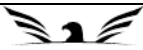

MARITIME ESPIONAGE AND THE LEGAL CONSEQUENCES OF THE UNITED STATES' POTENTIAL RATIFICATION OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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This paper explores the potential ramifications of ratifying the United Nations Convention on the Law of the Seas (LOSC) on the United States' maritime espionage policy and operational practices. Part I briefly reviews the legality of maritime espionage, particularly focusing on intelligence collection outside of traditional armed conflict situations. Part II explains the Law of the Sea and coastal state security in the innocent passage regime presumably codified in the LOSC. Part III considers policy and practice with respect to maritime espionage, interestingly observing divergent trends between treaty law development and state practice, particularly with regard to nearshore espionage under the theoretical 'non-innocent passage' regime. This part considers consistency of United States policy and practice with the LOSC's Article 19, which forbids 'intelligence gathering' during innocent passage. Part VI considers possibilities for the United States to consider when assessing whether to ratify the LOSC; namely, the overall benefits and costs, the 'package deal' nature of the LOSC, ways the LOSC may constrain United States maritime espionage practice, and the potential risks of these issues being litigated in an international forum. Finally, this paper concludes by stressing the need for senators and the intelligence community to carefully discuss the impacts of accession to the LOSC on maritime espionage. The United States should not accede to the LOSC if unwilling or unable to abide by its maritime espionage rules.

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INTRODUCTION

With renewed calls for the United States to accede to the United Nations Convention on the Law of the Sea (LOSC) and new political leadership, long-stalled ratification may soon gain traction.[1]

[1] *See e.g.* Harold Hongju Koh, *America's Post-Trump Reckoning*, PROJECT SYNDICATE (Jan. 15, 2021), https://www.project-syndicate.org/onpoint/america-post-trump-reckoning-global-standing-by-harold-hongju-koh-2021-01 (Yale International Law professor and U.S. State Dep't Legal Advisor during the Obama administration: "The two treaties that could attract bipartisan support are [the Strategic Arms Reduction Treaty] and the [LOSC], whose ratification has been supported by top foreign-policy officials in both Democratic and Republican administrations for more than 20 years."); Jonathan Power, *Time Overdue for the US to Ratify Law of The Sea Treaty*, IN DEPTH NEWS (Dec. 1, 2020),

Presidents from both major parties, Navy leadership, and powerful and diverse lobbies, including the U.S. Chamber of Commerce, American Petroleum Institute, Natural Resources Defense Council, and Ocean Conservancy, all urged Senate ratification.[2] Now-

https://www.indepthnews.net/index.php/opinion/4024-time-overdue-for-the-us-to-ratify-law-of-the-sea-treaty; John Grady, *Senators Renew Call to Ratify Law of the Sea Treaty to Help Chart Future of the Arctic*, U.S. NAVAL INST. NEWS (Jul. 19, 2017), https://news.usni.org/2017/07/19/senators-renew-call-ratify-law-sea-treaty-help-chart-future-arctic; Aditya Singh Verma, *A Case for the United States' Ratification of UNCLOS*, THE DIPLOMIST (May 2, 2020), https://diplomatist.com/2020/05/02/a-case-for-the-united-states-ratification-of-unclos/;Shane Ward, *A Problem, Not An Opportunity: How New U.S. Military Strategy Threatens Arctic Cooperation*, THE ORG. FOR WORLD PEACE (Jan. 16, 2021), https://theowp.org/a-problem-not-an-opportunity-how-new-u-s-military-strategy-threatens-arctic-cooperation/, Note: Initially, the U.S. advocated for an omnibus Law of the Sea treaty drafting process, but later objected to Part IX regarding deep seabed mining provisions requiring sharing the benefits of mining and technology transfers to less-developed nations. However, in 1994, an implementing agreement was negotiated removing the contentious provision. Considering deep seabed issues resolved, President Bill Clinton transmitted the LOSC and the 1994 Agreement to the Senate for advice and consent. Yet, a minority of Senators at the time and since then opposed the LOSC as undermining U.S. sovereignty, thereby preventing the 2/3rds required for ratification. Austin Wright, *Law of the Sea treaty sinks in Senate*, POLITICO (Jul. 16, 2012), https://www.politico.com/story/2012/07/law-of-the-sea-treaty-sinks-in-senate-078568; Theodore R. Bromund et. al, *7 Reasons U.S. Should Not Ratify UN Convention on the Law of the Sea*, HERITAGE FOUND. (Jun. 4, 2018), https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea; Myron H. Nordquist, *Why is the US not a Party to UNCLOS?* Inst. for China-America Stud. (Dec. 17, 2015), https://chinausicas.org/materials/us-not-party-unclos/.

[2] Bonnie Glaser, *Why the U.S. Should Ratify the Law of the Sea Treaty*, THE CIPHER BRIEF (Jul. 13, 2016), https://www.thecipherbrief.com/column_article/why-the-u-s-should-ratify-the-law-of-the-sea-treaty (referring to Presidents George W. Bush, Republican, and Barrack Obama, a Democrat); *Hearing on Nat'l Def. Authorization Act for Fiscal Year 2013 and Oversight of Previously Authorized Programs Before the H. Comm. on Armed Servs.*, 112th Cong. 118 (2012) (Budget Request from the Department of the Navy) ("As the world's preeminent maritime power, the [U.S.] has much to gain from the legal certainty and global order brought by UNCLOS [LOSC]."); *see also The Convention on the Law of the Sea*, U.S. NAVY JAG COPRS. (accessed Aug. 30, 2020), https://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm ("Becoming a Party to [LOSC] would help to preserve the Navy's ability to move forces on, over, and under the world's oceans, whenever and wherever needed, and is an important asset in the modern maritime environment. [It] is in the national interest of the United States because it establishes stable maritime zones, including a maximum

President Joseph Biden, in 2007, placed ratification of the LOSC as the top agenda item for the Senate Foreign Relations Committee, which he chaired.[3] Proponents tout the treaty as a way for the United States to cement important navigational rights, stabilize the legal environment for resource extraction on the continental shelf, and provide 'a seat at the table for international decision-making' among States Parties. It also offers the opportunity for an American to be a permanent judge on the International Tribunal for the Law of the Sea, thereby providing an ability to shape the development of Law of the Sea jurisprudence.[4] Backers assert the United States should join the one hundred and fifty-eight states that are party to the LOSC[5] and not be seen in the company of the small group of nations outside of the treaty (Libya, Iran, North Korea, Syria, Sudan, Turkey, and Venezuela).[6]

Opponents object to provisions that: expose the United States to liability for environmental damage in international courts; obligate technology transfer to developing countries; require royalties to the International Seabed Authority; enable the United Nations to impose taxes on United States citizens; and restrict maritime interdiction

outer limit for territorial seas; codifies innocent passage, transit passage, and archipelagic sea lanes passage rights; works against 'jurisdictional creep' by preventing coastal nations from expanding their own maritime zones; and reaffirms sovereign immunity of warships, auxiliaries and government aircraft."); Ernest Z. Bower & Gregory Poling, *Advancing the National Interests of the United States: Ratification of the Law of the Sea*, CTR. FOR STRATEGIC AND INT'L STUD. (Oct. 14, 2003), (noting support among commercial and environmental interests).

[3] *U.N. Convention on the Law of the Sea: Hearing Before S. Comm. on Foreign Rel.*, 110th Cong. 1 (Oct. 31, 2007) (listing Committee's agenda items).

[4] John Norton Moore and William L. Schachte, Jr., *The Senate Should Give Immediate Advice and Consent to the Law of the Sea Convention: Why the Critics Are Wrong*, 59 J. INT'L AFFAIRS 1-15 (2005); *see also* William L. Schachte, *The Unvarnished Truth: The Debate on the Law of the Sea Convention*, 61 NAVAL WAR COLL. REV. 119 –127 (Spring 2008); Roncevert Ganan Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT (May 24, 2017), https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/.

[5] *Id.*

[6] Glaser, *supra* note 2.

operations, thereby endangering United States national security.[7] Hundreds of articles have been written by esteemed statesmen, experts, and scholars on whether or not the United States should ratify the LOSC.[8]

This article does not attempt to address these arguments or reach a conclusion on the ultimate issue of whether the United States Senate (Senate) should ratify the LOSC. Instead, it highlights an important issue—maritime espionage—which has been lacking from scholarly discussion related to ratification. Specifically, would the United States' accession to the LOSC impact current maritime espionage policy or practice? It calls on the Senate to ensure it fully understands the impact the LOSC accession would have on maritime espionage.

Maritime espionage activities stoke international tensions, especially for the United States. In 1968, North Korea seized the USS Pueblo, an intelligence collection ship, and forced the Navy sailors aboard to make false confessions claiming they had been illegally spying inside North Korean territorial waters.[9] In 1973, Cambodia fired upon, boarded, and captured the Mayaguez, a United States ship suspected of spying while steaming in commercial shipping channels seven nautical miles from Cambodian-claimed Wai Island.[10] Throughout the Cold War, the United States and the Soviet Union used submarines to conduct maritime espionage.[11] In 2001, a Chinese fighter jet aggressively veered into a United States Navy reconnaissance patrol plane, which media reports suggest was operating over the South China Sea, forcing an emergency landing.[12] In 2016, the Chinese seized a United States Navy unmanned undersea

[7] See e.g. Peter Leitner, *A Bad Treaty Returns: The Case of the Law of the Sea Treaty*, 160 WORLD AFFAIRS 143-44 (1998).
[8] For a full review and listing of 220 scholarly articles on the topic, see UNCLOS Debate, https://www.unclosdebate.org/citations.
[9] Stephen B. Finch Jr., *Pueblo and Mayaguez: A Legal Analysis*, 9 CASE W. RES. J. INT'L L. 79, 81 (1977).
[10] *Id.*
[11] *See* James Kraska, *Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters*, 54 COL. J. TRANSNAT'L L., 164, 169, 191 (2015).
[12] Eric Donnelly, *The United States- China EP-3 Incident: Legality and 'RealPolitik,'*9 J. CONFLICT & SEC'Y L. 29 (2004).

glider in the South China Sea, which was using specialized sensors to map and monitor the underwater space.[13] Most recently, in 2019, Iran destroyed a United States Navy long-range surveillance drone, which *The Guardian* magazine alleges was "sucking up huge quantities of data from Iran."[14] These incidents draw attention to the legality of maritime espionage, which occupies an awkward position between espionage, which is not explicitly regulated under international law, and the law of the sea, which has largely been codified in the detailed provisions of the LOSC.

Historically, law of the sea was primarily derived from customary international law.[15] Since the United States is not a party to the LOSC, it continues to follow customary international law of the sea. However, if the United States ratifies the LOSC, it will be bound by the specific language of the treaty and the treaty will become the law of the land in the United States, binding federal components, including the military and intelligence community. [16] This could be problematic for maritime espionage because the LOSC explicitly forbids "*collecting information*" in certain situations, most importantly nearshore in the territorial sea (generally, the area within 12 nautical miles of shore).[17] This is a vitally important point. However, as of yet, there has been no scholarly consideration of how accession to the LOSC would impact United States maritime espionage. The last major study of maritime espionage occurred prior

[13] Bob Bateman, *China just returned a US Navy drone. Why'd they take it in the first place?* VOX (Dec. 16, 2016), https://www.vox.com/world/2016/12/20/14012922/pentagon-underwater-navy-drone-china-seized-trump-taiwan.

[14] Sebastien Roblin, *A War Begins? How Iran Shot Down a U.S. RQ-4N Surveillance Drone*, THE NAT'L INT. (21 Jun 2019), https://nationalinterest.org/blog/buzz/war-begins-how-iran-shot-down-us-rq-4n-surveillance-drone-63717; Julian Borger, *How a drone's flight took the US and Iran to the brink* war, THE GUARDIAN (21 Jun 2019), https://www.theguardian.com/world/2019/jun/21/iran-latest-trump-drone-attack-timeline-airstrikes-called-off.

[15] YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 12 (3rd Ed. 2019).

[16] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC].

[17] Roncevert Ganan Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT (May 24, 2017), https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/

to the LOSC going into effect.[18] Contemporary scholarship barely mentions maritime espionage. The *Tallinn Manual 2.0 on the International Law Applicable to Cyber Warfare*, a non-binding study generated by academic experts, only offers a brief chapter on maritime cyber-activities, including intelligence gathering, which merely echoes the LOSC without further analysis.[19] Maritime law expert James Kraska provides a brief review narrowly focused on submarine espionage, but does not consider how United States policy or practice would be impacted by accession to the LOSC.[20] This leaves a significant gap in scholarship at a critical time. Maritime espionage impacts global peace and security. Therefore, if the United States considers ratifying the LOSC, it is important to understand how the LOSC would impact United States maritime intelligence operations in policy and practice.

