volume

1

ASCOMARE YEARBOOK ON THE LAW OF THE SEA 2021

Law of the Sea, Interpretation and Definitions

Edited by

Pierandrea Leucci and Ilaria Vianello

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ON THE LAW OF THE SEA

2021

Volume 1:
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Volume 1: Law of the Sea, Interpretation and Definitions

The *Associazione di Consulenza in Diritto del Mare* (ASCOMARE) is dedicated to promoting the study, and uniform interpretation and application of the international law of the sea, including the United Nations Convention on the Law of the Sea, 1982, and its implementing instruments. The work of ASCOMARE is inspired by human rights considerations and environmental principles. The *ASCOMARE Yearbook on the Law of the Sea* strives to serve as a tool to support the work of international law experts, judicial bodies, policy makers and legal practitioners in the field of the law of the sea.

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Cover image: Emma Critchley, *'Frontiers'* from a film still, 2016.

The Editors would like to dedicate this book to all the souls lost at sea searching for hope, peace, and a warm touch of humanity

Ilaria Vianello and Pierandrea Leucci
Heidelberg and Lecce, December 2021

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Foreword

A few years ago, I was supporting a government in drafting a piece of its domestic legislation. It was late at night when I started working on the part of the text setting rules on marine environmental conservation. I needed a definition of 'environment' that could fit the purposes of the law. Something broad enough to cover not only natural resources and ecosystems, but also environmental amenities. After an hour or so, my mind switched to autopilot. For a moment, I felt like Darrell Standing traveling across space and time, and finding shelter, quite oddly, in the words of Judge Bedjaoui in the *Gabčikovo/Nagymaros* case — the captivating idea that the conceptualisation of the 'environment' holds a static nature. In the meantime, *The Dark Side of the Moon* LP, gently playing in the background, reached track three — 'Time'. I could hear the voice of Gilmour singing, 'the sun is the same in a relatively way but you're older'. What an unconventional way to grasp the intimate gist of the unruly relation between predictability and reality, including the perception of reality. The environment is the environment, but the way we look at it changes over time. This is also why definitions are needed in the first place. A flowery normative dress to wrap words in. A dress that, like any other, does not last forever, but from time to time needs to be patched up, and eventually thrown away. In the *Corfu Channel* case, Judge Alvarez noted that 'international life is in a state of constant evolution, and […] international law must always be a reflection of that life.' But then how could the gap between predictability and reality be bridged, in practice? One way of doing so is by changing the law; another by (re)interpreting it. The latter exercise, however, is more challenging, as rules and definitions have a life of their own: they have a history, a legal family, an object, and a purpose. This is true in the law of the sea, as in other areas

of international law, where the meaning of terms (or the absence of any official meaning) is the result of a complex negotiation process. As such, reaching a common understanding of what certain terms mean and how they should be interpreted is not an easy task for jurists, nor for national and international courts.

This first volume of the *ASCOMARE Yearbook on the Law of the Sea* is devoted to 'law of the sea, interpretation and definitions'. This is not a manifesto of all the undefined terms and concepts of the law of the sea. Here you will not find a comprehensive definition of 'environment.' Rather, the goal envisioned in this book is to look at legal terms and provisions through the lens of our times in order to prompt further reflection, and facilitate an exchange of views on the role of interpretation and definitions under the law of the sea. We hope you will enjoy the reading.

Pierandrea Leucci
President of ASCOMARE
Lecce, December 2021

The Image: An Interpretation

*Mekhala Dave**

This piece came about upon our discussion and love for the Oceans. At ASCOMARE, law of the sea attempts to demystify the Oceans from a legal standpoint, however, we recognized that a jarring gap remained with literacy of images for the Oceans. We may think of a few artists whose (re)creations from art of the Oceans have taken our breath away.

How much do we know of our Oceans, legally and scientifically? How can we think of the Oceans artistically? How do we connect and care for the Oceans? Do we feel it in our ears, smell, touch, or sight? How do we experience our contemporary (changing) times of the Oceans? We felt an imminent need to elucidate these questions that have not yet been entirely touched upon in the legal world. To inspire care for the Oceans culturally, we required artistic means and mediums to brainstorm. We consider this piece as a starting point to stir a dialogue with our contributors and readers. Even if questions remain unanswered, we hope the artwork as the book cover would justify what could not be entirely expressed in this piece – in carrying forward a unique visual interpretation from each of you.

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* Mekhala Dave is a PhD researcher at the University of Applied Arts Vienna and an Ocean Law & Policy Analyst | TBA21–Academy.

The inaugural issue of ASCOMARE on the Law of the Sea signifies change for the Oceans. The foreword poignantly describes the perception of reality, inspired by music.

Art, in the form of music, crafts or images offers us an insight into reality. Reality is conceived but with multiple perspectives and narratives. Upon this precise basis, law and its language have kaleidoscopic meanings but with a congruent purpose for us to all universally agree upon. Law's language is a constant evolution, told by stories, events, society and politics of our changing times.

ASCOMARE, with its inaugural issue, presents the interpretation of terms and meanings in the Law of the Sea to spark exchange of views and ideas.

Whilst the book immerses us into narrating legal language from different perspectives, the artwork as the book cover is an attempt to invite a dialogue on the literacy of images and its translation of the Oceans.

A translation of visual, emotive, and sensorial narratives of the Oceans.

The Oceans are a mysterious and spiritual force that inhabit the Earth.

Ceremoniously non-territorial by humans but marked by Ocean inhabitants, a world in its own shape and form, escapes humans' understanding and imagination of the Oceans.

The artwork brings us closer to the Oceans to the reality of wading with water, amplifying our imagination with Oceans.

A single image can have 1000 realities and perspectives. The image can sometimes translate what we cannot express with words. A powerful image touches a nerve in us that we cannot yet comprehend in words.

It serves as a point of connection to the life around us. Similarly, this artwork as a book cover may evoke our vocabularies that may not present itself on our tongues.

An artist who perceives an image in her mind thus imitates the environment around her with the image taken from the camera. Environment, as regarded in the foreword, is a space that is static in nature, however, it

changes according to our interpretation of it. The author Oscar Wilde in his essay (1889) The Decay of Lying emphasized that 'Life imitates Art far more than Art imitates Life.' This is the reverse of the philosopher Aristotle's concept of 'mimesis.' 'Mimesis' means that art draws inspiration from our environment. Anti-mimesis, which is Oscar Wilde's perceptive, is that life or our environment has aesthetics already which is realized by expressions from forms of art. Judge Alvarez, as quoted in the foreword, mentioned in the *Corfu Channel* case that international law must be a reflection of international life that is constantly evolving. Interestingly, one may experience 'anti-mimesis' that the [international] legal language *mirrors* life which is the changing relations with each other and to our environment. Legal language itself is also a way of storytelling of our fluctuating times. Storytelling may be often recorded by the medium and use of images.

Upon the vehicle of an image, Emma Critchley captures the aesthetics of our environment what is already there – for us to surrender to the image. Thus, the image draws our attention to our environment.

The artwork is conceived when the image is circulated and distributed for viewers' perceptions maintained in the image – a reality that explodes into 1000 realities.

This artwork, conceived by Emma Critchley, from her underwater photography and deep-sea dives brings us to consider her experience with water and the Oceans. She is applying spaces of philosophy, politics and the environment with the combination film, sound, photography, and installation to discover human relationships to our environment. The artwork was a precursor to her film *'Common Heritage'* (2019). The artwork was taken during the NARS Foundation residency in New York in 2015 and the artwork is titled *'Frontiers'* from a film still, 2016. Her research began on new frontiers which focused on a curious vessel that touches upon the ocean water to indicate a sublime yet apocalyptic feel of discovery. This leaves our eyes to trace possibilities of encounters with the artwork: who discovers, why the discovery, what is yet to be discov-

ered and have we (metaphorically) landed to discover further possibilities to the Oceans…?

As we maintain our individual experiences, we also consider hers in exchange of ours. The artist and we as viewers contemplate and comprehend history, politics, and language to describe the artwork. It is here that the clasp of the artist over the image diminishes and enters the arena of the viewers.

History and politics, and the ideas that fuel them sit in trial for us to consider changes within our environment.

Relating (or unrelating) with the artwork, it belongs to translating and narrating our environment.

We, as viewers, embark on the journey with the artwork bringing us to a closer understanding of the Oceans. Therefore, the power of an image and thus, presented as an artwork cannot be underestimated. However, what presents a challenge for us is the literacy of images: how do we read them, how do we connect to them and, how do we translate/mediate them?

Law, it's language and art are not different from one another as we think it may be separated by two polarized fields. In fact, anti-mimesis, the thing which is life reverberates across both fields of law and art – both is imitated by Life, our relations, and the environment around us.

The artwork as the book cover constructs a beautiful sentiment not only to the contents of the authors contributions but to also the observations/responses of our readers.

We believe that a copy of this book, from artwork and texts from cover to cover, holds the key to *'Gesamtkunstwerk'*. It is a German term for 'total work of art' that originated in the 18th century for Opera, drama, and theatre. Borrowing the term loosely and upon (re)adaptation in this context, the readers experience a comprehensive dialogue with the authors' contributions and the artwork for the Oceans. Thus, this inaugural book isn't only a book. It is an homage and a 'total' immersive experience for the Oceans in which Life imitates Art, i.e., the anti-mimesis of our environment.

Emma Critchley *is an artist who uses a combination of photography, film, sound, and installation to continually explore the human relationship with the underwater environment as a political, philosophical and environmental space. She is Royal College of Art alumni, and her work has been shown extensively nationally and internationally. Recent works include 'Common Heritage', a film about the imminent threat of deep-sea mining for rare earth minerals and 'The Space Below', a large-scale public sound installation about underwater acoustic pollution made in collaboration with artist Lee Berwick and installed in the Greenwich Foot Tunnel for the launch of the UK National Maritime Museum's 'Our Ocean, Our Planet' season in 2020. In 2021, her film installation 'Witness', created during the Earth Water Sky residency programme with Science Gallery Venice launched in the Italian Pavilion of the Venice Architecture Biennale.*

www.emmacritchley.com

List of Abbreviations

BBNJ:	Biodiversity Beyond National Jurisdiction
CCAMLR:	Convention on the Conservation of Antarctic Marine Living Resources
CJEU:	Court of Justice of the European Union
COLREGS:	Collision Regulations
CS:	Continental Shelf
DOALOS:	Division for Ocean Affairs and the Law of the Sea
ECtHR:	European Court of Human Rights
EEZ:	Exclusive Economic Zone
FAO:	Food and Agriculture Organization
GAIRS:	Generally accepted international rules and standards
GFCM:	General Fisheries Commission for the Mediterranean
GCHS:	Geneva Convention on the High Seas
GIS:	Geographic Information System
HRC:	Human Rights Council
ICC:	International Criminal Court
ICCAT:	International Convention for the Conservation of Atlantic Tuna
ICCPR:	International Covenant on Civil and Political Rights
ICJ:	International Court of Justice
ICS:	International Chamber of Shipping
IHO:	International Hydrographic Organization
ILC:	International Law Commission
ILM:	International Legal Materials
IMO:	International Maritime Organisation
IOC:	Intergovernmental Oceanographic Commission of UNESCO
IOM:	International Organization for Migration

IPCC:	Intergovernmental Panel on Climate Change
ISA:	International Seabed Authority
ISNT:	Informal Single Negotiating Texts
ITLOS:	International Tribunal for the Law of the Sea
IUU:	Illegal, Unreported and Unregulated fishing
LOSC:	UN Convention on the Law of the Sea
LON:	League of Nations
MFCM:	Magnuson Fisheries Conservation and Management Act
MLE:	Maritime Law Enforcement
MoU:	Memorandum of Understanding
NCP:	National Competition Policy
NCPs:	Non-Contracting Parties to UNCLOS
NGO:	Non-Governmental Organization
OHCHR:	UN Office of the High Commissioner for Human Rights
P&I:	Protection and Indemnity
PCA:	Permanent Court of Arbitration
PCIJ:	Permanent Court of International Justice
PGIS:	Participatory Geographical Information Systems
PIF:	Pacific Island Forum
PSMA:	Agreement on Port State Measures to Prevent Deter and Eliminate Illegal, Unreported and Unregulated Fishing
RCCs:	Rescue Co-ordination Centres
RIAA:	Reports of International Arbitral Awards
RSNT:	Revised Single Negotiating Text
SAR:	Search and Rescue
SARCon:	International Convention on Maritime Search and Rescue
SHOM:	Hydrographic and oceanographic service of the French navy
SOLAS:	Convention for the Safety of Life at Sea

SRFC:	Sub-Regional Fisheries Commission
SRRs:	Search and Rescue Region
STCW:	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
SUA Con:	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
SUA Protocol:	Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf
TALOS:	Seminar on Technical Aspects of Law of the Seas
TS:	Territorial Sea
TSC:	Geneva Convention on the Territorial Sea and the Contiguous Zone
UNCLOS:	The United National Convention on the Law of the Sea
UNCLOS I:	First UN Conference on the Law of the Sea
UNCLOS II:	Second UN Conference on the Law of the Sea
UNCLOS III:	Third UN Conference on the Law of the Sea
UNFSA:	UN Fish Stocks Agreement
UNHCR:	United Nations High Commissioner for Refugees.
UNODC:	United Nations Office on Drugs and Crime
UNTS:	United Nations Treaty Series
VCLT:	Vienna Convention on the Law of Treaties
WCPFC:	Western and Central Pacific Fisheries Commission, Conservation and Management Measures and Resolutions

Unilateral Interests of States, Common Interests of States and Interests of Mankind: From Coexistence to Cooperation in the 1982 UN Convention on the Law of the Sea

*Ida Caracciolo**

1. From Coexistence to Cooperation in the 1982 UN Convention on the Law of the Sea

The 1982 UN Convention on the Law of the Sea (UNCLOS) has been described as one of the most significant and visionary multilateral conventional instruments of the 20th century. UN Secretary-General Ban Ki-moon remarked that UNCLOS establishes the legal framework within which all activities in the oceans and seas must be carried out and that it is characterised by its universal and unitary nature as well as being one of the most successful international treaties ever negotiated.[1] UNCLOS

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1. *UN Secretary-General’s remarks at 30th anniversary of the UN Convention on the Law of the Sea*, 10 December 2021 at https://www.un.org/sg/en/content/sg/statement/2012-12-10/secretary-generals-remarks-30th-anniversary-un-convention-law-sea.

is an example of diplomatic multilateralism, often innovative, which has been able to reconcile the opposing interests of States in a long negotiation held in a historical period in which the political and economic balances and legal rules of the past were criticised by the newly independent States. It is also an example of regulatory multilateralism in that it defines a system of maritime spaces and rules applicable to activities at sea and to the protection of the marine environment with a universal scope that not only safeguards the particular interests of individual States but also the common interests of States. Multilateralism also results in a universalism that contemplates mechanisms for the conservation and management of marine resources on behalf of all mankind.

UNCLOS does not only guarantee the unilateral interests of States to exercise, on the one side, their sovereignty, sovereign powers and jurisdiction at sea and, in the other, the freedoms of the sea and it does not merely establish rights and obligations between States under reciprocity, but it also identifies and protects interests that are common to States and in certain cases interests of individuals as a whole.[2]

The protection of state common interests at sea dates far back into the past as the ancient rules on the repression of piracy attest. Already the Romans considered pirates *hostis humanis* generis with the aim of protecting maritime trade which was of common concern.

Nowadays the need to safeguard shared interests calls for cooperation between States particularly in maritime areas beyond national jurisdiction. The regime of the high seas under the 1982 Convention is typically characterized by duties of cooperation, from cooperation for the safety of life at sea to cooperation in contrasting the illicit traffic of drugs and psychotropic substances. Other duties have been provided for by other

2. Bruno Simma, 'From Bilateralism to Community Interests in International Law' (1994) in Recueil des Cours Vol. 250, 217, at 234 and Yoshifumi Tanaka, 'Protection of Community Interests in International Law: The Case of the Law of the Sea', in Armin Von Bogdandy, Bruno Simma (eds), 'Max Planck Yearbooks of United Nations Law' (2011) Vol. 15, 329 ff.

subsequent treaties such as the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (with its 1988 and 2005 Protocols) and the 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air with reference respectively to terrorism at sea and smuggling of migrants by the sea.

These obligations to cooperate constitute an innovation in the regime of the high seas introduced by UNCLOS and complement the regime of coexistence of state individual interests in the various uses of the high seas that is guaranteed by Article 87(2). This provision balances the opposing interests of States through the so-called principle of "due regard". It implies that activities on the high seas must be exercised taking into consideration to the interests of other States in the exercise of the freedoms of the high seas and to the rights enshrined in the Convention with respect to the exploration and exploitation of deep-seabed resources.[3]

2. Common Interests of States and Cooperation in the Protection of the Marine Environment and the Sustainable Exploitation of Fisheries

The sector in which multilateral cooperation obligations are most widely enshrined by UNCLOS is the protection of the marine environment. Marine environment and its protection from pollution are no longer regarded as the object of States' individual rights and obligations, strictly reciprocal and mutual. On the contrary, the protection of the marine environment is considered as of general interest for the International

3. David J. Attard, Patricia Mallia, 'The High Seas', in David J. Attard (ed.), *The IMLI Manual of International Maritime Law. The Law of the Sea, Volume 1* (OUP, Oxford, 2014) 239 ff., at 244; Ida Caracciolo, 'Due diligence et droit de la mer', in Stefano Cassella (ed.), *Le standard de due diligence et la responsabilité internationale* (Pedone 2018), 163 ff.

Community. Therefore, any State, acting *uti universus*, namely on behalf of the International Community, is attributed certain jurisdiction against any other State that has polluted the marine environment, acting *uti singulus*; and, conversely, *erga omnes* obligations are imposed on all States to protect the marine environment against pollution.

Specifically, UNCLOS obliges States to protect and preserve the marine environment (Article 192) and to take, individually or jointly, all necessary measures to prevent, reduce and control pollution of the marine environment from any source (Article 194). The obligation to protect relates to any maritime zone: from areas under coastal State's sovereignty to areas under coastal State's sovereign powers and jurisdiction as well as the high seas, irrespective of the occurrence of transboundary effects. The obligation to cooperate, which can also be implemented through competent international organisations, aims at developing standards and procedures for the protection of the marine environment (Article 197). The 1982 Convention also establishes framework rules for typical cases of pollution: these are pollution from land-based sources (Article 207); from exploitation of the seabed (Article 208); from exploitation of the deep seabed (Article 209); by dumping (Article 210); from vessels (Article 211); and from and through the atmosphere (Article 212).[4]

Regarding pollution from vessels, it is worth highlighting that the 1982 Convention modifies the classic dichotomy between the flag State and the coastal State, giving enforcement jurisdiction also to the port State (Article 218). Thus, while it is for the flag State to exercise enforcement jurisdiction over vessels flying its flag which are responsible for pollution, irrespective of where the pollution was committed or produced, and while the coastal State has enforcement jurisdiction on foreign ships having polluted its territorial sea or exclusive economic zone, the port

4. Daud Hassan, Saiful Karim, *International Marine Environmental Law and Policy* (Routledge 2019).

State may undertake investigations and institute proceedings in respect of any discharge from any vessel in its ports which has polluted maritime areas outside its internal waters, territorial sea or exclusive economic zone (Article 218). In exercising these powers, the port State assumes the role of "organ" of the International Community in guaranteeing its common interest in the protection of the marine environment. In the event of pollution arising from maritime casualties all State are "delegated" to intervene on the high seas to avoid pollution also from foreign vessels (Article 221).[5]

Duties of cooperation are established by UNCLOS also in the field of fisheries. The 1982 Convention imposes two specific duties on States: a duty of conservation and a duty of cooperation both limiting the freedom of fishing (Articles 117 and 119). The establishment of such obligations is determined by the circumstance that, on the high seas, three different types of interests are opposed: the interests of the International Community in the conservation of the living resources of the high seas and the protection of the marine environment; the interests of individual States in the exploitation of these resources through the exercise of the freedom of fishing on the high seas, as enshrined in customary and conventional international law; and, finally, the interests of coastal States in the reasonable exploitation of these resources that does not harm the fishing activity carried out in their waters.

In addition to the duty of conservation, States on the high seas are subject to a duty of cooperation which is obligatory between States whose fishing boats exploit identical or different living resources in the same area. The concerned States shall negotiate with a view to adopting the measures necessary for the conservation of these resources (Articles 117 and 118). This obligation to cooperate in fishing on the high seas does not have a

5. Yoshifumi Tanaka (n 2).

merely programmatic value, since the refusal to accede to both international agreements on fishing on the high seas and to the relevant international organisations may constitute a breach of the general obligations of conservation and reasonable management of marine resources and of cooperation for these purposes, enshrined in the 1982 Convention.[6]

Different subsequent treaties have applied to illegal, unregulated or unreported fishing the modalities of control introduced by the UNCLOS for the protection of the marine environment, namely the concurrence between flag State, coastal State and port State control.[7] Here too, the dichotomy between flag State and coastal State is reinforced by the attributions of enforcement jurisdiction to the port State, which can carry out controls on catches and licenses, as well as adopt coercive measures to protect the common interest of all States in the conservation of marine living resources.

3. Interests of Mankind and State Cooperation in the Exploitation of Non-living Resources of the Area

UNCLOS enhances state cooperation also for the fulfilment of interests of individuals as a whole. In this perspective, the 1982 Convention defines

6. Olav Schram Stokke, *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (OUP 2001); Umberto Leanza, Ida Caracciolo, *Il diritto internazionale: Diritto per gli Stati e diritto per gli individui. Parti speciali* (3rd ed., Giappichelli 2012) 263 ff.

7. Article 23 of the 1995 Agreement for the Implementation of the Provisions of the 1982 United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and, most importantly, the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

and regulates the principle of the common heritage of mankind and the regime implementing that principle with the creation of the International Seabed Authority, competent to manage the exploration and exploitation of non-living resources of the Area and to distribute the results therefrom.[8]

Actually, UNCLOS acknowledges the progressive relevance of individuals, albeit collectively considered, in the field of natural resource management. This relevance has been generally translated into the awareness that the direct beneficiaries of natural resources are not States, as States-organisations, but rather all individuals, namely States-collectivities. This has led to the elaboration of a mechanism for the management of deep seabed non-living resources which could guarantee all mankind the enjoyment of their benefits. That mechanism is rooted in the principle of the common heritage of mankind, which testifies to the need and will of the entire universal community of individuals to correctly manage, protect and conserve its heritage, seen as the "inheritance" of past generations and the "wealth" of future ones. And in this sense, that principle is also at the basis for the emergence of the new principle of sustainable development.[9]

The application of this solidarity approach to the Area and its resources has taken place with many difficulties and with many perplexities

8. Marie V. Bourrel, Torsten Thiele, Duncan Currie, 'The common of heritage of mankind as a means to assess and advance equity in deep sea mining' (*Marine Policy*, 2016) <http://dx-.doi.org/10.1016/j.marpol.2016.07.017i> accessed 31 December 2021; Aline Jaeckel, 'Benefitting from the Common Heritage of Humankind: From Expectation to Reality' (2020) 35 Int'l J Marine Coastal L 660, 260 ss.; Yoshifumi Tanaka (n 2) 343 ff.

9. Umberto Leanza, Ida Caracciolo (n 6) 335; Fernanda Millicay, 'The Common Heritage of Mankind: 21st Century Challenges of a Revolutionary Concept', in Lilian C. Del Castillo, *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill/Nijhoff 2015) 272 ff.; Chuanliang Wang, Yen-Chiang Chang, 'A new interpretation of the common heritage of mankind in the context of the international law of the sea' (2020) *Ocean & Coastal Management 191 (2020) 105191*, 1-7 <http://law.dlmu.edu.cn/lunwen20200414.pdf > accessed 31 December 2021.

regarding the rules contained in Part XI of UNCLOS, so much so that it was necessary to adopt an additional Agreement implementing Part XI and an Annex.[10] The adoption of the Implementing Agreement in 1994 allowed a rapid and general participation in the 1982 Convention by the industrialised States that had hitherto contested it.[11]

The regime envisaged in Part XI of the 1982 Convention, as amended by the Implementing Agreement, on the one hand establishes that the seabed, ocean floor and subsoil beyond the limits of national jurisdiction, and their resources constitute the common heritage of mankind (Article 136), and, on the other, seeks to reconcile the conflicting interests of industrialised and developing countries, the former being inclined to carry out their own research and exploitation activities, and the latter to make the exploitation of the seabed a first step in the New International Economic Order.[12] Both these interests have been then coordinated with those of the land-based producers of the metals that can be extracted from the nodules of the seabed, which were concerned that an intense extraction activity from the international seabed could have negative repercussions on the prices of their products, and with those of the import-

10. The expression common heritage of mankind was first used in the UNGA Resolution, *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction*, A/RES/2749(XXV), 17 December 1970.

11. Unlike many of the other rules of the 1982 Convention, which, although formally in force since 1994, had long since been the subject of general *de facto* acceptance by almost all States, the provisions of Part XI not only did not give rise to any spontaneous observance, but on the contrary constituted an insurmountable obstacle to the participation of industrialised States in the Convention until the amendments introduced by the 1994 Implementing Agreement. See in this regard D.H. Anderson, David H. Anderson, 'Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment' (1995) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 275-289, 275 ff <https://www.zaoerv.de/55_1995/55_1995_2_a_275_289.pdf> accessed 31 December 2021.

12. UNGA Resolution, *Declaration on the Establishment of a New International Economic Order*, A/RES/S-6/3201, 1 May 1974.

ing countries of these metals, which are interested, for opposite reasons, in a large extraction and a growing availability of the same minerals at a lower price. The compromise was reached by creating a new international organisation, the International Seabed Authority, and by outlining delicate relationships, outside the Authority, between its functions and competences and the rights of Member States and their companies, and within the Authority, in its structure, composition and decision-making system, as well as in the distribution of competences between them.[13]

In conclusion, UNCLOS has internationalised certain interests through the principle of the common heritage of mankind. In this way, rules on the coexistence of States are complemented by rules on cooperation, which do not connect individual benefits to the obligations assumed by States, but on the contrary the protection and preservation of some common goods. Consequently, the interest of mankind in sustainable development is achieved, not only from an economic point of view, with the aim of developing an efficient and equitable management of certain maritime zones, resources and goods of common interest.

Moreover, the distribution of benefits makes this internationalisation particularly innovative if compared to the traditional system of interstate relations. It introduces into international law a dimension of solidarity consisting in the effective sharing of material benefits on an equitable basis.[14] The principles of solidarity and equity have been also institutionalised in the UNCLOS with the creation of the International Seabed Authority, creating a system for the exploitation of resources of common interest that is still unique today, given that the 1979 Agreement Governing the Activ-

13. Umberto Leanza, Ida Caracciolo (n 6) 338-339.

14. Tullio Treves, 'Principles and Objectives of the Legal Regime Governing Areas Beyond National Jurisdiction', in Erik J. Molenaar, Alex G. Oude Elferink (eds.), *The International Legal Region of Areas Beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff 2010), 7 ff.

ities of States on the Moon and Other Celestial Bodies, while describing them as the common heritage of mankind, does not go beyond this qualification and does not create a system that makes the principle effective.[15]

4. Future Scenario for the Protection of Common Interests at Sea: The Negotiation of an International Agreement on Marine Biodiversity beyond National Jurisdiction

Managing and preserving common interests of States continues to be an important thread in the law of the sea, as testified by the negotiation of an international legally binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ), arguably the most ambitious law of the sea treaty in decades, which seems to have entered its final stages.

Almost two-thirds of the ocean lies outside maritime zones under coastal States' sovereignty, sovereign powers and jurisdiction. These two-thirds include both the high seas and the Area whose non-living resources are subject to the common heritage of mankind regime. These areas are characterised by a very high level of marine biodiversity, much of which is still unknown to science. Although UNCLOS and other agreements and non-binding instruments contain standards for the protection of marine biodiversity, they are not deemed to offer a sufficient regime for marine biodiversity beyond areas of national jurisdiction. Therefore, at the 2012

15. Since the last decade of the 20th century, the principle has no longer been included in the agreements for which it was proposed. This was the case, for example, with the 1992 Framework Convention on Climate Change, where the problem of climate change is only qualified as a "common concern of humankind" even though Malta's original proposal was to use the concept of the common heritage of mankind (*ibid*, 336).

United Nations Conference on Sustainable Development (Rio +20), participating States committed to urgently address the issue of conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the UN Convention on the Law of the Sea.[16] An International Conference was convened in 2017 by the UN General Assembly and it started its works in 2018 which are still ongoing.[17]

The negotiating text on which the Intergovernmental Conference is working contains several critical points on a possible new regime for marine biodiversity beyond national jurisdiction on which delegations have not yet reached a shared approach.[18] These are the issues of benefit-sharing from marine genetic resources; management tools, including marine protected areas; environmental impact assessment; and capacity building and transfer of marine technology.

Marine genetic resources consist of the genetic material of marine organisms that may be of use to mankind. Marine scientific research on these resources could help develop new medicines or compounds for use in food or industrial processes.[19] Area-based management allows activities to be controlled in a comprehensive and integrated but also flexible manner, for example, by providing a greater degree of protec-

16. *The Future we want. Outcome Document of the UN Conference on Sustainable Development*, A/CONF.216/L.1, 19 June 2012, para. 162.

17. UNGA Resolution, *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, A/RES/72/249, 24 December 2017.

18. Vito De Lucia, 'A Very Quick Look at the Revised Draft Text of the new Agreement on Marine Biodiversity in Areas beyond National Jurisdiction', *EJIL: Talk!* (23 January 2020) <https://www.ejiltalk.org/a-very-quick-look-at-the-revised-draft-text-of-the-new-agreement-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/> accessed 31 December 2021.

19. The negotiation issues concern the definition of genetic resources, whether and how access to resources should be regulated and whether the benefits derived from the use or commercialisation of resources should be shared and if so, according to which mechanisms.

tion to an area than to the adjacent one. There are various area-based management tools, ranging from sectoral (regulating one activity, e.g., fishing) to cross-sectoral (regulating all human activities in an area), including marine protected areas, which are generally used for biodiversity conservation. To function effectively they require the involvement, not easy to achieve, of existing bodies and organisations in the sector or region.[20] Also the environmental impact assessment for activities on the high seas is controversial. While there is agreement on the necessity of such an assessment, it is still to be decided when it would be necessary, what information should be included, how the cumulative impact of activities should be assessed and what role should be assigned to existing organisations in the assessment process. Finally, opposite views concern how to address the development of the marine scientific and technological capacity of developing States so that they can participate fully in the conservation and sustainable use of marine biodiversity.[21]

The above brief analysis highlights the complexity of the BBNJ negotiations, still characterized by many divergent positions. First and foremost, there is the contrast between northern and southern States over the application of the principle of the common heritage of mankind to genetic resources beyond national jurisdiction.[22] Similarly, one of the most difficult topics relates to the access to resources, where there is still

20. Lisa Eurén Höglund, 'Area-based Management Tools, Including Marine Protected Areas – Reflections on the Status of Negotiations', in Myron H. Nordquist, Ronàn Long (eds.), *Marine Biodiversity of Areas Beyond National Jurisdiction* (Brill/Nijhoff 2021) 90 ff.

21. Harriet Harden-Davies, *Towards a Capacity-Building Toolkit for Marine Biodiversity beyond National Jurisdiction*, in ibid., 231 ff.

22. Fran Humphries, Harriet Harden-Davies, 'Practical policy solutions for the final stage of BBNJ treaty negotiations', in *Marine Policy 122 (2020) 104214*, 1-7, 1 ff.; David Leary, 'Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction', in *Marine Policy 99(2019) 101016*, 21-29, 21 ff.

opposition between developed States, many of which favour a free access regime, and developing States which support the prior informed consent model set out in the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.[23] Similarly States disagrees on whether to include in the scope of application of the BBNJ agreement only the sampling of *in situ* genetic resources or also of ex situ genetic resources and *in silico* analyses, as well as the related question of the status of what is derived from such resources and whether to include in the benefit-sharing only monetary benefits (as argued by industrialised States) or also non-monetary benefits (as argued by G77 States among others).[24]

Many are the obstacles to the conclusion of an agreement on marine biological diversity beyond national jurisdiction, and it remains to be seen whether the signature of such an agreement will be followed by a large number of ratifications that will make possible not only the entry into force of the agreement, but also a wide subjective scope of application able to guarantee an effective uniform management of marine biodiversity at global level. However, it is worth noting that no State has challenged the principles and rules contained in UNCLOS. Indeed UNCLOS continues to be appreciated for being able to provide framework rules even to the most recent problems relating to the uses of the sea.

In conclusion, UNCLOS not only establishes a balanced set of rights and obligations and provides for forms of cooperation aimed at fostering activities at sea and the protection of the marine environment and the management of marine resources but also encourages States to develop and improve new forms of cooperation with regard new activities and

23. The Protocol is an implementing agreement of the 1992 Convention on Biological Diversity.

24. David Leary (n 22) 26 ff.

for the protection of new common state interests. The 1982 Convention have been fully analysed, interpreted, and commented for forty years however it still offers room for reflection on its application from different and new perspectives, such as marine biodiversity but also the sea level rise or the protection of the marine environment from plastic and microplastic.

Some Remarks on Definitions in International Law of the Sea

*Tullio Scovazzi**

1. Turning the Pages of the Digest in the Wrong Direction

Moving from the assumption that definitions state the precise meaning of a word or an expression, I am inclined to look very carefully at them when drafting a legal text. I am afraid that, once you have worked out a definition and included it in a law or a treaty, you will, at the time of application of the instrument, discover that the scope of the definition is too broad or too narrow and that something that you would desire to exclude is, in fact, included or vice-versa.

Many years ago, I remember that, during the negotiations for a treaty on the protection of the marine environment, an endless discussion arose about the proper definition of a term. The problem was that scientists, belonging to different schools of thaught, had different views on the meaning of the term. This determined a relentless discussion among

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the scientists who were present in the delegations. I had the wish to put an end to the session, as it was late in the evening and there was something better to do, and I suggested to leave the term without definition, pointing out that, after all, we could allow for a certain flexibility in our future treaty. That is what negotiators sometimes call "constructive ambiguity". I also recalled that already the Roman emperor Justinian (482-565) warned in the Digest that every definition is dangerous in a legal text.

Backed by the authority of an emperor (and an emperor who has acquired a solid reputation in legal science), my suggestion was followed. But a foreign colleague asked me if I was able to provide him with a precise quotation from where in the Digest the passage on definitions could be found. I assured him that, while I regretted not to have with me the precise reference, I would duly answer his question once at home (there was no internet at that time to find everything easily). I did not tell the colleague that I had only a vague recollection of the passage from my university studies in law.

When, after the end of the negotiation, I went home, I started turning the pages of the Digest from the beginning to the end. The Digest is a big volume, normally full of dust, composed of many books. Every book is composed of many titles. Every title is composed of many fragments.

The required passage appears in the 202nd fragment (out of 211), of the 17th title (the last one) of the 50th book (the last one). It would have been much better if I had turned the pages from the end to the beginning! I spent a whole feverish day, from the morning to the night (included), in a desperate effort on the Digest! Finally, the passage, which is taken from the Roman jurist Lucius Javolenus Priscus (first century A.D.), materialized. It reads as follows:

> 'Omnis definitio in jure civili periculosa est: parum est enim ut non subverti possit'.

[‘Every definition is dangerous in civil law, because little is enough to overturn it’].[1]

My present view slightly departs from the teaching of the Digest. The use of definitions in a legal text is not in itself dangerous, provided that it does not become an abuse. Drafters of legal texts should be prudent with definitions. They are not supposed to compile a dictionary. Definitions should be provided only where the intended meaning of a term departs from its ordinary meaning or where, moving from a general concept, there is a need for a more specific notion to delimit the scope of application of a legal text.

For instance, I would not recommend to engage in an exercise to define the term ‘woman’ for the purposes of the Convention on the Elimination of All Forms of Discrimination against Women (New York, 1979), also in order not to preempt a natural evolution in the interpretation of this treaty – in fact, the term is not defined in the Convention. However, it seems to me that there is a real need to provide a definition of ‘child’ for the purposes of the Convention on the Rights of the Child (New York, 1989), where the age limit becomes a crucial aspect for the application of the treaty – in fact, the term is defined in the Convention.[2]

2. About Some Definitions in the UNCLOS

Only six definitions are given in Article 1 of the United Nations Convention on the Law of the Sea (Montego Bay, 1982),[3] specifically devoted to ‘use of terms and scope’ (Article 1). Among them, two are merely

1. Translation by the author.

2. “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (Article 1). However, a different age (fifteen years) is indicated for the prohibition of recruiting children (Article 38, para 3).

3. Hereinafter: UNCLOS.

terminological,[4] one reflects a current legal concept[5] and three have a substantive content.[6]

Particularly elegant from the logical and textual point of view seems to me the definition of 'pollution of marine environment' (Article 1, para. 1, sub-para. 1):

> 'pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

The definition catches the two main points of the matter, namely that pollution results in a negative effect for the marine environment and that this is due not to natural events, but to human action, irrespective of intention, which consists in the introduction into the marine environment of substances or energy. A number of examples of negative effects are provided, which do not have an exhaustive character ("such … as"). Strangely, despite the fact that the words 'introduction … of … energy' aim at encompassing noise among the cases of pollution, the UNCLOS does not include this type of pollution among those which are specifically regulated by it.[7]

However, in the UNCLOS there are much more than six definitions, as several others are scattered along the UNCLOS Parts. It would be in-

4. 'Area' and 'Authority'.

5. 'States Parties'.

6. 'Activities in the Area', 'pollution of the marine environment' and 'dumping'.

7. Namely, pollution from land-based sources, pollution from sea-bed activities subject to national legislation, pollution from activities in the Area, pollution by dumping, pollution from vessels, pollution from or through the atmosphere.

teresting to count how many definitions can be found in this big treaty, composed of 320 articles and nine annexes and followed by two implementation agreements.

It would also be interesting to elaborate on what definitions are missing, identifying cases where a definition would have been desirable to avoid difficult legal problems of application or interpretation. An instance in this regard could be the missing definition of 'marine scientific research' and, another, although less evident, instance the missing definition of 'strait'.

Focusing on the existing definitions, in certain cases, the reader finds a term in a given provision, but is acquainted about the relevant definition many provisions thereafter. For example, the UNCLOS refers to 'islands' as soon as in Article 6, while the definition of 'island' is given only in Article 121, para. 1. Consequently, it is only after having reached Article 121 that the reader seizes the difference between an 'island' and a 'low-tide elevation', which, in its turn, is already defined in Article 13, para. 1. In the same Article 121, para. 3, the reader suddenly finds the word 'rock', which is left without any definition. What is the difference between an 'island' and a 'rock'?[8]

Another problem is due to the textual scope of application of the definition. For instance, the definition of 'geographically disadvantaged States' is given in Article 70, para. 2, but only for the purposes of Part V (exclusive economic zone).[9] Does this imply that, when the expression is used elsewhere – for example, in Article 254, included in Part XIII (marine scientific research) – it can be given another meaning?

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8. The Arbitral Tribunal that on 12 July 2016 decided the case between the Philippines and China on the *South China Sea* found that "Article 121 therefore contains a distinction between two categories of naturally formed high-tide features, which the Tribunal refers to as 'fully entitled islands' and 'rocks' respectively" (para 390).

9. On the contrary, the definition of land-locked State is given in Article 124, para 1, for the purposes of the whole Convention.

'Enclosed or semi-enclosed sea' is defined in Article 122 (Part IX) as follows:

> For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

This definition conceals a logical conundrum. What is purpose of distinguishing between an 'enclosed sea' and a 'semi-enclosed sea', if both of them fall under the same definition?

The definition of 'piracy' given in Article 101[10] is the typical case in which it may be asked why certain actions seem included in the definition, while they would deserve to be excluded (for example, acts of interposition of ships committed by anti-whaling non-governmental organizations) and why certain other actions are excluded from the definition, while they would deserve to be included (for example, acts of violence for taking control of a ship committed by people already on board).

An instance to show how unexpected problems may arise after a definition has been given is Article 77, para. 4, of the UNCLOS, which corresponds to Article 2, para. 4, of the previous Convention on the Continental Shelf (Geneva, 1958). It provides the definition of living organism belonging to sedentary species, that is to say,

> organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

10. The defintion is complemented by Article 102 and by the definition of 'pirate ship or aircraft' given by Article 103.

The definition seems sufficiently precise and clear: organisms that are attached to the sea-bed or move creeping on the sea-bed are sedentary species, as such subject to the regime of the continental shelf; organisms that swim in the superjacent waters are another kind of resource, subject to the different regime of the exclusive economic zone or the high seas. However, there are species of lobster that move in a hopping or jerky way, hooking their body backward with the curved tail in retrograde motion. Does this behaviour mean moving "in constant physical contact with the sea-bed", as required by Article 77 to qualify as a sedentary species? This question was in the past the subject of a legal dispute that opposed Brazil and France.[11]

While the previous instance may seem of little importance, the new definition of continental shelf involves one of the main aspects of present international law of the sea, In Article 1 of the 1958 Geneva Convention on the Continental Shelf the term was used as referring

> *a)* to the seabed and subsoil of the submarine areas adjace nt to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; *b)* to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

This definition is conceptually weak, as it does not state with sufficient precision the meaning of the relevant expression or, better, it does this only partially, as regards the alternative limit of the 200-metre depth. But, as regards the other limit of the so-called exploitability, there is no indication of where the continental shelf ends, everything being dependent on the progress of underwater exploitation technologies.

11. See Azzam, *The Dispute between France and Brazil over Lobster Fishing in the Atlantic*, in *International and Comparative Law Quarterly*, 1964, p. 1453; Koulouris, *Les droits souverains sur le plateau continental*, in *Revue Hellénique de Droit International*, 1971, p. 299.

The new definition, resulting from Article 76, para. 1, of the UNCLOS, follows a completely different alternative between the distance of 200 nautical miles from the coast and the outer edge of the continental margin, whichever is more favourable for the coastal State:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

However, the subsequent paragraphs of Article 7 specifically elaborate on how to determine the outer edge of the continental margin resorting to a large display of geological elements. It is worth to fully reproduce the paragraphs in question:[12]

> 3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.
>
> 4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

12. On the origin of this provision see Gardiner, *Reasons and Methods for Fixing the Outer Limit of the Legal Continental Shelf beyond 200 Nautical Miles*, in *Iranian Review of International Relations*, 1978, p. 145.

> (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
>
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.
>
> 5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a) (i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.
>
> 6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.[13]

I am not sure whether the geological orientation of Article 76 was a wise choice by the UNCLOS drafters and whether such a level of underwater geological complexities is desirable in a legal text. Should we enter into the distinction between a shelf, a slope, a rise, a ridge, a plateau, a cap, a bank and a spur? Is it feasible and reliable to measure the thickness of sedimentary rocks in many points of the sea-bed, at more than 200 n. m. off the coast? If it is, what is the cost of the operation and how many years will it last? International law of the sea has historically progressed when maritime zones were simply defined through a given distance from the coast.

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13. Emblematic of the geological complications introduced by Article 76 is the fact that para 6 provides for an exception to an exception to the rule established in para 5.

This, in the case of sea-bed can be replaced by a certain depth of waters, which is an almost equally simple way of measuring a space. But introducing in a definition complex geological concepts, which require to be applied by an ad hoc technical body (the Commission on the Limits of the Continental Shelf), does not seem to be a solution to a problem.

I

Limitations on the Duty to Render Assistance at Sea under International Law in the COVID-19 Era

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Abstract

The duty to render assistance at sea is a fundamental norm of international law. The genesis of this obligation lies in the overwhelming need to protect seafarers at sea; today, the duty has been extended to cover all human life at sea. With developments in technology, safety standards at sea have improved significantly; nevertheless 'human distress at sea' situations continue to increase. The international maritime community is now facing a wide range of practical and legal problems relating to rescue at sea which were not apparent even some decades ago. The conflict and instability existing in certain areas of the Middle East, Africa and South-East Asia have exacerbated the phenomenon of irregular migration by sea. The enormity of the problem has placed pressures on coastal State rescue services as well as members of the maritime community, in particular, shipmasters, who are increasingly asked to rescue persons

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in distress at sea. This paper examines the status of the contemporary international legal regime regulating the shipmaster's duty to render assistance at sea in light of the challenges associated with rescues involving irregular migrants. Special attention will be given to the impact of the COVID-19 pandemic on the implementation of the obligation to rescue. It will be argued that these challenges may limit further the vital duty of the shipmaster to render assistance at sea.

Keywords: Duty to Render Assistance, Shipmaster, Migrants, Search and Rescue, Law of the Sea, COVID-19

1. Introduction: The Plight of the Shipmaster and Crew in the *Maersk Etienne* Saga

In May 2021, the shipmaster and crew of the *Maersk Etienne* tanker were awarded the Danish Shipping Prize for their exceptional bravery in a historic rescue operation which occurred almost ten months earlier.[1] The rescue commenced on 4 August 2020, following a request from the Malta Rescue Co-ordination Centre to attend to a sinking fishing boat in the Gulf of Gabes.[2] The shipmaster changed course in order for his crew to rescue 27 migrants, including a pregnant woman and child. The *Maersk Etienne* then proceeded towards Malta in order to disembark the rescuees but was denied entry into port. The shipmaster anchored

1. Max Tingyao, 'Maersk Etienne crew wins Danish Shipping Prize for saving Libyan migrants' (TradeWinds, 27 May 2021) <https://www.tradewindsnews.com/casualties/maersk-etienne-crew-wins-danish-shipping-prize-for-saving-libyan-migrants/2-1-1017154> accessed 28 May 2021.

2. 'German Boxship stranded off Lampedusa with Migrants on Board', *The Maritime Executive* (6 May 2020).

the vessel outside the Maltese contiguous zone and waited for further instructions.[3] A record 38-day political standoff ensued, where States involved in the incident disagreed over responsibility to offer a safe port for disembarkation.[4] After weeks at sea, conditions onboard the *Maersk Etienne* quickly deteriorated. The frustrated rescuees were confined to the vessel's limited deck space and forced to sleep on make-shift beds.[5] The situation escalated when three desperate migrants jumped into the sea, inducing a second rescue by the crew.[6] The saga finally ended when the migrant rescuees were transferred to a Non-Governmental Organization (NGO) vessel and subsequently disembarked in Sicily on 13 September.[7] Thereafter, the *Maersk Etienne* continued with its original voyage, leaving its shipowners to deal with the commercial ramifications of over a month-long delay.[8]

3. Per Fredrik Jensen and Bjørg Eikeland, 'The Maersk Etienne rescue highlights the difficulties in disembarking migrants rescued at sea', Gard Insight (8 October 2020) <https://www.gard.no/web/updates/content/30502985/the-maersk-etienne-rescue-highlights-the-difficulties-in-disembarking-migrants-rescued-at-sea> accessed 1 April 2021.

4. For an examination of the potential responsibility of States in this case, notably, Denmark, Tunisia and Malta; see Felicity G. Attard and Richard L. Kilpatrick Jr, "Reflections on the *Maersk Etienne* Standoff and its Ramifications for the Duty to Render Assistance at Sea", *EJIL:Talk!* (12 October 2020) <https://www.ejiltalk.org/reflections-on-the-maersk-etienne-standoff-and-its-ramifications-for-the-duty-to-render-assistance-at-sea/> accessed 1 April 2021.

5. See Julian Delia, 'Captain makes desperate appeal following four-week standoff' *The Times of Malta* (Birkirkara, 4 September 2020) <https://timesofmalta.com/articles/view/watch-captain-makes-desperate-appeal-following-four-week-standoff.816162> accessed 2 April 2021; and Hannah Roberts, 'Lost at sea: Ship standoff builds pressure over migrant rescues' *Politico* (20 September 2020) <https://www.politico.eu/article/lost-at-sea-ship-standoff-builds-pressure-over-migrant-rescues/> accessed 2 April 2021.

6. Jensen and Eikeland (n 3).

7. Matthew Vella, 'Maersk Etienne migrants to be disembarked in Sicily after NGO rescue' *MaltaToday* (San Gwann, 13 September 2020).

8. For a discussion of the commercial impacts of the rescue operation; see Attard and Kilpatrick (n 4).

Unfortunately, the plight of the shipmaster and crew of the *Maersk Etienne* has become commonplace since the escalation of the migration by sea crisis in 2013.[9] The vessel is one of the many which are regularly engaged in similar search and rescue (SAR) operations.[10] The reliance on commercial ships to conduct migrant rescue operations has become an issue of increasing concern for the international community. These vessels are not equipped to undertake such operations, which often present dangers to both the migrants and the rescuers. The shipmaster often faces formidable challenges out at sea, including delayed disembarkation and consequent disruption to the commercial voyage. Recent developments such as the COVID-19 crisis have also had significant impacts on such operations. In the wake of the pandemic, governments have imposed several border restrictions, including the closure of national ports declared to be 'unsafe' to land migrants.[11] As a result, State

9. The *Maersk Etienne* incident follows a number of high-profile migrant rescues in the Mediterranean involving commercial vessels including the *MV Salamis* in 2013, the *King Jacob* in 2015 and the *Alexander Maersk* in 2018. For a review of these cases and other similar rescues; see further Felicity G. Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (Brill Nijhoff 2020) 11-16.

10. Between 2014-2015 more than 1,000 merchant vessels saved over 65,000 migrants at sea; see Jonathan Saul, 'In Mediterranean, Commercial Ships Scoop Up Desperate Human Cargo' *Reuters* (21 September 2015) <http://www.reuters.com/investigates/special-report/europe-migrants-ship/> accessed 2 April 2021. Furthermore, the International Chamber of Shipping (ICS) has reported that: '…the number of merchant ships involved in rescue operations has remained relatively constant since 2015 and the average number of persons rescued by each merchant ship remains over 110'. See IMO, 'Statement to the International Dialogue on Migration Geneva' (19 July 2017).

11. See Inter-ministerial Decree n.150 of 7 April of the Italian Minister of Infrastructure and Transport in agreement with the Ministers of Foreign Affairs, Interior and Health <https://www.shipmag.it/wp-content/uploads/2020/04/shipMag.pdf> accessed 5 April 2021; and Department of Information Malta, 'Statement of the Government - COVID-19' P200468, (9 April 2020). <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/09/pr200648.aspx?fbclid=IwAR3bTWYjRLSoHBfzlmNbdfhJ0cig3dxp7P_VvAybXZIF6iWtnBOGepyFuQI> accessed 5 April 2021.

and NGO-led SAR operations were decreased significantly or halted entirely.[12] This gap in the SAR operations has – as will be seen below - amplified the burden on shipmasters of commercial vessels to rescue migrants in distress.[13]

The duty to render assistance at sea has been characterized as one of the 'traditional hallmarks of the law of the sea'.[14] This fundamental norm was formulated to protect life in the face of the perils of the seas.[15] The scope and contours of the obligation to render assistance are firmly established in customary international law and reflected in various treaties.[16] Despite this established legal framework, the implementation of the duty faces significant challenges as a result of increased irregular migration by sea. As exemplified by the *Maersk Etienne* rescue, this phenomenon has placed significant pressure on those who exercise the duty to render assistance, in particular, the shipmaster. This study examines

12. Council of Europe, 'A distress call for human rights: The widening gap in migrant protection in the Mediterranean' (March 2021) 9-11.

13. id.

14. Bernard H Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 ColumJTransnatlL 399, 414.

15. See the dictum of Chief Justice Cockburn in *Scaramanga v Stamp*, where he emphasizes the humanitarian considerations underlying the duty to render assistance at sea: '[t]he impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequence which may result to a ship or cargo from the rendering of the needed aid'. See *Scaramanga v Stamp* (1880) 5 CPD 295, 304; see also Francesco Munari, 'Search and Rescue at Sea: Do Challenges Require New Rules?' in Aldo Chircop and others (eds), *Governance of Arctic Shipping: Rethinking Risk, Human Impacts and Regulation* (Springer 2020) 64-65.

16. For a detailed discussion of the development of the duty under treaty law and customary international law; see Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) Chapter 3.

the status of the contemporary international regime regulating the shipmaster's duty to render assistance against the backdrop of challenges posed by maritime migration. It commences by examining these challenges, with particular focus given to new complexities generated by the COVID-19 pandemic.

The study then provides an appraisal of the major international rules regulating the shipmaster's duty to render assistance. In this respect, it will make specific reference to the importance of defining the duty to render assistance and constitutive elements of the obligation such as 'rescue' and 'distress' in the light of current developments. While the study addresses primarily the law of the sea regime, applicable rules of human rights law and refugee law which may affect his[17] obligation to assist are also considered. The study concludes by offering reflections on the efficacy of the current international regime regulating the duty to render assistance in the COVID-19 era. It will be argued that the legal and practical challenges described below may unfortunately place on limitations on this essential duty.

2. Challenges Facing the Shipmaster's Duty to Render Assistance in Migrant Rescue Operations

2.1 Safety and Security Ramifications

Migrant rescue operations are generally complex and sensitive operations which may take days or weeks to be completed. Depending on the type of vessel, a rescue of this nature may raise a myriad of safety and security

17. This study will focus primarily on the position of the shipmaster of a commercial vessel. When referring to the shipmaster, the masculine gender is largely utilised in order to be consistent with the phraseology used in international treaties. This approach is adopted to reflect the author intention's to be faithful to the treaty texts. No discrimination is intended.

concerns for the shipmaster. At the outset, the shipmaster must ensure safe and swift embarkation which does not endanger the well-being of the migrants or crew members.[18] Commercial vessels are not configured to retrieve persons from much smaller boats or crafts.[19] This may lead to operational risks and practical difficulties in transferring large groups of panicked and weak individuals, especially in perilous weather conditions.[20] The crew are rarely physically or psychologically trained to undertake rescue operations of this nature.[21] The presence of rescuees may also expose the shipmaster and crew to infectious illnesses - a concern that has become more pronounced during the COVID-19 pandemic.[22] The existence of viruses onboard may result in long quarantine periods for the ship, crew and rescuees. In this respect, the COVID-19 restrictions have already had significant impacts on seafarers who are unable to process crew changes.[23] As evidenced in the *Maersk Etienne* case, the presence of migrants onboard for a prolonged time could result in unrest amongst

18. See further Amaha Senu, 'Migration, Seafarers and the Humanitarian-Security-Economic Regimes Complex at Sea' in Lisa Otto (ed), *Global Challenges in Maritime Security: An Introduction* (Springer 2020) 84-86.

