

Faculty of Law

Does a coastal State have the right to use potentially lethal force against submarines in its internal waters and territorial sea?

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Word count: 17 997

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Master thesis in Law of the Sea ... September 2015

Acknowledgements:

First, I would like to express my gratitude to my supervisor Magne Frostad. Thanks for our discussions, your inspiration and the time you have dedicated to my research project over the last months.

Furthermore, I would like to thank Ola Engedahl and Ove Bring for providing me with relevant information and research material, as well as inspiration to continue to work with the topics at hand.

Thanks to UIT - The Arctic University of Norway, my family, fellow students and friends for your support and encouragement. Finally, I would like to thank my boyfriend Martin for his patience and support during the last months.

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Chapter I – Background Information

1.1 – Introduction

Submarine intrusions were a major security issue for several coastal states in the aftermath of World War II and during the Cold War. Recent incidents suggest that this might not only be a problem that belongs to the past. How may then a coastal State defend itself against such intrusions? Is the coastal State entitled to use force? If yes, do human rights influence the legality of the use of force? These are questions that require a further analysis in light of the recent submarine incidents.

The topic of this thesis is inspired by what occurred in the Swedish territorial sea in October 2014. What is likely to have been a submarine was spotted several times in the *Skjaergaard* of Stockholm. Sweden used a lot of resources and non-lethal measures to locate the intruder, without any success.¹ A similar incident occurred in Finland, where a submarine was spotted close to the Finnish capital Helsinki in April 2015.²

In the aftermath of Sweden's unsuccessful operation in October 2014, a debate arose in Sweden on the authorization to use potentially lethal force against submarines. Some legal scholars have argued that Sweden was allowed to use potentially deadly force in order to force the submarine up to the surface³. Sweden, on the other hand, seems to have intentionally avoided the use of potentially lethal force in respect of human rights, as contained in ECHR, with heavy emphasis placed upon the right to life.⁴

¹ <http://www.forsvarsmakten.se/sv/aktuellt/2014/10/underrattelseoperationen-avslutad/> (Last accessed 15 August 2015).

² <http://www.telegraph.co.uk/news/worldnews/europe/finland/11568042/Finland-fires-warning-shots-at-foreign-submarine-near-Helsinki.html> (Last accessed 20 August 2015).

³ http://www.svd.se/tvist-om-marinen-far-anvanda-dodligt-vald_4501740 (Last accessed 10 August 2015).

⁴ Id.

Sweden's reaction to the submarine intrusion indicates that the right of a coastal State to protect itself against submerged submarines in its maritime zones must be balanced against the right to life of the individuals operating the submarines.

1.2 – The relationship between the law of the sea and human rights.

The Law of the Sea is one of the oldest branches of international law.⁵ By the work *Mare Liberum* written by Hugo Grotius in the seventeenth century, the freedom of the seas doctrine arose. As “the oceans have been and continue to be fundamental to human life”,⁶ the development of the modern law of the sea has moved away from this doctrine and into a regime of creeping coastal State jurisdiction. This development provides the coastal states with greater powers to limit the freedoms of the seas.

The primary function of the law of the sea is the spatial distribution of jurisdiction to sovereign coastal states by “dividing the ocean into multiple jurisdictional zones”.⁷ In these different zones, the coastal State and third states are granted different rights and obligations. The State's sovereignty decreases as the distance to the coast is increasing.

The Law of the Sea Convention (LOSC),⁸ negotiated and adopted at UNCLOS III, is often referred to as the “Constitution of the oceans” and as a framework Convention. With its 320 Articles, it is recognized as one of the most comprehensive legal Conventions of all time.

Even though the LOSC is considered a comprehensive framework convention, it is not “a human rights instrument per se”.⁹ Its main objective is to provide a legal order of the oceans. Yet, it includes provisions concerning human beings.¹⁰ “As human activities in the oceans...are not free from risk, elements of humanity must be taken into account in the

⁵ Tullio Treves, “Human rights and law of the sea,” *Berkeley Journal of international law* 28 (2010): 1-14, 1.

⁶ Yoshufumi. Tanaka, *The International Law of the Sea*, (Cambridge: Cambridge University Press, 2012,) 3.

⁷ *Ibid*, 4.

⁸ UN Convention on the Law of the Sea 1982, 1833 UNTS 397.

⁹ Treves (2010), 3.

¹⁰ *Id.*

application of the law of the sea”.¹¹ By virtue of Article 293(1) of the LOSC,¹² the Convention “includes international law in general terms in its provision concerning the applicable law”.¹³ Thus, “it could hardly be said that the law of the sea is indifferent to human rights, human rights being to some extent one of its interpretative guidelines”.¹⁴

International human rights law developed mainly in the aftermath of the atrocities committed during World War II. Its main function is to provide rights to individuals typically within the jurisdiction of the states. One of the major human rights instruments is the European Convention on Human Rights (ECHR),¹⁵ and with all 47 member states of the Council of Europe ratifying and accepting the rights and freedoms contained in the Convention, over 800 million people are currently protected by it.¹⁶ As individual human rights may conflict with the rights of the coastal states under the law of the sea, it is clear that the two legal systems in some cases might overlap. An illustrative example of such an overlap is the use of potentially lethal force against submarines.

The role of the European Court of Human Rights (ECtHR) is to “interpret and apply the Convention”.¹⁷ Its “principal role is to pronounce on applications, brought both by individuals and states under the European Convention on Human Rights”.¹⁸ The Court’s decisions are final¹⁹ and the parties “undertake to abide by the final judgement of the Court in any case to which they are parties”.²⁰

¹¹ Tanaka (2012), 16.

¹² In Article 293 of the LOSC, it is stated that “[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention”.

¹³ Stefano Dominelli, “Human Rights at SEA: Does the Law of the Sea Clash with Well-Established Human Rights Principles?” in *Jurisdiction and Control at Sea: Some Environmental and Security Issues*, ed Gemma Andreone (Napoli: Giannini editore, Marsafenet, 2014): 127-151, 131.

¹⁴ *Ibid.*, 134.

¹⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950, ETS 5.

¹⁶ David Harris, et al, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights (Third Edition)*, (New York: Oxford University Press, 2014,) 4.

¹⁷ ECHR Article 32 (1).

¹⁸ Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights – sixth edition* (New York: Oxford University Press, 2014,) 21.

¹⁹ ECHR Article 44.

²⁰ ECHR Article 46(1).

In the 1978 *Tyrer* case, the Court stated that “[t]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present day conditions”.²¹ This “living instrument”-doctrine has three main features. First, the Court will take into account present day conditions. Thus, the Court rarely looks at the intention of the negotiating states in relation to the Articles of the ECHR when it is interpreting its provisions. Hence, the preparatory works can be invoked as “a general guide to the general intentions of the Contracting Parties, rather than to delimit strictly the scope of particular Articles”.²² Second, the “present-day standards that the Court takes into consideration must somehow be *common* or *shared* amongst contracting states”.²³ This is evident due to the merits of the *M.C v. Bulgaria* case, where the Court analyzes the provisions concerning rape in the domestic law of several European countries in order to establish how the consent to sexual intercourse must be given.²⁴ Third, “the Court will not assign decisive importance to what the respondent state... considers to be accepted standards in the case at hand”.²⁵ The reasoning behind this is that the respondent State might have standards that are too low to meet the criteria established in light of present-day conditions.

1.3 – Research question and objective of the thesis

The objective of this thesis will be to discuss the following research questions:

- What are the regulations on the use of force in the Law of the Sea?
- How are the regulations on the use of force in the Law of the Sea applied in the case of submarines?

²¹ *Tyrer v. The United Kingdom*. Application No. 5856/72, Chamber judgement of 25.04.1978, para 31.

²² Rainey, Wicks and Ovey (2014), 67. See also Njål Høstmælingen, *Internasjonale Menneskerettigheter* (Oslo: Universitetsforlaget, 2003,) 90.

²³ George Letsas, “The ECHR as a living instrument: its meaning and legitimacy”, in *Constituting Europe: The European Court of Human Rights in National, European and Global Context*, ed. Andreas Føllesdal, Birgit Peters and Geir Ulfstein (Cambridge: Cambridge University Press, 2012,) 106-141, 108.

²⁴ *M.C v. Bulgaria*, Application no. 39272/98, Chamber judgement of 04.12.2003 paras 90-100.

²⁵ Letsas (2012), 109.

- Does the individual right to life under the European Convention on Human Rights constitute a limitation on such use of force?

Even though the three questions are different in nature, they all constitute fundamental parts of the main research question, namely:

- Does the coastal State have a right to use potentially lethal force against submarines in its internal waters and its territorial sea?

1.4– Scope and outline of the thesis

This thesis will address the authorization and the limitation on the right to use force against submarines during times of peace. As the use of force naturally generate questions belonging to the law of armed conflicts, it is necessary to mention that this aspect of the use of force will not be dealt with in this thesis. The scope of the thesis thus contains the use of force in light of the relevant framework within the law of the sea and human rights law.

This thesis is divided into seven chapters. The introduction and general background information is provided in Chapter I. In Chapter II, I will explain the different relevant regimes within the law of the sea, in order to place the subject matter in a wider context.

Chapter III addresses the regulation of the use of force in the law of the sea. Furthermore, Chapter IV addresses the use of force and human rights.

In Chapters V and VI, I will address the use of potentially lethal force against submarines and provide the conclusions of the main research question.

1.5 – Legal sources and methodology

In considerations of the outlined objectives of the thesis, the relevant legal sources are typically found within the law of the sea itself. Special consideration will then be given to the LOSC and customary international law elaborating on the LOSC. But as the law of the

sea cannot be considered as a separate branch of international law, other fields of law also apply. This thesis will therefore also look at the authorization and limitations on the use of potentially lethal force against submarines found in the ECHR.

The legal sources will be interpreted and applied with a revised positivistic methodology. This methodology is based on summarization of “theories that focus upon describing the law as it is backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations”.²⁶ Furthermore, the legal sources will be identified in accordance with Article 38 of the Statute of the International Court of Justice,²⁷ whereas the method for analyzing treaties will be in accordance with the 1969 Vienna Convention on the Law of Treaties (VCLT),²⁸ especially Article 31(1)(a), where it is stated that a treaty shall be interpreted in "good faith in accordance with the ordinary meaning...in their context and in the light of its object and purpose".

The research questions raised in this thesis create several challenges. First, there are few sources dealing with the authorization on the use of force against submarines. This specific challenge will require the writer to undertake independent and critical thinking when the research questions in this thesis are discussed. Second, as there are few written sources on the subject matter, special considerations must be given to the development of customary international law. This means that the LOSC will have to be interpreted in light of customary law throughout the thesis. The challenges with thoroughly identifying the relevant State practice and *opinio juris* require extensive work which might be hard to fit within the time and length requirements of a masters thesis. Thus, judicial literature will be applied to a great extent when the writer is trying to identify the customary law on the use of force against submarines. Selected state practice will nevertheless be more closely examined. Third, this customary law must be balanced against the rights contained in the ECHR. This creates a difficult legal scenario, as the LOSC and customary international law developed in the law of the sea must be balanced against the ECHR and the ECtHR’s interpretation of the Convention. Furthermore, Article 31(3)(c) of the VCLT states that “any relevant rules of international law applicable in the relations between the parties”

²⁶ Steven R. Rather and Anne-Marie Slaughter, "Appraising the methods of international law: A prospectus for readers," *American Journal of International Law* 93 (1999), 1-21, 4.

²⁷ Charter of the United Nations and the Statute of the International Court of Justice 1945, 1 UNTS XVI.

²⁸ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

must be taken into account. Thus, the interplay between the two different legal regimes must be subject to closer examination.

Chapter II – Territorial sovereignty of the coastal State

The aim of this chapter is to provide the reader with the relevant rules governing the obligations and rights of the coastal State in its internal waters and territorial sea.