I. LEGALITY OF INTELLIGENCE ACTIVITIES UNDER INTERNATIONAL LAW

Professor Hays Parks offers a clear, if expansive, explanatory definition of 'intelligence gathering,' remarking "nations collect intelligence to deter or minimize the likelihood of surprise attack; to facilitate diplomatic, economic, and military action, in defense of a nation in the event of hostilities; and in times of 'neither peace nor war,' to deter or defend against actions by individuals, groups, or a nation that would constitute a threat to international peace and security (such as acts of terrorism)."[21] Espionage, a subset of

[18] See e.g. Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L. L. 53, 67, 71 (1984) (focused almost entirely on the sovereign immunities of spying at sea).

[19] MICHAEL N. SCHMITT, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0].

[20] James Kraska, *Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters*, 54 COL. J. TRANSNAT'L L., 16, 169, 191 (2015) (noting that submarines can conduct cyber espionage).

[21] W. Hays Parks, NATIONAL SECURITY LAW, 433-34 (John Norton Moore & Robert F Turner eds., 1999).

intelligence gathering, "involves clandestine action to obtain information" employing "secrecy or concealment."[22]

Often considered "the second oldest profession," espionage dates to the earliest civilizations.[23] The ancient Aztecs used *quimitchin* secret agents to collect intelligence amongst their enemies.[24] Feudal Chinese war strategist Sun Tzu advocated use of secret informants to infiltrate opposing armies.[25] The Bible recounts God telling Moses to reconnoiter the land of Canaan and later for Israel to send spies into Jericho.[26] Early Japanese shinobi-monomi ninjas "were people used in secret ways, and their duties were to go into the mountains and disguise themselves as firewood gatherers to discover and acquire the news about an enemy's territory."[27] With the emergence of powerful nation states, espionage practice expanded significantly. Most notably was Francis Walsingham's network of 'intelligencers,' who gathered secrets and tapped into clandestine communications across Europe.[28] During the Eighteenth Century came developments of networks of spies, intelligence-oriented diplomats, and robust analytical staffs.[29] While espionage dates millennia, until recently, there has been little public acknowledgement of the practice and little discussion of associated rules and norms, especially outside the context of armed conflict.

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[22] The U.S. Army Judge Advocate General's Legal Center, Operational Law Handbook 33 (2016); Halleck, *Military Espionage*, 5 AM. J. INT'L. L. 590, 598 (1911).
[23] Elena Brunet, *The second oldest profession spies and spying...*, L.A. TIMES (Jan. 17, 1988), https://www.latimes.com/archives/la-xpm-1988-01-17-bk-36739-story.html (referring to PHILLIP KNIGHTLEY, THE SECOND OLDEST PROFESSION SPIES AND SPYING IN THE TWENTIETH CENTURY (1988); *see generally* Geoffrey B. Demarest, *Espionage in International Law*, 24 DENY. J. INT'L L. & POL'Y 321 (1996).
[24] JACQUES SOUSTELLE, THE DAILY LIFE OF THE AZTECS 209 (2002).
[25] SUN TZU, THE ART OF WAR, ch. 4 (trans. Lionel Giles 1910), https://suntzusaid.com/book/3/18.
[26] CHRISTOPHER ANDREW, THE SECRET WORLD: A HISTORY OF INTELLIGENCE 13-15 (2018) (referencing Numbers 13:1-33, Joshua 2: 1-24); *see also* Joshua 6:25, James 2:24-25.
[27] STEPHEN TURNBULL, NINJA AD 1460-1650 27 (2004).
[28] *Id.* at 158-90.
[29] CHRISTOPHER ANDREW, THE SECRET WORLD: A HISTORY OF INTELLIGENCE 13, 243-90 (2018).

A. Treaty Law Explicitly Recognizes Lawfulness of Wartime Intelligence Activities

Reflecting longstanding and widespread practice, customary international law has long recognized the importance of intelligence gathering during, and as a precursor to, armed conflict. Hugo Grotius' 1625 treatise on the Law of War and Peace declared the sending of spies in war to be "beyond a doubt permitted by the laws of nations."[30] The Liber Code promulgated to the Union Army during the American Civil War observes the practice of espionage as a valid method part of warfare.[31] In treaty law, the 1907 Hague Convention on the Laws and Customs of War on Land codified espionage as "permissible" during armed conflict, but noted spies can be punished.[32] The Geneva Conventions provide similar, though inexplicit, recognition of wartime espionage. [33] No treaty or other multinational instrument generally prohibits espionage as an international crime.[34] Accordingly, the current version of the Operational Law Handbook reflects "espionage is not a [law of armed conflict] violation."[35]

B. Peacetime Espionage under International Law

The legality of espionage during peacetime is far murkier. Scholars suggest the lack of treaties or internationally recognized norms on peacetime espionage as evidence of a "lacuna that is a blank space or gap in the law."[36] In 1962, Richard Falk noted "international

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[30] HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. III, ch. IV, xviii (F. Kelsey trans., Oxford 1925) (1625).

[31] Francis Lieber, *Instructions for the Government of Armies of the United States in the Field (Lieber's Instructions)* 2 (1863), https://ihl-databases.icrc.org/applic/ihl/ijl.nsf/ART/110-20088?OpenDocument.

[32] Laws and Customs of War on Land, art. 24, Oct. 18, 1907, I Bevans 631.

[33] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 at art. 5; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, Jun. 8, 1977, 1125 U.N.T.S. 3 at art. 46(2).

[34] Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53, 68 (1984).

[35] Judge Advocate General's Operational Law Handbook, *supra* note 22,

[36] A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595, 596 (2007), *available at* https://repository.law.umich.edu/mjil/vol28/iss3/5

law is remarkably oblivious to the peacetime practice of espionage. Leading treatises overlook [peacetime] espionage altogether."[37] More recently, Professors Sulmasy and Yoo's comprehensive study of intelligence operations concludes "the very notion that international law is currently capable of regulating [peacetime] intelligence gathering is dubious."[38] There is significant disagreement regarding the legality of peacetime espionage under international law.

1. Viewpoints: Legal, Illegal, Neither Legal or Illegal, & Sometimes Legal

Some scholars assert the practice of peacetime espionage is legal, others say illegal, while others paradoxically argue it is "neither legal or illegal," with a final camp arguing that sometimes it is illegal and sometimes it is not, depending on the circumstances. Some jurists argue intelligence collection, even within foreign countries, has not historically been considered contrary to international law.[39] Professors John Radsan and Geoffrey Demarest assert that while peacetime espionage is an "unfriendly act" it does not violate international law.[40] Yale fellow Asaf Lubin observes a "sovereign right to spy" as "jus ad explorationem (JAE)" to justify peacetime espionage based on a right to state survival, right to self-defense, and right to monitor potential threats, but admits no "lex lata corpus of international law of intelligence, let alone its lex scripta… as there is simply nothing to extrapolate."[41] Similarly, proponents of the lawfulness of peacetime espionage tie it to the "right of anticipatory"

[37] Richard A. Falk, Foreword to ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW, at v, v (Roland J. Stanger ed., 1962).
[38] Glenn Sulmasy & John Yoo, *Counterintuitive: Intelligence Operations and International Law*, 28 MICH. J. INT'L L. 625, 626 (2007).
[39] Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 TEMPLE L.Q. 365, 395 (1973) ("The gathering of intelligence within the territorial confines of another state is *not*, in and of itself, *contrary to international law* unless it contravenes policies of the world constitutive process affording support to protected features of internal public order.").
[40] Radsan *supra* note 36 at 603 (referring to Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321, 321 (1996).)
[41] Asaf Lubin, *The Sovereign Right to Spy*, 112 PROCEEDINGS AM. SOC'Y INT'L. L. 155, 155-56 (2019); "lex lata corpus" is a Latin phrase meaning "the body of law as it exists" [cite]; "lex scripta" is a Latin phrase meaning "the written law" [cite].

self-defense under the United Nations ("UN") Charter.[42] Sulmansy and Yoo argue "nowhere in international law is peace[time] espionage prohibited… experts today still agree espionage remains a … sovereign right of the nation-state."[43]

Conversely, others take the view that outside of war, espionage is illicit. Most of these scholars frame their arguments in terms of violations of territorial sovereignty (even within 'sovereign cyber-domains').[44] Professor Quincy Wright points to the UN Charter requirement to "respect territorial integrity and political independence of other states."[45] Likewise, Professor Manual Garcia-Mora opines "peacetime espionage is regarded as an international delinquency and a violation of international law."[46]

A third approach adopted by a number of scholars "prefers to sidestep th[e] debate and avoid it entirely. In doing so, they have

[42] Comdr. Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 AF. L. REV. 217, 224-25 (1999) ("the surreptitious collection of intelligence in the territory of other nations that present clear, articulable threats based on their past behavior, capabilities, and expressions of intent, may be justified as a practice essential to the right of self-defense."); legal scholars have argued the right of anticipatory self-defense is rooted in Article 51 of the U.N. Charter. *See* Leo Van den Hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 4 (2003) (available at https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1160&context=auilr#:~:text=Charter%20requires%20that%20states%20refrain,Purposes%20of%20the%20United%20Nations).

[43] Sulmansy & Yoo, *supra* note 38, at 628 (citing Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 284 (1992)).

[44] JOHN KISH, INTERNATIONAL LAW AND ESPIONAGE 88 (David Turns ed., 1995);Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 3 (Roland J. Stranger ed., 1962); JOHN KISH, INTERNATIONAL LAW AND ESPIONAGE 88 (1995); *see also* Wolff Heintschel von Heinegg, *Legal Implications of Territorial Sovereignty in Cyberspace*, NATO CCD COE PUBL'N 7, 11 (2012) 2012, https://www.ccdcoe.org/uploads/2012/01/1_1_von_Heinegg_LegalImplicationsOfTerritorialSovereigntyInCyberspace.pdf

[45] Wright, *supra* note 44.

[46] Manuel R. Garcia-Mora, Treason, *Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT L. REV. 65, 79-80 (1964) (referring to whether 'espionage' could be considered an internationally recognized offense for the purpose of extradition).

determined that 'international law is silent on the subject' of espionage, that is, that this is a practice that is neither "legal nor illegal under international law."[47] United States Central Intelligence Agency's (CIA) former General Counsel, Daniel Silver, and former Inspector General, Frederick Hitz, posit "[t]here is something almost oxymoronic about addressing the legality of espionage under international law" observing the "ambiguous state" of the practice.[48] To them, peacetime espionage is "neither clearly condoned nor condemned."[49] Similarly, scholar Christopher Baker euphemistically contends "international law neither endorses nor prohibits espionage, but rather preserves the practice as a tool by which to facilitate international cooperation."[50]

A fourth approach advocated by Professor W. Michael Reisman and James Baker, former Counsel to the President's Foreign Intelligence Advisory Board, and Legal Advisor to the National Security Council, recognizes that international rules constrain intelligence gathering in limited instances.[51] Similarly, Professor Ashley Deeks proposes a 'sliding scale' hybrid approach based on "gradations of interpretation" to apply international law to espionage operations based on specific circumstances, including risks, target, and overt parallels to other international law.[52]

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[47] Inaki Navarrete & Russell Buchan, *Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions*, 51 CORNELL INT'L L.J. 899 (2019).

[48] Daniel B. Silver, Intelligence and Counterintelligence, in NATIONAL SECURITY LAW 935, 965 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005) (updated and revised by Frederick P. Hitz & J.E. Shreve Ariail).

[49] Radsan, *supra* note 36, at 605-06 (referring to Silver, *supra* note 48.)

[50] Christopher D. Baker, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U.INT'L. L. REV. 1091,1092 (2004).

[51] W. MICHAEL REISMAN & JAMES E. BAKER, INTERNATIONAL LEGAL REGULATION OF PROACTIVE
COVERT OPERATIONS, IN REGULATING COVERT ACTION 77 (1992) ("the legality of [espionage] should be tested by whether it promoted the basic policy objectives of the [UN] Charter...")

[52] Ashley S. Deeks, *Confronting and Adapting: Intelligence Agencies and International Law*, 102 VA. L. REV. 599, 601-06, 669-75, 683-84 (2016).

a. Difficulty Discerning between War and Peace

Further complicating legal analysis of 'peacetime espionage' is the pragmatic challenge of distinguishing between peace and war. Increasingly during the post-Cold War era, many state competitions fall in the 'Grey Zone' of "competitive interactions… that fall between the traditional war and peace duality."[53] Former United States Special Operations Commander, General Joseph Votel, noted "the Grey Zone is characterized by intense political, economic, informational, and military competition more fervent in nature than normal steady-state diplomacy, yet short of conventional war."[54] Contemporary intelligence gathering activities often occur in these 'grey zones,' making it challenging to determine which binary legal concept applies—the wartime 'espionage is clearly permitted' regime or the murkier peacetime regime.

