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NAVAL POWER IN THE INDIAN OCEAN: RISING TENSION, MARITIME GOVERNANCE AND THE ROLE OF LAW

ABSTRACT

Maritime areas of the world are fast becoming sites of growing tension and potential confrontation by rising global powers. While the world is well aware of the issues surrounding claims in the South China Sea, another site of rising tension is the Indian Ocean Region (IOR), especially in the context of India and China. Such tensions may be addressed and ameliorated through the agency of law. While dispute resolution mechanisms such as that found in the *United Nation Convention on the Law of the Sea* may provide a possible means of avoiding potential conflict, the force of law is possibly better applied through its more diffuse, but no less powerful, normative effect. That is, the capacity of law to provide boundaries of engagement and to shape vocabularies and frameworks of resolution within the political realm, offer much more hope of success than the rather blunt application of formal processes of adjudication. This article will canvass the manner in which law may have that harmonizing effect within the IOR at a time where actions and reactions hold the real potential for overreaction by any side.

I INTRODUCTION

The Indian Ocean will likely be the focus of increasing tension and decisive policy/legal interplay over the next few decades. The emergence of significant maritime powers and potential competitors such as India and China, the importance of the Indian Ocean for Sea Lines of Communication between the Middle East, Africa and Asia and the strategic interests of the United States ensure that the region will attract key geo-political attention. Add to this the challenges of piracy and other acts of maritime lawlessness already evident in the region and the growing resource and strategic interests of Indian Rim powers such as Australia,

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South Africa and France,¹ and it is inexorable that critical focus will be directed to the Indian Ocean in the 21st century.²

Whether this region will witness a harmonised evolution of cooperation or will be the site of fiercely contested legal and policy discord is uncertain. However, it will be argued in this article that the indicators are actually quite positive that international law will have a constructive role to play in defusing tension and promoting greater cooperation and security for all. This is based on an assessment regarding the structural capacities for resolving disputes resident in the 1982 *United Nation Convention on the Law of the Sea* ('*LOSC*'),³ but possibly not in the manner anticipated. It will be argued that it will not be the dispute resolution mechanisms contained within the *LOSC* that will achieve this positive outcome. Rather it will be the normative effect of the Convention itself that will prompt the merging of political goals and legal positions. The Convention framework has the ability to promote a broader justificatory discourse that will deliver the optimistic results predicated. Such a normative influence is more durable and has greater chance of success than the legally insular assertion of the role of dispute resolution mechanisms of the *LOSC*. This is not to say that the dispute resolution mechanisms are not significant, but rather their effect is relevant more to shaping international discourse, and setting up channels of potential accommodation, than in resolving issues at play through direct adjudication mechanisms.

II THE STRATEGIC INTERPLAY OF THE INDIAN OCEAN

In his relatively recent assessment of the geo-political factors in the Indian Ocean Region (IOR), Richard Kaplan presents a highly dynamic account of the powers and vulnerabilities at play.⁴ According to Kaplan, China recognises its comparative strategic and military disadvantage in the IOR, and seeks broader maritime security cooperation for the development of the touted 'maritime silk road' for commercial

¹ 'France has traditionally held a high degree of influence in the western Indian Ocean region and uses its cultural ties, external territories and military power to maintain its regional presence': Bruno de Paiva, *France: National Involvement in the Indian Ocean Region* (5 December 2011) Future Directions International <<http://www.futuredirections.org.au/publication/france-national-involvement-in-the-indian-ocean-region/#sthash.09baRvpD.dpuf>>; see also, Bruno de Paiva, 'France: National Involvement in the Indian Ocean Region' (Strategic Analysis Paper, Future Directions International, 5 December 2011).

² See eg, Jason J Blazevic, 'Defensive Realism in the Indian Ocean: Oil, Sea Lanes and the Security Dilemma' (2009) 5(3) *China Security* 59; Lee Cordner, 'Rethinking Maritime Security in the Indian Ocean Region' (2010) 6 *Journal of the Indian Ocean Region* 67.

³ Opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

⁴ Robert D Kaplan, *China's Unfolding Indian Ocean Strategy — Analysis* (11 February 2014) Center for a New American Security Online <<https://www.cnas.org/press/in-the-news/chinas-unfolding-indian-ocean-strategy-analysis>>.

and security objectives, while at the same time seeking increased port basing rights. The US prioritises navigational freedom in the IOR for commercial goals, security stability in the region and access to the Strait of Hormuz. In contrast, India is wary of both China's and the US' actions, and is seeking greater engagement with IOR littorals in order to bolster its geographic advantage.

The greater Indian Ocean 'encompasses the entire arc of Islam'.⁵ Two bays dominate it: the Arabian Sea in the west and Bay of Bengal in the east.⁶ The Indian Ocean accounts for half the world's seaborne container traffic, and 70 per cent of the total traffic of the world's petroleum.⁷ The Indian Ocean is characterised by a number of strategic chokepoints, namely Bab el Mandeb and the Straits of Hormuz and Malacca.⁸ Both India and China are asserting their growing maritime strength in the Indian Ocean and both view the world's third largest body of water as a strategic priority. China is building maritime facilities in Pakistan, a fuelling station in Sri Lanka and a container facility in Bangladesh.⁹ Added to this is the establishment of its first overseas military support base in Djibouti.¹⁰ Recent statements by a senior Chinese state official that '[w]e can no longer accept the Indian Ocean as an ocean only of the Indians',¹¹ contributed to the growing unease felt by India in the face of the rapidly increasing Chinese military activity.