Furthermore, the regime of innocent passage will be explained and discussed. Finally, the reader will be provided with the obligations of states operating with submarines, and the legal regime concerning submarines in the internal waters and territorial seas.

2.1 – The coastal State’s jurisdiction over foreign vessels in its internal waters

It is a general view that “internal waters form an integral part of the territory of a coastal State”.²⁹ This indicates that the coastal State in this maritime area normally exercises the same legal regime as it does within its land territory. Thus, the regime of internal waters is merely touched upon in the legal framework related to the law of the sea.

The spatial scope of the territorial sea is defined by the baselines measured by the coastal State. The baseline is the line from which the outer limits of the territorial sea and other maritime zones are measured.³⁰ In accordance with Articles 5 and 7 of the LOSC, two different methods for the construction of such baselines are identified in the Convention.

The primary method of measuring the baselines is to apply the rule of normal baselines contained in Article 5. This is also explicitly stated by the wording “except where otherwise provided in this Convention”. Furthermore, the normal baseline “is the low-water line along the coast”.³¹ As the internal waters are recognized as part of a state’s

²⁹ Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Berlin: Springer, 2005,) 45.

³⁰ R.R Churchill and A.V Lowe, *The law of the sea—third edition*, (New York: Juris Publishing, 1999) 31.

³¹ In the *Fisheries Case (UK v. Norway)*, the International Court of Justice (ICJ) recognized the use of straight baselines. As a direct result of the judgement, Article 7 of the LOSC forms an exception from Article 5 and enables the coastal states to draw straight baselines where the criteria listed in the Article are met. That the coastal states are empowered to draw straight baselines where this is reasonable due to special geographical

territory, the coastal State has “sovereignty over those waters fully encompassing prescriptive and enforcement jurisdiction”.³² By entering the internal waters of a coastal State, vessels have thus accepted to be subject to the laws and regulations of the State.

When the baselines are established, one can identify the spatial scope of the internal waters. In accordance with Article 8 of the LOSC, the internal waters are recognized as being the “waters on the landward side of the baseline of the territorial sea”. Internal waters embrace “different kinds of natural waters or artificial waterways of a state”.³³ This naturally includes “lakes, rivers, bays, gulfs, estuaries, creeks, ports and canals”.³⁴

Yet another evidence of the sovereignty of the coastal State is the lack of any right of innocent passage for foreign vessels through internal waters. The only exception to this rule is found in Article 8(2) of the LOSC, where it is stated that “[w]here the establishment of a straight baseline... has the effect of enclosing as internal waters areas which had not previously been considered as such”, the right of innocent passage of foreign vessels still exist. Furthermore, the right of passage seems to exist where a situation of *force majeure* occurs.

In its internal waters, a coastal State is entitled to protect itself against potential threats. This is most evident due to the fact that the coastal State in certain situations is entitled to close its ports to foreign vessels. The right to such protection was recognized in the 1958 *Saudi-Arabia v. Aramco* arbitration, where the arbitral award stated that “[a]ccording to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require”.³⁵ Measures may thus be undertaken “to safeguard good order on shore, to signal political

features must be said to create a flexible and equitable system in the law of the sea. See *Anglo-Norwegian fisheries*, UK v. Norway, Order, 1951, ICJ 117 (Jan. 18).

³² D Rothwell and T. Stevens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010) 54. See also N. Klein, *Maritime Security and the Law of the Sea*, (New York: Oxford University Press, 2011) 65.

³³ Rainer Lagoni, “Internal Waters,” in *Encyclopedia of Public International Law II*, ed. Rudolf Bernhardt (Heidelberg, 1995): 1034-1036, 1034.

³⁴ Yang (2005), 47.

³⁵ *Saudi-Arabia v. Arabian American Oil Company (ARAMCO) 1963*, in G. Brugmann, *Access to Maritime Ports* (Norderstedt: Books on demand, 2003) 1.

displeasure or to defend vital interests”.³⁶ One “vital interest” recognized in this matter is the protection of public safety,³⁷ which might apply when a foreign submarine is operating in the internal waters without consent. On the other hand, ports are recognized to lie under the territorial sovereignty of the coastal State. Thus, the State may be entitled to “regulate foreign vessels’ entry to its ports”³⁸ and close the ports in any matter. However, it seems clear that the coastal State is entitled to close its ports when it considers this to be a necessary measure.

It is clear that the security need of the coastal State in its internal waters enables it to take measures to protect itself. What these measures might include will be discussed in chapter III.

The maritime zone adjacent to the internal waters is the territorial sea. It is necessary to define the legal and spatial scope of the territorial sea in order to explain the authorization of the use of force by the coastal State within this maritime area.

2.2 – The coastal State’s jurisdiction over foreign vessels in its territorial sea

The territorial sea is, like the internal waters, under the territorial sovereignty of the coastal State. That the territorial sea is subject to the sovereignty of the coastal State is evident due to the wording of Article 2 of the LOSC. Here, it follows that “[the sovereignty of the coastal State extends, beyond its land territory and internal waters...to an adjacent belt of sea, described as the territorial sea”.

Further, in the 1909 *Grisbadara* case, the arbitral award stated that “the maritime territory is an essential appurtenance of land territory” and that this area is “an inseparable appurtenance of this land territory”.³⁹ These statements emphasise the legal status of the territorial sea, long before the adoption of the LOSC.

³⁶ Klein, Natalie. *Maritime Security and the Law of the Sea* (New York: Oxford University Press, 2011,) 67.

³⁷ De La Fayette, “Access to ports in International Law,” in *The International Journal of Marine and Coastal Law* 11 (1996): 1-22, in N. Klein, *Maritime Security and the Law of the Sea*, 67.

³⁸ Tanaka (2012), 80.

³⁹ *Grisbadarna Case* (Norway v. Sweden), Award of 23 October 1909, 4.

In Article 3 of the LOSC, the spatial scope of the territorial sea is defined. In accordance with the provision, “every State has the right to establish the breadth of the territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines”.⁴⁰ Further, the sovereignty of the coastal State extends to the seabed and subsoil below and the airspace above the territorial sea.⁴¹ Because of the proximity to the coast, it is evident that a lot of maritime activities are undertaken by the coastal State in its territorial sea.⁴²

Besides being a maritime area where coastal states are entitled to enjoy their freedom of sovereignty, the territorial sea is also “an area of considerable security sensitivity for coastal States”.⁴³ This is emphasised by the historical background of the territorial sea, where its main function was to provide the states with protection against hostile activities and intruders.⁴⁴

Even though the LOSC recognizes the sovereignty of a coastal State over its territorial seas, an exception from these rights is recognized by the regime of innocent passage. The regime of innocent passage thus constitutes one example where the LOSC balances different rights and obligations. On this specific subject matter, the right of navigation must be balanced against the rights of the coastal State. One must take a closer look at how the right of innocent passage is affecting the interests of the coastal State, among them the right of security and protection.

The “coastal State’s sovereignty over the territorial sea is restricted by the right of innocent passage for foreign vessels”.⁴⁵ Innocent passage can thus be said to constitute a major exception to the coastal State’s right to enjoy unfettered and unlimited rights and powers in its territorial sea. It must be determined what constitutes “passage” in accordance with the LOSC.

⁴⁰ See the definition of baselines in chapter 2.1.

⁴¹ LOSC Article 2 (2).

⁴² Rothwell and Stevens (2010), 58.

⁴³ Id.

⁴⁴ http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm (Last accessed 10 August 2015).

⁴⁵ Tanaka (2012), 85.

The definition of “passage” can be found in Article 18(1), and encompasses both lateral and vertical passage.⁴⁶ Lateral passage is defined in Article 18(1)(a), which states; “Passage means navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters”. Vertical passage includes both inwards and outbound navigation and is defined as passage where the vessel is “proceeding to or from internal waters or a call at such roadstead or port facility” in Article 18(1)(b) in the LOSC.

In Article 18(2) it is further stated that passage shall be continuous and expeditious, but the passage includes stopping or anchoring if this is necessary due to navigation or in cases of *force majeure*.

Due to the right of navigation, the coastal State must accept and tolerate certain activities by foreign flagged vessels in its territorial sea. The duties of the coastal State in this regard are stated in Article 24 of the LOSC. In accordance with Article 24, the coastal State is deprived of the ability to interfere with the passage except in the cases where such interference is recognized in the LOSC, UN Security Council resolutions, etc.

Several exceptions from the abovementioned duty of the coastal State are nevertheless found in Article 19 of the LOSC, which states that “passage is innocent as long as it isn’t prejudicial to the peace, good order or security of the coastal state”. The Article then lists activities that render passage non-innocent in number 2.

In accordance with the Convention, “only activities are here of relevance”.⁴⁷ The list of activities is long, and is not intended to be exhaustive due to the wording of Article 19(2) letter l. Also activities besides those expressly mentioned, which have no “direct bearing on passage”, may be considered prejudicial to the peace, good order or security of the coastal State”,⁴⁸ and may thus render the passage “non-innocent”.

⁴⁶ Id.

⁴⁷ K Hakapää and E J Molenaar, “Innocent Passage – Past and Present,” *Marine Policy* 23 (1999): 131-145, 132.

⁴⁸ Id.

With the wording contained in Article 19, two specific questions arises; can passage be considered non-innocent on the sole basis of its first paragraph and what activity in paragraph 2 is applicable in the case of submarines? I will start by addressing the first question.

If paragraph 2 of Article 19 is considered to be an illustrative list of paragraph 1, then paragraph 1 may be regarded as superfluous.⁴⁹ Further, Article 19(1) doesn't mention "activities" as a criterion. Thus, it is possible to argue that a ship can be in "non-innocent" passage, even though it is not conducting any activities in the territorial sea of the coastal State.

On the other hand, the regime of innocent passage was negotiated and adopted on the basis of the freedom of navigation by several maritime states. If Article 19(1) arguably can be considered as a sufficient legal basis for rendering passage "non-innocent", this would constitute a major impact on the abovementioned freedom. Thus, the coastal State would be granted more jurisdiction in its territorial sea than it was intended to have in the first place.

Tanaka nevertheless seems to argue that Article 19(1) can be used on its own to render passage "non-innocent". The argument is based on the fact that "the Japanese government takes the view that the passage of foreign warships carrying nuclear weapons through its territorial sea is not innocent, whilst Japan generally admits the right of innocent passage of foreign warships".⁵⁰ As a curiosity, it should be emphasised that this view doesn't seem to be shared by Russia and the US. These countries do not recognize the right to apply article 19(1) as an independent source for this purpose.⁵¹ This seems to be based on the argument that the freedom of navigation prevails where the opposite is not explicitly recognized in Article 19(2).

⁴⁹ Tanaka (2012), 87.

⁵⁰ Id.

⁵¹ "A ship passing through the territorial sea that does not engage in any of those activities [listed in Article 19(2)] is in innocent passage". 1989 USA-USSR Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage, published by Office for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* 14, December 1989, available at: http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE14.pdf

It might seem that Article 19(1) can be interpreted to be independent from the list of activities in article 19(2). Thus, the conclusion must be that passage can be considered as non-innocent solely on the basis of Article 19(1).

The next question that must be addressed is whether some of the activities listed in Article 19(2) are applicable in the case of submarines.

Depending on the purpose of the passage through the territorial sea of the coastal State, several of the activities listed in Article 19(2) might apply in the case of submarines.

Of special interest in the case of submarines is Article 19(2)(a), which states that passage is non-innocent if the vessel engages in activities that cause “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State”.⁵² A natural interpretation of the wording “any”, means that all potential threats constituted by the foreign flagged submarine may render the passage “non-innocent”. However, it must be emphasised that the threat must be based on the use of force. If a submarine is only conducting research or survey activities, its activities cannot automatically be regarded as a threat of the use of force. Such activities would instead fall under the scope of article 19(2)(j).⁵³ That also *litra j* is of special interest in the case of submarines is due to the fact that “within foreign territorial sea areas there exists a general prohibition of ‘research or survey activities’”.⁵⁴ Furthermore, there is a prohibition of “any exercise or practice with weapons of any kind”,⁵⁵ and “any act aimed at collecting information to the prejudice of the defense or security of the coastal State”⁵⁶ during passage in foreign territorial seas.

