoyle (n 155) 80–1.

resources of the EEZ.[165] This question was relevant because Russia was purporting to exercise enforcement jurisdiction over thirty Greenpeace members protesting the operation of one of Russia's oil platforms. Nonetheless, the Tribunal was able to refer to the earlier work of the ILC and the intention that the rights afforded to coastal States over the continental shelf included jurisdiction for 'the prevention and punishment of violations of the law'.[166]

If enforcement powers are considered to exist beyond the strictures of the Convention, the question that arises is what limits might exist for the exercise of these powers.
In response to the actions of the Arctic 30 protestors, the *Arctic Sunrise* Tribunal observed that 'the protection of a coastal State's sovereign rights is a legitimate aim that allows it to take appropriate measures for that purpose. Such measures must fulfil the tests of reasonableness, necessity, and proportionality.'[167] Meeting these requirements will always be highly fact-specific.

ITLOS addressed the amount of force that may be permissibly used during the course of law enforcement activities in *M/V Saiga (No. 2)*.[168] In that case, ITLOS took the view that 'the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'.[169] The emphasis on avoiding force aligns with the position of the Tribunal in *Guyana v Suriname*

[165] *Arctic Sunrise, Merits* (n 16) 285 [283].
[166] Ibid, citing 'ILC Articles Concerning the Law of the Sea with Commentaries' (1956) 2 *Yearbook of the International Law Commission*, 297.
[167] Ibid 297 [326].
[168] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* [1999] ITLOS Reports 10 ('*M/V "Saiga" (No 2)*'). The use of force during law enforcement was previously addressed in the *I'm Alone* and *Red Crusader* decisions. For discussion, see Klein (n 163) 116–17.
[169] *M/V 'Saiga' (No 2)* (n 168) 61–2 [155].

in casting the threat of force made in that case as unlawful. Despite this low tolerance for the use of force, law enforcement would often involve the arresting State hailing the vessel for boarding and, if resistance follows, to fire across its bow before resorting to direct force against the vessel. Shearer has suggested that '[m]ethods other than gun-fire are to be used wherever possible where the pursued vessel refuses to stop, for instance, outmanoeuvring, high pressure water hoses to short the electrics of the pursued vessel, harpooned sheets to foul propellers, etc.'.[170]

Law enforcement activities in the South China Sea are replete with examples of forceful efforts to prevent fishing perceived to be in violation of coastal State rights. For example, China is reported to have rammed and sunk Philippine and Vietnamese fishing vessels.[171] Indonesia has fired on Chinese fishing vessels, injuring a Chinese fisher, in its EEZ around the Natuna Islands, which China considers part of its traditional fishing grounds.[172] Any legal assessment of some of these actions is complicated by the underlying territorial sovereignty dispute, as well as the increasing use of maritime militias with less certain legal status compared to a State's navy or coast guard.[173]

Law enforcement actions in the South China Sea have also extended to efforts to explore and exploit seabed resources. In some instances, China has issued verbal protests and

[170] Ivan A Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35(2) *International and Comparative Law Quarterly* 320, 342.
[171] Diane A Desierto, 'China's Maritime Law Enforcement Activities in the South China Sea' (2020) 96 *International Law Studies* 257, 259–60; Yann-huei Song, 'The Declaration on the Conduct of Parties and a Code of Conduct in the South China Sea: Recent Actions Taken by ASEAN' in Seokwoo Lee and Hee Eun Lee (eds), *Northeast Asian Perspectives on International Law: Contemporary Issues and Challenges* (Brill, 2013) 29, 34.
[172] Morris et al (n 8) 116.
[173] For discussion on China's maritime militia and status under international law see Rob McLaughlin, 'The Law of the Sea, Status and Message Ambiguity', in Donald R Rothwell and David Letts (eds), *Law of the Sea in South East Asia: Environmental, Navigational and Security* Challenges (Routledge 2020) 136, 138–44. See also Morris et al (n 8) 27–30, 33–34.

pressured oil companies that have engaged with Viet Nam over possible exploration activities.[174] However, China sought to place its own oil platform, HD 981, in Viet Nam's EEZ in 2013. This action was accompanied by 'an armada' of eighty Chinese vessels and led to confrontations with Vietnamese vessels (albeit not warships); the Chinese vessels regularly rammed the Vietnamese vessels and deployed high-pressure water cannons against them to prevent their interference.[175] In this situation, both China and Viet Nam believe that they are the rightful coastal State seeking to exercise and enforce their exclusive sovereign rights. While the responses must be assessed against the legality of the initial claim, the lawfulness of this law enforcement action would still be assessed for what is reasonable and necessary in each situation. As such, even where the underlying claim prompting the response may not be resolved, there are still standards that must be followed in any law enforcement response. Adherence to the legal rules in this regard may again serve to reduce ambiguity that may be exploited in some policy settings.

b. Suspension or Termination of a Treaty

Where States are party to a treaty and one party considers the other party to be acting in violation of that treaty, another response to contemplate is suspending or terminating the treaty in question. Under the *Vienna Convention on the Law of Treaties*, a State may only withdraw from or suspend the operation of a treaty in respect of the treaty as a whole and not particular parts of it, unless the treaty otherwise stipulates or else the parties agree.[176] Given that UNCLOS has been widely considered as a 'package-deal' in its