Indian commentators have spoken out on this unease. In relation to the sending of a Chinese Shang Class Nuclear submarine to the Indian Ocean in December 2013, former Indian Vice Admiral Anup Singh noted that 'sending a strategic platform into waters that are already stressed is not a healthy sign, and works counter to all effort at confidence-building between China and India'.¹² Moreover, in relation to Chinese PLA (Navy) manoeuvres off Christmas Island in February 2014, Vice Admiral Singh observes '[i]f the idea was to provoke Indian Ocean powers, the Chinese may have scored a short-term goal, but actually lost score in the game of trust-building for the long term'.¹³ Moreover, Chinese maritime activity in submarine visits to Colombo and participation by a Chinese submarine in an anti-piracy mission in the Gulf of Aden, has prompted the observation that '[s]ubmarines have no role to play in

⁵ Robert D Kaplan, 'Center Stage for the Twenty-first Century' (2009) 88(2) *Foreign Affairs* 16, 19.

⁶ *Ibid* 17.

⁷ *Ibid* 19.

⁸ *Ibid* 20.

⁹ *Ibid* 22.

¹⁰ Shannon Tiezzi, 'China has "Reached Consensus" with Djibouti on Military Base', *The Diplomat* (online), 23 January 2016 <<http://thediplomat.com/2016/01/china-has-reached-consensus-with-djibouti-on-military-base/>>.

¹¹ Zhao Nanqi former director of the General Logistics Department PLA quoted in Kaplan, *China's Unfolding Indian Ocean Strategy*, above n 4, 22.

¹² Vice Admiral Anup Singh, 'India's Maritime Security Perspective' (RUMLAE Research Paper No 16-13, The University of Adelaide, 12 January 2016) 5.

¹³ *Ibid* 4-5.

anti-piracy tasks and the real purpose of sending such a platform is not lost on any one'.¹⁴ Indeed, Indian reactions to such activity have involved the steady increase in military commitment to its own bases in the Andaman and Nicobar Islands located in the north Indian Ocean. Recent reports indicate that India has deployed two of its most advanced patrol/anti-submarine warfare aircraft to these islands.¹⁵ Moreover, there have also been reports of increased Japanese and Indian cooperation on these islands as a means of countering Chinese expansion in the Indian Ocean.¹⁶

Realist tropes of International Relations (IR) theory accept that international law can have a place in advancing state interests, at least where doing so is convenient or coincides with military or economic power goals.¹⁷ In this regard, both the US and China would likely use the law to advance ideas of navigational freedom while India would promote concepts of coastal state security. Generally speaking, for the US and India, that has been their practice over the last decade or so. The US and its Freedom of Navigation program¹⁸ is an active player in championing rights of navigational freedom resident within the *LOSC* or customary international law in the IOR (and elsewhere across the globe), whereas India has for some time asserted state security rights in areas such as its Exclusive Economic Zone (EEZ).¹⁹

The question of coastal state rights and correlative navigational freedoms has been a live issue from the beginning of the negotiation of the *LOSC*. Issues relating to, inter alia, special security issues/zones, prior notification and/or permission for passage through territorial seas, marine scientific research and excessive claims have been

¹⁴ Ibid 5.

¹⁵ Franz-Stefan Gady, 'Indian Ocean: India Deploys New Sub-Killer Planes to Counter Chinese Subs', *The Diplomat* (online), 19 January 2016 <<http://thediplomat.com/2016/01/indian-ocean-india-deploys-new-sub-killer-planes-to-counter-chinese-subs/>>.

¹⁶ Ankit Panda, 'India Opens Door to Japanese Assistance in Andaman and Nicobar Islands', *The Diplomat* (online), 12 March 2016 <<http://thediplomat.com/2016/03/india-opens-door-to-japanese-assistance-in-andaman-and-nicobar-islands/>>: 'China's increasingly assertive behavior in the East and South China Seas and its simultaneous pursuit of civilian port infrastructure along the Indian Ocean littoral has in part driven New Delhi and Tokyo closer together'.

¹⁷ Jack Goldsmith and Eric Posner, *The Limits Of International Law* (Oxford University Press, 2005) 12.

¹⁸ See generally, Richard J Grunawalt, 'Freedom of Navigation in the Post-Cold War Era' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights And Freedoms And The New Law Of The Sea* (Martinus Nijhoff, 2000) 15.

¹⁹ India stated:

The Government of the Republic of India understands that the provisions of the Convention do not authorize other states to carry out in the exclusive economic zone and on the continental shelf military exercises or maneuvers, in particular those involving the use of weapons or explosives without the consent of the coastal State.

LOSC: India: Depository Notification by India Upon Ratification, UN Doc CN 199.1995.Treaties-5 (1995).

the subject of ongoing debate since the *LOSC* entered into force in 1994, in the IOR and more generally across the globe.²⁰

Australia, for example, does not recognise the existence of the obligation to provide prior notification or to seek prior permission before undertaking innocent passage by warships within foreign territorial seas, *a fortiori* in the 200 nautical mile EEZ zone. In the 2005 Royal Australian Navy Doctrine Publication *The Navy Contribution to Australian Maritime Operations*, it is stated bluntly that ‘Australia’s position is that prior notification or permission is not required for transit of the territorial sea in accordance with the regime of innocent passage’.²¹ Such a position accords with international practice, but nonetheless raises the potential for friction with states who seek to assert such a right. During the *LOSC* negotiations some states did advance the view that warships required prior permission to undertake innocent passage. Indeed, others also pressed that warships intending to exercise rights of innocent passage within foreign territorial seas should be required to provide prior notification of such an exercise. Significantly, neither position was reflected within the terms of the *LOSC*.²² The silence in the Convention on these points is interpreted by most that these requirements are not necessary but has not stopped some states from continuing to press their views on this issue.