⁵² See also the UN Charter Article 2(4), where it is stated that “[m]embers shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”.

⁵³ In Article 19 (j) it is stated that passage is non-innocent if the vessel is engaging in “the carrying out of research or survey activities”.

⁵⁴ Wolff Heintschel Von Heinegg, “Submarine Operations and International Law”, in *Law at war – The Law as it was and the Law as it Should Be: Amicorum Ove Bring*, ed. Ola Engedahl and Pål Wrange, (The Netherlands: Koninklijke Brill BV, 2008), 141-161, 147.

⁵⁵ Article 19(2)(b).

⁵⁶ Article 19(2)(c).

By virtue of the second paragraph of Article 19, several security interests of the coastal State are recognized. While several provisions in the LOSC acknowledge the freedom of navigation in the territorial sea, it is also providing the coastal State protection against hostile activities affecting its security. While it might seem like the regime of innocent passage is limiting the coastal State's right to protection at first, it must be emphasised that the second paragraph is providing the coastal State's with the right to take action against certain activities that is rendering passage non-innocent.

It seems like both the first and the second paragraph of Article 19 can be applied to render passage non-innocent. However, due to the scope of this thesis only Article 19(2) will be continuously linked towards the discussions.

2.3 – Obligations and rights of States operating with submarines

As recognized in Article 17 of the LOSC, “ships of all States...enjoy the right of innocent passage through the territorial sea”. A natural interpretation of the provision thus reaffirms that also submarines enjoy the right of innocent passage.

However, in accordance with Article 20, states operating with submarines are “required to navigate on the surface and to show their flag”. The rule was first adopted in Article 14(6) the 1958 Geneva Convention.⁵⁷ The reasoning behind the rule originating in the 1920s was, among others, that “since navigational laws are universally framed upon the theory of surface navigation” the submarine entering the territorial sea of a coastal State “in time of peace may be properly required to remain upon the surface, so that it may conform to the accepted standards of safety to navigation”.⁵⁸ The idea of navigational security further developed as Diena in 1925 argued, “the coastal State could not verify the pacific character of the passage unless the submarine was on the surface”.⁵⁹

⁵⁷ 1958 Convention on the Territorial Sea and the Contiguous Zone 1958, 516 UNTS 205.

⁵⁸ D. P. O'Connell, *The International Law of the Sea Volume 1*, (New York: Oxford University Press, 1982) 294.

⁵⁹ Diena, 32 *Annuaire* (1925), page 524, cited in D.P O'Connell *The International Law of the Sea Volume 1*, 295.

During the negotiations of UNCLOS III, the protection of the passage rights of submarines was a critical concern for the United States and the former Soviet Union due to strategic concerns.⁶⁰ However, the argument that submarines might pose a serious danger to the security of the coastal State outweighed the right to operate with submarines in their normal submerged mode in the territorial sea of a foreign coastal State.⁶¹

With the requirement to navigate on the surface, now embodied in Article 20 of the LOSC, two specific questions arise; Is a breach of the requirement to navigate on the surface a negation of the right of innocent passage and to what extent can the coastal State use force to prevent passage which it considers “non-innocent”?

As discussed above in chapter 2.3, the security interests of the coastal State provide for specific obligations affecting states operating submarines. As this obligation, requiring the submarine to navigate on the surface and show its flag, is contained in a separate provision of the LOSC, it must be examined whether or not a breach of this obligation will render the passage “non-innocent” in accordance with Article 19.

On the one hand, the drafters of the LOSC “could easily included [Article 20] in the...list of non-innocent activities. The failure to do so indicates the drafters’ intentions not to make surface operation a requirement of innocence for submarines”.⁶²

On the other hand, Tanaka argues that “it seems that a submerged submarine in the territorial sea is not considered as innocent passage”.⁶³ Fitzmaurice further argues that “a submarine that traverses the territorial sea submerged or not showing her flag may possibly not be in innocent passage, but this will not be because she is submerged or not showing her flag”.⁶⁴ In other words, it seems that submerged passage is not an activity that renders passage non-innocent in itself.

⁶⁰ Klein (2011), 42.

⁶¹ UN Conference on the Law of the Sea Vol. 3, UN Doc A/Conf. 13/C.1/SR.36-40, page 112, paras 28-29 (Mr Sorensen, Denmark).

⁶² David Froman, “Uncharted Waters: Non-innocent passage of Warships in the Territorial Sea,” *San Diego Law Review* 21 (1984): 625-681, 663.

⁶³ Tanaka (2012), 87.

⁶⁴ G. Fitzmaurice, “Some Results of the Geneva Conference on the Law of the Sea”, *International and Comparative Law Quarterly* 8 (1958): 73-121, 98.

Following the line of the arguments made by Tanaka, it seems logical to argue that submerged passage in the territorial sea will be contrary to the abovementioned letters contained in Article 19(2) of the LOSC.⁶⁵ As a submarine naturally constitutes a potentially serious danger to the coastal State's security, submerged passage can be seen as a threat of use of force against the territorial integrity of those states. The legal basis for this argument is that "the maritime territory is an essential appurtenance of land territory"⁶⁶ and that the coastal State in this maritime zone enjoys sovereignty.

In this regard, the obligations contained in Article 20 must be viewed separately from Article 19 of the Convention. It is thus clear that it is not the violation of Article 20 in itself that render the passage "non-innocent", but the nature of the submarine and its normal activities.⁶⁷

Another argument that can be raised on the subject matter is that it would be impossible for the coastal State to verify that the submarine is in innocent passage while it is not navigating on the surface. As submerged passage naturally restricts the coastal states opportunity to verify whether or not the passage is innocent, the submarine can presumably be considered to not exercise its right of innocent passage in this circumstances.

As passage cannot be considered innocent in the territorial sea for a submerged submarine due to its nature, it is clear that the coastal State may be entitled to take measures to prevent such passage. In this regard, a brief introduction of the rights of the coastal State to prevent non-innocent passage is in place.

The right to protection of the coastal State is contained in Article 25 of the LOSC. The provision states that "[t]he coastal State may take necessary steps in its territorial sea to prevent passage which is not innocent". The Article functions as the legal basis for a justified reaction against a submerged submarine, as it is not considered as enjoying the right of innocent passage.

⁶⁵ Articles 19(2)(a), 19(2)(b), 19(2)(c) and 19(2)(j).

⁶⁶ *Grisbadarna Case (Norway v. Sweden)*, 4.

⁶⁷ This view doesn't seem to be supported by the US Department of the Navy, which simply states that "a vessel does not enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged." *The Commander's Handbook on the Law of Naval Operations* (July 2007,) Section 2.5.2.1.

Article 25 is broadly defined and thus leaves a wide margin of discretion to the coastal State when it decides what constitutes “necessary steps”. By virtue of the wording, the provision “gives to the coastal State considerable scope of variety of responses depending on the circumstances”.⁶⁸ Necessary steps “could include an exchange of communications requesting a delinquent ship to refrain from certain acts, a request that the ship leave the territorial sea immediately, [or] the positioning of vessels to prevent the ship from continuing its passage”.⁶⁹ A common aspect for all these “steps” is that they do not including force against the foreign vessel.

Furthermore, Rothwell and Stevens state that “necessary steps” could include “the use of armed force” when a ship is posing a threat to the coastal State.⁷⁰

The LOSC does not define the scope of measures that can be undertaken by the coastal State for its own protection. Rothwell and Stevens argues that it thus “goes to the question of State sovereignty and how a State may choose to protect itself from what may be perceived or actually is, a threat”.⁷¹

As a submarine can be said to pose a threat of force to the territorial integrity of the coastal State affected, it may be implied that the threshold for the use of actual force might be lower in such circumstances. This leads to my first research question: The regulations and restrictions of the use of force in the law of the sea.

⁶⁸ Rothwell and Stevens (2010), 218.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

Chapter III – The regulation of the use of force in the Law of the Sea

The aim of this chapter is to provide an overview of the authorization to use force in the law of the sea. The right of the coastal State to use force against submarines in “non-innocent” passage and in its internal waters will furthermore be examined.

As a starting point it must be emphasised that the LOSC was adopted with several provisions that underlines that the oceans shall be used for peaceful purposes. The most prominent Articles in this regard are Article 88, which purpose is to reserve the high seas for peaceful purposes, and Article 301, which emphasises that the rights and obligations in the Convention shall be used for peaceful purposes. The Articles are essentially reaffirming Article 2(4) of the UN Charter,⁷² which embodies the principle of prohibition of the threat or use of force. Furthermore, the preamble of LOSC states that the Convention will “promote the peaceful uses of the seas and oceans”. Thus, in light of both the LOSC and the UN Charter, the starting point is that both the rights and obligations of states operating submarines, and coastal states seeking protection from intrusion by such vessels, are subject to the obligation to reserve the use of the ocean for peaceful purposes. In relation to the coastal states, this obligation is naturally modified by the threats potentially posed by the submarines.

3.1 – The Law of the Sea Convention

The LOSC does not contain any specific provisions regulating the use of force that can be undertaken by the coastal states when they seek to prevent passage, which is not innocent. As the LOSC is silent on the matter, “a permissible response would ultimately depend upon the circumstances”.⁷³ As the circumstances may vary, it seems hard to establish the threshold for what use of force may be legally applied by the coastal State in accordance with the LOSC. Thus, several incidents of the use of force have been considered by both

⁷² Charter of the United Nations 1945, 1 UNTS XVI.

⁷³ Rothwell and Stevens (2010), 218.

ITLOS and other dispute settlement mechanisms. In order to establish what measures may be legally applied by the coastal State, one must take a closer look at the case law.

3.2 - The development of case law

In the pre-LOSC “judgements of the *S.S I’m Alone* case from 1935, and the *Red Crusader* case from 1962, only a vague sketch was given of the legal use of force”⁷⁴ under the law of the sea regime.

In the first case, the vessel *I’m Alone* was engaged in smuggling liquor into the United States. As the vessel refused to stop, a US coastguard cutter pursued the vessel onto the high seas. While still in hot pursuit, another cutter joined the pursuit. The *I’m alone* was sunk on the high seas by the revenue cutter. The arbitrators stated that “if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose...the pursuing vessel might be entirely blameless”.⁷⁵ While recognizing that the use of force might be legal in certain circumstances, the use of force would still be subject to the test of necessity and reasonableness. The Arbitrators found that this test was not fulfilled in the specific case and thus stated that “the admittedly intentional sinking of the suspected vessel was not justified”.⁷⁶

In the *Red Crusader* case the arbitral award considered the legality of the firing of weapons, even aimed shots, against a foreign ship. A Danish fishery protection vessel put a boarding crew aboard the UK flagged *Red Crusader*. The boarding crew was detained and the vessel attempted to escape to the high seas. The pursuing vessel fired warning shots across the bow and stern of the UK flagged vessel, and then directed a round of solid shot at its radar scanner and lights. The Danish fishery protection vessel was found to have “exceeded legitimate use of armed force” as it fired a round of solid gun without first

⁷⁴ Magne Frostad, “Anti-Piracy and the use of force: The Cohabitation of the United Nations Convention on the Law of the Sea and the European Convention on Human Rights,” in *Maritime Safety and Environmental Protection in Europe: Multiple Layers in Regulation and Compliance*, ed. Marta Chantal Ribeiro and Erik J. Molenaar (Porto – Utrecht: Marsafenet, 2015): 205-237, 207.

⁷⁵ *S.S ”I’m Alone” (Canada v. United States)* in United Nations, Reports of International Arbitral Awards, Vol. III (New York: 2006), 1609-1618, 1615.