2. Customary Practice of Peacetime Espionage

In the absence of formal agreements, the role of "international custom," as evidenced by "general [state] practice," becomes vital to ascertaining international law.[55] While some claim customary international law "has very little to say about espionage,"[56] intelligence gathering, including espionage, is widely practiced without international objection. International legal historians note that delegates to the San Francisco Conference, who drafted the United Nations Charter, did not intend Articles 2 or 51 to prohibit intelligence collection.[57]

Similarly, former CIA legal advisors explain no international treaties specifically address peacetime espionage because "countries for reasons of self-defense and for their own interests, are going to

[53] CPT PHILIP KAPUSTA, WHITE PAPER: THE GRAY ZONE, UNITED STATES SPECIAL OPERATIONS COMMAND 1, Sept. 9, 2015, *available at* https://publicintelligence.net/ussocom-gray-zones/.
[54] Joseph Votel et al., *Unconventional Warfare in the Gray Zone*, 80 JOINT FORCE Q. 101, 102 (2016).
[55] Statute of the International Court of Justice, ch. II, art. 38, §1(b) Jun. 26, 1945.
[56] Radsan, *supra* note 36, at 597.
[57] Sulmansy & Yoo, *supra* note 38, at 628 (observing the state practice of the U.S. and U.S.S.R. following the ratification of the UN Charter).

commit espionage in other countries."[58] International jurists cite "numerous examples of states, particularly those with the resources, capabilities, and national will to conduct intelligence collection, engaging in such activities in both the past and the present. Russia, China, the United Kingdom, Israel, France, Germany, Japan, the Koreas, Cuba, and countless others have, and do, engage in intelligence collection."[59] Globally, more than 1.25 million people work for intelligence agencies.[60] The only international judicial challenge to peacetime espionage practice involves Australia using its Secret Intelligence Service to raid the law offices of East Timor's counsel in a maritime boundary dispute to seize files and electronic data.[61] While the International Court of Justice (ICJ) ruled against Australia, the basis for the verdict was Australia's bad faith and violation of attorney client-confidentiality during an arbitration proceeding, rather than a repudiation of espionage.[62] The normalized and (relatively) open practice of state intelligence gathering constitutes a customarily accepted part of international relations.

a. Acceptance of National Intelligence by International Institutions

Further supporting the contention that peacetime intelligence collection is permissible under customary international law, multinational institutions routinely recognize and use intelligence gathered through espionage. The United Nations "receives information from [national intelligence agencies] … especially from the UN Security Council members" to enable decision-making and operations.[63] Similarly, international tribunals composed of prominent global jurists accept information gathered by national

[58] *Id.* at 606.
[59] *Id.* at 629.
[60] Brunet, *supra* note 23.
[61] Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Summary, 2014 I.C.J. 2 (Mar. 3).
[62] *Id.* at 7.
[63] KEES GAROS, THE ALL SOURCE INFORMATION FUSION UNIT: A NEW PHENOMENON IN UN INTELLIGENCE, THESIS 3 (2015), Restrictions on Intelligence Sharing with the United Nations, 50 U.S.C. §§ 3047(a)(1)-(2) (U.S. statute prohibits sharing intelligence with the U.N. absent Presidential determination of enhancing U.S. national security.)

intelligence agencies in prosecutions. For instance, the International Criminal Tribunal for the Former Yugoslav (ICTY) accepted aerial and satellite imagery of mass grave sites near Srebrenica as lawful evidence in war crimes prosecutions.[64] Indeed, Professor Simon Chesterman postulates that the global community recognizes the benefits of espionage for international norm shaping.[65] Sulymansy and Yoo also assert "peacetime intelligence gathering allows nation-states to judge potential threats more accurately [offering more courses of action, noting] intelligence gathering often provides the basis for jus ad bellum [the law governing the resort to armed force]," thus preventing unnecessary armed conflicts.[66]

This tacit acceptance indicates the legality of espionage under international law, while creating a legal conundrum as "most states, while they conduct espionage and expect that it will be conducted against them, reserve the right to prosecute people who commit espionage within their territory."[67] Domestic criminalization does not equate to international illegality.

II. MARITIME ESPIONAGE AND LAW OF THE SEA

At sea, "the lack of clarity or agreement concerning operational norms and law for espionage add an additional element of volatility… that could turn deadly."[68] Historically, coastal states feared foreign vessels off their coasts. This tension between the rights and duties of coastal states *vis-à-vis* seafaring foreign vessels operating offshore shaped the formation of customary Law of the Sea over centuries, which eventually manifested into the provisions of the LOSC. However, recently, state policy and practice has diverged from trends in treaty law, suggesting a wrinkle in international law regarding maritime espionage.

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[64] MARGARET MIKYUNG LEE ET AL., BOSNIA WAR CRIMES: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND U.S. POLICY, CONGRESSIONAL RESEARCH SERVICE REPORT TO CONGRESS 24 (1998).

[65] Simon Chesterman, *The Spy Who Came in From the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1099-1100 (2006).

[66] Sulmasy & Yoo, *supra* note 38, at 627.

[67] Radsan *supra* note 36, at 605 (citing Scott, *supra* note 42, at 226).

[68] Kraska *supra* note 20, at 212.

A. Customary Law Balances Coastal State Security with Freedom of Navigation

The Law of the Sea is considered one of the earliest forms of customary international law. The principle that ships could move freely on the ocean and that no state could claim sovereignty over the ocean were pivotal developments and were some of the earliest understandings between modern nation states. Hugo Grotius' 1609 treatise *Mare Liberum* (Freedom of the Seas) expressed the right of all states to freely travel and use the oceans.[69] On the high seas, the vessels of seagoing nations were permitted to conduct whatever activities they liked, except when those activities would endanger other vessels or were disallowed by their respective flag states.[70] However, closer to shore, coastal states legitimately sought to ensure greater control for security.

1. Innocent Passage in Territorial Seas

The emergence of 'territorial sea' or "belt of water immediately adjacent to the coast" where "the Sovereignty of the state extends" legal concept represents one of the earliest balancing of coastal state and seagoing state interests.[71] Coastal states asserted control over the sea by force, literally, by attacking ships with shore-based cannons. Pragmatically, customary law followed the physical reality. The "cannon shot rule," recognized sovereign rights to territorial seas as far as the effective range of a shore-based cannon could shoot.[72] In 1894, the *Institut de Droit International* recognized coastal state 'territorial' sea claims, but simultaneously enunciated a right of vessels of all nations "without distinction" to be permitted to travel through a coastal state's territorial waters as *passage inoffensif*,

[69] HUGO GROTIUS, MARE LIBERUM (1609) (explaining the sea was a common resource with a right to use used freely by all nations).
[70] *See* LOSC, *supra* note 16, at part VII, arts. 87, 88, 98, 99, 106, 108, & 113.
[71] Definition taken from the later Convention on the Territorial Sea, pt. I, art. 1, 15 U.S.T. at 1608. Restatement (Third) of The Foreign Relations Law of the United States § 51- l(a)(1986).
[72] Cornelis Van Binkershoek, DE DOMINIO MARIS DISSERTATIO, 1702. English translation of Second Edition 1744 by Ralph Van Deman Magoffin, Oceana, 1923; *see* further Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas* 23-35 (1972).

or innocent passage.[73] But, the rights under the innocent passage regime were disputed. Some nations conditioned innocent passage, such as requiring submarines to surface or excluding warships.[74] When the League of Nations planned a conference to codify customary Law of the Seas in 1930, the Preparatory Committee accepted the rule that the innocent passage regime would apply to warships, on the condition that submarines surface and show their flag.[75] The Committee's proposed rule empowered coastal states to demand foreign vessels depart from the territorial sea if they violated the rules of innocent passage.[76]

2. International Jurisprudence on 'Non-prejudicial' Manner of Innocent Passage

Early international jurisprudence focused on activities conducted in territorial seas. The ICJ's first case considered whether British warships could pass through Albania's territorial sea.[77] The Court held that "provided that the passage is *innocent. . .* there is no right for a coastal [s]tate to prohibit."[78] The ICJ found Albania, as a coastal state, owed an international duty to keep its territorial seas free of mines and to warn transiting foreign ships of dangers.[79] The Court focused on the manner in which the innocent passage was carried out, noting the warships' guns were unloaded and there was no evidence of espionage or other activities that could undermine Albanian

[73] 13 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 329–30 (1894–1895), reprinted in U.S. Naval War Coll., 13 INT'L L. TOPICS AND DISCUSSIONS 1913, at 27, 28 (1914).
[74] *See* LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA, UNITED NATIONS LEGIS. SERIES, Dec. 1956, U.N. Leg., Ser. ST/LEG/SER B/6, 361–62; id. at 409–10 (listing Sweden's regulation); 1 D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 294, 377-78 (I. A. Shearer ed., 1984) (noting Germany's regulation); *Belgium Regulations Relative to the Admission of Foreign Warships into Belgium Ports and Harbors–Brussels*, Dec. 30, 1923, reprinted in BRITISH AND FOREIGN ST. PAPERS, 118 BRIT. & FOREIGN ST. PAPERS 43 (1923).
[75] League of Nations Doc. C.74M.39, 1929 V (1929), reprinted in 24 AM. J. INT'L L. Supp. 25, 38–40 (1930).
[76] *Id.*
[77] Corfu Channel, United Kingdom v Albania, Judgment, Merits, I.C.J. 1, (1949).
[78] *Id.* at 28.
[79] *Id.* at 23.

national security.[80] Still, the ICJ found the United Kingdom exceeded the scope of activities permitted under innocent passage by later minesweeping in Albanian territorial waters.[81] This ruling upheld the right of unimpeded innocent passage by warships through foreign territorial seas, but mandated passage be non-threatening.

This restatement of customary international law through judicial finding paved the way for codification in later treaties. The 1958 Convention on the High Seas and its legal counterpart, the Convention on the Territorial Sea and Contiguous Zone, recognized the "right of innocent passage… [as] not prejudicial to the peace, good order, or security of the coastal state" for "ships of all states."[82] However, the Convention authorized coastal states to "take the necessary steps in its territorial seas to prevent passage which is not innocent" and to temporarily suspend innocent passage, if necessary, for "national security."[83]

Nonetheless, the Cold War was a confusing period for the Law of the Sea. Long-range weapons, displays of naval force, and developing nations' desires to capitalize on ocean resources led to expansive maritime claims. Nine South American nations each claimed territorial seas extending out two hundred-nautical miles and banned foreign warships from entering, thus eliciting protests from the naval superpowers as a challenge to freedom of navigation.[84] Responsively, in 1973, the United Nations General Assembly agreed to convene a comprehensive convention on the law of the seas. Over 140 states were represented at the Conference,[85] where a strange détente developed between the United States and Soviet Union as they worked cooperatively to permit coastal states to extend rights and

[80] *Id.* at 30-31.
[81] *Id.* at 35.
[82] Convention on the High Seas pmbl., arts. 2(1), (4), 14-15, Apr. 29, 1958, 450 U.N.T.S. 11 (entered into force on Sept. 30, 1962).
[83] *Id.* at art. 16(1).
[84] Nine nations claimed a 200 nm sovereign rights zone. *See* Montevideo Declaration on the Law of the Sea, 8 May 1970, (9 I.L.M. 1081 (1970)) reproduced in 9 INT'L L. MATERIALS 181, 181-183 (1970).
[85] Garry Taylor, *The Law of the Sea and "creeping jurisdiction" of coastal states*, PULSE (July 21, 2015), https://www.linkedin.com/pulse/law-sea-creeping-jurisdiction-coastal-states-garry-taylor.

jurisdiction, so long as access and navigational freedom were preserved.[86]

B. Law of the Sea Convention Treatment of Intelligence Activities

The LOSC innovatively balanced rights in maritime zones where states would exercise different degrees of sovereignty. Closer to shore, coastal states would exercise greater control, while becoming increasingly permissive further from shore. The different maritime zones include the High Seas, coastal state Exclusive Economic Zone, Contiguous Zone for enforcement actions, Territorial Sea, and Internal Waters.

1. Peaceful Maritime Surveillance and Reconnaissance Protected as High Sea Freedoms

On the high seas, beyond coastal state jurisdiction, vessels have the greatest latitude to conduct espionage. The high seas "are open to all states"[87] to enjoy "[f]reedom of the high seas," including, *inter alia*, navigation, overflight, fishing, and scientific research.[88] Under the LOSC, outside of twelve nautical miles, "no state may validly purport to subject any part of the high seas to its sovereignty."[89] Only flag states (the state where vessels are registered) can regulate vessels or the activities that take place onboard.[90] No other state is permitted to exercise jurisdiction (subject to limited exceptions).[91]

In the LOSC, an "ostensible consensus" was reached: all states have a right to conduct military activities outside of the territorial seas.[92] However, states must exercise these rights "with due regard for

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[86] *Id.*
[87] LOSC *supra* note 16, at art. 87, at 432.
[88] *Id.*
[89] *Id.* at art. 89.
[90] *Id.* at art 92(1).
[91] *Id.* Exceptions for stateless or quasi-stateless ships (without apparent nationality) (Art 92(2)), suspected slavery which provides the right of visit & boarding by foreign warships (art 99, 110(1)(b)).
[92] Ivan Shearer, *Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance*, 17 OCEAN Y.B. 548, 561 (2003) (noting that discussion focused

the interests of other states in their exercise of the freedom of the high seas" and only for "peaceful purposes," which is defined in basic terms as "refrain[ing] from any threat or use of force against the territorial integrity or political independence of any state."[93] Consequentially, the only constraints on high seas espionage are those imposed by flag state domestic law, the UN Charter's universal prohibitions on "unpeaceful" activities, and the LOSC's reservation of the high seas for peaceful purposes.[94] However, the meaning of "peaceful," in the context of "maritime espionage," is subject to dispute even among experts. Some say "what is not 'innocent' in the territorial sea [under LOSC Article 19] may not be considered 'peaceful.'"[95] All Tallinn experts felt there were times when espionage could be permitted at sea,[96] and a minority consider it always legal at sea.[97]

Routine and uncontested maritime surveillance and reconnaissance suggest that intelligence gathering is clearly permitted as a high seas freedom and an accepted international norm beyond the territorial sea. For example, the United States found no reason to object to Soviet submarines five miles off the coast of California (when United States claimed a three nautical mile territorial sea),[98] saying foreign submarines were "free to roam the high seas as they please."[99] Likewise, the United States regularly operates just outside of twelve nautical miles proximate to China and other countries as part of its "Freedom of Navigation" program, including intelligence gathering

on the coastal state's Exclusive Economic Zone (EEZ) extending from 12-200 nautical miles from the coastal state baseline).

