The Gulf of Sidra

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THE GULF OF SIDRA

"[O]ur objective in this operation was . . . to maintain basic principles of freedom of navigation in international waters and airspace. We sought only to conduct a freedom-of-navigation exercise in waters universally recognized as international seas, more than 100 miles off the coast of a country whose government has made excessive claims to those waters and had militarily threatened any nation to defy them."

INTRODUCTION

The Gulf of Sidra is a large indentation into the coast of Libya, approximately 275 miles wide by 150 miles deep. Since 1973, Libya unilaterally has claimed the Gulf as part of its integral territory and as being under its complete sovereignty. The United States denies this claim; it considers the Gulf international waters and asserts the right of all states to navigate freely within the Gulf. In an effort to assert rights of navigation, the United States has continued to conduct military maneuvers within the Gulf. The dispute sharpened when in March, 1986, Libyan forces fired missiles at United States Naval aircraft operating over the Gulf. In response, United States forces destroyed the sources of the Libyan attack. The conflict has

4. See statement of Weinberger, supra note 1.
5. The maneuvers have not been without incident. In August 1981, two United States Navy F-14 fighter jets shot down two Libyan SU-22 fighters 60 miles off the Libyan coast, after being fired upon by one of the Libyan aircraft. In January 1986, while the United States 6th Fleet was conducting planned maneuvers near the Gulf, Libyan leader Colonel Muammar Qaddafi boarded an armed Libyan patrol boat and sailed into the Gulf to stage a confrontation. However, the Libyans took no military action. N.Y. Times, Mar. 25, 1986, at A11, col. 1-4. Other military maneuvers since have been held in an effort to underscore freedom of navigation. San Diego Union, July 15, 1986, at 11, col. 1.
caused international concern over the continued peaceful stability of the region.7

This conflict raises important issues concerning unilateral claims to large expanses of ocean space, as well as the resort to force in settling these claims. Two important sources of international law are useful in resolving these issues. First, the 1982 United Nations Convention on the Law of the Sea (LOS Convention)8 prescribes definitive rules with respect to claiming expanses of ocean as sovereign territory. Second, the United Nations Charter (U.N. Charter or the Charter)9 defines the permissible use of force under international law. This Comment will evaluate the validity of the Libyan claim to the Gulf of Sidra in relation to the LOS Convention. An analysis then will be made to determine the lawfulness of United States Naval maneuvers within the Gulf. Finally, an analysis will be made of the resort to the use of force in the settlement of this dispute within the context of the U.N. Charter and customary international law.

THE INCIDENT

On March 25, 1986, the United States Sixth Fleet, consisting of a 30-ship task force, was conducting air and sea maneuvers in the Mediterranean Sea,10 well north of the disputed Gulf of Sidra.11 The purpose of the maneuvers was to assert the right of free navigation within the Gulf of Sidra.12 Three aircraft carriers led the task force — the Coral Sea, the Saratoga, and the America13 — from which regular flight operations took place.14 The United States filed a no-

14. N.Y. Times, Mar. 27, 1986, at A8, col. 6 (city ed.).
tice of intent with the International Civil Aviation Organization to ensure the safety of airliners in the region.\textsuperscript{15} United States Naval aircraft, including F-14’s, F-18’s and A-7’s, entered the Gulf below 32 degrees 30 minutes latitude\textsuperscript{16} — the boundary line south of which Libya claims its territorial waters.\textsuperscript{17} A United States Navy surface action group then entered the Gulf at a point within 40 miles of the Libyan coast.\textsuperscript{18} Three ships made up the surface action group — the Aegis air-defense cruiser \textit{Yorktown}, a destroyer, and a guided-missile cruiser.\textsuperscript{19}

Hostilities began soon afterward when Libya fired surface-to-air missiles at United States aircraft.\textsuperscript{20} Four Soviet-made SAM-5 and two SAM-2 missiles were fired from a missile-launching site at Surt on the Libyan coast.\textsuperscript{21} However, United States radar jamming technology emitted from EA-6B support aircraft caused the missiles to miss their intended targets.\textsuperscript{22} The rules of engagement, as approved by President Reagan, gave the Sixth Fleet Commander discretion to respond to the Libyan attack.\textsuperscript{23} The Commander determined that Libya had committed “hostile” acts and ordered a response to any further aggression by Libyan forces.\textsuperscript{24}