19. Record of the Views of the Inter-agency meeting with the Maritime Industry on Mixed Migration, held at IMO on 30 October 2017, para 1.3 <https://refugeesmigrants.un.org/sites/default/files/stocktaking_imo_arbour.pdf> accessed 2 April 2021.

20. ICS, *Large Scale Rescue Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons* (2nd edn, 2015) 7.

21. Inter-agency meeting with the Maritime Industry on Mixed Migration (n 19) para 1.4.

22. During the pandemic, the Armed Forces of Malta, reported that the vast majority of migrants who were rescued were found to be positive for COVID-19, therefore endangering the safety of the rescuing vessel; see 'Malta plans to quarantine migrants at sea as further 19 are COVID-19 positive' *The Times of Malta* (Birkirkara, 30 July 2020).

23. United Nations General Assembly, 'Report of the Secretary General on the Oceans and Law of the Sea' (9 September 2020) UN Doc A/75/340, paras 31-34; see also IMO, 'Crew Changes: A Humanitarian, safety and economic crisis' <https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx> accessed 9 April 2021.

rescuees. The shipmaster and crew may face difficulties in maintaining order on the vessel. Rescuees could wander off to restricted areas of the ship and unintentionally or deliberately tamper with navigational systems or cause damage to the ship or its cargo. It is noteworthy that a number of commercial vessels that have undertaken rescue operations involving migrants have been embroiled in serious security incidents. The shipmaster and crew of the vessels navigating in the Mediterranean, such as the *Vos Thalassa* and the *El Hiblu 1*, have been confronted by violent migrants.[24] During the *MV Marina* rescue, which occurred at the height of the COVID-19 pandemic, the shipmaster reported that armed migrants threatened to endanger the safe navigation of the vessel.[25] Other security concerns include the risk that amongst the rescued migrants may be possible terrorists attempting to gain access to a State territory.[26]

2.2 Human Rights and Refugee Rights Concerns

The shipmaster has a duty to maintain the safety and security of his ship whilst concomitantly protecting the human rights of his rescuees and crew in accordance with flag State laws. Shipmasters who have embarked persons in distress should treat them humanely, within the capabilities of his vessel.[27] This is often an arduous task for the shipmaster, particularly

24. For a discussion of legal and practical challenges surrounding the *Vos Thalassa* and *El Hiblu* incidents; see Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 157-161.

25. Gary Dixon, 'Situation critical': knife fight breaks out on boxship after migrant rescue' (TradeWinds, 6 May 2020); and Jacob Borg, 'Situation worsens on stranded cargo ship after migrants rescue' *The Times of Malta* (Birkirkara, 4 May 2020).

26. See Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 JRS 50-56; and Todd Bensman, 'What Terrorist Migration Over European Borders Can Teach About American Border Security' Centre for Immigration Studies (November 2019) 4-13.

27. See further Section 4.

in cases where he has rescued hundreds of migrants in need of food, water and medical attention.[28] Furthermore, among the rescuees may be asylum-seekers who are entitled to international protection under refugee law.[29] The shipmaster thus has responsibilities to uphold fundamental principles of refugee law and prevent the disembarkation of migrants in a place where their lives may be in danger.[30] This is often challenging for the shipmaster given the refusal of States to accept migrants into their territories, particularly during the COVID-19 pandemic. Indeed States, such as Malaysia have reportedly refused the entry of Rohingya refugees and asylum-seekers arriving at their shores due to the risk of COVID-19 transmission.[31] Shipmasters also face mounting pressures from government authorities to disembark rescuees in their State of departure, which may not be considered to be a place of safety.[32]

2.3 Commercial Implications

The shipmaster is considered to be the representative of the shipowner and is required to implement the commercial objectives of the maritime voyage.[33] He will be conscious of the financial ramifications underlying

28. Richard L Kilpatrick Jr and Adam Smith, 'The International Legal Obligation to Rescue During Mass Migration at Sea: Navigating the Sovereign and Commercial Dimensions of a Mediterranean Crisis' (2016) 28 USF MLJ 141, 152.

29. See further Section 4.

30. Jean-Pierre Gauci, 'When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations', British Institute of Comparative and International Law (24 November 2024) 12.

31. Human Rights Council, 'Report on means to address the human rights impact of push-backs of migrants on land and at sea', (12 May 2021) A/HRC/47/30, para 75.

32. See further Section 4 below.

33. For an in-depth examination of the different costs associated with irregular migrant rescue operations; see Richard L Kilpatrick Jr, 'The "Refugee Clause" for Commercial Shipping Contracts: Why Allocation of Rescue Costs is Critical During Periods of Mass Migration at Sea' (2018) 46 GaJIntl&CompL 403, 410-412; and Gauci (n 30) 18-22.

a migrant rescue operation and the attendant risks and costs.[34] As will be discussed further below, COVID-19 has further increased the reluctance of States to accept migrants, which not only enhances the threat to ship safety, but also presents a high possibility where the vessel itself is in quarantine further pressuring the shipmaster from a commercial point of view.[35] Certain expenses may be covered by the vessel's insurance policy, depending on the type of insurance cover undertaken by the shipowner.[36] Consequently, insufficient cover may expose the shipowner to substantial financial losses, for example, if rendering assistance entails a loss of profit or depreciation. Most commercial vessels are insured by Protection and Indemnity (P&I) Clubs.[37] Whilst some of these Clubs do cover certain limited expenses relating to the rescue, such as extra fuel, wages or port charges, most do not cover costs resulting from the deviation or delay of the vessel which can run into thousands of dollars.[38] Delays are

34. Davies argues that 'in a perfect world, the commercial cost of assisting those in danger at sea would play no part in the shipmaster's decision about whether to obey the legal and moral duty to stop and help. Sadly, because the legal duty to assist can be ignored with relative impunity, the commercial implications are likely to play a significant role in practice'; see Martin Davies, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea' (2003) 12 PacRimL&PolyJ 109, 111.

35. Alyssa McMurty, '5 large ships quarantined at Spanish ports' (4 May 2021) *Anadolu Agency* <https://www.aa.com.tr/en/europe/5-large-ships-quarantined-at-spanish-ports/2229622> accessed 3 April 2021.

36. Åsne K Aarstad, 'The Duty to Assist and its Disincentives: The Shipping Industry and the Mediterranean Migration Crisis' (2015) 20 Mediterranean Politics 413, 415.

37. Hazelwood and Semark describe a P&I Club as '…an association of commercial shipowners and charterers and other associated parties, which provides protection against a number of risks inherent in industrial ship operation'. The type of protection offered by P&I insurance differs from hull and machinery insurance which is aimed to safeguard shipowners against losses to his vessel. P&I insurance indemnifies a shipowner in relation to the discharge of legal liabilities he has incurred in the operation his vessel; see Steven J Hazelwood and David Semark, *P & I Clubs Law and Practice* (4th edn, OUP 2010).

38. UNHCR and Mixed Migration Centre, 'A Roadmap for Advocacy, Policy Development, and Programming: Protection in Mixed Movements along the Central and Western Mediterranean Routes 2021' (2021) 121.

frequently exacerbated by States' refusal to allow disembarkation and, at times, also induced by the migrants themselves as evidenced in the 2021 *Bulk Freedom* rescue.[39] It is also unclear which party is responsible for absorbing these expenses and whether this should be the shipowner or charter.[40] Insurers have advised that the allocation of costs will likely depend on the underlying shipping contracts.[41] However, many of these agreements do not contain explicit clauses addressing which actors bear the costs of rescue delays.[42]

3. The Shipmaster's Duty to Render Assistance in Migrant Rescue Operations: The Law of the Sea Regime

The shipmaster's duty to render assistance at sea was developed at the beginning of the last century in order to protect seafarers who were in distress largely due to collisions or shipwrecks.[43] The first international rules

39. On the 4 April 2021, *Bulk Freedom's* shipmaster rescued 14 Cuban refugees approximately 50 nautical miles away from Grand Cayman. The migrants had fled from the Islands a few days earlier. The shipmaster anchored off the coast of George Town, while members of the Coastguard boarded the vessel in order to transfer the rescuees ashore. The migrants however refused to leave the vessel, claiming that they would be mistreated by Cayman authorities. After a 4-day stand-off, the migrants voluntarily disembarked. See 'Cubans refuse to leave Tanker', Cayman News Service (6 April 2021) <https://caymannewsservice.com/2021/04/cubans-returned-after-rescue-by-passing-boat/> accessed 9 April 2021.

40. Kilpatrick (n 33) 412-434.

41. Attard and Kilpatrick (n 4).

42. id.

43. Wilbur Smith, 'The Duty to Render Assistance at Sea: Is it Effective or Adrift?' (1971) 2 CalWIntlLJ 146; and Jeffrey Maltzman and Mona Ehrenreich, 'The Seafarer's Ancient Duty to Rescue and Modern Attempts to Regulate and Criminalise the Good Samaritan' (2015) 89 TulLRev 1267, 1270.

imposing an obligation to assist persons in distress can be found in maritime treaties such as the 1910 International Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea,[44] the 1910 International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels,[45] and the 1914 International Convention on the Safety of Life at Sea.[46] The definition of the duty to render assistance in these early conventions had great influence on the formulation of the obligation under contemporary international law, as reflected in Article 98 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[47] The norms found in the Convention are supplemented by the 1974 International Convention for the Safety of Life at Sea (SOLAS),[48] and the 1979 International Convention on Maritime Search and Rescue (SARCon),[49] with Amendments to both Conventions designed to deal with the safety of migrants in distress.[50] The following sections examine the adequacy of the said law of the sea regime in the light of problems specific to migrant rescue operations.

44. (adopted 23 September 1910, entered into force 1 March 1913) UKTS 4.

45. (adopted 23 September 1910, entered into force 1 March 1913) UKTS 4.

46. (adopted 20 January 1914, not in force).

47. (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. See further; Felicity Attard, 'The Contemporary Significance of Efforts to Codify the Duty to Render Assistance' (2017) 15 BMB 61; and Arthur A Severance, 'The Duty to Render Assistance in the Satellite Age' (2006) 26 (2) CalWIntlLJ 377, 378-383.

48. (adopted November 1974, entered into force 1 May 1991) 1184 UNTS 3.

49. (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97.

50. IMO Maritime Safety Committee, 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended' (20 May 2004) Res MSC.153 (78); and IMO Maritime Safety Committee, 'Adoption of the International Convention on Maritime Search and Rescue, 1979, as amended' (20 May 2004) Res MSC.155 (78).

3.1 The Nature and Scope of the Duty to Render Assistance under Article 98 of UNCLOS

The principle rules on the rendering assistance are found in Article 98 of UNCLOS,[51] which is widely recognised as the cornerstone of the international regime regulating rescue at sea:[52]

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
> (a) to render assistance to any person found at sea in danger of being lost;
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
> 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

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51. The Convention has been ratified by the majority of the international community and presently has 168 State Parties; see United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 10 April 2021.

52. Oxman (n 14) 414-415; Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 IJRL 329, 331; Irini Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98(2) IRRC 491, 493; Raul Pedrozo, 'Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective' (2018) 94 IntLS 102, 106; Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010) 137-138.

The duty to render assistance at sea has been described as an obligation of broad application that extends to all areas of the ocean space.[53] Article 98 imposes two distinct but complementary obligations on States aimed to protect persons in distress at sea. The first obligation, incumbent on the flag State, is to ensure that the shipmaster renders assistance and rescue persons in distress.

As noted by Papastavridis, this duty translates to an obligation of conduct which should be executed through the enactment of effective national legislation mandating the shipmaster to assist as well as vigilant enforcement of said laws.[54]

Indeed, the practice of major maritime powers and large shipping registries demonstrates that the UNCLOS rules regulating the shipmaster's duty have been implemented and enforced through municipal laws.[55] The flag State duty requiring the shipmaster to render assistance

53. Satya Nanda and Shabtai Rosenen (eds), *The United Nations Convention on the Law of the Sea: A Commentary Volume III* (Martinus Nijhoff 1995) 173; Douglas Guilfoyle, 'Part VII High Seas' in Alexander Prölss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos 2017) 726.

54. See Efthymios Papastavridis, 'Is There a Right to be Rescued? A Skeptical View' (2014) QuestIntlL 17, 21-22; and Efhymios Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility' in Thomas Gammeltoft-Hansen and Jen Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 173. See also Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 262-266.

55. Some examples include Greek Code of Public Maritime Law, Legislative Decree 187/1973, Article 120; Malta Merchant Shipping Act, Chapter 234 of the Laws of Malta, Part V, Article 306(1), Liberian Maritime Law, Title 21 of the Liberian Code of Laws of 1956 (rlm-107 Series 2018), Chapter 10, Section 296(10); Maritime Act, Title 47 of the Marshall Islands Revised Code of Laws of 1990 (MI-07 October 2016), Chapter 8, Part II, Section 811(j), and the 46 United States Code § 2304 (2006) (a)(1). For a more detailed review of State practice which reflects the implementation and enforcement of the shipmaster's duty to render assistance; see Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 92-110.

is supplemented by the coastal State obligation to organise and undertake effective search and rescue services.[56]

The duty to render assistance covers all human life at sea. UNCLOS requires that the shipmaster's duty be exercised to 'any person' in danger of being lost and to all 'persons' in distress. These requirements ensure that the duty is discharged without discrimination, the obligation therefore extends from seafarers to irregular migrants in need of assistance at sea.[57] Whilst UNCLOS requires assistance to be rendered to all persons, what constitutes such an act is not specified under the Convention. However, the text of Article 98(1) appears to differentiate between assistance and rescue, predicating the shipmaster's obligation to rescue for those in distress at sea, while allowing the lesser form of intervention (that of assistance) in cases of persons 'in danger of being lost'.[58] The latter could apply in situations such as where a migrant vessel has a malfunctioning engine or is lacking navigational equipment. In such cases, 'assistance' may constitute the provision of navigational aids, repairing the engine,

56. See further Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn, Hart 2016) 171; Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security Through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers 2010) 101-103; and Francesco De Vittor and Massimo Starita, 'Distributing Responsibility Between Shipmasters and Different States involved in SAR Disasters' (2019) 28 ItYBIL 77, 81-82.

57. This view is supported by Rothwell and Stephens who argue that: '[t]he requirement in Article 98 to rescue 'any person' makes clear that there should be no distinction exercised in the rescue of persons at sea. This is important given some variable practice which has risen with respect to the rescue of asylum seekers'. See Rothwell and Stephens (n 56) 171.

58. This distinction is recognised by various scholars; see e.g. Frederick J Kenney Jr and Vasilios Tasikas, 'The *Tampa* Incident: IMO Responses and Perspectives on the Treatment of Persons Rescued at Sea' (2003) 12 Pacific Rim L&P J 144, 148-153; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 449. For an opposing view; see Roland Bank, 'Introduction to Article 11' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 822.

escorting the vessel for part of its journey or towing it to safety.[59] Depending on the circumstances of the case, the provision of assistance may not always require boarding the migrants onto the assisting ship.[60] This may be significant for the shipmaster who wishes to avoid potential safety and security risks associated with the embarkation of migrants.[61] Embarkation will be required if the rendering of assistance entails rescue. In such cases, the obligation under Article 98(1)(b) requires the shipmaster to act proactively in two ways: a) on receiving relevant information from a coastal State authority, take active steps to alter the vessel's course to retrieve migrants in distress; and b) to render the same assistance if, *en route*, he happens to locate migrants in distress.

The shipmaster's duty to render assistance also applies in the case of collisions. Given that frequent channels of migration traverse major international sea lanes, the risk of a collision between merchant vessels and migrant boat is a growing concern for shipmasters. Vulnerable migrants are generally transported in overcrowded and unsafe vessels, not equipped with proper engines or navigational devices.[62] Boats are typically small unregistered rubber crafts which are difficult to detect or monitor.[63] The presence of unseaworthy vessels may pose a threat to the

59. IMO Maritime Safety Committee, 'Outcome of Informal Meeting on "Safety Measures and Procedures for the Treatment of Persons Rescued at Sea"' MSC 76/22/11 (27 September 2002) para 5.2.

60. For a further discussion on this point; see Marcello Di Filippo, 'Irregular Migration across the Mediterranean Sea: Problematic Issues Concerning The International Rules On Safeguard Of Life At Sea' (2013) 01 JIntlLIntlRel 53, 56; and Kenney and Tasikas (n 58) 151-152.

61. See Section 2.1.

62. United Nations Office on Drugs and Crime (UNODC), *Issue Paper: The Smuggling of Migrants by Sea* (UNODC 2011) 27-28.

63. See European Commission, Study on the international law instruments in relation to illegal immigration by sea, Brussels, 15 May 2007, SEC (2007) 691; United Nations Security Council, 'Report of the Secretary-General: Implementation of resolution 2437(2018)' (5 September 2019) S/2019/711, para 8.

safe navigation of other vessels and have the potential to cause serious maritime casualties. In the *King Jacob* rescue, the shipmaster of the cargo vessel proceeded to rescue over 800 migrants in distress in the Mediterranean.[64] On approaching the migrant vessel, the latter steered erratically and rammed into the *King Jacob*, forcing the migrants to shift to one side of their vessel causing it to capsize. In the wake of the incident, the ICS Secretary General stated that the '...tragic events of the weekend seem to have shown, merchant ships are really not best equipped to deal with such large-scale operations involving hundreds of people'.[65]

It is submitted that the shipmaster's duty to render assistance, although wide in scope, is not absolute. The general duty under Article 98(1) is qualified in so far as rendering assistance may cause '…serious danger to the ship, the crew or passengers' and '…in so far as such action may reasonably be expected of him'. Accordingly, the duty may not sustain in certain circumstances, for instance, if a migrant rescue operation proves to be unfeasible or may compromise the safety of the vessel, passengers or crew.

A question may arise as to how to determine whether these limitations exist. In this author's view, a major shortcoming of Article 98 is the absence of comprehensive rules to gauge the seriousness of the danger. This is particularly relevant in the context of migrant rescue operations where shipmasters are continually required to balance their duties towards persons in distress with the safety and security of their ship and crew. In the event of conflict between these duties, the shipmaster is expected to rely on his professional judgment in the light of the circum-

64. Julian Miglierini, 'Migrant Tragedy: Anatomy of a Shipwreck' *BBC News* (London, 24 May 2016).

65. European Community of Shipowners' Association, 'Shipping Industry Calls on EU Leaders to be Decisive and Immediately Increase Mediterranean Search and Rescue Resources' (23 April 2015) < https://www.ecsa.eu/news/shipping-industry-calls-eu-leaders-be-decisive-and-immediately-increase-mediterranean-search> accessed 15 April 2021.

stances of the rescue, for example, the type and size of his ship and the number of individuals who need to be embarked.[66]

While Article 98(1) provides the basis of the international regime regulating the shipmaster's duty to render assistance, the provision *per se* is not sufficient to deal with the contemporary problems associated with migrant rescue operations, particularly in the COVID-19 era. The text offers only general guidance to shipmasters. However, the UNCLOS formulation of the duty fails to elaborate on elements of the obligation which affect its implementation, such as, what constitutes being 'in distress'. This lack of specificity could lead to disagreement over the extent of the obligation to proceed with all possible speed to the rescue of persons.[67] Furthermore, the Convention does not appear to provide guidance to the shipmaster in cases of being unable to provide assistance. There may be circumstances which do not permit the shipmaster to embark large groups of migrants onboard his vessel. In such cases, it may be reasonable to expect to shipmaster to provide all possible assistance such supplying fuel and provisions or immediately requesting coastal State authorities or nearby vessels to assist. Significantly, Article 98(1) of UNCLOS also fails to provide any direction to the shipmaster as to his responsibilities towards rescues once assistance has been rendered. There is no elaboration, for example, on whether the shipmaster's obligation rescue also includes disembarkation.[68]

The absence of detailed UNCLOS provisions addressing the rendering of assistance may not be surprising when one considers the drafting history of Article 98. As noted above, the first rules regulating the duty

66. See Myron H Nordquist and others (eds), *The United Nations Convention on the Law of the Sea 1982, Volume III: A Commentary* (Martinus Nijhoff Publishers 1995) 175; Guilfoyle (n 53) 725-726.

67. See Section 3.3.

68. Barbara Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 FordhamIntlLJ 75, 97.

were drafted to deal with seafarers in distress due to collisions or shipwrecks, where seafarers could easily be repatriated to their home State or next port of call with minimal difficulties.[69] This is no longer the case today as shipmasters face more complex rescues involving greater numbers of asylum-seekers and refugees.[70] The vagueness of the relevant UNCLOS provisions and the *lacunae* referred to above, impose upon the shipmaster great responsibilities. In this regard, it may be useful to refer to other international instruments, which could offer further guidance on the interpretation of the duty to render assistance at sea.

3.2 IMO Rules on the Duty to Render Assistance: SOLAS and SARCon

The formulation of the duty to render assistance at sea under UNCLOS has been expanded in other international instruments dealing with the safety of life at sea, in particular, those falling under the auspices of the IMO such as the SOLAS and SARCon. SOLAS is the centrepiece instrument regulating the safety of merchant shipping. The Convention covers matters ranging from ship construction and equipment to ship security;[71] particularly important is Chapter V of the Annex to the Convention, dealing with the safety of navigation, wherein the duty to render assistance is elaborated upon. The SARCon establishes a comprehensive international system covering SAR operations.[72] The Convention was

69. Miltner notes that: '[w]ith the advent of sea-borne refugees, the rescue framework's implied disembarkation practice was turned on its head. Boat people, unlike those formerly encountered in distress at sea, did not enjoy the protection of their State, and return to their State of origin was not a viable option'. See Miltner (n 68) 89; see also Louis B Sohn and others (eds), *Cases and Materials on the Law of the Sea* (2nd edn, Brill Nijhoff 2014) 107.

70. Mallia, *Migrant Smuggling by Sea* (n 56) 97.

71. SOLAS, Annex, Chapter 11-1 and Chapter X1-2 respectively.

72. SARCon, Preamble.

adopted as a response to the emergence of the first large-scale migratory flows by sea in South-East Asia during 1970s Indochinese crisis.[73] During this period, many States in the region refused to permit disembarkation of migrants fleeing Vietnam, which discouraged shipmasters from undertaking rescues.[74] The substantial loss of life at sea led the international community to develop a more uniform approach to SAR activities based on international cooperation.[75] Both SOLAS and SARCon have received general State acceptance.[76]

The shipmaster's duty to render assistance required under Article 98(1) of UNCLOS is explained further in Regulation 33-1 of Chapter V of the Annex to the SOLAS:

> The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such person or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress...

73. United Nations General Assembly, 'Report of the Secretary-General on Oceans and the Law of the Sea' (7 November 1979) UN Doc A/34/627, para 22.

74. Seline Trevisanut, 'Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Border Management' in Loïc Azoulai, Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (OUP 2014) 129.

75. id.

76. SOLAS has 167 State parties which represent 98% of world tonnage, while SARCon is ratified by 113 parties which account for over 80% of global tonnage. See IMO, 'Status of Treaties' <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreatiesByCountry%20(2).pdf> accessed 1 May 2021.

The duty to render assistance appears to be couched in similar terms under both UNCLOS and SOLAS. The latter affirms that the obligation to assist applies universally to persons in distress, regardless of 'the nationality or status of such person or the circumstances in which they are found'. The duty to render assistance is also qualified under SOLAS, where its implementation is contingent upon whether the shipmaster is '…in a position to be able to provide assistance' and whether he considers reasonable and necessary to do so. The harmonization of the UNCLOS and SOLAS rules governing the duty to render assistance is useful and avoids the potential conflict over the extent of the shipmaster's responsibilities under different treaty regimes. Nevertheless, unlike the UNCLOS, the duty to render assistance is addressed to the shipmaster under SOLAS which increases the burden of responsibility, making him directly accountable. The duty to render assistance is also given more operational detail under SOLAS.[77] In particular, the Convention gives direction to the shipmaster that finds him unable to render assistance and imposes an additional obligation to enter into the vessel's log-book, the reasons for failing to assist.[78] This supplementary requirement aims to ensure that shipmasters are kept accountable for their actions and may assist in avoiding cases of failure to render assistance for frivolous reasons.[79] However, this requirement may not, in today's circumstances, prove adequate to ensure that shipmasters honour their duties. Situations where the shipmaster decides that in the 'special circumstances of the case', it would be unreasonable or unnecessary to render assistance, are largely unregulated. As discussed above,[80] the limited imposition also applies under UNCLOS. Nevertheless, it may be argued that in the spirit of the duty, in the event that the shipmaster is

77. Gallagher and David (n 58) 447.

78. SOLAS, Annex, Chapter V, Regulation 33-1.

79. Barnes (n 52) 138.

80. See Section 3.1.

unable to assist or rescue in the case of the exceptions allowed by law, it would be reasonable to expect him to assist in any possible manner until the appropriate assistance can be provided.[81]

The duty to render assistance is covered by various provisions of the SARCon,[82] most notably Chapter 2.1.10:

> Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

The general duty to render assistance under SARCon engages the responsibility of both flag and coastal/SAR States. Each of these States should ensure that the shipmaster rescues persons in distress and provide any necessary assistance in order for him to execute the duty.[83] However, it is generally accepted that coordination of the rescue takes place under the leadership of the SAR State.[84] This is the State which is required to assume responsibility for a delimited Search and Rescue Region (SRRs), wherein SAR services should be provided.[85] The SRR is not however classified as a jurisdictional zone.[86] It is a designated 'functional zone'

81. For e.g. assistance provided by the relevant the coastal or SAR State authorities or other private ships close to the location of the distressed vessel.

82. See for e.g. SARCon, Annex, Chapter 2.1.1 and Chapter 3.1.9.

83. See further Rick Button, 'International Law and Search and Rescue' (2017) 70 NavalWarCollRev 26, 31-37.

84. Patricia Mallia (Vella de Fremeaux) and Felicity Attard, 'Dehumanising the Human Element of Maritime Migrant Smuggling: A Discussion on the Application of Human Rights in the Maritime Sphere' 17 Benedict's Maritime Bulletin 1, 8.

85. SARCon, Annex, Chapter 2.1.3.

86. See SARCon, Article II on other treaties and interpretation which provides that:
(1) Nothing in the Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750 (XXV) of the General Assembly of the United Nations' nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.
(2) No provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments.

where States commit themselves to provide effective SAR services and to assume cooperation in and coordination of rescue operations. The centralized coordination of SAR services occurs through the establishment and operation of rescue co-ordination centres (RCCs),[87] which should guide the shipmaster before and throughout the rescue.[88] As will be discussed below, ultimately, the shipmaster's success in executing the duty to render assistance depends on the SAR State's fulfillment of its own SAR obligations, especially concerning disembarkation.[89] The subsequent sections will discuss how SARCon has also attempted to further clarify elements that formulate the duty to render assistance under UNCLOS and SOLAS, in particular the notions of distress and rescue.

3.3 The Notion of Distress at Sea and the Implementation of the Obligation to Rescue

The unprecedented scale of migrant rescue operations in recent years has given rise to renewed discourse over the scope and content of SAR obligations. In this respect, particularly contentious has been the interpretation and meaning of the terms 'distress' and 'rescue'.[90] As noted above, there exists an intricate relationship between the two, as the shipmaster's obligation to rescue is brought into effect once a state of distress exists.[91] The first internationally recognised definition of maritime rescue was introduced as part of the 1998 amendments to SAR-

87. SARCon, Annex, Chapter 2.3.

88. See further Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 68-71.

89. See De Vittor and Starita (n 56) 82-87. See also Section 3.4.

90. See further Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 JRS 50; and Maarten Den Heijer, *Europe and Extraterritorial Migration Control* (Hart 2012) 244-245.

91. See Section 3.1.

Con.[92] Under the Convention, rescue is described as 'an operation to retrieve persons in distress, provide for their initial medical or other needs and deliver them to a place of safety'.[93] Accordingly, in order for a shipmaster to fulfil his rescue obligation, he must attend to the basic needs of the persons he has saved and also deliver them to a place of safety. While not explicitly provided for in the definition of rescue, for such delivery to be effective, it must include disembarkation.[94] This position recently affirmed by Italy's highest Court in a decision concerning the actions of the shipmaster of the NGO operated *Sea-Watch 3*, who entered the Lampedusa port to disembark rescued migrants without authorisation.[95] The Court of Cassation found that the obligation to rescue includes a concomitant obligation to disembark in a place of safety, and that the shipmaster could not be held criminally responsible for attempting to disembarking migrants who had undergone intense physical and psychological distress after weeks at sea.[96] It may therefore be argued that the fulfilment of the rescue operation does not depend exclusively on the actions of the shipmaster. The definition of rescue gives rise to obligations

92. Amendments to the International Convention on maritime search and rescue of 27 April 1979 (concluded London, 18 May 1998) <http://www.admiraltylawguide.com/conven/amendsearch1998.html> accessed 15 May 2021.

93. SARCon, Annex, Chapter 1.3.2.

94. Killian O'Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem' (2010) 3 GoJIL 715, 724; Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (n 94) 499; and Mallia, *Migrant Smuggling by Sea* (n 56) 97; De Vittor and Starita (n 56) 81.

95. For an overview of the facts of the case, see: Zara Freudenberg and others, 'The Island of Hope in a Sea of Misery - The Italian Court of Cassation's Unequivocal Stance on the Right to Disembark' Verfassungsblog (10 March 2020) <https://verfassungsblog.de/the-island-of-hope-in-a-sea-of-misery/> 16 May 2021.

96. See Sentenza sul ricorso proposto dal Procuratore della Repubblica presso il Tribunale di Agrigento nel procedimento nei confronti di Rackete Carola, nata a Preetz Kreis Plon 1'08/05/198 <https://www.giurisprudenzapenale.com/wp-content/uploads/2020/02/Cass-6626-2020.pdf> accessed 17 May 2021.

for SAR States, which should provide the shipmaster with the necessary support to carry out the disembarkation. To this end, States must 'make the necessary arrangements in cooperation with other RCCs to identify the most appropriate place(s) for disembarking persons found to be in distress'.[97]

As pertinently observed by Moreno-Lax, 'since rescue is contingent on 'distress', the definition of that term is central to the SAR response'.[98] A prudent interpretation of this concept is not merely an academic exercise, it has significant impacts on the implementation of the duty in practice, which may in turn affect the protection of life at sea. Distress is defined in the SARCon as a 'situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.[99] One may question what the threshold for a rescue operation is to be made legally obligatory aside from practical necessities. According to the SAR definition, a distress situation would arise if there is a real and present danger to the vessel or migrants on board. There is little doubt that a migrant vessel on the brink of sinking would constitute a situation of distress. However, signs of distress may not always be so evident. A migrant vessel, which is proceeding normally, may *prima facie* appear not to be in distress, however this may still be the case, if – for example - migrants on board require urgent medical assistance. It would be very difficult for the shipmaster to be aware of such situations, unless he has made contact with persons on board, which is not always possible. It may be argued that the SARCon definition of distress is broad enough to cater for situations where there is

97. SARCon, Annex, Chapter 3.1.6.4.

98. Violeta Moreno-Lax, 'The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia' (Kaldor Centre for International Refugee Law, May 2017) Policy Brief 7.

99. SARCon, Annex, Chapter 1.3.13.

a serious likelihood of danger, even if it has not yet fully materialized.[100] Accordingly, distress is likely to be presumed in cases where migrants are travelling in overcrowded, unseaworthy vessels which have do not have proper equipment to navigate perilous conditions out at sea.[101]

It is submitted that the wide SARCon definition of distress allows the shipmaster to assess each case in the light of the resources available to him and after taking into account the seaworthiness of the migrant vessel and/or the condition of the persons on board. However, considering that these types of rescue operations are rarely straightforward, in practice, it may not always be possible for the shipmaster to make such a satisfactory assessment out at sea. He will often have to rely on information he has received from SAR State authorities. In this respect, another problematic issue is the varying interpretations of distress in State practice.[102] Certain States such as Italy consider all unseaworthy migrant vessels to be *ipso facto* in distress.[103] Drawing strictly from the SARCon definition, Malta considers distress to arise if there is an immediate danger of loss of life and where failure to intervene in the most expeditious manner possible would result in injury or death.[104] Greek officials have adopted a high

100. Moreno Lax, 'The Interdiction of Asylum Seekers at Sea' (n 98) 7.

101. Bank (n 58) 822; Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of States* (Hart Publishing 2013) 297; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member State Obligations Accruing at Sea' (2011) 23 IJRL 174, 195.

102. See Moreno Lax, 'The Interdiction of Asylum Seekers at Sea' (n 98) 7; Matteo Tondini, 'The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECthr Decision in the Hirsi Case' (2012) 18 JIML 59, 62; and Gallagher and David (n 58) 459.

103. Sergio Carrera and others, *Policing Humanitarianism: EU Policies against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 104.

104. Information obtained from an interview with a former Lieutenant Colonel of Maritime and Air Plans Operations, AFM (University of Malta, Msida, 15 February 2019).

threshold and consider distress to be dependent on a call for assistance or 'immediate risk of sinking'.[105] There is a fear that a very restrictive interpretation of distress may obstruct States from effectively responding to potential rescue operations in order to avoid consequent responsibilities discussed hereunder.[106] These concerns have become more acute in the COVID-19 era, where the unprecedented challenges posed by the pandemic have resulted in a depletion of SAR services, as national resources were focused on measures to contain the virus.[107]

Nevertheless, this author argues for an expansive interpretation of distress in light of the object and purpose of SARCon which is to ensure effective rescue services to persons in distress. The shipmaster should implement in good faith his obligations under international law and adopt a precautionary approach to potential distress cases to prevent loss of life. This is even more necessary in cases where the operation requires the shipmaster to attend to an unseaworthy vessel laden with migrants, where generally the line between difficulties and distress at sea is undetectable in the swiftness of its development.

3.4 Contemporary Legal Response Strategies to the Duty to Render Assistance in Migrant Rescue Operations: 2004 Amendments to SOLAS and SARCon

A turning point in the development of the law on the rendering of assistance at sea was the controversial migrant rescue operation conducted

105. Carrera and others (n 58) 105.

106. See Section 4.

107. Office of the United Nations High Commissioner for Human Rights, '"Lethal Disregard" Search and rescue and the protection of migrants in the central Mediterranean Sea' (May 2021) 10 <https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf> accessed 26 June 2021.

by the Norwegian-flagged *MV Tampa*.[108] The rescue brought into focus the challenges of the shipmaster when implementing the duty to render assistance. On 26 August 2001, the container vessel's shipmaster saved over 400 migrants from a sinking ferry boat in the Indian Ocean and attempted to disembark at the closest port in Christmas Island.[109] The Australian authorities refused entry into port and the *MV Tampa* remained stranded for eight days, while States in the region agreed on a relocation process for the migrants.[110] This incident had a catalytic role in the development of legal response strategies to enhance the implementation of the duty, particularly in cases of irregular maritime migration.[111] These efforts are reflected in the adoption of the 2004 Amendments to the SOLAS and SARCon, and supplementing IMO Guidelines on the Treatment of Persons Rescued at Sea.[112]

The primary aim of the 2004 Amendments was to strengthen cooperation between States to support shipmasters in their efforts to render assistance.[113] The Amendments require Parties to coordinate and cooperate to

108. For a historical and legal analysis of the case; see Jessica E Tauman, 'Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the *Tampa* Crisis' (2002) 11 PacRimL&PolyJ 478; Rolf E Fife, 'The Duty to Render Assistance at Sea: Some Reflections after *Tampa*' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martii Koskenniemi* (Martinus Nijhoff Publishers 2003); Erik Røsæg, 'Refugees as Rescuees – the Tampa Problem' (2002) 295 SIMPLY 43; Kenney and Tasikas (n 58) 144.

109. Fife (n 108) 472.

110. Tullio Scovazzi, 'The Particular Problems of Migrants and Asylum Seekers Arriving by Sea' in Laura Westra, Satvinder Juss, and Tullio Scovazzi (eds), *Towards a Refugee Oriented Right of Asylum* (Routledge 2016) 202-203.

111. IMO Assembly, 'Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea' (29 November 2001) Res A.920(22).

112. IMO Maritime Safety Committee, 'Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2004) Res MSC.167 (78) (2004 IMO Guidelines on the Treatment of Persons Rescued at Sea).

113. Daniel Ghezelbash and others, 'Securitization of Search and Rescue at Sea: The Response to Board Migration in the Mediterranean and Offshore Australia' (2018) 67 ICLQ 315, 322.

ensure that shipmasters providing assistance are not burdened with unnecessary deviations and consequent delay.[114] A major obligation is imposed on the State responsible for the SRR where assistance is rendered. In these cases, the SAR State has a 'primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety' as soon as reasonably practicable.[115] The 2004 Amendments do not, however clearly specify where the ultimate responsibility for disembarkation lies. State practice is mainly divided into two groups on the obligation to allow disembarkation. The first view holds that the 2004 Amendments impose a 'residual obligation' on the SAR State to allow disembarkation in its own territory, after all meaningful efforts to find a place of safety elsewhere have failed.[116] The second view finds this interpretation to be inconsistent with general international law and maintains that it is the State which offers closest safe port from the location of the rescue that must accept disembarkation.[117] It should also be noted that not all States have accepted the 2004 Amendments, for example, Malta has persistently objected to them.[118] Malta's fol-

114. SOLAS, Annex, Chapter V, Reg 33-1-1 and SARCon, Annex, Chapter 3.1.9.

115. id.

116. This interpretation is supported by non-binding IMO documentation; see IMO Facilitation Committee, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea' (22 January 2009) FAL 3/Circ.194; see also Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Co-operation or Conflict?' (2010) 25 The International Journal of Marine and Coastal Law 523, 530; and Jasper van Berckel Smith, 'Taking Onboard the Issue of Disembarkation: The Mediterranean Need for Responsibility-Sharing after the Malta Declaration' (2020) 22 EJIML 493, 506-507.

117. See further Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 81-83.

118. IMO, 'Status of IMO Treaties – Comprehensive Information on the Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions' <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf > accessed 1 June 2021; and IMO Facilitation Committee, 'Report of the Facilitation Committee on its Thirty-fifth Session' (19 March 2009) FAL 35/17, para 6.56 and anx 6.

lows the second view and considers that it is the State which can offer the closest port of safety that should be responsible for accepting the disembarkation.[119] In a typical rescue scenario within the Mediterranean, distress situations often occur in Malta's SRR, but much closer to an Italian port of Lampedusa.[120] In such cases, it would make little humanitarian sense to delay disembarkation and have the vessel travel a longer distance to Malta with vulnerable persons on board, instead of a much closer port of safety in Italy. A shorter voyage protects not only the migrants on board but also the security of the vessel, shipmaster and crew. However, most States, including Italy, follow the first view.[121] These opposing positions have often tested the good neighbourliness and friendly relations of States, particularly in the Mediterranean.[122]

The legal SAR regimes discussed above,[123] require coastal/SAR States to support the shipmaster by identifying the most appropriate place for disembarkation and facilitating the completion of the rescue. As posited

119. Department of Information Malta, 'Another Amnesty International Report Riddled with Inaccuracies, Misinformation and Glaring Omissions', Press Release (28 May 2010) <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2010/05/28/PR0985.asp> accessed 1 June 2021.

120. Enkelejda Koka and Denard Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation' (2019) 21 EJML 26, 42-43.

121. Patricia Mallia, 'The Challenges of Irregular Maritime Migration' (203) No. 4 Jean Monnet Occasional Papers No. 4/2013, 5, 11.

122. For examples of disputes over SAR responsibilities between Italy and Malta; see the *MV Pinar E* case described in Barnes (n 52) 142; and the *Aquarius* incident discussed in Melanie Fink and Kristof Gombeer, 'The *Aquarius* Incident: Navigating the Turbulent Waters of International Law', *EJIL:Talk!* (14 June 2018) <https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/> accessed 5 June 2021. See also Amnesty International Public Statement, 'Italy/Malta: Obligation to safeguard lives and safety of migrants and asylum seekers EUR 30/007/2009' (7 May 2009) < https://www.amnesty.org/download/Documents/48000/eur300072009en.pdf> accessed 5 June 2021.

123. See Section 3.

by Scovazzi, '…it is sufficiently clear that it is not for the master of the assisting ship alone to decide where survivors shall be disembarked'.[124] Unfortunately, practice has shown that State assistance in this respect is not always forthcoming. Apart from security and health risks associated with the entry of large numbers of migrants into their territories, States are concerned with having to undertake potentially lengthy and costly asylum processing procedures. As observed by Coppens and Somers, these factors have contributed greatly to a general reluctance of States to allow disembarkation 'unless they receive financial or readmission guarantees'.[125] The unwillingness of States to offer a place for disembarkation has been especially apparent in the outbreak of the COVID-19 epidemic. Shipmasters have faced increased difficulties in locating a safe place for disembarkation as a result of port closures and other restrictions imposed in response to the global health crisis.[126]

While the IMO has contributed greatly to improving the international regime on the duty to render assistance, the extent of the State responsibility to allow disembarkation remains nebulous. The absence of clearly defined legal obligations requiring States to accept disembarkation seems, at times, to be frustrating the effectiveness of the international SAR regime. The repercussions are often experienced by shipmasters who continue to face the pressures described above,[127] when called to save lives at sea. It appears that while the shipmaster is required to proceed with all possible speed to the rescue distressed persons, not all States are prepared to shoulder responsibility to release him of his obligation without 'minimum further deviation to his voyage'.[128]

124. Scovazzi (n 110) 198.

125. Jasmine Coppens and Eduard Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 IJMCL 377.

126. Gauci (n 30) 6.

127. See Section 2.

128. SOLAS, Annex, Chapter V, Reg 33-1-1 and SARCon, Annex, Chapter 3.1.9.

4. The Shipmaster's Duty to Render Assistance in Migrant Rescue Operations: Considerations under Human Rights Law and Refugee Law Regimes

As noted above, the shipmaster's duty to render assistance was originally formulated to cater for seafarers in distress from shipwrecks or collisions.[129] Today, it forms the foundation of a body of law designed to protect the rights of distressed migrants at sea. In recent years, human and refugee rights considerations in the treatment of migrants in rescue operations have come to the forefront.[130] In compliance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties,[131] a holistic approach to SAR operations, obliges that in interpreting and applying their law of the sea obligations, States must also consider relevant humanitarian obligations. This section examines the interaction between the shipmaster's duty to assist and relevant State obligations under human rights law and refugee law in migrant rescue operations.

129. See Section 3.1.

130. For notable works on the subject see; Efthymios Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold"' (2020) 21 GLJ 417; Irini Papanicolopulu, *International Law and the Protection of People at Sea* (OUP 2018); Vassilis P Tzevelekos and Elena Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 ActScandJurisGent 427, 427–469; Lisa-Marie Komp, 'The Duty to Assist Persons in Distress at Sea: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach – Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016); and Stefan Kirchner, Katarzyna Geler-Noch, and Vanessa Frese, 'Coastal State Obligations in the Context of Refugees at Sea Under the European Convention on Human Rights' (2015) 20 Ocean&CoastalLJ 57.

131. (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Article 31(3)(c) provides that in interpreting treaties, States shall take into account '… any relevant rules of international law applicable in the relations between the parties'.

It is generally recognised that States have human rights obligations towards individuals falling under their jurisdiction or effective control, whether on land or at sea.[132] The vast majority of migrant rescue operations are undertaken on the high seas where the principle of flag State jurisdiction applies.[133] The flag State thus owes human rights obligations in respect of all persons on board their vessels, including rescuees.[134] The shipmaster shoulders a particularly important responsibility in this context and acts as the vector in fulfilling these obligations.

Various human rights may be adversely affected in the context of a migrant rescue operation, most notably the right to life and the protection from torture, inhuman or degrading treatment or punishment.[135] The protection of said rights may be all the more necessary in cases of the rescue of migrants who are in distress, and often malnourished, dehydrated or requiring urgent medical attention. When the shipmaster is faced with a

132. UNHRCOM, 'General Comment no 31 [80]' in 'The nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev 1/Add 13, para 10; see also Irini Papanicolopulu, 'Human Rights and the Law of the Sea' in David Joseph Attard (ed), *The IMLI Manual on International Maritime Law Volume 1: The Law of the Sea* (OUP 2014) 518-522; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model' (2020) 21 GLJ 385, 385-387; and Koka and Veshi (n 120) 37-39.

133. UNCLOS, Article 94(2)(b). See further Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 JMLC 219, 221-223.

134. Myron H Norquist and others (eds), *United Nations Convention on the Law of the Sea, 1982: A Commentary: Volume III* (Martinus Nijhoff 1995) 146. See also the findings of the European Court of Human rights, which in a number of its judgments has recognised that 'instances of the extraterritorial exercise of jurisdiction by a State to include cases involving the activities on board of ships registered in, or flying the flag of, that State'; see *Bakanova v Lithuania* App no 11167/12 (ECtHR, Judgment of 31 May 2016), para 63; see also *Banković and Others v Belgium and 16 Other Contracting States* App no 52207/99 (ECtHR, Decision (GC) of 12 December 2001) 51-61.

135. Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (n 9) 206-226.

distress at sea situation, he and his crew should take immediate action to preserve life and bring individuals to safety. Once migrants in distress have been embarked, the shipmaster is required to treat them with humanity within the capabilities and limitations of the ship.[136] Prolonged disembarkation may however lead to the deterioration of conditions on board, which could potentially expose already vulnerable migrant rescuees to degrading treatment. In cases where the shipmaster is unable to meet human rights standards for reasons beyond his control, he should be able to cooperate and rely on the assistance from nearby coastal or SAR States.[137] Depending on the circumstances, cooperation may extend to disembarkation, particularly if there is a severe humanitarian crisis onboard.[138] However, as discussed above, practice has shown that States are often reluctant to accept disembarkation, which could lead to other human right challenges such as confinement or detention of rescuees for prolonged periods of time.[139]

The shipmaster should act as the guardian of human rights of all persons on his vessel. In this respect, he has the sensitive task of balancing the human rights protection of migrants in distress with those of his crew. As discussed above, the duty to render assistance is not absolute and human

136. SOLAS, Annex, Chapter V, Regulation 33-6. See further Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (n 52) 498.

137. See De Vittor and Starita (n 56) 84-85 who argue that '[i]t must be kept in mind that the obligation to treat survivors humanely and, more generally, to respect the human rights of rescued persons while on board needs to be interpreted in light of the particular circumstances of maritime situations. Furthermore, the captain may find himself faced with the material impossibility of adopting positive measures aboard his ship in order to protect the life and wellness of survivors (i.e. measures of medical care) without the cooperation of the coastal State'. (footnotes excluded). See also Erik Røsæg, 'The duty to rescue refugee and migrants in distress' (25 March 2020) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/03/duty-rescue> accessed 10 June 2021.

138. Kiara Neri, 'The Missing Obligation to Disembark Persons Rescued at Sea' (2019) 28 ItYBIL 47, 51. June 2021.

139. Gauci (n 30) 24-25.

rights considerations may apply.[140] The shipmaster has discretion in rendering assistance if his life or that of the crew/passengers are at risk. He must ensure that the human rights of his crew are safeguarded throughout the often-risky embarkation procedure, but also when hosting migrants onboard. In some respects, protection of the right to health of the crew creates a further limitation on the implementation of the duty. The COVID-19 pandemic brings new perspectives in that the shipmaster who offers assistance needs to protect his crew against contagious viruses.[141]

While human rights protection applies to all individuals onboard, some rescued migrants may be entitled to additional protection by virtue of being asylum-seekers. The central obligation applying in this context is the principle of *non-refoulement* enshrined in Article 33(1) of the Convention Relating to the States of Refugees and its 1967 Protocol[142] which mandates that no person may be sent back to a place of persecution. The extraterritorial application of this principle on the high seas in rescue operations has been judicially recognized by the European Court of Human Rights in the landmark *Hirsi Jama and others v Italy* case.[143] The practical implications of the *non-refoulment* rule require that persons making an asylum claim are subject to appropriate status determination procedures.[144] Therefore, a breach of the *non-refoulment* obligation

140. See Sections 3.1-3.2.

141. Gauci (n 30) 13-14.

142. (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

143. *Hirsi Jamaa v Italy* App no 27765/09 (ECtHR, 23 February 2012).

144. See the findings of the European Court of Human Rights in *MSS v Belgium* App no 30696/09 (ECtHR, Judgment (GC) of 21 January 2011) para 321; see also Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 IJRL 256; and Vladislava Stoyanova, 'The Principle of *Non-Refoulement* and the Right of Asylum-Seekers to Enter State Territory' (2008) 3 IJHRL 1, 5.

would arise if rescued migrants were immediately return to a place of persecution without a proper review of asylum claims.

The shipmaster's disembarkation of migrant rescuees to a place of safety is fundamental consideration for the respect of *non-refoulement*.[145] A problematic issue however is the lack of a firm definition of a place of safety under international law.[146] Some guidance is provided to States and the shipmaster in 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea which define a place of safety as one where both basic needs and human rights of migrants are protected. The Guidelines also call on the shipmaster specifically, requiring him to ensure that 'survivors are not disembarked in a place where their safety would be further jeopardized'.[147]

Therefore, even if the shipmaster can disembark migrants at the nearest port, this may not always be possible in light of the rule of *non-refoulement*. This is particularly relevant in the Mediterranean context, where most of the rescue operations occur off the coast of Libya which is not considered to be a place of safety.[148]

The situation in Libya is characterised by political instability and conflict, several international organisations have also reported severe human rights abuses against migrants who travel from neighbouring States including, unlawful killings, slavery, arbitrary detention and forced la-

145. See further Martin Ratcovich, 'The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2016) 33 AYBIL 81, 120-121.

146. See further Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn, CUP 2019) 214-215 and Ratcovich (n 145) 100-105.

147. 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, para 5.1.6.

148. UNHCR, 'Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation following Rescue At Sea' (September 2020) <https://www.refworld.org/docid/5f1edee24.html> accessed 9 June 2021.

bour.[149] These human rights violations against migrants have only increased since the outbreak of the COVID-19 pandemic.[150]

States should take the necessary measures to prevent the shipmaster being party to violations of *refoulement*.[151] Unfortunately, there is evidence to suggest that the opposite is happening in State practice. In the last three years, a disconcerting trend has developed where shipmasters of commercial vessels are being instructed by States to pushback migrants to Libya either directly or indirectly by transferring them to the Libyan Coastguard. During this period, there have been over 30 reported cases where migrants were pushed back to Libyan shores in this manner. One of these incidents involving the Panamanian-flagged *Nivin*, has prompted a complaint against Italy before the Human Rights Committee.[152] In November 2018, the vessel's shipmaster rescued 95 migrants in the Mediterranean and was then instructed by the Italian RCC to disembark in

149. UNHCR, 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation following Rescue at Sea' (September 2020) <https://www.refworld.org/docid/5f1edee24.html> accessed 10 June 2021; OHCHR Report Lethal Disregard (n 107) 2-3; Amnesty International, European Council on Refugees and Exile, Human Rights Watch, 'Plan Of Action: Twenty Steps to Protect People On the Move along the Central Mediterranean Route' (June 2021) < https://www.hrw.org/sites/default/files/media_2021/06/Central%20Med%20Plan%20of%20Action%20June%202021_eng.pdf> accessed 1 July 2021.

150. OHCHR Report Lethal Disregard (n 107) 10.

151. Gauci (n 30) 12; see also OHCHR Recommendation which emphasizes flag State responsibility in this context: '…[s]hipmasters of private commercial and humanitarian SAR organisations should refrain from returning any rescued migrants to Libya and their flag States should ensure that rescued migrants are promptly designated a port of safety'; see OHCHR Report Lethal Disregard (n 107) 24.

152. Communication to the United Nations Human Rights Committee In the case of SDG against Italy (Anonymized version) Submitted for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights to The United Nations Human Rights Committee <https://c5e65ece-003b-4d73-aa76-854664da4e33.filesusr.com/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf> accessed 2 June 2021.

Libya.[153] Once docked in Misrata, the rescuees refused to leave the vessel. After ten days onboard, the Libyan security officials forcefully removed most of migrants, including minors, using rubber bullets and tear gas.[154] Similar pushbacks by continued throughout the COVID-19 era as evidenced by the *Panther* and *Vos Triton* incidents.[155] Whilst the pandemic has placed a magnitude of pressures on State authorities to curtail the spread of the virus, international and regional organisations have cautioned against the imposition of emergency measures which effectively allow States to derogate from their *non-refoulement* obligations.[156]

As affirmed by the Special Rapporteur on the human rights of migrants:

> …while global public health crises may require travel restrictions, screening, testing, medical quarantine or isolation measures, these measures may not result in denying effective access to asylum and protection under international law. States must ensure that such measures are

153. Forensic Oceanography, 'The Nivin Case Migrants' resistance to Italy's strategy of privatized push-back: A reconstruction of events by Forensic Oceanography, affiliated to the Forensic Architecture agency, Goldsmiths, University of London (December 2019) 12 <https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf> accessed 16 June 2021.

154. ibid 11.

155. Patrick Kingsley, 'Privatized Pushbacks: How Merchant Ships Guard Europe 'IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya' *The New York Times* (New York, 16 June 2021) <https://www.iom.int/news/iom-and-unhcr-condemn-return-migrants-and-refugees-libya> accessed 18 June 2021.

156. See UNHCR, 'The COVID-19 Crisis: Key Protection Messages' (31 March 2020) <https://www.refworld.org/publisher,UNHCR,POSITION,,5e84b9f64,0.html> accessed 18 June 2021; European Commission, 'COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures on resettlement' (16 April 2020) C(2020) 2516. For an analysis of the effect of the COVID-19 pandemic on State *non-refoulement* obligations; see Salvo Nicolosi, 'Non-refoulement During a Health Emergency', EJIL:Talk! (14 May 2020) <https://www.ejiltalk.org/non-refoulement-during-a-health-emergency/> accessed 19 June 2021.

non-discriminatory, necessary, proportionate, subject to regular and independent review, and reasonable, in line with international law. Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.[157]

5. Conclusion

The above analysis demonstrates the important need to constantly keep reviewing legal terms, which though have been coined decades ago, continue to be used in contemporary international legal instruments. This requires that the constitutive elements of definitions may have to be revised to take into account new legal developments and the realities of international life. The duty to render assistance as established in the early part of the last century continues to be an important element in the protection of life at sea. It appears necessary to reconsider the duty, first established to deal mainly with shipwrecks in the face of the challenges of irregular migration by sea.