[93] LOSC, *supra* note 16, at arts. 87, 88, & 301.

[94] *Id.*at art. 88. ("Reservation of the high seas for peaceful purposes. The high seas shall be reserved for peaceful purposes.")

[95] Mark Valencia and Ji Guoxing, *The 'North Korean' Ship and U.S. Spy Plane Incidents: Similarities, Differences, and Lessons Learned*, 42 ASIAN SURVEY 723, 730 (2002).

[96] TALLIN MANUAL 2.0 *supra* note 19, commentary to rule 32 para 6.

[97] *Id.*; *see* also Ashley Deeks, *An International Legal Framework for Surveillance* 55 VA.J.INT'LL. 291, 302-3 (2015).

[98] *Submarine Hunted by Navy on Coast*, N.Y. TIMES (Mar. 31, 1950), at 21.

[99] *No Curb on Submarines: Foreign Craft Free to Roam Outside 3-Mile Limit, Say Navy Men*, N.Y. TIMES (Mar. 27, 1948) at 2.

flights.[100] China too conducts naval intelligence operations in international waters outside the territorial seas of Hawaii and Guam.[101] Such activities by intelligence gathering ships are clearly potentially adverse but begrudgingly accepted as consistent with high seas freedoms. This practice of permitting espionage beyond the territorial sea reflects a deliberate choice on the part of drafters of the LOSC to "intentionally le[ave] open the volatile question of peacetime naval maneuvers and reconnaissance missions within and above the [EEZ]."[102] Consequentially, maritime espionage can freely be conducted in the EEZ, just as in the high seas, but with the one added caveat that seagoing vessels "must have due regard" for the coastal state's economic interests in living and nonliving resources.[103]

Yet, even on the high seas, there may be limits to the extent of intelligence collection permissible, if not due to law, then due to practicalities, particularly if the intelligence activity is deemed 'threatening'.[104] For instance, in December 2019, the Indian Navy chased away the Chinese spy ship SHIYAN operating on the high seas, albeit adjacent to territorial waters.[105] New technologies have also caused some scholars to consider whether the intelligence collection

[100] Raul Pedrozo, *Military Activities in and over the Exclusive Economic Zone*, in FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 235, 239–48 (Myron H. Nordquist, Tommy T.B. Koh & John Norton Moore eds., 2009); Eric Donnelly, *The United States-China EP-3 Incident: Legality and Realpolitik*, J.OF CONFLICT & SEC. LAW, Vol. 9, No. 1, 25 (2004).
[101] Kevin Kerrigan, *China's aircraft carrier passes near Guam*, THE GUAM DAILY POST (27 Jun 2019), ; Kathrin Hille, *Chinese Navy Begins U.S. Economic Zone Patrols*, FIN. TIMES (June 2, 2013), https://www.ft.com/content/02ce257e-cb4a-11e2-8ff3-00144feab7de.
[102] Asaf Lubin, *The Dragon-Kings' Restraint: Proposing a Compromise for the EEZ Surveillance Conundrum*, 57 WASHBURN L.J. 17 (2018).
[103] LOSC, *supra* note 16, at art. 58.
[104] A threatening use, as stated, would be against the LOSC's mandate activities are conducted for "peaceful purposes," which is defined in basic terms as "refrain[ing] from any threat or use of force against the territorial integrity or political independence of any state." LOSC, supra note 16, at arts. 87, 88, & 301.
[105] Liu Zhen, *Chinese research vessel expelled by Indian warship for operating near Andaman and Nicobar Islands*, SOUTH CHINA MORNING POST (Dec. 4, 2019), https://sg.news.yahoo.com/chinese-research-vessel-expelled-indian-122436868.html.

from the EEZ should be legally curtailed.[106] For example, Moritaka Hayashi questions "whether some of the [latest advanced Electronic Warfare]-related activities conducted in or above the EEZ should be considered to be inconsistent with… the peaceful purposes clauses of the [LOSC]," citing "deliberately provocative" "active signals intelligence (SIGINT) activities," which "involve far greater interference with the communication and defense systems of the targeted coastal state than any traditional passive intelligence gathering activities conducted from outside [the EEZ]."[107] Arguing that longer range surveillance capabilities renders the territorial sea boundary irrelevant, since surveillance can be conducted from further away, Asaf Lubin proposes "developing a new conciliatory legal model for intelligence gathering within and above the EEZ [beyond the territorial sea]."[108] While the concerns for intelligence collection on the high seas may have merit for further consideration, presently, they serve to underscore, as a legal matter under international law, intelligence collection is undoubtedly permitted on the high seas.

2. The 'Non-Prejudicial to Coastal State Security' Meaning of Innocent Passage

The LOSC set a distance of twelve nautical miles from shore as the point where high seas freedoms must give way to the coastal state's territorial sea. Echoing the language of the 1958 Territorial Sea Convention, the 1983 LOSC permits innocent passage through the territorial sea, if not "prejudicial to the peace, good order or security of the coastal state."[109] Inclusion of this provision was vitally important to a vocal group of states at the Conference that felt warships were inherently threatening and should not be entitled to the right of innocent passage; but conceded once assured passage would

[106] Lubin, *supra* note 103; *see* Stuart Kaye, *Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral*, 24 AUSTL. Y.B. INT'L L. 93 (2005).
[107] Moritaka Hayashi, Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms, 29 MARINE POL'Y 123, 126 (2005)
[108] Lubin, *supra* note 102, at 23.
[109] LOSC, *supra* note 16, at art. 19(1) (echoing Article 14(4)).

be non-threatening.[110] To appease these states, specific proscriptions were enumerated in Article 19(2) as *prima facie* violations of innocent passage:

> (a) any *threat or use of force* against the sovereignty, territorial integrity or political independence of the coastal state, or in *any other manner in violation of the principles of international law* embodied in the [UN] Charter;
>
> (c) any act *aimed at collecting information* to the prejudice of the defen[s]e or security of the coastal state;
>
> (k) any act aimed at *interfering with any systems of communication* or any other facilities or installations of the coastal state;
>
> (l) any *other activity not having a direct bearing on passage*.[111]

By contrast, the right of unannounced innocent passage by warships can be inferred.[112] Taken together, the self-evident meaning of "innocent passage" coupled with the Article 19(2)'s prohibitions show such passage must not be prejudicial or harmful and "any act aimed at collecting information"[113] against the coastal state expressly forbidden.

[110] *See* Official Records of the Third U.N. Conference on the Law of the Sea Volume XVI, U.N. Doc. A/CONF.62/L.117, at 225 (Apr. 13, 1982)(proposing restrictions on warships in innocent passage supported by Algeria, Bahrain, Benin, Cape Verde, China, Congo, Democratic People's Republic of Korea, Democratic Yemen, Djibouti, Egypt, Guinea Bissau, Iran, Libyan Arab Jamahiriya, Malta, Morocco, Oman, Pakistan, Papua New Guinea, Philippines, Romania, São Tomé and Príncipe, Sierra Leone, Somalia, Sudan, Suriname, Syria, Uruguay and Yemen.) Official Records of the Third U.N. Conference on the Law of the Sea, Volume XVI, U.N. Doc. A/CONF.62/SR.176, at 132 (Apr. 26, 1982).

[111] LOSC, *supra* note 16 at art. 19(2)(emphasis added).

[112] NAVAL WARFARE PUBLICATION 1-14M, 2-5.

[113] LOSC *supra* note 16 at art. 19(2)(c).

a. Legality of Surveillance Activities not Explicitly Authorized in LOSC

The navigational provisions of the LOSC, including innocent passage, are enunciated as protected rights. This begs the question: are activities inconsistent with the conditions set forth for exercising those rights *per se* illegal or merely unprotected? This is an important question, because if activities, like intelligence collection or tapping into coastal state communications systems, are just unprotected, then such activities could lawfully be conducted, whereas, if illegal, then the actions would be outlawed. James Kraska observes "legal scholars, and national leaders of affected coastal states firmly renounce [surveillance operations, such as] espionage in their territorial waters as inherently unlawful,"[114] while noting the "applicable international law on the subject is somewhat more circumspect."[115] While acknowledging the affirmative right of innocent passage, Kraska argues that passage inconsistent with the terms guaranteed by the right does not necessarily cause the passage to be illegal under international law, even if coastal state domestic law is violated.[116] To him, "innocent passage is a right … but the United States view is that it is not a prohibition."[117] Under this view, "peacetime espionage in the territorial sea of another state occupies an uncomfortable gray area between clearly lawful conduct and an unmistakable international delict."[118] This theory of "unprivileged, not protected" transit through foreign territorial seas outside of the regimes described in the LOSC is referred to as 'non-innocent passage.'"[119]

The LOSC makes no mention of "non-innocent" passage. Since what is not specifically prohibited is presumed permissible

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[114] Kraska, *supra* note 20.
[115] *Id.*
[116] *Id.* at 172.
[117] *Id. see* e.g. NWP 1-14M, *supra* note 112 at 2-6 (the "[LOSC] does not prohibit passage that is noninnocent, such as overflight of or submerged transit in the territorial sea.").
[118] *Id.* at 174.
[119] *Id.* at 226 ("Innocent passage does not create a general obligation that must be kept – *pacta sunt servanda* – but rather it offers a privilege that may be accepted or rejected.").

under international law,[120] Kraska contends the LOSC's silence on espionage in 'non-innocent passage' merely means Article 19 "does not apply to it and thus does not restrict it," noting international treaty terms should not be expanded by interpretation.[121] However, asserting the validity of an unarticulated legal regime to justify conducting activities that conflict with Article 19's provisions seems untenable, especially since the LOSC functions as a "Constitution for the Oceans"[122] with precise definitions explaining the applicable rights and duties of states in every ocean space. But proponents of the non-innocent passage theory counter, arguing that the LOSC's innocent passage regime does not explicitly authorize the rights of assistance entry or safe harbor either; yet, both are recognized legal justifications for unauthorized entry into foreign territorial seas.[123] Yet, non-innocent passage is rarely discussed outside of Kraska's allusions to it in reference to submarine activities.[124]

While this alternative theory could be textually supported by the LOSC's silence, the result of such an interpretation would undermine the LOSC's carefully balanced provisions. The territorial sea has long been considered akin to land territory in terms of sovereignty.[125] In that sense, "non-innocent passage" would be the equivalent of a foreign state driving a tank across another state's border without permission – a clear violation of state sovereignty to be avoided as a matter of international policy, if not law. But if peacetime espionage may be tolerated on land territory, it seems odd that it should not also be tolerated in the territorial sea off the coast.

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[120] S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18–20 (Sept. 7).

[121] Kraska, *supra* note 20, at 226- 227 (referring to The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821).).

[122] Tommy T. B. Koh, *A Constitution for the Oceans, Remarks at the Conference at Montego Bay* (Dec. 6, 1982), in The UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: OFFICIAL TEXT, at xxxiii (1982), https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf, see also Robert C. De Tolve, *At What Cost? America's UNCLOS Allergy in the Time of Lawfare*, 61 Naval L. Rev. 2 (2012).

[123] Kraska *supra* note 16, at 226.

[124] *Id.* ("Non-innocent submarine passage and espionage may not qualify as violations of the international law of the sea, or even as inconsistent actions with international law more generally.")

[125] *See* UNCLOS, *supra* note 25, at art. 2.

Yet, the precise language of Article 19 appears to create in the Territorial Sea an additional protection, which, incongruently, does not exist on land territory. Nevertheless, as the United States considers ratifying the LOSC, it is important to consider 'non-innocent passage,' since it would become the only rationale for maritime espionage in foreign territorial seas if the United States ratified the LOSC.

b. Intelligence Collection and the Narrow Exception for 'Non-prejudicial' Activities

The LOSC only prohibits collecting information "prejudicial" to the defense or security of the coastal state.[126] Consequentially, it might be permissible to conduct intelligence gathering in the territorial sea, without violating Article 19(2)(c), so long as the activity is not "aimed at collecting information to the prejudice the defen[s]e or security of the coastal state."[127] For example, intelligence gathered in coastal state waters might be useful for countering third-state and non-state actors, such as terrorists, while having no adverse impact on the state itself. Other intelligence might be used to verify good faith in negotiating or to verify compliance with international agreements to further enhance bilateral diplomacy.