⁷⁶ *Id.*

having cautioned that such force would be used unless the vessel stopped. Furthermore, the Danish vessel created danger to human life without any proved necessity, as it had not attempted other means before firing at the *Red Crusader*.⁷⁷

The two pre-LOSC cases illustrates that the use of force must be “necessary” and “reasonable”. The criterion of necessity reflects that the circumstances must be serious and that other measures cannot be used to achieve the same results as the use of force. The criterion of reasonableness indicates that even though “the force may be necessary, it might nevertheless fail to be reasonable”.⁷⁸ Thus, the criterion may be used to censure force that is fulfilling the requirements of being “necessary”.⁷⁹ The test of “reasonableness” thus points towards an assessment of proportionality.

Some post-LOSC cases have also dealt with the use of force against foreign vessels. The *M/V Saiga (No. 2)* case and the *Guyana/Suriname* case are here illustrative.

In the *M/V Saiga* case (*No.2*), the *Saiga* was engaged in selling oil and serving as a bunkering vessel: It had served oil to three fishing vessels licensed by Guinea to fish in its EEZ. The refuelling occurred within Guineas EEZ and the vessel was the next day fired on, boarded and arrested by the Guinean authorities. Some of the crewmembers were hit and suffered injuries after the firing. The ITLOS observed that “the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law”.⁸⁰

⁷⁷ *Investigation of certain incidents affecting the British trawler Red Crusader*, in United Nations, Reports of international Arbitral Awards, Vol. XXIX (New York: 2012), 521-529, 536-538.

⁷⁸ Frostad (2015), 215.

⁷⁹ Nevertheless, Frostad states that “it is hard to find cases where necessary acts have been censured.” Ibid, 215.

⁸⁰ *The M/V Saiga (No.2) Case* (Saint Vincent and the Grenadines v. Guinea), ITLOS, judgement ,1 July 1999, para 155.

Further, in the 2007 *Guyana/Suriname* case, the arbitral Tribunal accepted “the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary”.⁸¹

As mentioned above, the two pre-LOSC cases recognize that the use of force must be “necessary” and “reasonable”. Noteworthy, a “third” criterion seems to have evolved in the aftermath of UNCLOS III.

Both in the *M/V Saiga (No.2)* case and the *Guyana/Suriname* case, the adjudicating Tribunals make a reference to the criterion “unavoidable” when dealing with the merits. However, the reference made to “unavoidable” “should be seen as highlighting an aspect of the necessity principle”⁸². The criterion “unavoidable” seems to create a higher threshold for the use of force than the threshold previously established under the “necessity” criterion. A natural interpretation of the wording “unavoidable” indicates that all other reasonable measures must be implied before the use of force would be justified.

The requirements of necessity and reasonableness, as developed in case law, can be seen as placing limitations upon the states when they are considering the use of force against foreign vessels. In order to comply with the law of the sea, states should refrain from the use of force if this is not strictly “necessary”, “reasonable” and “unavoidable”. What is clear is that these three criteria must be applied in the light of the circumstances faced by the State. The test of whether the criteria can justify the use of force is subject to verification by international courts and tribunals.

It can be concluded that the two criteria also function as limitations upon the coastal State when dealing with submerged submarines in its internal waters and territorial sea. However, the threat against the territorial integrity, as discussed in chapter 2.3, could arguably lower the threshold for the use of force. It must then be examined what measures may be taken against submarines.

⁸¹ Award of the Arbitral Tribunal in the matter of the arbitration between Guyana and Suriname of 17 September 2007, 47 I.L.M 166, para 445.

⁸² Frostad (2015), 208.

3.3 – The case of submarines

The use of foreign submarines in the internal waters and/or territorial seas of coastal states are not only a legal problem due to the recent incidents in the Swedish territorial sea. The adoption of Article 20 of the LOSC must naturally be seen as an attempt to prevent submerged activities. The adoption of the provision was important in light of the “incidents involving Soviet or unidentified submarines that have occurred...of the coast of several Western countries, such as Sweden, Norway and Italy”⁸³ around the 1980’s.

As the coastal State is unable to verify the activities of a submerged submarine, the potential threat posed by such activities is undisclosed. Examples of what activities the submarine may undertake include are “emplacement of electronic devices to monitor coastal military activities, laying of navigational buoys on the seabed to guide an attack, visual and electronic inspection of the coast in view of landing of special commando forces and covert mining of certain areas to prevent access or transit for enemy navies”.⁸⁴

Thus, as the unauthorized presence of a foreign submarine in the area of internal waters “constitutes a *prima facie* violation of the coastal State’s territorial sovereignty, [it] is also significant in determining the range of coercive countermeasures that the coastal State may adopt against the foreign intruder”.⁸⁵ As the territorial sea is located within a State’s territory, it must be assumed that the statement also describes a violation of the sovereignty in cases where a submerged submarine enters the territorial sea. Tanaka argues that such countermeasures in the territorial sea should not “instantly justify the use of force against the submarine” when it is in breach of Article 20 of the LOSC.⁸⁶ It can be assumed that the same approach should be applied in the internal waters.

Bearing in mind that potential force must be justified by “necessity”, “reasonableness” and be “unavoidable” in order to be in accordance with the law of the sea, all other measures

⁸³ F. Francesco, “Peacetime use of Force, Military Activities, and the New Law of the Sea,” *Cornell International Law Journal* 18 (1985): 203-226, 206.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Tanaka (2012), 86.

must be exhausted before force is initiated by the coastal State. This entails that “every measures should be taken short of armed force to require the submarine to leave”.⁸⁷

It would seem reasonable that submerged passage in the internal waters and territorial sea is due to the submarine intentionally trying to avoid the attention of the coastal State. If the coastal State nevertheless is able to trace the submarine, it must request the submarine to leave before taking other measures. If the submarine fails to comply with this request, the coastal State is entitled to take further initiatives. Bearing in mind that force must be notified, as stated in the *Red Crusader* case, the coastal State may use force if also such warning is ignored by the submarine and the circumstances otherwise justifies a reaction. However, it must be emphasised that it might be hard or almost impossible to give a prior notification to a submarine that is trying to avoid the attention of the coastal State.⁸⁸ This leads me to my second research question. It must be examined how the regulations of the use of force in the Law of the Sea apply in the case of submarines.

3.3.1 – How are the regulations on the use of force in the Law of the Sea applied in the case of submarines?

Previous incidents including submerged submarines indicate to what extent the coastal State may be entitled to use force to prevent submerged passage. Sadurska states that “[t]he extent of force a coastal State may use to prevent illicit submerged passage was highlighted by Sweden’s efforts to prevent a series of intrusions into its waters in 1982”.⁸⁹ In the Hårsfjärden Event⁹⁰ in 1982, the Swedish authorities authorized the use of depth charges in order to locate a submarine that was spotted close to one of its naval bases.

⁸⁷ Tanaka, *The International Law of the Sea*, 86, in D. P. O’Connell, *The International Law of the Sea Volume 1*, 297.

⁸⁸ This issue will be further discussed in Chapter 3.3.1.

⁸⁹ R. Sadurska, “Foreign Submarines in Swedish Waters: The Erosion of an International Norm”, *10 Yale Journal of International Law* (1984): 34-76 in Klein, *Maritime Security and the Law of the Sea*, 42.

⁹⁰ The Swedish 1982 Submarine Defense Commission stated that the Hårsfjärden incident included the use of six submarines. See SOU 1983:13, *Att möta ubåtshotet – Ubåtskränkningar och svensk säkerhetspolitik*, Betänkande av ubåtsskyddskommissionen (Stockholm: Ministry of Defence, 1984,) 10.

Several depth charges were dropped, but the submarine was not located.⁹¹ As an immediate reaction to the increasing submarine intrusions, the Swedish government adopted new legislation to remedy its security concerns.⁹² In the Ordinance, it is stated that in the internal waters, if a foreign submarine is found submerged, it shall be forced to the surface.⁹³ As the measures shall be used to force the submarine to the surface, the Ordinance differs from the use of force where the intention is to destroy the submarine in order to sink it. This indicates that the principle of reasonableness is applying and that such force thus might be in accordance with the customary international law developed in the law of the sea. This is due to the fact that the force is not exceeding what is considered as necessary to remedy the situation the State is facing.⁹⁴ Furthermore, “if necessary, force of arms shall be used without prior warning”.⁹⁵ In the territorial sea, a submerged submarine “shall be turned away from the territory”. Also here, “if necessary, force of arms shall be used. Should special circumstances so require, the force of arms may be used without prior warning”.⁹⁶

Interestingly, the world community accepted the adoption of section 15 of the Swedish Ordinance“, since “[n]o member of the international community protested the new Swedish Policy”⁹⁷ after it was widely made public.⁹⁸ The lack of protests may indicate that the use of force against submarines, as contained in the Swedish legislation, has developed into customary international law. It must be emphasised that under normal circumstances, something more would be required for customary law to develop.⁹⁹ For a custom to

⁹¹ Sadurska, “Foreign Submarines in Swedish Waters: The Erosion of an International Norm”, 10 *Yale Journal of International Law* (1984): 37.

⁹² Swedish Ordinance containing instructions for the Armed Forces in Times of Peace and in State of Neutrality (IKFN-Ordinance), (Sweden: The Swedish Ministry of Defence, adopted March 3, 1983).

⁹³ *Ibid*, Section 15.

⁹⁴ This view seems to be supported by Ove Bring. See “Ubåtsoperationar och folkrätt,” in *Festskrift till Lars Hjerner: Studies in International Law* ed. Jan Ramberg et al (Stockholm: Norstedts Förlag, 1990,) 63-92, 91

⁹⁵ Swedish Ordinance, Section 15.

⁹⁶ *Id*.

⁹⁷ Sadurska (1984), 52.

⁹⁸ Sadurska states that “[t]he Governments of the other Western Countries did not speak out” after the Swedish legislation was made public. Sadurska (1984), 51.

⁹⁹ In Article 38 of the ICJ Statute, customs are recognized as “evidence of a general practice accepted as law”.

develop, it must generally constitute "two elements: state practice and opinio juris".¹⁰⁰ However, the Swedish Ordinance lays down legislation that affects all coastal states, and it was widely made public without any protests. This may indicate that the lack of protests may be sufficient evidence for the development of customary law. The lack of response from the nations with great submarine fleets indicates a silent acceptance of the new rules.¹⁰¹

Sadurska further argues that "it must be assumed that international elites were aware that by tacitly approving of Swedish behaviour, they were acquiescing not only in a justified case of self-defence, but also in the erosion of a long-standing principle¹⁰² of international law".¹⁰³ The Swedish Ordinance has been changed multiple times since its adoption, but section 15 remains almost unchanged. This seems to indicate that the provision is still in force and applicable to submarine intrusions in Sweden's territorial sea and internal waters.

The significance of the acceptance of the Swedish practice is that a special legal regime for the use of force against submarines may have developed. Bring and Körlof-Askholt states that the Swedish Ordinance is in accordance with international law, and that force against submarines thus must be accepted in the prescribed circumstances.¹⁰⁴

The Danish fishery protection vessel was found to have "exceeded legitimate use of armed force" as it had not cautioned that force would be used against the vessel if it didn't comply with the orders given in the *Red Crusader* case.¹⁰⁵ The criterion that prior notification must be given before the use of force is legitimate is thus departed from in the customary law on submarines developed in light of Sweden's legislation. The reasoning behind this might be that it is hard or almost impossible to give a prior warning to a submerged submarine. However, the use of force without a prior notification may be

¹⁰⁰ Anthea, Elizaabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *The American Journal of International Law* 95 (2001): 757-791, 757.

¹⁰¹ Countries such as the US, Great Brittan, France and Soviet.

¹⁰² Sadurska is here discussing the principle of jurisdictional immunity for foreign warships. Sadurska (1984), 52.

¹⁰³ Id.

¹⁰⁴ Ove Bring, and Anna Körlof-Askholt, *Folkrätt i krig, kris och fredsoperationer. En handbok*, (Stockholm: Norstedts Juridik AB, 2010): 47.