Article 98 of UNCLOS provides the basis for the execution of the shipmaster's long-standing obligation to render assistance. However, in the light of the magnitude of the problems of irregular migration by sea, and the particular risks to human life involved, the UNCLOS rules addressing the duty to render assistance are no longer sufficient. The UNCLOS framework has been strengthened, largely by the regimes set up under the auspices of IMO. In exercising their judgment, shipmasters are expected to act in good faith and to the best of their abilities while offering their utmost assistance to persons needing aid. This will require them to consider safety and security concerns relating to his ship, passen-

157. HRC, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea' (n 31) para 106.

gers and crew, commercial considerations underlying a migrant rescue operation, as well as related humanitarian concerns.

Despite the great progress that has been made in the formulation and application of the rules on the duty to render assistance, there still remain important unresolved issues affecting the obligations of the shipmasters before and after the exercise of the duty. Most notably the responsibilities associated with disembarkation and what constitutes a place of safety continue to be contentious issues amongst States. Furthermore, the multitude of commercial costs that may arise may complicate or inhibit further the shipmaster's duty to rendering assistance. These challenges appear to be seriously limiting the effectiveness of the shipmaster's duty to render assistance at sea under international law. It has been reported that shipping companies are now avoiding popular shipping routes which are also active migration hotspots or unable to find seafarers who will work on such routes.[158] Certain organisations have also reported that some shipmasters are allegedly switching off their Automatic Identification System to avoid being called to rescue.[159] There is evidence that problems posed by the COVID-19 pandemic appear to be further disincentivizing some shipmasters from providing assistance and rescue. The Office of the United Nations High Commissioner for Human Rights recently interviewed several migrant survivors who claimed that shipmasters of commercial vessels approached their vessels in distress, but

158. Speech given by Dottore Emanuele Grimaldi, President of Grimaldi Lines and Vice-President of Malta International Shipowners Association, Symposium on 'Maritime Search and Rescue: The Ship and the Shipowner' held at the IMO International Maritime Law Institute, Malta (29 May 2015).

159. Tomas Kristiansen, 'Migrants crisis has ships going off radio and rerouting near Malta' Shipping Watch (9 September 2020) <https://shippingwatch.com/carriers/Tanker/article12401608.ece> accessed 21 June 2021; UNHCR, 'UNHCR Proposals to Address Current and Future Arrivals of Asylum-seekers, Refugees and Migrants by Sea to Europe' (March 2015) <http://www.refworld.org/docid/55016ba14.html> accessed 21 June 2021.

failed to render assistance.[160] One migrant child reported that the crew of one vessel proceeded to take photographs of their rubber craft, but did not render assistance claiming that: 'We can't give you food. We cannot accept you [on board]. You have coronavirus'.[161]

It is submitted that the existing legal regime regulating the shipmaster's duty to render assistance is adequate and reasonable when balancing on the one hand, the paramount need to protect life at sea, and on the other hand, the responsibilities the shipmaster has, particularly the safety and security of his ship, crew and passengers. However, in the face of frequent migrant rescue operations, although the existing rules may provide a certain amount of stability, it is difficult for them to offer comprehensive solutions to the contemporary challenges described above, particularly, when the political will from States may be lacking. The severity of COVID-19 has added further pressures on the shipmaster's duty, where delays in or refusal of disembarkation by States has become more acute against the backdrop of the global pandemic.

The test of efficacy of the current international regime may be the comparison of delays faced by the shipmaster of *MV Tampa* and *Maersk Etienne* nearly two decades later. In the case of the former, the shipmaster suffered a delay of eight days. In the case of the *Maersk Etienne*, the shipmaster had to endure an unacceptable 38-day long delay. It would appear that States need to give more attention to developing effective legal mechanisms to relieve the shipmaster and crew as soon as reasonably practicable. This author agrees with the observations of Munari who postulates that: '… in most instances, present beneficiaries of SAR are no longer those on which the international legal regime has been developed

160. OHCHR Report Lethal Disregard (n 107) 11.

161. id.

162. Munari (n 15) 70.

and progressively set up, then we should question whether these differences may imply also a modified approach vis-à-vis the existing rules'.[162] A possible way forward could be the development of a predictable and systemic process of disembarkation, where both coastal/SAR States and flag States share in the responsibilities for the relocation of migrant rescuees. Such a mechanism could serve as an incentive by reassuring shipmasters that they will receive the necessary support to complete the rescue through disembarkation - an approach which may contribute to enhancing the overall effectiveness of the international SAR regime.

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II

Protecting Non-State Actors' Interests at Sea: Judicial Responses to the Silence of UNCLOS

Marianthi Pappa and Chiara Pavesi***

Abstract

The presence of non-State actors at sea is constantly increasing. The risks that they encounter are also on the rise. That is particularly evident in two contexts. The first is when private actors hold exploratory or fishing rights in areas of maritime boundary disputes. Their economic interests may be reallocated from one State to another due to a subsequent delimitation judgment. The second is when individuals are threatened, arrested, or attacked at sea by State forces. In this case, human lives might be harmed.

The position of UNCLOS towards the protection of non-State actors is ineffective. Despite its volume, the Convention is heavily State-centric. It contains no definition of non-State actors or adequate regulation for the protection thereof against the risks which may arise at sea. This legal uncertainty causes practical problems with the interpretation or ap-

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plication of the Convention in judicial cases involving private interests. Without a legislative framework, the burden of defining and securing those interests rests on international courts and tribunals.

The article seeks to investigate the treatment of non-State actors' interests in international jurisprudence of law of the sea. In doing so, the authors discuss cases concerning the delimitation of maritime areas hosting private petroleum or fishing rights and cases concerning forcible acts of States towards individuals at sea. This analysis will demonstrate whether judicial responses to the Convention's silence are effective for the protection of private interests.

Keywords: Non-State Actors, Private Interests, Maritime Disputes, Law Enforcement, International Jurisprudence, UNCLOS

1. Introduction

The United Nations Convention on the Law of the Sea 1982 (UNCLOS or the Convention)[1] constitutes the main and most comprehensive regulatory framework of international law of the sea. The Convention was drafted with the intent to cover all issues concerning the law of the sea. In doing so, it has managed to fill important gaps in the pre-existing Geneva Conventions of 1958,[2] such as the maximum breadth of the Territorial Sea (TS), the control and exploitation of offshore natural resources, the protection of the marine environment, and the need of the

1. Signed on 10 December 1982, and entered into force on 16 November 1994 (1833 UNTS 3).

2. Namely: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf.

newly independent States to access and utilise the ocean.[3] This bestowed UNCLOS the title of the 'constitution for the oceans'.[4]

However, this characterisation can be now challenged. UNCLOS dealt with matters that were critical for the law of the sea *at the time of its making*, and concern mainly the acts and interests of States (coastal States, landlocked or geographically disadvantaged States, fishing States, archipelagic States) in the ocean.[5] Although crucial, the above topics do not coincide with the issues which concern the international community four decades after the Convention's making.[6] A series of different issues have arisen since then, which are not addressed in UNCLOS. These in-

3. Yoshifumi Tanaka, *The International Law of the Sea*, (Third Edition, Cambridge University Press, 2019) 32.

4. See remarks by Ambassador Tommy Koh, President of the Third United Nations Conference on the Law of the Sea at <http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf> accessed 20 November 2021.

5. The agenda of the Conference of UNCLOS included 25 subjects: the international regime of the sea-bed and the ocean floor beyond national jurisdiction; the Territorial Sea; the contiguous zone; straits for international navigation; the Continental Shelf; the Exclusive Economic Zone beyond the territorial sea; coastal State preferential rights or other non-exclusive jurisdiction over resources beyond the Territorial Sea; high seas; land-locked countries; rights and interests of shelf-locked States and States with narrow shelves or short coastlines; rights and interests of States with broad shelves; preservation of the marine environment; scientific research; development and transfer of technology; regional arrangements; archipelagos; enclosed and semi-enclosed seas; artificial islands and installations; regime of islands; responsibility and liability for damage resulting from the use of the marine environment; settlement of disputes; peaceful uses of the ocean space: zones of peace and security; archaeological and historical treasures on the sea-bed and ocean floor beyond the limits of national jurisdiction; transmission from the high seas; enhancing the universal participation of States in multilateral conventions relating to the law of the sea.

6. See, David Freestone (ed), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Brill 2013); Tullio Treves, 'UNCLOS at Thirty: Open Challenges' (2013) 27 Ocean Yearbook 49-66; David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press 2006); Anastasia Strati et al (eds), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff 2006).

clude the presence of private actors at sea and the challenges that they face from States' acts. Despite its significance, this topic remains underexplored in literature. By shedding light on this theme, this article seeks to inform the scholarly debate about the efficacy of UNCLOS in relation to non-State actors and to offer insight to private actors (e.g., individuals, corporations) holding interests at sea.

Following this introduction, Part 2 of the article will discuss the increasing presence of non-State actors at sea along with the challenges that they face in this domain and highlight the normative failure of UNCLOS to regulate those actors. Part 3 will examine the judicial responses to this normative failure by referring to cases concerning the delimitation of maritime areas hosting private petroleum or fishing rights and cases concerning forcible acts of States towards individuals at sea. Finally, Part 4 will summarise the study's main findings and the lessons to be learned for the future.

2. UNCLOS and Non-State Actors

2.1 Non-State Actors at Sea: Increasing Presence and Challenges

The presence of humans at sea goes back to ancient times. For centuries, the ocean has been used for fishing, commerce, and navigation. And yet, during the past fifty years, the presence of non-State actors (individuals, private corporations) at sea has increased to unprecedented levels.[7] Private actors now use the ocean for more advanced economic activities (such as the exploration of hydrocarbons) but also to flee from warzones,

7. Irini Papanicolopulu, *International Law and the Protection of People at Sea*, (Oxford University Press, 2018) 15.

while the phenomenon of piracy or maritime organised crime is also on the rise. At the same time, the increased presence of private actors at sea comes with increased challenges. The most important challenges (physical, economic, legal) that non-State actors face at sea are discussed below.

In the past, the phenomenon of irregular migration at sea has affected millions of people. In the Mediterranean region alone, hundreds of thousands of migrants have used the sea to move from the Middle East and north Africa to the coasts of European countries. Such trips are fraught with severe risks. It may lead to hundreds of deaths caused by accidents while onboard, by the lack of rescue operations at sea, or by the deliberate decision of coastal States to deny migrants access to national ports.[8]

Another source of risk for private actors at sea comes from piracy. From January to May 2021, there were thirty-eight registered piracy incidents against private vessels.[9] The Gulf of Guinea constitutes one of the most well-known hot-spots for piracy, followed by Somalia, Singapore Straits, Indonesia, Gulf of Mexico, and South America.[10] The attacks perpetrated by pirates, such as armed robbery and hostage-taking, threaten the safety of the seafarers and cause high damage costs to ship-

8. See Efthymios Papastavridis, 'Rescuing 'Boat People' in the Mediterranean Sea: The Responsibility of States under the Law of the Sea,' Blog of the European Journal of International Law (May 31, 2011) <https://www.ejiltalk.org/rescuing-boat-people-in-the-mediterranean-sea-the-responsibility-of-states-under-the-law-of-the-sea/> accessed 20 November 2021.

9. ICC, International Maritime Bureau, Piracy and Armed Robbery Against Ships: Report for 1 January – 31 March 2021 <https://www.skuld.com/contentassets/a58fecffc88b4418959a19e6d2e07778/2021-q1-imb-piracy-report.pdf> accessed 20 November 2021.

10. ICC, 'Gulf of Guinea remains world's piracy hotspot in 2021, according to IMB's latest figures' <https://iccwbo.org/media-wall/news-speeches/gulf-of-guinea-remains-worlds-piracy-hotspot-in-2021-according-to-imbs-latest-figures/#:~:text=IMB's%20latest%20figures-,Gulf%20of%20Guinea%20remains%20world's%20piracy%20hotspot%20in,according%20to%20IMB's%20latest%20figures&text=In%20the%20first%20three%20months%20of%202021%2C%20the%20IMB%20Piracy,upon%2C%20and%20one%20vessel%20hijacked.> accessed 20 November 2021.

owners. At the same time, the necessity to fight the threat of piracy calls for coordinated actions by States, private organisations and associations and an increase in law enforcement operations, often leading to excessive uses of force against pirates or violation of their human rights.[11]

Another category of non-State actors at sea are private corporations. These companies conduct operations (ranging from commercial fishing to petroleum exploration) all over the world and employ thousands of people.[12] Despite the use of new technical means and equipment, offshore operations are not absolved of risks. These range from physical (caused by the harshness of the marine environment), to economic (caused by the uncertainty of oil discoveries or fish of the area), or political/legal (such as boundary disputes in the region or threats or attacks against private actors by the involved States). The latter category forms the subject matter of this study.

Most of the world's maritime boundary disputes involve private rights (related to fishing or petroleum exploration) which either or both of the involved States have granted to non-State actors. Perhaps the greatest challenge for those rights is their prospective redistribution from State A to State B upon delimitation. Questions arise as to the treatment and, ultimately, the fate of those rights: can the presence of private rights in the disputed area determine or affect the maritime boundary's course? If not, can reallocated private rights be otherwise protected against the absorbing State?

11. IMO, 'Maritime Safety Committee resolution calls for greater collaboration to tackle escalating attack in Gulf of Guinea' <https://www.imo.org/en/MediaCentre/PressBriefings/pages/GulfOfGuineaMay2021.aspx accessed 20 November 2021; BIMCO 'The Gulf of Guinea Declaration on Suppression Of Piracy' https://bi-cd02.bimco.org/ships-ports-and-voyage-planning/security/gulf-of-guinea-declaration-on-suppression-of-piracy> accessed 20 November 2021.

12. See Global Fishing Watch, <https://globalfishingwatch.org/map/> accessed 20 May 2021; Carto, Oil Platforms in the Gulf of Mexico <https://skytruth-org.carto.com/viz/6b36c068-1dd0-11e6-b5c7-0e8c56e2ffdb/public_map> accessed 20 November 2021; Papanicolopulu (n 7) 15.

In several cases of maritime boundary disputes, States have used excessive or unjustified force against non-State actors in order to protect their political and economic interests and to pursue their sovereign rights in the concerned maritime areas. On those occasions, the use of force by States may cause economic loss, physical injury, or even death of the people on board.

Having outlined the increasing presence of non-State actors at sea and the challenges which they face in this domain, the study will now examine whether and how non-State actors are regulated in UNCLOS.

2.2 Normative Failure of UNCLOS to Regulate Non-State Actors at Sea

In its preamble, UNCLOS seeks to settle 'all issues relating to the law of the sea' and contribute to 'the maintenance of peace, justice and progress for all peoples of the world'. This in itself might imply that the Convention is concerned with States and non-State actors alike, as both hold interests at sea. In order to assess this hypothesis, one must refer to the provisions of UNCLOS.

Article 1 defines the terms used in the Convention. Although several activities listed in this provision (such as activities in the Area and pollution of the marine environment) are conducted by individuals or corporations, non-State actors are not formally defined therein.

Despite the lack of a definition, non-State actors *are* mentioned in certain provisions of UNCLOS. However, this is done rarely and without particular reference to the status of those actors.

The first category of those provisions concerns law enforcement acts of States towards private actors conducting illegal activities at sea. Article 101, which defines piracy, provides that this act should be committed

'for private ends' (by the crew or passengers of a private ship or private aircraft and directed against other persons).[13] Article 105 adds that States may seize a pirate ship or aircraft and arrest the persons who commit piracy acts. However, no reference is made to the legal status (rights, duties, procedural capacities) of those non-State actors. Further, in the situation where the seizure of a ship or aircraft on suspicion of piracy has been without adequate grounds, UNCLOS provides that the acting State shall be liable to the ship or aircraft's State of nationality, instead of the individuals affected.[14] In the same fashion, the provision of hot pursuit only regulates the duties of pursuing States vis-à-vis other States, with no reference to the treatment of involved individuals.[15] That is striking, considering that acts of piracy are only conducted by non-State actors. Of course, it can be argued that the rules of international human rights or humanitarian law regulating the status of pirates as individuals may apply in this case.[16] However, on many occasions, political interests and expediency take precedence over the fulfilment of human rights State obligations towards pirates.[17]

In the same spirit, Article 109(3) allows for the prosecution of any person engaged in unauthorised broadcasting from the high seas, Article 113 allows for the punishment of private actors for the breaking or injury

13. Article 101(a).

14. Article 106.

15. Article 111.

16. These include the individual's right to be brought promptly before a judge, the non-refoulement, the right to fair trial, and the right to an effective remedy. See European Convention on Human Rights and the International Covenant on Civil and Political Rights, and the Convention against Torture.

17. See, Barry Hart Dubner and Brian Otero, 'The Human Rights of Sea Pirates: Will the European Court of Human Rights Decisions Get More Killed?' (2016) Washington University Global Studies Law Review 15(2) 215-254; Stefano Piedimonte Bodini, 'Fighting Maritime Piracy under the European Convention on Human Rights' (2011) European Journal of International Law 22(3) 829-848.

of submarine cables or pipelines, and Article 73 paragraphs 1 and 3 allow States to take measures (such as boarding, inspection, arrest, juridical prosecution) against vessels and punish acts which violate its laws and regulations in the Exclusive Economic Zone (EEZ). But as in the case of piracy, questions on human rights protection also arise for those provisions.

Special reference to private actors is made in the provisions which concern arrested vessels and crews. In particular, Article 73(2) provides that arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security. Article 292 adds that where such prompt release is not effected by the detaining State, the matter may be brought to an international court or tribunal.[18] However, the right to initiate these proceedings rests to the vessel's flag State, not the affected individuals.[19]

A more extensive reference to private actors (as natural or juridical persons) is made in Part XI of UNCLOS, which regulates the exploration of the deep seabed (Area). In particular, Articles 137(3), 153, 168(3), 187(c), and 190 describe the conditions under which private actors can perform exploratory activities in the Area and their procedural capacity to appear before the International Tribunal of the Law of the Sea (ITLOS) in order to settle any disputes which may arise with the International Seabed Authority (ISA) in relation to those activities. However, it should be highlighted that the capacity of private actors to operate in the Area is not self-established as it requires previous State sponsorship, while the State shall be liable for damage caused by the sponsored private actor.[20]

18. 292(1).

19. 292(2).

20. Article 153(2b); Article 4 of Annex III; Article 139; ITLOS Seabed Disputes Chamber, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, case no. 17, Advisory Opinion of 1 February 2011. Irini Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons?' (2012) The International Journal of Marine and Coastal Law 867; 869.

Finally, a number of UNCLOS provisions are concerned with the protection of human life. Article 98 imposes on ships the duty to render assistance to persons in danger and rescue those in distress in the high seas, while Article 99 prohibits the transport of slaves in ships. Additionally, Article 146 requires that activities in the Area be conducted with respect to human life. However, these provisions are not absolved of practical issues. Firstly, both the high seas and the Area fall beyond the States' jurisdiction. By contrast, no such provisions exist for the maritime spaces under national jurisdiction — viz. the TS, the Contiguous Zone, the EEZ, and the Continental Shelf (CS), which is where private actors are most commonly present.[21] Secondly, the above provisions establish merely a positive State obligation — not a subjective right which non-State actors could secure under the dispute resolution mechanisms of Part XV UNCLOS.[22] Thirdly, there is no general obligation of States in UNCLOS to respect and protect the rights of individuals. That is striking, considering that the Convention imposes general State obligations for other issues, such as the protection of the marine environment.[23]

The above demonstrate that non-State actors are not effectively regulated in UNCLOS. They are either invisible in the eyes of UNCLOS (as in the case of human life in maritime zones under national jurisdiction) or treated merely as extensions of the flag State (as in the prompt release of ves-

21. For example, the exploration of the deep seabed is still very sparse. At the moment, only 21 contractors hold permits to explore the Area, and many of these organizations are State-owned, like the China Minerals Corporation or the Federal Institute for Geosciences and Natural Resources of Germany. Source, ISA <https://www.isa.org.jm/minerals/exploration-areas> accessed 20 November 2021. By contrast, a massively greater number of private (seismic, drilling, scientific) operations are conducted daily in the States' Continental Shelf. In 2018, over 1.300 oil rigs were located in the world's maritime zones. Source <https://www.statista.com/statistics/279100/number-of-offshore-rigs-worldwide-by-region/> accessed 20 November 2021.

22. Papanicolopulu (n 20) 870; Papanicolopulu (n 7) 88.

23. Article 192. See Papanicolopulu (n 20) 869.

sels). Only States bear international rights, duties, and procedural capacities under UNCLOS. And in the exceptional case of Part XI, which grants private actors the right to conduct exploratory operations in the Area and appear directly before ITLOS for the settlement of relevant disputes with the ISA, these rights are derived from State sponsorship. The normative failure of UNCLOS to regulate non-State actors causes practical problems in cases where private interests are concerned, such as boundary disputes and forcible State acts towards non-State actors. In those contexts, the protection of private interests rests on the interpretation of UNCLOS. The following section will examine how this is performed by international courts and tribunals and whether judicial responses to the Convention's silence are effective for the protection of private interests at sea.

3. Judicial Responses to UNCLOS' Inefficacies

3.1 Delimitation Cases Involving Private Rights

A maritime boundary dispute is a long-standing disagreement between two States regarding their boundary's exact location or the criteria to be applied for the establishment of the boundary line.[24] As with all international disputes, those disagreements may pose security challenges for the involved States and also threaten international peace and stability.[25] Therefore, maritime boundary disputes should only be settled with peaceful means, such as interstate delimitation treaties or delimitation rulings by international courts or tribunals.[26] Although not mandatory (as the presence of fixed

24. Daniel Johnston, *Theory and History of Boundary-Making* (McGill-Queen's University Press 1998) 10.

25. As per Articles 33(1) UN Charter and 279 UNCLOS.

26. By contrast, any unilaterally-established boundaries are void. Fisheries case (*United Kingdom v Norway*) (1951) ICJ Rep 116, 132.

international boundaries is not a requirement of Statehood),[27] delimitation will separate the disputing States' overlapping claims and establish the limits of the parties' contiguous maritime jurisdictions in a clear and final way.[28]

Maritime delimitation is one of the most-discussed topics in the literature of law of the sea.[29] The vast body of existing works analyse the rich case law of international courts and tribunals settling maritime boundary disputes. However, these works are limited to the legal and practical challenges of delimitation for States and the principles under which maritime boundaries should be established due to the absence of a fixed delimitation method in law. Departing from this approach, the present study examines maritime delimitation rulings from the perspective of non-State actors. In doing so, the study will refer to the relevant provisions of UNCLOS and their application in delimitation cases by international courts and tribunals.[30]

27. James Crawford, *The Creation of States in International Law* (Clarendon 1979) 36-37; North Sea Continental Shelf Cases (*Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands*) (1969) ICJ Rep 3 [46]. As stressed in another case '[w]hatever may be the importance of the delimitation of boundaries, one cannot go so far *as to* maintain that as long as this delimitation has not been legally effected the *State* in question *cannot* be considered as having any territory whatever […]' *Deutsche Continental Shelf Gas-Gesellschaft v Polish State* (1929) PCIJ 5 AD no 5, 14-15.

28. Case Concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal Award (*Guinea-Bissau/Senegal*) (1989) [63].

29. See, Prosper Weil, *The Law of Maritime Delimitation -Reflections* (Grotius Publications 1989); Jonathan Charney and Robert Smith (eds), *International Maritime Boundaries* (Brill Publishers 2002); Nuno Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Martinus Nijhoff 2003); Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Oxford University Press 2006); Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Brill 2006); Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation* (Cambridge University Press 2015); American Society of International Law, *International Maritime Boundaries*, Vols I-IV edited by Jonathan Charney and Robert Smith, Vols V-VI edited by David Colson and Robert Smith, Vol VII edited by Coalter Lathrop (Martinus Nijhoff 1993-2016).

30. Although States generally prefer to establish their boundaries via treaties (which allows them to maintain control of the dispute and also to consider non-legal factors which might otherwise be rejected by international courts or tribunals), it is important to discuss judicial delimitation as international jurisprudence has developed a consistent approach for the establishment of maritime boundaries.

3.1.1 Delimitation Provisions in UNCLOS

The provisions of UNCLOS which regulate maritime delimitation are Articles 15, 74(1), and 83(1). Article 15 regulates delimitation of the TS. It provides that, failing an agreement between coastal States, delimitation shall be effected by the median line, unless a historic title or special circumstances exist in the area which justify departure from equidistance. This provision is identical to Article 12 of Convention on the Territorial Sea and the Contiguous Zone 1958 which was the first to regulate delimitation of the TS.[31] It is recognised that Article 15 represents customary law.[32]

Articles 74(1) and 83(1) regulate delimitation of the EEZ and the CS respectively. The twin Articles provide that delimitation of these zones 'shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution'.

Articles 74(1) and 83(1) were 'consciously designed to decide as little as possible' in order to secure an agreement between States that supported equidistance and States that favoured equitable principles for the delimitation of the EEZ and the CS.[33] Both provisions bear the force of international custom.[34]

Two main observations can be made. First, there is not a fixed delimitation method in UNCLOS for all maritime zones. Second, none of these provisions refers to private rights. The following section will examine how these issues are addressed in case law.

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31. Signed on 29 April 1958, and entered into force on 10 September 1964, 516 UNTS 205.

32. Ashley Roach, 'Today's Customary International Law of the Sea' (2014) Ocean Development and International Law 45(3) 239; 242-243.

33. *Eritrea/Yemen* (Second Stage) [116]; Tanaka (n 3) 241.

34. Roach (n 32) 246-248.

3.1.2 Case Law[35]

The absence of a fixed delimitation method in international law of the sea creates uncertainty. In order to mitigate this, international jurisprudence has sought to develop a standardised delimitation method. Over the years, this process evolved from the systematic use of equitable principles (between the 1960s and 1980s — viz. before the adoption of UNCLOS)[36] to the method of corrective equidistance (from the 1990s onwards).[37] The latest and most sophisticated version of corrective equidistance is the 3-stage approach, which consists of the following steps: the construction of a provisional equidistance line, made of all points that are equally distant from the States' base points; the adjustment of this line if required by any relevant circumstances; and a retrospective proportionality check of the delimitation outcome.[38] The 3-stage ap-

35. The relevant cases have been extensively analysed in another work of the first author. See Marianthi Pappa, *Non-State Actors' Rights in Maritime Delimitation: Lessons from Land* (Cambridge University Press 2021) 73-83.

36. See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3; Concerning the Continental Shelf *(Tunisia/Libyan Arab Jamahiriya)* [1985] ICJ Rep 192; Case Concerning the Continental Shelf *(Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13; Dispute Concerning Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau *(Guinea v Guinea-Bissau)* (1985) 24 ILM 252; Delimitation of Maritime Areas between Canada and the French Republic (St Pierre et Miquelon) (Arbitral Award) (1992).

37. See *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38; Eritrea/Yemen Arbitration (Second Stage: Maritime Delimitation) (17 December 1999) (2001) 22 RIAA 335, (2001) 40 ILM 983.

38. Maritime Delimitation in the Black Sea (Romania v Ukraine) [2009] ICJ Rep 61 Maritime Dispute (Peru v Chile) [2014] ICJ Rep 3; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (2012) 51 ILM 840, ITLOS Reports 2012, 4; Territorial and Maritime Dispute between Nicaragua and Colombia (Nicaragua v Colombia) [2012] ICJ Rep 624; Maritime Boundary Arbitration in the Bay of Bengal between the People's Republic of Bangladesh and the Republic of India (Bangladesh v India) (2014); *Arbitration between the Republic of Croatia and the Republic of Slovenia (Croatia v Slovenia)* (2017); *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)* (Judgment) (2017) ITLOS.

proach has been hailed in both theory and jurisprudence for securing objectivity and predictability in maritime delimitation.[39] Therefore, it is applied firmly by courts 'unless there are compelling reasons that make it unfeasible' in a particular case.[40]

On the face of it, it might be assumed that private rights play a role in maritime delimitation, either as 'special' or as 'relevant' circumstances. As systematically repeated in jurisprudence, there is not a closed list of the factors which can affect the boundary's course. Rather, these factors 'evolve from physical, mathematical, historical, political, economic or other facts [...] and from the characteristics peculiar to the region'.[41]

However, this is not the case in practice. When applying either the method of equitable principles or the method of corrective equidistance (including the 3-stage approach), international courts take only geographical factors (e.g., the concavity or convexity and the length of the States' coasts, the presence of islands in the area) into account. By contrast, any non-geographical factors (such as the presence of private rights in the disputed area) are rejected almost by reflex.

In particular, when it comes to fishing activities, these are treated by courts as purely economic factors extraneous to delimitation. As explained in several cases, it is not the purpose of delimitation to refashion geography or compensate States for nature's inequalities.[42] Therefore, economic factors cannot affect the boundary's course, unless ignoring them would have 'catastrophic repercussions' for the livelihood of a State's population.[43] But at the same time, the judges have never managed to explain

39. *Libya/Malta* [45]; Shi Jiuyong, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) 9 Chinese Journal of International Law 271-291.

40. *Romania v Ukraine* [116].

41. *Guinea/Guinea-Bissau* [89].

42. *North Sea Continental Shelf Cases* [91]; *Libyan Arab Jamahiriya/Malta* [46].

43. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States)* [1984] ICJ Rep 292, 341–42; *Libyan Arab Jamahiriya/Malta* 41, 46; *Guinea v Guinea-Bissau* 302.

the exact meaning of this condition. The sudden reallocation of private fishing rights due to a subsequent delimitation ruling may have serious (if not 'catastrophic') economic consequences for the affected persons if the absorbing State refuses to preserve them. Hence, it is only questionable why courts reject these as irrelevant to delimitation.

To this day, the only case in which fishing rights have affected maritime delimitation is *Jan Mayen* in 1993.[44] At first, the factors invoked by the parties in relation to security, the size of their population, and their socio-economic interests in the disputed area were rejected by the Court as irrelevant. However, particular attention was paid to the fishing activities of the States' nationals. The Court acknowledged that the fishing of capelin was vital to the livelihood and the well-being of the States' populations. It also observed that the provisional median line would attribute to Norway the whole area of the parties' overlapping fishing claims. To avoid this inequitable result, the Court shifted the line eastwards so that Denmark received a larger part of the area than it would have done had the original median line been followed.[45]

Although a majority decision of fourteen to one, the ruling was strongly criticised by panel members themselves (both dissenting and non-dissenting) and by scholars, for departing from previous decisions on the role of non-geographical factors in maritime delimitation and for 'sending strong echoes of distributive justice'.[46] To avoid similar criticism, courts never again allowed private fishing rights to affect a boundary's course.

44. *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38.

45. 72ff.

46. See Declaration of Vice-President Oda Separate Opinions of Judges Schwebel and Weeramantry and Dissenting Opinion of Judge Fischer; R Churchill, 'The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation' (1994) 9 International Journal of Marine and Coastal Law 1, 21–22; G Politakis, 'The 1993 Jan Mayen Judgment: The End of Illusions?' (1994) 41 Netherlands International Law Review 1.

With regards to oil concessions, international courts maintain that a line of existing permits cannot be considered in delimitation, unless it constitutes a tacit agreement between the States as to the boundary's exact location.[47] However, in none of those cases have courts provided the legal requirements for the existence of a tacit boundary agreement. Likewise, despite the large number of disputes involving oil permits, no court has ever thoroughly explained why such agreement was not found to be in place.

For example, in the *Eritrea/Yemen Arbitration (Second Stage: Maritime Delimitation),* while it was initially acknowledged that the presence of oil concessions could militate in favour of following the median line in the disputed area, in the end it was concluded that the purpose of delimitation is not to promote petroleum operations but to define enduring boundaries.[48] Hence, even if the method of equidistance could be used, the boundary was constructed on the basis of geometry rather than the line of concessions coinciding with equidistance.

Likewise, in *Guyana v Suriname*, although the tribunal acknowledged that the disputed area had a high concentration of petroleum activities, as both parties had been granting oil concessions between 1977 and 2004, it chose to follow the 'marked reluctance of international courts and tribunals to accord significance to the oil practice of parties in the determination of the delimitation line'.[49] Although the application of equidistance led to a result that largely matched the line of Guyana's permits in the disputed area, it cut through one of the State's eastern oil

47. Delimitation of Maritime Areas between Canada and the French Republic (*St Pierre et Miquelon*) (1992) Arbitral Award [89-91]; *Newfoundland and Labrador/Nova Scotia* [3.4]; *Cameroon/Nigeria* [304]; *Barbados and Trinidad/Tobago* [361-364]; *Nicaragua/Honduras* [247]; [253-258]; *Nicaragua/Colombia* 705; *Romania v Ukraine* [198].

48. *Guyana/Suriname* 354–55.

49. ibid 122–25.

blocks.[50] This could have been avoided if oil concessions were recognised by international jurisprudence as factors that could shift or adjust the provisional equidistance line.

A much stricter approach towards oil permits was adopted in the delimitation case between Ghana and Côte d'Ivoire in 2017.[51] The applicant State, Ghana, claimed that the maritime boundary with its neighbour in the West Atlantic Ocean should be based on equidistance. As evidence, Ghana invoked a series of oil permits that both States had granted to oil companies throughout the previous fifty years and which had followed the equidistance principle without any protest from either side.[52] The claimant argued that the long-standing presence of this concession line was a tacit boundary agreement of the kind that could affect maritime delimitation according to case law.[53]

The Special Chamber of ITLOS accepted that delimitation should be effected by the well-established method of equidistance. However, it based its decision on reasons of geometry and coastal geography, rejecting the evidence put forward by Ghana in support of the presence of a tacit agreement. Although the judges observed that both sides' permits conformed to equidistance, they concluded that 'oil practice, no matter how consistent it may be, cannot in itself establish the existence of a tacit agreement on a maritime boundary'.[54] Rather, these acts were simply 'the manifestation of the caution exercised by the Parties' pending de-

50. See 'CGX Energy Pleased with Guyana/Suriname Resolution' (*Rigzone*, 21 September 2007) <https://www.rigzone.com/news/oil_gas/a/50517/cgx_energy_pleased_with_guyanasuriname_resolution/> accessed 20 November 2021.

51. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire)* (Judgment) (2017) ITLOS Reports 2017.

52. ibid 21ff, 33ff.

53. ibid 40ff.

54. ibid [215].

limitation'.[55] It added that '[t]o equate oil concession limits with a maritime boundary would be equivalent to penalizing a State for exercising such caution and prudence'.[56] Hence, although the boundary the Special Chamber drew was almost identical to the line claimed by Ghana, and although all of Ghana's active oil permits in the disputed area were eventually secured from reallocation, their protection was incidental rather than purposeful.

To comply with previous case law, the Special Chamber ruled out the possibility of legally valid private rights having any role in maritime delimitation, even if those rights were clear evidence of equidistance.[57] The generalisation that oil practice could not qualify as tacit agreement took the reluctance with which case law treated private exploratory rights to an even higher level, eliminating any chance of those rights affecting maritime delimitation. It remains to be seen whether international courts will maintain this stance in subsequent cases, but in the meantime, States can be expected to be more cautious about basing their boundary claims on oil concessions.

3.1.3 Assessment of Judicial Practice

Obviously, the development of a standardised delimitation method by jurisprudence grants the delimitation process a high degree of objectivity and predictability. However, the exclusive reliance of courts on geographical factors seems to turn the legal process of maritime delimitation into a strict mathematical exercise.

55. ibid, quoting *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625, 664, para 79.

56. ibid [225].

57. ibid [211–28; 468–79].

From a theoretical perspective, it is true that the provisions of UNCLOS for the delimitation of maritime zones make no explicit reference to private rights which might be present in the disputed area. However, this should not be perceived as an exclusion of private rights from the delimitation process.

Firstly, the presence of private rights in the disputed area should be able to support the existence of a historic title for the claimant State or qualify as special circumstances that could justify departure from equidistance, as per Article 15. This may be the case if the invoking State demonstrates the long and unprotested presence of private rights in the TS under the doctrine of acquiescence.

Secondly, the general reference to Article 38 ICJ Statute in the above provisions covers all rules and principles of international law, including those which relate to private rights, such as acquiescence and estoppel or the doctrine of acquired rights.[58] In that sense, it can be argued that private rights should play a role in the delimitation of the EEZ and the CS. It might be argued that the international rules that are applicable in maritime delimitation are only those relating to the status and interests of the States concerned. However, such limitation would contradict the preamble of UNCLOS, which provides that 'the matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.[59] The same is repeated in Article 293, which provides that the settlement of disputes in relation to UNCLOS

58. The use of general rules and principles of international law in maritime delimitation has also been supported in literature. See Cottier (n 31) 490 and Mark Feldman, 'The Tunisia-Libya Continental Shelf case: Geographic Justice or Judicial Compromise?' (1983) 77 American Journal of International Law 233-234.

59. According to Art 31 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in accordance with the ordinary meaning given to its terms in their context and in light of its object and purpose. For the purposes of interpretation, a treaty comprises not only its text but also its preamble and annexes.

by international courts or tribunals (including disputes with regards to the delimitation of maritime boundaries) is subject to the rules of UNCLOS 'and to other rules of international law not incompatible with this Convention'. Hence, even if private rights are not verbally mentioned in the provisions that govern maritime delimitation, nothing precludes judges from interpreting those provisions broadly in order to apply the rules and principles of international law which will secure private rights from a potential reallocation.[60]

Thirdly, the term 'equitable solution' in Articles 74(1) and 83(1) means that a balance shall be reached between the interests of the States concerned. However, equity is a highly contextual term. It is 'inherently wedded to the context and facts of a particular case. [It] cannot operate in a vacuum, but depends upon a particular problem which needs to be solved'.[61] This exactly denotes that an equitable delimitation should consider all interests that are involved in a particular situation. If the only interests in the area under delimitation are those of the States concerned, then an equitable result should be achieved in relation to those interests alone. But if other interests are also present in the disputed area, such as private exploratory or fishing rights, then equity should also extend to those interests as the opposite might be detrimental to their holders.

From a practical perspective, the exclusion of private rights from the delimitation process opens the way to their redistribution from State A to State B — and eventually, their discharge.[62] This creates great uncer-

60. According to Art 293(1) UNCLOS, only an international rule which is incompatible with the Convention could not apply. This might be the case if the protection of private rights in a particular boundary situation contradicts the promotion of the interests of States or the reaching of an equitable result. But this must be proven in the case in question, rather than simply assumed.

61. Cottier (n 29) 29.

62. Marianthi Pappa, 'The Impact of Judicial Delimitation on Private Rights Existing in Contested Waters: Implications for the Somali-Kenyan Maritime Dispute' (2017) Cambridge Journal of African Law 61(3) 393-418.

tainty to individuals who already possess fishing, exploratory, or scientific rights in contested waters. It may also discourage private actors who wish to invest large sums of money in resource-rich maritime areas with outstanding or disputed boundaries. To avoid the discharging effect of reallocation, States A and B must agree that any affected private rights will be recognised by the absorbing State. However, this depends solely on the parties' good will.

In some cases, the judges advised States to collaborate post-delimitation in order to exploit jointly their shared natural resources.[63] This can preserve any reallocated private rights and secure their holders' interests in the region. Unfortunately, State collaboration is only mentioned in few delimitation cases. What is more, judges made this recommendation with a view to promoting the economic benefits of involved States in the disputed area, not accommodating any existing private rights therein.

It may be argued that the holders of redistributed private rights may resort to international human rights law or international investment law in order to enforce their rights to the absorbing State. However, this option is fraught with difficulties, such as the requirement to exhaust local remedies (in human rights cases) and the lack of a mechanism for the enforcement of winning decisions to respondent States.[64]

3.2 Forcible State Acts Towards Non-State Actors

The duty of States to refrain from the threat or use of force in their international relations is considered one of the cornerstones of international

63. *North Sea Cases* [97-99]. *Eritrea/Yemen* Award, Second Stage [84-86]; *Guinea/Guinea-Bissau* [121-123].

64. For an analysis see, Marianthi Pappa, 'Private Oil Companies Operating in Contested Waters and International Law of the Sea: A Peculiar Relationship' (2018) OGEL 16(1) 25.

law.[65] However, a distinction is drawn between unlawful and lawful cases. On some occasions, the use of force by States is justified as an exercise of law enforcement and protection. Law enforcement constitutes one of the main means for States to face maritime security threats. Maritime law enforcement (MLE) operations may involve the use of force or threat to recourse to it by States towards foreign vessels suspected of illegal activities.[66] They also include acts of surveillance, stopping and boarding vessels, inspection, arrest of vessels and crew on boards, imposition of sanctions, and detention of people on board.[67]

However, not all situations are cases of law enforcement as the forcible actions used against non-State actors may be unjustified or excessive. In light of the above, two questions arise. First, how do UNCLOS rules regulate the use of force at sea and how do these norms extend to non-State actors? Second, how can we distinguish the legitimate use of force in the context of MLE from violations of Article 2(4) UN Charter? In particular, how can MLE operations be distinguished from military activities of States at sea?

3.2.1 UNCLOS Provisions

This section aims to analyse the main articles of UNCLOS concerning the use of force and law enforcement.

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65. Article 2(4) UN Charter; Article 301 UNCLOS; Marianthi Pappa, 'Forcible Acts by States towards Non-State Actors Operating in Disputed Waters: Beyond the Limits of International Law?' (2019) 7 Legal Issues Journal 1.

66. Natalie Klein, *Maritime Security and the Law of the Sea*, (Oxford University Press 2011), 62; Malcolm D. Evans and Sofia Galani, *Maritime Security and the Law of the Sea. Help or Hindrance?*, (Elgar, 2020), 12; Jinxing Ma and Shiyan Sun Restrictions on the use of force at sea: An environmental protection perspective' (2016) International Review of the Red Cross 515; 519; Matteo Tondini, 'The use of force in the course of maritime law enforcement operations' (2017) 4(2) Journal on the Use of Force and International Law 253, 254.

67. Natalie Klein (id).

Firstly, by repeating Article 2(4) UN Charter, Article 301 of UNCLOS highlights the duty of States to refrain from the use of force in the exercise of their rights and duties 'against the territorial integrity or political independence of any State'. As it stands, the provision seems to only apply in interstate relations, excluding situations between a State and a non-State actor.[68] This might be interpreted by coastal States as freedom to use force towards individuals or private corporations at sea.

Secondly, UNCLOS contains different rules for law enforcement. Coastal States have enforcement and legislative jurisdiction over all people in their EEZ. Article 73 of UNCLOS provides that coastal States are entitled to adopt law enforcement activities such as boarding, inspection, and arrest 'to ensure compliance with the laws and regulations adopted by it in conformity with this Convention'.[69] In paragraph 2, the Article stipulates the duty to release the detained vessel and crew in case of bond or other security by the flag State. This norm intends to limit the power of law enforcement to violations concerning pollution and fishing actuated by vessels.[70]

Articles 110 and 111 of UNCLOS identify two exceptions to the exclusive jurisdiction of the flag State. According to Article 110, States may exercise the right of visit toward a vessel only when there is a reasonable ground for suspecting that the foreign vessels are involved in piracy, the slave trade, unauthorised broadcasting activities, or when a foreign vessel is without nationality or not displaying their flag nationality, warships

68. Pappa 'Forcible Acts by States towards Non-State Actors Operating in Disputed Waters' (n 65) 36.

69. Article 73 UNCLOS; According to Tanaka, although the article does not mention confiscation, in the decision of *M/V Virginia* case, ITLOS states that confiscation may be consider lawful for the provision 73 UNCLOS. Tanaka (n 3) 153-154.

70. Article 73 UNCLOS; Alfred H. A. Soons, 'Law Enforcement in the Ocean – An Overview', (2004) (3) 1 WMU Journal of Maritime Affairs 3, 11; Klein, (n 66) 89-97; Evans and Galani (n 66) 13; Tanaka (n 3) 153-154.

or identified government vessels.[71] On the other hand, Article 111 of UNCLOS establishes the right of hot pursuit, which may be exercised by coastal States 'if there is have good reason to believe that the ship has violated the laws and regulations of that State'.[72] This includes terrorist attacks, human trafficking, illegal fishing, or environmental crimes.[73] In this light, States may perform actions such as arrests, boarding, and request to show flag in order to investigate the above-mentioned actions.[74]

Finally, Articles 224 and 225 of UNCLOS establish the duties of conduct for States. The former identifies the types of vessels and aircraft which are allowed to exercise enforcement powers against foreign vessels.[75] The latter is concerned with the obligation of States to not endanger the safety of navigation and pose an environmental risk in case of use of force.[76]

Although law enforcement is regulated in greater detail than the use of force in UNCLOS, the Convention's respective provisions are not without limitations. In particular, these Articles do not provide any fixed criteria for the identification of law enforcement or the amount of force that should be exercised in MLE operations in order for them to be legitimate.[77]

71. Although there is no reference to human trafficking, it is considered as slavery in the contemporary meaning. Tanaka (n 3) 200.

72. Article 111 UNCLOS.

73. Tanaka (n 3) 202-206; Evans and Galani (n 66)14-15.

74. Rob McLaughlin, 'Authorizations for maritime law enforcement operations' (2016) 98 International Review of the Red Cross 465, 483; Tanaka, (n 3) 198-202; Evans and Galani (n 66), 15.

75. Article 224.

76. Article 224 UNCLOS; article 225 UNCLOS; Ma and Sun (n 66), 528.

77. Efthymios Papastavridis, 'The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)' (2015) 2 (1) The Journal of Territorial and Maritime Studies 119 128.

Another aspect to consider is the concept of military activity. This has not been clearly defined in international case law or UNCLOS. The Convention makes a reference to military activity in Article 298(b) but without defining the term. Following the position of Ishii, the concept of military is usually attached to the interest of States to protect national security concerns against external armed threats.[78] As a result, the identification of the nature and the scope of these activities is left to the discretion of States. However, several times the use of force at sea by States has left doubts as to whether the involved activities constitute MLE operations or military activities and which legal regime should apply.[79] Consequently, this vagueness creates uncertainty as to which State acts are lawful or not.

The following section will examine the judicial approach to cases involving forcible State acts towards non-State actors at sea.

3.2.2 Case Law

International courts and tribunals have previously been called on to decide cases concerning forcible State acts towards non-State actors. The study of those cases brings to light important information as to who can initiate claims about such violations and how unlawful force can be distinguished from lawful situations of law enforcement.

78. Yurika Ishii, 'The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Provisional Measures Order' EJIL: TALK! Blog Of The European Journal Of International Law (May 31, 2019) Available online <https://www.ejiltalk.org/the-distinction-between-military-and-law-enforcement-activities-comments-on-case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures-order/>.

79. Ishii (ibid); McLaughlin (n 78) 488.

With regards to the first aspect of procedural capacity, Part XV of UNCLOS, Article 62(1) of the ICJ Statute, and Article 31(1) of ITLOS Statue provide that only States can bring an action to an international judicial body.[80] This means that, in case of violation of Articles 2(4) UN Charter, 301 UNCLOS, and dispositions concerning law enforcement in UNCLOS, States are the only actors that can initiate proceedings. This is widely confirmed in jurisprudence, starting with the famous *M/V Saiga (No 2)* case.[81] In this case, Saint Vincent requested compensation from Guinea for the use of force against the *Saiga* ship which also caused the injury of two board members. ITLOS affirmed that Saint Vincent was entitled to compensation for the damages suffered by the *Saiga* ship.[82] Similarly to *Saiga*, in the *Guyana/Suriname* and *M/V "Virginia G"* cases, it was affirmed that a compensation for the violation of UNCLOS and the damages directly suffered by private actors should be awarded to the flag or authorising State.[83]

With regards to the classification of State acts, international jurisprudence has affirmed that force can be exercised in a legitimate way in MLE operations.[84] However, this does not extend to military activities. In the *Saiga*'s decision, ITLOS identified three principles to distinguish

80. As seen earlier, non-State actors can bring to ITLOS any disputes which may arise with the ISA in relation to the exploration of the deep seabed. However, they can only do so under State sponsorship.

81. See Saint Vincent and The Grenadines V Guinea (M/V 'Saiga' (No. 2)) (Judgment) [1999] ITLOS, Para 97; The M/V "Virginia G" Case (Panama/Guinea-Bissau) [2014] (Reports of Judgments, Advisory Opinions and Orders) ITLOS [48]; Arbitration Between Guyana and Suriname (*Guyana/Suriname*) Award (PCA 2007) [263-267].

82. *Saiga* (ibid) [156- 172]; Bernard H Oxman and Vincent Bantz, 'The M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment (ITLOS Case No. 2)'. (2000) 94 The American Journal of International Law 144.

83. *Guyana/Suriname* [452]; *The M/V "Virginia G"* [434].

84. See *Fisheries Jurisdiction* (Spain V Canada) Jurisdiction of the Court, Judgment, ICJ Reports 1998 [84]; Papastavridis (n 77), 129; *The M/V "Virginia G"* [362].

these two activities: unavoidability, reasonability, and necessity.[85] It also stated that the use of force should be avoided and must respect humanity standards of international law.[86] These principles were followed and applied in subsequent cases.[87]

In the *Arctic Sunrise Arbitration*, the Permanent Court of Arbitration was called to decide on the identification of law enforcement operations.[88] The Arbitral Tribunal established a three-pronged test to demonstrate if an enforcement operation was performed in accordance with international law:

> first, the response actions to prevent or end a protest action must have a legal basis in international law; second, such response action must be carried out in accordance with international law; third, any subsequent law enforcement actions related thereto must also be carried out in accordance with international law.[89]

In this case, the Tribunal highlighted the necessity of an international basis of law for enforcement operations to be considered as such.

In relation to the identification of military activity, an attempt to clarify this concept was made in the *South China Sea Arbitration*.[90] Accord-

85. *Saiga* [155-172].

86. id.

87. See *Guyana/Suriname* [445]; *The M/V "Virginia G"* [362].

88. Permanent Court of Arbitration, *In the Matter of the Arctic Sunrise Arbitration, Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the kingdom of Netherlands and The Russian Federation*, Award on the Merits (PCA 2015).

89. [221; 333].

90. Permanent Court of Arbitration, *In the Matter of South China Sea Arbitration, Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of Philippines and the People's Republic of China*, Award (PCA 2016).

ing to the Tribunal, a 'quintessentially military situation, [involves] the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another'.[91]

In the more recent case concerning the *Detention of Three Ukrainian Naval Vessels*, ITLOS stated that the distinction between these two concepts requires an 'objective evaluation of the nature of the activities'.[92] However, as Judge Gao underlined in his Separate Opinion, the distinction between law enforcement and military activities is not easily marked, and that a law enforcement operation may simply turn into military action.[93]

In conclusion, it may be asserted that attacks against vessels, platforms, and other private actors operating at sea are considered by jurisprudence as attacks against the flag or the authorising State, rather than against the affected individuals. Furthermore, international case law offers no clear distinction between law enforcement and military activities.

3.2.3 Assessment of Judicial Practice

This section will critically assess the implications of the above examined cases for non-State actors.

91. [1161].

92. Case concerning The Detention of Three Ukrainian Naval Vessels (*Ukraine V. Russian Federation*) (Judgment) (2019) ITLOS Para 66-68 71-76; James Kraska, 'Did ITLOS Just Kill the Military Activities Exemption in Article 298?', EJIL: TALK! Blog Of The European Journal Of International Law (May 27,2019) Available Online <Https://Www.Ejiltalk.Org/Did-Itlos-Just-Kill-The-Military-Activities-Exemption-In-Article-298/#:~:Text=The%20key%20question%20was%20whether,Under%20article%20298%20of%20UNCLOS.&-Text=But%20in%20reaching%20this%20conclusion,Diminished%20the%20military%20activities%20exemption.> accessed 20 November 2021.

93. International Tribunal of The Law of The Sea, 'Separate Opinion of Judge Gao' <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_O25.05_SO_ZG.pdf> [49-50].

Firstly, as seen above, non-State actors have no procedural capacity to sue the acting State for its forcible acts, even when these cause threat to human life. Non-State actors at sea are treated as State extensions, instead of actors or subjects of law. Any compensation for the threat or attack towards them will be directly awarded to the flag or authorising State.

The current stance of law of the sea towards non-State actors does not comply with most of the other areas of international law (e.g., human rights law, international investment law, international criminal law, international environmental law) which vest on non-State actors' international rights, duties, and procedural capacities.

It would be sensible for non-State actors to possess procedural capacity (for example, to ITLOS) for any cases of law of the sea involving private interests, including forcible State acts. It may be counter-argued that private actors may recourse to other legal venues for the protection of their interests against State acts, such as international human rights courts or investment tribunals. But as explained previously, a series of barriers (exhaustion of local remedies, lack of enforceability mechanisms) seem to be hindering the protection of private interests towards State acts.

A second aspect to consider is the distinction between law enforcement and use of force. The analysis of case law demonstrated that there is not a clear distinction between these two concepts. This leaves room for judicial discretion and may even lead to questionable interpretations.

What is more, the absence of a clear distinction between law enforcement and military activities allows States to cover unlawful forcible acts with the cloak of legitimate law enforcement. A clear legal framework with fixed definitions and criteria for the distinction of law enforcement from the use of force would offer certainty and judicial predictability.

4. Conclusion

For decades (if not centuries), international law was exclusively concerned with States; but gradually, non-State actors have managed to earn a significant place in the international sphere. They now possess rights, procedural capacities, or even duties under multiple areas of international law. This bestows them the legal status of 'actors' and allows them to be in a more equitable relationship with States.

Notwithstanding, that is not the case in international law of the sea. Although one of the oldest and most dynamic areas of international law, the law of the sea remains extremely State-centric. This is widely reflected in UNCLOS. Despite its volume and rich content, the Convention fails to regulate the status of non-State actors.

