Chapter 4
UN Naval Peace Operations, Innocent Passage, and the Use of Force

[In the post-Cold War era] the international community should be able to cope with a situation of...local conflict more expeditiously. In that context, a greater precision on the right of innocent passage in the territorial sea...as embodied in the Convention would seem to acquire an increasing importance for the stability of the global maritime order.¹

– Hisashi Owada, 1993

International law [of the sea] does not yet provide for all situations; a variety in practice may arise as nations take up their responsibilities in these new areas and one may need to make changes for the future. This situation, however, is better than one of neglect.²


Introduction

The LOSC, as the Spanish delegate to UNCLOS III noted, was anticipated to be a unified regime protecting and serving two intricately related sets of rights and obligations – those of the individual coastal and flag states, and those of the international community, both divisibly and as a whole.³ Nowhere is this delicate balance more evident, more important, and yet more ambiguous than the what-where-who-how as it relates to innocent passage and the international community’s authority to use force in the Territorial Sea. With respect to UN naval peace operations, the inherently exceptional nature of the interface between the international community and the Territorial Sea is, however, further complicated by the imported legitimation implications of the UN Charter and Chapter VII. In the Territorial Sea, as with UN peace operations on land, application of the general Article 2(4) and 2(7) prohibitions on the threat or use of force, and interference in the domestic affairs of states, must be interpreted with reference to the UNSC’s international peace and secu-

rity competence. Thus third party rights of innocent passage through the Territorial Sea must account for and respond to the necessities of UN naval peace operations. Similarly, the fact of coastal state sovereignty over the Territorial Sea is thus subject to both inherent caveats in favour of the international community generally (such as innocent passage), and imported caveats in favour of international peace and security in particular (such as Chapter VII of the UN Charter).

The next four chapters of this book will examine the construction of authority in respect of the types of operational conduct that planners and executors of UN naval peace operations must take into account. The use of force in the territory of another state is the most categorically and prudentially significant act which a state or the international community collectively can contemplate. The interaction between power and legitimation, and the consequent authority context this generates, is to a large degree dependant on whether and how this interaction is cognisant of those issues that are of particular importance to UN naval peace operations in the Territorial Sea. This chapter will therefore examine the problematic issue of innocent passage and use of force generally. Chapter five will analyse a practical example of how a basis of authority can be constructed in support of UN naval peace operations in the Territorial Sea of a non-consenting state – the enforcement of UNSC sanctions regimes. Chapter six will broaden this scope by examining the practice of constructing a similar basis of authority in Territorial Seas within which sovereignty is unclear. Chapter seven, using the doctrine of unit self-defence as a comparative point and a source of principles, will then propose a means of constructing the necessary authority to enable UN naval peace operations in the Territorial Seas of non-directly involved, and non-consenting (third party) states.

The aim in this chapter, therefore, is to describe and analyse a basis of general authority for UN naval peace operations in the Territorial Sea, through examining the relationship between innocent passage, use of force, and UN naval peace operations. The chapter will begin with a brief overview of the nature of the Territorial Sea. It will then examine the concept of innocent passage, and describe its implications for UN naval peace operations in the Territorial Sea. Finally, the chapter will conclude with an analysis, in general terms, of the issue of international community uses of force in the Territorial Sea during UN naval peace operations, outlining the purposes, triggering acts, and permissible levels which attach to force in the Territorial Sea.

The Nature of the Territorial Sea

The Territorial Sea regime described in Part II of the LOSC details the width, delimitation, and rights and obligations of states within this most sensitive of ocean zones. The fundamental aspects of this regime (such as the 12 nautical mile width of the Territorial Sea, and Article 19 on innocent passage) were settled relatively early in the UNCLOS III process – as early as 1976 in most cases. Further, these provisions changed little over the subsequent course of negotiations, despite several attempts – even as late as 1982 – to put aspects of the regime back on the agenda.

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4 In 1980, for example, Argentina, China, Ecuador, Madagascar, Peru, and The Philippines proposed an amendment aimed at introducing a regime of prior notification for war-