A Libyan high speed missile-carrying patrol boat was detected approaching United States warships.\textsuperscript{25} In response, United States aircraft fired two Harpoon missiles at the Libyan patrol boat, destroying it.\textsuperscript{26} Two United States A-7’s, from the aircraft carrier \textit{Saratoga}, then attacked the missile site at Surt, the source of the earlier Libyan missile attacks.\textsuperscript{27} HARM anti-radiation missiles struck the missile site, rendering it inoperable.\textsuperscript{28} A second Libyan Combattante class patrol boat was detected as it approached within offensive-miss-

\begin{thebibliography}{9}
\bibitem{15} Id.
\bibitem{17} Colonel Qaddafi has called this boundary line the “line of death,” challenging United States forces to cross it. \textit{See supra} notes 3 and 5 and accompanying text.
\bibitem{20} Id.
\bibitem{21} L.A. Times, Mar. 27, 1986, § 1, at 34, col. 4. The missiles use radar to find their targets and travel at three times the speed of sound. \textit{Id.}
\bibitem{22} L.A. Times, Mar. 27, 1986, § 1, at 34, col. 4.
\bibitem{23} The maneuvers were approved by President Reagan with the expectation of a Libyan attack. N.Y. Times, Mar. 26, 1986, at A8, col. 5-6.
\bibitem{24} L.A. Times, Mar. 27, 1986, § 1, at 34, col. 1.
\bibitem{26} Id.
\bibitem{27} N.Y. Times, Mar. 26, 1986, at A8, col. 2.
\bibitem{28} Id.
\end{thebibliography}

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The Libyan patrol boat was employing radar and was accelerating toward the United States aircraft carriers. The Aegis cruiser *Yorktown* fired two surface-to-surface missiles, sinking the approaching patrol boat. When the missile-launching site at Surt again became operational, it was attacked a second time and put out of action. The following day, a third Libyan patrol boat, a Nanuchka-class corvette, was attacked after it left the port of Benghazi and began heading toward United States forces. The corvette was destroyed. Hostilities ended with United States forces proceeding unchallenged within the Gulf. Twenty-four Libyan sailors were believed killed in the attacks on Libyan patrol boats. The United States suffered no casualties.

**LIBYA'S CLAIM**

In 1973, Libya made a unilateral claim to the Gulf of Sidra in a letter to the United Nations. The claim purported to enclose all waters landward of 32 degrees 30 minutes as an integral part of Libyan territory, and therefore under its complete sovereignty. The validity of Libya's claim delimiting the Gulf of Sidra as internal waters depends upon the recognition of the claim in relation to recognized principles of the international law of the sea. One of the most important sources concerning international law of the sea is the LOS Convention. Except for minor changes, it virtually restated the relevant provisions concerning the delimitation of bays of its predecessor, the 1958 Convention on the Territorial Sea and Contiguous Zone. The provisions concerning delimitation of bays are consid-

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29. The missile range of this patrol boat is approximately 38 miles. *Id.* at col. 1.
30. *Id.*
31. *Id.* at col. 3.
32. The radar dish at the missile launching site is relatively easy to replace. *L.A. Times*, Mar. 27, 1986, §1, at 34, col. 4.
34. *Id.*
35. *Id.*
38. *Id.*
41. *See LOS Convention, supra* note 8.
42. LOS Convention, *supra* note 8, art. 10, para. 2 (changes “this Convention” to “these articles”) and para. 5 (“nautical miles” to “miles.”) For the differences between the LOS Convention and the Convention on the Territorial Sea and Contiguous Zone concerning the system of straight baselines, see Guttry, *The Delimitation of Territorial Waters in the Mediterranean Sea, 11 Syracuse J. Int'l L. & Com. 377, 378 n.8 (1984).*
ered generally recognized international law. Thus, the LOS Convention may be used as a guide in determining the validity of Libya’s claim.

The LOS Convention allows a state to claim a marginal belt of water along its coast as its territorial sea. The territorial sea is measured from a baseline at the low-water mark following the sinuosities of the coast and extending seaward a certain distance. However, in the case of bays, gulfs, and other coastal peculiarities, exceptions exist to the normal baseline rule. These exceptions are the juridical bay, the historic bay and the straight baseline method, discussed more thoroughly below.