Regrettably, this legal framework does not match the picture of the world's oceans. Non-State actors have always been and are increasingly present at sea. They use the ocean for navigation, fishing, petroleum exploration, or as a means to escape from dangerous environments. This often comes with severe challenges, threatening the lives or the economic interests of private actors.

The failure of UNCLOS to regulate non-State actors at sea creates legal uncertainty in judicial cases which involve private interests. Without a definition or a comprehensive reference to non-State actors in the Convention, the role of international courts is limited to deciding only on the rights, duties, and interests of States.

By focusing on two case studies (private rights in contested waters and forcible State acts towards non-State actors), this article discussed the legal and practical implications which the State-centrism of law of the sea has for private actors. As the study exposed, non-State actors are either completely invisible to the eyes of law of the sea (as in the case of private rights in disputed waters) or treated as mere extensions of States (as in the case of forcible State acts towards private actors at sea). This causes

severe disadvantages to non-State actors at sea and creates inconsistencies among the various disciplines of international law.

The place of non-State actors at sea is one among the many aspects which have not been (satisfactorily) addressed in UNCLOS and call for future developments in this area of law. A definition of non-State actors in the Convention's text could be the starting point, as it would put them 'on the map' of the legislation of the sea. The regulation of non-State actors at sea should follow. A particular provision or section in the Convention should establish those actors' legal status (rights, duties, procedural capacities) in the context of international relations, offering certainty and providing them with the means to address the associated legal challenges at sea.

Whether the above developments should be in the form of UNCLOS amendments or of a new convention on the law of the sea falls beyond the scope of the present study. In any case, it is important that these developments are pragmatic and reflective of the oceans' image — not just the present but also the future.

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III

The Place of Economic Actors as 'Nationals' under the UN Convention on the Law of the Sea

*Léna Kim**

Abstract

The term 'nationals' in the United Nations Convention on the Law of the Sea gives a particular connotation to the traditional concept of nationality since it is mostly used in the context of economic activities taking place at sea. In this regard, some provisions in UNCLOS refer to rights accorded to these 'nationals' through their States of nationality. These provisions concern almost exclusively economic activities in States' exclusive economic zones, in the high seas, and in the Area. They encompass the right of exploitation of living resources in general (fisheries) but also States' obligation of conservation of these living resources. Other economic activities are also potentially covered by these provisions — notably the relevant Articles on the Area — such as the exploitation of hydrocarbons in the high seas. This article argues that it is necessary to take into account

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private economic actors' interests and rights in the law of the sea because such actors are the main users of the maritime space. It points out that UNCLOS, despite being framed in a State-centrism vision, contains elements in favour of such a broader recognition of individuals' rights of exploitation of the sea and its resources. It shows that provisions containing the term 'nationals' can be used to replace private parties as economic actors at the center of the law of the sea. Such recognition of their rights is however limited by the State-centric foundations and approaches of UNCLOS that are still used today. In parallel, these rights are constrained by contradicting approaches of the utilisation of the sea, which highlights the different interests of the private economic actors and the States. Therefore, this paper aims to analyse the place of individuals in international law through the use of the term 'nationals' in UNCLOS and provides an insight into the necessity of a distinction between the States and their own nationals in the international law of the sea plane.

Keywords: Law of the Sea, Nationals, Individual, Individual Rights, Economic Activities, Exploitation of Marine Resources

1. Introduction

The law of the sea regulates activities that take place at sea,[1] by dividing the maritime space into different zones. Signed in 1982, the United Na-

1. United Nations Convention on the Law of the Sea (adopted 16 November 1973, entered into force 16 November 1994), 397 UNTS 581 (UNCLOS), Preamble (*"Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment […]"*).

tions Convention on the Law of the Sea (UNCLOS), was framed as a way to solve States' concerns on the delimitation of their maritime spaces and to regulate the activities operating therein. The place of individuals or private parties was not the main concern of the Convention. Therefore, the rights and obligations as provided in UNCLOS are first and foremost directed at the States Parties to the Convention. However, the drafters of UNCLOS could not ignore the fact that individuals and private parties are the main users of the sea and operate within the maritime zones it was regulating. This is the reason why individuals are sometimes mentioned in the Convention, without being at the center of it.

As mentioned by Judge Tullio Treves, 'concerns for human beings, which lie at the core of human rights concerns, are present in the texture of its provisions'.[2] More specifically, '[p]ersons are mentioned now and then and some rules are actually directed at them or consider them or are of benefit to them'.[3] This is the case, for example, of Article 98 on the duty to render assistance to persons in danger at sea, which places persons at the center of the provision by establishing the obligation of States to require the masters of ships flying its flag to assist such persons. Within UNCLOS, individuals and private persons are also directly addressed in the context of piracy. Indeed, Article 101 of UNCLOS, defining the term 'piracy', provides that 'any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft' fall within the definition of piracy. In addition, a number of other conventions and soft law regulations have been adopted in order to take into account individuals

2. Tullio Treves, 'Human Rights and the Law of the Sea', Berkeley Journal of International Law, (2010) Vol. 28, Issue 1.

3. Irini Papanicopulu, 'The Law of the Sea Convention: No place for Persons?', (2012) 27(4) International Journal of Marine and Coastal Law, 867, 869. See also, in the context of migration at sea, Richard Barnes, 'Refugee Law at sea', (2004) 53 ICLQ, 47.

in specific areas of the law of the sea which were lacking or under developed in UNCLOS. This is the case, for example, of the SAR and SOLAS Conventions[4] and directives adopted within the International Maritime Organization in the context of safety at sea, which complete the obligation to render assistance at sea as set out in Article 98 of UNCLOS. Infrequent mentions of individuals also appear at Article 27 on criminal jurisdiction on foreign ships, or Article 99 on the prohibition to transport slaves.

Despite that UNCLOS seems to take into account individuals and private parties in these areas, it is hard to find any rights or obligations expressly directed at them. This article argues that such rights can be found in the context of the economic exploitation of the sea and its resources. Because economic activities that take place at sea are carried out by physical or juridical individuals and not the States themselves, individuals do have a specific place in UNCLOS in this context. It will be demonstrated that individuals are granted rights through the term 'nationals' in UNCLOS, which appears in Articles 51(1), 61(5), 62(3) and 62(4), 64(1), 69(4), 70(5), 72(1), 116, 117, 118, 139(1), and 153(2)(b) of the Convention.

Indeed, nationality is the legal link to States,[5] which entitles individuals to rights and obligations under international law. In other words, '[n]ationality identifies and recognizes individuals under international law, and often provides them with rights and obligations.'[6] Therefore, an analysis of the term 'nationals' as used in UNCLOS in the afore-

4. International Convention on Search and Rescue, April 27th, 1979. 23489 UNTS 119; International Convention on the Safety of Life at Sea, November 1st 1974. 1184 UNTS 278.

5. *Nottebohm (Liechtenstein v. Guatemala)* (Second Phase) [1955] ICJ Rep 1955, 23.

6. Chiara Giorgetti, 'Rethinking the Individual in International Law', (2018) 22(4) Lewis & Clark Law Review, 1120.

mentioned provisions can reveal such 'rights'. The ICJ in the *LaGrand* case confirmed that international treaties can create rights that belong to individuals,[7] clarifying the position of the PCIJ in the *Courts of Danzig* case which established that 'an international agreement, cannot, as such create direct rights and obligations for private individuals'.[8] Following this evolution in international law, States have adopted several treaties that create such individual rights and obligations. Most of these rights are granted and can be claimed directly by their holders, i.e., individuals, because of the link of nationality. This is the case of bilateral investment treaties that create rights to the benefit of foreign investors, whether they are considered to be owned by the State or by the investor under the doctrines of direct and derivative rights.[9] These treaties usually require that the protected investor is a national of one of the Contracting Parties.[10] In this context, as noted by Giorgetti:

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7. *LaGrand Case (Germany v. United States of America)* (Judgment) [2001] ICJ Rep 2001, paras. 466, 494, 497 (*"Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person.* […] *The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual"*).

8. *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ Series B. No 15, 17-18.

9. Anne Peters, *Beyond Human Rights, The Legal Status of the Individual in International Law* (CUP 2016) 304-308.

10. For example, Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments (adopted 16 June 1992, entered into force 1 December 1992) 2461 UNTS 49, Article I(3) (*"The term "Investor" shall mean with regard to each Contracting Party: A) A natural person having status as a national of that Contracting Party in accordance with its laws, B) Any legal person such as any corporation, company, firm, enterprise, organization or association incorporated or constituted under the law in force in the territory of that Contracting Party.*").

> because the link between the individual and international law is establish through nationality, an individual must hold the correct nationality to access international law remedies; this also means that individuals who do not possess the right nationality lack access to international protection.[11]

It follows that international law often uses the link of nationality to 'filter'[12] individuals entitled to certain rights under international law. However, this is not a systematic practice, and international law has evolved to recognise certain rights to individuals without any distinction of nationality. This is the case in human rights law in which it is considered that human rights 'derive from the inherent dignity of the human person', and thus are not dependent on the nationality of the person[13] Indeed, human rights instruments generally specify that they apply without the distinction of nationality.[14]

It would be wrong to conclude that such evolution of international law has largely expanded to UNCLOS. However, two situations in which nationality is of no importance can be pointed out. First, no distinction of nationality should be drawn with regards to humanity considerations. For example, if it is recognised a right to any person in danger at sea to be rescued under UNCLOS, which is still unclear,[15] such right naturally does not only belong to nationals of the States Parties to the Convention.

11. Chiara Giorgetti (n 6) 1090.

12. id.

13. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Preamble.

14. See, for example, ICCPR, Article 2 (*"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*).

15. The provision of Article 98 is framed as a duty to rescue, and not as a right to be rescued.

It would indeed be absurd to ask the nationality of a person in danger before deciding to help them or not. Second, in the case of the flag State's jurisdiction over its ship, the International Tribunal for the Law of the Sea (ITLOS) in the *Arctic Sunrise* case held that the nationality of the individuals on the ship is not relevant, and that the flag State has jurisdiction over the persons on board whether they have the nationality of the flag State or not.[16]

In the context of UNCLOS, and more particularly of the economic exploitation of the sea, it is important that rights of private parties are recognised. Indeed, they are the main users of the sea and operate in the framework of UNCLOS. Their interests are sometimes different from States' interests, which is why it is necessary to distinguish their rights to States' rights to guarantee them and thus, the stability of their operations at sea. However, because of the tension between this reality of the maritime space and the State-centered characteristics of UNCLOS, such recognition is not self-evident. This article will show that the multiple use of the term 'nationals' can be used to address this tension and resolve it to a certain extent.

First, Part 2 of this article will clarify the meaning of the term 'nationals' in these specific provisions of UNCLOS, and the determination of such nationality. In Part 3, it will be demonstrated that the provisions

16. *The Arctic Sunrise arbitration (The Kingdom of the Netherlands v. The Russian Federation)* (Award on the Merits) [2015] XXXII RIAA 205 para 175. (*"The nationality of the individuals is not relevant. The Netherlands is not exercising diplomatic protection in the classic sense over all of the individuals on board; it can only do that with respect to the Dutch nationals on board. Rather, the Netherlands is acting in its capacity as the flag State of the Arctic Sunrise, with exclusive jurisdiction over the vessel within the EEZ of Russia."*). See also, ILC, 'Draft articles on Diplomatic Protection' (2006) UN Doc A/61/10, Article 18 (*"The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act."*).

employing the word 'nationals' tend to suggest that nationals, as economic actors, have individual rights to pursue economic activities at sea under UNCLOS, but that this recognition is however constrained by the State-centric approach of UNCLOS. The exercise of the identified rights is likewise limited by States' obligations to regulate them, in line with UNCLOS' objective of conserving and preserving the marine environment, which reduces the place of individuals in the law of the sea. This will be discussed in Part 4.

2. The Meaning of 'Nationals' and the Determination of Nationality under UNCLOS

2.1. The Scope of the Term 'Nationals' in UNCLOS: 'Nationals' as Economic Actors

The concept of nationality is the traditional legal link of individuals to their State, which allows a State to exercise its jurisdiction over these persons and provides them certain rights and obligations under international law. In the context of the law of the sea, other specific wordings are used in this regard. By using the term 'nationals', the drafters of the Convention have adopted a pragmatic approach in choosing this generic wording over more particular qualifications that would require specific definitions. Indeed, these provisions reveal that 'nationals' is the favoured wording to designate economic actors at sea, the scope of which is broad enough to include individuals such as fishers or other entities such as enterprises and corporations.

However, not all the provisions that grant rights or obligations, whether directly or indirectly, to individuals use the term 'nationals'. For example, Article 17 of UNCLOS on the right of innocent passage is

expressly addressed to 'ships of all States'.[17] UNCLOS also refers to the 'crew' or 'passengers' or even the 'master' of a ship.[18] The provisions that explicitly use these wordings will not be analysed in this article, as this analysis is limited to the term 'nationals'. It would, however, be interesting to analyse such provisions in an exhaustive study of the rights of these economic actors under UNCLOS.

Nevertheless, all these actors are included in the term 'nationals'. Indeed, 'nationals' under the law of the sea should be understood as encompassing both physical and juridical persons. The inclusion of both categories of persons in the word 'nationals' as used in UNCLOS is in line with the meaning of the Convention and its objectives of developing an equitable economic order,[19] notably through the regulation of activities at sea. These activities at sea that have a commercial or economic purpose, by their nature, often involve both categories of persons. For the purposes of this article, 'economic actors' is to be understood as encompassing non-State entities, physical or juridical persons who exercise an economic activity at sea, such as the exploitation of marine resources through fishing.

A ship can also be considered as a 'national' under some of the provisions analysed. Indeed, a ship is naturally part of the economic actors operating at sea, notably in the context of fisheries. The UNCLOS provisions which include the term 'nationals' do not refer to the 'flag State' as such, but simply to 'States'.[20] Therefore, the scope of the word

17. UNCLOS, Article 17 in full reads as follows: *"Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."*

18. See for example, UNCLOS, Article 98 on the duty to render assistance (*"Every State shall require the master of a ship flying its flag, as so far as he can do so without serious danger to the ship, the crew, the passenger: (a) to render assistance to any person found at sea in a danger of being lost […]"*).

19. UNCLOS, Preamble, Indent 5.

20. Rosemary Rayfuse, 'Article 117' in Alexander Proelss (ed), *The United Convention on the Law of the Sea, A Commentary* (Bloomsbury Collection 2017) 816.

is broader and 'nationals' does not necessarily exclusively mean 'ships', which confirms our interpretation. However, a ship as such cannot have rights or obligations under international law. Indeed, ships are, under the law of the sea, 'defined first and foremost as a craft navigating at sea under the responsibility of a state under which it can be linked by a link of nationality'.[21] The function of the link of nationality of vessels is to determine the jurisdiction of the State, and its control over the ship.[22] Therefore, ships do not have a legal personality in international law and are merely seen as a 'floating construction made to navigate at sea'[23] that cannot have rights and obligations by themselves. Despite some inclinations to give ships legal personality for practical reasons in the doctrine, it remains a fiction,[24] and ships do not, as such, have legal personality under international law.[25] In other words, 'it lacks all the attributes of personality: the vessel has no rights, no obligations, no legal powers, no organs and no agents capable of acting on its behalf as do personalized collective beings.'[26] Therefore, for the purposes of this article, the rights

21. Laurent Lucchini, Michel Voelckel, *Droit de la mer*, Tome 2, vol 1, (Pedone 1996) 38 (French original: *«Au regard du droit de la mer, le navire se définit d'abord et avant tout comme un engin évoluant en mer sous la responsabilité d'un État auquel il peut être rattaché par le lien de nationalité et qui peut récuser toute ingérence d'un autre État»*).

22. Niki Aloupi, 'La nationalité des véhicules en droit international public' (PhD Thesis, Université Panthéon Assas 2011) 254.

23. Jean Salmon (dir.), *Dictionnaire de droit international public* (Bruylant 2001) 729 (French original: *«Terme essentiellement technique désignant toute construction flottante conçue pour naviguer en mer et y assurer, avec un armement et un équipage qui lui sont propres, le service auquel elle est affectée.»*).

24. See for instance, Alex T. Howard, 'Personification of the vessel: fact or fiction?', (1990) Vol. 21 Journal of Maritime Law and Commerce 319.

25. Niki Aloupi, (n 22) 11.

26. Jean Combacau, 'Les bateaux et le navire : tentative de détermination d'un concept juridique international ; Conclusions ', in *Colloque de la SFDI : Le navire en droit international* (Pedone 1993) 244 (French original: *«tous les attributs de la personnalité lui font défaut: le navire n'a pas de droits, pas d'obligations, pas de pouvoirs légaux, par d'organes et pas d'agents aptes à agir pour lui comme en ont les êtres collectifs personnalisés»*).

and obligations of 'nationals' are to be understood as owned by the natural or legal persons operating at sea, or the flag State of a ship if such ship carries out economic activities at sea.

The multiplicity of potential economic actors at sea is confirmed by the Convention itself, which explicitly refers to certain categories of persons who are entitled to exercise such economic activities at sea. This is particularly striking concerning the legal regime of the Area, and Articles 139 and 153. These two provisions indeed explicitly state that such activities are 'carried out by States Parties, or state enterprises or natural or juridical persons'. The Convention therefore explicitly recognises that States are not the only actors when it comes to the economic activities of exploitation of the sea and its marine resources.

2.2. The Criteria Determining the Link of Nationality under UNCLOS

UNCLOS does not define the term 'nationals' or 'nationality' of individual or private entities other than vessels. The criteria determining nationality of vessels are defined by Article 91 of the Convention, which reads as follows:

> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

This provision also refers to domestic law for the conditions of the granting of ships' nationality. Similarly, Article 91 of UNCLOS introduces the concept of 'genuine link' between the ship and the flag State. From

the wording of this Article, such link with a State seems to be required to ascertain a vessel's nationality. However, the scope of this notion remains uncertain. Indeed, ITLOS has considered that this 'genuine link' does not constitute a criterion of attribution of nationality.[27] As noted by Proelss, Article 91(1) of UNCLOS 'should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships'.[28] The commentators generally recognise that there are no rules of international law which regulate the attribution of nationality for vessels.[29] Despite several attempts to clarify the criteria of vessels' nationality,[30] the rule remains that the criteria are to be found in States' domestic law, as the ITLOS stated in the *M/V Saiga* case.[31] Therefore, the issue of vessels' nationality is under the exclusive jurisdiction of the flag State,[32] which means that a State cannot call into question how the flag State has attributed its nationality

27. *M/V "SAIGA" (No.2) (Saint Vincent and the Grenadines v. Guinea)* (Judgment of 1 July 1999) ITLOS Report 1999, para 83 (the purpose of this genuine link *"is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States."*).

28. *M/V "Virginia G" (Panama v. Guinea-Bissau)* (Judgment of 14 April 2014) ITLOS Reports 2014, para 110.

29. Douglas Guilfoyle, 'Article 91' in Alexander Proelss (ed), *The United Convention on the Law of the Sea, A Commentary* (Bloomsbury Collection 2017) 695, (*"International law does not have explicit rules for the attribution of ships to one or another State. It leaves that to municipal law, and merely requires that the country which offers its flag must regulate the conditions upon which ships may sail under it."*).

30. An attempt was made with the work of the Consultative Group of Flag State Implementation and the United Nations Convention on Conditions for Registration of Ships signed in 1986. This Convention required a national maritime administration, the information on identity of the owner(s) for the "genuine ling" to be characterized. However, it has never entered into force.

31. *M/V "SAIGA" 'No. 2* (n 34) para 63.

32. ibid para 65.

to a particular vessel.[33] Therefore, States recognise and accept the conditions of attribution of nationality from other States even if their own conditions of attribution of nationality are different.

The criteria of individuals and private entities in general international law is framed in a similar way. The definitions have been extensively addressed in general international law, notably by the ICJ. In the context of nationality of individuals, it is well established that States have exclusive jurisdiction regarding the criteria under which they provide their nationality. Indeed, in the case of silence or indeterminacy in international law, it is widely recognised that there is an implicit *renvoi* to domestic law.[34] The PCIJ has stated that the criteria of nationality falls within the ambit of domestic law, as restricted by 'obligations which it [a State] may have undertaken towards other states',[35] a principle later reaffirmed in the work of the International Law Commission in 1952.[36] In the *Nottebohm* case, the Court established an international criterion of individual's nationality which lies on 'the real and effective nationality', 'based on stronger factual ties between the person concerned and one of

33. See notably, Tullio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2000) 286 RCADI 39, 221-222.

34. Andrew Paul Newcombe, Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009 Kluwer Law International) 97; Charles de Visscher, 'La notion de référence (renvoi) au droit interne dans la protection diplomatique des actionnaires de sociétés anonymes', (1971) 7 Revue belge de droit international 1, 2.

35. *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Series B No. 4, 24 (*"In a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states."*). See also, Nottebohm (n 5), 20 (*"It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation.* […] *This is implied in the wider concept that nationality is within the domestic jurisdiction of the State."*).

36. ICL, 'Report on Nationality, Including Statelessness', (1952) UND Doc A/CN.4/50, 6-7.

the States whose nationality is involved'.[37] In the *Nottebohm* case, this criterion for individuals' nationality was specifically established in order to determine which State is entitled to exercise diplomatic protection in the case of concurrent nationalities between two States. It is however generally recognised as a case of reference when it comes to the definition of nationality under public international law, which is to be considered under the law of the sea.

Regarding the determination of the criteria of the nationality of corporate entities, the International Court of Justice in the *Barcelona Traction* case held:[38]

> In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. *The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.* These two criteria have been confirmed by long practice and by numerous international instruments (emphasis added).

Despite this general practice, the Court noted that the diplomatic protection of corporate entities has been exercised under other criteria of nationality, such as the existence of seat of a company in the territory of the State, or even the fact that the majority of shares were owned by nationals of that State.[39] It follows that, as in the case of the nationality of individuals, the rules are first and foremost to be found in States' practice. However, in both cases, a specific relation between the entity and the State.

37. *Nottebohm* (n 5) 22.

38. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Merits) [1970] ICJ Rep 1970, para 70.

39. id.

It follows from the absence of definition of nationality under UNCLOS that there are no circumstances under UNCLOS which suggest that the determination of the nationality of individuals and corporate entities in the law of the sea should depart from these rules of international law.

Along with the link of nationality, the law of the sea also uses the concept of 'effective control' in order to regulate economic activities at sea. Indeed, under the UNCLOS regime regulating activities in the Area (Part IV of the Convention), 'nationals', and also entities that 'are effectively controlled by them [States Parties] or their nationals', are allowed to operate in the Area. In other words, '[t]he connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control'.[40] Indeed, pursuant to Article 153(2):

> Activities in the Area shall be carried out as prescribed in paragraph 3:
> a) by the Enterprise, and
> b) in association with the Authority by States Parties, *or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals*, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III (emphasis added).

'Effective control' in international law usually describes a de facto control exercised by a State, as applied by the International Court of Justice in *Nicaragua v USA* case.[41] However, it is unclear when a de facto control

40. *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Reports 2011, para 77.

41. *Case concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Reports 1986, paras. 115-116. See also, ILC, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries' (2001) UN Doc A/56/10, para 12 (The function of effective control is *"to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction de jure, such as in cases of unlawful intervention, occupation and unlawful annexation."*).

can be qualified under Article 153. Given the lack of definition of the notion of effective control in UNCLOS, the doctrine has proposed two different approaches; the economic control based on the economic presence of the entity in the territory of the State, and the regulatory control which would be based on the incorporation of the entity.

In addition to the criteria of nationality or effective control, UNCLOS also require that the person or entity which seek to carry out exploitation activities in the Area be sponsored by a State Party to the Convention. It therefore adds another requirement for those who want to operate in the Area. Notwithstanding this additional barrier, the legal regime governing the Area opens up the possibility for entities that do not have the nationality of a State Party to the Convention to carry out economic activities at sea. In this sense, it is the reflection of the logic of the Convention that the Area is the common heritage of humankind.[44]

Despite the difference of nature between the link of nationality and the link created by the State's effective control over a non-State entity, both links have the same purpose in the context of UNCLOS: establishing rights to non-State actors regarding the exploitation of the marine resources and environment, and defining States' jurisdiction over physical or juridical persons in order to regulate activities carried out at sea.

3. The Recognition of the Rights of 'Nationals' under UNCLOS

The term 'nationals' in specific provisions implies that these persons have rights to exercise specific activities at sea (3.1). However, these rights are framed in a way that it is sometimes unclear whether the rights belong to the States of nationality or to nationals themselves, as individuals or

44. UNCLOS, Article 136.

private entities (3.2). The disputes resolution mechanisms available to these categories of persons in UNCLOS confirm that these rights can be owned by both the State and its nationals (3.3).

3.1. The Provisions Granting Rights to 'Nationals' under UNCLOS

Numerous provisions referring to States' 'nationals' aim at regulating exploitation of marine resources, especially fisheries. Some of these provisions seem to establish individual rights of States 'for their nationals'. This is particularly striking regarding the right to fish in the high seas under Article 116 which provides that:

> All States *have the right for their nationals* to engage in fishing on the high seas subject to: (a) their treaty obligations; (b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and (c) the provisions of this section (emphasis added)

"This provision is the only one in the Convention which explicitly confers rights to individuals or corporate entities through their State of nationality under the term 'nationals'.

Indeed, the recognition of individual rights in UNCLOS is mostly implicit. Two elements suggest that there is an implicit recognition of the economic actors' rights in the provisions that contain the term 'nationals'. First, some provisions, framed as establishing an obligation to States, refer to rights with respect to these 'nationals'.[45] Second, such

45. UNCLOS, Article 51(1) (*"Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or share with third States or their nationals."); Article 72(1) ("Rights provided under articles 69 and 70 to exploit living resources shall not be directly or indirectly transferred to States or their nationals by lease or licence, by establishing joint ventures or in any other lanner which has the effect of such transfer unless otherwise agreed by the States concerned."* [emphasis added]).

rights are in fact exercised by individuals and private parties, not by the States themselves.

Articles 51(1) on existing agreements, traditional fishing rights, and existing submarine cables and 72(1) on the restriction of transfer of rights, under which certain rights 'shall not be transferred to or shared with third States or their nationals', refer to such rights. These provisions contain the word 'rights'. First, traditional fishing rights mentioned in Article 51(1) have been recognised as owned by individuals and not States.[46] It could therefore be possible for individuals to claim a breach of their traditional fishing rights based on the concept of vested rights in international law and on Article 51. Article 72(1) is more interesting, as it can constitute a more solid indication that UNCLOS establish economic rights owned by individuals. It reads as follows:

> *Rights provided under articles 69 and 70 to exploit living resources* shall not be directly or indirectly transferred to third States *or their nationals* by lease or licence, by establishing joint ventures or in any other manner which has the effect of such transfer unless otherwise agreed by the States concerned (emphasis added).

Rights under Articles 69 and 70 are the 'right to participate […] in the exploitation of an appropriate part of the surplus of the living resources of the EEZ of coastal States of the same subregion or region' for land-locked States and geographically disadvantaged States. As mentioned above, the term 'nationals' is used with reference to the transfer of rights in Articles 51 and 72. Both provisions are in this regard similar to Ar-

46. Richard Barnes, Carmino Massarella, 'Article 51' in Alexander Proelss (ed), *The United Convention on the Law of the Sea, A Commentary* (Bloomsbury Collection 2017) 387 (*"The protection afforded to traditional fishing rights is derived from the notion of vested rights. These rights akin to property and which attach to individuals or communities, not States. As such they are different from State claims to historic title."). See also, The South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)* (Award of 12 July 2016), para 798.

ticle 36(1)(b) of the Vienna Convention on Consular Relations which has been recognised as establishing an individual right by the ICJ in the *Lagrand* case. According to the Court,[47]

> Article 36, paragraph 1(b), spells out the obligations the receiving State has towards the detained person and the sending State. […] Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph" (emphasis added). […] The clarity of these provisions viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand […]. Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights.

The Court strictly relied on the wording of the provision and applied it 'as it stands'.[48] If the Court's reasoning is to be applied to Articles 51 and 72 of UNCLOS, it can be considered that UNCLOS implicitly creates individual rights for the exploitation of the marine living resources by using the word 'rights', with reference to individuals. Based on this reasoning, a general right of fishing can also be recognised to the economic actors of the maritime space under Articles 61, 62, 64, 69, and 70 of the Convention as they establish rights and obligations to States 'whose nationals' fish in the relevant zone.

This leads to the second point, that such rights are de facto exercised by individuals and private parties and that as such, these economic actors should be recognised as the legitimate owners of those rights. The question then is whether provisions establishing a right that is actually exercised by the economic actors should be systematically considered as conferring them such right. In other words, do provisions that do

47. *LaGrand Case* (n 7) para 77.

48. id.

not contain the word 'nationals' but that establish rights enjoyed by private economic actors constitute a recognition of individuals' rights? For example, Article 87 lists the freedoms in the high seas, encompassing: the freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing, and freedom of scientific research.[49]

Two interpretations can be identified. The first follows a literal interpretation of the provision. In the *Norstar* case, the ITLOS has refused to recognise that the freedom of navigation under Article 87 of the Convention was an individual right. The Tribunal indeed considered that this right 'belongs to Panama under article 87 of the Convention, and that a violation of that right would amount to direct injury to Panama'.[50] As Judge Heidar noted, this article indicates that 'these freedoms shall be exercised by all states'.[51] On the contrary, the second interpretation is based on the widely accepted fact that these rights are also de facto exercised by physical and juridical persons, which is why they should be considered as the owners of these rights. In this regard, Judge Wolfrum stated that 'disputes concerning the exercise of freedom of navigation, in general involve rights of natural or juridical persons which may prevail over the rights of States'.[52] Therefore, the debate on whether provisions that do not expressly refer to natural or juridical persons create rights for these economic actors or only for the States parties to the Convention remains.

49. UNCLOS, Article 87(1).

50. *M/V "Norstar" Case (Panama v. Italy)* (Judgment of 4 November 2016) ITLOS Reports 2016, para 270. See also, *M/V "Virginia G"* (n 28), para 157.

51. *M/V "Norstar" Case (Panama v. Italy)* (Declaration of Judge Heidar, 4 November 2016) ITLOS Reports 2016, paras 6-7.

52. *M/V "SAIGA" (No.2)* (n 27) para 51.

3.2. The Owner of the Rights Related to Economic Exploitation of the Sea: The State or its 'Nationals'?

Despite the elements highlighted above that support the recognition of individuals' rights, the State-centric view of UNCLOS remains and manifests itself in different ways. First, most of the provisions analysed in Part 3.1 are framed in such way that they are directed to the States. Both Articles 51 and 72 of UNCLOS start with 'States shall have the *right to* …'. Similarly, in Article 87, the freedoms identified above are addressed to 'all States', and 'shall be exercised by all States'.[53] It is indeed indisputable that the States are the first and foremost owner of these rights. In the context of exploitation of the sea, this can be seen for instance in Article 81 of UNCLOS which provides that the coastal State has the right to authorise and regulate such activity in its continental shelf. This drilling activity is undoubtedly operated in many cases by private companies or State-owned companies.[54] Nevertheless, the Convention does not mention these actors, nor does it use the word 'nationals' in the continental shelf regime. Such view is shared by the CJEU in the *Intertanko* case, in which the Court held that 'it must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State'.[55] This approach stems from the traditional 'State-centric' presumption under international law, which assumes that treaties do not create rights for individuals unless it is explicitly provided in the treaties.[56]

53. UNCLOS, Article 87(2).

54. Amber Rose Maggio, 'Article 81' in Alexander Proelss (ed), *United Convention on the Law of the Sea: A Commentary* (Bloomsbury Collection 2017) 636.

55. Case C-308/06 *Intertanko and others v. Secretary of State for Transport*, ECLI:EU:C:2008:312, 2008 ECR I-04057, para 64.

56. Astrid Kjeldgaard-Pedersen, 'The international court of justice and the individual' (2019) in Achilles Skordars (ed), *Research Handbook on the International Court of Justice, Edward Elgar* (forthcoming), 14.

Such a view is however incomplete and outdated. Indeed, it has been recognised that individuals or corporation entities can be the owners of some rights provided in UNCLOS, along with their State of nationality, concurrently. That is because some rights, attributed to the States, are by nature owned and exercised by such private entities, as explained above. This is the position held by Judge Wolfrum in the *M/V Saiga No. 2* case. In this case, while assessing whether the rule of exhaustion of the local remedies shall be applicable, the Tribunal held the position that 'none of the violation of rights claimed by Saint Vincent and the Grenadines […] can be described as breaches of obligations concerning the treatment to be accorded by aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines'.[57] In particular, Saint Vincent and the Grenadines claimed a violation of the freedom of navigation and the freedom not to be subjected to illegal hot pursuit, which was considered as a States' rights exclusively. However, in its Separate Opinion, Judge Wolfrum stated that 'the concept of freedom of navigation has as its addressees States as well as individuals or private entities'.[58] His reasoning relied on the wording of UNCLOS provisions, as well as the dispute resolution procedures available for natural or juridical persons under UNCLOS, namely Articles 295 and 292(2) on the application for a prompt vessel release. Indeed, according to Judge Wolfrum, the right of the State and the right of these individuals 'are interwoven'. In this regard, he refers to the wording of Article 116 of UNCLOS which establishes the right of all State 'for their nationals'. According to Wolfrum, this would also be the appropriate wording to describe the freedom of navigation.[59] This position is also shared by Judges Rao and Warioba.[60] However, the

57. *M/V Saiga (No. 2)* (n 27) para 98.
58. ibid para 51.
59. ibid para 53.
60. See, *M/V "SAIGA" (No.2)* (n 27) paras 14-15; *M/V "SAIGA" (No.2)* (n 27) (Dissenting Opinion of Judge Warioba, 1 July 1999) ITLOS Report 1999, para 61.

ITLOS judgment in the *M/V Saiga* case rejected the idea that the rights claimed were owned by individuals.

This approach was not unanimously accepted by the judges and widely criticised by the doctrine.[61] The critics have pointed out that Article 295 on the exhaustion of local remedies would not exist if the drafters of the Convention considered that individuals do not have rights under the Convention, because 'if there is no injury to the national, there is also no need for the exhaustion of local remedies'.[62] In other words, it is recognised that there can be injuries to nationals in case of breaches of the obligations provided in UNCLOS. Having to apply this provision, the Tribunal in the *M/V Virginia G* case held that '[w]hen the claim contains elements of both injury to a State and injury to an individual, for the purposes of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant.'[63] By this statement, the Tribunal explicitly acknowledged that individuals' rights stem from the Convention, but that these rights are to be put in balance with States' rights in order to determine which one is 'preponderant'.

The ITLOS has considered several times that the injury to the individual was not preponderant compared to the State's, raising many controversies each time. This has been the issue in the *M/V Virginia G* case.

61. Nobuyuki Tako, 'Protection of a Ship by the Flag State and Diplomatic Protection: Conceptual Relationship and Admissibility of Claims' (2015) Hokuga, 305 (*"In order to exclude the application of the local remedies rule, however, it is not sufficient that some right of the State is also violated at the same time. If disputes concerning the interpretation or application are only disputes between State Parties arising from alleged violations of State's rights, article 295 of the UNCLOS would be meaningless."*). Pablo Ferrara, 'Article 295' in Alexander Proelss (ed), *The United Convention on the Law of the Sea, A Commentary* (Bloomsbury Collection 2017) 1902.

62. Pablo Ferrara, 'Article 295' in Alexander Proelss (ed), *The United Convention on the Law of the Sea, A Commentary* (Bloomsbury Collection 2017) 1902.

63. *M/V "Virginia G"* (n 28), para 157.

Despite the position of the majority, many judges in the *M/V Virginia G* case have taken the view that the Tribunal should have considered that it was a diplomatic protection case. Indeed, Judges Hoffman, Marotta, and others considered that the claims of the State, Panama, were preponderantly indirect.[64] The same view is shared in a Separate Opinion of Judges Cot and Kelly, that the injuries were preponderantly those of the ship and the cargo, not the flag State.[65] Judge Jesus noted that the Tribunal has changed the characterisation of the case as presented by Panama, which it should not have done.[66] Judge ad hoc Sérvulo Correria considered that the Tribunal's position on this point was not consistent with the Convention.[67] In the *Norstar* case, it has been reproached to the Tribunal that it did not even assess the claim regarding the persons and entities to determine the preponderance or not compared to the State's injury.[68] This jurisprudence of ITLOS has also strongly been denounced by Judge Cot in the following words:[69]

> The case law of this Tribunal in the past has clearly given preference to the direct injury to the State, in particular in the M/V "SAIGA" (No. 2) and M/V "Virginia G" cases. In my opinion, this past case law is not in

64. *M/V "Virginia G"* (n 28) (Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, 14 April 2014) ITLOS Reports 2014, para 9. *" (No.2)* (n 27) para 51.

65. *M/V "Virginia G"* (n 28) (Separate Opinion of Judges Cot and Kelly, 14 April 2014) ITLOS Reports 2014, para 22.

66. *M/V "Virginia G" (n 28)* (Dissenting Opinion of Judge Jesus, 14 April 2014) ITLOS Reports 2014, paras 74-75, 80.

67. *M/V "Virginia G" (n 28)* (Dissenting Opinion of Judge ad hoc Sérvulo Correia, 14 April 2014) ITLOS Reports 2014, para 9.

68. *M/V "Norstar" (Panama v. Italy)* (Dissenting opinion of Judge ad hoc Treves, 4 November 2016) ITLOS Reports 2016, para 19.

69. *M/V "Norstar" (Panama v. Italy)* (Declaration of Judge Cot, 4 November 2016) ITLOS Reports 2016, para 5.

> conformity with practice and the general state of international law. Our case law should be changed in that respect. By excessive reliance on the concept of direct injury to the flag State, the Tribunal is ignoring the clear wording of article 295 of the Convention, rendering it devoid of any meaning. It is difficult to imagine a situation in which the Tribunal, in a given case, would not invoke direct injury to the claimant State.

It follows from the debate arising from these cases that it is generally recognised that some rights can be owned by both States and natural or juridical persons. The jurisprudence of ITLOS however fails to recognise the logical conclusions of the finding that in certain circumstances the preponderant claim is one of the individual and not of the State. This position reduces the place allocated to individuals in UNCLOS. It is also in contradiction with the fact that the Convention provides procedural mechanisms to these non-State actors to claim a breach of their rights before an international court or tribunal.

3.3. The Recognition of Individual Rights through the Dispute Resolution Mechanisms Available to Individuals under UNCLOS

The dispute resolution mechanisms provided in UNCLOS confirm that physical or juridical persons are entitled to specific rights under UNCLOS. When the term 'nationals' is used to confer specific rights to individuals, it implies that these rights can be invocable through the mechanism of diplomatic protection by the State of nationality. The State of an individual whose rights were violated can introduce a claim before an international court or tribunal, as is implicitly recognised in UNCLOS through Article 295. As explained above, the use of the wording 'nationals' may be interpreted to mean that the rights are individual rights which can be invoked by the States Parties to the Convention to the benefit of their nationals. In this regard, the *M/V Saiga* case has shown

that the determination of the owner of the right claimed has direct implications in international proceedings, especially with regards to the rule of exhaustion of domestic remedies. Indeed, if the Tribunal had ruled that the rights claimed were individual rights, the claim would have potentially been rejected.

The Convention does not contain a general procedure available for natural or legal persons. There are however two mechanisms under which such economic actors as defined in Part 2.1 can make a claim. In this regard, Article 291 of the Convention introduces the possibility for 'entities other than States Parties' to use the dispute settlement procedures of UNCLOS. It concerns Part XI of the Convention which regulates activities in the Area, beyond States' national jurisdiction. The legal regime of the Area does not contain the word 'nationals'. However, it is relevant with regards to the rights of economic actors since it explicitly refers to such persons. The relevant rules are set out in Articles 187 and 188 of the Convention. A dispute arising out of an activity carried out in the Area can be submitted to a special chamber of ITLOS, and an ad hoc chamber of the Seabed Disputes Chamber, or binding commercial arbitration, by the parties to the dispute, who can be: a State Party, the Authority, the Enterprise, state enterprises, and 'natural or juridical persons as referred on article 153 paragraph 1'.[70] This is confirmed by Annex VII of UNCLOS regarding the competence of the International Tribunal on the Law of the Sea which provides that:

> [t]he Tribunal shall be open to *entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement* conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.[71]

70. UNCLOS, Article 187.

71. UNCLOS, Annex VII, Article 20(2) on the access to the Tribunal; [Emphasis added].

Since the Area is not governed by any national jurisdiction, it is indeed a balanced approach to open a dispute resolution procedure for physical and juridical persons who retain rights of exploitation and utilisation of the resources in the Area under the Convention. The competence of the Tribunal for individual claims is not limited to disputes regarding the Area. Indeed, the Tribunal may rule on disputes under UNCLOS if stipulated in another 'agreement', which does not have to be an international agreement between States but may also be an agreement between a private entity and a State.[72] This possibility enhances the place of non-State entities and economic actors in the Law of the Sea.

The second mechanism is the procedure of prompt release of vessels as provided in Article 292, under which an application 'may be made by or on behalf of the flag State of the vessel' in the case of a detention of the vessel and/or its crew by a State. In most cases, the claim has been submitted by the State itself, but a few applications have been made by private parties on behalf of the State.[73] However, this procedure is strictly limited to the obligation of States to promptly release a foreign vessel upon the receipt of a bonding or financial security. This obligation is reflected in Articles 73(2), 220(6), (7), and Article 226(1)(c) of UNCLOS.[74] The nationality of the vessel and its crew is not particular-

72. Tullio Treves, 'The International Tribunal for the Law of the Sea and the Oil and Gas Industry' [2009] Vol. 6[1], Transnational Dispute Management 1, 5.

73. See for instance, *The "Camouco" Case (Panama v. France)* (Application submitted on behalf of the Republic of Panama 17 January 2000); *The "Monte Confurco" Case (Seychelles v. France)* (Application submitted on behalf of the Republic of Seychelles, 24 November 2000; *The "Grand Prince" Case (Belize v. France)* (Application submitted on behalf of Belize 21 March 2001); *The "Chaisiri Reefer 2" Case (Panama v. Yemen)* (Application on behalf of Panama 2 July 2001); *The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)* (Application on behalf of Saint Vincent and the Grenadines 18 November 2004).

74. For a detailed analysis of these provisions, see notably, David Heywood Anderson, 'Prompt Release of Vessels and Crews' [2008] Max Planck Encyclopedias of International Law, paras 14-20.

ly relevant in this context. However, notwithstanding this tailor-made procedure regarding the obligation to release a vessel or its crew in these circumstances, detention usually occurs following the exercise of the freedoms and rights mentioned in Part 2 by such vessels and their crew. In this context, private parties can claim a violation by the State of such rights provided in UNCLOS.

4. The Constraints of 'Nationals'' Rights to Exploit the Sea Dictated by the Need to Protect and Preserve Marine Resources

The rights to the benefit of States' nationals that are established in the analysed UNCLOS provisions are not absolute. An analysis of how such rights are constrained by different interests and objectives in UNCLOS sheds light on the place of these economic actors in the bigger picture of the system of the Convention. Indeed, these rights are limited by the objective to protect the marine environment (4.1), which explains States' responsibility to regulate activities at sea carried out by their nationals (4.2).

4.1. Economic Actors at Sea at the Core of Two Contradicting Interests: Exploitation of the Sea vs Protection of the Maritime Space

The utilisation of the sea with an economic purpose can harm the marine environment, and the need to preserve the marine environment has led States to strengthen their policy and regulations regarding specific activities. For instance, France has recently announced the end of offshore drilling in its maritime zones, following the adoption of the Paris

Agreement.[75] Two objectives drove this decision: the conservation of sea resources, and the preservation of the marine environment. Both aspects are treated in specific agreements, such as the UN Fish Stocks Agreement and the Convention on Biological Diversity. They are also a main concern in UNCLOS, and constitute two of its objectives. Indeed, the need to preserve and protect the maritime environment is reflected in the Preamble of UNCLOS, which highlights on one hand the need to promote 'the equitable and efficient utilization of their [the seas and the oceans'] resources, the conservation of living resources, and the study, protection and preservation of the marine environment', and on the other hand, UNCLOS also aims to create an 'equitable international economic order'.[76] In this regard, the rights and obligations in UNCLOS establish a balance between two contradicting interests in the utilisation of the maritime space.

This dichotomy is reflected in the UNCLOS provisions that contain the expression 'States whose nationals' exploit the marine resources. Indeed, numerous provisions grant specific obligations regarding the preservation of marine resources to 'States whose nationals' fish, especially in the EEZ, or to the coastal States, because of the rights of 'States whose nationals' conduct fisheries in its EEZ. In particular, the economic aspect and the objective of an equitable economic order are translated in Articles 61(5), 69(4), and 70(5). Pursuant to Article 61(5), the coastal State has to take into account the economic situation of the land-locked States and geographically disadvantaged States in the allocation of surplus in its exclusive economic zone, in order to 'minimize detrimental effects on fishing communities and economic dislocation in *States whose nationals*

75. See, 'Hydrocarbures : le Gouvernement met définitivement fin aux forages en mer en France' (French Ministry of Ecological Transition Official announcement, 20 February 2020) <https://www.ecologie.gouv.fr/hydrocarbures-gouvernement-met-definitivement-fin-aux-forages-en-mer-en-france> accessed on 13 July 2020.

76. UNCLOS, Preamble, Indent 4.

have habitually fished in the zone'.[77] Indeed, 'Art. 69(4) underlines the objective of Article 69 as more of a means to address economic inequalities, rather than geographical inequalities per se'.[78]

It follows that rights of economic actors as described in Part 3 are not absolute. Their limits are laid down in obligations incumbent to the States.

4.2. States' Responsibility to Regulate Activities at Sea Carried out by Their 'Nationals'

In the context of UNCLOS, numerous provisions establish obligations related to the conservation of these resources in the EEZ and the high seas. Regarding the fisheries, the Convention imposes specific obligations on States 'whose nationals have habitually fished in the zone'.[79] Other articles in the same vein use slightly different expressions: 'The coastal State and other States whose nationals fish in the region';[80] 'States whose nationals exploit identical living resources, or different living resources in the same area'.[81] States whose nationals carried out such fishing activities have a specific responsibility regarding the conservation of the marine resources that are fished. The obligations are first and foremost obliga-

77. UNCLOS, Article 69(4); Article 70(5) [emphasis added].

78. James Harrison, 'Article 69', in Alexander Proelss (ed), *United Convention on the Law of the Sea: A Commentary* (Bloomsbury Collection 2017), 548.

79. UNCLOS, Articles 62(3) on the utilization of living resources, Article 61(5) on Conservation of living resources (albeit with a slightly different formulation (*"whose nationals are allowed to fish in the exclusive economic zone"*)); Article 69(4) on the right of land-locked States; Article 70(5) on the Right of geographically disadvantaged States.

80. UNCLOS Article 64(1) on stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it.

81. UNCLOS, Article 118 on the Cooperation of States in the conservation and management of living resources

tions for the States to cooperate and exchange information related to fish stocks. They are found in Article 61(5) (obligation to exchange information relevant to the conservation of fish stock), Article 64(1) (obligation to cooperate to ensure the conservation of highly migratory species) in the EEZ, and Article 118 (obligation to enter into negotiations to take the necessary measures for the conservation of the living resources) in the high seas. These obligations are addressed to States whose 'nationals' fish in the respective maritime zones.

Moreover, States must take specific measures for the conservation of the resources in the EEZ (Articles 61 and 62) and in the high seas (Article 117). These obligations to take measures regarding the conservation of living resources are addressed to different obligees. Articles 61 and 62 impose obligations on the coastal State to take such measures, which encompass for instance the determination of the total allowable catch in the EEZ,[82] measures that will 'ensure or restore populations of harvested species at levels which can produce the maximum sustainable yield'.[83]

Interestingly, Article 62(4) seems to impose an obligation on States' 'nationals'. This Article poses a limitation to the right of fishing in the exclusive economic zone of 'nationals of other States' in the following words: 'Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.' Article 62(4) refers to two obligations; an obligation of the 'nationals of other States' to comply with the laws and regulations of the coastal State, and the obligation of the coastal State to adopt such conservation measures in its laws and regulations under Article 61 of the Convention. Such duality in Article 62(4) strengthens one of the goals of the Convention outlined in its Preamble, the conservation of living re-

82. UNCLOS, Article 61(1).

83. UNCLOS, Article 61(3).

sources.[84] If Article 62(4) seems to directly impose on these 'nationals' an obligation to comply, it also implicitly provides an obligation to enforce for the State of nationality. Indeed, the ITLOS has specified in its *SRFC* Advisory Opinion that this provision 'imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations'.[85] Therefore, despite the quite direct wording of Article 62(4) that 'nationals […] shall comply', the traditional interpretation of international law as imposing obligations to States rather than to their nationals remains. A direct obligation to 'nationals' under international law is not necessary as long as domestic law provides such guarantees. Indeed, some arguments are made in favour of direct obligations to individuals in international law because '[g]lobal interdependence, the increasing power of non-State actors, and the weakness of some States have enhanced the risk of insufficient State measures'.[86] In this sense, interna-

84. UNCLOS, Preamble (*"Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment"*). See also, *Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC)* (Advisory Opinion) [2015] ITLOS Reports 2015, para 102 (*"One of the goals of the Convention, as stated in its preamble, is to establish "a legal order for the seas and oceans which… will promote" inter alia "the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment". Consequently, laws and regulations adopted by the coastal State in conformity with the provisions of the Convention for the purpose of conserving the living resources and protecting and preserving the marine environment within its exclusive economic zone, constitute part of the legal order for the seas and oceans established by the Convention and therefore must be complied with by other States Parties whose ships are engaged in fishing activities within that zone."*).

85. *Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC)* (n 64), para 123.

86. Anne Peters (n 9) 76.

tional law could be used as a supplementary tool to pursue 'important concerns of the international community'.[87]

By contrast, the obligations in the maritime zones beyond national jurisdictions are exclusively attached to the States, and the term 'nationals' here is not used to establish an obligation to these economic actors as such. For instance, the obligation established in Article 117 is directed to 'all States', including States which nationals do not necessarily fish in the high seas.[88] It provides:

> *All States* have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas (emphasis added).

This article reflects the corollary right that 'all States' have for their nationals to fish in the high seas, pursuant to Article 116. It follows that such conservation measures would only be applicable to States' nationals.

To the contrary, Article 139(1) has a broader scope. First, it establishes the obligation to ensure that activities carried out in the Area are not in violation of Part XI of UNCLOS, for all 'States Parties'. Second, States' responsibility in this case is extended to the activities carried out by themselves, State enterprises, or natural or juridical persons that are effectively controlled by them or their nationals, in addition to their own nationals. Article 139(1) reads as follows:

> *States Parties shall have the responsibility to ensure that activities in the Area*, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, *shall be carried out in*

87. ibid 78.

88. Rosemary Rayfuse (n 20) 809.

> *conformity with this Part.* The same responsibility applies to international organizations for activities in the Area carried out by such organizations (emphasis added).

The responsibility of all States pursuant to this article reflects once again, the characteristic of the Area as the common heritage of humankind. It follows from these provisions that the rights to exploit the sea and its resources are strictly limited by obligations to preserve the resources and the marine environment, mostly incumbent on the States.

5. Conclusion

The use of the term 'nationals' in UNCLOS shows the struggle of the traditional State-centered conception of international law in modern international law. On one hand, it is unclear whether UNCLOS provides for direct individual rights for non-State economic actors. On the other hand, the law of the sea cannot ignore the fact that all the activities occurring in the maritime zones are exercised by physical and juridical persons, and an interpretation of the provisions can be favourable to the recognition of such rights. Such rights are not absolute and show the contradicting interests that have been balanced by the drafters of the Convention. UNCLOS imposes obligations on the States with regards to the activities carried out by their own nationals, or other entities under their jurisdiction pursuant Article 153 in the Area.

None of the potential rights that can be deduced from the wording of the Convention are autonomous. Such potential individual rights indeed derive from the existence of a right owned by the States themselves. However, the Convention leaves the door opened for more presence for non-State entities in realm of the international law of the sea, especially with regards to the dispute resolution mechanisms available and the competence of ITLOS which, in the words of the Judge T. Treves, 'could

be used more'.[89] Such interpretation of UNCLOS would allow the realisation of the full potential of the Convention as a 'Constitution of the oceans'[90] in all its aspects, and bring it closer to the reality of the economic activities at sea.

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89. Tullio Treves (n 72) 12.

90. Tommy T.B. Koh, 'A Constitution for the Oceans' (Remarks of Singapore President of the Third United Nations Conference on the Law of the Sea, 1982) <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf > accessed 15 December 2021.

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IV

The Evolution, Nature and Application of ‘Private Ends’ in Piracy Definition*

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Abstract

This paper examines the evolution, nature, and judicial interpretations of ‘private ends’, a mainstay of piracy definition from the League of Nations, the Harvard and the International Law Commission Drafts to Article 15(1) of the Geneva Convention on the High Seas[1] and Article 101(a) of the United Nations Convention on the Law of the Sea.[2] Ju-

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1. Also known sometimes as UNCLOS I.

2. Also known sometimes as UNCLOS II.

dicial applications considered include *Castle John v NV Mabeco* (Castle John and Nederlandse Stitching Sirius v NV Marjlo and NV Parfin) (*The Greenbeard*);[3] the Institute of Cetacean Research and Others v Sea Shepherd Conservation Society (*The Sea Shepherd*);[4] *The Arctic Sunrise*[5] and *The Enrica Lexie*.[6] The paper finally argues that had above decision predated the *Santa Maria,*[7] the Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited (*The Bolivian Republic*)[8] and *The Achille Lauro*[9] outcomes in the latter might have been different.

Keywords: Piracy, Private Ends, Public Motives, Greenbeard, Sea Shepherd, UNCLOS

3. Castle John v NV Mabeco (*The Green Bearded Pirate*) Castle John and Nederlandse Stitching Sirius v NV Marjlo and NV Parfin, 77 *INT'L L.R.* 537. Court of Cassation; December 19, 1986.; For a full commentary on the case see Samuel Pyeatt Menefee, 'The Case of the Castle John, Or *Greenbeard The Pirate*: Environmentalism, Piracy and the Development of International Law' (1993) Californian Western International Law Journal, Vol. 24 Fall 1993 No.1, 1-16.