[174] Song (n 171) 31.
[175] Carlyle A Thayer, 'South China Sea Tensions: China, the Claimant States, ASEAN and the Major Powers' in Tran Truong Thuy and Le Thuy Trang (eds), *Power, Law and Maritime Order in the South China Sea* (Lexington Books, 2015) 3, 9.
[176] *VCLT* (n 161) art 44.

negotiations,[177] it would not be expected to count as a treaty from which parties could withdraw from particular parts. This point is reinforced by the prohibition on reservations and exceptions to the Convention.[178] A State party may instead denounce UNCLOS pursuant to Article 317 of the Convention.

Article 60 of the *Vienna Convention on the Law of Treaties* allows for the possibility of treaties being suspended or terminated as a result of a 'material breach'. In the context of a State alleging that a treaty provision has been violated, the breach of that rule would be 'material' if that State could demonstrate that the breach involved 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'.[179] The purpose of this provision is to set a high threshold to warrant the termination of treaty so as to provide greater stability in treaty relations.[180] What exactly counts as a 'material breach' will depend on the facts at issue and the specific provision being breached. It seems likely that the breach of a provision that carries with it a preordained response within UNCLOS (such as the availability of taking 'necessary steps' under Article 25 to a breach of the right of innocent passage) would not constitute a material breach.

Moreover, there are further considerations when there is a material breach of a multilateral treaty. In the context of a multilateral treaty, Article 60(2) of the *Vienna Convention on the Law of Treaties* provides:

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[177] See, eg, Rothwell and Stephens (n 1) 17. See also Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, 'The United Nations Convention on the Law of the Sea: A Historical Perspective', *Oceans and Law of the Sea* (Web Page, 1998) <https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm>.
[178] *UNCLOS* (n 2) art 309. See also Rothwell and Stephens (n 1) 17.
[179] *VCLT* (n 161) art 60(3).
[180] Shaw (n 88) 948.

A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

    (i) in the relations between themselves and the defaulting State, or

    (ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

Once again, the threshold is set high so that States not involved in any way with the material breach do not have their own rights affected by the dispute between a small subset of State parties to the treaty. This avenue has not yet been followed as a response to a violation of UNCLOS.[181]

c. Alternative Agreements

[181] The suspension or termination of a treaty pursuant to Article 60 of the *VCLT* (n 150) is distinct to countermeasures. Countermeasures relate to questions of responsibility for unlawful conduct whereas suspension or termination relate to the substantive obligations that are owed between the parties concerned. *ILC Draft Articles on State Responsibility* (n 147) 128–9 [4].

Where a State's rights have been (or are suspected to have been) violated, that State may seek to prevent repetition of the unlawful conduct through an agreement with the offending State. The new agreement may seek to articulate in more detail the standard of conduct expected in relation to a specific activity in an area and so go beyond general requirements that may already exist under international law. Bilateral fishing agreements may be examples of these agreements.[182] Alternatively, the new agreement may seek to bring together existing principles of international law in a structure that is responsive to the specific source of tension. An example of this sort of agreement is the Code for Unplanned Encounters at Sea,[183] which brings together rules from the COLREGS,[184] UNCLOS, and the International Code of Signals.[185] Finally, the agreement may just reaffirm adherence to existing principles of international law. The 2002 Declaration of Conduct between ASEAN and China fits within this category in its reaffirmation of the freedom of navigation consistent with 'universally recognized principles of international law', including UNCLOS.[186]

When considering the parameters of this sort of response, it should be borne in mind that the law of treaties provides guidance on the interrelationship of treaties.[187] Further, the treaty interpretation rule of systemic integration allows for coherency between existing

[182] See, eg, *Fisheries Agreement between the Government of the Republic of Korea and the Government of the People's Republic of China*, signed 3 August 2000, 2486 UNTS 233 (entered into force 30 June 2001); *Agreement Between Japan and the Republic of Korea Concerning Fisheries*, signed 28 November 1998, 2731 UNTS 305 (entered into force 22 January 1999).
[183] Western Pacific Naval Symposium, 'Code for Unplanned Encounters at Sea' (Version 1, 22 April 2014) <http://www.ions.global/sites/default/files/CUES-10-Approvedat-the-14th-WPNS-2014422.pdf>.
[184] *Convention on the International Regulations for Preventing Collisions at Sea*, opened for signature 20 October 1972, 1050 UNTS 16 (entered into force 15 July 1977).
[185] International Maritime Organisation, *International Code of Signals* (4th ed, 2005).
[186] Association of South East Asian Nations*, Declaration on the Conduct of Parties in the South China Sea*, 4 November 2002 <https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2>.
[187] See *VCLT* (n 161) art 30.

international obligations.[188] The relationship between UNCLOS and any new treaty relating to the law of the sea is governed by Article 311 of UNCLOS. Where other agreements are compatible with UNCLOS, the Convention will not alter the rights and obligations of States Parties arising under those agreements.[189] In addition, treaties that are 'expressly permitted or preserved by other articles' of UNCLOS are permissible.[190]

However, if States Parties to UNCLOS wish to modify or suspend the operation of certain provisions of UNCLOS as between themselves, a number of conditions must be satisfied, as laid out under Article 311(3):

> provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Further, pursuant to Article 311(4): 'States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.' It might well be anticipated that any intention to modify or suspend UNCLOS provisions may provoke unfavourable reactions from other parties depending on what is proposed and how it is perceived.