Generally, a bay is delimited by drawing an imaginary line — a baseline — across the mouth of the bay, assuming certain legal requirements are met. The waters enclosed by the baseline form part of the state’s internal waters; those waters on the seaward side of the baseline are territorial waters. The drawing of such a baseline is what has sparked the current conflict between the United States and Libya.


45. Territorial waters are those waters over which a state enjoys exclusive sovereignty. Traditionally, territorial waters were limited to the extent a state could exercise control. This became known as the “cannonshot” rule. See generally C. Colombos, The International Law of the Sea 87-175 (6th ed. 1967). Modernly, states have sought to extend their territorial waters beyond traditionally recognized distances. This has been termed “creeping jurisdiction” by one author. See K. Booth, Law, Force & Diplomacy at Sea 37-58 (1985). Article 3 of the LOS Convention allows a state to establish the breadth of its territorial seas not exceeding 12 nautical miles. LOS Convention, supra note 8, art. 3. Libya has claimed a 12 mile limit. Foreign states traditionally have been allowed to pass through the territorial waters of another state as long as the passage is innocent. For an in-depth discussion of this right in reference to the innocent passage of warships, see Froman, Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea, 21 San Diego L. Rev. 625 (1984).

46. The baseline is an imaginary line from which the territorial sea is be measured. M. Strohl, The International Law of Bays 5 (1963).

47. See C. Colombos, supra note 45, at 88.

48. See generally M. Strohl, supra note 46.

49. Id. at 3-6.

50. Id. at 6. Internal waters are considered within the exclusive sovereignty of the coastal state. They differ from territorial waters in one important aspect — there is no right of passage by foreign states. L. Bouchez, The Regime of Bays in International Law 4-6 (1964).
Juridical Bay

The first exception to the normal baseline rule is the juridical bay. Article 10 of the LOS Convention sets forth two tests for the determination of a bay. Satisfaction of both tests results in a juridical bay. The first test, labeled as the semi-circle test, is used to distinguish a bay from a mere curvature of the coast. Under this test, a straight closing line is drawn between the entrance points of the indentation. The indentation is to be regarded as a bay if the area is as large as, or larger than, that of a semi-circle whose diameter is the closing line. The sea area of the Gulf of Sidra is much smaller than that of such a semi-circle, and thus does not satisfy the requirement of article 10(2) of the LOS Convention.

The second test for the determination of a bay is set forth in article 10(5). This test limits the mouth of a bay to a distance twice the maximum allowable territorial sea width, or twenty-four miles. The distance at 32 degrees 30 minutes latitude is approximately 275 nautical miles, far exceeding the twenty-four mile limit of article 10(5). Therefore, the Gulf of Sidra meets neither of the technical requirements of a juridical bay of article 10 of the LOS Convention.

Historic Bays

The second exception to the normal baseline rule is that of the historic bay. Although agreement exists as to the general requirements of a valid claim under the doctrine of historic bays, disagreement exists as to the application of these requirements. This lack of agreement has resulted in the absence of a codified rule in the LOS Convention.

Three general requirements exist for the recognition of a claim

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51. LOS Convention, supra note 8, art. 4, paras. 2 & 5.
52. See M. Strohl, supra note 46, at 55-57; Comment, supra note 40, at 947.
53. LOS Convention, supra note 8, art. 10, para. 2.
55. LOS Convention, supra note 8, art. 10, para. 5.
56. See supra note 2.
57. Related to the doctrine of historic bays is the questionable doctrine of "vital" bays. For an in-depth discussion concerning the applicability of both, see Spinnato, supra note 3, at 72-82; Francioni, Status, supra note 54, at 320-26. Comment, The Doctrine of Historic Bays: Applying an Anachronism in the Alabama and Mississippi Boundary Case, 23 SAN DIEGO L. REV. 763 (1986).
58. See L. Bouchez, supra note 50, at 199-202; M. Strohl, supra note 46, at 251-305.
59. LOS Convention, supra note 8, art. 10, para. 6 (creating exception for historic bays). It has been suggested that an explanation for the failure to codify the doctrine of historic bays is a desire to keep it purposely vague. See Comment, supra note 40, at 939.
under the doctrine of historic bays. First, the coastal state must claim the body of water as within its sovereignty. Second, the state must exercise sovereignty over the waters for a sufficiently long period of time. Finally, other states must acquiesce to the exercise of such sovereignty. As applied to Libya's claim to the Gulf, the short duration of the claim tends to make the doctrine inapplicable. Despite Libya's assertion that it has exercised sovereignty over the Gulf throughout history and without dispute, there is no serious evidence to confirm this. Libya became a state in 1951 and at no time prior to 1973 did Libya attempt to exercise sovereignty over the Gulf. Sovereignty was not exercised over the Gulf earlier during the Italian domination, or before, under the Turkish domination of Libya.