4. Institute of Cetacean Research v Sea Shepherd Conservation Society, 725 F.3d 940 (9th Cir. 2013).

5. *The Arctic Sunrise Arbitration (Netherlands v Russia)*, *Award on the Merits* [2014] PCA 2014-02 (Arbitral Tribunal (UNCLOS, Annex VII)) [233–333, 401(C)].

6. *The 'Enrica Lexie' Incident (Italy v India)*, *Award* [2020] Arbitral Tribunal (UNCLOS, Annex VII) PCA Case No. 2015-28.

7. The S.S. *"Santa Maria"* (seizure), HC Deb 24 January 1961 vol 633 cc32-5: <https://christiebooks.co.uk/2017/09/operation-dulcinea-the-hijacking-of-the-ss-santa-maria-21-january-2-february-1961/> accessed 31 September 2021.

8. *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited* [in the Kings Bench and Court of Appeal [1909] 1 K.B. 785.

9. *Achille Lauro <https://www.britannica.com/event/Achille-Lauro-hijacking>* accessed 31 September 2021; see also generally, Andrew L. Liput 'An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice' (1985) Fordham International Law Journal 9(2), Issue 2, Article 5, 328-372.

1. Introduction

This analysis traces the development, examines its nature, and discusses the judicial application of 'private ends'[10] in the Belgian and US Courts, the International Tribunal for the Law of the Sea (ITLOS), and the Permanent Court of Arbitration (PCA). The problem of what constitutes 'private ends' arose in the Belgian decision on *the Greenbeard* (1986), where recourse to the drafting archives of its evolution revealed surprises of its nature and contents. From the *Republic of Bolivia* (1909), the *Santa Maria* (1961), and the *Achille Lauro* (1985) decisions it was considered a settled issue that 'private ends' related only to piracy offences and excluded State actors and those acting for 'political motives'. Thus, *the Greenbeard* decision revived the debate as to its meaning and constitution thereof by showing that 'private ends' could also be attributed to the actions of non-pirates such as environmental campaigners and political activists and by extension to terrorists and armed robbers against ships. The *Greenbeard* decision was cited in the US case of *the Sea Shepherd* (2013). On the other hand, the *Arctic Sunrise* crew were released without charge by the Russian Federation, a situation only recently resolved, together with the *Enrica Lexie,* by ITLOS and the PCA.

Against that backdrop this analysis questions whether the *Sea Shepherd* and the *Greenbeard* decisions in revisiting the League of Nations (LON),[11] Harvard Draft and International Law Commission (ILC)'s

10. Although only 'private ends' is used in Article 101(a) of UNCLOS, it is equated to private motives and the contrasts, 'public motives' and 'political motives', are also used throughout this paper to highlight the differences.

11. The first attempts in 1922 was abandoned until 1925 as member states were unwilling to accept the proposed solutions. Even then stage, it was postulated that the notion of piracy should include any acts of violence at sea irrespective of the violators' ends and motives. In the end, this proposal was also rejected and the issue of piracy was clearly separated from politically motivated acts.

linkage of 'hatred' and the 'desire for vengeance' to 'private ends' was apt. The analysis also postulates that, were they to predate the *Greenbeard* and the *Sea Shepherd*; the *Achille Lauro*, the *Santa Maria*, and the *Bolivian Republic* outcomes might have been different and under current conditions. Justice Kennedy in the *Bolivian Republic* case decided that:

> The acts of those who seized the goods came within the legal definition of piracy for some purposes, the word "pirates," as used in the policy, must be construed in its popular sense, and in that sense it meant persons who plunder indiscriminately for their *private gain*, not persons who simply operate against the property of a particular State, however unlawful that might be, for a *public political end*, and, therefore, there had [not] been a loss through "pirates" within the meaning of the policy.[12]

The case also demonstrates differences between commercial and legal approaches to piracy definition, hence Justice Kennedy's use of 'private gain' in contrast to 'public political end'.

That withstanding, it is arguable that the Belgian and US decisions in the *Greenbeard* and the *Sea Shepherd* respectively, were probably representative of some contemporary ethos that cannot distinguish the actions and motives of political and environmental protestors from those of clear incidences of piracy. It is also debateable whether convictions in the two cases would have been successful had the Belgian and US courts not delved into the history of the LON, Harvard, and ILC Drafts and Commentaries. On that supposition, this analysis contends that had those courts accepted that 'private ends' was the only means of separating actual piracy offences from political and related protestors acting on genuine public motives, they would have avoided adding further uncertainties to the definitional problems that have ensued. For the same rea-

12. *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited* (n 8) 786. Emphasis added.

sons and assumptions, the analysis maintains that those court decisions in effect inadvertently further clouded the 'private ends' requirements in piracy offences and thereby may have rendered Articles 15(1) of the Geneva Convention on the High Seas (GCHS) and Article 101(a) of the UN Convention on the Law of the Sea (UNCLOS) almost redundant.

Instead, the judgments in the *Greenbeard* and the *Sea Shepherd* not only emphasised and relied heavily on 'hatred' and 'desire for vengeance' but also introduced 'taking the law into their own hands' to try and distinguish 'private ends' from public motives in the piracy definition. Accordingly, this analysis adopts a novel approach[13] by employing a more critical stance to the decisions.

2. Evolution of 'Private Ends' under UNCLOS I–UNCLOS II

2.1. Pre-UNCLOS Development: LON and Harvard University Drafts on 'Private Ends' and 'Political Ends'

The modern era of universal law on piracy and of the law of the sea started with the LON conference in 1922 and LON draft in 1925. Before

13. See UNCTAD, Maritime Piracy: An Overview of the International Legal Framework and of Multilateral Cooperation to Combat Piracy Part II *Studies in Transport Law and Policy*, No.2, UN NY/Geneva 2014, paras 19-22 <https://unctad.org/system/files/official-document/dtltlb2013d1_en.pdf> accessed 15 December 2021; Arron N. Honniball, 'The "Private Ends" Of International Law Piracy: The Necessity of the Legal Clarity in Relation to Violent Political Activists' (2015) International Crimes Database (ICD), ICD Briefing 13, October 2015, 5-15 <https://www.internationalcrimesdatabase.org/upload/documents/20151102T100953-Honniball%20ICD%20Brief.pdf> accessed 26 November 2021; Konrad Marciniak, 'International Law on Piracy and Some Current Challenges Related to its Definition' (2012) Symposium on Maritime Piracy in International Law, 2012, Vol. 1, Polish Review of International and European Law, Issue 3–4, 2012 Vol. I, 97-140, 114-123. The origin of the term 'private ends' as a condition of piracy is found within M. Matsuda and M. Wang Chung-Hui, 'Report by the Sub-Committee of Experts for the Progressive Codification of International Law', questionnaire No. 6' (1926) 20 AJIL Supplement, 223-224.

this, piracy was governed by customary international law and municipal legislations implementing the Law of [Civilised] Nations. There were, however, regional intergovernmental drafting efforts prior to the LON Draft, the details of which are beyond the scope of this analysis. However, despite being the first universal exercise, the LON Draft 1922–1925 did not come to much fruition, whereupon the challenge was taken up by the Harvard Draft.[14] This attempt too came to the same fate. Following the formation of the United Nations, the ILC was established and successfully revived the LON project. Thus, after a long history of drafting developments from the Law of [Civilised] Nations and customary international law, through the LON,[15] Harvard, and ILC Drafts,[16] the first codified and universally agreed definition of piracy resulted in Article 15 of the GCHS and later Article 101 of UNCLOS. 'Private ends' features prominently in Article 15(1) and Article 101(a) respectively of both Conventions.

However, 'political motives', 'political ends', or 'public motives' do not appear in the two Conventions but are nonetheless implied in their provisions, in contrast to 'private ends'. Nevertheless, it took another fifty-two years, four different institutional drafts,[17] and twenty-seven conference sessions — including eleven during UNCLOS III negotiations — from the LON Draft in 1922–1925 and the ILC Draft in 1956 to the GCHS (1958) and UNCLOS (1982), for the general consensus on the definition to emerge. Thus, after a long passage through the LON[18]

14. For the Harvard Draft and Reports see (1932) 26 AJIL Supplement, 743-872.

15. United Nations Documents on the Development and Codification of International Law, AJILSupplement, 1947, Vol. 41, No.4, 66–68.

16. 10 *Yearbook of the International Law Commission'* 1956, Vol. II, 253–301.

17. LON1925, Harvard Draft Report 1932, ILC 1956 and the Third United Nations Conference on the Law of the Sea (UNCLOS III 1965-1982).

18. See, League of Nations, Acts of the Conference for the Codification of International Law, (LN. doc. C.351.M.145, 1930, V.); Report of the Second Commission, League of Nations Publication V. Legal, 1930.V. 9 (C.230, M. I 17, 1930. V).

and ILC[19] phases, international customary law was finally developed and codified in the first Geneva Conference on the Law of the Sea (UNCLOS I)[20] with piracy in Article 15(1) of its fourth Convention — the GCHS.[21]

Yet, it appears 'private ends' was initially missing in the LON 1922–1925 and Harvard 1932 Drafts. The focus had been on exempting 'political ends' (or political motives) from the definition and, therefore, the offence of piracy. Delegates at and drafters of the LON Conferences could not agree on what constituted 'political ends' for reasons of its ambiguity.

It was thought inclusion of 'political ends' would blur the distinction between sponsored State actors and the opposing non-State actors, especially in relation to State owned and operated vessels. However, since State warships and State-owned vessels cannot commit piracy, the only exemptions would be actions committed for 'political ends' by non-State actors. That would leave only 'private ends' in the running. A commentator alludes to the probable continued dilemma when opining that 'private ends' had in fact [also] been omitted from the 1958 ILC text in order to include within it the definition of acts of violence or depredation committed for 'political ends'.[22]

It was still assumed then that 'private ends', not 'political ends', constitute piracy. It was only for those reasons that 'private ends' was reinstated in the ILC draft.

19. International Law Commission, see Art 13(1) of the UN Charter; see also, 42 AJIL Supplement 2 (1948).

20. The Geneva Convention 1958 is sometimes referred to as UNCLOS 1; Article 15 of the GCHS corresponds to Article 39 of the ILC draft Articles.

21. In 1956, the United Nations held its first Conference on the Law of the Sea (UNCLOS I) at Geneva, Switzerland. UNCLOS I resulted in four treaties concluded in 1958: this paper's main interest is the GHSC whose Article 15 defines piracy.

22. Samuel Pyeatt Menefee (n 3) 11, 37.

2.2. Under UNCLOS III Conference 1956–1982: ILC Draft on State Actors and Non-State Actors

The second United Nations Conference on the Law of the Sea 1960 (UNCLOS II) was convened to consider further the breadth of the territorial sea. However, it did not lead to any agreement on the issues at stake, the list of which, in any case, did not include piracy. The main focus of the piracy offence definition, in the resumed UNCLOS III conference, was not merely the use of violence, deprivation of freedom, or other related factors, but whether the motives were for 'private ends' as contained in Article 15(1) of the GCHS and Article 101(a) of UNCLOS.

UNCLOS is supposed to have finally settled the 'private end' debate by comprehensively codifying customary international law and developing the contemporary law of the sea in peacetime. For those, inter alia, reasons, it has been widely regarded as 'the greatest codification in international law and the major milestone in the history of the law of the sea'.[23]

However, Article 101(a) of UNCLOS did not materially change the text of Article 15(1) of the GCHS which remained unaltered except for paragraph numberings. Significantly, reference to 'private ends' also remains unchanged. Article 101 of UNCLOS should be read together with Article 58(2) of UNCLOS, which makes it clear that the Article and other pertinent rules of international law apply to the Exclusive Economic Zone (EEZ) in so far as they are not incompatible with the provision of UNCLOS relating to the EEZ; and especially Articles 102 and 103 of UNCLOS on the status of State owned and/or operated vessels, emphasising the significance of State actors or State system in determining the scope of 'private ends' versus 'political motives'. Thus, the actions of State

23. For further background information, see generally, Alfred P. Rubin, 'The Law of Piracy' (1987) 15 Denv. J. Int'l L. & Pol'y 173, 1-63 <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=2312&context=djilp> accessed 15 December 2021; Alfred P. Rubin AP, in Bernhardt(ed.) Encyclopaedia of Public International Law (1989), 259-62.

actors or with the authority, or touching on the authority, of the State or State system seems to fall in the realm of 'public motives', while actions by any non-State actors relate to 'private ends'.

Understanding these subtle distinctions is essential to appreciating the evolution, nature, and role of 'private ends' in the definition of piracy. That was the drafters and negotiators' intentions regarding 'private ends' and 'political motives'. The matter was considered settled. The upshot then was that only pirates were subject to the 'private ends' test with State actors and political activists being exempt but subject to political motives test. Key to current issues is that environmental activists, terrorists, and armed robbers against ships were not in the drafters and delegates' contemplation at the time as were those actors in the grey area. Hence reasons for continued dilemma of 'private ends' versus 'public ends'.

Further insight on the nature and function of 'private ends' can be gathered from its judicial considerations in municipal courts and international tribunals. The earliest opportunity for testing 'private ends' came in the Belgian Courts under the GCHS definition before UNCLOS entry into force.

3. Judicial Interpretation of Nature of 'Private Ends' in the Belgian and United States Courts

3.1. 'Desire for Private gain' and 'Private Ends' in the Belgian Courts: *The Greenbeard*

The judicial pronouncements from the Belgian case of the *Greenbeard*[24] reopened the debate on its meaning and role. Legal action on the case

24. Green signifies environmental credentials of the captain. It also seems to be reference to Edward Teach or Edward Thatch (c. 1680 – 22 November 1718), better known as *Blackbeard*; and *Redbearded* Pirate Barbarossa Brothers, Ottoman pirates.

arose from the Greenpeace campaign against the vessel *Falco* and the *Wadsy* tanker dumping industrial wastes into the sea, and involved boarding, occupying, and causing damage to the two vessels. According to the Court, Greenpeace vessels went too far in preventing the dumpers from leaving the harbour in accordance with the required permit and in those actions, violated accepted navigational practices, though significantly not the GCHS practices.

To aid their interpretation of Article 15(1) of the GCHS, the Court revisited the drafting archives. One such record was a Commentary on 'private ends' in the League of Nations Committee of Experts for the Progressive Codification of International Law in 1925 giving insight that:

> Certain authors take the view that *desire for gain* is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but *hatred* or a *desire for vengeance*. In my opinion it is preferable not to adopt the criterion of *desire for gain*, since it is both *too restrictive* and contained in the *larger qualification "for private ends*." It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often-delicate question of motives. Nevertheless, when the acts in question are committed from *purely political motives*, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime. Such a rule does not assure any absolute impunity for the political acts in question, since they remain subject to the ordinary rules of international law.[25]

Although the piracy definition in the GCHS is underpinned by the two words 'private' and 'ends', neither the GCHS/UNCLOS nor the 1956

25. See *League of Nations, Acts of the Conference for the Codification of International Law*, (LN. doc. C.351.M.145, 1930, V.); *Report of the Second Commission, League of Nations Publication* V. Legal, 1930 V. 9 (C.230, M. I 17, 1930 V.). Emphasis added.

ILC Commentary on the draft article define what constitutes 'private ends'.[26]

'Private' refers to personal interests or personal self (ego) gain, individual, own benefits or reasons as opposed to the expressions general, sharing with, or belonging to the public as a whole.[27] The nearest alternative that best explains 'private' is 'private profit', construed as the underlying reason why, for instance, a taxpayer or company participates in business activities of any kind.[28] However, profit is a business occupation which arises from the function of revenue minus expenses, an analogy which does not apply well to 'private ends' in piracy operations, even if profit motives may be involved in the latter.[29]

As to motives, Curzon and Richards define 'motive' under English Criminal Law as 'that which incites to action, the source of power for a given action but which should not be confused with *men's rea*'.[30] That approach is the same for municipal as well as international criminal offences. In US law, however, Garner best defines private as 'that relating or belonging to an individual as opposed to the government or public'[31] which also reflects the common use of the word. So, from the above,

26. The ILC Commentaries on their equivalent Article 39 had 4 conclusions; the second commentary simply provided that: "The acts must be committed for private ends" without adding much to it.

27. See Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press <https://dictionary.cambridge.org/dictionary/english/private> accessed 15 December 2021.

28. id; however, a business or company concept of private differs slightly from those of the individual.

29. Although the Somali piracy has been associated with business, shareholding and floatation in the Mogadishu Stock Exchange. The potential for enormous reward is undoubtedly the major draw for young pirates.

30. Leslie B. Curzon and Paul Richards, *The Longman Dictionary of Law* (7th Edn., Longman, 2007) 388; see also *R v Rowley* [1991] 1WLR1020 and Birch v DPP (2000), *The Independent* 13 January 2000 both criminal law cases in which motive is liked to purpose.

31. Brian A. Garner, *Black's Law Dictionary* (2nd Edn., West Publishers, 2001) 553.

those who attack ships for private, individual, and self-benefits qualify as pirates while those who do so for political or public cause should not. Precedents in the latter include the *Santa Maria* and the *Achille Lauro* in both of which passengers highjacked cruise ships in support of their political causes, and the *Bolivian Republic* where insurgents hijacked and confiscated a merchant vessel and her cargo for similar political reasons.

On the other hand, 'ends', equated to 'motives', also means a reason for doing something, as in, the 'police were unable to establish a motive for his murder'.[32] In this context the word motive is synonyms with reason, motivation, and has an implication of incentive and consideration, as in, 'the motive for the attack is still unknown'.[33]

3.2. Probable Influence of the Level of Violence on 'Private Ends': SUA–COLREGs Conventions Offences

It is arguable that the Court in the *Greenbeard* case had difficulties convicting the crew for actions purely for 'private ends'. Instead, the Court in effect suggested that these were offences under the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs), as interference with and endangering navigation rather than piracy. Nevertheless, for the interference with navigation and execution of permitted functions, the trial Court declared the action a piracy, and accordingly issued injunction prohibiting the defendants from engaging in any conduct 'hindering the free passage' of the dumping vessels from their point of departure or in their freedom of navigation within Belgian territorial waters, 'when such conduct would risk

32. id.

33. ibid (n 31) 1014: Motive on the other hand means a reason for doing something, e.g., "police were unable to establish a motive for his murder". It is synonyms with reason, motivation, motivating force, rationale, ground s, cause, basis, occasion, thinking, the whys and wherefores, object, purpose, intention, design.

safety or lives'.[34] A sentiment repeated by Chief Judge Konzisk in the *Sea Shepherd* case.

Despite, in their inference, this being partly a COLREGs and freedom of navigation issue rather than piracy, the Court nevertheless concluded that the threatened actions on the high seas involved conduct which fulfilled the definition of piracy under Article 15(1) of the GCHS. Pursuant to the Court:

> It appears from the facts available that, at the time of their action against *the Wadsy Tanker* and the *Falco,* the applicants resorted to "violence" [...] The actions in question were committed *for personal ends*, in furtherance of ... [their] objects". Furthermore, more personal motivation such as *hatred*, the *desire for vengeance* and the *wish to take justice into their own hands* are not excluded in this case. There is no provision of municipal or international law which imposes restrictions on the competence of the Belgian courts, in relation to their own nationals to take measures to protect their *free right of passage* and their lawful activities and even, if necessary, to pronounce a civil sanction to *ensure respect for the freedoms granted to all persons*.[35]

From the above quotation, the freedom of navigation under Article 87(1) (a) of UNCLOS only applies to State actors. Secondly, in revisiting the LON and the ILC Commentaries on the meaning of 'private ends' which included 'hatred', the Court seems to equate the actions of Greenpeace activists to those of lawless mobs or rioters, meaning violent people 'who

34. See (n 3).

35. See also Castle John v NV Mabeco (n 3) 538-39. The Court of Appeal noted that violence was included among the actions undertaken by the defendant against the *Wady Tanker* and the *Falco*. This consisted not only of material deeds such as boarding, painting the vessels, making threats with a knife, detaching the cable used for dumping and sawing through it, but also included moral pressure on the crews, such as threats to throw themselves across the bow, the presence of divers in the water, and threats to loosen the anchors, all of which could be labelled as forms of violence. (Emphasis added indicating the supposed real reasons for the court's decision).

wish to take justice into their own hands'. It is plausible the Court was influenced by the perceived level of violence employed by the activists — a sentiment the *Sea Shepherd* found persuasive. That interpretation would seem to fit with international customary law's characterisation of pirates: outlaws who have by their actions forsaken the protection of national jurisdictions, 'taken the law into their own hands', and become enemies of civilisation — *hostis humani*.[36]

However, this paper takes a dissimilar view as to whether lawless mobs and rioters should be a correct description of non-pirates such environmental, conservation, and political activists.[37] From its pronouncements the Court seemed more concerned with the Greenpeace crew's apparent violation of 'accepted navigational practices', 'free right of passage', and ensuring 'respect for the freedoms granted to all persons' than whether the defendants' actions were for 'private ends' and, therefore, constituted piracy under Article 15(3) of the GCHS. Accordingly, it appears any actions that deviated from the Court's perceptions were consigned to 'private ends'. Instead, a holistic rather than a selected reading of the Commentaries in the drafting archives would have put 'private ends' and 'political ends' into perspective.

The Court also returned to 'hatred' in the LON and ILC Commentaries. In that respect it raises doubts as to whether the Court was right in both its reasoning and conclusion.

3.3. Hatred in 'Private Ends'

In its decision the Belgian Court of Appeal revisited 'hatred' as a constituent of 'private ends'. However, it was the Commentary rather than Article 15 of the GCHS definition that included 'hatred'. The Court was

36. See also generally, Konrad Marciniak (n 13) 97-140.

37. Cf, generally, Kevin J. Heller, 'Why Political Ends are Public Ends, Not Private Ends' (Opinio Juris, 1 March 2013) <http://opiniojuris.org/2013/03/01/a-final-word-about-politically-motivated-piracy/> accessed 31 July 2021.

supposed to ascertain Article 15(1) rather than its history. The common law mischief rule has been discredited. Despite that, the Court did not define 'hatred'. However, the word means intense dislike, inter alia. It is synonymous with hostility, loathing, hate, and detestation.[38] Despite the LON and ILC alluding to the term in their 1925 and 1956 Commentaries[39] respectively, it is doubtful whether they or the Court were aware of introducing such emotive language and concepts into the interpretation of an international Convention and, therefore, international law. That notwithstanding, the Court concluded that the defendants' actions were committed for 'private ends', the inference here being the achievement of their group's corporate goals. But corporate goals can hardly be for 'private ends'. Individuals can, but a group cannot have a group 'private end'. It is different from the analogy, in company law, of associating the actions of company directors to that of the company

Yet, the Court felt that more personal motivations, presumably of individual crews, could not be excluded from the publicly motivated actions of activists such as Greenpeace. The supposition here being that hatred can turn a seemingly public motive into 'private ends'. That might be understandable in political actions where emotions can sometimes run so high that it is hard to distinguish a political cause from a private one, but not necessarily in environmental protests. In that context, the Court seemed to venture into metaphysical logic by suggesting that public motives are a collective form of private motives. However, delving into metaphysics is beyond the scope of this paper. That notwithstanding, the nature of the actions was held by the Belgian trial Court to fulfil the 'private ends' test, and the Belgian Court of Appeal upheld the decision that

38. It is synonymous with hostility: Brian A Garner (n 31) 728.

39. Hatred was contained in the Commission's first conclusion on the equivalent Article 39, namely that "(i) The intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain".

the piracy provisions applied. Greenpeace appealed to the Belgian Court of Cassation, on the grounds that its actions did not involve piracy, as they were not committed for 'private ends' and reasoned that:

> An action which impedes, threatens, prevents, or makes more difficult the discharge at sea of waste products which are harmful for the environment, taken with a view to alerting public opinion, cannot be considered as having been committed "for private ends" merely because that aim corresponds with the objects set out in the articles of association *(object social)* of the applicant. The consideration that those personal motives such as *hatred*, the *desire for vengeance* or the *wish to take justice into their own hands* "are not excluded" in this case, is insufficient in law to deduce the existence of "personal ends".[40]

Nevertheless, in arriving at that view, the Court did not demonstrate existence of corporate goals in Greenpeace's Articles and Memorandum of Association. Notwithstanding, in rejecting this contention, the Court of Cassation noted that:

> The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather than purely in support of *a personal point of view concerning a particular problem, even if they reflected a political perspective*. On the basis of these considerations the Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning of the Convention on the High Seas. The ground of appeal is therefore unfounded in law.[41]

So, 'hatred' is a constituent of 'private ends' in the GCHS, unless it was 'committed in the interest or the detriment of a State or a State system'[42] rather than in that of an individual or organisation, however noble the

40. Castle John v NV Mabeco (n 3) 539.

41. ibid 540. Emphasis added.

42. id. Emphasis added.

objectives of that individual or organisation are or was. In referring to the 'State or State System', the Court appeared to return to the origin and intention of the LON draft definition to exclude public or political motives from piracy. Accordingly, the Court suggested that environmentalists were not political rebels and, therefore, not among the beneficiaries of political motives; instead, they represented a private view, even if those views reflected political or public perspectives.[43] This reasoning is questionable. Even if the defendants actually hated the respondents in this case, it is arguable that that was not the point here, considering their non-discriminatory position against all polluters rather than just these particular appellants. Following the Court's rationale, it is doubtful whether even the actions of indisputable political activists such as those of the *Bolivian Republic*, the *Santa Maria*, and the *Achille Lauro,* would have qualified as political motives before this Court.

That notwithstanding, the Court went on to consider 'desire for vengeance' as a further constituent of 'private ends' pursuant to the LON and ILC Commentaries.

3.4. Desire for Vengeance in 'Private Ends'

3.4.1. 'Desire' and Intentions to Rob

The court's third revisit to the Commentaries was regarding 'desire for vengeance'. This too originated from the LON and ILC Commentaries (where the text used was instead 'feelings of vengeance'), details of which are omitted in both the GCHS and UNCLOS definitions.[44] Furthermore, it is not clear from the judgment whether 'feelings' and 'desire'

43. Douglas Guilfoyle, 'Political Motivation and Piracy: What History Doesn't Teach Us About Law' (EJIL: Talk!, 17 June 2013) <https://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/> accessed 15 December 2021.

44. The Commission's first conclusion on their commentary to Article 39 did not use the term "desire for vengeance" but rather "a feeling of hatred or vengeance".

convey the same meaning. Neither did the Court define what constitutes 'desire for vengeance'. This analysis will be divided into 'desire' and 'vengeance'. Like 'hatred', the noun 'desire' means desperation for, having a strong feeling of wanting to have something or wishing for something to happen, as in, 'he resisted public desires for choice in education'.[45] While the adverb of desire also refers to strongly wishing for or wanting (something),[46] as in, 'he never achieved the status he so desired'.[47]

It is, however, doubtful that in their use of the term neither the LON and the ILC Commentaries nor the Court in the *Greenbeard* case appreciated its true and wider meaning. Yet, it is improbable that the appellant actors in this case would have had such a strong, in-depth, and emotional desire for revenge (vengeance), as characterised in the judgment, against the respondents. In that context 'private ends' does not necessarily have any connections with private gains. This is because the intention to rob is not an essential part of 'private ends' in piracy. As the IMO Committee Legal Committee has reaffirmed:

> Article 101(a) of UNCLOS, requires that, in order to constitute piracy "any illegal acts of violence or detention, or any act of depredation," be committed "for private ends". It is noteworthy that the International Law Commission (ILC), in its 1956 draft Articles concerning the Law of the Sea with commentaries (Commentary), stated that "[t]he intention to rob (animus furandi) is not required. Acts of piracy may be prompted by *feelings of hatred or revenge* and not merely by the desire for gain".[48]

45. More fanciful meanings of the term include inclination, yearning, longing, craving, and hankering for an object. Used informally it would include one's desire to see the world.

46. In this context the term is synonymous with wish for, want, long for, yearn for, crave, set one's heart on, hanker after/for, day.

47. id.

48. IMO Circular Letter concerning information and guidance on elements of international law relating to piracy, Circular Letter No.3180, 17 May 2011 <http://www.un.org/depts/los/piracy/circular_letter_3180.pdf> accessed 11 September 2021. Emphasis added.

Once private gains and intention to rob are removed from the equation, it renders political motives without robbery irrelevant and instead equates political motives or public motives to 'private ends'. The Virginia Commentary on Article 101(a) of UNCLOS agreed that '[i]n limiting the definition to acts committed for "private ends", Article 101(a) excludes acts having political motives'.[49] This also represents the views of past and recent scholars such as Birnie[50] that those who act purely for self and private enrichment are not exempt. Another author,[51] however, points out that the term 'private ends' is not defined, making it difficult to interpret what exactly is meant.[52] In support of another,[53] the same authors opines that the clause itself was supposed to distinguish between acts of true piracy and acts of privateering, the historical practice of State-sponsored piracy outlawed in the mid nineteenth-century.[54] Accordingly, '[a] pirate either belongs to no state or organised political society or by the nature of his act he has shown his intention to reject the authority of that to which is his properly subject'.[55] It is only from this type of approach that one can understand the nature and perspective of 'private ends', and therefore piracy.

That notwithstanding, in the LON and the ILC Commentaries and the *Greenbeard* judgment, 'desire' is further linked to 'for vengeance'.

49. Myron H. Nordquist, Satya Nandam SN, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume VII* (Brill/Nijhoff 2011) 200.

50. Patricia M Birnie, 'Piracy: past, present and future' (1987) 11 Marine Policy, Issue 4, 163-183, 171.

51. Malvina Halberstam, 'Terrorism on the high seas: the Achille Lauro, piracy and the IMO convention on maritime Safety', AJIL 82 (2), 269–310.

52. Elizabeth Nyman, 'Modern Piracy and International Law: Definitional Issues with the Law of the Sea' (2011) Center for International Studies, Georgia Southern University, Geography Compass 5/11:863–874, 865-866.

53. Lawrence Azubuike, 'International law regime against piracy' (2009), Annual Survey of International & Comparative Law, Vol.15, Iss.1, Art.4, 43–59.

54. Elizabeth Nyman (n 52).

55. Harvard Research in International Law. (1932). "Draft convention on piracy with comments. *AJIL* 26, 739–885.

3.4.2. 'For Vengeance'

The Court's fourth reference to the Commentaries was 'for vengeance'.[56] This, too, was neither included in the GCHS or UNCLOS definitions nor defined by the Court. Like 'desire', 'vengeance' imparts somewhat strong language and emotive interpretation into the provision. It means punishment inflicted or retribution exacted for an injury or wrong. The word is synonymous with revenge, as in, 'he demanded vengeance for the murder of his father'.[57] That notwithstanding, the *Greenbeard* decision reaffirms the proposition that as non-State actors, violent actions by environmentalists qualify as 'private ends' and, therefore, constitute piracy under international law. The Court also appeared to view the actions as a malicious vendetta as described in Hammurabi's 'an eye for an eye and a tooth for a tooth'. It is, however, unlikely that the defendants in the *Greenbeard* harboured such extreme feelings of vengeance individually or jointly. Besides, what would they be revenging against? It is assumed that the LON, Harvard, and ILC drafters were all competent linguists, some of whom were probably native English speakers, who must have understood the real meanings and seriousness of using these terminologies. That being the case, it is rather unfortunate that they could have chosen such strong and emotive expressions as 'hatred' and 'desire for vengeance' to designate 'private ends'.

Pursuant to the judgment, to take it out of the private and into the public motive arena, the act had to be in the interest or to the detriment of a State or a State system rather than purely in support of a point of view concerning a particular problem, even if they reflected a political

56. Contained in the Commission's first conclusion of their commentary on their equivalent Article 39.

57. See Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press <https://dictionary.cambridge.org/dictionary/english/vengeance> accessed 15 December 2021.

perspective. In other words, merely wrapping a personal point of view in a public interest context, even for such a noble cause as saving the environment and, therefore, the planet, is immaterial so long as what the defendants embodied is neither for nor against a State or a State system. To further exacerbate the problem, the Court did not define what constitutes a system but the statement should be read in the context of *ejusdem generis* to a State as the apex of a public institution. Whether this view is subsequently accepted or ultimately becomes general consensus is immaterial. However, on the basis of 'hatred' and 'desire for vengeance', the *Greenbeard* decision is in the paper's opinion questionable.

As noted, the clue seems to be in the level of violence employed by the accused and the Courts' apparent abhorrence of protesters 'taking the law into their own hands'. This line of argument is also supported by Menefee who suggests that 'the answer to and key to understanding the decision is its link with external factors: the Court's disapproval of violent attack on vessels'.[58] If those assumptions are correct, then *the Greenbeard* and later *the Sea Shepherd* (post) decisions seem to have 'jumped the gun' (to use a jargon): the decision seems to be based on SUA Convention offences of violent attacks on ships than on piracy, and, one would add, COLREGs offences of interference with the freedom of navigation. However, the SUA Convention 1988 (including the SUA Protocol 1988 and the SUA Protocol 2005) offences were at least two years too late at the earliest for *the Greenbeard* decision.

3.5. Extension of 'Private Ends' to Armed Robbery Against Ships

For the above reasons, it is probably safe to assume the decision was also based on what turned out to be SUA-type offence rather than on 'private

58. Samuel Pyeatt Menefee (n 3) 1-16; see also Samuel Pyeatt Menefee, 'Anti-piracy law in the year of the ocean: Problems and opportunity' (1999) ILSA Journal of International & Comparative Law, 5(2), 309-318. Emphasis added.

ends' in Article 15(1) of the GCHS. It has also been opined correctly that:

> two *external* factors also lessen the likelihood that the *Greenbeard* decision represents a turning point in the international definition of piracy. The first is the reluctance of some countries to face up to the problem of piracy at all. A second factor which makes the redefinition of piracy unlikely is the existence of a new alternate ground of prosecution.[59]

This was unavailable at the time the *Greenbeard* was decided. The answer, therefore, might lie in Article 3 of the SUA Convention,[60] drafted in response to the *Achilles Lauro*[61] hijack. Among the unlawful acts covered by the SUA provision are the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to destroy or damage it. The *very absence* of terms, such as 'piracy' and 'maritime terrorism', makes it more likely that this SUA-type offence was prematurely applied in the *Greenbeard* and *Sea Shepherd* decisions.

It is expected it will also now be applied by SUA Member States in appropriate environmental contexts and thus *less* likely that an expanded definition of international piracy will come into use. Having 'private ends' is not essential for commission of a SUA offence but it is for armed robbery against ships. Consequently, this is now included in the IMO's *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*,[62] which provides that armed robbery against ships consists of any of:

59. id.

60. And Articles 3bis and 8bis, namely: Maritime Terrorism and Arms and Weapons of Mass Destruction (WMD).

61. See Malvina Halberstam (n 51).

62. Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, adopted by the IMO General Assembly Resolution A.1025. (26) during the 26th IMO Assembly on 2 December 2009.

> any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for *private ends* and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea.[63]

Although armed robbery is not piracy, this definition is almost identical to Article 101(a) of UNCLOS except for the geographical requirement. So, 'private ends' is no longer the preserve of piracy definition and has been extended to armed robbery against ships. Viewing the decision in that context of extension of 'private ends' remit would probably make sense, instead of the Belgian Court struggling with/overreaching itself in revisiting the LON and ILC Commentaries on 'hatred' and 'desire for vengeance' without any apparent explanations or justifications.

In adding their own, 'wishing to take justice into their own hands', which was not in the LON and ILC Commentaries, into the constituents and interpretation the Court seemed to cause yet more confusion. Regrettably, a similar approach was adopted by the American Courts in the *Sea Shepherd.*

3.6. Wishing to Take Justice into Own Hands and Private Ends

The fifth consideration was the 'wish to take justice into their own hands', also excluded in the LON and ILC Commentaries as well as the GCHS. It was instead added, but not defined, by the Court. However, in so doing, the Courts in the *Greenbeard* and later in the *Sea Shepherd* were perhaps not only expressing their personal disapproval of the activists' actions but also assimilating those actions to mob rule or vigilante

63. id; See also Niclas Dahlvang, 'Thieves, Robbers & Terrorists: Piracy in the 21st Century' (2006) 4 Regent Journal of International Law 17, 17–45. Emphasis added.

justice.[64] It is plausible that in the two cases the Belgian and US courts were likewise equating the actions to the origin of mutinies and piracy when naval officers rebelled against the established rules and thereby placing themselves outside the normal judicial system — hence *hostis humani generis*. Mob rule is not generally popular and so the Courts are conceivably suggesting that grievances against marine environmental pollution (*Greenbeard*) and illegal whaling (*Sea Shepherd*) should follow the normal judicial channels rather than a group of people, for whatever reasons, taking it upon themselves to punish whalers and those they regard as polluters.

In that context it was interesting to note Chief Judge Konziscki's remarks in the *Sea Shepherd*:

> You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.[65]

It gave the unfortunate impression the Courts were expressing disapproval of the vigilantism, hooliganism, and anarchism of those they equated to political activists and environmental agitators. Taking the law into one's own hands and attempting to effect private justice according to one's own understanding of right and wrong have several connotations and are tantamount to actions taken by, for instance, anarchists. It is contended that this is what the Courts objected to in these decisions rather than whether the actions in question constituted 'private ends'

64. See, generally, Barry Hart Dubner, Claudia Pastorius, 'On the ninth circuit's new definition of piracy: Japanese Whalers v The Seashepherd who are the real pirates (i.e. plunderers)?' (2014) 45 J.Mar. L. & Com. 415 (2014) Journal of Maritime Law and Commerce, 415-444.

65. Institute of Cetacean Research V Sea Shepherd Conservation Society, United States Court of Appeals 9th Circuit 725 F.3d 940, 947.

rather than 'public motive' and, therefore, piracy. The level of violence applied by the accused maybe swayed the judges.

As noted, put into the appropriate historical context of piracy history and development, in the view of the Belgian Court of Appeal by 'taking justice in their own hands', like the original pirates, the defendants removed themselves from, and forsook, the protection of the 'public motive' sphere and the judicial system into the realm of 'private ends'. Not to mention that in so doing, the defendants were 'usurping' the role of courts and judges, a course of action not condoned by the judiciary. The *Greenbeard* and *Sea Shepherd* decisions also paint a black and white picture of motives, leaving no room for actions falling between 'private ends' and 'public motives'. The Courts were instead rigidly unwilling to countenance the possibility of the co-existence of a grey area: a mixture of 'private end' and political motives in piracy. That notwithstanding, it is thought that in the *Sea Shepherd* decision, the Court missed the point, namely that:

> The outer bounds of the private ends requirement are relatively clear. On one end, proving *animus furandi* – or the intention to steal for personal pecuniary gain – is not required to satisfy the private ends requirement. On the other end, it is undisputed that acts of violence committed on the high seas under state authority fail to satisfy the private ends requirement. But there is significant room between these two extremes. Just exactly where the line should be drawn between these two extremes, and on which side of that line the Sea Shepherds fall, is a more difficult issue.[66]

So, desire is probably a stronger and a more appropriate expression. The same probably also applies to vengeance.

Belish, in the above view, exemplifies the problem caused by the nature of 'private ends' in the piracy definition.

66. Jon Bellish, 'More Great Piracy Facts in U.S. Courts: Private Ends Edition' (EJIL: Talk!, 28 February 2013) <https://www.ejiltalk.org/more-great-piracy-facts-in-u-s-courts-private-ends-edition/> accessed 15 December 2021.

4. ITLOS and PCA: The Arctic Sunrise and the *Enrica Lexie*

The arrest of the *Arctic Sunrise* and her crew in 2013 and the threatened prosecution of her thirty crew members for piracy in the Russian Federation intensified the debate over the nature and role of 'private ends' in the definition of piracy. The *Arctic Sunrise*'s flag State, the Netherlands, instituted arbitral proceedings against the Russian Federation under Annex VII of UNCLOS[67] at ITLOS. The Netherlands argued that the arrest and detention of the *Arctic Sunrise* and its crew was in violation of the provisions of UNCLOS.[68] The issue was whether the crew committed piracy generally and in particular whether 'private ends' could be attributed to entities other than individuals under Article 101(a) of UNCLOS. The incident also brought back vivid memories of the bombing and sinking of Greenpeace's *Rainbow Warrior*.[69] The PCA unanimously decided that the Russian Federation were in breach of their international obligation in detaining the vessel and its crew for suspected piracy and ordered the Russian Federation to pay the Netherlands compensation for: damage to the *Arctic Sunrise*; non-material damage to the Arctic 30 for their wrongful arrest, prosecution, and detention in the Russian Federation; and damage resulting from the measures taken by the Russian Federation against the Arctic 30.[70] The importance of the case is that a charge of piracy based on 'private ends' would have been unsustainable in the Russian Federation.

67. See also Theodore Kill, 'Arctic sunrise arbitration (Netherlands v Russia) (Perm. Ct. Arb.) (2016) ILM, 55(1), 1-73; and Eva Rieter, 'The Arctic Sunrise Case (Netherlands/Russia) (ITLOS)' (2014) ILM, 53(4), 603-619.

68. *The Arctic Sunrise Arbitration* (n 5) 238-241.

69. France-New Zealand (*Rainbow Warrior*), Arbitration Tribunal, 82 I.L.R. 500 (1990) 82 ILR 500.

70. *The Arctic Sunrise Arbitration* (n 5).

In the latest development, ITLOS-PCA in the *Enrica Lexie* case, in which Italian marines acting as martials on board an Italian tanker shot and killed two Indian fishers and injured a third on board the fishing vessel the *St Anthony* they suspected of piracy. The Tribunal decided unanimously in respect of India's submissions that the fishers were not pirates and that, therefore, Italy had breached Articles 87(1)(a) and 90 of UNCLOS for the injury to India's non-material interests. As a result of this breach by Italy, India was entitled to payment of compensation in connection with loss of life, physical harm, material damage to property (including to the *St Antony*), and moral harm suffered by the captain and other crew members of the *St Antony*, which by its nature cannot be made good through restitution.[71] As with the *Arctic Sunrise*, Italy's proof of piracy based on 'private ends' against the *St Anthony* crew would have failed.[72]

5. Conclusion

This analysis has demonstrated that: piracy definitional provisions in the GCHS and UNCLOS have had a tortuous evolution; the nature and constitution of 'private ends' have had unintended consequences outside their original targets; doubts persist as to whether actions in the *Greenbeard* and the *Sea Shepherd* cases were for 'private ends' in that the defendants were not indiscriminate plunderers for private gain under both customary and Treaty Law; besides the actual pirates and political activists, newer actors such environmental activists, terrorists,[73] and

71. *The 'Enrica Lexie' Incident* (n 6).

72. Danielle Ireland-Piper, 'The Enrica Lexie and St. Antony: A voyage into jurisdictional conflict' (2014) Vol 14 No 2: QUT Law Review, 74-89.

73. Martin Murphy, 'Piracy and UNCLOS' in Frantz Peter Lehr, (ed.) *Violence at sea: piracy in the age of global terrorism. United States of America* (Routledge, 2007) 155–18; Terence Fokas, 'The Barbary Coast revisited: the resurgence of international maritime piracy', USF Maritime Law Journal 9, 427–460.

armed robbers against ships had not been anticipated at the drafting and Conferences resulting in Article 15(3) of the GCHS and Article 101(a) of UNCLOS:[74] the *Greenboard*'s and S*ea Shepherd's* introducing the SUA Convention (supposed to supplement UNCLOS in accommodating the new violent regimes at sea) and COLREGs offences into the equation only contributed to further blurring the 'private end' issues; and 'hatred', 'desire for vengeance', and 'taking the law into one's own hands' are now entrenched in the definition, nature, and contents of 'private ends' in piracy irrespective of whether the offending actions are embodied in public- spirited and a noble cause.

As observed in the *Greenbeard* case, supporting the 'private end' predicament in this paper:

> Examining the Castle John action in context has shown how the changing definition of piracy relates to the development of international law particularly in the interface between piracy and maritime environmental actions. While the decision of the Court of Cassation does not appear to herald a new trend in redefining the crime of piracy, it does suggest some of the problems raised by increasing maritime environmental violence. If this review of a contemporary problem and one possible solution makes us think further about these issues, then *Greenbeard*, like his less fictional forebears, will have served his purpose.[75]

The inclusion of 'hatred' and 'desire for vengeance' had been known since the LON Commentary way back in 1925 and was reiterated by the ILC Commentary in 1956. The LON, Harvard, and the ILC Commentaries have come to haunt current scholars of piracy. The US and Belgian Court rulings were a reminder of what academics (including this author) had forgotten, and taken for granted, that there are different shades to

74. id; see also Elizabeth Nyman (n 52).

75. Samuel Pyeatt Menefee (n 3) 11.37.

'private ends' and 'public motives'. It is not just that scholars had forgotten about it but had assumed that Article 101 was now irrefutable. They predated the negotiations leading to both the GCHS and UNCLOS. That the *Greenbeard* revisited it in 1986 and the *Sea Shepherd* in 2013 was therefore no major reflection.[76] That notwithstanding, the issues in this paper are, however, whether the judicial decisions discussed above have enriched and furthered the jurisprudence on piracy. On the contrary, it is probably a regressive move as it takes us back ninety-five years to when 'hatred' and 'desire for vengeance' first surfaced in the LON and Harvard Draft and later the ILC Commentaries.

The upshot is that only clear-cut cases of piracy where motives are purely pecuniary and for individuals' gains are now settled areas. In view of the above judicial stance, actions of political protesters run the risk of being dragged into 'hatred' and 'desire for vengeance' and, therefore, the 'private end' cobweb. When intention to rob and pecuniary interests are removed from the equation then any action is regarded as usurpation of judicial process and falls foul of 'hatred', 'desire for vengeance', and 'taking the law into own hands'. In political and environmental activities where emotions can sometimes run high, it is easy to depict them as events leading to 'hatred' and 'desire for 'revenge'. For same reasons in political actions where convictions tend to be so polarised and deeply entrenched, it would be easy for them to fall into the trap of 'taking the law into own hands'. This is unfortunate as the original intention of 'private ends' was to exempt State actors and politically motivated actions from piracy. Environmental campaigners and others in the grey area find themselves in the deeper end of the trap; they were not envisaged in the draft or mentioned in the Commentaries. So nearly 100 years since

76. See, generally, Stefano Dominelli, 'Evolutionary Trends in Maritime Piracy: Possible Assessment of Eco-Activists' Conduct' (2014) Australian International Law Journal, Vol. 21, 41-54.

the first LON draft in 1922 and its evolution through the many drafts, international conferences and two conventions, not much has improved on ‘private ends’. What evolved from a purely anti-piracy measure has evolved into a mechanism against a wider unintended group.

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V

Exclusive Jurisdiction Revisited: The Diverging Conceptualisation and Application of Article 92 of UNCLOS in The Enrica Lexie Incident Award

*Arron N. Honniball**

Abstract

The Arbitral Tribunal concerning the *Enrica Lexie* incident recognised 'jurisdiction' as a broadly used term in international law, largely undefined in the case law of courts and tribunals. The United National Convention on the Law of the Sea (UNCLOS) includes frequent references to State jurisdiction, whereby its context may provide a clear definition (e.g., Article 73 on enforcement jurisdiction) or leave jurisdiction less defined (e.g., Article 92 on exclusive flag State jurisdiction). The undefined jurisdiction in Article 92 of UNCLOS has stimulated differing interpretations upon whether this includes prescriptive and enforcement jurisdiction, or purely enforcement jurisdiction. This article analyses the 2020 *Enrica Lexie Incident Award*, demonstrating that the Tribunal followed a broad interpretation of Article 92 of UNCLOS within its conceptual restatement of exclusive flag State jurisdiction (i.e., exclusive

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prescriptive and enforcement jurisdiction), but actually applied the narrow interpretation of Article 92 of UNCLOS to resolve the *Enrica Lexie* incident dispute (i.e., purely enforcement jurisdiction). Respectively, a different Tribunal's majority and minority in the 2019 *M/V Norstar Judgment* had advanced each conflicting interpretation of jurisdiction concerning Article 92 of UNCLOS. In the interests of legal clarity and legal certainty this article proposes that international courts and tribunals explicitly return to a narrow interpretation of Article 92 of UNCLOS whenever the next opportunity arises. Article 92 undoubtedly affirms extraterritorial flag State enforcement. Nonetheless, if it were to also reserve extraterritorial prescriptive jurisdiction, it would also operate as a limitation to the otherwise applicable general law of State jurisdiction. 'Jurisdiction' should therefore be conservatively interpreted to the extent that State practice supports. State practice concerning the high seas continues to demonstrate the exercise of customary prescriptive jurisdiction over the conduct of foreign-flagged vessels or persons therein, highlighting the lack of any limitation to non-flag State prescriptive jurisdiction in Article 92 of UNCLOS.

Keywords: High Seas, Enforcement Jurisdiction, Prescriptive Jurisdiction, Flag State, Article 92(1), Treaty Interpretation

1. Introduction[1]

On 21 May 2020 the Arbitral Tribunal in respect of *the 'Enrica Lexie' Incident (Italy v India)* furnished its Award (*Award*),[2] an award rich in the interpretation and application of numerous substantive and procedural provisions of the United Nations Convention on the Law of the Sea (UNCLOS) and related customary international law.[3] To date, attention has often focused on the Tribunal's findings of incidental jurisdiction under Article 288(1) of UNCLOS in respect of the immunity of the Italian marines for acts committed during the incident of 15 Feb-

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1. The views expressed in this article are those of the author, and do not necessarily reflect the views of the Foundation, any other staff, or that of any other institution. This article is based upon research first presented in blog posts, namely, Arron N Honniball, 'The "Enrica Lexie" Incident Award and Exclusive Flag State Jurisdiction' (*Centre for International Law Blog*, 10 August 2020) <https://cil.nus.edu.sg/the-enrica-lexie-incident-award-and-exclusive-flag-state-jurisdiction-by-arron-n-honniball/> ; and Arron N Honniball, 'Freedom of Navigation Following the M/V "Norstar" Case' (*The NCLOS Blog*, 4 June 2019) <https://site.uit.no/nclos/2019/06/04/freedom-of-navigation-following-the-m-v-norstar-case/>. For a concurring analysis, see James G Devaney and Christian J Tams, 'In Re Arbitration Between the Italian Republic and the Republic of India Concerning the "Enrica Lexie" Incident' (2021) 115 American Journal of International Law 513, 516-517.

2. *The 'Enrica Lexie' Incident (Italy v India), Award* [2020] Arbitral Tribunal (UNCLOS, Annex VII) PCA Case No. 2015-28, followed by a Joint Dissenting Opinion, a Dissenting Opinion and a Concurring and Dissenting Opinion. For broader discussions of the Award see: Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2020' (2021) 36(4) The International Journal of Marine and Coastal Law 539; Massimo Lando and Nilüfer Oral, 'Jurisdictional Challenges and Institutional Novelties – Procedural Developments in Law of the Sea Dispute Settlement in 2020' (2021) 20(1) The Law & Practice of International Courts and Tribunals 191, 211-218; Natalino Ronzitti, 'Il caso della Enrica Lexie e la sentenza arbitrale nella controversia Italia-India' (2020) 103(4) Rivista di diritto internazionale 937. Italian literature is accessed through translation software – all misunderstandings or misquotes are the fault of the author.

3. United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

ruary 2012.[4] While it is agreeable that the Parties' dispute would likely not have been resolved by ruling on jurisdiction without addressing the question of immunity,[5] controversy begets attention, and one may find both supportive and critical literature concerning the Tribunal's incidental jurisdiction.[6]

However, the Tribunal likewise broke new ground for international courts and tribunals by providing the first explicit interpretation of exclusive flag State jurisdiction under Article 92(1) of UNCLOS, a provision whose scope has long been subject to differences of interpretation in literature and not infrequently included in the claims of States in dispute settlement proceedings.[7] Surprisingly, as far as this author

4. *Enrica Lexie Award* (n 2) para 1094(B)(2)-(3) "India is precluded from exercising its jurisdiction over the Marines". Commentaries: Deepak Raju, 'The Enrica Lexie Award – Some Thoughts on "Incidental" Jurisdiction (2 Parts)' (*Opinio Juris*, 22 July 2020) <http://opiniojuris.org/2020/07/22/the-enrica-lexie-award-some-thoughts-on-incidental-jurisdiction-part-i/>; Valentin J Schatz, 'Incidental Jurisdiction in the Award in "The 'Enrica Lexie' Incident (Italy v. India)" (2 Parts)' (*Völkerrechtsblog*, 23 July 2020) <https://voelkerrechtsblog.org/incidental-jurisdiction-in-the-award-in-the-enrica-lexie-incident-italy-v-india-part-i/>; Aurel Sari, 'Tanker, Jailer, Soldier, Sailor: Functional Immunity and the Enrica Lexie Award (2 Parts)' (Just Security, 4 September 2020) < https://www.justsecurity.org/72284/part-1-tanker-jailer-soldier-sailor-functional-immunity-and-the-enrica-lexie-award/>; Eleni Methymaki and Christian J Tams, 'Immunities and Compromissory Clauses: Making Sense of Enrica Lexie (2 Parts)' (*EJIL: Talk!*, 27 August 2020) <https://www.ejiltalk.org/immunities-and-compromissory-clauses-making-sense-of-enrica-lexie-part-i/>.

5. *Enrica Lexie Award* (n 2) paras 806-808. Attila M Tanzi, 'Adjudication at the Service of Diplomacy: The Enrica Lexie Case' (2021) 12(3) Journal of International Dispute Settlement 448, 457-459.ties-and-compromissory-clauses-making-sense-of-enrica-lexie-part-i/>.

6. Yoshifumi Tanaka, 'Between the Law of the Sea and Sovereign Immunity: Reflections on the Jurisdiction of the Annex VII Arbitral Tribunal in the Enrica Lexie Incident Case' (2021) 20(2) The Law & Practice of International Courts and Tribunals 367; Loris Marotti, 'A Satisfactory Answer? The Enrica Lexie Award and the Jurisdiction Over Incidental Questions' (2021) 30(1) The Italian Yearbook of International Law Online 191. On the interest balancing therein, Devaney and Tams (n 1) 517-519.