Similarly, it is evident that in the realm of Maritime Scientific Research (MSR) within a foreign state EEZ there is a growing divergence of opinion between China and the US (especially) as to what constitutes MSR (thus requiring permission of the coastal state under the terms of art 246(2) of the *LOSC*). In a series of recent articles by American Professor Raul (Pete) Pedrozo²³ and Deputy Director Zhang Haiwen²⁴ of the Chinese Institute for Marine Affairs, the authors exchange sharp views on the rights and obligations owed between the coastal states and transiting maritime forces within a foreign EEZ. The issue of MSR is specifically canvassed where Professor Pedrozo makes a distinction between such research, which he acknowledges is within coastal state EEZ jurisdiction, and ‘military surveys’ which are not.²⁵ Deputy Director Zhang provides a critical riposte taking issue with many of Professor Pedrozo’s points. She contends, *inter alia*, that marine scientific research

²⁰ See generally Dale Stephens, ‘The Legal Efficacy of Freedom of Navigation Assertions’ (2006) 80 *International Law Studies Series* 235.

²¹ Royal Australian Navy, *The Navy Contribution to Australian Maritime Operations* (Commonwealth of Australia, 2005).

²² See Rob McLaughlin, *United Nations Naval Peace Operations in The Territorial Sea* (Martinus Nijhoff 2009) 100–2 for an outline of the resolution of this issue.

²³ Raul (Pete) Pedrozo, ‘Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone’ (2010) 9 *Chinese Journal of International Law* 9; Raul (Pete) Pedrozo, ‘Responding to Ms Zhang’s Talking Points on the EEZ’ (2011) 10 *Chinese Journal of International Law*, 207.

²⁴ Haiwen Zhang, ‘Is it Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? — Comments on Raul (Pete) Pedrozo’s Article on Military Activities in the EEZ’ (2010) 9 *Chinese Journal of International Law* 31.

²⁵ Pedrozo, ‘Navigational Rights’, above n 23, 20–3.

is not defined in the Convention and the jurisdictional reach by the coastal state is significantly broader than what Professor Pedrozo contemplates. Moreover, she asserts that freedom of navigation has a narrow scope under the *LOSC* and does not encompass ‘unconditional’ and ‘absolute’ freedom to conduct military activities within a foreign EEZ.²⁶

Professor Pedrozo draws a distinction between ‘marine scientific research’ and ‘military surveys’ in relation to the requirement to obtain permission from the coastal state²⁷. Relying upon standard canons of construction he invokes the *expressio unius* rule²⁸ to differentiate between ‘research’ and ‘survey’ activities and argues that survey activity is prohibited in territorial waters and international straits/archipelagic sea lanes,²⁹ but not within the EEZ. Accordingly, he asserts that only research activity is caught in the prohibition regarding the EEZ, thus implicitly allowing survey activity. His point of differentiation between MSR and military survey turns not on the function of the collection of information, but the use to which the information is to be directed, noting ‘the primary difference between MSR and military marine data collection ... is how the data is used once it is collected’.³⁰ For him, data collected for military purposes during a military survey is not normally released to the public or the scientific community, rather its use is restricted to military purposes, which includes the capacity for safe surface and submerged passage.³¹

In response, Deputy Director Zhang disagrees with this classification and notes that ‘[t]he key point is that the Convention neither explicitly prescribes what activities fall into marine scientific research, nor expressly states that military activities should not be categorised as marine scientific research’.³² She argues that the distinction between MSR and military surveys advanced by Professor Pedrozo is illusory. Hence, for her it is the function of the collection that is caught by the prohibition, noting that ‘there is almost no difference between the scientific instruments and equipments [sic] on board these [naval] vessels and those on board common marine scientific research vessels’,³³ and accordingly, it is impossible to draw a sharp distinction between marine scientific research and marine data collection that occurs through a military survey.³⁴ There is a hint in Deputy Director Zhang’s response that a broad definition of MSR is necessary to ensure that proper environmental stewardship can be maintained by the coastal state.³⁵ Additionally, there is also the unmistakable

²⁶ Zhang, above n 24, 32.

²⁷ Pedrozo, ‘Navigational Rights’ above n 23, 21.

²⁸ *Expressio Unius Est Exclusio Alterius* (‘the express mention of one thing excludes all others’).

²⁹ Pedrozo, ‘Navigational Rights’ above n 23, 11–2.

³⁰ *Ibid* 22.

³¹ *Ibid*.

³² Zhang, above n 24, 35.

³³ *Ibid* 38.

³⁴ *Ibid* 42.

³⁵ *Ibid* 38

flavour of security concerns with the act of collection and the potential military use such information may be put.³⁶

These competing objectives of navigational freedom versus coastal state rights have played out in the IOR on the question of the lawfulness of foreign military exercises in the EEZ of littoral states. India, in essence, maintains that foreign naval exercises or activities involving the firing of weapons within its EEZ are prohibited because, inter alia, art 88 of the *LOSC* reserves the ‘High Seas’ of which the EEZ overlay for ‘peaceful purposes’.³⁷ The counter to this argument is that the preceding article in the *LOSC* that relates to the ‘High Seas’, namely art 87, expressly preserves ‘freedom of navigation’ rights in the high seas/EEZ and hence permits the exercise of such rights even by foreign warships subject only to the ‘due regard’ obligations owed to the coastal state in respect of their economic rights within the EEZ.

In sum, India asserts that the *LOSC* framework creates a general legal condition for the EEZ that prohibits military activity of a nature that is not peaceful. The term ‘peaceful’ is then construed to not include general naval exercises or activities that do not pay sufficient regard to coastal state security interests.³⁸ In contrast, the US position³⁹ (and other like-minded states, including Australia)⁴⁰ is that in this context, the *LOSC* changes nothing in relation to the waters that are now enclosed by the EEZ, and that while threats or use of force are prohibited (in accordance with art 2(4) of the *Charter of the United Nations*), normal freedom of navigational rights that involve naval activities, including exercises, remain unimpeded.

The views of US and India on this issue are not easily reconcilable. However, the law and its associated processes may yet prove useful in resolving this clash of views.