The lack of acquiescence by other states also is problematic. Immediately following Libya's 1973 proclamation of sovereignty over the Gulf, the United States filed protest. Other states similarly have protested the Libyan claim. In order to challenge the claim and show nonacquiescence, the United States continually has entered the Gulf. This nonacquiescence, together with the short duration of the claim, tends to defeat the application of the doctrine of historic bays to Libya's claim to the Gulf.

Straight Baselines

A final exception to the normal baseline method of delimitation of territorial waters is the straight baseline method. The concept of straight baselines was derived from the Fisheries Case, decided in 1951 by the International Court of Justice. The 1958 Convention

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60. See L. Bouchez, supra note 50, at 203.
61. See Francioni, Status, supra note 54, at 322; Spinnato, supra note 3, at 76-77.
62. Spinnato, supra note 3, at 74; see Francioni, Status, supra note 54, at 322.
63. Francioni, Status, supra note 54, at 322.
64. Spinnato, supra note 3, at 77.
65. Id.
66. See statement of Weinberger, supra note 1, at col. 2.
67. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Judgment of Dec. 18). In the Fisheries Case, Norway sought to protect the historic fisheries off its coast. The coastline has two unique characteristics. The Northern Arctic section is made up of great indentations which form the entrances to fjords. The Atlantic section is paralleled by an archipelago. Norway claimed as its territorial waters a width extending from a straight baseline drawn along the direction of coast connected by natural landmarks. Many of the inhabitants of coastal Norway were economically dependent on the fisheries landward of the baselines. Great Britain disputed this claim and sought to fish within the waters, consistent with the right of fishing associated with the principle of freedom of the high seas. The Court found for Norway and established the principles from which straight baselines emerged.
on the Territorial Sea and Contiguous Zone codified this method and it was readopted in its successor, the LOS Convention. The ambiguous language in the *Fisheries Case* decision, however, has led to many interpretation problems. The ambiguities have resulted in an increase in claims based on an arguably liberal application of the doctrine. Although the 1973 Libyan proclamation does not claim the use of the straight baseline method, an evaluation is appropriate in light of the *Fisheries Case*.

Article 7 of the LOS Convention provides four conditions for the application of the straight baseline method. First, the coastline must be deeply indented or cut into. Second, the drawing of baselines must not depart to any appreciable extent from the general direction of the coast. Third, the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. Finally, account may be taken of the locality’s peculiar economic interests which are clearly evidenced by long usage.

The Gulf of Sidra reasonably cannot be characterized as a deep indentation or cut into the coast. Instead, the Gulf is a large curvature in the coast of Libya 275 miles long and 150 miles deep. Assuming *arguendo* that the first condition of article 7 is met, the drawing of a straight baseline across the mouth of the Gulf would depart from the general direction of the coast with the effect of rounding off the African coast. Peculiar economic interest presents another obstacle to the application of the straight baseline method. As applied similarly within the historic bays doctrine, little evidence exists to support an historical economic dependence on the Gulf.