7. To remain concise, the jurisprudence and literature previously analysed cannot be repeated here, but nonetheless remains the foundation upon which this paper stands. See the many contributions of diverse authors concerning Article 92 of UNCLOS cited in: Arron N Honniball, 'The Exclusive Jurisdiction of Flag States: A Limitation on Pro-Active Port States?' (2016) 31 The International Journal of Marine and Coastal Law 499.

is aware, this new ground has garnered comparatively less attention. Furthermore, while informative analysis prior to the *Award* explored the interpretation and application of Article 92(1) of UNCLOS to the facts of the incident,[8] this understandably could not foresee the systemic manner in which the Tribunal would interpret and apply Article 92(1) of UNCLOS across the various submissions and interrelated provisions of UNCLOS. It is within this context that this paper seeks to tease out the Tribunal's interpretation and application of Article 92(1) of UNCLOS across the Parties' submissions, demonstrating the extent to which, if at all, the Tribunal has contributed to the clarification and consolidation of the 'exclusive flag State jurisdiction' concept, or further muddied the water.

In short, this paper focuses on the Tribunal's interpretation and application of Article 92(1) of UNCLOS, demonstrating that the Tribunal's statement on conceptualising exclusive flag State jurisdiction adopts a broad *interpretation* to include exclusive flag State prescriptive and enforcement jurisdiction. That interpretation follows the 2019 precedent of *the M/V "Norstar" Case (Panama v Italy) Judgment* (*M/V Norstar Judgment*),[9] suggesting that exclusive flag State jurisdiction encapsulates both enforcement jurisdiction and prescriptive jurisdiction.[10] Nonetheless, on *application* of Article 92(1) of UNCLOS to Italy's submission, or when Article 92(1) is indirectly raised, the Tribunal's reasoning limits exclusive flag State jurisdiction to enforcement jurisdiction. Thus, for States, courts, tribunals, or commentators considering the impact of exclusive

8. Persuasively concluding that Article 92 only refers to prescriptive jurisdiction and thus not at dispute: Paolo Busco and Filippo Fontanelli, 'Questioni di giurisdizione e immunità nella vicenda dell'Enrica Lexie, alla luce del diritto internazionale' (2013) 3 Diritto Penale Contemporaneo 399, 411-414. Note as this work predates the submission of counterclaims by India, one cannot presume the author's conclusions extend to Italy's actions re the *St Anthony*
9. *M/V 'Norstar' (Panama v Italy), Judgment* [2019] ITLOS 25, ITLOS Reports 2018–2019 10.
10. ibid 225.

flag State jurisdiction on disputes, domestic laws, proposed legislative amendments, or ongoing multilateral negotiations, the question arises whether this broad interpretation of Article 92 of UNCLOS in the *Enrica Lexie Award* and the *M/V Norstar Judgment* should be followed. By revisiting Article 92 of UNCLOS in light of the customary laws of treaty interpretation and contemporary State practice, this article reasserts that Article 92 of UNCLOS is limited to governing exclusive flag State enforcement jurisdiction. There is currently little benefit or support — but plenty of danger — in extending Article 92 of UNCLOS to questions of prescriptive jurisdiction on the high seas.

Part 2 sets the scene, briefly summarising the facts of the *Enrica Lexie* incident and introducing Article 92 of UNCLOS. Parts 3 and 4 respectively address the interpretation and application of exclusive flag State jurisdiction in the *Award.* Part 5 builds on this doctrinal discussion to address the practical considerations of the diverging interpretation and application of exclusive flag State jurisdiction, both internally within the *Award* and externally in respect of State practice concerning high seas prescriptive jurisdiction. Part 6 concludes with a look ahead to resolving ambiguities in the interpretation and application of Article 92 of UNCLOS.

2. The *Enrica Lexie* Incident and Exclusive Flag Stat Jurisdiction

On 26 June 2015 Italy commenced arbitral proceedings against India concerning the *Enrica Lexie* incident, the case coming before an Arbitral Tribunal established under Annex VII of UNCLOS.[11] Bucking a

11. *M/V 'Norstar' (Panama v Italy), Judgment* [2019] ITLOS 25, ITLOS Reports 2018–2019 10.

recent trend, the proceedings[12] on the merits were not transferred to ITLOS following the conclusion of the interrelated ITLOS provisional measures proceedings, nor following the procedural matters consultation of the Parties by the President of the Tribunal.[13] Paragraphs 77–216 of the *Award* provide a detailed account of the facts of the incident and subsequent State responses, as understood by the Parties and the Tribunal.

For the purposes of analysing the Tribunal's broader doctrinal contributions on jurisdiction at sea, the facts may be briefly summarised. In short, two Italian navy marines, serving as a vessel protection detachment aboard the Italian-flagged *Enrica Lexie*, fired upon the Indian-registered *St Antony* within India's Exclusive Economic Zone (EEZ), killing two fishers and causing damage to *St Antony* and other crew members. Both India and Italy claimed prescriptive jurisdiction over the incident. India also exercised enforcement jurisdiction over both the *Enrica Lexie* and the Italian marines once they entered India's territorial sea.[14] Italy requested exclusive enforcement jurisdiction and expressed a commitment to resume its criminal investigation into the incident.[15]

The concept of exclusive flag State jurisdiction is found in Article 92(1) of UNCLOS, which states: 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in inter-

12. *"Enrica Lexie" (Italy v India), Provisional Measures, Order of 24 August 2015* [2015] ITLOS 24, ITLOS Reports 2015 182. See also, *The 'Enrica Lexie' Incident (Italy v India), Order - Request for the Prescription of Provisional Measures* [2016] Arbitral Tribunal (UNCLOS, Annex VII) PCA Case No. 2015-28.

13. E.g., as occurred: *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment* [2012] ITLOS 16, ITLOS Reports 2012 4 [1–2]; *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment* [2021] ITLOS 28 [1–2].

14. *Enrica Lexie Award* (n 2) para 356.

15. ibid 75, 889.

national treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'.[16]

In so far as it remains compatible with Part V of UNCLOS, exclusive flag State jurisdiction also applies in the EEZ.[17]

This textually ambiguous provision, for which the drafting history of UNCLOS does not provide authoritative supplementary guidance as to the scope of 'jurisdiction' referred to, called for careful interpretation and application on at least three counts.[18] First, there existed the dispute upon Article 92(1) of UNCLOS, which essentially revolved around whether India's acts in connection with the *Enrica Lexie* while the *Enrica Lexie* was within India's EEZ amounted to an act of unauthorised enforcement jurisdiction. Second, Article 92(1) of UNCLOS is raised as part of the applicable law in the context of interpreting and applying other closely associated articles of UNCLOS which had formed the basis of further submissions by the Parties.[19] Finally, concerning third States, the reasoning and findings of international courts and tribunals often carry great weight in guiding practice and national interpretation.

16. UNCLOS Article 92.

17. ibid Article 58(2).

18. Both a contextual interpretation of Article 92(1) of UNCLOS and an examination of the drafting history were previously published and not repeated here, Honniball, 'The Exclusive Jurisdiction of Flag States' (n 7) 519–528. Further supplementary means of interpretation exist, but notwithstanding the additional difficulty of attributing individual statements to the UNCLOS drafters' collective intention, these appear insufficiently conclusive to confirm a particular meaning of 'jurisdiction', nor remove the ambiguity therein. Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980) Article 32 (VCLT).

19. UNCLOS Article 293(1).

3. Conceptualisation of Exclusive Flag State Jurisdiction

Exclusive flag State jurisdiction is first raised by the Tribunal in respect of Italy's Submission 2(a), but only in so far as establishing that both Italy's and India's flag State jurisdiction would extend to the incident (see 4.2). The Tribunal's main analysis of Article 92 is found in response to Italy's Submission 2(b) that '[b]y interdicting the *Enrica Lexie* and escorting her to Kochi, India violated Italy's exclusive jurisdiction over the *Enrica Lexie*, in breach of UNCLOS Article 92'.[20]

It is worth noting that Italy's submission on Article 92(1) of UNCLOS adopted the prevailing restrictive interpretation and application of 'exclusive flag State jurisdiction' which predated the *M/V Norstar Judgment*, i.e., only referring to exclusive at-sea enforcement jurisdiction.[21] Italy argued that 'India breached Article 92 of the Convention by *directing, interdicting, and escorting* the "*Enrica Lexie*" while it was in India's exclusive economic zone'.[22] These are all at-sea enforcement measures. Furthermore, it is evident that Italy promotes a zonal approach to interpretation whereby exclusive flag State jurisdiction protects a vessel from unauthorised enforcement in the EEZ/high seas while a vessel is navigating in the EEZ/high seas.[23] Likewise, India responded that it did not take any enforcement measures until the *Enrica Lexie* was boarded in its territorial sea.[24]

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20. *Enrica Lexie Award* (n 2) paras 68, 75, 521.

21. *Owners, Officers and Men of the Wanderer (GrBr).v United States, Decision* (1921) VI RIAA 68, 71–75; *The Arctic Sunrise Arbitration (Netherlands v Russia), Award on the Merits* [2014] PCA 2014-02 (Arbitral Tribunal (UNCLOS, Annex VII)) [233–333, 401(C)].

22. *Enrica Lexie Award* (n 2) para 510 (emphasis added).

23. ibid 896, 907.

24. ibid 514–517.

Nonetheless, in response, the Tribunal's analysis did not limit Article 92(1) of UNCLOS to exclusive enforcement jurisdiction. Instead, the Tribunal adopted an expansive interpretation of exclusive flag State jurisdiction so as to also include exclusive prescriptive jurisdiction:

> (a) *The concept of exclusive jurisdiction of the flag State*
> 524. The principle of exclusive flag State jurisdiction has been recognised as an 'essential adjunct to the principle of the freedom of the seas' or a 'corollary of the open and free status of the high seas'.
> 525. The concept of 'jurisdiction', derived from the Latin *juris dicere* (literally: 'to speak the law'), while broadly used in international law, remains largely undefined in the case law of international courts and tribunals.
> 526. One may distinguish between prescriptive jurisdiction, adjucative jurisdiction, and enforcement jurisdiction. Prescriptive jurisdiction is the authority of a State to make laws in relation to persons, property, or conduct; adjudicative jurisdiction is the authority of a State to apply law to persons or things; and enforcement jurisdiction is the authority of a State to exercise its power to compel compliance with law. Under international law, *the exercise of jurisdiction* by a State *entails an element of prescribing laws*, rules, or regulations over conduct, *or applying or enforcing such laws*, rules, or regulations over persons or property.
> 527. *It follows from the above analysis that the principle of exclusive flag State jurisdiction under the Convention is violated when a State other than the flag State seeks to prescribe laws, rules, or regulations over a ship of the flag State, or applies or enforces such laws, rules, or regulations in respect of such a ship.* The Arbitral Tribunal also recalls in this respect the observation of ITLOS in *M/V 'Norstar'* that the principle of exclusive flag State jurisdiction 'prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas'.[25]

25. *Enrica Lexie Award* (n 2) (emphasis added; notes omitted).

Unfortunately, this section of the *Award* provides little clarification or reasoning for the Tribunal's interpretation of Article 92(1) of UNCLOS. The *Award* therefore does not respond to the numerous dissenting opinions of the previous ITLOS *Enrica Lexie Provisional Measures Order*, opinions which suggested UNCLOS (including Article 92) was silent on extraterritorial prescriptive jurisdiction concerning crimes (e.g., murder) at sea.[26] Such reasoning would have also been welcome because the Tribunal has purposively sought, through obiter dictum, to contribute to a broadening interpretation of Article 92(1) of UNCLOS. This is because any question of exclusive flag State prescriptive jurisdiction was not vital to resolving the Parties' dispute on Article 92, i.e., whether India's conduct amounted to an exercise of unauthorised enforcement jurisdiction in the EEZ.

The analysis in Paragraphs 524–526 of the *Award* does not examine Article 92(1) of UNCLOS itself. It is difficult to conclude how 'it follows' from a general introduction to the concept of jurisdiction in international law that jurisdiction in Article 92(1) of UNCLOS must refer to prescriptive and enforcement jurisdiction.[27] As the Tribunal highlights, 'jurisdiction' is often not explicitly defined and, depending on the circumstances and context of each use, can refer to prescription jurisdiction, enforcement jurisdiction, or both. Tellingly, one of the general authorities on jurisdiction cited by the *Award*[28] was also cited in

26. *"Enrica Lexie" (Italy v India), Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Lucky* [2015] ITLOS 24, ITLOS Reports 2015 268 [36, 60]; *"Enrica Lexie" (Italy v India), Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Vice-President Bouguetaia* [2015] ITLOS 24, ITLOS Reports 2015 232 [15]; *"Enrica Lexie" (Italy v India), Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Ndiaye* [2015] ITLOS 24, ITLOS Reports 2015 246 [23].

27. *"Enrica Lexie Award* (n 2) para 527.

28. "Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015).

a seven-strong Joint Dissenting Opinion to the *M/V Norstar Judgment* reaching an opposing, more restrictive, interpretation of Article 92(1) of UNCLOS as referring solely to enforcement jurisdiction.[29]

In support of its interpretation of Article 92(1) of UNCLOS, the Tribunal only refers to the *M/V Norstar Judgment*. Unfortunately, the Tribunal, like the ITLOS in its *M/V Norstar Judgment*, advanced its interpretation of Article 92 of UNCLOS without detailed reasoning and without the support of jurisprudence, State practice, or subsequent treaties. At least one of the authorities cited by the *Award* to support its interpretation of Article 92(1) has referred to the *M/V Norstar Judgment* as appearing 'contrary to actual state practice'.[30] Neither of the current leading academic commentaries to UNCLOS adopt an expansive interpretation of Article 92(1) of UNCLOS, instead treating exclusive jurisdiction as one of enforcement.[31]

Tellingly, while the Tribunal refers to the *M/V Norstar Judgment* for its interpretation of Article 92(1) of UNCLOS, the Parties, at least according to the summaries of their arguments as represented in the *Award*, did not. Italy's objection to India's exercise of extraterritorial prescriptive jurisdiction only refers to the *M/V Norstar Judgment* to support its sub-

29. *M/V 'Norstar' (Panama v Italy), Judgment, Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge ad hoc Treves* [2019] ITLOS 25, ITLOS Reports 2018–2019 10.

30. Cedric Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (Oxford University Press 2020) 152. For literature supportive of applying the broad interpretation to the *Enrica Lexie* incident, see Daniele Fabris, 'Crimes Committed at Sea and Criminal Jurisdiction: Current Issues of International Law of the Sea Awaiting the "Enrica Lexie" Decision' (2017) 9(2) Amsterdam Law Forum 5, 18.

31. Douglas Guilfoyle, 'Article 92' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) paras 1, 6–11; Myron Nordquist, Satya Nandan and Shabtai Rosenne, *UN Convention on the Law of the Sea Commentary 1982 Online* (Brill 2013) 126–127. The later predominantly discusses enforcement exceptions, albeit with some uncertainty by raising Article 218 of UNCLOS which concerns prescriptive jurisdiction.

mission that, in lacking a recognised legal basis, India's legislation would violate Article 87 of UNCLOS.[32] Article 92(1) was not envisaged as relevant to this part of the dispute. To the contrary, it appears Italy itself was asserting extraterritorial prescriptive jurisdiction concerning the offences of murder and complicity in murder committed on the high seas by its nationals.[33] For the Italian assertion of prescriptive jurisdiction the fact that the offence occurred on an Italian vessel and Indian vessel was immaterial — as was Article 92 of UNCLOS.

On its part, India highlighted the highly controversial nature of the *M/V Norstar Judgment* and attempted to distance the *Enrica Lexie* incident from its findings.[34] More generally, India advanced numerous customary law bases of prescriptive jurisdiction that are not found in UNCLOS, nor any other applicable treaty, such as passive personality-based jurisdiction. India also argued that 'while a coastal State does not have sovereignty over its exclusive economic zone, "this does not mean that it has no rights beyond the sovereign rights and the jurisdiction expressly recognized in the Convention"'.[35] Both references would seemingly be in direct contrast to both Tribunals' interpretations of Article 92(1) in the *M/V Norstar Judgment* and *Enrica Lexie Award* as including exclusive flag State prescriptive jurisdiction.

4. Application of Exclusive Flag State Jurisdiction

Following the Tribunal's broad interpretation of Article 92 of UNCLOS it remained necessary to settle the Parties' disagreements on the applica-

32. *Enrica Lexie Award* (n 2) paras 309–310.

33. ibid 209 referring to Article 110 and 575 of the Italian Penal Code.

34. ibid 336–337, 518–519.

35. ibid 336–337, 518–519.

tion of UNCLOS to the *Enrica Lexie* incident. This section reviews the Tribunal's finding in so far as each dispute concerns the interpretation and application of Article 92(1) of UNCLOS.

4.1. Applying Article 92

As per Italy's submission, on the facts the Tribunal's analysis of Submission 2(b) only assessed whether any of the alleged conduct of India included an element of *enforcement* jurisdiction which could therefore violate Article 92(1) of UNCLOS.[36] The Tribunal's application of Article 92 was thus much more restricted than its doctrinal restatement of Article 92.

The Tribunal also unanimously found that Italy's physical interference in the navigation of the *St Antony*, within the Indian EEZ and without legal basis, violated Articles 87 and 90 of UNCLOS.[37] As acts of physical interference attributable to Italy, this could have also raised a violation of Article 92(1) of UNCLOS — but this was not included in India's submissions.[38]

4.2. Applying Customary Law-Based Prescriptive Jurisdiction

In response to Italy's submission that India's *1976 Maritime Zones Act* and *1981 Notification* were incompatible with UNCLOS, India argued that its exercise of jurisdiction over the incident was not based on that legislation but rather the territoriality principle or passive personality principle.[39] The Tribunal accepts that a State may, by virtue of an ex-

36. ibid 528–536.

37. ibid 1036–1043.

38. Attribution: ibid 860–862.

39. ibid 352–359.

tended territoriality principle, exercise prescriptive jurisdiction over its flagged vessels as if offences aboard the vessel were committed in its territory.[40] The Tribunal also accepts that the objective and subjective territoriality principles would apply to vessels so that a flag State's prescriptive jurisdiction may extend beyond the vessel to related acts initiated or concluded extraterritorially. This includes the acts of foreign nationals aboard foreign-flagged vessels on the high seas. '[W]here an offence was commenced on board one vessel and completed on board another vessel, the flag States of both vessels may have concurrent jurisdiction over the offence'.[41] Such customary law prescriptive jurisdiction is entirely valid, but not codified in any relevant international treaties and therefore is not what Article 92(1) of UNCLOS envisages as 'exceptional cases expressly provided for in international treaties or in [UNCLOS]'. This alone already suggests that questions of whether the extended territoriality principle provides lawful prescriptive jurisdiction in any given case are answered without recourse to 'exclusivity' and Article 92 of UNCLOS.

The Tribunal's engagement with objective and subjective territoriality is a welcome addition. One critique of the *M/V Norstar Judgment* was its failure to do so despite the Italian submissions on this matter within that case.[42] However, the *Award* immediately follows this addition with another ambiguous statement on Article 92(1) of UNCLOS:

> Furthermore, in the Arbitral Tribunal's view, India's exercise of jurisdiction over the 'Enrica Lexie' incident is not only compatible with the Convention, but *justified by Article 92, paragraph 1, of the Convention, which provides for the principle of exclusive flag State jurisdiction*. Pursuant to this principle, India, as the flag State, has *exclusive jurisdiction* over the

40. ibid 364–365.

41. ibid 366, 840.

42. *M/V 'Norstar' Judgment, Joint Dissenting Opinion* (n 29) paras 22–32.

> 'St. Antony' and may assert its jurisdiction in respect of the offence that was allegedly completed on board its vessel in the exclusive economic zone, in the same way as Italy, as the flag State, has *exclusive jurisdiction* over the 'Enrica Lexie' and may assert its jurisdiction in respect of the offence that was allegedly commenced on board its vessel.[43]

Had the Tribunal limited the concept of exclusive flag State jurisdiction to enforcement jurisdiction at-sea, this statement would clarify that the previously recognised concurrent prescriptive jurisdiction of Italy and India over a transboundary/trans-vessel offence does not affect the exclusive enforcement jurisdiction of each State concerning its vessel in the EEZ. There is no express exception to exclusive flag State jurisdiction concerning the crime of murder, so neither State could take non-consensual enforcement measures in the EEZ or high seas against any foreign vessel involved. Both States could, however, exercise prescriptive jurisdiction over the offence and await the foreign vessel's entry into its territorial enforcement jurisdiction, such as entering its ports. Enforcement could then occur. Instead, the Tribunal's statement that the exclusive flag State jurisdiction concerns both prescriptive and enforcement jurisdiction results in a series of paragraphs which suggest prescriptive jurisdiction over a vessel can be simultaneously 'concurrent' and 'exclusive'. That suggestion directly conflicts with the ordinary meanings of these diametrically opposite terms.

The Tribunal felt it was unnecessary to address the validity of the passive personality principle once territoriality was established.[44] Given today's heightened awareness of gross human rights abuses at-sea, including modern day slavery and the murder of fishers or observers, a positive

43. *Enrica Lexie Award* (n 2) para 368 (emphasis added).

44. ibid 369. Supporting India's position: Mahin Sobhani, 'Study on the Criminal Jurisdiction on the Exclusive Economic Zone with Emphasis on Enrica Lexie case' (2021) 2(1) The Iranian Review for Law of the Sea and Maritime Policy 199, 205-206.

affirmation of the continual applicability of this customary jurisdiction at-sea, regardless of Article 92 of UNCLOS, could promote greater safety and human security at sea.[45] At the time of writing, the major flag States are *not* the major labour supply States of either merchant shipping or fisheries related vessels. India apparently raised significant State practice to support its position. Italy objected to its applicability in this case but, while sceptical, does not appear to outright object to its applicability at-sea.[46] Other previously sceptical States, such as the USA, exercise prescriptive personality-based jurisdiction and explicitly include murder of a US national aboard a foreign vessel as one such example.[47]

4.3. Applying Articles 87 and 90

The *Award* reaffirms the intimate link between exclusive flag State jurisdiction and the freedoms of the high seas.[48] It also reaffirms that extraterritorial prescriptive jurisdiction over foreign-flagged vessels, without a valid legal basis, would violate Article 87 of UNCLOS[49] and related provisions such as Article 90.[50] Article 87 of UNCLOS protects a flag

45. *Contra*, arguing Article 92 of UNCLOS limits passive personality-based jurisdiction: Angela Del Vecchio, 'The Fight Against Piracy and the Enrica Lexie Case', in Lilian del Castillo (ed) *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill 2015) 404-405.

46. *Enrica Lexie Award* (n 2) paras 323–324, 345.

47. 18 United States Code 2020 § 7(7)-(8), 1111(b).

48. Previously, e.g., M/V *'Norstar' Judgment* (n 9) paras 216–218, 225.

49. *Enrica Lexie Award* (n 2) paras 468–473.

50. ibid 1037–1038. On enforcement, see *The Case of the SS Lotus (France v Turkey), Judgment* [1927] PCIJ 9, PCIJ Series A No 10 25; *M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment* [1999] ITLOS 2, ITLOS Reports 1999 10 [149–150]; *Arctic Sunrise (Merits)* (n 21) paras 332–333. On prescription, see *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment* [2014] ITLOS 19, ITLOS Reports 2014 4 [220–222] (implicit); *M/V 'Norstar' Judgment* (n 9) para 224; *M/V 'Norstar' Judgment, Joint Dissenting Opinion* (n 29) paras 14–17.

State's vessels from unlawful exercises of prescriptive jurisdiction by non-flag States on the high seas or within EEZs. As confirmed in the *South China Sea Arbitration*, Article 56 of UNCLOS also protects a coastal State's jurisdiction over those vessels within its exclusive EEZ rights and jurisdiction from being subject to unlawful exercises of prescriptive jurisdiction by non-coastal States within its EEZ.[51]

The freedoms of the high seas are an interrelated but distinct principle to that of exclusive flag State jurisdiction. As the latter is a 'component' of high seas freedoms, Article 87 of UNCLOS is implicitly broader on the matter of jurisdiction at sea so as to not be superfluous.[52] The *Award* nonetheless appears to blur this boundary by reiterating that Article 92(1) of UNCLOS codifies a longstanding customary principle that:

> [A]part from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.[53]

This is in direct reference to the *S.S. Lotus Judgment* and is the same sole precedent cited in the *M/V Norstar Judgment* to support its controversial

51. *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China), Award* [2016] PCA 2013-19 (Arbitral Tribunal (UNCLOS, Annex VII)) [716] whereby Chinese prescriptive jurisdiction exercised in the EEZ of the Philippines breached Article 56 because it extended beyond the regulation of Chinese vessels to include the regulation of foreign flagged (Filipino) vessels without legal basis. It was thus contrary to the otherwise reserved Filipino jurisdiction for fisheries therein.

52. ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) II Yearbook of the International Law Commission 187, 219 as far as *ut res magis valeat quam pereat* is a general rule it is embodied in Article 31(1) of VCLT.

53. *Enrica Lexie Award* (n 2) para 467.

reading of Article 92 of UNCLOS.[54] However, the Tribunals in both the *Enrica Lexie Award* and the *M/V Norstar Judgment* did not emphasise that the *S.S. Lotus Judgment* was likely discussing at-sea enforcement jurisdiction. On ex-post adjudicative jurisdiction, which presupposes valid extraterritorial prescriptive jurisdiction, the PCIJ stated that 'it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas'.[55] This caveat by the PCIJ was not addressed in the *M/V Norstar Judgment* nor the *Enrica Lexie Judgment*.[56]

What is more, if jurisprudence predating UNCLOS is being considered, the *Muscat Dhows Case* appears informative on the general approach to prescriptive jurisdiction at-sea whenever express treaty provisions do not provide otherwise. The Tribunal's starting point was that:

54. *SS Lotus* (n 50) 25; *M/V 'Norstar' Judgment* (n 9) para 216. Critical reflections, see: Richard Collins, 'The M/V "Norstar" Case (Panama v. Italy) (ITLOS)' (2019) 58 International Legal Materials 673; Eduardo Jiménez, 'La Sentencia Del Tribunal Internacional Del Derecho Del Mar De 10 De Abril De 2019 En El Caso M/V Norstar (Panamá C. Italia)' in Eduardo Jiménez and others, *Revista Electrónica de Estudios Internacionales*, vol 2019 (2019); Alla Pozdnakova, 'Oceans as Spaceports: State Jurisdiction and Responsibility for Space Launch Projects at Sea' (2020) 26 Journal of International Maritime Law 267, 275–277; Chie Kojima, 'Modern Slavery and the Law of the Sea: Proposal for a Functional Approach' (2021) 9 The Korean Journal of International and Comparative Law 4, 14–17; Vasco Becker-Weinberg, 'The Interpretation and Application of the Freedom of Navigation and Flag State Jurisdiction in the M/V "Norstar" and the M/T "San Padre Pio" Cases' (2021) 9 The Korean Journal of International and Comparative Law 108.

55. *SS Lotus* (n 50) 25. On transboundary criminal law, "Customary international law does not prevent States from asserting jurisdiction over acts that took place outside their territory on the basis of the territoriality principle" *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* [2019] ICC-01/19-27 (ICC Pre-Trial Chamber III) [56–62]. "There is no apparent reason why the threshold for territorial jurisdiction would be different based on whether the location of the conduct/crime is on land or vessel/aircraft" ibid 48.

56. *M/V 'Norstar' Judgment, Joint Dissenting Opinion* (n 29) paras 19, 36. Busco and Fontanelli (n 8) 408-412.

> the legal situation of vessels flying foreign flags and of the owners of such vessels in the territorial waters of an Oriental State is determined by the general principles of jurisdiction, by the capitulations or other treaties and by the practice resulting therefrom.[57]

While in this case a bilateral treaty had limited enforcement jurisdiction within the territorial sea, this expressly had no consequence for the exercise of nationality-based jurisdiction by the Sultan of Muscat over owners, masters, or crew members of such vessels.[58]

4.4. Applying Article 97

It was previously argued that the necessity for, and existence of, Article 97 of UNCLOS was testament to the fact that exclusive flag State jurisdiction under Article 92 of UNCLOS concerns enforcement and not prescriptive jurisdiction.[59] The *Award*'s reasoning on Article 97 of UNCLOS would support this proposition, notwithstanding the *Award*'s opposing conceptualisation of exclusive flag State jurisdiction:

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57. *Muscat Dhows (France/Great Britain), Award (Official Translation)* [1905] PCA 1904-01 (Arbitral Tribunal (Compromis)) 4.

58. ibid 5.

59. Honniball, 'The Exclusive Jurisdiction of Flag States' (n 7) 525–526; Benedetto Conforti, 'In Tema Di Giurisdizione Penale per Fatti Commessi in Acque Internazionali' (*Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea*) <http://www.sidi-isil.org/wp-content/uploads/2012/10/Conforti1.pdf>; Douglas Guilfoyle, 'Shooting Fishermen Mistaken for Pirates: Jurisdiction, Immunity and State Responsibility' (EJIL: Talk!, 2 March 2012) <https://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility/>; Duncan B Hollis, 'The Case of Enrica Lexie: Lotus Redux?' (*Opinio Juris*, 17 June 2012) <http://opiniojuris.org/2012/06/17/the-case-of-enrica-lexie-lotus-redux/>.

> The PCIJ's [*S.S. Lotus*] judgment, which decided that both France and Turkey were entitled to exercise penal jurisdiction over the French officer, was reversed with 'the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation'. Article 35 of the ILC Draft Articles Concerning the Law of the Sea accordingly *reserved* exclusive penal jurisdiction to either the flag State of the ship on which the accused person serves, or the State of which the accused person is a national, with the latter addition made 'in order to enable States to take penal or disciplinary measures against their nationals serving on board foreign vessels who are accused of causing collisions'.
>
> 646. *It is thus apparent that an exception to the otherwise prevailing rules on allocating jurisdiction was created specifically for a situation* where the master or any other person in the service of a ship are at risk of facing penal proceedings before foreign courts in respect of navigational conduct on the high seas; such risk would typically arise only where some form of damage or harm has occurred as a result of navigation.[60]

The Tribunal did not address the relationship between its conclusions on Article 97 and Article 92, but it is argued here that its reasoning on the former would not support its reasoning on the latter. Paragraph 646 of the *Award* interprets Article 97 in the context of the general international law on allocating prescriptive jurisdiction and not exclusive flag State prescriptive jurisdiction. This is an implicit application of the restrictive interpretation of Article 92, despite the Tribunal's previous explicit statement supporting an expansive interpretation. As argued by India, Article 97 of UNCLOS (and other intermediate treaties) leave intact

60. *Enrica Lexie Award* (n 2) paras 645–646 (emphasis added).

the position of the *S.S. Lotus Judgment* in respect of criminal prescriptive jurisdiction at-sea beyond those expressly reversed cases of 'collisions or other incidents of navigation'.[61]

4.5. Applying the Immunity of State Officials

When addressing Italy's submission on the immunity of the marines, the Tribunal's statement of dual concurrency and exclusivity for flag State jurisdiction is repeated, raising possible further confusion:

> Pursuant to Article 58, paragraph 2, and Article 92, *each Party has exclusive jurisdiction over their respective ship* involved in the incident, namely, Italy over the 'Enrica Lexie' and India over the 'St. Antony'. *The Parties therefore have concurrent jurisdiction over the incident.*[62]

Had exclusivity been limited to enforcement, one could interpret this without internal conflict as referring to exclusive enforcement over the vessel and concurrent prescriptive jurisdiction over the incident (extending to prescriptive jurisdiction over the foreign-flagged vessel involved by way of extended territoriality).

The Tribunal's discussion of immunity also puts to rest any suggestion that by exercising objective or subjective territorial jurisdiction there is no extraterritorial effect or scope to the laws applicable to a foreign-flagged vessel. India had argued that a territorial tort exception to immunity would preclude the Italian marines from enjoying immunity *ratione ma-*

61. ibid 633. On this issue: Giuseppe Cataldi, 'The Enrica Lexie Award Amid Jurisdictional and Law of the Sea Issues' (2021) 30(1) The Italian Yearbook of International Law Online 167, 176-179. For another recent case concerning interpretation of Article 97 of UNCLOS; Changwoo Ha, 'Criminal jurisdiction for ship collision and marine pollution in high seas-Focused on the 2015 judgement on M/V Ernest Hemingway case' (2020) 4(1) Journal of International Maritime Safety, Environmental Affairs, and Shipping 8.

62. *Enrica Lexie Award* (n 2) para 839 (emphasis added).

teriae. However, in rejecting its application to this incident, the Tribunal recognises that in this case India's law is prescribing standards of conduct concerning foreign nationals aboard foreign vessels in the EEZ:

> In the present case, it is undisputed that *the Marines were on board the 'Enrica Lexie',* and not on Indian territory, *when they committed the acts at issue* [...] to the extent that the "territorial tort" exception is a customary rule of international law, it would in any event not apply in this case because *the Marines were not on Indian territory when they committed the acts at issue*.[63]

Article 87 (and Article 92 for the Tribunal in *Enrica Lexie*) are *applicable* when a non-flag State exercises extraterritorial prescriptive jurisdiction over foreign vessels in the EEZ or high seas. Nonetheless, a greater standard of appreciation is required to establish a *breach* thereof. The extension and extraterritorial effect of Indian law governing the acts of foreign nationals aboard a foreign vessel were justified — in so far as the applicable Articles of UNCLOS — by the extended territoriality principle.[64]

5. Dangers of Divergence

International judicial decisions are sometimes a compromise among the Tribunal's Members. The text of decisions may thus reflect these differences or use broad and compromissory language that is open to differing interpretations, so as to achieve consensus. Furthermore, given the preference and priority of settling disputes by negotiation or other peaceful means, courts and tribunals are rarely asked to rule on clear-cut legal questions.

63. ibid 871–873 (emphasis added).

64. Contra *M/V 'Norstar' Judgment* (n 9) para 226 whereby the extension of Italian law to foreign vessels on the high seas was sufficient to both raise Article 87 as applicable and as violated (despite the distinction set out by the Tribunal in para 188).

An inherent danger of internal divergence nonetheless arises. Conflicting reasoning may result in a matter remaining unsettled, possibly resulting in the continuation of the dispute. The 1927 *S.S. Lotus* reasoning on extraterritorial jurisdiction is testament to this, with most literature of jurisdiction beginning with the debate on whether the prohibitive rule or the permissive principles approach to prescriptive jurisdiction is correct. This remains so despite the lack of State practice supporting the unlimited unless prohibited approach.[65]

International judicial decisions may also raise external divergence if the interpretation and application of UNCLOS was to conflict with the legal outcomes or directions of another dispute settlement procedure that is seized of similar facts, or more broadly the interpretation of State Parties as evident in subsequent State practice or agreements regarding the interpretation and application of UNCLOS. Divergencies with State practice and reasoning may also raise more general concerns, such as trust in courts and tribunals, faith in their interpretation, loyal implementation of their judgments by Parties to a dispute, and the fragmentation of international law concerning overlapping fields — here, the law of State jurisdiction and the law of the sea. More broadly, unclear reasoning may prolong or aggravate other disputes relating to exclusive flag State jurisdiction.

In cases of external divergence, it is difficult to give much weight to the *Award*'s views on the scope of exclusive flag State jurisdiction and Article 92 of UNCLOS because the Tribunal has not given reasons for its interpretation.[66] In such cases, explanatory reasoning would be of benefit to the international community and the lasting legacy of the Tribunal's jurisprudence.

65. Ryngaert (n 28) 29–48.

66. A point raised in another context, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates), Provisional Measures, Order of 23 July 2018, Joint Declaration of Judges Tomka, Gaja and Gevorgian* [2018] ICJ 172, ICJ Reports 435 [5].

5.1. Internal Consistency

One envisaged avenue to improve internal consistency is that the Tribunal may be using a different definition of 'exclusive' than its ordinary understanding. Essentially, exclusive jurisdiction would then be reduced to meaning a flag State has exclusive prescriptive jurisdiction unless another State has jurisdiction; be that prescriptive jurisdiction established in treaty law or customary international law.

However, as Article 92(1) of UNCLOS is limited in application to extraterritorial maritime zones, States already require a recognised jurisdictional nexus in general international law when prescribing laws concerning foreign-flagged vessels or persons aboard. If this was the Tribunal's understanding of 'exclusive', this would mean that on the point of exclusive flag State jurisdiction, Article 92(1) of UNCLOS simply repeats general international law, without any unique contribution beyond enabling compulsory dispute settlement via Part XV of UNCLOS.

Arguably, this could be a dangerous proposition for the law of the sea. It is well recognised that Article 92(1) of UNCLOS does *at least* protect vessels from foreign enforcement jurisdiction on the high seas or in the EEZ, unless 'exceptional cases expressly provided for' apply. The Tribunal reasons that, because Article 92(1) does not define which 'jurisdiction' it is referring to, it must include both exclusive prescriptive and enforcement jurisdiction. But the logical end of that reasoning is that the same expansive interpretation applies to the scope of exceptions to exclusive 'jurisdiction'. For example, the Tribunal accepts India's objective territoriality as one case where prescriptive jurisdiction can be exercised over acts committed aboard an Italian vessel in the EEZ. There is an exception to Italy's exclusivity. But, following the Tribunal's expansive interpretation of Article 92 of UNCLOS, on what basis would this exception not also provide an exception for India to exercise extraterritorial enforcement jurisdiction against an Italian vessel in India's EEZ?

There is nothing in the wording of Article 92(1) of UNCLOS for which a differing test could be established for questions of exclusive prescriptive jurisdiction and questions of exclusive enforcement jurisdiction. If Article 92(1) of UNCLOS is not reserved to only refer to exclusive enforcement jurisdiction, the ability to distinguish these frequent cases of permissible prescription but impermissible enforcement disappears. Many States would balk at such a dilution of their rights of exclusive enforcement jurisdiction.

Alternatively, one might narrowly read the *Enrica Lexie Award* and the *M/V Norstar Judgment* in context so as to apply their discourse on Article 92 of UNCLOS to only governing the relationship between coastal State jurisdiction and flag State jurisdiction. Compared to other cases of overlapping jurisdiction, UNCLOS does set out to a greater degree the division of coastal State jurisdiction and flag State jurisdiction. UNCLOS also includes provisions, such as Article 59, to assist in unattributed cases. A coastal State does not have prescriptive jurisdiction in the EEZ or high seas beyond those entitlements established by, or under, the UNCLOS framework. On this hypothesis, a contextual reading of the *Enrica Lexie Award* and the *M/V Norstar Judgment* would assist in narrowing and clarifying the Tribunals' interpretations and applications of Article 92 of UNCLOS.

The facts of the *M/V Norstar Judgment* might lend themselves to such a contextual reading.[67] However, this is less persuasive in refining the *Enrica Lexie Award* because of the reframing of India's disputed jurisdiction during this saga from one of a coastal State's penal law in the EEZ and contiguous zone (witnessed in India's domestic proceedings) to one of

67. *M/V 'Norstar' (Panama v Italy), Judgment, Declaration of Judge Kelly* [2019] ITLOS 25, ITLOS Reports 2018–2019 10, 2 which, while welcoming clarification of the exclusive flag State jurisdiction concept, does so in the context of emphasising the flag-coastal balance of UNCLOS. *al Measures, Order of 23 July 2018, Joint Declaration of Judges Tomka, Gaja and Gevorgian* [2018] ICJ 172, ICJ Reports 435 [5].

objective flag State jurisdiction (witnessed in the arbitral proceedings). Within the *Enrica Lexie Award* the Tribunal was therefore discussing the wider role of Article 92 in balancing jurisdiction on the high seas and EEZ as between the flag State and all other jurisdictions recognised in UNCLOS and compatible customary international law (in this case another flag State).[68] It is in this more general context that the conceptualisation of Article 92 as including exclusive flag State prescriptive jurisdiction is difficult to reconcile with State practice and other sections of the *Award* that recognise concurrent jurisdiction, in particular the discussions on the exceptionalism of Article 97 of UNCLOS in narrowing penal jurisdiction in limited and defined scenarios.

5.2. External Consistency

As argued previously, an interpretation of exclusive flag State jurisdiction in the wider context of UNCLOS and its object and purpose would point towards 'jurisdiction' as referring to enforcement jurisdiction. Nonetheless, another decisive element appears to be the interpretation of State Parties as evident in subsequent State practice and agreements which clearly extend customary principles of State jurisdiction to foreign vessels on the high seas and EEZ, without limitation and without the necessity of concurrent treaty-based jurisdiction.[69]

For example, one may consider the extensive State practice on active personality-based prescriptive jurisdiction extending to foreign-flagged vessels,[70] or the simple lack of any limitation to applying the universality principle to crimes involving foreign-flagged vessels. What is more, mul-

68. See references to customary and general international law in UNCLOS Preamble and Articles 58(2)-(3), 221(1), 293, 297(1)(b) and 311(2).

69. VCLT Article 31(3).

70. Simone Vezzani, *Jurisdiction in International Fisheries Law. Evolving Trends and New Challenges* (CEDAM 2020), 182-195.

tilateral treaties predating UNCLOS (e.g., *Convention for the Protection of Submarine Telegraph Cables*)[71] and subsequent to UNCLOS (e.g., *Port State Measures Agreement*),[72] distinguish prescriptive and enforcement jurisdiction at-sea, presupposing general customary law principles such as nationality-based jurisdiction apply, regardless of flag State and regardless of whether the flag State is a Contracting Party. Contrary State practice, for example, where the exercise of extraterritorial prescriptive jurisdiction is explicitly excluded as a matter of legal obligation, is not known to this author.

Legal uncertainties are detrimental to State Parties and general efforts to protect the maritime community and marine environment. Urbina's damning expose in *The Outlaw Oceans* highlights the often exacerbating lack of political will for international cooperation and enforcement concerning crimes that are committed far from shore.[73] Likewise, when addressing entities involved in emerging maritime concerns with a jurisdictional nexus to the State, State responses should not be unnecessarily complicated by expansive interpretations of Article 92 of UNCLOS. It would be very unfortunate if the *M/V Norstar Judgment* and *Enrica Lexie Award* begin to have a chilling effect on the extension of perfectly valid customary law prescriptive jurisdiction to activities involving foreign-flagged vessels.

71. Convention for the Protection of Submarine Telegraph Cables, signed 14 March 1884, TS 380 (entered into force, 1 May 1988) Article 8 (possible exercise of nationality-based jurisdiction).

72. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 22 November 2009, 55 ILM 1157 (entered into force 5 June 2016), Preamble, Articles 15(a)(ii) and 18(1)(a) (transmit inspection results to the State of nationality – in the hope that an adequate response occurs).

73. Ian Urbina, *The Outlaw Ocean: Journeys Across the Last Untamed Frontier* (Alfred A. Knopf 2019).

6. Conclusion

The practical legacy of the *Award* in resolving the Parties' dispute is clear.[74] As required by the *Award*, in 2021 Italy and India reached agreement on the quantification of compensation due to India and this has been duly paid.[75] In turn, the criminal cases against the Italian marines were discharged and India has therefore ceased to exercise criminal jurisdiction over the Italian marines.[76] The continuation and eventual conclusion of the Italian criminal investigation into the incident, with the cooperation of India, is the last remaining step to bring the *Enrica Lexie* incident to conclusion.

However, the doctrinal contribution of the *Award* to clarifying the appropriate interpretation and application of Article 92(1) of UNCLOS is less clear, and arguably less positive. The Tribunal's statement on conceptualising exclusive flag State jurisdiction takes the broadest possible interpretation of Article 92(1) to include exclusive flag State prescriptive and enforcement jurisdiction, with little reasoning or support. And yet, when applying Article 92(1) to Italy's submission, or when Article 92(1) is indirectly raised, the Tribunal's reasoning limits exclusive flag State jurisdiction to enforcement jurisdiction, as per the restrictive approach. The latter may be a saving grace for the particular findings of the *Enrica Lexie Award*, but to repeat the same mistakes of the *M/V Norstar Judgment* in its doctrinal restatement of Article 92(1) of UNCLOS is shaping to be an untenable

74. For a contextual reading, whereby Tanzi argues the use of third-party dispute settlement was complementary to wider diplomatic means and the abatement of circumstances making continued a negotiated settlement unfeasible, Attila M Tanzi (n 5), 451-453.

75. *Enrica Lexie Award* (n 2) para 1094(B)(6)(b); *Special Leave Petition (Civil) No. 20370 of 2012 (Massimilano Latorre and others v. Union of India and others), Order of 15 June 2021*, Supreme Court of India (2021), para 3, available at <https://main.sci.gov.in/supremecourt/2012/22647/22647_2012_41_43_28070_Order_15-Jun-2021.pdf>.

76. *Enrica Lexie Award* (n 2) para 1094(B)(2); *Special Leave Petition (Civil) No. 20370 of 2012, Order of 15 June 2021* (n 75) para 7.

trend in current jurisprudence. The trend within other international fora is certainly not to suggest exclusive flag State prescriptive jurisdiction on the high seas but rather promote the exercise of all available jurisdictions.[77]

Neither the facts nor the positions of the Parties required the Tribunal to, without reasoning, support the *M/V Norstar Judgment*'s interpretation of Article 92(1). Given the Tribunal's contradictory support of concurrent prescriptive jurisdiction in other sections of the *Award*, either Paragraphs 524–527 should have been deleted, or they should have been significantly expanded to include reasoning, State practice, and application of the rules of treaty interpretation to justify their conclusion. That opportunity was lost.

Equally, when discussing flag State jurisdiction, it would be best to refrain from simultaneously referring to concurrent and exclusive jurisdiction. The Concurring and Dissenting Opinion of Judge Rao provides a good example, simply referring to concurrent flag State jurisdiction under Article 92 of UNCLOS.[78] Given the internal and external inconsistencies of the *Award*'s broadly construed *interpretation* of Article 92 of UNCLOS — and the very real potential this has to mislead those who do not delve into the more fine-tuned *application* of Article 92 of UNCLOS within the *Award* — it has been necessary here to discuss and clarify this aspect of the *Award*.[79] This remains all the more so given that

77. FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2001) para 9.3.

78. *The 'Enrica Lexie' Incident (Italy v India), Award, Concurring and Dissenting Opinion Dr Sreenivasa Rao Pemmaraju* [2020] Arbitral Tribunal (UNCLOS, Annex VII) PCA Case No. 2015-28 [19].

79. However, see Ringbom's engaging and accessible articulation of jurisdiction at sea, including in the BBNJ negotiations context which may represent a missed opportunity to explicitly realign the existing egocentric jurisdictional framework with the community interests such an instrument is purported to serve: Henrik Ringbom, 'Ships in ABNJ – Broadening Jurisdictional Opportunities for Non-Flag States' in Vito De Lucia, Alex Oude Elferink, and Lan Ngoc Nguyen (eds) *International Law and Marine Areas beyond National Jurisdiction: Reflections on Justice, Space, Knowledge and Power* (Brill 2022).

the undisputed core of the dispute was the question of jurisdiction over the incident vis-à-vis Articles 92 and 97 of UNCLOS.[80]

Regardless of whether one agrees with the Tribunal's interpretation of Article 92 as incorporating exclusive flag State prescriptive and enforcement jurisdiction, or the position affirmed here that it refers to enforcement jurisdiction, it is desirable to persuasively define the scope of 'jurisdiction' in Article 92(1) of UNCLOS. Legal clarity is necessary to either protect flag States from other States exercising prescriptive jurisdiction prohibited by UNCLOS, or to avoid unnecessary uncertainties and possible inhibitions to the rights of non-flag States to regulate persons, property, or conduct at sea whenever they fall within their established jurisdictional entitlements. This author would clearly side with the latter and the need to avoid any chilling effects of the *Enrica Lexie Award*'s and the *M/V Norstar Judgment*'s general statements on Article 92 of UNCLOS going forward.

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80. By contrast, the Award's interpretation and application of Article 97 of UNCLOS has been subject to detailed analysis: Andrea Cannone 'L'interpretazione della espressione "altri incidenti di navigazione" di cui all'art. 97 della Convenzione sul diritto del mare nella sentenza arbitrale del 21 maggio 2020 relativa alla vicenda della Enrica Lexie (Italia c. India)' (2021) Ordine Internazionale e Diritti Umani 283.

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VI

The Legal Understanding of the Terms 'Ship' and 'Vessel' Under the United Nations Convention on the Law of the Sea (UNCLOS)

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Abstract

The term 'ship' appears multiple times in various UNCLOS provisions, for example, when addressing 'rules applicable to all ships' (Part II, Section 3, Subsection A). The term is also utilised by referring to the 'nationality of ships' or the 'status of ships' (Part VII, see Articles 91 and 92). However, UNCLOS does not explicitly define the potential legal limitations of the term 'ship'. In addition, the Convention also utilises the term 'vessel' frequently. There seems to be no compelling systematic reason why some UNCLOS provisions refer to 'ships' while other provisions refer to 'vessels'. Rather, UNCLOS seems to presuppose a general legal understanding of how the legal user should categorise the terms. However, this presupposition might potentially cause problems in delimiting the terms 'ship' and 'vessel' from 'installations and structures' (pursuant to Article 60 of UNCLOS) or from 'equipment' (Article

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258 of UNCLOS). For example, the existence of a 'pirate ship' could be questionable (see Articles 103–105 of UNCLOS) if the pirates launch their external attacks from an offshore 'installation' or a 'structure' at sea and then approach with small skiffs or motor-propelled rubber boats to attack another object at sea. More recently, very large constructions (purpose-built for the offshore oil and gas industry) as well as very small vehicles operating at sea (for example, underwater drones or floating marine gliders) have caused problems regarding the question of whether or not they qualify as 'ships' under UNCLOS. There seems to be no other way but to resort to possible legal definitions as agreed in other International Maritime Conventions, predominantly, under the auspices of the International Maritime Organization (IMO). But even here, the user will note a surprising multiplicity and variety of differing legal definitions of the term 'ship' and/or 'vessel'. Nevertheless, it is possible to identify a common material core of the terminology — which should then also be applicable for UNCLOS. The legal uncertainty as created by the missing definitions calls for this detailed identification. There could be serious legal consequences if a 'ship' does not fall under that common material core but is rather closer to be an offshore 'installation', a 'structure', or floating 'equipment' at sea (or if it is substantially destroyed and thus could rather qualify as a 'wreck'). Above all, the material scope of the specific ship-related provisions of UNCLOS (and other International Maritime Conventions) might not be applicable at all. Ultimately, this could have an interpretative impact for the approach under compulsory liability insurance schemes and in relation to compensation funds, in particular in the area of compensating damage to the environment resulting from marine pollution.

Keywords: Ship, Vessel, Installation, Structure, Equipment, Navigation, Compulsory Insurance

1. The Consequences of the Missing Definitions in UNCLOS and Drafting Difficulties

UNCLOS does not provide for a legal definition of the term 'ship' or 'vessel'. The International Law Commission (ILC) avoided defining the terms because — as to be discussed in this article — both the terms 'ship' and 'vessel' create a number of complications in legal drafting.[1] It has been argued that the term 'ship' is utilised in the context of UNCLOS provisions addressing navigation and status-related matters whereas the term 'vessel' appears more frequently in the context of marine environmental protection and preservation (Part XII UNCLOS).[2] This initial assessment is confirmed by the fact that Article 1(5)(a)(i) of UNCLOS defines the term 'dumping' as 'any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea' — thus not referring explicitly to 'ships' but rather to 'vessels' (and differentiating them from 'platforms'). However, the varying terminology could also be explained by the simple fact that different expert drafting groups worked on the wording of materially different UNCLOS provisions. In addition, the dispute settlement provisions of Part XV UNCLOS refer to the procedural possibility of a prompt release of 'vessels' (see Article 292 of UNCLOS), and this would also apply to situations that could have no relevance at all for the protection of the marine environment. Quite evidently, Article 292 of UNCLOS applies to 'ships' as well and not only to 'vessels'.

Thus, it seems more likely that the selected wording of either 'ship' or 'vessel' has no compelling underlying legal logic but, rather, a common

1. ILC Summary Records of the Meetings of the 7th Session, *ILC Yearbook* (1955), Vol. I, 10, as cited by Richard Barnes, Art. 17, para 9, in Alexander Proelss et al., *United Nations Convention on the Law of the Sea: A commentary* (Beck Hart Nomos 2017).

2. id.

core of shared semantics when it comes to differentiating these terms from other offshore objects, in particular, 'installations' and 'structures' at sea (as applied by Article 60 of UNCLOS).

In fact, the underlying definition problem is confirmed by the fact that different International Maritime Conventions and domestic laws apply varying definitions of the legal term 'ship'. One of the broadest legal definitions for the term 'ship' is found, for example, in Article 2(4) MARPOL.[3] The MARPOL Convention is, arguably and historically speaking, the most important IMO instrument for the international protection of the marine environment. It defines a 'ship' to mean 'a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms.'[4] Two observations could be highlighted here: first, under MARPOL, it seems that the term 'ship' is seen as more generic than the term 'vessel' because the definition of 'ship' refers to 'a vessel of any type.'[5] In fact, the etymology of the term 'vessel', stemming from the Latin *vascellum* could speak against this approach: *Vascellum*

3. MARPOL 73/78 stands for the "International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997" <https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx> accessed 20 December 2021.

4. It should be noted that other International Conventions incorporate the ship definition of MARPOL 73/78 as well, for example, the "Convention on the Protection of the Marine Environment of the Baltic Sea Area" (Helsinki Convention), the "Convention for the Protection of the Marine Environment of the North-East Atlantic" (OSPAR Convention) and the "1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties" (Intervention Convention).