³⁶ Ibid 44–5.

³⁷ Jing Geng, ‘The Legality of Foreign Military Activities in the Exclusive Economic Zone Under UNCLOS’ (2012) 28(74) *Merkourios: Utrecht Journal of International and European Law* 22, 27.

³⁸ Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 49–51.

³⁹ The Commander’s Handbook on the Law of Naval Operations (US Department of Navy, NSWP 1-14M, 2007) [1.6.2]:

In the EEZ all nations enjoy the right to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships and aircraft that are not resource related’, and paragraph 2.6.3 ‘All ships and aircraft, including warships and military aircraft, enjoy complete freedom of movement and operation on and over the high seas. For warships, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing. All nations also enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelf beyond the territorial sea.

⁴⁰ Phillip Coorey, ‘Australia backs US in Latest South China Sea Stoush’, *Australian Financial Review Weekend* (online), 31 January 2016 <<https://web.archive.org/web/20160611204931/http://www.afr.com/news/politics/australia-backs-us-in-latest-south-china-sea-stoush-20160130-gmhuug>>.

One of the heralded features of the *LOSC* is its compulsory dispute settlement architecture. Hence, parties to the *LOSC* are directed towards numerous dispute resolution avenues to resolve disputes before they might escalate to military force. Such avenues involve litigation before the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea, arbitration before a General or Special Arbitral Tribunal,⁴¹ or ultimately conciliation and negotiation processes.⁴²

Notwithstanding this series of choices that are available under the banner of compulsory dispute resolution processes, there is a major treaty exception that allows ‘military activities’ to be excluded from ‘compulsory’ jurisdiction processes under art 298(1)(b) of the *LOSC*. China and India have both made declarations invoking the art 298 waiver or reserving the right to invoke the jurisdictional waiver.⁴³ Given this waiver opportunity, coupled with the fact that the US is not a party to the *LOSC*, it is highly unlikely that this dispute or any dispute involving military activity could be resolved through the compulsory dispute resolution mechanisms. This then opens the door to the alternative route through which the law might guide resolution of this dispute, which is the subject of the rest of the article.

III THE EFFICACY OF INTERNATIONAL LAW

Despite that fact that issues pertaining to military activities are able to be exempted from the dispute resolution machinery, it is contended that the law does still provide a useful framework for resolving contentious security issues within the IOR. It can act to shape the vocabulary of debate, and provide a structure of bounded argument that can influence a level of convergence in positions held that may produce negotiated outcomes or understandings that are potentially reconcilable. In this way, the law may have an impact on disputes even where mechanisms for the adjudicated resolution of those disputes are specifically excluded. This section examines how law would assist in the resolution of the dispute over military activities in the EEZ, before the subsequent sections turn to examine the broader relevance of law in resolving this dispute outside of a traditional adjudicative enforcement paradigm.

Ironically, one of the enduring features of modern international legal process generally is its practicality and deference to state consent.⁴⁴ While not necessarily reflective of a realist IR set of preferences, it still does allow great latitude for states to advance their interests. In respect of the issue of military activities in the EEZ identified above, international law takes a practical view of state actions. Hence, when seeking

⁴¹ *LOSC* art 287.

⁴² *Ibid* art 284.

⁴³ Declarations of parties upon signature and/or ratification and accession of the *LOSC* can be found here: United Nations, *Declarations and Statements* (29 October 2013) United Nations Oceans and Law of the Sea <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification>.

⁴⁴ Ian Brownlie, *Principles of International Law* (6th ed, Oxford University Press 1995) 4: ‘the general consent of states creates general rules of application’.

to reconcile Indian and US perspectives on the EEZ issue under the *LOSC*, weight is placed on the actual actions of states. Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* ('*VCLT*')⁴⁵ provides that 'subsequent state practice in the application of the Treaty' can assist in constructing meaning of otherwise ambiguous terms of a Treaty text. To this end, assertions of security rights in the EEZ across the globe may be surveyed and reviewed to ascertain whether there is a general practice consistent with the Indian position.

While not devoid of some relevant state practice,⁴⁶ it is likely that the Indian position would not represent sufficient 'subsequent state practice' by other states who are party to the *LOSC* to inform the meaning of art 88. Given the vast preponderance of contrary state practice, the recognition of the lawfulness of US Navy manoeuvres in the Nicaraguan EEZ by the ICJ⁴⁷ and ample textual qualifications resident in the *LOSC* regarding express naval navigational rights even within foreign territorial seas,⁴⁸ it is manifestly clear that this line of reasoning regarding a broad application of 'peaceful purposes' is unsustainable. It is evident that naval transits and exercises do occur within the EEZ regions of all countries in the world.⁴⁹

However, the US is not a party to the *LOSC* so a review of customary international law (CIL) might be undertaken to determine whether there is a parallel security right in the EEZ of the kind advanced by India. If there is sufficient state practice by those states who are not party to the *LOSC* and also an associated conviction that this was a lawful entitlement (*opinio juris*) then (subject to the issue of persistent objection, addressed below) states such as the US would be bound to observe such rights.⁵⁰

As with the survey undertaken under art 31 of the *VCLT*, it is again unlikely that there is sufficient general state practice and expression of *opinio juris* to ground a conclusion that there exists a special security status in the EEZ under *CIL*.

This does not, however, mean that such an assertion is devoid of legal meaning. Given the pragmatic nature of international law, it is still open for a country that asserts a right under customary international law to assume the status of 'persistent objector' to the emergence of an obligation and thus not be bound by the subsequent crystallisation of that obligation. The requirements for persistent objector status are

⁴⁵ Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁴⁶ Geng, above n 37, 27–29.

⁴⁷ *Military and Paramilitary Activities (Nicaragua v US) (Judgment)* [1986] ICJ Rep 14, 118.