¹⁰⁵ *Investigation of certain incidents affecting the British trawler Red Crusader*, 536-538.

considered as legitimate means due to the fact that the flag states are made aware of the special regime that seems to have developed in the case of submarines. That force can be used without prior warning implies that the threshold for the use of force against submerged submarines is lower than against other foreign vessels located in the internal waters and the territorial sea.

As the Swedish legislation specifically mentions that force shall only be used when it is necessary, it is emphasised that the general rules for the use of force in the law of the sea nevertheless is not wholly disregarded in the case of submarines.

As a curiosity, it must be mentioned that the criterion requiring that the use of force must be “unavoidable” was developed after the adoption of the Swedish Ordinance of 1983. The *M/V Saiga* case (No.2) case originates from 1999 and the Guyana/Suriname case was brought to adjunction in 2007. Thus, it is hard to clarify how the criterion would apply to new situations concerning submarine intrusions. On the one hand, the principle of *lex posterior* might be applied when interpreting the relevant rules governing the use of force against submarines. Thus, the criterion would limit the use of force in light of new case law. On the other hand, the wording in section 15 seems to imply that force against submarines is an exception to the original rules crystallized in the case law. As no prior notification is required, this would naturally affect the criterion of force having to be “unavoidable”. Thus, the special regime developed for submarines might “trump” the general rules established in the international law of the sea.

The observations made in chapter 3 seem to affect the general rules concerning the use of force in the law of the sea. The test of whether the potential use of force is “necessary”, “reasonable” and “unavoidable” is thus modified in the case of submarines due to the development of customary international law specifically applicable to that type of vessel.

Finally, as stated in the *M/V Saiga* (No.2) case, “considerations of humanity must apply in the law of the sea, as they do in other areas of international law”.¹⁰⁶ This leads me to my next research question. It must be examined if the individual right to life under the ECHR

¹⁰⁶ *M/V Saiga* (no.2), para 155.

constitutes a limitation on the potentially use of force against submarines in the law of the sea.

Chapter IV – The right to life under the European Convention on Human Rights

Article 1 of the ECHR states that the parties shall “secure to everyone within their jurisdiction the rights and freedoms” in the Convention. The first guaranteed right is found in ECHR Article 2, which protects the right to life, and the right to life is recognized as “the most basic human right of all”.¹⁰⁷ Further, Article 2 contains “one of the basic values of the democratic societies making up the Council of Europe”.¹⁰⁸

The aim of this chapter is to present the relevant rules governing the rights and obligations of the states in light of the ECHR Article 2. Furthermore, the relationship between the law of the sea and the ECHR will be explained. Finally, the positive and negative obligations in Article 2 will be presented.

4.1. – Scope of Application

The objective of this thesis is to examine whether a coastal State can use potentially lethal force against submarines in its internal waters and its territorial sea. As shown in chapter 2.1 and 2.2, the coastal State exercises jurisdiction in these maritime zones within the law of the sea. It must be examined whether also the ECHR is applicable to these maritime zones.

In the *Al-Skeini* case¹⁰⁹, the Court stated that “jurisdiction under Article 1 is a threshold criterion”¹¹⁰ and that “jurisdiction is presumed to be exercised normally throughout the State’s territory”.¹¹¹ As the internal waters and territorial seas are considered under general international law to be a natural part of a State’s territory, Article 1 also extends the ECHR’s scope of application to the two maritime zones. Thus, coastal states, which are

¹⁰⁷ Harris et al (2014), 203.

¹⁰⁸ *McCann and Others v. The United Kingdom*, Application no. 18984/91, Grand Chamber judgement of 27.09. 1995, para 147.

¹⁰⁹ *Al-Skeini and Others v. The United Kingdom*, Application no. 55721/07, Grand Chamber judgment of 07.07.2011.

¹¹⁰ *Ibid*, para 130.

¹¹¹ *Ibid*, para 131.

also parties to the ECHR, are bound by the obligations contained in Article 2 of the Convention in relation to the maritime zones under consideration here.

As the ECHR is applicable to the maritime territory of the coastal states, the general case law developed by the Court when adjudicating other cases concerning the right to life might influence the general rights and obligations of the coastal states in these maritime zones. Thus, the general principles established by the ECtHR also apply when states are faced with threats posed by submarines in these waters.

It must then be examined how the obligations in the ECHR Article 2 affect the State parties in the situation under consideration here.

4.2 – Object and purpose of Article 2

Together with the prohibition of torture and degrading treatment in Article 3, the object and purpose of Article 2 is to protect the physical integrity and dignity of a person. The ECtHR states that Article 2 “ranks as one of the most fundamental provisions in the Convention” in the Grand Chamber judgment in the *Nachova* case.¹¹² Evidence of the status of Article 2 can also be seen in Article 15(2) of the ECHR, which regulates the states’ right to derogate from the Convention in time of war or other public emergency. Unless the deprivation of life is justified by lawful acts of war, the very nature of the right protected by Article 2 cannot be derogated from.

The reasoning behind the status of Article 2 is that the deprivation of life is one of the gravest encroachments on the physical integrity of a person. This is evident since the deprivation of life is an irreversible act. Further, the killing of a person affects both the family left behind and the society as such.

The ECtHR normally provides the states with a margin of appreciation when they are deciding how the obligations in the Convention shall be secured on a national level.¹¹³

¹¹² *Nachova and Others v. Bulgaria*, Application nos. 43577/98 and 43579/98, Grand Chamber judgement of 06.07.2005, para 93.

¹¹³ *Silver and Others v. The United Kingdom*, Application no. 7136/75, Chamber judgement of 25.03.1983, para 113.

Nevertheless, the ECtHR has declared that "the domestic margin of appreciation goes hand in hand with European supervision".¹¹⁴ This margin of appreciation also varies due to the nature of the right and freedom protected by the Convention. The State naturally has a narrower margin of appreciation when the right is of a fundamental character,¹¹⁵ And as the right to life "ranks as one of the most fundamental provisions in the Convention", states are under a special obligation to take measures to protect this right.¹¹⁶ This has also been emphasised by the current President of the Court, who has stated that "the margin of appreciation is virtually inexistent when it comes to the non-derogable rights".¹¹⁷

That the ECtHR is provided with the mandate to interpret the ECHR in light of present day conditions¹¹⁸ creates an effective and adaptable protection of the substantive rights and freedoms contained in the Convention. The "living instrument"-doctrine also affects the margin of appreciation of the contracting parties. By taking into consideration the common and shared practice of the parties, the margin of appreciation changes as the national practices do.

4.3 – The positive and negative obligations contained in Article 2

Article 2 of the ECHR contains both positive and negative obligations. The provision places upon the State the positive obligation to protect the right to life, and "[t]his positive obligation must be interpreted and applied so that it is "practical and effective"". ¹¹⁹ Thus, the states are obliged to both prescribe laws prohibiting the deprivation of life and to have "an effective judicial system"¹²⁰ to enforce the prescribed criminal law. The states are

¹¹⁴ Handyside v. The United Kingdom, Application no. 5493/72, Plenary judgement of 07.12.1976, para 49.

¹¹⁵ Dudgeon v. The United Kingdom, Application no.7525/76, Plenary judgement of 22.10.1981, para 52.

¹¹⁶ Nachova and Others v. Bulgaria, para 93.

¹¹⁷ Dean Spielmann, "Allowing the Right Margin – The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review," *CELS Working Paper Series* (Cambridge, 2012): 1-30, 11.

¹¹⁸ See Chapter 1.1.

¹¹⁹ Harris et al (2014), 203; McCann and Others v. The United Kingdom, para 146.

¹²⁰ Öneriyildiz v. Turkey, Application No. 48939/99, Grand Chamber judgement of 30.11.2004, para 94.

under an obligation to effectively take measures to protect the right to life. Furthermore, Article 2 can be regarded as an obligation of means.¹²¹

The first sentence of Article 2(1) obliges the State to adopt legislation in order to protect the right to life. The provision reflects a positive obligation to prevent the deprivation of life by both public officials and private individuals. The Court has noticed that positive obligations “may involve the adoption of measures designed to secure the respect for private life in the sphere of the relations of individuals between themselves”.¹²²

Article 2 of the ECHR furthermore places upon the states an obligation to refrain from acts that may result in the taking of life – a so-called negative obligation. The Article emphasises that the State should remain passive and not interfere with the right to life of individuals within its jurisdiction. The provision applies to the taking of life by the police¹²³, soldiers¹²⁴, and other state agents¹²⁵.¹²⁶ Thus, “Article 2 prohibits the taking of life where this is not justified by any of the exceptions permitted by its text”.¹²⁷ The exceptions will be further discussed in chapter 4.4.

Furthermore, it seems reasonable to argue that the rules established by the Council of Europe reflect those applicable to the rest of the World Society. Article 6 of the UN Covenant for Civil and Political Rights states that “every human has the inherent right to life...[n]o one shall be arbitrarily deprived of his life”.¹²⁸ It can be argued that the wording “arbitrarily deprivation” of life must be interpreted to contain the same rights and

¹²¹ Juliette Chevalier-Watts, “Effective Investigations Under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?” *The European Journal of International Law* 21 (2010): 701-721, 712.

¹²² *X and Y v. The Netherlands*, Application no. 8978/80, Chamber judgement of 26.03.1985, para 23.

¹²³ *Hugh Jordan v. The United Kingdom*, Application No. 24746/94, Chamber judgement of 04.08.2001.

¹²⁴ *Isayeva, Yusupova and Bazayeva v. Russia*, Application Nos 57947/00, 57948/00 and 57949/00, Chamber judgement of 06.07.2005.

¹²⁵ *Avşar v. Turkey*. Application No. 25657/94, Chamber Judgement of 10.07.2001.

¹²⁶ Harris et al (2014), 221.

¹²⁷ *Id.*

¹²⁸ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

obligations as those contained in the ECHR Article 2.¹²⁹ Thus, the contexts included in Article 2(2) “probably constitute the sum total of instances in which killing would be considered non-arbitrary under the International Covenant on Civil and Political Rights”.¹³⁰

As previously discussed in Chapter 3.2, the use of force in the law of the sea requires that the force is “necessary” and “reasonable”. It must be examined what the criterion “use of force” within the ECHR entails.

4.4 – The prohibition of the use of lethal force

The starting point is that states are under an obligation to safeguard the right to life by refraining from unlawful killing at the hands of their agents. Article 2(2) lists three situations that would nevertheless justify the taking of life. The list is exhaustive¹³¹:

“Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- a) in defence of any person from unlawful violence
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained
- c) in action lawfully taken for the purpose of quelling a riot or insurrection”

The wording of the three exceptions does not mention the right of a State to protect itself against potential threats or situations concerning national security beyond what is required in *litra c*. It must be examined whether situations mentioned in *litra a* to *c* may nevertheless be applicable to submarine intrusions.

¹²⁹ Frostad, Magne. ”Kan liv tas til vern av annet enn menneskelig liv og helse?” in *Nordisk Politiforskning, Årgang 2, Nummer 1* (Oslo: Universitetsforlaget AS, 2015): 75-108, 91.

¹³⁰UN General Assembly, Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, 2011, UN Doc. A/HRC/17/28, 10. See also reference made to Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P Engel, 2005).

¹³¹Harris et al (2014), 227.

With regard of previous submarine intrusions in states' internal waters or territorial seas, force has typically been used to prevent the escape of the submarine.¹³² The intention of such force is to force the submarine to the surface and not to destroy or sink it. As the exceptions contained in Article 2(2) only applies if there is a sufficient "deprivation", a question arises of whether this approach would constitute a "deprivation of life". In the *Vasil Sashov Petrov* case,¹³³ the Court stated that "if the force was potentially deadly and the conduct of the officers concerned was to put the applicant's life at risk, then Article 2 is applicable".¹³⁴ As the use of explosives may result in death, specifically for any divers operating outside of the submarine, Article 2(2) seems to be applicable in cases concerning submarine intrusions.