Such an interpretation of the LOSC is consistent with historical precedent evidencing support for the notion that not all espionage is hostile. Indeed, after the Soviet Union shot down a United States U-2 spy plane over its territory, France noted that, while borders were violated, it was "normal practice" and a non-hostile act to spy to keep track of weapons positions.[128]

Similarly, in the sphere of cyber operations, although Tallinn experts repeated the LOSC's Article 19 prohibitions on intelligence

[126] LOSC, *supra* note 13, at art. 19(c).
[127] Similar arguments have previously been made in reference to submarine espionage. *See* Kraska *supra* note 20 at 225.
[128] *See* Cable Dated 18 May 1960 from the Minister of Foreign Affairs of the Union of Soviet Socialist Republics Addressed to the President of the Security Council, Rep. of the S.C. on Its Fifteenth Session (July 16, 1959–July 15, 1960), at 13, U.N. Doc. A/4494 (1960).

gathering nearly verbatim, a majority agreed "passive (nonintrusive) assessments [of coastal state] wireless networks by vessels in innocent passage" would be permissible.[129] A minority of experts disagreed, countering that probing a land-based cellular network has no impact on a vessel's ability to safely navigate and thus would be disallowed as an "activity having no direct bearing on passage" forbidden by Article (19)(2)(l).[130] Here, the minority seem correct based on the plain language of Article 19. However, the majority can still point to the lack of "prejudice" to explain espionage activities.

Nevertheless, if the majority had wanted to carve out an exception without running afoul of the LOSC text, they might have better recognized the permissibility of nonharmful operations in the territorial sea under the regime of non-innocent passage or as a unenumerated *de minimis* exception to Article 19(2). However, the "catch all" final provision of Article 19, banning other activities "not having direct bearing" on the innocent passage may eliminate this potential exception.[131] Moreover, safe navigation requires the collection of some basic intelligence, such as collecting charts, carefully observing conditions, and communicating with other vessels or ashore. This *de minimis* intelligence collection for the purposes of safe navigation was viewed as consistent with innocent passage, mainly because it is not prejudicial to coastal state security and has a direct bearing on passage. Thus, the range of intelligence operations permissible in the territorial sea under the innocent passage regime is extremely limited to those activities having a direct bearing on passage that do not interfere with coastal state communications systems and do not prejudice its security or defense.

c. International Straight Transit Espionage: Permissible in Limited Cases

The LOSC created a special regime for straits used for international navigation where the breadth of the territorial seas of coastal states leaves no high seas ocean space between countries, which

[129] *Id.*
[130] *Id.*
[131] LOSC, *supra* note 16, at art. 19(l).

creates conditions separate and distinct from innocent passage.[132] The State Department identified 265 such straits, including the highly sensitive Hormuz, Malacca, and Taiwan straits.[133] At the Convention, major maritime powers insisted on a special new regime- transit passage- through these waterways to ensure the unimpeded global movements of ships, submarines, and aircraft.[134] It permits vessels and aircraft to move between parts of the high seas or EEZ through coastal state territorial seas at straits used for international navigation" "solely for the purpose of continuous and expeditious transit of the strait."[135] Importantly, this regime permits ships, subs, and aircraft to travel in their "normal modes," which means submarines may remain submerged and aircraft can fly through coastal state territorial seas at these locations.[136] Consequentially, it could be argued that surveillance ships and aircraft can collect intelligence during transit passage, so long they stay in "normal mode" and their purpose (which must be understood as objective) is the "continuous and expeditious" transit of the strait. Such a proposition is supported by the LOSC's textual distinction between innocent passage and transit passage. Innocent passage forbids "any other activity *not having a direct bearing on passage*," whereas transit passage only guides to "refrain from activities *other than those incident to their normal modes*." [italics added] [137] The subtle difference might permit ships and aircraft to continue activities, if in "normal mode," while in international straits.

However, senior statesmen dismiss this interpretation as inconsistent with the intent of the state parties. John Norton Moore, a senior member of the American delegation to the Convention, says the 'strait transit regime' merely facilitates mobility and cannot be

[132] LOSC, *supra* note 13, at art. 38(1).
[133] Lewis M. Alexander, Navigational Restrictions within the New LOS Context: Geographical Implications for the United States 99, 188-98, Table 12-A (Peace Dale, RI: Off shore Consultants Inc, 1986).
[134] *See* John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT' L. 77, 80- 81, 95-110 (1980).
[135] LOSC, *supra* note 16, at art. 38(2).
[136] *Id.* at art. 39(1)(c).
[137] *Id.* at arts. 19(2)(l), 39(1)(c) (emphasis added).

construed to permit activities "inimical to the security" of states adjacent to international straits.[138]

Consequentially, maritime espionage may be more permissible under the international straits transit regime than under the innocent passage regime, but still must not deviate from "normal mode" and cannot be inimical coastal state security.[139] The LOSC would not prohibit the intelligence collecting, but the craft in transit would remain subject to international law against threats or use of force, or interfering with the political independence or territorial integrity of other states.[140] Activities that do not harm the coastal state could be permitted, such as passive surveillance targeting a third country or activities against non-state actors (e.g., terrorist groups), would be allowed. While the aperture for intelligence activities remains highly constrained in straits transit, it is more permissive than innocent passage.

III. UNITED STATES' POSITION ON THE LAW OF THE SEA WITH RESPECT TO MARITIME ESPIONAGE

Historically, American practice generally reflected the international law of the sea, but, more recently, there appears to be divergence between American practice and policy pronouncements and the textual provisions of the LOSC. In 1793, President George Washington adopted the overtly security-oriented cannon shot rule in proclaiming a three nautical mile territorial sea.[141] This remained the American position until 1988, when President Ronald Reagan extended the width to twelve nautical miles, in part "to keep Soviet intelligence-gathering vessels farther from the shoreline."[142] This

[138] John Norton Moore, Statement by Mr. Moore, Committee II, 71 U.S. Dep't of State Bull. 389, 410 (1974). 71 U.S. DEP'T OF STATE BULL. 409, 410 (Sept. 1974).
[139] LOSC, *supra* note 16, at art. 39(1)(b) ("Ships and aircraft...shall... "refrain from any threat or use of force" against States bordering the straits).
[140] *Id.* at art. 39(1)(b).
[141] See Harry N. Scheiber &Chris Carr, *Constitutionalism and the Territorial Sea: An Historical Study, 2* TERR. SEA. J. 67-68 (1992).
[142] *Id.at 67; see* Presidential Proclamation No. 5928, 54 FED. REG. 777 (Dec. 27, 1988); Andrew Rosenthal, *Reagan Extends Territorial Waters to 12 Miles*, N.Y. TIMES, Dec. 29, 1988, *available at* https://www.nytimes.com/1988/12/29/us/reagan-extends-territorial-waters-to-12-miles.html.

evolution reflected American observance of the inextricable link between activities in the territorial sea and security. However, the issue of the legality of espionage from within territorial seas may put United States policy and practice at odds with Article 19's prohibitions.

A. Acknowledged and Alleged Practice of Maritime Espionage in Foreign Territorial Seas

The customary innocent 'so long as it is not prejudicial to the peace, good order or security of the costal state' passage regime was codified in 1958, but since then the United States has acknowledged entering territorial seas to collect intelligence.[143] The CIA revealed it snuck into Soviet territorial waters to tap communication lines during the Cold War in Operation Ivy Bells. Maritime historian Craig Reed notes "United States fast attack submarines routinely slipped into Soviet waters near Vladivostok to observe shipping in the largest Russian naval and commercial port in the Far East"[144] and the Soviet atomic bomb test range at Novaya Zemlya,[145] plus other locations.[146] Given the sensitivity, the extent of United States activities in foreign territorial waters remains mostly unknown. However, several serious mishaps suggest at least limited state practice, including the USS

[143] Convention on the Territorial Sea and the Contiguous Zone art 14(4), Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 1958.
[144] Kraska *supra* note 20, at 202-03 (citing W. Craig Reed, Red November: Inside the Secret U.S.-Soviet Submarine War 3-9, 312-16 (2010)).
[145] Reed, *supra* note 144, at 62.
[146] Seymour Hersh, *Submarines of U.S. Stage Spy Missions Inside Soviet Waters*, N.Y. TIMES May 25, 1975), https://www.nytimes.com/1975/05/25/archives/submarines-of-us-stage-spy-missions-inside-soviet-waters-submarines.html.

Gato,[147] USS Pintado,[148] and USS Baton Rouge[149] collisions in claimed-Soviet/Russian territorial waters in 1969, 1974, and 1992, respectively. In 1988, the USS Yorktown and USS Caronwere alleged to have been conducting intelligence operations in Soviet territorial waters off Crimea.[150] The USSR objected, and commentators observed the United States passage could not be considered 'innocent.'[151] Although, months later, the United States and the Soviet Union resolved the issue by agreeing to a "uniform [legal] interpretation," noting "warships, regardless of cargo, armament or means of propulsion" are entitled to the right of innocent passage without prior notification, the agreement

[147] Seymour Hersh, *A False Navy Report Alleged in Sub Crash; Ex-Crew Members on U.S. Vessel Tell of Collision with Russian Craft Off Soviet Union*, N.Y. TIMES , July 6, 1975, at 1.

[148] Collision occurred near the Soviet naval base at Petropavlovsk. *Collision of U.S. and Soviet Subs Off Siberia in 1974 Is Recounted*, N.Y. TIMES (July 4, 1975), https://www.nytimes.com/1975/07/04/archives/collision-of-us-and-soviet-subs-off-siberia-in-1974-is-recounted.html. The collision occurred near the Soviet naval base at Petropavlovsk. Id.

[149] See Sebastian Roblin, *In 1992, a Russian Nuclear Attack Submarine Slammed into an American Sub (Right off Russia's Coast)*, THE NATIONAL INTEREST (Dec. 13, 2016), https://nationalinterest.org/blog/the-buzz/1992-russian-nuclear-attack-submarine-slammed-american-sub-18735. The United States claimed the accident occurred slightly over 12 nm from the Russian shoreline in waters it considered international, while the Russians noted it was 5 nm within its territorial sea due to a straight baseline. Id. s*ee* also *Protest Lodged*, IZVESTIYA (Moscow), Mar. 27, 1992, morning ed. at 2, translated in FBIS-SOV-92-060, Mar. 27, 1992, at 6.

[150] John W. Rolph, *"Freedom of Navigation Operations in the Black Sea Bumping Incident: How 'Innocent' must Innocent Passage Be*?", 135 MIL. L. REV. 137, 140 (1992); Richard Halloran, *2 U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence*, N.Y. T (Mar. 19, 1986), https://www.nytimes.com/1986/03/19/world/2-us-ships-enter-soviet-waters-off-crimea-to-gather-intelligence.html.

[151] *See* Alfred P. Rubin, *Innocent Passage in the Black Sea?*, CHRISTIAN SCIENCE MONITOR (Mar. 1, 1988), *available at* http://www.csmonitor.com/1988/0301/eship.html. (opining "If the radio shacks of the U.S. warships were listening to anything from the coastal state not directly aimed at them, if the officers on the bridge were scanning the land, or if, in the language of the [1958 Geneva Convention], 'any other activity not having a direct bearing on passage' was involved, the passage was not 'innocent.'").

did not mention surveillance activities or address whether United States actions were lawful.[152]

The Chinese government alleges the United States entered their territorial waters at least 300 times to collect intelligence.[153] North Korea dubiously asserts (and uses torture-induced, now repudiated confessions[154] as evidence) the USS Pueblo spy ship entered territorial waters, per the now famed 1958 incident.[155] In 1960, Cuba alleged that the cruiser USS Norfolk entered territorial waters, coming within three miles of Cayo Blanco.[156] As part of its Freedom of Navigation program, the United States routinely enters into foreign territorial seas under the right of innocent passage, although during these transits the United States says its activities are fully consistent with international law.[157] Due to sensitivity surrounding maritime espionage, the extent to which the United States conducts espionage in foreign territorial seas remains unknown. However, the nearshore allegations are indicative of the potential claims that could be made if the United States were to become party to the LOSC.

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[152] Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., Sept. 23, 1989, 28 I.L.M. 1444 (1989).

[153] *300th Peking "Warning" to U.S.,* N.Y. TIMES, June 30, 1964, at 3.

[154] David Welna, *Remembering North Korea's Audacious Capture of the USS* PUEBLO, NPR (Jan 23, 2018), available at https://www.npr.org/2018/01/23/580076540/looking-at-the-saga-of-the-uss-pueblo-50-years-later.