⁴⁸ *LOSC* arts 19(a)–(c), 19(e)–(f), 20, 30.

⁴⁹ See eg US Maritime Claims Reference Manual, which details US instances of activities undertaken in the EEZ in those countries asserting special security status in the EEZ: *Maritime Claims Reference Manual* (May 2014) US Navy Judge Advocate General's Corps <http://www.jag.navy.mil/organization/code_10_mcrm.htm>.

⁵⁰ *Statute of the International Court of Justice* art 38(1)(b).

very exacting. They include opposition to the emerging rule, stated at the outset and expressed in a consistent manner.⁵¹ It is arguable whether that might be established here. Assessment of US actions in foreign EEZs would need to be undertaken to arrive at a determination. It would, however, be relevant only to the US (and any other non-party states to the *LOSC* who might be able to demonstrate persistent objector status, however unlikely that may be), and only if there were otherwise sufficient practice and *opinio juris* to found a customary rule limiting military activities in foreign states' EEZs.

International law does, therefore, through the relevance of subsequent practice to treaty interpretation, and through customary international law, have pragmatic means of arriving at a solution to the interpretive dispute over military activities in the EEZ, which is based on the actual practice of states themselves. In this regard, it allows for a mechanism of ascertaining treaty meaning and/or parallel customary international law rights and obligations. In this instance, it appears likely that the view of the US regarding navigational rights has particular force, but without an opportunity to obtain any kind of judicial or quasi-judicial determination, there remains the nagging reality of ambiguity to such claims and the ever-present potential for escalating tension. However, this does not mean that international law has no constructive role to play in ameliorating potential disputes. As will be argued in the next section, international law's greatest traction comes not from a 'formalist' viewpoint, for there are many potential dead ends as revealed above, but from its capacity to provide a viable vocabulary and sense of boundary to facilitate convergence in how arguments within international diplomacy can be advanced, defended or assimilated.

IV JUSTIFICATORY DISCOURSE AND INTERNATIONAL LAW

In the broader context of national security interests, it is self-evident that the relationship between law and policy is complex. This is a result of the irreducible indeterminacy of the law, but also a reflection of the perceived mutual exclusivity of both the moral-legal universe⁵² and the animus of power as conceived in 'national interest' political formulations.⁵³ The parallel nature of these perceived universes invariably generates regular moments of collective existential crisis as to the very discipline of international law⁵⁴ and inevitable normative self-reflection in the context of power politics. Despite these theoretical chasms, it is still abundantly clear that

⁵¹ *Fisheries Case (United Kingdom v Norway)(Judgment)* [1951] ICJ Rep 116.

⁵² Observations made in relation to work of George Kennan and Hans J Morgenthau by M McDougal, 'Law and Power' (1952) 46(1) *American Journal of International Law* 89, 102.

⁵³ Judith Shklar, *Legalism, Law, Morals and Political Trials* (Harvard University Press, 1964) 124.

⁵⁴ Hilary Charlesworth, 'Saddam Hussein: My Part In His Downfall' (2005) 23(1) *Wisconsin International Law Journal* 127, 130.

law, politics and policy have many points of mutual engagement and are frequently intermixed in a symbiotic relationship.⁵⁵

The broad institutional interrelationship between law and policy was a key focus of the international legal process movement that was particularly prominent in the US in 1960s and '70s, of which Chayes, Ehrlich and Lowenfeld⁵⁶ were among the leading proponents. This tradition paid particular attention to the role that law and lawyers played in international society⁵⁷ and provided insightful observations of the reality of the interdependence between law and policy. The seminal account of the 1962 Cuban missile crisis by Chayes⁵⁸ provides a particularly illuminating exposé of this relationship.

As may be recalled, the Cuban missile crisis concerned US actions to restrict the importation of nuclear-armed missiles and other armaments by the USSR to Cuba. Regarding the positioning of such missiles as a threat to US national security, the Kennedy administration responded by not attacking Cuba or the Soviet Union, but by imposing a maritime 'defensive quarantine' around Cuba, not under the aegis of art 51 of the UN Charter as an exercised strategic right of national self defence, but as an action collectively authorised by the Organization of American States (OAS) under the *The Inter-American Treaty of Reciprocal Assistance* ('*Rio Treaty*')⁵⁹ as a highly conditioned and calibrated reactive measure.

Chayes served as a legal advisor to the State Department during the crisis and through the experience summarised the ways law affected the actions, noting that it was, '[f]irst, as a constraint on action; second, as a basis of justification or legitimation for action; and third, as providing organizational structures, procedures and forums.'⁶⁰ Discussions concerning the imposition of a blockade were canvassed in that instance, though were acknowledged to be tantamount to an act of aggression under the law in the absence of an actual armed conflict (which was to be avoided). Hence law was deployed to restrain the boldest action, and instead, a limited quarantine was conceived as a viable legal device and subsequently imposed. Such a quarantine was carefully worded and represented a novel, but measured and justified, response that registered US resolve without crossing a significant legal or political line of escalation. Here, it was also seen as imperative to obtain regional consensus for this

⁵⁵ Martii Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 455, 473.

⁵⁶ Abram Chayes, Thomas Ehrlich and Andreas Lowenfeld, *International Legal Process* (Harvard, 1969).

⁵⁷ Mary Ellen O'Connell, 'New International Legal Process' in Steven R Ratner and Anne-Marie Slaughter (eds), *New International Legal Process in The Methods Of International Law* (Princeton, 2004) 82.

⁵⁸ Abram Chayes, *The Cuban Missile Crisis, International Crises And The Role Of Law* (Oxford University Press, 1974).

⁵⁹ Opened for signature 2 September 1947, 21 UNTS 77 (entered into force 3 December 1948).