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68. LOS Convention, *supra* note 8, art. 7.
69. See Guttry, *supra* note 42, at 391.
70. See Francioni, *Status, supra* note 54, at 320 n. 53.
71. For a detailed analysis on the application of the straight baseline method, see Alexander & Hodgson, *Towards an Objective Analysis of Special Circumstances, Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls*, in *The Law of the Sea Institute, Occasional Paper No. 13* (1972).
72. LOS Convention, *supra* note 8, art. 7.
73. The straight baseline method also may apply to fringe islands. LOS Convention, *supra* note 8, art. 7, para. 1.
74. LOS Convention, *supra* note 8, art. 7, para. 3.
75. *Id.*
76. LOS Convention, *supra* note 8, art. 7, para. 5.
77. See Francioni, *Status, supra* note 54, at 319.
78. *Id.*
79. *Id.* Libya’s claim to the Gulf of Sidra, as represented in its Declaration of October 10, 1973, is based, among other things, on economic and security concerns. See Spinnato, *supra* note 3. Ironically, Libya used economic concern to justify its insistence on a 12 mile territorial sea during the 1958 United Nations Conference on the Territorial Sea. In particular, Libya claimed its fisheries were of great importance as a source of food, and together with sponges, consituted a valuable export. In sharp contrast to these assertions, two reports prepared through the United Nations Technical Assistance Pro-
For these reasons, the straight baseline method should not be applicable.

Under the three exceptions to the normal baseline rule, the Libyan claim to the Gulf is not supported by recognized principles of international law of the sea. Because the claim is not recognized, the Gulf belongs to no one state, but instead to all states. This conclusion raises the issue as to the legality of the presence of United States forces within the Gulf, discussed below.

**FREEDOM OF NAVIGATION**

Libya claims a twelve mile limit as its territorial seas. Those waters beyond the twelve mile limit are the high seas, of which most of the Gulf qualifies. The high seas are not subject to ownership or sovereignty by any state, but instead belong to the community of all states. The most important aspect of the high seas is the body of rights associated with it — most notably, freedom of navigation.

The right of free navigation is part of the universally recognized
doctrine of freedom of the seas. Under the modern doctrine, no nation may exercise exclusive dominion over the high seas. All states which observe the rules of international law enjoy the same rights and liberties, regardless of the naval pre-eminence of one state over another.

The modern doctrine has not always been accepted, but instead, emerged from historic conflict caused by the competing doctrine of closed seas. Dutchman Hugo Grotius largely is credited with championing the concept of freedom of the seas. In 1604 Grotius began writing his famous treatise, *Mare Liberum*, in defense of the Dutch right to trade with the East Indies, which had been challenged by the Portuguese. Grotius maintained that no nation could acquire a monopoly on commerce over open sea areas. Grotius defended the principle of free seas on two grounds. First, he maintained that that which cannot be possessed, such as the physical nature of the seas, cannot be the property of any one state. Second, he maintained that that which is by its nature inexhaustible and can be used inoffensively is common to all people. Accordingly, no nation should be able to claim exclusive dominion of the high seas, nor exclusive rights to navigation.

Grotius' *Mare Liberum* was based primarily on protection of free trade and communication. Modernly, this rationale continues as the basis of freedom of navigation and has been extended to incor-

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85. See Reppy, *supra* note 84, at 243.


87. See generally Macrae, *supra* note 86, at 185; Reppy, *supra* note 85.


90. See Lapidoth, *supra* note 84, at 271.

91. Freedom of the seas for the purposes of free trade and communication is a cornerstone of U.S. Naval policy: The United States is a maritime nation with only two international frontiers and thousands of miles of coastline bordering two of the world’s largest oceans . . . . Unlike its potential adversaries, the United States is heavily involved in the interdependent world economy. Should the sea lines of communication be interdicted for any length of time, the welfare of U.S. citizens would be radically impaired . . . . All U.S. international relations, be they economic, political, or military are influenced by this heavy dependence on free and unimpeded passage on the oceans of the world. The dependence on the seas impacts directly on all consideration of national strategy.
porate freedom of overflight for aircraft as well. Freedom of navigation is incorporated in both the LOS Convention and a predecessor, the Convention on the High Seas, and is considered an established principle of international law. Therefore, the presence alone of United States forces in the Gulf did not violate Libyan territorial sovereignty and was consistent with the right of all states to freely navigate the high seas. While the mere presence of United States forces in the Gulf appears proper, the question remains as to the lawfulness of conducting naval maneuvers on the high seas.