[155] William Butler et. al., *The Pueblo Crisis: Some Critical Reflections*, 63 PROC. AM. Soc'Y INT'L L. 10, 12-13 (1969) ("[C]oastal states cannot be blamed if they view offshore [high seas] electronic intelligence operations as a substantially new phenomenon in international life. A vessel such as the Pueblo not only carries away visual impressions of the external appearance of a country along the coast; it pierces the very interstices of the defense establishment by monitoring inland communications . . . Under such circumstances, it is hardly unexpected for small coastal countries to question the appropriateness of granting absolute immunity to electronics intelligence vessels.").

[156] Kraska *supra* note 20, at 204; *see Castro Says Cuba Fired on U.S. Sub*, N.Y. TIMES, May 14, 1960, at 1.

[157] *Report to Congress Annual Freedom of Navigation Report Fiscal Year 2017,* Department of Defense, available at https://news.usni.org/2018/01/25/pentagon-2017-freedom-navigation-report.

1. Espionage Inconsistent with the LOSC Does Not Create New Customary Law

Importantly, the United States would not be alone in this practice of conducting intelligence and reconnaissance activities either at odds with or outside the LOSC's Article 19 requirements. Russia (and its predecessor, the Soviet Union) are accused of invading territorial seas on hundreds of occasions in Sweden,[158] Norway, [159] Finland, [160] Dominican Republic,[161] Argentina, and Chile.[162] Other Soviet (and, eventually, Russian) espionage incidents appear linked to gathering naval intelligence off an Italian naval base[163] and United States base in Scotland in 2014.[164] In early 2018, the Russian spy ship, VICTOR LEONOV, reportedly attempted to intercept communications along the United States eastern seaboard, near

[158] GORDON H. MCCORMICK, STRANGER THAN FICTION: SOVIET SUBMARINE OPERATIONS IN SWEDISH WATERS 5 tbl. 1 (1990) (noting over 200 intrusions).
[159] Marian Leighton, *Soviet Strategy Toward Northern Europe and Japan*, in SOVIET FOREIGN POLICY IN A CHANGING WORLD 285, 300 (Robin F. Laird & Erik P. Hoffmann eds., 1986) (observing over 230 intrusions).
[160] Juhana Rossi, *Finland Chases Off Suspected Submarine: Country's Maritime Forces Detect Underwater Activity Inside Finnish Waters*, WALL ST. J. (Apr. 28, 2015), http://www.wsj.com/articles/finland-chases-off-suspected-submarine-1430212090;Jussi Rosendahl, *Finnish Military Fires Depth Charges at Suspected Submarine*, REUTERS (Apr. 28, 2015), http://www.reuters.com/article/2015/04/28/us-finland-navyidUSKBN0NJ0Y120150428; Andrew Marszal, *Finland Fires Warning Shots at "Foreign Submarine" Near Helsinki*, TELEGRAPH (Apr. 28, 2015), http://www.telegraph.co.uk/ news/worldnews/europe/finland/11568042/Finland-fires-warning-shots-at-foreignsubmarine-near-Helsinki.html.
[161] *"Soviet" Submarines to be Cited to U.N.*, N.Y. TIMES, Mar. 5, 1952, at 6.
[162] *Submarine Off Chile Attacked*, N.Y. TIMES, May 22, 1967, at 27.
[163] *Italians Issue a Protest over Intrusion by Sub,* N.Y. TIMES, Mar. 2, 1982, at A4.
[164] GARY E. WEIR & WALTER J. BOYNE, RISING TIDE: THE UNTOLD STORY OF THE RUSSIAN SUBMARINES THAT FOUGHT THE COLD WAR 176–77 (2003); Tony Osborne, *Canadians, French, U.S. Hunt for Submarine Off Scotland*, AVIATION WEEK & SPACE TECH. (Dec. 9, 2014), *available at* http://aviationweek.com/defense/canadiansfrench-us-hunt-submarine-scotland.

National Aeronautics and Space Administration (NASA) and Navy facilities.[165]

China, too, has repeatedly entered foreign territorial seas. Since 2012, China has sent surveillance ships within twelve nautical miles of the disputed Senkaku/Diaoyus islands over 216 times.[166] Similarly, Japan found Chinese submarines collecting intelligence within Japanese waters in 2004[167] and via electronic intelligence spy ship in 2016.[168] Again in 2018, a Chinese spy ship followed Indian warships arriving for triumvirate (US, India, and Japanese) naval exercise into Japan's territorial sea; however, in this instance, China claimed to be exercising unannounced innocent passage.[169] The Japanese expressed concern that the spy ship likely continued to use its sensors while following the Indian vessels in Japan's waters,[170] which would be inconsistent with innocent passage. While United States practice seems to align more closely to Chinese and Russian practice than to the LOSC, this practice does not constitute the creation of *opinio juris* permitting territorial sea espionage. Even staunch advocates for maritime espionage note "there is no

[165] Ryan Browne & Zachary Cohen, *Russian spy ship spotted 100 miles off North Carolina coast*, CNN (22 Jan 2018), https://www-m.cnn.com/2018/01/22/politics/russia-spy-ship-us-coast/index.html.
[166] AMITAI ETZIONI, HOW AGGRESSIVE IS CHINA 54 (2017).
[167] China Div., Asia-Pacific Affairs Bureau, Ministry of Foreign Affairs, Chugoku Sensuikan niyoru Wagakuni Ryoukai Senkou Jijan (Case of a Chinese Submarine Passing Submerged through the Japanese Territorial Sea), Nov. 17, 2004, mimeo., ¶ 1, as cited in Masahiro, *supra* note.
[168] Mizokami, Kyle, *Chinese spy ships shadow U.S. and allies*, POPULAR MECHANICS (June 15, 2016), https://www.popularmechanics.com/military/navy-ships/a21367/chinese-spy-ships-shadow-us-allies/.
[169] *China shaken of US, India, Japan triumvirate: Chinese spy ship sneaks into Japanese territorial waters tracking Indian ships*, INDIA TIMES (July 12, 2018), https://economictimes.indiatimes.com/news/defence/china-shaken-of-us-india-japan-triumvirate-chinese-spy-ship-sneaks-into-japanese-territorial-waters-tracking-indian-ships/articleshow/52765173.cms?from=mdr.
[170] *Id.*

international acceptance of spying inside … the territorial sea of a state."[171]

B. U.S. Policy Statements Send Mixed Messages on Maritime Espionage

1. Policy Statements Adopt 'Non-Innocent Passage' Doctrine

While the United States is not a signatory to the LOSC, United States President Ronald Reagan declared the United States would conform to the LOSC's navigational provisions under the belief they represent customary international law.[172] This would seemingly align with the LOSC's maritime regimes, but recently key United States leaders have espoused the 'non-innocent passage' theory as operational policy for permitting espionage activities with the territorial seas of foreign nations. In 2004, Director of National Intelligence James McConnell revealed "the overwhelming opinion of Law of the Sea experts and legal advisors is that the Law of the Sea Convention simply does not regulate intelligence activities, nor was it intended to," in striking contrast to Article 19(2)(c) of the LOSC, which limits "any act aimed at collecting information" during innocent passage.[173] Former State Department Legal Advisor William H. Taft IV likewise opined "with respect to whether [articles of the LOSC related to innocent passage] would have any impact on United States intelligence collection, the answer is *no*… collecting information to the prejudice of the defense or security of the coastal state… activities are not prohibited or otherwise affected by [the

[171]Id. at 213-14 ("Conventional wisdom leaves no doubt that ... intelligence collection inside another country's territorial sea is patently illegal as a matter of international law ... akin to intelligence activities conducted on the land territory...").
[172] Statement on United States Ocean Policy, 1 PUB. PAPERS OF PRESIDENTS 378 (March 10, 1983); Proclamation No. 5030, 48 Fed. Reg. 10,601 (1983), *reprinted in* 16 U.S.C.A. 1453, at 226 (West Supp. 1 1983).
[173] Letter from J.M. McConnell, Dir. of Nat'l Intelligence, to Hon. Sen. Rockefeller IV and Hon. Sen. Bond (Aug. 8, 2007), S. EXEC. REP. NO. 110-9, at 32–33 (2007) (recalling testimony of Central Intelligence Agency Assistant Director for Collection).

LOSC]."[174] Other statements by senior executive branch leaders to Congress neglect Article 19(2)(c), while misapplying the transit passage regime saying intelligence collection in innocent passage is permissible so long as it isn't unusual.[175] Most importantly, a State Department report to the Senate Foreign Relations Committee regarding potential LOSC treaty ratification in 2007 declared "[the LOSC] set forth conditions for the enjoyment of the right of innocent passage in the territorial sea, but *do not prohibit or otherwise affect activities or conduct that is inconsistent with that right* and therefore not entitled to the right."[italics added][176] If the Senate were to ratify the LOSC based on this understanding, it would constitute an official adoption of 'non-innocent' passage as United States law.

2. Condemnation of Foreign Espionage in U.S. Waters Undermines Position

Tellingly, the United States does not permit other states' practice of 'non-innocent passage' in United States territorial sea or abroad. For instance, when "Soviet Electronic Intelligence (ELINT) spy ships entered the American territorial sea, United States officials immediately ordered them to leave."[177] When a Soviet submarine ran aground in Swedish internal waters in 1981, the United States deplored the incident as "blatant disregard for Swedish territorial

[174] Written Statement of William H. Taft, Legal Adviser, U.S. Dep't, Before the S. Select Comm. on Intelligence on June 8, 2004 Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part IX of the Law of the Sea Convention,S. EXEC. REP. NO. 110-9, at 34, 36-37 (2007) (claiming also the U.S. was "not aware of any States taking the position [that UNCLOS or 1958 Convention] set[] forth the conditions for the right of innocent passage prohibit[ing] or otherwise regulat[ing] intelligence collection or submerged transit of submarines.").

[175] Department of Defense Authorization for Appropriations for Fiscal Year 1989: Hearing on S. 2355 Before the S. Comm. on Armed Services, 100th Cong. 97–98 (1988) ("If you gather intelligence in the process, all right. But you cannot do anything unusual in order to gather intelligence while you are engaged in innocent passage. In fact, you cannot do anything to operate out of the ordinary pattern except to go. That is it.") (statement of Admiral William J.Crowe, Chairman, United States Joint Chiefs of Staff).

[176] S. EXEC. REP. NO. 110-9, at 12 (2007).

[177] *See* Leonard C. Meeker, *Legal Aspects of Contemporary World Problems*, 58 U.S. DEP'T OF STATE BULLETIN. 465, 468 (1968).

integrity" for the purpose of "hostile espionage."[178] As a matter of policy, adopting 'non-innocent passage,' while simultaneously denouncing other states for the same actions seems hypocritical; and from a legal standpoint, undermines the United States argument. Recognizing United States power to order expulsion of nonconforming vessels reflects recognition of an international right to do so. The international right to remove, logically, must be paired with a reciprocal absence of legal right to enter the territorial sea outside of the regime of innocent passage. Thus, the United States position that 'non-innocent passage' can be employed to permit espionage is critically eroded by the American exercise of expulsion. It would be nonsensical to permit a state to enforce a prohibition, while not implicitly recognizing the underlying basis for the prohibition as law. This inconsistency was highlighted by United States Senators David Vitter and Jim DeMint, who opposed LOSC ratification, noting the treaty does not carve out an exception for espionage in its sweeping provisions against "collecting intelligence." They forewarn the United States would be in breach of its treaty obligations if it ratified the LOSC and conducted maritime espionage operations.[179]

Maritime espionage in the territorial sea, while operating under the innocent passage regime, appears completely at odds with several of the listed prohibited activities in Article 19(2) of the LOSC, specifically the intelligence gathering, interfering with

[178] Frank J. Prial, *Sub Leaves Sweden; Joins Soviet Flotilla*, N.Y. TIMES (Nov. 7, 1981), *available at* http://www.nytimes.com/1981/11/07/world/sub-leaves-sweden-joins-soviet-flotilla. html (quoting Max Kampelman, U.S. envoy for European Security); Russia claimed the submarine unintentionally wandered into Swedish waters due to a faulty navigational equipment; however, there was no distress signal and observers note implausibility of a submarine accidentally traversing submerged through a perilous serious of narrow straits. Marie Jacobsson, *Sweden and the Law of the Sea*, *in* 28 THE LAW OF THE SEA: THE EUROPEAN UNION AND ITS MEMBER STATES 495, 517 (Tullio Treves & Laura Pinesch eds., 1997).