⁶⁰ Chayes, above n 58, 7.

action through the multi-lateral forum of the Organization of American States where processes of deliberation and genuine consent underpinned a collective political and legal outcome. These actions spoke of both legal and political creativity. While legal discourse had a role, its influence was indirect. Its significance lay in its symbiotic relationship with broader imperatives of statecraft. Indeed, as Chayes notes:

The meetings of the Executive Committee were not dominated by debates on fine points of law. Nor would one have wished that they should be. The factual record is irrefutable, however, that the men responsible for decision did not ignore legal considerations. On the contrary, they made a considerable effort to integrate legal factors into their deliberations.⁶¹

It is evident on this account that law infiltrated decision-making throughout the crisis, but not with a dispositive character. Rather, it acted both as a justificatory and constraining narrative that shaped the decision-making process. Chayes observes that international law is diffuse and ‘at best legal reasoning and analysis will impact on alternatives in terms of more or less, not yes and no’.⁶² Moreover, Chayes highlights the political role legal justification took in decision-making noting:

The requirement of justification suffuses the basic process of choice. There is a continuous feedback between the knowledge that the government will be called upon to justify its action and the kind of action that can be chosen. The linkage tends to induce a tolerable congruence between the actual corporate decision-process, with its interplay of personal, bureaucratic, and political factors and the idealized picture of rational choice on the basis of objectively coherent criteria. We may grant considerable latitude for evasion and manipulation. But to ignore the requirement of justification too long or to violate its canons too egregiously creates, in a democracy, what we have come to call a ‘credibility gap’.⁶³

The perspective established by Chayes finds more contemporary resonance in the views of Koskenniemi who served as a legal advisor to the Finnish Mission of the United Nations at the time of the 1990 Iraqi invasion of Kuwait, when Finland held a seat at the Security Council. The account of law’s normative role by Koskenniemi bears a strikingly similar resemblance to that advanced by Chayes.

The actions of the Security Council were taken in the full awareness that a new, extraordinary assertion of collective power was being initiated. Koskenniemi notes that legal issues concerning ‘aggression, sanctions, blockade and non-recognition’⁶⁴ were raised and debated intensely with an earnestness that recognised the interdependence between law and high politics. There was a felt need by the members of the Security Council, when making decisions concerning maritime blockades and interdictions and numerous other authorisations, to ensure a consistent narrative, one

⁶¹ Ibid 100.

⁶² Ibid 102.

⁶³ Ibid 103.

⁶⁴ Koskenniemi, above n 55, 475.

bounded by a self-reinforcing structure of objective justification.⁶⁵ This was done not as a 'façade', to deliver political outcomes under the semblance of 'law', but rather in the full knowledge of the inter-relationship between law and power. Such a relationship is not dependent on any narrow, formalist notion of law's place, but rather one where law is allied with political capacity.

In both instances, law serves a justificatory role in decision-making, it sets political boundaries and applies normative content to arguments. Koskenniemi observes:

Law's contribution to security is not in the substantive responses it gives, but in the process of justification that it imports into institutional policy and in its assumption of responsibility for the policies chosen. Entering the legal culture compels a move away from one's idiosyncratic interests and preferences by insisting on their justification in terms of the historical practices and proclaimed standards of the community.⁶⁶

In both the Koskenniemi and Chayes accounts of law within the international security sphere, there is interplay with politics, where law's voice is sometimes marginalised but is also made central to the progress of resolution of policy conflict. It is clear from both accounts, however, that legal articulation is based upon a desire for achieving a requisite congruence between preferred policy outcome and a style of reasoning that acknowledges a shared sense of responsibility.⁶⁷

Despite its decentralised nature, the process of international law largely occurs through the deployment and acceptance of modes of legal argumentation as illustrated above. Certain types of argument and styles of reasoning are acceptable while others are consciously or tacitly 'out of bounds'. Oscar Schachter famously referred to 'an invisible college'⁶⁸ of international lawyers who are able to differentiate between good and bad legal arguments. Such a professional community comprising scholars, practitioners and government officials strive for a requisite level of objective judgment when making an assessment of the veracity of any particular claim. The goal of this process is to attain a general consensus of the efficacy of tendered legal positions, while avoiding and differentiating the inevitable relativism that supports many national positions. The process is inevitably diffuse, however the number of legal arguments that can be advanced are not unlimited. The particular justificatory discourse that underpins this process ensures that states feel constrained in the ambit of their arguments and are careful not to be too self-serving.

This has played out in the first decade of the 21st century where arguments relating to the War on Terror, the application (or not) of the *Geneva Conventions of 1949* to Afghanistan and definitions of torture were all animated by different conceptions of

⁶⁵ Ibid 473–478.

⁶⁶ Ibid 478.

⁶⁷ Ibid 480.

⁶⁸ Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217.

the policy-legal interplay. David Kennedy observes that the practice of international law is a variegated process of input and reaction from relevant constituencies. Persuasion often has greater traction than arguments made under assertions of formal validity. Kennedy asserts '[i]nternational law has become the metric for debating the legitimacy of military action ... law now shapes the politics of war', and further:

In the court of world public opinion, the laws in force are not necessarily the rules that are valid, in some technical sense, but the rules that are persuasive to relevant political constituencies. Whether a norm is or is not legal is a function not of its origin or pedigree, but of its effects. Law has an effect — is law — when it persuades an audience with political clout that something someone else did, or plans to do, is or is not legitimate ... the fact that the modern law in war is expressed in the keys of both validity and persuasion makes the professional use of its vocabulary both by humanitarian and military professionals a complex challenge.⁶⁹