Naval and Air Manuevers

The use of the high seas for naval maneuvers, although not codified, is a recognized customary right provided that certain conditions are met. The right is limited to ensure safety and that other states' concurrent rights of free navigation are not interfered with.

The lawfulness of a naval maneuver or operation must be evaluated in light of other reasonable competing uses of the high seas. Factors to be considered in evaluating the reasonableness of the operation include the size of the ocean area involved, the density of traffic, other planned uses for the area, precautions taken to ensure safety to others, and the length of the operation. The application of these factors to the 6th Fleet maneuvers leads to a conclusion that the maneuvers were reasonable. The operations took place in a rela-


92. LOS Convention, supra note 8, art. 87, para. 1(b). For a brief synopsis of modern international aviation law, see Comment, Korean Airline Flight 007, 22 SAN DIEGO L. REV. 878-81 (1985).

93. LOS Convention, supra note 8, at art. 87, para. 2(b).


95. See Sohn, supra note 44, at 277.

96. Article 87, LOS Convention, provides for rights comprising, inter alia, freedom of navigation, overflight, laying of submarine cables, construction of artificial islands, conditional fishing, and scientific research. These rights are considered exemplary of recognized customary rights but are not intended to be exhaustive. The high seas are limited to peaceful purposes. LOS Convention, supra note 8, art. 87 & 88.

97. See L. BOUCHEZ, supra note 50, at 10.

98. A carrier task force is said to require 200 square miles when deployed for action. See K. BOOTH, supra note 45, at 140. Another large use of the high seas is for nuclear armament testing, which can require up to 200,000 square miles of isolated high seas. The legality of the testing of these weapons is disputed. L. BOUCHEZ, supra note 50, at 11.

tively isolated area of the Mediterranean with little shipping activity.\textsuperscript{100} The operation lasted only seventy-five hours,\textsuperscript{101} and prior notice was given to the International Civil Aviation Organization to ensure the safety to others.\textsuperscript{102} For these reasons, the United States forces were lawfully using the high seas. The question remains as to the lawfulness of the use of force which resulted from the United States presence in the Gulf.

**THE USE OF FORCE**

The U.N. Charter generally outlaws the use of armed forces to settle disputes.\textsuperscript{103} Members of the United Nations have accepted an obligation to settle all international disputes by peaceful means.\textsuperscript{104} Article 2(4) of the Charter contains the language proscribing the use of force: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations.”\textsuperscript{105}

Still, the Charter recognizes two exceptions in which the use of force is justified\textsuperscript{106} — in self-defense when an armed attack occurs, and when authorized by the United Nations Security Council.\textsuperscript{107} Therefore, any resort to armed force that is not justified under either exception violates international law. Because no action had been authorized under the latter exception, this Comment addresses only the issues concerning the justified use of force in self-defense. A starting point in the evaluation of the use of force is the characterization of the presence of United States forces in the Gulf, aside from the law-

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\textsuperscript{100} Id.
\textsuperscript{101} L.A. Times, Mar. 28, 1986, § 1, at 1, col. 1 (city ed.).
\textsuperscript{102} N.Y. Times, Mar. 27, 1986, at A8, col. 5.
\textsuperscript{105} U.N. Charter, supra note 9, art. 2, para. 4.
\textsuperscript{106} Professors Waldock and Brierly support the limited use of force to secure a legal right as outside of the general prohibition of article 2(4) against the use of force. The argument is supported as outside the qualifying language “against the territorial integrity” of another state, and based on dictum in the *Corfu Channel* case decided by the International Court of Justice in 1949. Thus, the presence of United States forces, if assumed to be a threat of force, would be justified as securing a legal right — the right of navigation. See 12 M. White, *Digest of International Law* 52-55 (1971) (citing Waldock); J. Brierly, *supra* note 8, at 428-30. But see D. Bowett, *Self-Defense in International Law* 14-15 (1958); I. Brownlie, *International Law and the Use of Force by States* 256, 264-68 (1963).
\textsuperscript{107} See Schachter, *The Right of States*, supra note 103, at 1620.
ful use of the high seas.