In light of the exhaustive list contained in the ECHR Article 2(2), however, the ECtHR has specifically stated that the taking of life to prevent an escape from a State's territory is not permitted.¹³⁵

At one stage of the drafting of the Convention, a fourth situation was actually stipulated. This exception would have justified the deprivation of life where force was used to prohibit "entry to a clearly defined place to which access is forbidden on grounds of national security",¹³⁶ but "[t]his wording was finally omitted, so that the taking of life on this basis is not allowed".¹³⁷ It is thus clear that national security, as the sole reason for the use of force cannot justify potentially lethal force against individuals. However, national security may in some circumstances be relevant to the exceptions actually mentioned in Article 2(2). Thus, "lethal force might, for example, be used in the event of absolute

¹³² Sweden applied measures to prevent the escape of the submarine intruder in the Hårsfjärden event. Sadurska (1984), 37.

¹³³ *Vasil Sashov Petrov v. Bulgaria*, Application No. 63106/00, Chamber Judgement of 10.06.2010.

¹³⁴ *Ibid*, para 39.

¹³⁵ *Streletz, Kessler and Krenz v. Germany*, Application nos. 34044/96, 35532/97 and 44801/98, Grand Chamber judgement of 22.03.2001, para 96; Harris et al (2014), 228.

¹³⁶ Council of Europe, *Collected edition of the «Travaux préparatoires» of the European Convention on Human Rights*, Vol V (Leiden: Martinus Nijhoff Publishers, 1976), 120-122.

¹³⁷ Harris et al (2014), 227.

necessity in legitimate defence or to defend a person against violence linked to national security”.¹³⁸

Here, Article 2(2) requires that the “use of force” must be “absolutely necessary”, and it is therefore necessary to establish what the term “use of force” entails.

The criterion “use of force” is set forth in Article 2(2) of the ECHR. The term and its scope of application are not defined in the Convention itself. However, it is clear that the criterion must be viewed in conjunction with the object and purpose of the provision. It is thus clear that the “use of force” must be understood in accordance with one of the recognized exceptions found in *litra a-c*.

The Court has stated that the use of firearms¹³⁹, grenades and explosives¹⁴⁰ are considered as force in accordance with Article 2(2). Furthermore, as previously mentioned, Article 2 is applicable if the force creates danger to human life.¹⁴¹ Thus, the crucial element in the assessment of the applicability of Article 2 is whether the force is potentially deadly.¹⁴²

The ECHR requires that the “use of force” is applied in accordance with one of the three exceptions contained in article 2(2). Thus, “as it arises from the wording of Article 2...the use of force must satisfy two conditions: on one hand, it must aim [at] the purposes limited set out in paragraph 2...and, on the other hand, it must be absolutely necessary to achieve this goal”.¹⁴³

The Court has given several judgements that make it possible to identify situations where the criterion is applicable. The first situation is where death occurs as a consequence of the use of force.

¹³⁸European Court of Human Rights, Report prepared by Research Division, *National Security and European Case-law*, 2013, 24.

¹³⁹ *Nachova and Others v. Bulgaria*, para 109.

¹⁴⁰ *Dimov and Others v. Bulgaria*, Application no. 30086/05, Chamber judgement of 06.02.2013.

¹⁴¹ *Vasil Sashov Petrov v. Bulgaria*.

¹⁴² See also discussion in Chapter 4.4.

¹⁴³ Aldea, Adrian, “Considerations over the right to life and the use of fire-arms within ECHR legislation and Romanian Jurisprudence,” in *Legal Practice and International Laws*, 310-315. WSEAS Press, 2011. Accessed August 12, 2015. Available at: <http://www.wseas.us/books/2011/Brasov1/LAW.pdf>

Interestingly, Article 2 of the ECHR applies to both use of force that leads to the intentional and unintentional killing of a person.¹⁴⁴ In the *McCann* case, the Court stated that Article 2 “does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life”.¹⁴⁵ Thus, the State may be held accountable for the loss of life even where the intention was to use non-lethal force, but where the outcome was otherwise.

Furthermore, Article 2 also applies in situations where no death occurs as a consequence of the force used, but where the outcome could easily have been otherwise. The Court therefore found a violation of the Article in both the *Makaratzis* case¹⁴⁶ and the *Saso Gorgiev* case¹⁴⁷, where no deaths occurred. In both cases, the police used firearms against the applicants, who suffered severe injuries. In the former case, the Court stated that “it observes, however, that the fact that the latter was not killed was fortuitous”.¹⁴⁸ This emphasises that if the force is of a potentially lethal character, the threshold of Article 2 is reached, as the injuries inflicted in some cases may not meet the criteria under the scope of Article 3 of the ECHR.¹⁴⁹ Thus, in order to create an effective protection for the individuals, such force should be regulated by Article 2.¹⁵⁰

Against the background discussed in chapter 4.1, the exception of self-defense contained in the ECHR Article 2(2) a) will be further examined. Article 2(2)(b) could also have been subject to closer examination, but due to the limited scope of this thesis, *litra a* will be prioritized. The exception found in *litra c* can hardly be said to be applicable to the

¹⁴⁴ *McCann and Others v. The United Kingdom*, para 148.

¹⁴⁵ *Id.*

¹⁴⁶ *Makaratzis v. Greece*, Application No. 50385/99, Grand Chamber judgement of 20.12.2004.

¹⁴⁷ *Saso Gorgiev v. The Former Yugoslav Republic of Macedonia*, Application No. 49382/06, Chamber judgement of 19.07.2012.

¹⁴⁸ *Makaratzis v. Greece*, para 54.

¹⁴⁹ The Court has stated that the suffering must be inflicted for a purpose to fall within the scope of Article 3. See *Ilhan v. Turkey*, Application No. 22277/93, Grand Chamber judgement of 27.06.2000, para 85.

¹⁵⁰ This was also stated by the Court in the *Makaratzis case*. See *Makaratzis v. Greece*, para 44.

scenario of a submarine intrusion and it will thus not be subject to further discussion in this thesis.

The right of self-defence or the defence of another is located in ECHR Article 2(2)(a). The provision permits the use of force in relation to self-defence of human beings. While not stated in the text, this implicitly excludes the defence of property or other material assets. This is due to the Convention's intention being the protection of the rights of individuals. Furthermore, *litra a* differs from *litra b* and *c* as it is not expressly stated that the action taken must be lawful. However, this can also be "supposed to be the case in respect of Article 2(2)(a)".¹⁵¹

4.5 – The interpretation of “absolutely necessary” in ECHR Article 2(2)

As in the law of the sea, the criterion of “absolutely necessary” indicates that other measures cannot be used to achieve the same results as the use of potentially deadly force.¹⁵² This emphasises that there must be a direct link between the threat against people and the force used in order to invoke the exception in Article 2(2)(a). If an attack is not imminent, the Convention thus seems to restrict the right to use force under *litra a*.¹⁵³ This might place a limitation upon the coastal State when dealing with the threat posed by a submerged submarine, as it seems difficult to justify an attack on the basis that it *might* conduct activities that *may* pose a threat to the people within the jurisdiction of the State. On the other hand, submerged passage would seem to indicate that the submarine is at the very least trying to avoid the attention of the coastal State.

The interpretation of the criterion “absolutely necessary” must be viewed in conjunction with the requirement of proportionality. Thus, “[f]orce is ‘absolutely necessary’ only if it is ‘strictly proportionate’ to the achievement of a permitted purpose”.¹⁵⁴ It must thus be examined what the criterion “strictly proportionate” entails and how it affects the right to use force.

¹⁵¹ Harris et al (2014), 228-229. For a different view, see D. Ehlers and U. Becker, *European Fundamental Rights and Freedoms*, (Berlin: Walter de Gruyter, 2007,) who states that *litra a* “simply lays down substantial requirements” on page 89.

¹⁵² See Chapter 3.2.

¹⁵³ Frostad, *Kan liv tas til vern av annet enn menneskelig liv og helse?*, 103.

¹⁵⁴ Harris et al (2014) 227.

Before establishing the content of the term “strictly proportionate”, it must be recalled that the states are not allowed much margin of appreciation under Article 2(2). Thus, “the Court makes its own objective assessment of the strict proportionality of the force used”.¹⁵⁵

In the case of Article 2(2)(a), the force must thus be strictly proportionate to the aim of self-defence or the defence of another. Furthermore, there must be a direct link between this legitimate purpose and the means used to achieve the object. The Court has stated that there must be “a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Thus, the Court finds that it is legitimate to take also into account whether the interference envisaged by the State would be an effective means of pursuing a legitimate goal”.¹⁵⁶ The case concerned an alleged violation of Article 8 of the ECHR. As the requirement of Article 8 is simply one of proportionality, it seems reasonable to argue that the test of proportionality would be more rigorous under Article 2(2) where the requirement is that the means must be “strictly proportionate”.

In the *Finogenov* case, the Court stated that it might depart from the standard of absolutely necessity in cases where “its application may be simply impossible where certain aspects of the situation lie far beyond the Court’s expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal”.¹⁵⁷ In such exceptional circumstances, a margin of appreciation may also be allowed.¹⁵⁸ It must be emphasised that the case concerned a hostage situation, where the life of 950 peoples were at imminent danger. This refers to a more verifiable threat than the scenario of a submarine intrusion normally poses to a coastal State.

Further, a State may be held accountable for the loss of human life due to “the actual disproportionate use of force or for the planning or control of an operation involving the use of force for a purpose permitted by Article 2(2) that does not minimize the risk to life

¹⁵⁵ *Id.*

¹⁵⁶ *S.H and others v. Austria*, Application No. 57813/00, Grand Chamber judgement of 03.11.2011, para 94.

¹⁵⁷ *Finogenov v. Russia*, Application Nos. 18299/03 and 27311/03, Chamber judgement of 05.06.12, paras 211 and 248.

¹⁵⁸ *Ibid*, para 213.

as far as possible”.¹⁵⁹ This was found to be the case in the judgement of the *McCann* case,¹⁶⁰ where a strongly divided Court found that Article 2 had been infringed because the operation could have been planned and controlled so as to achieve the object without the need to kill the suspects.

As in the Law of the Sea, European human rights law requires a prior notification before force is actually used. Thus, Turkey was found in violation of Article 2(2) as a consequence of “the opening of fire [being] totally unwarranted and not even preceded by a warning shot”.¹⁶¹ The criterion “strictly proportionate” may also require a verbal warning in addition to the actual warning act.¹⁶²

The test of proportionality in European human rights law sets forth a threshold for the force permitted. That the force must be “strictly proportionate” indicates that the means used to achieve the objective of self-defence should not go any further than absolutely necessary. Furthermore, the ECHR requires, where it is possible, a prior notification before excessive force is used.¹⁶³

The discussions undertaken in Chapter IV leads me to my main research question. It must now be examined whether a coastal State has the right to use potentially lethal force against submarines in its internal waters and its territorial sea.

¹⁵⁹ Harris et al (2014), 227.

¹⁶⁰ *McCann and Others v. The United Kingdom*.

¹⁶¹ *Solomou and others v. Turkey*, Application no. 36832/97, Chamber judgement of 24.09.2008, para 75.

¹⁶² Harris et al (2014), 228.

¹⁶³ See discussion in Chapter 5.1.

Chapter V – The balance of the Coastal State’s right to protection and the right to life of individuals in the case of submarines

The aim of this chapter is to discuss how the coastal State’s rights in the law of the sea are affected by the obligations found in human rights law. The scenario of a submarine intrusion will thus be examined in light of the ECHR. Furthermore, the coastal State’s choice of means and the scope of force permitted when responding to an intrusion will be discussed. Finally, the question of whether a coastal State can use potentially lethal force against a submarine found in its internal waters or territorial sea will be answered.