Kennedy notes that 'international law only rarely offers a definitive judgment on who is right'.⁷⁰ From this perspective, while parties sometimes litigate matters before international courts and tribunals and deploy the full range formal legal methods of interpretive construction and remedy, international law more meaningfully plays out to a wider audience through channels and capillaries of power and through various mediums, including that of a perceived legitimacy. Accordingly Kennedy asserts that understanding restraint in the context of statecraft requires greater attention to the work of sociologists or political scientists 'about what functioned as a restraint or a reason [which becomes] more important than the ruminations of jurists in determining what international law was or was not'.⁷¹

While it is certainly open for a state to assert unilateral positions informed by realist commitments, it will likely suffer reputational loss and experience institutional marginalisation as a result. Perhaps more powerful states are able to bear this loss. But perhaps they are not. It is evident that the *LOSC* has had a normative effect in streamlining governance issues. Thus matters such as the breadth of the territorial sea,⁷² the designation of archipelagic sea-lanes and the broad acceptance of the unconditional right of innocent passage all represent moments of broad consensus between parties and non-parties to the Convention. Hence, the law provides both a central touchstone of reference but also encourages impetus for a convergence of thinking, or at least conditioned and bounded justification for positions reached. This phenomenon offers a guardedly optimistic view for how differences may be finessed in the IOR to achieve practical outcomes that align with broader national goals.

⁶⁹ David Kennedy, *Of War and Law* (Princeton University Press, 2006) 96–7.

⁷⁰ David Kennedy, *Dark Sides of Virtue* (Princeton University Press, 2004) 273.

⁷¹ David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion To International Law* (Cambridge University Press 2012) 71, 167.

⁷² Peter Dutton, 'Viribus Mari Victoria? Power and Law in the South China Sea' (Paper presented at Managing Tensions in the South China Sea conference, Center for Strategic and International Studies, 5–6 June 2013).

V CHINA AND THE PHILIPPINES LITIGATION

There has recently developed a growing interest in analysing this very capacity of international law to decisively shape international behaviour. Theories relating to sociological accounts of acculturation,⁷³ to theories of legitimacy ‘compliance pull’,⁷⁴ quantitative ‘tipping points’,⁷⁵ international and domestic audience interplay,⁷⁶ and sheer rationalist decision-making processes⁷⁷ collectively seek to provide a level of explanation. All of these approaches share a common view that international law can generate iterative processes of commitment that produce high levels of unmistakable convergence.

To return to the IOR, these accounts allow for a level of confidence that potentially disparate policy and geo-strategic views may be harmonised and coalesce around a common set of legal boundaries and vocabulary that can shape positive engagement.

The recent approach by China to the dispute it has with the Philippines in the South China Sea over the Scarborough Shoal provides a useful case study for this phenomenon, and allows for a sense of guarded optimism as to the capacity of law to facilitate constructive outcomes.

Scarborough Shoal lies approximately 118 nautical miles from the Philippines and is claimed by The Philippines in what it declares to be the West Philippine Sea. It is also claimed by China as Huangyan Island. Numerous standoffs⁷⁸ and escalatory incidents have occurred between China and the Philippines regarding fishing and occupation rights of Scarborough Shoal over the past few years. Both the Philippines and China are parties to the *LOSC*.

In 2013 the Philippines initiated legal action under art 287 of the *LOSC* before the Permanent Court of Arbitration (PCA) under art VII of the Convention. China explicitly rejected the jurisdiction of the PCA to rule on issues, relying heavily on the security and military exceptions under art 298.

Despite refusing to participate in the proceedings, the Chinese public statements in relation to this litigation have been revealing. As is well known, China has

⁷³ See Ryan Goodman and Derek Jinks, ‘Toward an Institutional Theory of Sovereignty’ (2003) 55 *Stanford Law Review* 1749.

⁷⁴ Thomas Franck, *The Power Of Legitimacy Among Nations* (Oxford University Press, 1990).

⁷⁵ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 895.

⁷⁶ Harold Koh, ‘Transnational Legal Process’ (1996) 75 *Nebraska Law Review* 181.

⁷⁷ Andrew Guzman, *How International Law Works* (Oxford University Press, 2008).

⁷⁸ Renato Cruz De Castro, ‘China’s Realpolitik Approach in the South China Sea Dispute: The Scarborough Shoal Standoff’ (Paper presented at the Managing Tensions in the South China Sea conference, Center for Strategic and International Studies, 5–6 June 2013).

maintained assertions of sovereignty over all the islands in the South China Sea. This is largely predicated on two grounds — the so-called ‘9 Dash’ line that encompasses the maritime area and the ‘historic waters’ claim.⁷⁹ Neither of these propositions has received much contemporary legal support,⁸⁰ and yet they have generally been at the centre of Chinese public assertions.

Notwithstanding this perspective, it is significant that a Chinese Government public position paper⁸¹ on the merits of the Philippines’ claims have been based upon very orthodox grounds of international legal reasoning. Hence, China asserts sovereignty over the territory in dispute based upon traditional concepts of acquisition of territory/sovereignty and the assertion of their status as islands under the *LOSC*. China asserts sovereignty based upon rights of discovery and administration as well as continuous occupation of the territory.⁸² The Chinese position paper thus employs a line of reasoning that comports fully to the established practices of international legal reasoning without any broader assertion of political entitlements. It barely mentions the concepts of the ‘9-dash’ line and ‘historic waters’ and squarely addresses the central legal issues in a highly conventional manner.

Irrespective of the actual merits of the response, the adoption of this particular strategy says much about the political-legal choices made. China has elected to adopt a formalist approach to its arguments that readily finds acceptance within the ‘invisible college’. More broadly, its identifiable taxonomy of reasoned legal argument presents a striking departure from the more traditional assertions of self-serving political right that have previously dominated Chinese assertions to the territory and land formations in the South China Sea. It may simply be a temporary tactical choice to adopt a formalist appropriation of the law to serve particular ends. Alternatively, it may represent an emerging recognition that higher Chinese strategic objectives are best served through a more authentic embrace of this type of discourse. It may also be a signal of an awakening consciousness of an emerging maritime power that much can be gained through investment in a stable law based system. A system where the collective judgement⁸³ of other relevant actors in this field as to legal rights asserted, derided and proselyted cannot be easily dismissed and where standing and reputation carry much ‘soft power’ capacity. To this end, the traction of international law in advancing (and sometimes blunting) national interests is clear and it offers a useful

⁷⁹ Peter Dutton, ‘Through A Chinese Lens’ (2010) 136 *United States Naval Institute Proceedings* 16.