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[188] Ibid art 31(3)(c).
[189] *UNCLOS* (n 2) art 311(2).
[190] Ibid art 311(5).

States may prefer to adopt an informal (i.e. non-binding) agreement to set expectations as to the standard of conduct but not create formal legal obligations through a treaty. Informal lawmaking as a process allows for relevant actors to assemble and share expertise and information, learn more about an issue, and bargain on what standards of behaviour are acceptable going forward to address that issue.[191] An informal agreement may therefore provide a useful response to a situation of tension where a coastal State claims that its rights are violated but the alleged offender denies the existence of those rights. An informal agreement may not necessarily solve the root of the problem but at least creates a means for States to resolve their immediate differences. Informal agreements offer flexibility, more rapid negotiation and implementation and less consequences if a State ultimately decides to deviate from the standards agreed in that instrument.[192]

Sometimes, though, informal agreements may be antagonistic to the core elements of the formal agreements that were already in place between the parties.[193] In this situation, the informal agreement may be used to signal the start of a new rule of international law. The informal agreement may seek to adjust current understandings of legal principles and shape them in an alternative direction. Some care is therefore still needed in using

[191] 'Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or other traditional source of international law (output informality)': Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2013) 13, 22.
[192] See Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization* 421, 423; Charles Lipson, 'Why Are Some International Agreements Informal?' (1991) 45(4) *International Organization* 495, 500, 514–17.
[193] Gregory C Shaffer and Mark A Pollock, 'Hard vs Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94(3) *Minnesota Law Review* 706, 790–91.

informal agreements as a means to diffuse political tensions in the short term but potentially seek to change international law in the longer term.

6. Conclusion

Assessing the actions and reactions of States has been the grist of international relations analyses for decades and grey zone conflicts have also long been part of international affairs, even if known by different names.[194] International law also has frames and rules for assessing State reactions to potentially unlawful acts. This article has sought to draw out the responses available to States in countering perceived violations of the law of the sea. Although UNCLOS should not be considered a self-contained regime because of the various ways it draws in and looks out to other rules of international law, the mechanisms available within UNCLOS should be considered a starting point in redressing the violation of rights that are enshrined in that treaty.

The responses available to States beyond UNCLOS may serve diverse purposes, both legal and political. Notably, States may protest actions where they are considered as violating international law. A further lawful response is retorsion, which may be an unfriendly action in terms of the political relationships of the parties concerned, but is permissible under international law. The messaging involved could have both legal and political significance. Moreover, these sorts of legal responses may also be limited in that they cannot constitute an abuse of right nor violate the prohibition on the threat of the use of force. Ensuring that legal standards are articulated and reaffirmed in the course of these

[194] Green et al (n 84) 22.

interactions may reduce normative ambiguity and thereby better support the rules-based order of the oceans.

Other legal responses entail requirements for their lawful use or set limits on their deployment. Hence, if a State wishes to respond to an unlawful act by its own unlawful act as a means to induce compliance by the offending State, it may do so as a form of countermeasure. However, there are a range of conditions that must be met for countermeasures to be a lawful response to a wrongful act. If these conditions are not met, or if the responding State was incorrect in its assessment of the legality of the offending State's actions, the responding State may itself be held responsible for a violation of international law. Equally, there are strict requirements involved for States to suspend the treaty obligations that it owes to the offending States if a material breach of a treaty can be established. While a coastal State may be able to terminate a bilateral treaty through notice, the termination of UNCLOS is more complicated. A coastal State may not be advantaged in withdrawing from a multilateral treaty and effectively denying itself the rights to participate in governance structures within that treaty as well as denying itself certain rights that only exist under that treaty and not within customary international law. Adherence to these legal processes may be viewed as politically cumbersome or unwieldy but do carry the advantage of confirming a rules-based approach to ocean governance and providing greater transparency and, possibly, accountability in relation to actions taken at sea.

The range of responses to law of the sea violations is thus varied and may be implicated to varying degrees before an injured State opts to resort to formal dispute settlement methods. For those States that are parties to UNCLOS, decisions about responses to

perceived international law violations must account for the possibility that the matter could ultimately be assessed before an international court or tribunal. The failure of a party to turn to UNCLOS dispute settlement may, in some circumstances, constitute a violation of UNCLOS in its own right.[195] Thus the critical point to underline is the ongoing relevance of international law in State decision-making and especially during engagements intended to challenge the good order of the oceans.

[195] As was determined in *Guyana v Suriname* (n 114) in assessing claims relating to Articles 73(3) and 82(3): at 137–8 [482].