[179] S. REP. NO. 110-9, at 26 (2007)(Senators David Vitter and Jim DeMint in the Minority Report) (objecting to Senate advice and consent. The Treaty fails to clearly include intelligence, surveillance, and reconnaissance activities under "military activities." While administrations have stated that these terms are covered, Congress considers these separate functions and have separate committees that oversee Intelligence and the Armed Services.)

communications system or installations, and the catch-all "any other activity not having a direct bearing on passage" prohibitions.[180]

a. 'Non-Innocent Passage' Territorial Sea Espionage Conflicts with Prior U.S. Positions

United States vessels have previously been seized while allegedly spying in territorial seas. As alluded to in Part III(A) of this note, on January 23, 1968, North Korea attacked and captured the United States spy ship USS Pueblo. At the time, Assistant United States State Department Legal Advisor George Aldrich highlighted the USS Pueblo "was seized slightly more than fifteen miles [off the coast and] did not at any time intrude into territorial waters claimed by North Korea," noting "the absolute immunity" of naval vessels on the high seas.[181] Similarly, on May 12, 1975, the United States merchant ship Mayaguez was seized by Cambodia's new Khmer Rouge government for alleged espionage activity deemed to be inconsistent with innocent passage. The vessel had sailed within less than 1.75 miles of a claimed Cambodian island while allegedly not flying a flag to show nationality [a legal requirement while traveling on the high seas or in foreign waters].[182] Suspiciously, the Mayaguez had left Saigon just nine days before the capital fell to the Viet Kong, advanced radar and radio equipment had been stowed onboard, and the captain destroyed secret codes upon capture by the Cambodian officials.[183] Still, as with the USS Pueblo capture, senior United States officials distinguished between activities within the territorial sea and those on the high seas, and reiterated the vessel was not conducting intelligence gathering or other harmful activities in Cambodian waters as part of the justification for urging immediate release of the vessel.[184]

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[180] LOSC, *supra* note 16, at art 19(2).

[181] George H. Aldrich, *Questions of International Law Raised by the Seizure of the U.S.S. PUEBLO*, 63AM. SOC'Y INT'L L. 2, 2-3 . (1969).

[182] Jordan J. Paust, *More Revelations About Mayaguez (and its Secret Cargo)*, 4 B.C. INT'L & COMP. L. REV. .61, 65, 69-70 (1981).

[183] *Id.* at 72-73. (The German journal *Stern* claimed containers onboard included top-secret electronic equipment. See Reuters, *West German Magazine Asserts Mayaguez Carried C.I.A.* Data, N.Y. TIMES May 23, 1975), https://www.nytimes.com/1975/05/23/archives/west-german-magazine-asserts-mayaguez-carried-cia-data.html).

[184] Michael David Sandler, Correspondence: Mayaguez, 86 YALE L.J. 203 (1976).

Contemporary assertions supporting 'non-innocent passage' conflict with previous pronouncements that tacitly recognized that espionage from within foreign territorial seas as unlawful.

b. United States Repudiates Alliterative Interpretations of LOSC

As proponent of a "rules-based international order," the United States champions "freedom of the seas in a manner consistent with international law."[185] The United States has a long history of challenging interpretations of the law of the sea that conflict with the LOSC. For instance, on April 2, 2001, a United States reconnaissance plane collided (or was bumped) by a Chinese fighter jet seventy miles southeast of Hainan island.[186] The United States asserted its plane was "enjoying freedom of navigation over 'international waters' [in accordance with the LOSC's high seas freedom regime]; China said foreign aircraft should not fly over its Exclusive Economic Zone [a position inconsistent with the LOSC] and should "refrain from activities which endanger the sovereignty, security, and national interests."[187] Here, the United States showed no openness to China's creation of a new air defense regime separate from the LOSC. Similarly, in 2020, the United States referencing the LOSC, charged that China "offered no coherent legal basis" for its nine-dash line and South China Sea.[188] The United States has developed an extensive program to challenge excessive or improper maritime practices by issuing diplomatic methods, as well as operational assertions (usually in the form of a naval vessel physical presence).[189] It challenged the

[185] MICHAEL R. POMPEO, U.S. DEP'T OF STATE, U.S. POSITION ON MARITIME CLAIMS IN THE SOUTH CHINA SEA (Jul. 13, 2021), https://la.usembassy.gov/statement-by-secretary-michael-r-pompeo-u-s-position-on-maritime-claims-in-the-south-china-sea/.

[186] Mark Valencia and Ji Guoxing, The 'North Korean' Ship and U.S. Spy Plane Incidents: Similarities, Differences, and Lessons Learned, 42 Asian Survey 723, 724 (2002).

[187] *Id.*

[188] POMPEO, *supra* note 185..

[189] ELEANOR FREUND, FREEDOM OF NAVIGATION IN THE SOUTH CHINA SEA: A PRACTICAL GUIDE (2017), https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide.

LOSC-inconsistent positions of Albania, China, Croatia, Egypt, Iran, Malaysia, Maldives, Oman, Pakistan, Saudi Arabia, Sierre Leone, Slovenia, Sri Lanka, Taiwan, United Arab Emirates, Venezuela, Vietnam, and Yemen in 2018 alone.[190] If the United States were to ratify the LOSC and then conduct maritime espionage operations in foreign territorial seas, presumably under the theoretical doctrine of non-innocent passage, American international credibility would be diminished and the United States might appear hypocritical in making assertions against nations while adopting 'non-innocent passage,' which isn't found in the LOSC.

C. Extent to which U.S. Activities are Restricted by LOSC Intelligence Gathering Provisions as Signatory, but Non-Ratifier

Some scholars assert "with respect to intelligence operations, the [LOSC] contains no restrictions on United States naval surveillance and intelligence operations not already included in the 1958 Convention on the Territorial Sea and Contiguous Zone to which the United States is already a party."[191] However, such a statement is not accurate. The LOSC enumerated specific, prohibited acts, including "intelligence collection" in Article 19. This regime differs from that created by the 1958 Convention, which included no specific provisions and merely required states not to take actions 'prejudicial' to the coastal state during innocent passage.

How can America's acknowledged practice be reconciled with customary law of the sea and the LOSC? First, espionage has historically been considered permissible, even during peacetime. Thus, in the absence of other instrumentation or prohibition, it is permitted. Since the 1958 Convention only required innocent passage not be prejudicial to coastal state security, it could be argued that

[190] Office of Secretary of Defense (Policy), Annual Freedom of Navigation Report, Fiscal Year 2018, Dep't of Defense Report to Congress (Dec. 31, 2018), https://policy.defense.gov/Portals/11/Documents/FY18%20DoD%20Annual%20FON%20Report%20(final).pdf?ver=2019-03-19-103517-010.

[191] Horace B. Robertson Jr., *The 1982 United Nations Convention on the Law of the Sea: An historical perspective on prospects for US accession*, 84 INT'L LAW STUDIES 11, 117-118 (2008).

intelligence collection would remain permissible (under the traditional view that peacetime espionage is a sovereign right under international law). Indeed, prior to the LOSC, the "general unwillingness [of states] to agree upon terms of high precision indicates a fundamental consensus that coastal states ought to have a measure of discretion" in deciding what constitutes innocent passage.[192] Therefore, one could argue that because maritime espionage in foreign territorial seas had not been formally prohibited by treaty or practice, that it was internationally lawful and would remain so unless custom or treaty changed the international legal obligations. Prominent scholars disagree, suggesting that before the LOSC was drafted, "it appears entirely consistent with both customary international law and the 1958 Geneva Convention on the Territorial Sea for a state to prohibit passage through its territorial sea by … vessels engaged in espionage activity, especially when the activity is directed against a relatively small, powerless coastal state."[193] However, under a positivist view, the United States would not be bound and would not have had any obligations under the LOSC, particularly Article 19(2), had it not signed it.

After signing the LOSC in 1994, the United States' ability to argue for a legal basis to conduct espionage in foreign territorial seas became more challenging. A signatory, while not bound by the provisions per the Vienna Convention on the Law of Treaties, must refrain from "acts which would defeat the object and purpose of [the] treaty."[194] First, the United States would have to claim that Article 19's prohibition against intelligence gathering does not constitute customary international law (which is plausible given United States practice and that of other states). Second, it would need to assert that maritime espionage in the territorial sea does not defeat the object and

[192] MYRES S. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEAN 262 (1962).
[193] Jordan J. Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774, 790 (1976).
[194] Somewhat ironically, the United States has signed, but not ratified the Vienna Convention, but considers "many provisions customary international law," yet, hasn't declared whether it considers this article to be custom. Vienna Convention on the Law of Treaties UN Doc/A/Conf. 39/27 Reprinted 8 I. L.M. (1969) at art. 18; U.S. Dep't of State, Vienna Convention on the Law of Treaties, (accessed on 2/28/2020) archived at https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm

purpose of the treaty. However, such an assertion is weakened because the practice would directly conflict with Article 19. Yet, it might still be argued that the true object and purpose of the LOSC is much broader than any specific rule, thus inconsistent practice would not constitute a frustration of the treaty or the United States could assert 'non-innocent passage' exists as an unenumerated legal regime. Finally, the United States would have to explain that espionage in the territorial sea is not one of the 'navigational provisions' President Reagan declared constituted customary international law when he signed the LOSC (although this may be easier because presumably President Reagan ordered or oversaw the territorial sea espionage operations during his time in office). While some of these instances predate the LOSC, some took place after the United States signed the LOSC in 1994.

IV. WAY AHEAD FOR THE UNITED STATES

The United States has much to gain from the LOSC, but accession may make previously conducted activities unlawful.

A. Broader Debate Regarding Ratification of the LOSC

Proponents assert accession would provide the United States a 'seat at the table' to shape developments in ocean law and governance, including the potential to have representation at meetings of States party, the International Tribunal for the Law of the Sea (ITLOS), Commission on the Limits of the Continental Shelf (CLCS) and Deep Seabed Authority.[195] They offer ITLOS as a "viable solution" to provide a legal mechanism to assert United States navigational rights and address excessive foreign maritime claims.[196] However, this argument is substantially weakened by the fact that the United States already had the ICJ available for such disputes but has shown great distaste for submitting matters to international judicial institutions

[195] Clive Schofield & Ian Townsend-Gault, *Time for the United States to Join the Party? Prospects for US ratification of the United Nations Convention on the Law of the Sea*, 8 INT'L ZEITSCHRIFT 1, 3-4 (2012).
[196] George V. Galdorisi & James G. Stavridis, *United States Convention on the Law of the Sea: Time for a U.S. Reevaluation?*, 40 NAVAL L. REV. 229, 233-34 (1992).

(the United States pulled out of the ICJ and maintains a hostile stance towards the International Criminal Court (ICC)).[197]

Opponents contend that being bound by the LOSC would be disadvantageous to the United States, citing sharing royalties for deep seabed mining and obligations to utilize binding and non-appealable mandatory dispute settlement provisions.[198] Further, opponents argue United States navigational freedoms, which currently exist under customary international law, could be eroded more easily, over United States objection, through the LOSC's modification provisions. They also note there are currently no barriers to United States companies' exploitation of resources from the deep seabed.[199] While recognizing the importance of careful consideration of these issues, other scholars have admirably done so, and there is not space in this paper to fairly weigh the merits of these positions. Besides, it would detract from this paper's main focus – ensuring the impact of accession on maritime espionage policy and practice is part of the discussion.

B. Assessing and Mitigating the Legal Risks of Ratification Related to Maritime Espionage

1. U.S. Cannot Make Modifications or Reservations to Change the Legal Effects of Article 19

Could the United States conditionally accede to the LOSC while opting out of Article 19 or declaring an understanding that it does not apply to espionage? The answer is no. According to Judge L. Dolliver M. Nelson, then-Vice President of the International Tribunal for the Law of the Sea, unlike most treaties,[200] the LOSC is framed as a

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[197] *See* Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies* in THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 1 (Cesare Romano, ed., 2008).

[198] Steven Groves, The Law of the Sea: Costs of U.S. Accession to UNCLOS, Testimony before the United States Senate Committee on Foreign Relations (2012), *available at* https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos (referring to LOSC at art. 86)

[199] *Id.*

[200] Vienna Convention on the Law of Treaties, art 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

'take it or leave it package deal.'[201] To ensure the integrity of a unified regime, states are not permitted to opt out of provisions or change meanings. Article 309 of the LOSC states "no reservations or exemptions may be made."[202] However, "declarations or statements" can be made to "harmonize" the LOSC with domestic law and regulations, but such statements cannot "purport to exclude or to modify the legal effect of the provisions of this Convention in their application."[203]

Nevertheless, numerous states have added 'interpretive declarations,' stating that elements of the Convention do not apply. For example, Finland and Sweden said that the LOSC strait transit regime would not apply to the Aaland islands, which had already been governed by another "long-standing" agreement.[204] Similarly, Brazil declared an understanding that the LOSC does not permit military maneuvers in the EEZ of another state without that state's approval; while Italy and Germany made declarations advancing the opposite position.[205]

In response, the United Nation's General Assembly called on the Secretary General to publicly identify (or more accurately, "blacklist") unilateral statements that do not conform to LOSC Articles 309.[206] The Secretary General identified inconsistent statements regarding: baselines, prior notifications for warship innocent passage, strait navigation, and subordination of the LOSC to national laws, including constitutional provisions.[207] This illustrates

[201] L Dolliver M. Nelson, Declarations, *Statements and 'Disguised Reservations' with Respect to the Convention on the Law of the Sea,* 50 ICLQ 767 (2001).
[202] LOSC, *supra* note 16, at art. 309.
[203] *Id.* at art. 310.
[204] United Nations Convention on the Law of the Seas Declarations Made upon Signature, Ratification, Accession or Succession, or any time thereafter Finland/Sweden, *available at* https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.
[205] *Id.*; *see* also Nelson, *supra* note 202.
[206] U.N. Secretary-General, Oceans and the Law of the Sea: Report of the Secretary General L, para. 12, UN Doc. A/59/62 (2004)
[207] *Id.*; *see* also Christian J. Tams, *Article 310* 15 in ALEXANDER PROELSS, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (2017).

the global community's willingness to "name and shame" states that attempt to opt-out or reinterpret the LOSC's meanings. This should serve as a warning for the United States to be careful to avoid declarations and reservations that could be challenged.