5.1 – Submarine intrusions in light of the ECHR

The ECtHR has seemingly never been faced with a case concerning the response to a submarine intrusion under Article 2. Thus, it is somewhat uncertain how the Court would apply the obligations contained in Article 2(2) in light of such special circumstances. In the *Medvedyev* case, the Court nevertheless emphasised that it must consider all rules applicable, “including those which have their source in international law” when it is faced with cases concerning human rights at sea.¹⁶⁴ This statement may indicate that the Court will take into account the law developed in the law of the sea where this is natural in the circumstances. Thus, the legal regime governing submarines in the law of the sea may be a factor when the Court interprets Article 2(2) of the ECHR where a coastal State responds to a submarine intrusion.

As described in Chapter 3.3.1, it would seem that a special legal regime has been developed in the case of submarines under the law of the sea. This regime enables the coastal State to use force in its internal waters and territorial sea without any prior warning when it is reacting to a submarine intrusion.¹⁶⁵ It must now be examined whether this State practice runs counter to Article 2 of the ECHR.

¹⁶⁴ *Medvedyev and others v. France*, Application No. 3394/03, Grand Chamber judgement of 29.03.2010, para 79.

¹⁶⁵ See Chapter 3.3.1.

On the one hand, it might seem like the use of potentially lethal force would under normal circumstances not be justified without any kind of prior notification. The objective of Article 2 is to protect the right to life, and when applying the provision, the Court will examine whether non-lethal measures could have been used to achieve the objective of the operation. In lack of a prior notification, the crew inside the submarine is not given the opportunity to stop its activities or leave the area. Another argument is that within the law of the sea, the coastal states are subject to obligations in relation to other states, whereas when dealing with human rights, the states are under obligations providing rights to individuals. As the right to life is the most fundamental right of an individual,¹⁶⁶ this distinction indicates that the coastal State cannot apply the same approach to a submarine intrusion as it could do if the law of the sea was considered an isolated branch of international law, outside the reach of human rights.

On the other hand, it is hard to imagine how the Court would apply the requirement of a prior notification in light of the special circumstances, as the ECtHR has never been faced with a similar case. It must be emphasised that a submarine intrusion, where a submarine is likely to engage in activities that may lead to serious injury or death, constitutes an extraordinary situation. It seems reasonable to argue that a prior notification might not be suitable to remedy the threat that the coastal State is facing in such a situation. Furthermore, a prior notification may not be considered as a natural remedy. This is due to the fact that it might be hard or impossible to give a prior notification to a submerged submarine that is trying to avoid attention from the coastal State. Thus, the conclusion must be that the lack of a prior notification would not constitute a violation of the ECHR in such cases.

Furthermore, a public statement saying that force will be used if a submarine is posing a threat of serious injury or death to people within a State's territory can be seen as a form of a prior notification. The states operating with submarines and their crew will thus be aware of the fact that force will be used without a direct warning to the submarine in the specific

¹⁶⁶Nachova and Others v. Bulgaria, para 93.

situation. Furthermore, the use of minor explosives before the coastal State use excessive force can also arguably be seen as a prior warning to the submarine.¹⁶⁷

As a curiosity, it should be mentioned that Finland applied several depth charges in its territorial sea close to its capital Helsinki in April 2015 as a response to what was likely to be a submarine intrusion.¹⁶⁸ These depth charges were “not intended to damage the target, the purpose [was] to let the target know that it has been noticed”.¹⁶⁹ Whether the “warning act” was used as a prior notification due to Finland’s human rights obligations contained in the ECHR or just as a defence act, has not been publically stated.

However, from the perspective of reasonableness, “it would be difficult to accept that highly intrusive measures were chosen if other, less harmful means were available”.¹⁷⁰ Thus, the coastal State would still be obliged to choose the less harmful measures, even if a prior notification is not required as one of those means.

Furthermore, “the determination as to whether a use of lethal force was ‘absolutely necessary’ requires the Court to inquire into the particular circumstances of each claim on a case-by-case basis”.¹⁷¹ In the *Finogenov* case, the Court stated that “the situation appeared very alarming”¹⁷² and that “there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the ‘lesser evil’ in the circumstances”.¹⁷³ Based on these findings, the Court found that Russia “did not in the circumstances run counter to Article 2 of the Convention” at this point. Thus, “even though the doctrine of margin of appreciation has been thought not to apply to Article 2, in fact, the Court’s decision to grant high level of

¹⁶⁷ This approach could be used if it is impossible to establish contact with the submarine.

¹⁶⁸ <http://www.bbc.com/news/world-europe-32498790> (Last accessed 22 August 2015).

¹⁶⁹ <http://ca.reuters.com/article/topNews/idCAKBN0NJ0Y120150428> (Last accessed 22 August 2015).

¹⁷⁰ Janneke Gerards, “How to improve the necessity test of the European Court of Human Rights,” *International Journal of Constitutional Law* 11 (2015): 466-490, 470.

¹⁷¹ Sarabeth M. Zielonka, “The Universality of the Right to Life: Article 2 and the Margin of Appreciation in the Jurisprudence of the European Court of Human Rights,” *New York University Journal of International Law and Politics* 47 (2014): 245-278, 251.

¹⁷² *Finogenov v. Russia*, para 226.

¹⁷³ *Id.*

deference to political choices of Contracting states exists because the Court does not feel that these decisions are within its capacity to review”.¹⁷⁴

It must be emphasised that a submarine intrusion creates an extraordinary situation. If a coastal State has credible information establishing that the submarine is engaging in activities that may lead to serious injury or death, which create a threat to the people within the jurisdiction of the said State, it might find itself in a situation somewhat similar to the previously mentioned *Finogenov* case.¹⁷⁵ If the authorities have to act under tremendous time pressure and with a minimal control over the situation, the State may be entitled to depart from the rigorous standard of “absolutely necessity”.¹⁷⁶ The decision to launch an attack against a submarine engaging in such activities in the internal waters or the territorial sea may arguably qualify as a political choice made under such circumstances.

However, even though a coastal State may find itself in a situation where it has to react to a verifiable threat to the life and health of persons under tremendous time pressure and with minimal control over the situation, this will not relieve it altogether of its obligation to apply the less excessive method.

5.2 – The choice of means and scope of force permitted in the case of submarines

In the case of submarine intrusions in times of peace, the objective of the operation initiated by the coastal State is likely to be the verification of activities undertaken and to protest to the government to which the submarine belongs. In extreme instances, the neutralization of the submarine might be held necessary.¹⁷⁷ Earlier measures taken by Sweden in the Hårsfjärden incident included the use of metal barriers across the two main entrances to Hårsfjärden, through which the submarine might leave the area.¹⁷⁸ The use of such measures would seem to be in accordance with the ECHR, as it does not include the

¹⁷⁴Zielonka, ”The Universality of the Right to Life: Article 2 and the Margin of Appreciation in the Jurisprudence of the European Court of Human Rights,” 260.

¹⁷⁵ *Finogenov v. Russia*, paras 211 and 248.

¹⁷⁶ *Id.*

¹⁷⁷ In this context, the word ”neutralization” must be understood as measures used to force the submarine to the surface, and not such force that is used to destroy or sink it.

¹⁷⁸ Sadurska (1984), 37.

use of potentially lethal force to achieve the object. Once a coastal State chooses to deploy and use depth charges, the legality of the method under the ECHR may be disputed.

Of special interest in the case of submarines is the fact that the ECHR is applicable even where death occurs as an unintended outcome.¹⁷⁹ This seems to be the case where a State uses force in order to achieve another goal than the taking of life. When a coastal State uses force against a submerged submarine in its internal waters or territorial sea, with the objective of forcing it up to the surface, the ECHR might be applicable even if the use of force leads to the “mere” unintentional killing of the crew and also situations where the crew survives but their lives are endangered.

The method used to force a submerged submarine to the surface may include the use of depth mines.¹⁸⁰ A depth mine is an explosive charge designed to explode underwater at a preset depth and which may have different characteristics. Some are designed to totally destroy its target, while incident depth charges “are designed to create numerous scattered punctures in a submarine’s hull that are not big enough to sink the submarine immediately but make immediate repair impossible, so that the submarine is forced to the surface without harming the crew”.¹⁸¹

The test of “absolute necessity” entails that the coastal State should at least try less intrusive measures before mines are deployed. A natural measure would be trying to establish the location of the submarine for the purpose of neutralizing it without the use of force. If a submarine is located, the armed forces of the coastal State might be able to disarm it by destroying its torpedo’s and stop its activities before a potential attack is launched. However, this approach could also pose a risk to the life and health of the crew. Other measures could hypothetically also include prevention of the submarine’s movements until the crew surrenders. In order to locate a submarine, “sound is the primary means”.¹⁸² Furthermore, “secondary means (visual observation, radar and signal intelligence, as well as magnetic anomalies) depend mainly on detection of snorkelling

¹⁷⁹ See Chapter 4.4.

¹⁸⁰ Sadurska (1984), 37.

¹⁸¹ Ibid, 50.

¹⁸² Ralf Lillbacka, “A Swedish Ebbinghaus Illusion? Submarine Intrusions in Swedish Territorial Waters and Possible Soviet Deception,” *Intelligence and National Security* 25 (2010): 656-681, 663.

masts and periscopes or voluntary transmissions”.¹⁸³ Another natural measure would be trying to establish contact with the submarine. Thus, the coastal State may request it to leave the area or surrender. If this measure fails, the State should try to use barriers to prevent the escape of the submarine where this is not impossible because of the depth of the Fjord.¹⁸⁴

The use of depth mines, with the purpose of destroying the hulls of a submarine in order to sink it, endangers the life of the crew operating the submarine. If depth mines are used only to make small scatters in the hull in order to force the submarine to the surface, the situation may be different. However, the abovementioned non-lethal means should be applied prior to the use of force. If this approach is applied, the coastal State may be able to justify its actions under the ECHR Article 2(2).

When a coastal State finds itself in a situation where it has to act in order to protect the life of people located within its territory, Article 2(2) also requires that the operation must be carefully planned and controlled. In the case of submarines, this could include prior investigation revealing the presumed location of the submarine intruder. Thus, the requirements of carefully planning and control will also enable the object of neutralization with non-lethal measures. It must be emphasised that in addition to planning and control during a specific operation, the coastal states should have generic plans describing the methods that should be used in case of submarines entering their internal waters and territorial seas and which poses a threat of serious injury or death to the people within its territory. Even though the current writer has not been able to identify this requirement in the judgements of the ECtHR, this would be in accordance with the requirement that operations involving the use of force must be planned and controlled so the risk of loss of lives are minimised.¹⁸⁵

Against this background, it must be examined whether the use of potentially lethal force against a submarine would constitute a violation of the ECHR. Due to the recent submarine intrusion in Sweden, it is natural to take a look at the means used by the armed forces of Sweden during this particular incident. As Sweden was faced with a submarine intrusion in

¹⁸³ Id.

¹⁸⁴ Sweden used metal barriers during the Hårsfjärden incident. See Sadurska (1984), 37.

¹⁸⁵ Nachova and Others v. Bulgaria, para 103.

October 2014,¹⁸⁶ the State that lead the way in the development of customary international law concerning the use of force against submarines within the law of the sea,¹⁸⁷ found itself in a situation where it had to react to the threat posed by a submarine. During this incident, the armed forces of Sweden used several measures in order to locate the intruder. None of these measures seem to have included the use of potentially lethal force. In the aftermath, it seems that the Swedish Government refrained from the use of potentially lethal force due to its human rights obligation.¹⁸⁸ This resulted in a debate as to whether Sweden was entitled to use potentially lethal force despite its obligations under the ECHR. The leading Swedish scholar Bring has publically stated that the Swedish Territorial Defence Ordinance¹⁸⁹ and the ECHR “are different sets of rules that functions in parallel, and that the European Convention of Human Rights was never intended to limit the military security interests [...] that takes over for the normal human rights obligations that functions in the times of peace”.¹⁹⁰

5.3 – May a coastal State use potentially lethal force against a submarine found in its internal waters or territorial sea?