5. The same reasoning is applied by section 313 (1) (c) of the UK Merchant Shipping Act 1995 which provides that a "*ship*" includes "*every description of vessel used in navigation*"; comparable definitions can be found in the laws of Australia (Admiralty Act 1988, section 3(1)); Canada (Federal Courts Act 1981, section 2(1)); Singapore (High Court Admiralty Jurisdiction Act, chapter 123, section 2) and South Korea, Ship Act, Article 1-2.

describes (in very basic terms) simply 'a thing that serves to contain other things' — thus, not necessarily floating on water or offshore.[6] This understanding could be the reason why some 'ship' definitions, particularly under some domestic laws, turn the MARPOL approach around and treat the term 'vessel' as more generic than the term 'ship'.[7]

Second, the clear intention of the MARPOL definition is to establish the widest possible scope of application. In this context, it is remarkable that the MARPOL definition also covers 'fixed platforms' (irrespective of a temporary or permanent fixation with the seafloor). If one would apply the MARPOL approach in order to understand the meaning of a 'ship' in the context of UNCLOS, the differences between the terms 'ship', 'vessel', 'installation', and 'structure' could become rather blurred. This legal concern is explained by the fact that 'installations' and 'structures' are addressed in the very same provision (Article 60 of UNCLOS) that covers 'artificial islands'. These three terms differ from ships in the permanence of their location, i.e., their immobility.[8] Thus, according to the systematic approach of UNCLOS, the element of movement at sea does not apply to 'installations' and 'structures' — but rather to 'ships' and 'vessels'. Consequently, the MARPOL definition should be viewed with some caution in the context of UNCLOS. Rather, the approach of UNCLOS with regard to 'ships' and 'vessels' seems to align itself closer to the

6. Sarah F. Gahlen, Ship revisited: a comparative study, 20 *Journal of International Maritime Law* (2014), 252 (254).

7. This could be true, for example, in the domestic law of the United States which, obviously, does not define the term "*ship*" at all but rather works with a generic legal understanding of the term "*vessel*" (which would then include a "ship" as well), see 1 U.S.C. § 3: "*The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water*." The domestic law of India also starts with the term "*vessel*" and includes the "*ship*" in the applicable legal definition, see "The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017", Section 2(l).

8. Alexander Proelss, Art. 60, para 10, in Alexander Proelss et al., *United Nations Convention on the Law of the Sea: A commentary* (Beck Hart Nomos 2017).

approach of the 1989 International Salvage Convention[9] which excludes 'platforms and drilling units' from the scope of application 'when such […] are on location engaged in the exploration, exploitation or production of sea-bed mineral resources.' This exclusion even applies when the platform or unit is mobile or floating at sea.

To contrast other legal definitions of the term 'ship' where the element of movement at sea plays a larger role, one could refer first to Article 1(b) of the Salvage Convention. This provision applies a straightforward (yet vessel-based) approach by defining a 'vessel' as 'any ship or craft, or any structure capable of navigation'. One could argue that the Salvage Convention focuses more specifically on the capacity for navigation itself. Second, the COLREGS Convention[10] eschews the term 'ship' almost completely[11] and rather defines the term 'vessel' generally as 'every description of water craft, including non-displacement craft and seaplanes, used or being capable of being used as a means of transportation on water'.[12] The key purpose of the COLREGS is to prevent collisions of any moveable objects at sea. Thus, it covers a variety of purpose-built objects which are floating on the water surface (whether temporarily or stationary), and which could be even used for purposes other than commercial navigation, for example, with regard to auxiliary services (such as dredging).[13]

9. The 1989 "International Convention on Salvage" <https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Salvage.aspx> accessed 20 December 2021.

10. The 1972 "Convention on the International Regulations for Preventing Collisions at Sea" <https://www.imo.org/en/About/Conventions/Pages/COLREG.aspx> accessed 20 December 2021.

11. The only exception is a reference to "*ships of war*" in Art. 1 (c) COLREGS.

12. See Art. 3 (a) COLREGS.

13. In this context, it should be noted that the catalogue of Art. 3 COLREGS lists several other definitions which substantiate the general understanding of the term "*vessel*" under this Convention, for example, "*power-driven vessel*", "*sailing vessel*", "*vessel engaged in fishing*", "*vessel not under command*", "*vessel restricted in her ability to manoeuvre*" (with six related sub-examples) and "*vessel constrained by her draught*".

Both the legal definitions of the Salvage Convention and the COLREGS seem to be partially helpful for an UNCLOS-focused interpretation. The element of a purposeful 'means of transportation on water' — frequently materialising in the capacity to navigate at sea — can definitely serve to differentiate a 'ship' and/or 'vessel' from an 'installation' and/or 'structure'. Some remaining drafting difficulties can still be identified, however: for example, when it comes to transit passage (see Articles 39, 54) or piracy (see Articles103–105, 107) UNCLOS prefers to make additional reference to (any kind of) 'aircraft' whereas COLREGS refers (more specifically) to 'seaplanes'. However, the technical differentiation between 'aircraft' and 'seaplanes' is not to be further analysed here.[14]

A final practical example for a ship definition — which is definitely important in the context of understanding the term pursuant to UNCLOS — can be extracted from the regulatory area of oil pollution compensation. In this context, the meaningful delimitation of the term 'ship' from other types of offshore units unfolds practical relevance in the wider context of Article 235 of UNCLOS, an important provision which addresses responsibility and liability for marine environmental damage.[15] In particular, the third paragraph of Article 235 of UNCLOS is the only provision in UNCLOS which highlights 'compulsory insurance' and 'compensation funds' as important instruments to establish criteria and procedures for payment of 'adequate compensation'.[16]

Evidently, the scope of application of both compulsory insurance and compensation funds must be defined with legal precision, otherwise legal

14. Interestingly, and in contrast to the COLREGS Convention, Australian domestic law specifically excludes "*seaplanes*" from the possibility to be legally qualified as "ships", Admiralty Act 1988, section 3(1).

15. See generally Stephens T, Commentary on Art. 235 UNCLOS, in: Alexander Proelss et al., United Nations Convention on the Law of the Sea: A commentary (Beck Hart Nomos 2017).

16. ibid, paras. 22 and 23.

foreseeability (and, ultimately, insurability) could not work properly. Should the material scope include all kinds of 'offshore craft', leading to their inclusion in compensation mechanisms? While this would be desirable, it does not reflect the prevailing legal situation. In order to establish a working framework for 'adequate' financial compensation from ship-generated oil spills at sea, the International Convention on Civil Liability for Oil Pollution Damage (CLC) was adopted (first in 1969, later updated in 1992).[17]

It should be noted that the search for, and recovery of, offshore oil has led to the construction of a wide range of new types of offshore craft. For example, the oil and gas sector utilises multiple technical variations of mobile offshore units, quite frequently materialising as FPSOs (Floating Production, Storage and Offloading Units).[18] In many cases, these units are converted former oil tankers. It is possible that the means of propulsion have been removed from these units and that, initially, the units were meant to be used in navigation, but are not further designated to fulfil that service in the future, while still in operation for the industry. Article 1.1 CLC defines a 'ship' to mean:

> any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

17. See <https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx> accessed 20 December 2021 and <https://iopcfunds.org/wp-content/uploads/2018/06/Text-of-Conventions_e.pdf> accessed 20 December 2021.

18. For further details see Massimiliano Musi, A Study on the Floating Units Operating in the Oil and Gas Off-shore Fields: the Need for a Juridical Placement and the Quest for the Applicable Discipline, 95-129, in: Massimiliano Musi (ed.), *The Ship: An Example of Legal Pluri-Qualification* (Bonomo Editore 2016).pdf> accessed 20 December 2021.

Since the correct interpretation of this legal definition has stirred up both scholarly legal debate and even applicable case law,[19] it might serve as the best guidance to identify a common core to understand the term 'ship' also in the context of UNCLOS (taking into account the vital objectives of marine environmental protection and preservation pursuant to Part XII UNCLOS), leaving out, however, oil trade-specific details.

2. Identifying a Common Interpretative Core for Defining the Terms 'Ship' and 'Vessel' Under UNCLOS

The discussion above has revealed an initial dilemma: UNCLOS utilises the terms 'ship' and 'vessel' interchangeably, without following a strict legal logic. International Maritime Conventions apply different legal definitions. Depending on their key regulatory objectives, they might either establish a wider scope of application or they might follow a more narrow approach. Different domestic laws offer a stunning variety of legal 'ship' definitions: sometimes they take the 'ship' as a starting point; sometimes they hold 'vessel' to be the more generic term. Some definitions as applied under domestic laws might be based on historic case law whereas other definitions have only been recently created (or updated) by the relevant legislative bodies. Nevertheless, the contrast to immobile 'installations' or 'structures' (Article 60 of UNCLOS) allows a first conclusion for UNCLOS: the understanding of a 'ship' (or 'vessel') implies mobility at sea. The question is whether the element of mobility can be

19. See Timagenis & Stavroulakis, Areios Pagos (Greek Supreme Court: Full Session) Case No. 23/2006 (the "*Slops*" Case), *Aegean Rev Law Sea* 2010, 141 et seq.; Peplowska, What is a ship? The Policy of the International Fund for Compensation for Oil Pollution Damage: the effect of the Greek Supreme Court judgment in the Slops case, *Aegean Rev Law Sea 2010*, 157 et seq.

narrowed down further. Initial aspects in that regard have been defined in academic literature as:

- floatability,
- capability of controlled movement on water,
- capability in the carriage of persons or goods beyond its own mass; and
- seagoing capability.[20]

However, the question remains as to whether all four elements should be cumulatively required under UNCLOS (or whether another element is potentially missing). One difficult interpretative example would be an object which is 'floating' at sea without any capability of carrying goods or persons, yet with the technical option to be remotely controlled (from land) and potentially being manoeuvred from its current location (seagoing). This question could arise in the context of maritime autonomous surface vehicles, for example, unmanned navy drones operating at sea. In this context, the challenges of legal interpretation under domestic laws usually have at least one advantage compared to UNCLOS as there is usually the benefit of applying an applicable legal definition. For example, under United States law and in an administrative context, it was possible to objectively disqualify a 'houseboat' from being construed as a 'vessel', despite clearly floating on a navigable waterway.[21] One should take a moment to ponder the fact that this question ultimately had to be brought to the United States Supreme Court to put an end to the differ-

20. Sarah F. Gahlen, Ship revisited: a comparative study, 20 Journal of International Maritime Law (2014), 252 (255 et seq).

21. *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 2013 AMC 1 (2013), see in particular, p. 12 of this judgment: *"[…] we have sought to avoid subjective elements, such as owner's intent, by permitting consideration only of objective evidence of a waterborne transportation purpose."*

ing legal views. Additionally, and for good reasons, English courts have explicitly denied qualifying 'jet skis' as being 'ships' — but more than one case of that kind had to be litigated on that subject matter.[22]

To provide one final example: the Greek Supreme Court actually qualified a decommissioned single-hull tanker (the *Slops*) — which was solely used as a storage facility for waste oil in the port of Piraeus and which had been stripped of all means of self-propulsion — as a 'ship' pursuant to Article 1(1) of the 1992 CLC.[23] This was despite the fact that the *Slops* was not carrying oil *as cargo* on a voyage (rather, she was permanently at anchor and held about 5,000 m^3 of separated oily water) and had not been moved from its position for about five years.[24] It was this case in particular that triggered extensive interpretative activity. This included the commissioning of a specific legal expert opinion on the matter at the level of the International Oil Pollution Compensation Funds (IOPC).[25] The IOPC Funds is the international body which gov-

22. See R v Goodwin, Lloyd's Law Reports [2006], Vol. 1, 432 et seq; Steedman v Scofield, Lloyd's Law Reports [1992], Vol. 2, 163 et seq.

23. For details see Timagenis & Stavroulakis, Areios Pagos (Greek Supreme Court: Full Session) Case No. 23/2006 (the "Slops" Case), Aegean Rev Law Sea 2010, 141 et seq.; Peplowska, What is a ship? The Policy of the International Fund for Compensation for Oil Pollution Damage: the effect of the Greek Supreme Court judgment in the Slops case, Aegean Rev Law Sea 2010, 157 et seq.

24. The "Slops" was registered with the Piraeus Ships Registry in 1994. She was originally designed and constructed for the carriage of oil in bulk as cargo. The vessel underwent a major conversion in 1995 where its engine was sealed and propeller shaft removed, at which time it was indicated that the purpose of the sealing of the engine and the removal of the propeller was to convert the status of the craft from a ship to a floating oily waste receiving and processing facility. She had been permanently at anchor since May 1995 without propulsive equipment and had been operating as a waste oil storage and oil separation unit. However, at the time of the incident in 2000, the Slops still remained registered at the Piraeus Ships' Registry, see OPC/OCT13/4/3/1 of 04 September 2013, para 3.4.

25. See Appendix I of the document IOPC/OCT11/4/4 of 14 September 2011 (*"Consideration of the Definition of "Ship"* – Note by the Director).

erns the application of the 1992 CLC. Ultimately, the IOPC Funds is one of the best working examples of the practical application of Article 235(3) of UNCLOS.[26]

Leaving most technical specifications aside, the general legal conclusions of the IOPC Funds differed from the approach of the Greek Supreme Court. The IOPC Funds view highlighted that the definition of the term 'ship' in Article 1(1) of the 1992 CLC was deliberately linked [sic] to the carriage of oil in bulk as cargo, and that such carriage was understood to involve the navigation of the ship on a voyage. In sum and in conclusion, the elements of carrying some kind of physical good at sea (in this case oil) and undertaking a voyage were deemed to be the key elements that had to be present in order to qualify as a 'ship' pursuant to Article 1(1) of the 1992 CLC. The floating element of an object at sea, in itself, was not enough. As a result, floating storage units could not be qualified as ships generally speaking. Nevertheless, human inventiveness necessitates some degree of flexibility and case-by-case discretion: for example, barges being towed by ships navigating on sea voyages (or temporarily at anchor for purposes incidental to ordinary navigation or *force majeure* or distress) could generally qualify as ships. Purpose-built floating storage units that have their own independent motive power and

26. UNCLOS itself does not establish a regime for responsibility and liability for damage to the marine environment but Art. 235 (3) UNCLOS includes a specific reference to the establishment of "*compulsory insurance or compensation funds*". In that regard, the 1992 CLC is a sector-specific example for this approach with regard to compensating oil pollution from oil tankers via compulsory insurance, strict liability for oil tanker owners and the establishment of a compensation fund. Generally, the International Tribunal for the Law of the Sea (ITLOS) has endorsed the approach of trust funds for environmental compensation purposes. In the Advisory Opinion on the "*Responsibilities and Obligations of Sponsoring States*", ITLOS even proposed to ponder whether more trust funds could be introduced in the future to compensate other forms of environmental damages, see Tim Stephens, Commentary on Art. 235 UNCLOS, in: Alexander Proelss et al., United Nations Convention on the Law of the Sea: A commentary (Beck Hart Nomos 2017), para 23.

steering equipment for seagoing navigation so as to be employed either as storage units or carriage of oil in bulk as cargo can generally qualify as ships. Craft originally constructed or adapted (or capable of being operated) as vessels for transportation of oil, but later converted to floating storage units, with capacity to navigate at sea under their own power and steering retained, can generally qualify as ships.[27] Ultimately, one has to admit that the features and functions of man-made objects will vary from case to case. One floating unit may satisfy the CLC definition of a 'ship', whereas another floating unit, with slightly different technical specifications, may fall outside of the scope of application. This is a reality of discussing the term 'ship' and confirms the serious complications which the UNCLOS negotiators potentially faced during the drafting of the UNCLOS text from 1974–1982. Maybe it was, in fact, wise to leave the term undefined. But what is there to conclude then, in view of the lack of an applicable 'ship' definition under UNCLOS?

3. Conclusion

It has been stated in the applicable academic literature that 'horizontal and vertical inconsistencies render the word "ship" a word of many meanings'.[28] One has to agree with this assessment — the more one engages in legal research on existing legal definitions and interpretations of the word 'ship', the more potential variations can be identified. For the understanding of the term under UNCLOS, one could propose the following approach: first, it has to be accepted that the UNCLOS text

27. ibid, para 3.10.

28. Lawrence Dardani, The Definition of "Ship": A Question of Method, 1 (7), in: Massimiliano Musi (ed.), *The Ship: An Example of Legal Pluri-Qualification* (Bonomo Editore 2016).

does not establish enough criteria to differentiate the terms 'ship' and 'vessel' with legal precision against any other potential mobile offshore object. Only the systematic difference between mobility and immobility provides some guidance. For example, a fixed platform will not qualify as a 'ship' under UNCLOS — for as long as it remains attached to the seafloor. This legal view was confirmed in the 2015 Award on the merits of the *Arctic Sunrise* case.[29] The Award clearly stated that it is an essential requirement of Article 101 of UNCLOS for an act of piracy to be directed 'against another ship.'[30] Since the case involved an alleged illegal activity at sea that was directed against a fixed platform (the *Prirazlomnaya*), the initial attempt to address the events under the purview of piracy had to be quickly dropped. The criminal charges were requalified to include 'hooliganism' and attempted damage to property. Under UNCLOS, it is thus not possible to commit piracy against an immovable object at sea. As a result, and as long as the discussion relates to a mobile object at sea, there is some degree of discretion for all UNCLOS ratifying States to unilaterally decide on the 'ship' criteria that should apply, as long as the approach is not in blatant contradiction of the general understanding of the terms as applied in International Maritime Conventions.

Second, there is some persuasive argument to link the understanding of a 'ship' or a 'vessel' to the general capacity to navigate at sea and to perform a function at sea. Any interpretative criteria should reflect that fact if the term 'ship' appears in the context of exercising navigational rights under UNCLOS (such as transit or innocent passage). It will be more difficult to accept the qualification as 'ship' or 'vessel' for any kind of 'craft' that is incapable of navigating at sea. However, this conclusion is not completely unthinkable. Navigation at sea does not neces-

29. The Arctic Sunrise Arbitration (Netherlands v. Russia) (Case No. 2014-02), Award on the Merits, 14 August 2015, <https://pca-cpa.org/en/cases/21/> accessed 20 December 2021.

30. ibid, para 238.

sarily equate with the capacity to navigate under a 'craft's' own power and steering. It seems reasonable to conclude that a craft which is being towed by a tug could still be navigating on a sea voyage (in the widest sense of the meaning). And evidently, the fact that a craft is temporarily at anchor for purposes incidental to ordinary navigation or *force majeure* or distress does not immediately disqualify this object at sea to be a 'ship' pursuant to UNCLOS.

Finally, the legal qualification as a 'ship' or 'vessel' should be linked to operational requirements that are accepted and expected in the UNCLOS system: does the 'craft' sail under a flag? Is it duly registered in a national ship registry (see Article 91 of UNCLOS)? If not, the craft could technically still be a 'ship', but it might fall under a special category. For example, if it does not fly a flag at all, it could be a ship without nationality (or a pirate ship within the meaning of Article 103 of UNCLOS). Generally, the UNCLOS system clearly indicates that submarines and other underwater vehicles can be 'ships' as well — Article 20 of UNCLOS (which addresses both types) appears under the systematic heading: 'rules applicable to all ships' (Part II, Section 3, subsection A UNCLOS). In cases of doubt, there is no other way but to resort to the systematic context of other UNCLOS provisions in question. For example, in the context of marine research, small unmanned underwater vehicles (UUVs) could be qualified as 'equipment' (pursuant to Article 258 of UNCLOS) rather than 'ships'.[31] But there are, potentially, many remaining cases of doubt, depending on the size of the object, on its operational patterns, and the purpose-built functions of those vehicles. This underlines the urgent necessity for specific future regulation in the twenty-first century, especially with regard to (semi-) autonomously op-

31. See generally Irini Papanicolopulu, Commentary on Art. 258 UNCLOS, in: Alexander Proelss et al., United Nations Convention on the Law of the Sea: A commentary (Beck Hart Nomos 2017), paras. 5-7.

erating 'maritime drones' (no matter if they are deployed to operate underwater or on the water surface).

In any case — and given the global importance of UNCLOS as a 'Constitution for the Oceans' — UNCLOS will demand a certain minimum threshold of operational control. Floatability of an object as such will not be enough. Rather, there must a degree of human navigational control or oversight (whether on board or remotely). Finally, this control or oversight will have to be exercised in the context of a purposeful (and lawful) utilisation of rights and obligations at sea. It is submitted that the freedom of navigation provides, again, the best practical example. But the lack of an applicable legal 'ship' definition necessitates some degree of discretion and interpretative flexibility — only this approach allows managing potential technical borderline questions on a case-by-case basis. But ultimately, one might have to fall back to the famous expression of United States Supreme Court Justice Potter Stewart (describing his threshold test for obscenity in *Jacobellis v Ohio* (1964)): 'I know it when I see it.' Taking into account that there are many supplementary legal definitions available to support the argumentation, a comparable 'gut reasoning' might very well be workable for 'ships' and 'vessels' under UNCLOS.

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VII

UNCLOS and the Unfortunate Oversight of Cartography

*Patrick Balsano**

Abstract

There is a strong but undervalued relationship between the law of the sea and cartography, and of the influence of this relation on maritime and insular spaces. The United Nations Convention on the Law of the Sea (UNCLOS) only briefly mentions charts and stays silent about maps, thus reproducing a purely scientific conception of cartography common in public international law. This shows a lack of perception and consideration of a relationship that the law of the sea actors have a crucial need to understand. Ultimately, UNCLOS has had an unforeseen influence on the cartography and perception of maritime spaces, notably islands, due to this lack of consideration. This article asserts that it would be in the best interest of the law of the sea actors to be aware of this relationship, and of the power of maps, as it can influence the effectiveness of the law of the sea.

Keywords: Cartography, Islands, Law of the Sea, Maps, UNCLOS

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1. Introduction

There is a strong but undervalued relationship between the law of the sea and cartography, and of the influence of this relation on maritime and insular spaces. The United Nations Convention on the Law of the Sea (UNCLOS)[1] only briefly mentions charts, without giving any specific definitions or taking maps into account. Coastal and archipelagic States' only obligation is to give due publicity to charts officially recognised and to deposit a copy with the Secretary-General of the United Nations. However, it is submitted that States, as well as other actors, use cartography to forge concrete sovereignties, and borders claims, in the national imagination of their populations. Cartographic discourses transform maps into new models for spatial, and legal, realities that facilitate the appropriation of maritime and insular spaces into the core of a national territory.

Going beyond this underestimated link between the law of the sea and cartography, it is vital to understand their mutual influence on the social perceptions and uses of maritime and insular spaces. UNCLOS plays a crucial part in this dynamic, notably because of its lack of consideration for cartography.

The word 'charts' only appears twenty-one times in UNCLOS, and without any definition. However, it is beyond the scope of this article to look into details in the international case law concerning the role of charts in maritime boundaries delimitation disputes. Instead, it shall focus on the broader absence of consideration for cartography and maps in UNCLOS, and its influence on the construction of maritime and insular spaces. If charts, perceived mostly in UNCLOS with a scientific

1. 'United Nations Convention on the Law of the Sea - Overview' <https://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm> accessed 17 November 2021.

perspective, can be defined as a geographical map or plan especially used for navigation by sea or air, they are not the be mistaken with maps.

A definition of maps, and cartography in general, is somewhat harder to achieve. John Brian Harley challenged a purely scientific view of cartography, according to which there would be a constant evolution of the map towards a single representation of a true reality.[2] Harley saw the map as a biography: of the space and landscape represented, but also of its producers and those who conserve and use it.[3] Maps are not frozen representations or simple reflections of the world. Even so-called scientific maps are not simply a mathematical object but the product of social traditions.

They belong to the social world that produced them, and it is crucial to look for the social forces that created them. If these issues deserve their own study, here we must keep in mind how Harley challenges the idea of the map as a mirror of nature as well as the evolution of the map towards an ever more precise representation of reality, due to the progress of science. He believes that such an approach carries with it a contempt for older maps or for non-European cartographies whose rules are different.[4]

Thus, our definition of maps is not only one that would meet a purely scientific and mathematical definition of the map. It is more appropriate to develop a definition including some of the characteristics mentioned by Gilles Palsky. The map is a representation, both a 'category of images and the product of a representation'.

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2. John Brian Harley (1932-1991) was a geographer and cartographer, co-editor of the History of Cartography with Davis Woodward. He was a prominent force in the development of critical cartography and strongly inspired our own conception of the relationship between cartography and law.

3. John Brian Harley, 'The Map as Biography: Thoughts on Ordnance Survey Map, Six-Inch Sheet Devonshire CIX, SE, Newton Abbot' 327, 327-331.

4. John Brian Harley, 'Deconstructing the map' (1989) 26 Cartographica 1.

It is not 'a recorded image but a fabricated image, resulting from human creative effort'. Therefore, it is not 'a neutral reflection of an external reality but a construct'. This article submits that purely scientific criteria such as projection, scale, or codification are too restrictive to use for the law of the sea in its conception of maps. Rather, the law of the sea actors should endeavour to keep in mind the function of the map as defined by Palsky when he emphasises the priority to accord to the use and usefulness of the map in relation to its intrinsic nature, which is 'to facilitate the spatial understanding of objects, concepts, processes or events in the human world'.[5]

Today, recent evolutions and technological developments in modern cartography have a significant influence on both geopolitics and public international law. Thus, if both the importance of geo-informatics in building nation-states and the uses of maps to claim and form national-territorial imagination have been stressed for land spaces, it becomes essential to extend this focus to maritime spaces as they are becoming more and more territorialised.

Moreover, both maritime and insular spaces are intrinsically resisting this evolution, a phenomenon public international law actors must have a deeper understanding of. As UNCLOS has influenced the cartography and perception of maritime spaces, and notably islands, it is thus critical for the law of the sea actors to be aware of this relationship, and of the power of maps, as it ultimately influences the effectiveness of the law of the sea.

5. Gilles Palsky, 'Définition de la carte' (Hypergéo) <http://www.hypergeo.eu/spip.php?article266> accessed 25 November 2021.

2. UNCLOS' Lack of Consideration of the Relationship Between Cartography and the Law of the Sea

2.1. An Undervalued Relationship by UNCLOS, Due to a Purely Scientific Conception of Maps

If previously maritime spaces may have been overshadowed by land spaces, for which the use of maps both in building nation-states and forming national-territorial imagination has already been indicated,[6] they are now also becoming more and more territorialised. However, they are intrinsically resisting this evolution and a direct transposition must be avoided. Otherwise, if they become territories of States without considering their historical contexts, they will be caught in what John Agnew called 'the territorial trap'.[7] It is thus essential to look beyond the reification of territories of States as spaces of secure sovereignty to have a deeper understanding of the increase and fragmentation of national territories created by the law of the sea. The next step is to understand how this evolution is translated through the medium of maps, resulting from the interaction between the law of the sea and cartography. Maps allow law to be seen, and law must be seen.[8] But what is given to be seen?

6. See for example Christine Leuenberger, 'The Politics of Maps: Mapping the West Bank Barrier' (2019) 25 The Brown Journal of World Affairs 7.

7. For Agnew, it implies a conventional way of thinking the territoriality of a state that 'relies on three geographical assumptions - states as fixed units of sovereign space, the domestic/foreign polarity, and states as 'containers' of societies'. John Agnew, 'The Territorial Trap: The Geographical Assumptions of International Relations Theory' (1994) 1 Review of International Political Economy 53, 53.

8. As Irus Braverman perfectly summarizes: 'In order to be effective, law must be asserted in the world; it must be acknowledged; and, most importantly, it must be visually seen'. Irus Braverman, 'Hidden in Plain View: Legal Geography from a Visual Perspective' (2011) 7 Law, Culture and the Humanities 173, 173.

What is made visible or invisible with maps? Various actors are both seeing and showing their conception of the law of the sea when they use maps, as a map influences the legal perceptions and representations of its readers. Too often they assume that mapping public international law is only a technical process of converting a text into an image. Even if maps hide and obscure, they also demonstrate an ideological presence, raising the issue of intermediaries between law and space, for example cartographers, jurists, etc.

However, there is an absence of standardisation in the construction of geospatial data in public international law.[9] As a result, maps are used to claim and form territorial imaginaries in the seas. Geographic Information System (GIS)[10] is actively participating in building the maritime representations of nation-states. Maps are evolving as objects in form and design, but also as practice. For example, the democratisation of Participatory Geographical Information Systems (PGIS)[11] and the social implications of GIS lead to increased pressure on the social conscience and perception of space. As shown by Leuenberger, the control and ownership of geographical information affects social spaces insidiously, while the representation of local and indigenous spatial knowledge has an influence on how maritime spaces are conceptualised and how they form a local background for the law of the sea. Maritime spaces can now be experienced the same way as continental spaces through PGIS. This leads to deeper implications for social spaces. For example, the evolutions in the perception of environmental issues, especially at sea, greatly affect the diffusion of discourses on maritime and insular spaces.

9. See Leuenberger (n 6).

10. A system that manages all types of data and connects them to a map by linking location data and descriptive information.

11. Methods using a participatory approach to collect spatial information and data, for example by collecting local knowledge and translating it to maps.

Despite this social aspect, public international law tribunals' approach is mostly science-driven, concerning technical precision and applying sets of rules defined by UNCLOS. They may fail to perceive how maps are created, used, and their effects outside of the courtroom. This is the case when States try to convince map readers of its maritime claims on maritime areas with 'ancient' maps. A multidisciplinary approach is then crucial to underscore this. In international case law, naming a space on a map is not the basis for determining sovereignty. In critical cartography, since John Brian Harley, it has been demonstrated that naming a space on a map has an influence on the control of that space, at least symbolically.

Nonetheless, because of its purely scientific approach, the law of the sea may seem poorly equipped when dealing with these naming disputes. It faces the risk of having the authority of maps competing with the authority of law. Indeed, while the law of the sea may consider maritime and insular spaces as abstractions or purely mathematical rules, maps can give them context, content, and practice. As opposed to maps perceived as purely scientific constructs by law actors, maps as popular images became essentials for scholars studying the history of international affairs.[12] Maps as propaganda have largely been used to create strong imaginaries as public international law and cartography interact to create new representations of these spaces. In his analysis of space, Lefebvre divided the production of social space into three components, in three moments.[13] First, the 'spatial practice' of a society determines its space (the perceived). Secondly, 'representations of space' defines a conceptualised space (the conceived), created by scientists among others. Finally,

12. See for example León W Consuelo, 'Foundations of the American Image of the Pacific', *Asia/Pacific as space of cultural production*, vol 21 (1994), 17.

13. Henri Lefebvre, *The Production of Space* (Donald Nicholson-Smith tr, Blackwell 1974), 33.

'representational spaces' are directly lived by its users through images and symbols (the lived). Cartography and maps play a role in each of these moments, as maps guide our social practices while cartographers shape our representations of space. Readers experience these representational spaces through the images and symbols on maps. Maps are infinite and cannot exhaustively represent a specific space. But maps are more than that as they create and modify territories. They help with the materialisation of spaces as they link together three components of defining a territory: institutionalisations of power, materialisations of place, and idealisations of people.[14]

Toponyms on maps give a striking example of the influence of maps on the law of the sea, especially if they benefit from a colonial and imperial background which amplifies the emotional properties of the map. Perceiving their potential legal aspects when it comes to maritime spaces is thus essential, especially since the law of the sea still fails to play an adequate role in the naming process of maritime features.[15] There is no agreement for the standardisation of internationally recognised names and no common repository for boundaries or toponyms. Kathleen Claussen advises for 'the creation of a central repository for border information that would serve as the authoritative source of boundary demarcation data'. While this concerns land boundaries, it is crucial to highlight a difference regarding maritime spaces, and how boundaries are perceived there. It cannot be stressed enough how maps play an essential part in their representations.[16]

14. Gearóid Ó Tuathail, 'Borderless Worlds? Problematising Discourses of Deterritorialisation' (1999) 4 Geopolitics 139.

15. See one of the first study on the legal aspects of toponyms for maritime spaces: Erik Franckx and others, 'The naming of maritime feature viewed from an international law perspective' 1.

16. Kathleen Claussen, 'Invisible Borders: Mapping out Virtual Law?' (2009) 37 Denver Journal of International Law and Policy 257, 258.

Therefore, this article promotes going beyond the map as a scientific object for public international law, with maps as a medium for the interactions between law and representation, as a link between words and images. Delaney pointed to 'Law-in-Space', whereby '[l]aw draws lines, constructs insides and outsides, assigns legal meanings to lines, and attaches legal consequences to crossing them', and to 'Space-in-Law'.[17] The relationship between the law of the sea and cartography also expresses itself through climate change and environmental issues. Several academics have investigated this issue for islands, mostly from a legal, and somewhat theoretical, perspective.[18] Some works point directly to the risk of an environmental crisis and how it could affect international law.[19] Threats of submersion to coastal areas of a State, or even to its whole territory, are finally getting some attention.[20] However, most research still focuses on a legal approach to the status of States or to baselines evolution.[21]

17. David Delaney, 'Legal Geography I: Constitutivities, Complexities, and Contingencies' (2015) 39 Progress in Human Geography 96, 99.

18. Clive Schofield and David Freestone, 'Islands Awash Amidst Rising Seas: Sea Level Rise and Insular Status under the Law of the Sea' (2019) 34 The International Journal of Marine and Coastal Law 391.; Rosemary Rayfuse and Shirley V Scott, International Law in the Era of Climate Change (Edward Elgar 2012).; Derek Wong, 'Sovereignty Sunk? The Position of "sinking States" at International Law' (2014) 14 Melbourne Journal of International Law 30.; Charles E Di Leva and Sachiko Morita, *Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?* (The World Bank 2008).; David Caron, 'When Law Makes Climate Change Worse: Rethinking the Law Of Baselines in Light of a Rising Sea Level' (1990) 17 Ecology Law Quarterly 621.

19. Cait Storr, 'Islands and the South: Framing the Relationship between International Law and Environmental Crisis' (2016) 27 European Journal Of International Law 519.; Paramjit S Jaswal and Stellina Jolly, 'Climate Refugees: Challenges and Opportunities for International Law' (2013) 55 Journal of the Indian Law Institute 45.

20. Rayfuse and Scott (n 18).; Sheila C McAnaney, 'Sinking Islands?: Formulating a Realistic Solution to Climate Change Displacement' (2012) 87 New York University law review 1172.

21. Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory' (2014) 27 Leiden journal of international law 621.; Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill - Nijhoff 2015).; Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2 Climate Law 345.

Several disciplines are concerned with these issues, which deserve a practical approach. Christine Leuenberger studied how maps are used by both public and private actors to put forth social and political claims concerning human rights in the West Bank barrier between Palestine and Israel. She demonstrated how maps are powerful rhetorical tools to make social and political claims. The association of people's cartography and the democratisation of mapping practices strengthen maps as a form of communication. For example, the barrier promoted on Israel's maps of the region recalls China's nine-dash line.[22] Social representations with maps of these phenomena in maritime spaces are becoming essential. In 2006, India's Lohachara Island was the first 'inhabited island to be wiped from the map'.[23] Online mapping is thus used to communicate sovereignty and the law of the sea discourses which are not also perceived by the law of the sea actors.

5.2. External Consistency

As we have seen, one of the main issues with a purely scientific approach to maps in public international law is that it is essentially descriptive. The concept of space in public international law deserves more.[24] It cannot settle for being based purely on zonal descriptions of sovereignty or economic rights on maps. If the concept of social space has only recently emerged, it is crucial to avoid going from the mental to the social without any kind of mediation.[25] There is a strong need for transition or

22. Christine Leuenberger, 'The Rhetoric of Maps: International Law as a Discursive Tool in Visual Arguments' (2013) 7 Law & Ethics of Human Rights 73.

23. Cited in Ann Powers and Christopher Stucko, 'Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels', *Threatened island nations : legal implications of rising seas and a changing climate* (Cambridge University Press 2013).

24. For example in Human Rights Law, or more imperiously, in Environmental Law. Leuenberger (n 22).

25. Lefebvre (n 13).

articulation between the physical, the mental, and the social. Lefebvre pointed out this risk of maintaining a gap between a mental space based on logico-mathematical categories, which he called an 'ideal' space, from a space of social practice, a 'real' space. Both geography and public international law are concerned with this gap. Public international law actors focus on this ideal mathematical space at the expense of the reality of social space. Lefebvre looked for a way to bridge this division and cartography can be part of that mediation. Maps are inherently an apparatus that can close gaps between these fields, as the law of the sea codifies physical space but in doing so disrupts its link with mental perception and social practice.

Nonetheless, cartography and its critic are a complex endeavour. Any conception of critical cartography that only amounts to studying either the making of maps or their use must be criticised. Maps are in constant evolution both in production and in consumption, as they are simultaneously representations and practices. An unwary critical cartographer risks focusing on only one aspect of maps, production or use, at a time. If John Brian Harley stressed how the mapping process was part of a specific social context, he never said it was set in stone. Maps are like books; it becomes a challenge to understand what the author decided to communicate if read from a contemporary perspective. Context is crucial to perceive any imperialist, colonialist, or legal motivations behind maps. But as modern evolutions such as online cartography blur the boundary between author and reader, it becomes imperative to look for who produces and uses the data. Sovereignty discourses promoted through maps, especially those pretending to be based on the law of the sea, are not always perceived by readers. As legal actors are like any map readers, they must be taught to look at maps beyond an ever-true scientific object.

Another point to emphasise about the physical is that Lefebvre considered social space as a social product, implying that natural space, the physical, was bound to disappear. Lefebvre stated that nature was threat-

ened of being relegated to the background, as decor.[26] If it was worth protecting, this was shadowed by a pursuit for new resources. In the 1970s and 1980s, the law of the sea, even if aiming to protect maritime resources, might have involuntary participated in this evolution by dividing natural space. Today, nature is back in our life through a newfound environmental awareness and maps are putting back the physical to the front. Islands facing sea level rise are now actually appearing on maps.[27]

As these new dynamics affect the interactions between the law of the sea and cartography, shaping maritime and insular spaces, the analysis of social space must be divided between the formal (its form), the structural (its structure), and the functional (its function). UNCLOS determines the forms and functions of areas in maritime spaces. It introduced new structures that cartography represents and/or transforms on maps. These elements drive a movement towards a territorialisation of maritime spaces, triggered by States, which copy some of the dynamics of territoriality defined by Sack:

> Territoriality is a form of behaviour that uses a bounded space, a territory, as the instrument of securing a particular outcome. By controlling access to a territory through boundary restrictions, the content of a territory can be manipulated and its character designed. This strategy seems to be ubiquitous across individuals and groups in their constructions of social organization.[28]

A clear distinction existed between public international law and the law of the sea. One implied a multiplication of borders and clear territorial sover-

26. id.

27. Like some Japanese islands which found their way on national maps after being threatened by erosion. These maps were used to mobilize the population on these issues.

28. Peter J Taylor, 'The State as Container: Territoriality in the Modern World-System' (1994) 18 Progress in Human Geography 151, 151.

eignties, while the other promoted freedom of navigation and prohibition on territorial sovereignty claims. This distinction became weaker when the Truman Proclamation in 1945 extended the jurisdiction of the United States on the natural resources of the continental shelf. More recently, in 1996, Michael Shapiro was referring to the works of Gilles Deleuze and Félix Guattari, and their analysis of the evolution of the state system:

> The state system, which Gilles Deleuze and Félix Guattari suggest is characterized by its resistance to flows, is under challenge, not only in terms of its control over territory but also in terms of its capture of cultural imagination and more generally its ability to control the range of felt affiliations.[29]

Both UNCLOS and cartography raise issues on these matters, with the effect of bringing more control. UNCLOS affected control of maritime space as a territory by disrupting a space that was characterised by its flows, bringing it closer, if unsuccessfully, to a 'territorialisable' space. Cartography of these spaces is both used by States to control the cultural imagination associated with the sea, and to increase affiliations of inhabitants towards more specific places like islands.

The critical study of maps is a recent field, yet the use of critical cartography in public international law is vital to indicate the subjectivity of maps and to study the relation of law and geography and how they interact with each other. However, experienced legal academics had strong a priori assumptions when it comes to maps: 'Maps mainly depict physical relations and distribution and, as such, they have a restricted application to legal phenomena'.[30] Thankfully, this perception is changing.

29. Michael J Shapiro and Hayward R Alker, *Challenging Boundaries: Global Flows, Territorial Identities* (University of Minnesota Press 1996), 22.

30. William Twining, 'Mapping Law: The MacDermott Lecture' (1999) 50 The Northern Ireland Legal Quarterly 12, 31.

A trans-disciplinary approach between law and geography has become essential. It was started a few decades ago by academics who promoted a new field of research: Legal Geography. Going beyond legal geography as the coupling of law and geography, Philippopoulos-Mihalopoulos studies the concept of spatial justice to redefine the relationship between law and geography. He aims to 'move the discussion by linking space not just to politics but also to law', as he believes that spatial justice should be an opportunity for geography to consider the centrality of space.[31] It is important to go beyond a concept of spatial justice that would only use a touch of geography and space as an adjunct.

Zoe Pearson looks at the way structures and sites of public international law development are mapped and evokes the role of international legal actors, of how they should 'maintain an awareness about [their] role as cartographers' of international landscapes. International law is found outside traditional maps as it is not 'spaceless'. Norms of creative power exist not only in hegemonic places but also in more discrete spaces.[32] Cartographic materials from different States and the evolution of their representations of maritime and insular spaces demonstrate some of the relation between cartography and the law of the sea. Affect must also be considered when studying the effects of maps, due to the overlooked influence of emotion. This is particularly true for the qualitative movement in GIS that focuses on the qualitative experiences used in creating a map when it comes to participatory mapping.[33] One of the main reasons for China's assertiveness in the seas is an increase in nationalist sentiments among officials and its population. Maps are a potent medium through

31. Andreas Philippopoulos-Mihalopoulos, 'Spatial Justice: Law and the Geography of Withdrawal' (2010) 6 International Journal of Law in Context 201, 202.

32. Zoe Pearson, 'Spaces of International Law' (2008) 17 Griffith Law Review 489, 493.

33. Jc Young and MP Gilmore, 'The Spatial Politics of Affect and Emotion in Participatory GIS' (2013) 103 Annals Of The Association Of American Geographers 808.

which these sentiments can be kindled, as emotions are generated by maps but also can be harnessed to inspire them.[34] The easier it gets to create maps, the easier it also gets for the producer/consumer to forget how powerful they can be. UNCLOS only reinforced these effects.

3. UNCLOS, Cartography, and the Construction of Maritime Spaces

3.1. The Unforeseen Consequences of UNCLOS on the Cartography of Maritime Spaces

Ever since UNCLOS, maritime spaces are becoming more and more integrated into States' territory as UNCLOS codified sovereignty of States in maritime zones and materialised new places, facilitating the idealisation of the maritime territory of a State by its nationals. Maps put human beings in space by showing it to them. This is notably what has been happening in the China seas, for both its maritime and insular spaces. A map of China with the nine-dash line reproduced on Chinese passports ensures that its nationals always know and carry the extent of their space. Japanese maps which now show the tiniest of islands changed the scale of perception of the Japanese of their space. Maps have become popular images and have influenced these perceptions. New dynamics in online

34. As pointed to by several academics, notably Thongchai Winichakul. Studying their work can be used to point to more specific issues concerning maritime spaces and the relation between cartography and the law of the sea. See for example: Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (Univ of Hawaii Press 2009) ; Sumathi Ramaswamy, 'Visualising India's geo-body: Globes, maps, bodyscapes' (2002) 36 Contributions to Indian Sociology 151.; Mate Paksy, 'DROIT ET GÉOGRAPHIE LA QUESTION DE L'(INTER)DÉPENDANCE ÉPISTÉMOLOGIQUE' (2017) 100 Géographie et Cultures 109.

cartography only increase the power and scope of popular images. They bring forth new representations of maritime and insular spaces. Maps and law cooperate here. Maps can deploy both aesthetic and rationalist aspects, following dominant discourses. Maps are used to recall memories or rewrite history. Maps used by China to promote its sovereignty and its historical rights in the China seas, notably in response to the 2016 Arbitration, separate time and space. Identity is associated to the past, and as such, used to reinforce present identity. Maps create a national identity for States which includes seas and islands, and influence the law of the sea in the process.

UNCLOS played an essential, if unforeseen, part in this transformation of the perception and use of maritime spaces. The law of the sea changed conventional spatial imaginaries in a way that was neglected for far too long. Nonetheless, extensive relations exist between public international law and geography. They have only recently become a centre of interest for legal geographers, mostly from the perspective of national law. David Delaney points out the importance of 'exploring the intersections of law and geography' from both theoretical and methodological perspectives.[35] Other academics also believe that geographical aspects and contexts have been neglected in the legal culture and discourses. A quick overview of the issue lays the basis of this relation: 'In drawing and policing boundaries between spaces and bodies, law plays a constitutive function for geography. In describing places and bodies, geography furnishes the grounds for the operation of law'.[36]

Of course, a more conceptual approach to the evolution of maritime and insular spaces under the influence of both the law of the sea and

35. David Delaney, 'Beyond the Word: Law as a Thing of This World' in Law and Geography Eds Holder, J, Harrison, C (Oxford University Press, 2004) 67.

36. Tayyab Mahmud, 'Law of Geography and the Geography of Law: A Post-Colonial Mapping' (2011) 3 Washington University Jurisprudence Review 64, 75.

cartography is needed. New spatial practices have appeared with the divisions introduced by the law of the sea involving seas and islands.[37] New zones of sovereignty are deployed, and high seas areas are being reduced, with new economic usages. There is a renewal of the confrontation between closure and movement, between Grotius and Selden, economic or strategic usages, from modern and post-modern states.[38] Representations of these spaces are also continuously evolving, between Western and Eastern conceptions, with or without grids or texts, to new conceptions considering their dimensions. The recent evolutions in the law of the sea made differences between maritime and continental spaces on maps 'blurrier'.

New issues appear for cartography, from three-dimensional representations, multiplication of features, or new cartographic practices. As representational spaces, the way seas and islands are described and lived through our imagination, both actively and passively, changes under the influence of factors as diverse as the law of the sea, evolution in cartographic technologies, or environmental issues. Islands were considered as places of relegation but also as places of exchange and transition. UNCLOS created a new perspective and maps further transformed their duality between negative and positive spaces. An empirical perspective with a multiscalar background becomes crucial to perceive the influence of UNCLOS on the perceptions and representations of islands.

Again, UNCLOS deeply transformed the use and perception of maritime spaces in unexpected ways. Categories have been transposed from continental to maritime spaces, only taking into account a scientific approach, leading to issues in their representation. Maritime and insular

37. Lefebvre's description of the Roman spatial representation of the city is part of my analysis. Lefebvre (n 13).

38. See of example Till's topology of national navies. Geoffrey Till, *Seapower: A Guide for the Twenty-First Century* (Fourth edition, Routledge 2018).

spaces evolved from being perceived and used as frontiers to become borders, on maps, and by States. These evolutions had consequences that were difficult to foretell by public international law experts (or by anyone), especially without an expanded spatial literacy. Maps work on different scales, from the scientific to the symbolic. It is essential to work on different range of spatial scales, from the international to the personal. Focusing on borders and boundaries in the production and organisation of space is fundamental. An interdisciplinary standpoint is as such essential to perceive the problematic nature of spaces of law and geography, from the physical to the social or mental spaces. One potential weakness of UNCLOS is that no one could predict these effects, in part due to its lack of precise definition.

Thus, one of the most significant issues that has arisen in the practice of the law of the sea stems from the imprecision of certain definitions, due to the difficulties of obtaining an agreement on a common text. However, due to the importance assumed by the new delimitations set by the UNCLOS, attention has been focused on the definition of islands and the distinction that must be made with rocks and low-tide elevations. As an extension of this problem, even beyond the vagueness of certain provisions, the effective application of the law of the sea is faced with the interpretation of UNCLOS. International courts had to deal with these issues concerning the methods of delimiting the Economic Exclusive Zone or the extended continental shelf.

3.2. The Lack for Precise definition of Islands in UNCLOS and its Consequences

Again, the problems introduced by changes in the law of the sea are numerous. One of the main issues which disrupts the application of UNCLOS remains its definition of islands or rocks and its consequences. The detailed study of the case law or state practice in connection

with these issues goes well beyond the scope of this article, Robert Kolb having already given a broad overview.[39] It is nevertheless relevant to mention it when it comes to the limits of law of the sea in dealing with cartography. Particularly important issues have emerged for the delimitations and uses of these maritime and island spaces. They find themselves confronted with a set of legal considerations which have upset their uses. Several questions seem to follow one another: what is an island? What criteria and modalities are to be used to resolve questions of sovereignty on an island, or even on a set of islands that it is sometimes difficult to define and delimit on the map? How to determine the resulting territorial boundaries and represent them on the map?

The perception of a specific duality of maritime and island spaces, between isolation and communication, is not new. Islands have been experienced by travellers as a destination and the sea as the way to get there. This duality resulted in a multitude of conceptions and representations of islands, which can make its definition difficult, and international law has not escaped this pitfall. For Sébastien Colin, the question of sovereignty over the islands of the Chinese seas only emerged recently, from the first half of the twentieth-century, as a result of the increase in rivalries between colonial powers. Before this period, the China seas were already a space of trade and commerce, where many merchants circulated. Islands like the Paracels or the Spratleys were 'then mainly perceived as sources of danger for navigation and [were] not claimed or disputed by the states of the region at a time when the concept of national sovereignty did not exist'.[40] The dual context of decolonisation and the post-war Cold War shook up questions of sovereignty, particularly at the time of

39. Robert Kolb, 'L'interprétation de l'article 121, paragraphe 3, de la convention de Montego Bay sur le droit de la mer' (1994) 40 Annuaire français de droit international 876.

40. Sébastien Colin, 'Litiges insulaires et enjeux géopolitiques en mer de Chine du Sud', *Les conflits dans le monde : approche géopolitique* (Armand Colin, 2012), 251.

the San Francisco Conference in September 1951, before the growing energy needs, particularly in hydrocarbons, and the development of the law of the sea does not complete the phenomenon.

So, islands have always occupied a particular place in maritime spaces, be it on maps or not. As such, they deserve some specific analysis, even more so since UNCLOS strongly modified their relation to both physical and social spaces. Representing an island on an ancient or even modern map has become tantamount to a sovereignty declaration, as if referencing on a map a space still empty of people was enough to affirm a sovereignty. These issues are not new for public international law. The use of maps in territorial disputes has already been studied by public international law experts. In 1969, Charles De Visscher wrote about 'the great circumspection shown by arbitrators et judges with regard to the use of maps', due to them possibly being 'inaccurate, contradictory, or intentionally misleading'.[41] Moreover, in 1986, the International Court of Justice ruled that:

> Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights (§54).[42]

It seems clear to the Court that even if maps can be accepted as the starting point of evidence in a territorial dispute, their value would remain low unless integrated in a treaty. However, these old issues found in sovereignty disputes with land spaces are still very much active when

41. Charles De Visscher, *Problèmes de confins en droit international public* (Pedone 1969).

42. Sébastien Colin, 'Litiges insulaires et enjeux géopolitiques en mer de Chine du Sud', *Les conflits dans le monde : approche géopolitique* (Armand Colin, 2012), 251.

it comes to maritime and insular spaces disputes. China is still using ancient maps to justify a historical sovereignty on islands against States that affirm their sovereignty through treaties or effective sovereignty. The use of Japanese maps dating from before the twentieth-century must be incorporated in a specific background: a withdrawal from maritime spaces and a cartography mostly used to transmit various ideologies and discourses.[43] Only then it is possible to understand how today's maritime borders and the law of the sea disputes are being perceived through maps and their effects. Harley strongly criticised any division between theory and practice in cartography and distinguished between understanding and using maps. Beyond just looking at how maps work, it is necessary to question the various practices and political projects that are deployed through them.

The absence of a precise definition of an island in Article 121 has already been indicated. However, another hypothesis is promoted here, which brings back the issue of the production of space by public international law and cartography. The law of the sea secluded islands from nature and brought them closer to being products, in a Marxist narrow sense. Indeed, Lefebvre believed that the meaning of both terms in 'production of space' needs clarification before its study. One interpretation draws on the works of Marx and Engels, who gave production a broad sense with the world produced by humans as social beings, but also a much narrower sense as a product, a thing: 'Humanity, which is to say social practice, creates works and produces things'.[44] A distinction exists between a work, characterised by its uniqueness, and a product that can be reproduced. The less creative and inventive this product is, the more it refers to labour.

43. For example, centrality and tribute for China, isolation and imperialism for Japan, colonialism and isolation of islands for both.

44. Lefebvre (n 13), 71.

The mere idea of creating space would have meant nothing to most philosophers a couple of centuries ago, because space could only be created by God.[45] Today, artificial islands create both physical and social spaces, through the law of the sea. It does not define islands in detail and is more concerned with the territorial effects they produce than with how they were constructed. However, these artificial islands can be considered both as unique works, and also as products for both the law of the sea and cartography. They most likely would be indistinguishable from each other and interchangeable on maps, unless at a very large scale. If the law of the sea does not give artificial islands the same rights as natural islands,[46] it does not forbid them altogether and allows their construction by coastal States in different zones.[47] Nevertheless, these artificial islands divide and redraw maritime spaces even more, if only with the safety zones they create and the rules they impose on navigation.[48] They have a strong link to the production of physical space from a public international law perspective.

Cartography puts islands in the social space, through maps. Thus, a new social form is created, that was not present in any previous physical space. The next step is to consider the social relationships that are hidden but present in this space.[49] It is particularly effective for what we call islands. Law brings new significance to insular places and removes islands from their context. Ultimately, they bring to the foreground an issue

45. See how a local Philippine authority named six sandbars that appeared a few years ago, due to sand drifting from Chinese dredging operation at Subi Reef. Greg Poling, 'Local Philippine authorities give new names to 6 features near Thitu (Pag-asa) Island' (*Twitter*) <https://twitter.com/GregPoling/status/1296822202088783873> accessed 12 July 2021.

46. Articles 11 & 60.8 UNCLOS.

47. Articles 56, 60, 80, 87.

48. Articles 60.5 & 60.6 UNCLOS.

49. For Penny English, '[a] place is not just a thing or an entity. Place is a relational concept'. Penny English, 'Space and Time: The Genius Loci of Ancient Places' (2003), 466.

easily forgotten by the law of the sea when it focuses on delimiting new zones in the seas: the issue of nature and natural spaces. What Lefebvre perceived in 1974 of the production of spaces in continental France was translated in 1982 to maritime spaces.[50] Economic, political, and strategic aspects established new criteria for the division, and domination, of nature as a resource. In doing so, by imposing mathematic and economic criteria that imply interchangeability between spaces, the main result is that 'places are deprived of their specificity — or even abolished'.[51] When divisions in the seas or distinctions such as islands and low-tide elevations are made based purely on physical criteria, like distance from the coast or submersion, nature is replaced by products. This implies a 'commodification' of maritime spaces, which are no longer only a means of production and instead become a product.