If the United States acceded to the LOSC with a declaration opting out of or modifying Article 19, and other nations disagreed, those states could use the LOSC's mandatory dispute settlement mechanisms to bring the United States before the International Tribunal for the Law of the Sea or binding international arbitration. Legally, if the international jurisprudential body ruled against the United States in finding an opt out or that modification of Article 19 constituted an impermissible reservation (a reasonably likely result in this context), it would invalidate the legal effects of the United States declaration, permit other parties to disregard it, and require the United States "to remain bound by the Convention, but without the benefit of the reservation."[208] Operationally, though, the finding would not change much as– foreign states can already order vessels conducting intelligence collection to leave its territorial sea. However, global perception would likely change and the United States' position as a defender of the Law of the Sea would be replaced with an international label as an offender. A judicial repudiation would undermine United States creditability in discussions regarding Law of the Sea and international order. Consequentially, it would be imprudent for the United States to attempt to opt out of Article 19 or provide a modified understanding of the permissibility of 'non-innocent passage intelligence gathering,' if it chose to accede. Thus, it should only ratify if it intends to abide by the entirety of the LOSC.

2. Opt-Out Provisions will Likely Not Shield from Mandatory Dispute Resolution

Importantly, while states cannot opt out of any provisions, in limited circumstances the LOSC allows the exemption of certain categories of disputes from mandatory dispute settlement.[209] Article 298(b) provides "disputes concerning military activities… and law

[208] Tams, *supra* note 208, at para 17.
[209] LOSC *supra* note 16, at art 298.

enforcement activities [are] excluded."[210] Therefore, if United States activities were based on "military" or "law enforcement" actions, which "intelligence gathering" arguably is, the United States could, theoretically, avoid mandatory dispute settlement procedures regarding these cases by arguing such matters are outside the jurisdiction of the mandatory dispute procedures under Article 298.

However, Russia attempted and failed to make this argument in the *Artic Sunrise* case after authorities detained a Dutch vessel protesting an oil rig in Russia's EEZ.[211] Russia claimed the International Tribunal for the Law of the Sea should not have jurisdiction over its "law enforcement" operations citing Article 298 of the LOSC's jurisdictional exemption for 'law enforcement,' but the Tribunal disagreed, narrowing the scope of the law enforcement exception to just those cases involving marine scientific research.[212] It assumed jurisdiction and applied provisional measures until arbitration could occur.[213] The prospect of an adverse judgement in an international forum influenced Russia's decision to reach a bilateral confidential settlement with the Netherlands.[214]

China had made similar jurisdictional arguments in its South China Sea dispute with the Philippines. China had argued that Article 298(a)(i) of the LOSC explicitly allows states to opt out of mandatory dispute resolution for issues "relating to sea boundary delimitations, or those involving historic bays or titles" and noted China had declared historic title to the area and opted out of mandatory dispute

[210] *Id.*

[211] International Tribunal for the Law of the Sea, '*Arctic Sunrise' Case* (Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports (2013), 246-247.

[212] *Id.*

[213] *Id.* at 247.

[214] JOINT STATEMENT OF THE RUSSIAN FEDERATION AND THE KINGDOM OF THE NETHERLANDS ON SCIENTIFIC COOPERATION IN THE RUSSIAN ARCTIC REGION AND THE SETTLEMENT OF A DISPUTE, Neth./Rus. May 19, 2019, https://www.government.nl/documents/diplomatic-statements/2019/05/17/joint-statement-of-the-russian-federation-and-the-kingdom-of-the-netherlands-on-scientific-cooperation-in-the-russian-arctic-region-and-the-settlement-of-a-dispute

resolution procedures upon acceding to the LOSC.[215] The Arbitral Tribunal, however, noted that though maritime boundary delimitation was an "integral and systemic process," and that "fixing the extent of parties' entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue;" and found "that a dispute concerning the existence of an entitlement to a maritime zone is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements overlap," thus finding jurisdiction was not barred by Article 298 of the LOSC because it was a "determining the existence of entitlement to a maritime zone" rather than "delimiting."[216] In protest, China discontinued participating in proceedings and objected to the ruling against it.[217] This is not to say that these international mandatory dispute resolution tribunals ruled incorrectly, but rather to highlight the willingness of international jurisprudential bodies to validate their own competency to rule on matters. Consequentially, the United States might find it difficult to rely on the military activities exception of Article 298(1)(b) of the LOSC to avoid mandatory dispute resolution.

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[215] LOSC, *supra* note 16 at art. 298(a)(i); China, Declaration under Article 298, Aug. 25, 2006, C.N.666.2006.TREATIES-5 U.N.T.S., https://treaties.un.org/doc/Publication/CN/2006/CN.666.2006-Eng.pdf. ("The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.") For full discussion of the jurisdictional issues, *see* Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 265, (2016).

[216] Republic of Philippines v. The People's Republic of China, PCA case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, at paras.155 and 156.

[217] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines. Ministry of Foreign Affairs of the People's Republic of China, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml (" With regard to the award rendered … by the Arbitral Tribunal … China solemnly declares that the award is null and void and has no binding force. China neither accepts nor recogni[z]es it.")

3. Prepare to Defend 'Non-Innocent Passage' on the Merits

Given the United States' acknowledged past practices and the numerous allegations against it of maritime espionage within foreign territorial seas, there is a strong possibility that a case on this matter could be brought before an international jurisprudential body if the United States acceded to the LOSC due to the mandatory dispute resolution provision. Thus, it is prudent to assess the likelihood of the United States prevailing on the merits in an international case related to maritime espionage in a foreign territorial sea utilizing a 'non-innocent passage' defense. Likewise, the Permanent Court of Arbitration held that exceptions to compulsory procedures for binding decisions must be read with Articles 309 and 310 of the LOSC, thus 'invalidat[ing] any interpretive declaration to the extent that it departs from the [LOSC]."[218] This precedent suggests, even if the subject of the disputes relates to military or law enforcement activities, international bodies might still find jurisdiction and rule against the United States if United States actions depart from the LOSC. Consequentially, the exceptions do not appear to provide broad protection from international jurisdiction on military and law enforcement matters.

C. Potential Operational Impact Post-Ratification

Since the United States cannot opt-out or alter the meaning of the LOSC, it must be prepared to play by the rules if it ratifies the LOSC. Article 19 of the LOSC clearly forbids "intelligence collection" prejudicial to the coastal state and other activities not having a direct bearing on innocent passage. If the United States ratifies, it must be prepared to abide by these provisions (or risk embarrassment and loss of international credibility). Per the LOSC, this would mean not conducting maritime espionage within the territorial seas of foreign countries. Whether and if so to what extent this would impact United States intelligence collection is unknown. Senators and intelligence

[218] Andrew Serdy, *Article 298* at 27, in Proelss *supra* note 208. (referring to Permanent Court of Arbitration, *Arctic Sunrise Arbitration* (Neth. v. Russ.), Award on Jurisdiction of 26 November 2014, 9-10 13 (para 55-58 and 68), *available at* https://pca-cpa.org/en/cases/21/.

officials must carefully consider the potential ramifications before ratifying the LOSC. Certainly past examples, such as submarine espionage and signals intelligence activities conducted from within foreign territorial seas, illustrate that American maritime espionage practice might be impinged upon, if the United States ratified LOSC and abided by its provisions.

Alternatively, the United States could ratify the LOSC and nevertheless conduct maritime espionage from the foreign territorial seas while hoping not to be caught. Such an illicit flouting of international law obligations carries great risk. As the past has shown, United States submarines have collided with foreign vessels on multiple occasions and have been forcefully evicted. Such actions may appear threatening or provocative and may spark conflict. Under the status quo as a non-party to the LOSC, the United States can reasonably assert that the actions constituting maritime espionage are tacitly permissible as a matter of customary international law.[219] However, by ratifying the LOSC, the United States would be bound by Article 19, and intelligence collection in foreign territorial seas would be illegal under binding international treaty law and United States domestic law. The United States would be unwise to ratify a treaty with the intent to conduct operations on the basis of 'non-innocent passage' which could be viewed as violating the LOSC's provisions.

D. Push for a New Law of the Sea Implementing Agreement

If the Senate finds the United States has a national security interest in conducting maritime espionage in foreign territorial seas and that such practice is lawful based on customary *de minimus* espionage practice that predate the LOSC, and has not been overridden by the LOSC, then it might consider requesting a new implementing agreement from the States Parties, which would permit accession without strict adherence to Article 19. The United States has successfully lobbied and won concessions from treaty provisions in the

[219] Arguable because the U.S. cannot frustrate the purpose of a treaty it has signed and because it could claim that Article 19 does not constitute Customary International Law.

form of a LOSC implementing agreement in the past,[220] and it may be possible to do the same for maritime espionage. In 1994, the United States lobbied and won a significant amendment to the LOSC, specifically changing provisions requiring technology transfer and resource-sharing with less developed states.[221] This implementing agreement made fundamental changes to the LOSC, yet was accepted by States Parties.[222] Some states may challenge such a change as an erosion of established coastal state protections enshrined in LOSC Article 19; but since key states clearly practice nearshore espionage, there may be some appetite to adopt a new implementing agreement.

IV. CONCLUSION

United States accession to the LOSC offers many strategic and economic benefits. Most notably: better recognition of United States continental shelf claims, new ability to economically participate in deep seabed mining under a universally recognized framework, stronger moral grounds for asserting navigational freedoms, and enhanced legal mechanisms (ITLOS & binding arbitration) to challenge excessive maritime claims. Thus, the United States should ratify but should do so only on its terms. Unlike other nations, such as China and Russia, which have signed but appear to flout the rules, the United States must stand behind its commitments as an honorable, law-abiding nation that upholds the international rules-based order. This means forthrightly advancing United States interests with respect to maritime espionage.

Peacetime maritime espionage remains murky, even more so when activities do not align with the LOSC. Certainly, Russia and

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[220] 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July, 28, 1994, 1836 U.N.T.S. 3, 33 I.L.M. 1309 (1994), UN Doc. A/RES/48/263.

[221] *Id.*; *see* also William L. Schachte, *The Unvarnished Truth: The Debate on the Law of the Sea Convention*, 61 NAV. WAR C. L. REV. 119, 122 (2008); Jon M. Van Dyke, *U.S. Accession to the Law of the Sea Convention*, 22 OCEAN YEARBOOK 47, 56 (2008).

[222] Division for Ocean Affairs, *Overview Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, United Nations (Sept. 2, 2016), *available at* https://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm

China appear to be conducting intelligence gathering within foreign territorial seas in apparent violation of Article 19 of the LOSC. Some evidence in American practice and policy statements suggests the United States might similarly be conducting intelligence activities in foreign territorial seas in ways that do not align with the LOSC's innocent passage regime. Presently, the United States can argue, albeit weakly, that it is not bound by the LOSC and that intelligence collection during innocent passage does not violate customary law. By acceding, however, the United States would acknowledge the LOSC as binding law. This places the United States Senate and intelligence community in a bind in trying to determine whether to ratify the LOSC. Ratification would mean being bound not to conduct maritime espionage in foreign territorial seas. The United States would also need to disavow policy statements made, which support the notion of 'non-innocent passage,' which is patently inconsistent with the plain understanding of the states that agreed to the LOSC. This unwritten regime constitutes an especially offensive betrayal of trust to the coastal states that agreed to the LOSC with the assurances that innocent passage would be non-threatening.

Since the LOSC is a "package deal," without opt-outs, the United States will have to consider whether it can live with the requirements of Article 19. Derogation or flouting is not permissible, violations will result in compulsory international dispute resolution, and the United States will likely be unable to shield itself under military or law enforcement exemptions. Beyond embarrassment and a loss of credibility, if the United States disregarded its obligations under the LOSC, other nations would surely follow, resulting in an unraveling of international ocean law, and thereby increasing risks, uncertainty, and violent conflict. The United States must also be careful to consider the important role of nearshore maritime espionage in future 'grey zone' conflicts. Further accession may restrict the United States' ability to employ new technologies, such as mini-submarines and cell site simulators, which it has invested in.

Consequentially, the United States Senate should carefully consider maritime espionage when discussing the LOSC ratification. If the United States is unwilling or unable to abide by Article 19's provisions, the Senate should not ratify the LOSC. If the Senate does

not ratify, the United States should push for LOSC States Parties to agree to a new implementing agreement altering the collective understanding of Article 19, specifically, changing the language from banning "nonprejudicial" intelligence collection to prohibiting maritime espionage that "causes physical harm or impacts." This will allow the United States and the global community to maximize the benefits of accession without risking an apparently important national security tool – maritime espionage.