**Threat of Force**

Article 2(4) of the Charter requires members of the United Nations to refrain from the threat of force in any manner inconsistent with the purposes of the Charter.\(^{108}\) The question of whether the presence of the United States Sixth Fleet maneuvers constituted an unlawful threat of force depends on two factors. First, what constitutes a threat of force? Second, assuming the presence of United States forces is a threat of force, is it inconsistent with article 2(4) and thus unlawful?

A threat of force is an express or implied promise by a government of a resort to force, conditional on the nonacceptance of that government’s will.\(^{109}\) The United States considers the Gulf of Sidra to be high seas.\(^{110}\) In order to enforce this position, the United States has adopted a policy of challenging unlawful claims to the high seas. The challenge consists of conducting naval maneuvers within disputed waters. In this case, the maneuvers are protected by the formidable and virtually impregnable defense-umbrella of the nearby Sixth Fleet.\(^{111}\) The result is the imposition of United States will—that the disputed waters are high seas—on Libya with an implied promise that if force is used in opposition to the maneuvers, the offensive capabilities of the nearby Sixth Fleet will be engaged. Unquestionably, this type of gunboat diplomacy by the United States is a threat of force.\(^{112}\) The question remains as to its lawfulness with respect to article 2(4).

Among the enumerated purposes of the Charter is the maintenance of international peace and security, the prevention of threats to peace, and the suppression of acts of aggression.\(^{113}\) A threat of

\(^{108}\) See supra note 105 and accompanying text.


\(^{110}\) See supra note 1 and accompanying text.

\(^{111}\) See supra notes 10-38 and accompanying text.

\(^{112}\) "The danger is that of the presence of foreign warships becoming a form of political pressure or threat.” D. Bowett, The Law of the Sea 8 (1967). “Pressure on a resisting State consists in a naval or military demonstration; involving such a display of force as is calculated to achieve the desired effect.” L. Colombos, supra note 45, at 471. See generally K. Booth, supra note 45, at 155; see generally Truter supra note 91.

\(^{113}\) U.N. Charter, supra note 9, art. 1, para. 1. Among its other purposes are the creation of an international organization for the maintenance of peace, friendly relations and international cooperation. See L. Henkin, supra note 109, at 1005.
force by member states contrary to these purposes will be considered unlawful because it is inconsistent with article 2(4). In determining the lawfulness of the United States threat of force, account should be taken of all relevant circumstances. Included within these circumstances are the 1981 confrontation in the Gulf that resulted in the downing of two Libyan fighter jets, the drawing of the "line of death" by Colonel Quaddafi and its military implications, the anticipated military response of Libya by the United States in planning the "freedom of navigation" exercise, and the overall relationship between the two countries. In light of these circumstances and the anticipated result — a military confrontation — the threat of force by the United States would be a threat to peace in the region and to the security of Libya. Therefore, although the presence of United States forces conducting naval maneuvers within the Gulf is lawful in the isolated context of freedom of navigation, the "freedom of navigation" exercise may be rendered unlawful by the threat of force its presence conveys, which is contrary to the enumerated principles contained in the Charter and hence in contravention of article 2(4). However, even if the United States maneuvers within the Gulf may be characterized as an unlawful threat of force, the subsequent attack by Libya on United States forces is not necessarily lawful. The lawfulness of the Libyan use of force is dependent upon its justification as self-defense. If Libya's attack is not justified as such, then it also will be an unlawful use of force in contravention of article 2(4).

Self-defense

Self-defense is a universally recognized principle in customary international law. Article 51 of the U.N. Charter preserves the customary right of self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ." The purpose of self-defense is to preserve the status quo pending a solution to the dispute. It is a privilege which justifies otherwise illegal conduct if necessary for the protection of certain rights. A necessary precondition to the resort to force used in self-defense is a breach of a legal duty owed to the state acting in self-defense. But the customary right of self-defense is not unlimited in

114. See supra note 5.
115. See supra note 17.
116. See supra note 24.
117. See supra notes 80-102 and accompanying text.
118. See D. Bowett, supra note 106, at 11.
119. U.N. CHARTER, supra note 9, art. 51.
120. See D. Bowett, supra note 106, at 11.
121. Id. at 269.
122. Id.
discretion or scope. Force used in self-defense must be both necessary and proportionate. Traditionally, self-defense is justified when the necessity for action is instant, overwhelming, and leaves no choice of means or moment for deliberation. The force used is limited to force in proportion to the danger and must not be excessive or go beyond that required for the protection of the substantive rights involved.