⁸⁰ *Ibid.*

⁸¹ Ministry of Foreign Affairs of the People’s Republic of China, *Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 December 2014) <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

⁸¹ *Ibid* [4], [20].

⁸² *Ibid.*

⁸³ Ian Johnstone, ‘Security Council Deliberations: The Power of a Better Argument’ (2003) 14(3) *European Journal of International Law* 437, 440.

function, especially given its practical and deferential approach to state consent, in shaping and providing boundaries to arguments seeking to achieve key national and multi-lateral outcomes. This ability of international law to impact on outcomes, even in the absence of a formal adjudicative dispute settlement that is accepted by the parties, is significant — and equally transferrable to the IOR (and elsewhere).

These factors will likely shape the actions and reactions of China and India within the IOR. China will invariably invoke legal arguments underpinning freedom of navigation rights under the *LOSC*. At the same time, India will marshal its arguments concerning security interests and coastal state rights. Paradoxically, Chinese interpretations of MSR and coastal state security jurisdiction that are advanced in the Pacific may well be invoked by India against Chinese maritime activity within the IOR. Simultaneously, China may well side with US views regarding interpretations of the *LOSC* that promote the right of military activity and freedom of navigation. The irony will not be lost on anyone, even if initially deflected. Legal language and statecraft will need to be reconciled, but there will be an inexorable pull towards legitimacy, as Thomas Franck might have predicated, to convince others, ‘invisible’ colleges and visible state actors alike, of the merits of respective positions. It seems likely that such engagement will produce an accommodation, deftly encouraged and promoted by invested epistemic communities, seeking the realisation of ‘rule of law’ ideals and concepts, but premised firmly upon a bounded rationality and political reality. It is in this process of inexorable convergence where the normative power of the law will be effectively realised.

VI CONCLUSION

The third *United Nations Conference on the Law of the Sea* (*UNCLOS III*)⁸⁴ debates that led to the drafting of the *LOSC* were conducted under a consensus negotiation process. This ensured that the *LOSC* was in many respects a ‘package deal’. Moreover, in reinforcing this ‘package deal’, the *LOSC* did not permit the making of general reservations.⁸⁵ This further added to both ambiguity and compromise evident in the language used.⁸⁶ Such indeterminacy is nothing new within international law and does not mean that constructive engagement is not possible. As has been noted by some academics:

the indeterminacy of the rule can give enough flexibility to the parties to strike a balance between their sovereign interests and thus to move away from the debate

⁸⁴ UNCLOS III debates extended from 1973 to 1982.

⁸⁵ *LOSC* art 309.

⁸⁶ See George K Walker and John E Noyes, ‘Words, Words, Words: Definitions for the 1982 Law of the Sea Convention’ (2002) 32 *California Western International Law Journal*, 343; George K Walker and John E Noyes, ‘Definitions of the 1982 Law of the Sea Convention — Part II’ (2003) 33 *California Western International Law Journal* 191.

on legality/illegality of one's actions and claims and focus on confidence- and relationship-building measures instead.⁸⁷

Hence, indeterminacy invariably animates a number of interpretive techniques that are deployed in advancing 'more' or 'less' persuasive arguments in support of national claims.

Such flexibility bolsters the capacity for the *LOSC* to play a key role in shaping debate and harmonising national positions in the IOR, even in respect of areas such as military activities in the EEZ where no adjudicative settlement is likely. As argued in this article, it is clearly evident that international law has a normative effect on the behaviour of states. So accepted is this proposition that there have arisen various accounts vying to provide a level of explanation for this phenomena. Numerous channels of convergence have been identified that relate, variously, to sociological phenomena, rationalist national power calculations, measures of perceived legitimacy as well as fusions of high politics and law in a self-aware expression of informed statecraft. These channels have tremendous capacity to propel consensus. It is notable that in the context of the Scarborough Shoal dispute, China has adopted a very orthodox public legal position in support of its claims. Such an election reveals a conscious policy choice by Chinese officials to depart from more self-serving themes of justification. Such a position was likely influenced by law's socialising effect as discussed in this article. To that end, in the IOR the importance of the *LOSC* may lie not in its formal provisions regarding potential dispute resolution, but its capacity to encourage a convergence of thinking and to provide a professional boundary of possible justification for positions advanced and defended. For most seasoned commentators, the surest solution for navigating potential strife in the maritime realm lay not with over-reliance on the dispute resolution mechanisms of the *LOSC*, but rather for 'continued international dialogue as the primary means to resolve [issues]'⁸⁸ and for creativity in 'developing useful modalities to better establish the balance of rights'⁸⁹ between maritime nations. Continuing dialogue and accounts of public justification of positions reached through these means necessarily allow for potential agreement, or at least accommodation of position. Such dialogue within a familiar vocabulary of an agreed sense of meaning offers much. Within the military space, dialogue on processes that avoid miscommunication and lessen the chance of forceful response can only be a positive step.

⁸⁷ Matthias Vanhullebusch and Wei Shen, 'China's Air Defence Identification Zone: Building Security Through Lawfare' (2016) 16(1) *China Review* 121, 139.

⁸⁸ George Galdorisi and Alan Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict' (2001) 32 *California Western International Law Journal* 253, 256.

⁸⁹ *Ibid.*