The critique of the armed forces of Sweden in the aftermath of the 2014 incident is mainly based on the argument that the ECHR was never intended to limit the military security interest of the member states. Thus, it must be examined whether the ECHR can be seen as an instrument limiting the coastal states right to use potentially lethal force against submarines.

¹⁸⁶ <http://www.reuters.com/article/2014/11/14/us-sweden-submarine-idUSKCN0IY0U720141114> (Last accessed 10 August 2015).

¹⁸⁷ See Chapter 3.3.1.

¹⁸⁸ However, the Swedish government has not given any public statement regarding the means that was used to locate the submarine and how the ECHR affected the choice of means in the operation. See Annex I.

¹⁸⁹ The Ordinance “is the national legislation which authorizes the armed forces to defend the Swedish Geographic Territory in peacetime.” This includes the sea territory of Sweden. See Victoria Ekstedt,, ”Is the Swedish Territorial Defence applicable on the fourth arena?” ed. C. Czosseck, E. Tyugu, and T. Wingfield. Paper presented at 2011 3rd NATO Conference on Cyber Conflict, Tallinn ,2011. Available at:

<https://ccdcoe.org/ICCC/materials/proceedings/ekstedt.pdf>

¹⁹⁰ <http://www.dn.se/nyheter/sverige/regler-for-ubatsinsats-kritiseras/> (Translated by the author), (Last accessed 5 August 2015).

As the alternative where force is used to prohibit “entry to a clearly defined place to which access is forbidden on grounds of national security”¹⁹¹ was omitted in the final draft,¹⁹² it would seem that the member states intended to limit the legal uses of force in situations regarding national security. Arguably, it could be argued that the exception was omitted because it was considered to be “consumed” by the three other exceptions in Article 2(2), but this seems doubtful.¹⁹³ Furthermore, that the list of exceptions included in Article 2(2) is considered exhaustive argues against force being used solely on the basis of national security.

Also, the status which the ECtHR has granted the right to life indicates that the Court would probably not feel bound by a potential consensus existing between the Parties regarding the use of force in 1950. This is a consequence of the “living instrument-doctrine” first introduced in the *Tyrer* case.¹⁹⁴ As conditions have changed over time, the Court could be expected to interpret Article 2 in a dynamic way, in light of the present-day conditions. Thus, the conclusion must be that the fundamental character of Article 2 constitutes a limitation on the coastal state’s right to use potentially lethal force against submarines.

With the strict requirements established under the ECHR, it seems doubtful that a coastal State can use potentially lethal force against a foreign submarine without applying non-lethal measures to achieve its object beforehand. The only potential exception would be if the coastal State finds itself in a situation similar to the previously mentioned *Finogenov* case.¹⁹⁵ However, the coastal State has to apply the less excessive method to achieve its object of neutralization. Furthermore, the Court has less inclined here to accept a weakening of the human rights due to the serious situations which the states are facing.¹⁹⁶

¹⁹¹ B.G Ramcharan, ”The Drafting History of Article 2 of the European Convention on Human Rights” in *The Right to Life in International Law*, ed. Bertrand G. Ramcharan (Leiden: Martinus Nijhoff Publishers, 1985): 57-62, 59.

¹⁹² Council of Europe, *Collected edition of the «Travaux préparatoires» of the European Convention on Human Rights*, Vol V, 120-122.

¹⁹³ Frostad, *Kan liv tas til vern av annet enn menneskelig liv og helse?* 94.

¹⁹⁴ *Tyrer v. The United Kingdom*.

¹⁹⁵ *Finogenov v. Russia*.

¹⁹⁶ Frostad, *Kan liv tas til vern av annet enn menneskelig liv og helse?* 95.

This is evident due to several cases decided on the basis of the non-international armed conflict in Chechnya.¹⁹⁷

It seems reasonable to argue that a coastal State faced with a submarine intrusion is obliged to refrain from the use of force. The reasoning behind this is that the object of neutralization, in order to protect the people within its jurisdiction, can be achieved without the use of force.¹⁹⁸ It must be emphasised that the situation in the *Finogenov* case¹⁹⁹ left the Russian Authorities with no other choice than using gas and storming the building, as the negotiations with the separatists broke down. In the case of a submarine intrusion, the coastal State would often be able to apply non-lethal measures to achieve its objective of neutralization. Furthermore, the case of a submarine intrusion differs from the situation in the *Finogenov* case,²⁰⁰ because the Russian authorities had reliable information confirming that the life of the 950 hostages were in imminent danger. When a coastal State is faced with a submarine intrusion, this particular element seems to be missing. Even though it can be assumed that a submerged submarine is engaged in activities that may lead to serious injury or death, the submerged mode cannot automatically be said to constitute an immediate threat to the people within the Coastal State's territory. Thus, the coastal State would presumably not be able to invoke the exception of self-defence contained in the ECHR Article 2(2)(a) under such circumstances. The only potential exception would be if the coastal State has credible information confirming that the submarine is preparing an imminent attack on individuals, or which would otherwise directly expose individuals to life-threatening situations. It seems reasonable to conclude that the threshold for the use of force in such situations would be high, and that this naturally constitutes a narrow exception. On the other hand, if the coastal State is in possession of intelligence about an immediate attack from another State, the law of armed conflicts would be applicable.

Against the discussion undertaken in this chapter, it can be concluded that a coastal State cannot normally use potentially lethal force against a submarine found in its internal waters or territorial sea without violating the ECHR article 2.

¹⁹⁷ *Id.*

¹⁹⁸ See discussion in Chapter 5.2.

¹⁹⁹ *Finogenov v. Russia.*

²⁰⁰ *Id.*

It can also be argued that the strict requirements, which regulate the use of force in the ECHR, set forth a higher threshold for the use of force than the Law of the Sea in situations concerning submarine intrusions. This is evident by the fact that the right to use force in the Law of the Sea seems to be wider when a State uses force against a submarine than another type of vessel.²⁰¹ A State that is a party the ECHR would nevertheless also be bound by its provisions, even though the rules established in the Law of the Sea seems to have a wider margin. Thus, the coastal states bound by both sets of rules cannot use the customary international law established in the Law of the Sea to rectify a violation of the European Human Rights law.

²⁰¹ See Chapter 3.3.1.

Chapter VI – Conclusion

6.1 – Concluding remarks

The main objective of this thesis was to establish whether a coastal State has the right to use potentially lethal force against submarines in its internal waters and its territorial sea. Against this background, several observations have been made.

First, the regulations on the use of force in the Law of the Sea requires that the force must be “necessary”, “reasonable” and “unavoidable”. Thus, the requirement of “necessity” emphasises that the circumstances must be serious and that other measures cannot be used to achieve the same results as the use of force. Furthermore, that the requirement of “necessity” includes the use of a prior notification before force is used. The criterion of reasonableness points towards an assessment of proportionality, and indicates that in situations where force is considered as a necessary means, it might nevertheless fail to be reasonable.²⁰² The criterion requiring that the force must be “unavoidable” indicates that all other reasonable measures must be implied before the use of force would be justified.

Second, the abovementioned criteria’s seems to be modified when a coastal State is responding to a submarine intrusion in its internal waters and territorial sea. Due to the lack of protests against the Swedish Ordinance of Defence adopted in 1982,²⁰³ it might seem that customary international law regarding the use of force against submarines has developed. The Swedish legislation provides for the use of force against submarines with no requirement of a prior notification. Thus, the criterion requiring that the force must be “necessary” and “unavoidable”, as developed in the Law of the Sea seems to be modified. Hence, the threshold for the use of force against a submerged submarine is lower than against other foreign vessels located in the internal waters and territorial sea of a coastal State.

²⁰² Frostad (2015), 215.

²⁰³ See Chapter 3.3.1.

Third, the individual right to life under the European Convention on Human Rights obliges the State Parties to safeguard the right to life by refraining from unlawful killings at the hands of their agents. However, in accordance with Article 2(2)(a) of the ECHR, the use of potentially lethal force may be justified if the force is used in “defence of any person from unlawful violence”. Such force must be “absolutely necessary” to be in accordance with the exception contained in the ECHR Article 2(2)(a). The assessment of “strict proportionality” requires a prior notification under normal circumstances. However, when a coastal State is responding to a submarine intrusion, it seems reasonable to conclude that the requirement of a prior notification may be departed from, as this does not seem to be a natural means under such extraordinary circumstances. Thus, the potentially customary international law that seems to have developed in the case of submarines within the Law of the Sea seems to be in accordance with the human rights obligations contained in the ECHR Article 2(2).

Finally, it seems reasonable to argue that the conclusion of the primary research question in this thesis must be that a coastal State cannot use potentially lethal force against a submarine found in its internal waters or in its territorial sea. This is due to the fact that the objective of neutralization, in order to protect the people within its territory in accordance with the ECHR Article 2(2)(a), may often be achieved with the use of non-lethal measures. Furthermore, submerged passage in these maritime zones cannot automatically be said to pose an immediate threat to the people within the coastal State’s territory, even though it can be assumed that it is engaging in activities that may lead to serious injuries or death. Thus, the use of force against a submarine under such circumstances would seemingly constitute a violation of the European Convention on Human Rights.

In light of the concluding remarks of this thesis, there might be a need for a global dialogue concerning the use of force against submarines.

As customary international law seemed to develop in the aftermath of the Swedish submarine intrusions in the 1980s, this raises the question of whether there is now a need for a codification of the customary rules and principles applicable to the use of force against submerged submarines found in a Coastal State’s internal waters or territorial sea. A decisive factor in this discussion will be the willingness of the states that possesses large fleets of submarines and submarine weapons to participate in such a discussion. It seems

doubtful that particularly the US, Russia and also China would be interested in a codification of the rules and principles applicable to submarines. This view is also supported by Von Heinegg, who argue that “ those states whose interests are specifically affected...will either remain absent or refuse to become a party”²⁰⁴ to a potential treaty. Thus, one might argue that “any codification would, at best, be counterproductive”.²⁰⁵

Even though it doesn't seem like there will be any possibility for codification of the relevant rules at present, this might be a possible scenario in the future. Bearing in mind the recent submarine incidents in both Sweden and Finland, the security interests of the coastal states' may nevertheless lead the way to a further debate concerning the rules regulating the use of force against submarines in the future.

²⁰⁴ Von Heinegg (2008), 161.

²⁰⁵ Id.

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ANNEX I – LETTER FROM THE SWEDISH MINISTRY OF DEFENCE.



REGERINGSKANSLIET

2015-08-18

F62015/01060/MFI

Försvarsdepartementet

Hej

Tack för ditt brev angående IKFN-förordningen.

Informationsoperationen i Stockholms skärgård i oktober 2014 bedrevs av myndigheten Försvarsmakten. Regeringen uttalar sig inte om detaljer i myndigheternas verksamhet. Det finns således inget officiellt uttalande från regeringen om vilka medel Försvarsmakten använde i informationsoperationen.

Enligt den svenska grundlagen får regeringen inte bestämma hur en myndighet ska tillämpa gällande lagar. Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna är lag i Sverige. Frågan om hur Försvarsmakten tolkar konventionen har därför inte heller kommenterats av regeringen.

Med vänlig hälsning

Tommy Åkesson

Biträdande chef för enheten för militär förmåga och insatser

ANNEX II – LETTER FROM THE SWEDISH MINISTRY OF DEFENCE (Translated by the author).

Hi,

Thank you for your letter regarding the IKFN-Ordinance.

The Armed Forces of Sweden conducted the information operation in the Stockholm archipelago in October 2014. The government does not comment on details of the authorities' operations. Thus, there is no public statement given by the government regarding the means applied by the armed forces in the information operation.

According to the Swedish constitution, the government is not permitted to decide how an authority should apply the applicable law. The European Convention for the Protection of Human Rights and Fundamental Freedoms is law in Sweden. The government has thus also neither commented on the question about how the armed forces interpret the Convention.

Best Regards

Tommy Åkesson
Biträdande chef för enheten för militär förmåga och insatser