The most apparent substantive right, that if breached will justify force used in self-defense, is the right of territorial integrity. However, because Libya does not have an internationally recognized claim to the Gulf of Sidra, it has no substantive right to protect. Therefore, the deadly use of force against the alleged trespasser remains unlawful as being disproportionate to the threat conveyed.

While Libya does not have a right to self-defense against an intruder into the disputed Gulf waters, one must consider whether Libya was justified in using force against the United States’ unlawful threat of force. Traditional customary requirements of proportionality apply in this situation — the necessity for action in self-defense must be instant and overwhelming, leaving no choice of means or moment for deliberation. Libya’s actions do not meet these criteria. United States forces had entered the disputed waters eight prior times, and had given advance notice of their intent to conduct the maneuvers. The Libyans did not attack instantly, but instead waited until two hours after the maneuvers had begun. Thus, the Libyans had ample time under the circumstances for choice of means and deliberation, for example, diplomatic protest or a request

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124. See D. Bowett, supra note 106, at 269.
125. Id. at 29.
126. I. Brownlie, supra note 106, at 374-75; Comment, supra note 92, at 882; Froman, supra note 45, at 665-66. However, a use of force against an intruder would be justified if the intrusion was non-innocent and into a state’s territorial waters, subject only to the traditional requirements of proportionality and necessity. See generally Comment, supra note 92, at 870, 881-82, 885 (civil airline intrusion into Soviet territorial airspace). Generally, passage is innocent if it is not prejudicial to the peace, good order, or security of the coastal state. LOS Convention, supra note 8, art. 3. Under the LOS Convention, article 30, a state may require a noninnocent intruder to leave immediately, subject to customary rules regarding the use of force. LOS Convention, supra note 8, art. 30. See Froman, supra note 45, at 625-26, 664-65 (submarine intrusion into Swedish territorial waters). Libya claims a 12 mile territorial sea. See supra note 80 and accompanying text.
127. See supra notes 1 and 14.
for protection to the United Nations Security Council. Under these circumstances, despite the unlawful threat of force by the United States naval maneuvers, the Libyan attack cannot be characterized as a justified act of self-defense. Because the repeated missile attacks by Libyan forces against United States aircraft were not justified as self-defense, the only characterization of the attacks would be as an unlawful use of force in contravention of article 2(4) of the Charter.

Given the unlawful use of force against the United States, was the response by United States forces justified as self-defense? Clearly, if an "armed attack" occurs, a state may act in self-defense within the literal meaning of article 51, subject to the traditional requirements of necessity and proportionality. When missiles are fired at aircraft operating lawfully, certainly it is necessary to abate the source before one should find its target. Similarly, approaching high speed missile-boats must be stopped at the threshold of their missile range. These are necessary steps for the protection of life which leave no choice of means or moment for deliberation. It is axiomatic that missile fire should be met with missile fire and as such is proportionate. When the source of the missile fire is remote, as in the case of the Surt SAM missile site, a state may respond beyond the immediate area of attack when sufficient reasons exist to expect a continuation of attacks from the same source. Thus, the defensive actions against the Surt missile site would be justified because the site was a source of the original armed attack, and soon after it was hit it again became operational. Therefore, the force used by United States forces in repelling the Libyan attacks was justified under customary international law and within the exception of article 51 to the U.N. Charter's prohibition on the use of force.

CONCLUSION

The recent conflict between Libya and the United States is representative of the growing threat to freedom of navigation by states to unilaterally claim large ocean expanses. The Libyan claim to the Gulf of Sidra is not supported by international law. The use of force


131. See supra notes 119-23 and accompanying text.

by Libya in an attempt to settle this dispute is a violation of the prohibition on the use of force in the United Nations Charter and of customary international laws.

The conflict between Libya and the United States is not a new one. Instead, it raises the age-old conflict between the competing principles of sovereignty and freedom of the seas. The most recent conflict in the Gulf of Sidra evinces the necessity for adherence to the principles contained in the Charter, namely, the pacific resolution of disputes. The alternative is, as the recent conflict has shown, an unfortunate one and threatens the stability of the region.

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