4. Conclusion

So, what is the role played by the law of the sea, and cartography, in the production of insular spaces? Does the law of the sea produce physical space, and cartography social space, through islands? The answer is not as straightforward. Both cartography and law transform nature by giving it a purpose and inscribing it in a social space. Cartographers and public international actors are essential mediators and must be considered as such. Perceiving the effects of UNCLOS, from the superficial to the deeper ones, is an ongoing process. On spatial aspects, understanding sea power strategies and tactics in the seas is essential for both maritime dis-

50. Lefevbre underscores that 'the more a space partakes of nature, the less it enters into the social relations of production'. The reverse is also true. The more a space deploys social relations of production, the less it is a natural space in a strict sense. Lefebvre (n 13), 83.

51. ibid 343.

putes and regional security.[52] For example, Patalano focuses on the role of the East China Sea for Japan, underlining how it acted as a space of social and economic interactions and as a barrier against invasions.[53] Disputes for islands exacerbated by UNCLOS must be re-integrated in this context, as the law of the sea has deeply modified this space. Sea power is also closely linked to these issues. It demonstrates that we must consider the wider context (Pan-Asianism, colonialism, Western conception of public international law, etc.) and question the effect of law on the sea on sea power and the use of maritime forces by states like Japan and China.

Going beyond a unique legal distinction between islands is necessary to understand some of the tensions to which the law of the sea is confronted in spaces like the East China Sea. States are increasing cultural and social pressures on these spaces, through maps. Control of maps and representations allow states like Japan and China to promote their spatial control. Cartography played different roles for Japan and China, creating centrality or promoting isolation. It continues today with the diffusion, control, and production of cartographic discourses. Whereas these islands are to be considered as rocks or islands is left to, or should be left to, public international law to decide. Nonetheless, UNCLOS seems to have failed in doing so in an uncontested manner. These shortcomings have consequences for the cartography of maritime and insular spaces and are exploited by States today. This raises an issue for modern public international law when states like Japan or China try to use ancient maps to affirm their sovereignty on islands, which were little more

52. Alessio Patalano notes that 'The implementation of UNCLOS offers coastal states a crucial normative tool for the justification of national expansion at sea and, with it, the political reconfiguration of the region space'. Alessio Patalano, 'Sea Power, Maritime Disputes, and the Evolving Security of the East and South China Seas' (2013) 158 The RUSI Journal 48, 50.

53. Alessio Patalano, 'Seapower and Sino-Japanese Relations in the East China Sea' (2014) 45 Asian Affairs 34.

than dots and changing toponyms. Ulises Granados made a distinction between knowing and controlling maritime spaces,[54] a distinction that states like China or Japan are trying to erase when promoting the use of ancient maps in modern legal disputes. New environmental issues will only add more pieces to the cartographic and legal puzzle. Drawing from the cartographic history of the maritime and insular spaces is essential to understand what challenges the law of the sea and public international law will be confronted with.

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54. Ulises Granados, 'The South China Sea and Its Coral Reefs during the Ming and Qing Dynasties: Levels of Geographical Knowledge and Political Control' [2006] East Asian history 109.

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VIII

The Meaning and Legal Significance of ‘Fringing Reefs’ in the LOSC, and Importance for Contemporary Challenges in the Law of the Sea

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Abstract

The term ‘fringing reefs’ is central to two provisions in the UN Convention on the Law of the Sea (the LOSC): Article 6 (Reefs) and Article 47 (Archipelagic baselines). Newly introduced in the LOSC (without treaty antecedents in previous law of the sea conventions), it was recognised that the geographic circumstances attending ‘fringing reefs’ required express provision, particularly to give due account to the close relationship between the land and water domains. This paper will examine the mean-

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ing of 'fringing reefs' and consider its legal significance for the overall baseline rules in the LOSC. While 'fringing reefs' is not defined in the LOSC, the article brings together insights from reef geomorphology with examples of State practice, discussion of international jurisprudence, and relevant *travaux preparatoires* to shed light on the term's meaning. The paper also considers other influential sources including publications of the International Hydrographic Organization (the TALOS manual and Dictionary). The paper will conclude with some observations on the work of the International Law Commission's Study Group on sea level rise and international law. The paper will identify how climate change threats to reefs and States' concern for jurisdictional vulnerability call for increased understanding about the implementation of reef baselines by coastal States.

Keywords: Reef, Fringing Reefs, Baseline, Sea Level Rise, International Law Commission

1. Introduction

The United Nations Convention on the Law of the Sea[1] makes express provision for fringing reefs in the context of two types of baseline provision, Article 6 ('Reefs') and Article 47 ('Archipelagic baselines'). In this way, the LOSC gives legal significance to fringing reefs by giving them the capacity to contribute to the baseline, and thereby the maritime zones of a coastal State. Of course, reefs — including fringing reefs — may also have significance for maritime zones in other ways. For example, reefs which uncover at low tide but are submerged at high tide may qualify as

1. *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (LOSC).

a 'low-tide elevation', potentially relevant for the application of Article 13[2] or Article 7.[3] Further, reefs may be relevant features in a maritime delimitation.[4] These broader contexts for fringing reefs are beyond the scope of this article, which takes up the focus of examining undefined terms in the LOSC. Accordingly, this article offers a critical analysis of the meaning and legal significance of the term 'fringing reefs' as it appears in Article 6 and Article 47(7) of the LOSC.

Part 2 of this article will examine the current provisions on 'fringing reefs' in the LOSC and demonstrate that a central purpose for an express provision for fringing reefs was to recognise a special geographic, ecological, and social relationship between island, reef, and lagoon. Following this, the article will show that a liberal approach should be taken to the types of reefs that may potentially be encompassed by the term 'fringing reefs'. The article will also outline approaches taken to two issues of some ambiguity — the problem of gaps in reefs, and the appropriate tidal datum for reefs — and suggest that pragmatic solutions adopted by coastal States are consistent with the drafters' recognition of the relationship between island, reef, and lagoon. Part 3 of this article turns to the implementation of Article 6, presenting a selection of State practice to demonstrate that a variety of methods have been adopted in legislation to implement baselines on reefs, including fringing reefs. These examples illustrate that coastal States

2. See discussion of the term 'naturally formed area of land' in Article 13, which may include sand, mud, coral and rocks: Clive R Symmons, 'Article 13 - Low-tide elevations' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (1st edn, CH Beck 2017) 136.

3. See brief discussion in Eritrea v Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), 17 December 1999, in which the tribunal considered whether 'Negileh Rock' would meet Article 7 requirements for the use of a low-tide elevation as an endpoint [144].

4. For example, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, which required consideration of cays and reefs.

implement baselines in accordance with Article 6 in combination with other baseline types, often integrating reef closing lines within the chosen means of implementation. Significantly, coastal States have frequently opted for baseline definitions by reference to charts and/or coordinates, which as this article contends, is likely to bear upon contemporary debates on the impacts of climate change on maritime jurisdiction (discussed in Part 4).

2. The 'Geographical Unity'[5] of Island, Reef, and Lagoon: 'Fringing Reefs' in the LOSC

2.1. Current Provisions on 'Fringing Reefs' in the LOSC and Their Legal Effect

Article 6 of the LOSC relate to the *normal baseline* of an island, and provides that:

> In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.[6]

The effect of Article 6 is that in circumstances where an island has a fringing reef, the coastal State may use the seaward low-water line of the reef as the normal baseline, rather than the low-water line along the coast of the island as provided for in Article 5 of the LOSC.

Especially considering the position of newly independent States at the time of the negotiation of the LOSC — many of which have islands

5. The phrase 'geographical unity' is borrowed from an authoritative commentary on the LOSC: Satya N Nandan, Myron H Nordquist and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Brill 2013) 92.

6. LOSC, Art 6.

with fringing reefs or surmounting atolls — the application of this new baseline rule has potential consequences 'not just in terms of the size of territorial sea, contiguous zone and EEZ to which such territories may become entitled, but also in security terms because all internal waters landward of the reef, will according to normal rules, qualify as internal waters'.[7] This article will use the term 'reef baselines'[8] to mean the type of normal baseline provided for in Article 6.

Article 47(7) of the LOSC relates to a technical requirement for the construction of *archipelagic baselines*, and provides that: '[f]or the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls'.[9]

In other words, where an archipelagic State draws 'straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago',[10] waters within fringing reefs may be treated as land in determining whether the ratio of the area of water to the area of land is between 1:1 and 9:1.[11] The purpose of the 9:1 ratio was 'to provide an objective criterion for the concept of an archipelagic State, and to limit its application to relatively compact oceanic island groups'.[12] Since Article 47(7) permits the increase of 'land' area to include waters enclosed by fringing reefs and atolls, this has the effect of permitting a proportionate increase in the water area enclosed by archipelagic baselines.

7. Ian Kawaley, 'Delimitation of Islands Fringed with Reefs: Article 6 of the 1982 Law of the Sea Convention' (1992) 41 International and Comparative Law Quarterly 152, 152.

8. This usage follows the terminology in Christina Trahanas, 'Recent Developments in the Maritime Boundaries and Maritime Zones for the Pacific' (2013) 31 Australian Year Book of International Law 41.

9. LOSC, Art 47(7).

10. LOSC, Art 47(1).

11. id.

12. Nandan, Nordquist and Rosenne (n 5) 429.

2.2. What are Fringing Reefs?

The natural sciences provide an obvious starting point for understanding fringing reefs. Based on observations made during his 1835 voyage on the *Beagle*, Charles Darwin considered that a fringing reef was the first in a series of developmental stages in reef and island formation.[13] While this view is also seen in the modern scientific literature — for example, where fringing reefs are referred to as 'the most juvenile'[14] of reef forms — many geomorphologists take a broader, descriptive approach to the term. For example, Hopley, Smithers, and Parnell consider that fringing reefs have 'identifiable reef flat development, attached to [the] mainland or continental island',[15] while Bird explains that fringing reefs grow 'upwards and outwards in the shallow seas that border continent or island shores'.[16] Definitions included in key sources published under the auspices of the International Hydrographic Organization also generally reflect this geomorphic understanding of fringing reefs. The main elements are that a fringing reef is attached to, or in the vicinity of, a continental or island shoreline,[17] and can be distinguished from other reef types (such as barrier reefs or platforms/patch reefs).[18]

13. See discussion of Darwin's 'subsidence theory' in Patrick D Nunn, *Oceanic islands* (Blackwell 1994) 229.

14. id.

15. David Hopley, Scott G Smithers and Kevin Parnell, *The geomorphology of the Great Barrier Reef: development, diversity, and change* (Cambridge University Press 2007) 152.

16. ECF Bird, *Coastal geomorphology: an introduction* (2nd edn, Wiley 2008) 353.

17. The Glossary of the 'TALOS manual' defines 'fringing reef' to mean a 'reef attached directly to the shore or continental landmass, or located in their immediate vicinity': International Hydrographic Organization, International Association of Geodesy and IOC Advisory Board on Law of the Sea, *A manual on Technical Aspects of the United Nations Convention on the Law of the Sea -1982* (International Hydrographic Bureau 2006) known as the 'TALOS manual', Appendix I - Glossary.

18. See *Hydrographic Dictionary: IHO Publication S-32* (5th edn, 1994) 'Fringing reef', original emphasis omitted.

In considering the meaning of 'fringing reefs' in the context of the LOSC, the drafting history indicates that the term's legal meaning need not be confined to its 'strict scientific sense'.[19] In 1974, Fiji, Tonga, New Zealand, and Western Samoa first put forward draft articles on islands which referred expressly to fringing reefs. Reflecting an earlier proposal by Malta in the previous year and proposals considered by the International Law Commission in the 1950s, Article 5 in the 1974 draft text provided that: '[i]n the case of atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea shall be the seaward edge of the reef, as shown on official charts'.[20]

In introducing this text, New Zealand explained that the intention of the provision was to address a 'gap in the existing law' on baselines, as that law could be applied to 'atolls and other island systems with the same features as atolls'.[21] It was necessary to reflect the special relationship between land and water that characterises such island systems:

> An atoll made up a geographical and ecological entity. A lagoon, encompassed by a reef system, had all the characteristics of land-locked waters and constituted the principal source of food for the inhabitants of an atoll. To protect the resources upon which their well-being depended, the inhabitants must be able to control the lagoon.[22]

19. See, for example JRV Prescott and Clive H Schofield, *The maritime political boundaries of the world* (2nd edn, M. Nijhoff 2005) 105. See also Kai Trümpler, 'Article 6 - Reefs' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (1st edn, CH Beck 2017) 63.

20. Second Committee, UNCLOS III, Fiji, New Zealand, Tonga and Western Samoa: *Draft Articles on Islands and on Territories under Foreign Domination or Control*, UN Doc A/CONF.62/C.2/L.30 (1974).

21. Second Committee, UNCLOS III, Statement of New Zealand: Regime of Islands in *Summary Records of the 38th meeting*, UN Doc A/CONF.62/C.2/SR.38 (13 August 1974).

22. id.

The 1974 proposal was not opposed during discussion in the Second Committee,[23] and was ultimately adopted with minor changes to become Article 6 of the LOSC.

Understanding the rationale behind the 1974 proposal is significant in two ways. Firstly, it shows that the 'geographic unity' of atoll and similar island systems, in which there is a special relationship between island, reef, and lagoon, was considered to justify legal accommodation in the form of express baseline rules. Secondly, the intention that the new rule would apply to 'atolls and island systems with the same features as atolls' points to a broad application for Article 6, suggesting that 'atolls' and 'fringing reefs' in the context of that provision may be interpreted broadly in terms of reef type. This also makes practical sense, because even from a geomorphic perspective the distinction between reef types can be ambiguous.[24] For example, if the coral-free area behind a fringing reef is deep and wide, 'the distinction between fringing and barrier reefs is blurred';[25] similarly, where there are very small islands and a large body of water enclosed by a barrier reef, 'the relationship between island and reef is usually described as that of an almost-atoll […] Reef geomorphology of almost-atolls does not differ significantly from that of atolls'.[26]

Translating these two factors to consider what types of island/reef/lagoon systems may fall within Article 6: the provision could apply where there is an almost-atoll (mentioned above), a 'horseshoe reef' (simply a reef formed in horseshoe shape), or a faro (a small atoll-shaped or oblong

23. Second Committee, UNCLOS III, Statement of New Zealand: Regime of Islands in *Summary Records of the 38th meeting*, UN Doc A/CONF.62/C.2/SR.38 (13 August 1974).

22. id.

23. See Nandan, Nordquist and Rosenne (n 5) 92.

24. DM Kennedy and CD Woodroffe, 'Fringing reef growth and morphology: a review' (2002) 57 Earth-Science Reviews 255, 256.

25. Nunn (n 13) 236.

26. id.

reef).[27] Indeed, guidance on the application of Article 6 specifically envisages that: 'the reference to fringing reefs in article 6 can be applied without distinction to *any reefs, including barrier reefs*, which are separated from the low-water line of the island and form a fringe along its shore'.[28]

Most writers agree that a wide interpretation should be given to 'fringing reefs' (and atoll) in Article 6.[29] Synthesising these considerations, the term 'fringing reefs' in Article 6 may apply where: (1) a reef fringes an island, where the reef is separated from the low-water line of the island; and (2) although there is no specified restriction on the distance between the reef and the island, the island,[30] reef and, lagoon must be closely related and form a 'geographical and ecological entity'.

In relation to 'fringing reefs' in the context of archipelagic baselines, the close relationship between island, reef, and lagoon was also a key idea in the development of the concept of the archipelagic State, one of the key innovations of UNCLOS III. Setting out 'archipelagic principles' that were 'largely representative of the position of archipelagic States in general at that time',[31] Fiji, Indonesia, Mauritius, and the Philippines put forward the view that an archipelagic State comprised 'islands and other natural

27. See Nandan, Nordquist and Rosenne (n 5) 93 and United Nations Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations 1989) 5.

28. United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea – Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations Publication, 1989) [23], emphasis added.

29. See discussion in PB Beazley, 'Reefs and the 1982 Convention on the Law of the Sea' (1991) 6 International Journal of Estuarine and Coastal Law 281, 297; Beazley considers that 'fringing reefs' may be interpreted as 'not excluding barrier reefs which form a fringe around an island'. Note the opposite view in I Kawaley, 'Delimitation of Islands Fringed with Reefs: Article 6 of the 1982 Law of the Sea Convention' (1992) 41 International and Comparative Law Quarterly 152, 156.

30. Prescott and Schofield (n 19) 105.

31. Till Markus, 'Article 46 - Archipelagic States' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (1st edn, CH Beck 2017) 344.

features [as] an intrinsic geographical, economic and political entity',[32] and that where the waters enclosed by archipelagic baselines 'regardless of their depth or distance from the coast, the sea-bed and the subsoil thereof, and the superjacent air space, as well as all their resources, belong to, and are subject to the sovereignty of the archipelagic State'.[33] A clear line may be seen from these first textual proposals to what is now part of the definition of an 'archipelago' (a constituent element of an 'archipelagic State'):

> 'archipelago' means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.[34]

Yet one of the main objections raised in relation to the development of a special regime for archipelagic States was the complex and diverse nature of archipelagos,[35] and the potential for straight baselines to enclose disproportionately large areas of water compared to the size of its constituent islands.[36] The introduction of the water-to-land ratio requirement was one of a number of proposals designed to limit the application of the special archipelagic regime.[37] Article 47(7) was first introduced by

32. Sea-Bed Committee, Archipelagic Principles as proposed by the Delegations of Fiji, Indonesia, Mauritius and Philippines UN Doc A/AC.138/SCII/L.15 (1973), paragraph 1.

33. ibid paragraph 2.

34. LOSC, Art 46(b).

35. See discussion on varying archipelagic forms in Donald Rothwell and Tim Stephens, *The international law of the sea* (2nd edn, Hart 2016) 171.

36. See discussion in Clive R Symmons, 'Article 47 - Archipelagic baselines' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A commentary* (1st edn, CH Beck 2017) 358.

37. Others were maximum lengths for archipelagic baseline segments (Article 47(2)), the requirement that baselines shall not depart from the general configuration of the archipelago (Article 47(3), and requirements for appropriate endpoints Article 47(1), (4).

the Bahamas in 1975,[38] and was adopted unamended from its original formulation.[39]

Given that Articles 47(7) and 6 refer to atolls and 'fringing reefs', a question arises whether both provisions apply to the same geographic circumstances. One point of difference relates to tidal datum (discussed below in Part 2.4). Another difference is that Article 47(7) refers to a 'steep-sided oceanic plateau' which is not found elsewhere in the LOSC, and which some commentators consider introduces uncertainty to what would otherwise be an objective water-to-land calculation.[40] But it is reasonably clear that the term 'fringing reefs' (and 'atolls') may be interpreted broadly in the context of Article 47(7) in terms of reef type, consistently with the approach taken for Article 6. Treating the lagoon waters of 'fringing reefs' (broadly understood) as land for the purposes of the water-to-land ratio is in principle consistent with the notion that such lagoon waters are 'sufficiently closely linked to the land domain to be subject to the regime of internal waters'[41] (justifying their enclosure by reef closing lines, discussed below in Part 2.3).

To conclude this section about what types of reefs are encompassed by the term 'fringing reefs', a brief note on reef composition. Broadly speaking, reefs are commonly composed of coral or rock, but there are also algal reefs and reefs built by certain organisms such as oysters and tubeworms.[42] In the context of the LOSC, scholars have taken differ-

38. Bahamas, '18 Principles for Inclusion in Archipelagic Articles', available in Nandan, Nordquist and Rosenne (n 5) Appendix 405.

39. Except for changes in numbering: see discussion in ibid 432.

40. Symmons, 'Article 47 - Archipelagic baselines' 371. Nordquist et al explains that this language reflects the specific geographic situation of the islands of the Bahamas, which had initially proposed the text in its 18 Principles paper: Nandan, Nordquist and Rosenne (n 5) 342.

41. United Nations Office for Ocean Affairs and the Law of the Sea (n 28) [25].

42. Bird (n 16) 349.

ent views as to whether 'fringing reefs' applies only to coral reefs,[43] or whether there is no such restriction.[44] But perhaps not much turns on this question, as atolls are certainly formed from coral reefs,[45] and reefs composed of coral are more extensive than algal reefs.[46] More significant is the requirement that 'fringing reefs' are naturally formed for the purposes of supporting maritime zones. While the LOSC is not explicit on this for reefs as such,[47] this conclusion is apparent from the term's ordinary meaning,[48] and is consistent with the explicit requirement for both a 'lowtide elevation' and 'island' to be a 'naturally formed area of land'.[49] If the applicable requirements are met, a reef could potentially qualify under either classification. But when considering whether certain 'heavily modified coral reefs'[50] should be classified as a 'low-tide elevation' or an 'island', the Arbitral Tribunal in the *Philippines v China* concluded

43. See Beazley (n 29) 282; Prescott and Schofield (n 19) 105.

44. See Kawaley (n 29) 157. Guidance from the United Nations Office for Ocean Affairs and the Law of the Sea also takes a broad approach, referring to reefs 'derived from some biological process involving coral, oysters or lime-secreting worms': United Nations Office for Ocean Affairs and the Law of the Sea (n 28) [21].

45. See Prescott and Schofield (n 19) 105.

46. Bird (n 16) 349.

47. Nor is the LOSC explicit on the matter of composition of a 'rock' in Article 121(3), which has generated considerable debate: see, for example Gilbert Guillame, 'Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award' (*EJIL:Talk!*, 25 February 2020) <https://www.ejiltalk.org/ricks-in-the-law-of-the-sea-some-comments-on-the-south-china-sea-arbitration-award/> accessed 15 December 2021.

48. For example, the *Oxford English Dictionary* defines reef thus: 'A ridge or bank of rock, sand, shingle, etc., lying just above or just below the surface of the sea or another body of water, usually in such a way as to pose a hazard to shipping'; <https://www.oed.com/view/Entry/160614?rskey=r2gOoq&result=2&isAdvanced=false> accessed 15 December 2021.

49. LOSC Art 13 and 121(a).

50. *South China Sea Arbitration* (Republic of the Philippines v People's Republic of China), Award of 12 July 2016 [306].

that the LOSC requires 'the status of a feature be ascertained on the basis of its earlier, natural condition, prior to the onset of significant human modification'.[51] This confirms the view that 'fringing reefs' in the LOSC encompass only naturally formed reefs.[52]

2.3. Gaps in Reefs

One matter on which the LOSC is silent is the treatment of gaps in reefs — that is, how its baseline provisions should be applied where there are breaks in the reef edge, forming channels connecting the lagoon waters with the ocean.[53] A practical approach to this naturally occurring circumstance is required in order to construct a unified baseline system. Further, if the intention of the LOSC is to treat reef-enclosed waters as internal waters, it is necessary to clearly separate internal waters from waters on the seaward edge of the reef, which may otherwise be either territorial sea or archipelagic waters. Where there are gaps in reefs, scholars generally agree that a straight line may be used to 'complete the enclosure of lagoon waters'[54] by analogy to the treatment of the mouths of rivers or bays.[55]

The ability to construct closing lines in reefs is broadly available in circumstances where the normal baseline is established by reference to

51. id.

52. This means that artificial reefs, such as those used in fisheries, are excluded. On artificial reefs, see Craig A Layman and Jacob E Allgeier, 'An ecosystem ecology perspective on artificial reef production' (2020) 57 Journal of Applied Ecology 2139.

53. See examples in United Nations Office for Ocean Affairs and the Law of the Sea (n 28) [26].

54. Beazley (n 29) 298; see also Prescott and Schofield (n 19) 105.

55. Nandan, Nordquist and Rosenne (n 5) 94; Hodgson RD and Smith RW, 'The informal single negotiating text (Committee II): A geographical perspective' (1976) 3 Ocean Development and International Law 225, 230.

Article 6; meaning that a straight line may be used to close a gap in a fringing reef, atoll, or other similar reef,[56] and thereby delineate internal waters from the territorial sea. A straight line may also be used by an archipelagic State to close a gap in a fringing reef or atoll and thereby demarcate internal waters from archipelagic waters.[57] Following earlier reasoning, if a broad interpretation is taken to 'fringing reefs' in Article 47(7), closing lines may also be drawn for other reef types where they are enclosed within an archipelagic baseline system. Writers have noted that the use of reef closing lines is widely seen in the Pacific, observing that the practice is 'consistent with the original intent of the proposers of Article 6 during the UNCLOS negotiations, as well as being consistent with Article 47, which allows lagoons to be counted as equivalent to land for the purposes of calculating the sea to land ratio'.[58]

The legislation of Belize is an example of provision for such lines in the case of fringing reefs in particular:

> [w]here there is a break or passage through the fringing reefs referred to in subsection (4)(a) of this section, the baseline from which the breadth of the territorial sea is measured shall be a straight line joining the sea-ward entrance points of that break or passage.[59]

56. See discussion at United Nations Office for Ocean Affairs and the Law of the Sea (n 28) [26], which gives the example of the almost-atoll Truk (or Chuuk) in the Federated States of Micronesia, and the need to delineate internal waters from lagoon waters by constructing closing lines across twelve gaps in the reef.

57. See LOSC Art 50, which permits the use of closing lines for the purposes of delimiting internal waters from archipelagic waters. Article 50 refers to closing lines drawn in accordance with LOSC Articles 9-11 (regarding rivers, bays and ports): arguably, the same reasoning justifying closing lines for gaps in reefs would be applicable here in the context of archipelagic baselines. Kiribati provides a good example of comprehensive provision of closing lines delineating internal waters within its atolls in archipelagos across all three island groups (Gilbert, Phoenix, Line): Closing Lines Regulations 2014 (Kiribati).

58. Robyn Frost and others, 'Redrawing the map of the Pacific' (2018) 95 Marine Policy 302, 306. See also Trahanas (n 8) 53.

59. Maritime Areas Act (Chapter 11) Revised Edition 2000 (Belize), subsection 4(4)(b).

More common is a legislative approach which provides for closing lines without specifying any particular reef type.[60] For example, the legislation of the Republic of the Marshall Islands specifies that 'where there are breaks in reefs or entrances to lagoons, any closing lines drawn between the natural entrance points at low water or between the geographic co-ordinates of points declared by order of the Minister'[61] form part of the baseline.

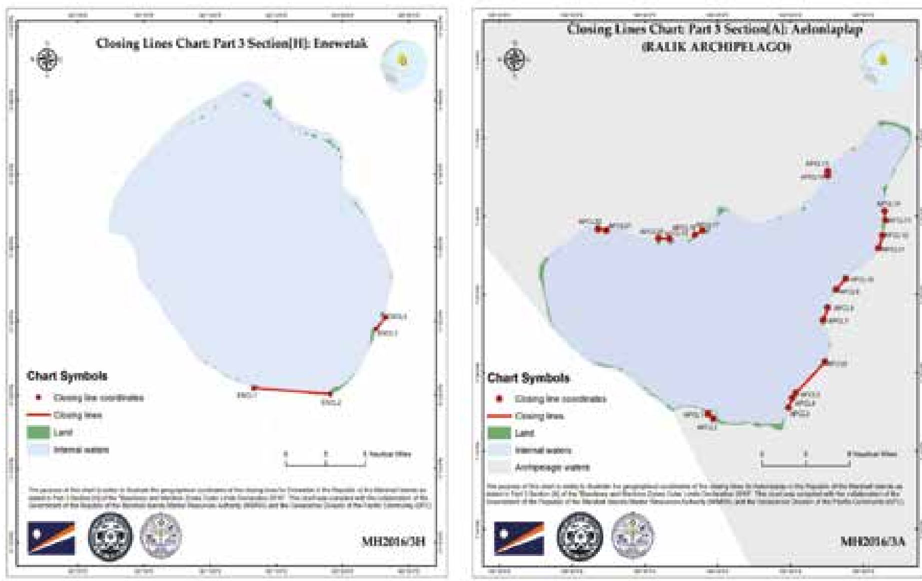

Figure 1: Closing Lines Chart for Enewetak and Aelonlaplap, Republic of the Marshall Islands[62]

60. See also Sea Boundaries Act 1997 (Nauru), section 2; Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, section 5.

61. Republic of the Marshall Islands Maritime Zones Declaration Act 2016, Section 107(1)(a)(ii). Geographic coordinates are listed in 'Part 3 – Closing Lines' in the Baselines and Maritime Zones Outer Limits Declaration 2016.

62. Baselines and Maritime Zones Outer Limits Declaration 2016 (Republic of the Marshall Islands).

Such closing lines include those for Enewetak, where the reef closing line connects to a normal baseline along the reef edge, thereby delineating internal waters from the territorial sea; and those for Aelonlaplap of the Ralik Archipelago, where the reef closing line connects to archipelagic baselines connecting the outermost points of the reef, and delineates internal waters from archipelagic waters (Figure 1).

The use of closing lines in relation to fringing reefs in particular can be seen in Rodrigues Island, Mauritius.[63] Regulations specify both coordinates and the types of line which are to join the coordinates. These line types include a 'reef closing line', which in combination with other baseline types (here, Article 6 baseline and a historic bay closing line), form a continuous baseline system comprising 81 points:

ISLAND OF RODRIGUES	
BASEPOINTS	BASELINE
R1 – R2	Reef closing line
R2-R3-R4-R5-R6-R7-R8-R9	Seaward low water line of reef
R9 –R 10	Reef closing line
R10-R11-R12-R13-R14-R15	Seaward low water line of reef
R15-R16	Reef closing line
R16-R17-R18-R19-R20-R21-R22-R23	Seaward low water line of reef
R23-R24	Reef closing line
R24-R25-R26-R27-R28-R29-R30	Seaward low water line of reef
R30-R31	Historic bay closing line
R31-R32- R33-R34-R35-R36-R37-R38-R39-R40-R41-R42 R43-R44-R45-R46-R47-R48-R49-R50 R51-R52-R53-R54-R55-R56-R57-R58 R59-R60-R61-R62-R63-R64-R65-R66 R67-R68-R69-R70-R71-R72-R73-R74 R75-R76-R77-R78-R79-R80-R81-R1	Seaward low water line of reef

Figure 2: Extract from Maritime Zones (Baselines and Delineating Lines) Regulations 2005, Second Schedule

63. See Maritime Zones Act 2005 (Mauritius), which provides that baselines may include 'the seaward low-water line of reefs as specified in Article 6 of UNCLOS' (section 4(2)(c)), and that closing lines delineating internal waters may be prescribed (section 5).

The illustrative chart included in the Regulations shows the general configuration of the baseline. When compared with Figure 4 showing the extent of fringing reef around Rodrigues, it may be discerned that the shape of the baseline follows that of the seaward edge of the fringing reef (which in parts measures approximately 8 kilometres from the island's shoreline) and includes four segments of reef closing line.

Despite its silence on the matter of gaps in reefs, both scholarship and State practice support the use of straight lines to delineate internal waters consistently with the LOSC. There remains some uncertainty as to how to construct a unified baseline system where a reef fringes only part of

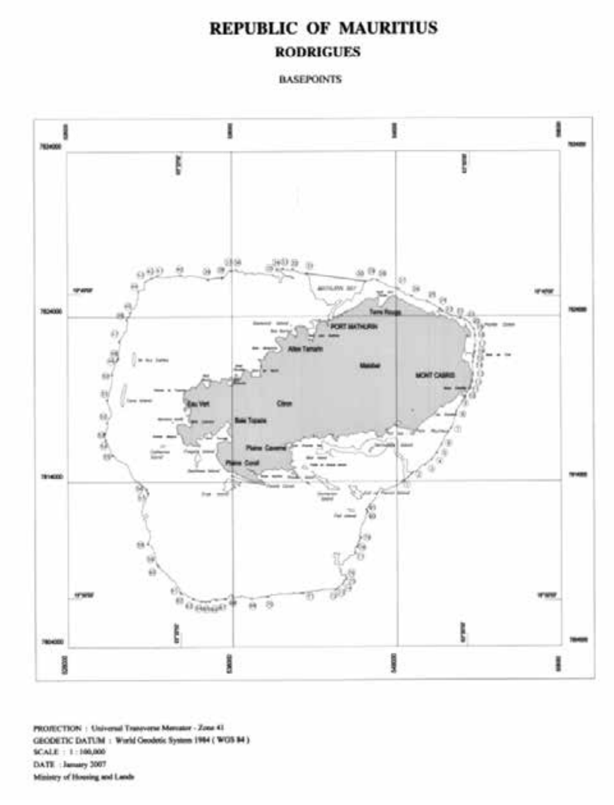

Figure 3: Extract from Maritime Zones (Baselines and Delineating Lines) Regulations 2005

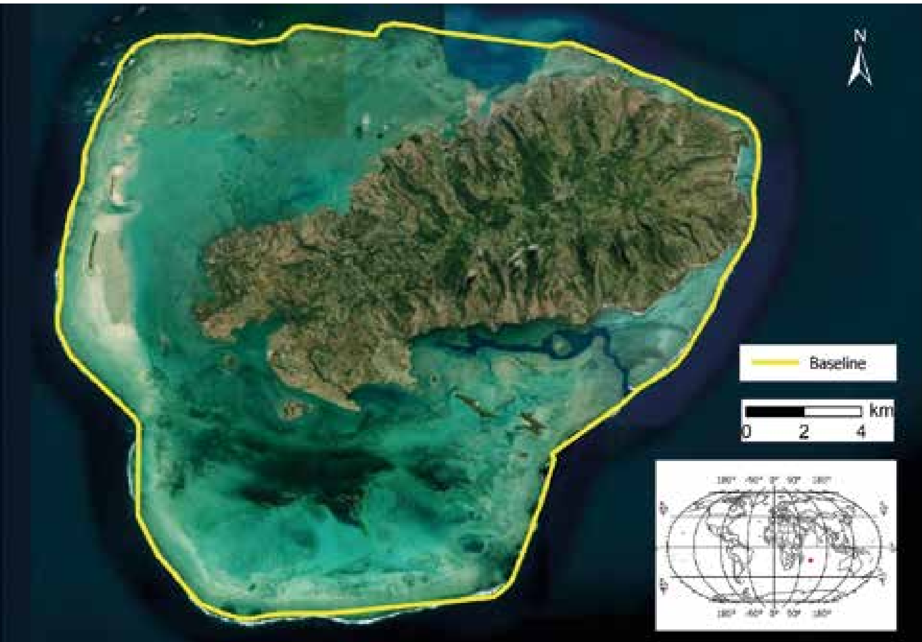

Figure 4: Baseline around fringing reefs of Rodrigues Island, Mauritius[64]

the island: the question is how to link the island to the reef in order to effectively delimit the internal waters. The practical suggestion has been made to use the shortest possible line,[65] though the south-eastern corner of Tahiti (French Polynesia) is an example of where a slightly longer line may be used to join the reef to the island where there is not a great distance between the reef and the island.[66]

64. Map produced by the author using ArcGIS Pro version 2.7.0. Sources: World Imagery basemap (Esri, DigitalGlobe, GeoEye, i-cubed, USDA FSA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community) and Maritime Boundaries Geodatabase, version 11 (Flanders Marine Institute (2019); available online at https://www.marineregions.org/. https://doi.org/10.14284/382).

65. United Nations Office for Ocean Affairs and the Law of the Sea (n 28) [28].

66. In this case, the fringing reefs visible in Figure 5 are connected to the island's shoreline by linking lines of approximately 1065m and 1305m (author's calculations, derived from map at Figure 5).

Figure 5: Detail of baseline around fringing reefs and connecting to the shoreline of the island of Tahiti, French Polynesia[67]

2.4. Tidal Datum of the Reef

One matter on which the LOSC is silent is the treatment of gaps Another question that scholars have raised about 'fringing reefs' in the LOSC is whether the term refers only to reefs which are exposed at low tide and submerged at high tide, or whether the term also encompasses submerged reefs. The earliest draft text for a treaty provision on reefs may be traced to the 'Report of the Committee of Experts on technical questions

67. Map produced by the author using ArcGIS Pro version 2.7.0. Sources: World Imagery basemap (Esri, DigitalGlobe, GeoEye, i-cubed, USDA FSA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community) and Maritime Boundaries Geodatabase, version 11 (Flanders Marine Institute (2019); available online at https://www.marineregions.org/. https://doi.org/10.14284/382).

concerning the territorial sea': '[a]s regards coral reefs, the edge of the reef as marked on the above-mentioned charts should be accepted as the low-water line for measuring the territorial sea'.[68]

While Special Rapporteur JPA Francois proposed this text to International Law Commission in 1953 it was not taken up, and the 1958 Convention on the Territorial Sea and Contiguous Zone contained no specific provision dealing with reefs. Discussion resumed in UNCLOS III, at which Malta proposed (in the context of atolls) that the 'seaward edge of the reef whether or not the reef is submerged at high tide'[69] could be used as a baseline. Drawing from these two early proposals, the 1974 text put forward by Fiji, Tonga, New Zealand, and Western Samoa (mentioned earlier as the first occurrence of text referring to fringing reefs specifically) revived the reference to charts: 'the baseline for measuring the breadth of the territorial sea shall be the seaward edge of the reef, as shown on official charts'. In 1976, a final adjustment was made to refer to the 'seaward low-water line' rather than the 'seaward edge' of the reef,[70] to form the basis of what became Article 6 of the LOSC.

This drafting history indicates that while early drafts may have permitted the use of submerged reefs for the purposes of the baseline if the reefs were charted,[71] the express reference to 'seaward low-water line, as shown on official charts' that was adopted in Article 6 makes clear that ultimately

68. JPA Francois, Special Rapporteur, *Second Report on the Regime of the Territorial Sea*, UN Doc A/CN.4/61 Annex 'Report of the Committee of Experts on technical questions concerning the territorial sea', 1-2. The Committee of Experts comprised the following members serving in their personal capacity: L E Asplund (Sweden), S W Boggs (USA), P R Couillault (France), R H Kennedy (UK), A S Pinke (Netherlands).

69. Sea-Bed Committee, Proposal by Malta, UN Doc A/AC.138/SC.II/L.28.

70. Nandan, Nordquist and Rosenne (n 5) 93.

71. Beazley (n 29) 291. See also Trümpler, 'Article 5 - Normal Baseline' 62, which points out that the phrase 'accepted as' in the 1953 text 'indicates a legal fiction that even constantly submerged coral reefs – as long as they were marked as reefs on nautical charts – were to be considered as providing a low-water line'.

a narrower approach was pursued, permitting only drying reefs[72] to be used in this context. This was also the view taken by the Arbitral Tribunal in the *Eritrea v Yemen* case, where 'Negileh Rock' was rejected as a possible Eritrean basepoint for the purposes of maritime delimitation on the basis that the feature was charted as a reef but 'not above water at any stage of the tide. A reef that is not also a low-tide elevation appears to be out of the question as a basepoint',[73] because of the requirements of Article 6.[74]

In contrast, there is no reference to tidal level in relation to 'fringing reefs' in Article 47(7). The absence of any reference to 'drying reef' in this context raises some doubt as to whether a 'fringing reef' is required to be above the chart's low-water datum. We have seen that the drafting history (together with some jurisprudence) supports this requirement in relation to Article 6. However, the overall context of Article 47 — with two contrasting references to 'drying reefs' in paragraphs (1) and (7) — leaves open the possibility that a 'fringing reef' for the purposes of paragraph (7) could include one that is fully or partly submerged. Beazley suggests that 'an archipelagic State may use submerged reefs as a boundary to an area that it wishes to include as land for the purposes of determining the water to land ratio'.[75] One example of such application is Wotje, an atoll in the Republic of the Marshall Islands, which is 'a large deep atoll with a lagoon that could accommodate a large fleet. Some of the reef stands above high water and supports low, sandy islands, but the larger part of the reef is submerged'.[76] Wotje contributes one archipelagic

72. A 'drying reef' is that part of a reef which is submerged at high tide but above water at low tide: see Nandan, Nordquist and Rosenne (n 5) 430. In this way, a 'drying reef' may be seen as a type of low-tide elevation: see Symmons, 'Article 13 - Low-tide elevations' 137.

73. Eritrea v Yemen (n 3) [143].

74. Noting that Eritrea claimed a straight baseline system in the region, the Arbitral Tribunal also considered and rejected the potential application of Article 7: ibid [144].

75. Beazley (n 29) 308.

76. Prescott and Schofield (n 19) 177.

basepoint to the Ratak archipelago (MHRTKBP37), and the relevant illustrative chart shows the entirety of the lagoon waters as internal waters.[77] This example supports the view that there is some flexibility to rely on at least a partly submerged reef for the purposes of Article 47(7) and the inclusion of lagoon waters as land in the water-to-land calculation.

3. Implementation of a Normal Baseline Supported by 'Fringing Reefs'

We have seen that the term 'fringing reefs' occurs in connection with two types of baseline provision in the LOSC, normal and archipelagic. With a focus on fringing reefs (in the narrow sense, where possible), this section now considers the implementation of reef baselines to show the range of approaches taken by coastal States in their legislation, and offers observations on the different (or similar) effect of those approaches.

3.1. Legislation Identifies Reef Baseline with the Seaward Low-Water Line of the Reefs

The legislation of the Solomon Islands provides an example of where a coastal State has implemented a reef baseline solely by means of drawing from the terms of Article 6 (and not, as in the contrasting examples below, also referring to charts or coordinates). There are approximately 1000 islands that make up the Solomon Islands,[78] and most of these

77. Baselines and Maritime Zones Outer Limits Declaration 2016 (Republic of the Marshall Islands), Closing Lines Chart Part 3 Section [V].

78. Permanent Mission of Solomon Islands to the United Nations, 'Country Facts', <https://www.un.int/solomonislands/solomonislands/country-facts> accessed 15 December 2021.

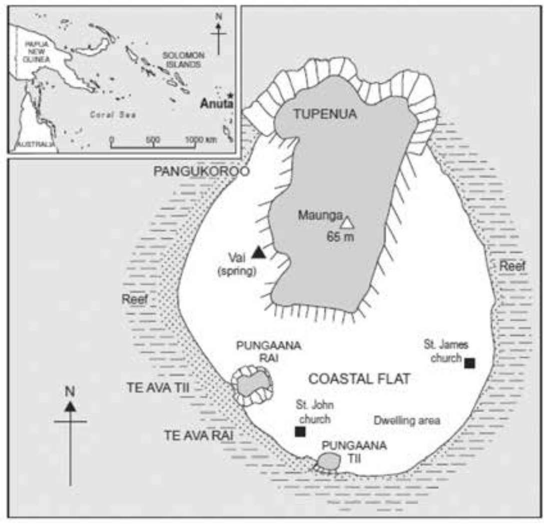

Figure 6: Map of Anuta island showing fringing reef and position of Anuta in the Solomon Islands

are enclosed by its five archipelagic baseline systems.[79] For islands not enclosed by archipelagic baselines, 'the baselines from which the breadth of the territorial sea is measured is the low-water line along the coast of each island except that in the case of islands situated on atolls or islands having fringing reefs the baseline is the seaward low-water line of the reef'.[80] Atoll islands falling within this baseline provision include Roncador Reef (just south of the Ontong Java archipelago) and Sikaiana (north of Malaita Island, within the main archipelago). This baseline provision also applies to islands having fringing reefs, which include the outlying islands of Tikopia, Fataka, and Anuta (Figure 6).[81] This legislative ap-

79. See Map 1 in United States Department of State, 'Solomon Islands: Archipelagic and Other Maritime Claims and Boundaries' (2014) 136 Limits in the Seas <https://2009-2017.state.gov/documents/organization/224319.pdf> accessed 15 December 2021; the illustrative chart of its archipelagic baselines indicates the five archipelagos but does not show other islands not included in the archipelagic baseline system.

80. Delimitation of Marine Waters Act 1978 (Solomon Islands), section 5(3).

81. Reproduced from Feinberg, Richard, 'Marine resource conservation and prospects for environmental sustainability in Anuta, Solomon Islands' (2010) 31(1) *Singapore Journal of Tropical Geography* 41, with the author's kind permission.

proach describes the location of the baseline for atoll or island having fringing reefs by reference to the low-water line of the reef itself. This may be contrasted with the use of coordinates that have been prescribed for archipelagic basepoints.

3.2. Legislation Defines Reef Baseline by Reference to Chart

Another approach to implementing reef baselines is where there is a legislative reference to a charted reef edge in a coastal State's baseline legislation. An example is the legislation of the Kingdom of Netherlands Antilles, which provides that '[t]he low-water line shall be the contour line at 0 metres or, where this does not exist, the coastline or edge of low-tide reefs, as marked on large-scale Dutch charts'.[82] Recalling the earlier discussion on the relevant tidal datum of the reef, it may be observed this legislation refers to the 'edge of *low-tide* reefs'.[83] This closely mirrors the language of Article 6 of the LOSC, and, as was seen in discussion of the provision's drafting history (see Part 2.4, reflects the general principle that only reefs above water at low tide may be used for the purposes of a reef baseline).

Legislation providing for the baseline of Bermuda is even more specific, referring expressly to the charted reef edge in Admiralty Chart 334 in relation to Bermuda's main group of islands:

> The baseline from which the breadth of the territorial sea is measured between a point on the coast at 32°15.2'N64°52.3'W inshore of Hogfish Cut and a point on the coast at 32°22.7'N64°39.7'W inshore of Town

82. Decree of 23 October 1985 governing the implementation of section 1 of the Territorial Sea of the Kingdom in the Netherlands Antilles (Extension) Act, section 1(2).

83. Decree of 23 October 1985 governing the implementation of section 1 of the Territorial Sea of the Kingdom in the Netherlands Antilles (Extension) Act, section 1(2), emphasis added.

> Cut […] shall be a line following, in a clockwise direction, the seaward limit of the highest areas, shown as awash on Admiralty Chart 334, of the main reef surrounding the area of deeper water to the west and north of the main group of islands of Bermuda.[84]

Figure 7 shows the contours of this baseline in relation to the Bermuda Islands and reef.

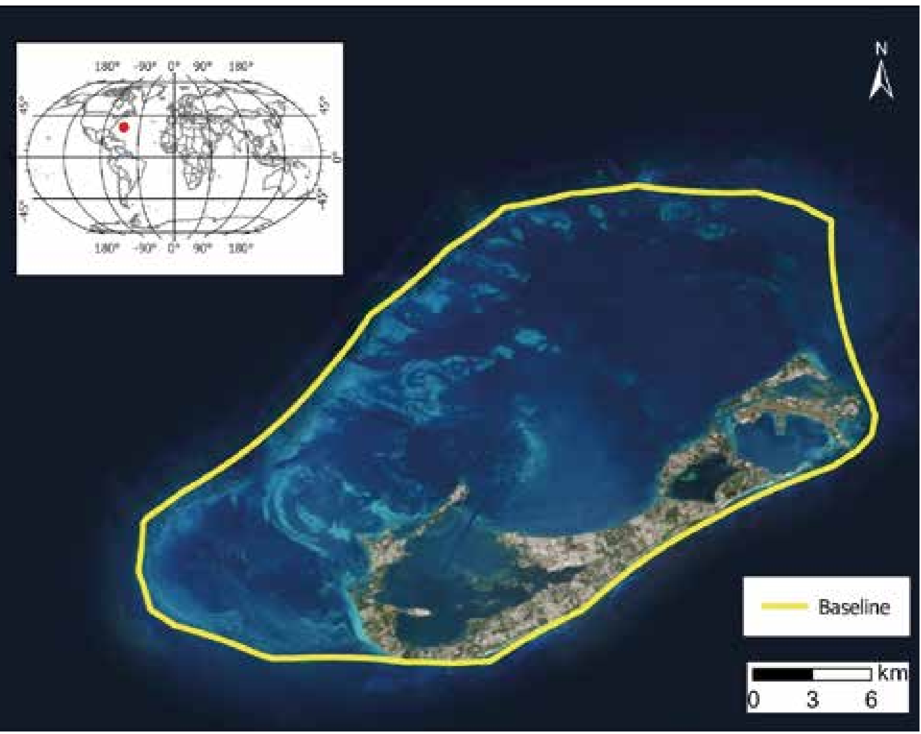

Figure 7: Bermuda baseline[85]

84. Bermuda (Territorial Sea) Order in Council 1988, Article 3(3).

85. Map produced by the author using ArcGIS Pro version 2.7.0. Sources: World Imagery basemap (Esri, DigitalGlobe, GeoEye, i-cubed, USDA FSA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community) and Maritime Boundaries Geodatabase, version 11 (Flanders Marine Institute (2019); available online at https://www.marineregions.org/. https://doi.org/10.14284/382).

Bermuda's legislation does not specify any particular tidal datum for the charted reef to which it refers. Indeed, imagery and its legislation suggest that the baseline tracks areas of deeper water. Beazley explains that due to the nature of coral reefs and the objective of charts to guide safe navigation, charting practice takes a pragmatic approach which means that areas of reef which may or may not dry at low tide are not always distinguished in a chart:

> Corals cannot live or grow out of water, so quite large areas of the surface of a "drying" reef may lie at or just below low-water level, but with pinnacles of coral or extensive patches of debris and sand which rise above it. Such reefs cannot be safely crossed by anything but very small boats, and particularly around an oceanic atoll or barrier reef the ocean swell breaking on the seaward edge of the reef will make it unapproachable. Customarily such areas forming constituents of a single reef are charted as a single drying reef using the symbol for coral which dries.[86]

In these circumstances, it is 'common practice to take the low-water line as being the edge of the reef'.[87] This is reflected in charting regulations of the International Hydrographic Organization, which state that 'where coral is exposed at low water, the coral edge symbol must be used to show the drying limits of the coral, *even when it continues underwater*'.[88] Figure 8 illustrates chart symbology for coral reefs, contrasted with that for submerged coral reefs and pinnacles:

86. Beazley (n 29) 288.

87. DC Kapoor and Adam J Kerr, *A guide to maritime boundary delimitation* (Carswell 1986) 32.

88. International Hydrographic Organisation, *S-4: Regulations for International (INT) Charts and Chart Specifications of the IHO* (4.9.0 edn, International Hydrographic Organisation 2021), <https://iho.int/uploads/user/pubs/standards/s-4/S4_V4-9-0_March_2021.pdf> accessed 15 December 2021 [B-426.3] 'Coral reefs and foreshores': emphasis added.

Feature	IHO Symbol	Symbol code
Coral reefs and foreshores (B-426.3)		J22
Submerged coral reefs and pinnacles (B-421.5)		K16

Figure 8: IHO symbology for coral reefs[89]

In the case of Bermuda, this charting practice may explain the use of a charted reef edge as a baseline even in areas where the reef appears to be submerged.[90] For the implementation of reef baselines generally, there are practical reasons why the distinction between parts of a reef that are above water at low tide and those parts that are fully submerged is not always depicted as a matter of charting practice. Indeed, in charting '*usually* coral reefs are generalised since it is impossible to chart all the individual lumps and bumps, and the area is for practical purposes not navigable'.[91] Where legislation defines the reef baseline by reference to a chart, this gives legal significance to the chart as a generalisation of that reef; that is, the location of the baseline is determined not by reference to the reef itself but the chart's representation of that reef. Given that Article 6 expressly refers to a charted reef baseline, this understanding of charting practice may have the effect of admitting some flexibility to the general requirement that a reef baseline should be supported by a reef that is above water at low tide. If so, this possibility directly engages concerns about the submergence of vulnerable coral reefs as a result of climate change impacts. Part 4 will consider this briefly.

89. Table compiled with information extracted from S-4 (id).

90. Though Kawaley mentions the practice may be justifable on a historical basis as well: Kawaley (n 29) 155.

91. S-4 (n 88) [B-440.4] emphasis added.

3.3. Legislation Defines Reef Baseline by Reference to Coordinates

The terms of the LOSC expressly envisage the use of coordinates for certain types of baselines, such as for archipelagic baselines (Article 47(8)). But there is also State practice showing the use of coordinates in the context of implementing reef baselines, a matter on which the LOSC is silent. The earlier example of Rodrigues Island (Mauritius) showed the use of coordinates as turning points between segments of baseline (e.g., reef closing line, historic bay closing line, seaward low-water line of the reef). Illustrated in the chart accompanying the legislation, coordinates are also specified for lengths of reef baseline; for example, point R31 in a counter-clockwise direction back to R1 is a continuous length of reef baseline along the fringing reef comprising 52 points. A similar approach is taken by Nauru,[92] Niue,[93] and Samoa[94] to implement reef baselines along fringing reefs, and similarly by Tuvalu,[95] Kiribati,[96] and the Republic of the Marshall Islands[97] for baselines around atolls. Most of these States also employ archipelagic baselines in combination with reef baselines.

The use of coordinates for a reef baseline is well-illustrated by the legislation of the Federated States of Micronesia:

92. Sea Boundaries Act 1997 (Nauru).

93. Territorial Sea Baseline Notice 2013 (Niue).

94. Maritime Zones Order 2017 (Samoa).

95. Declaration of Territorial Sea Baselines 2012 (Tuvalu).

96. Territorial Sea Baselines of Kiribati Regulations 2014.

97. Baselines and Maritime Zones Outer Limits Declaration 2016 (Republic of the Marshall Islands).

> The baseline of an atoll or island or portion of an island having a barrier reef, fringing reef, or other reef system is a line following the contour of the seaward edge of the reef system, which line connects those outermost elevations of the reef which are above water at low-water drawn by reference to lists of geographical coordinates expressed in terms of the geodetic datum or as marked on large-scale charts officially recognized by the government of the Federated States of Micronesia.[98]

Figure 10: Baseline around fringing reef of Pohnpei, Micronesia[99]

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98. Chapter 1 of Title 18 of the Code of the Federated States of Micronesia (Annotated), as amended by Public Law No. 19-172 on April 28, 2017, section 101(1)(b).

99. Map produced by the author using ArcGIS Pro version 2.7.0. Sources: World Imagery basemap (Esri, DigitalGlobe, GeoEye, i-cubed, USDA FSA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community) and baseline data from 'Territorial Sea Baselines for Federated States of Micronesia_WFL1' available from ArcGIS Online.

Recent legislation has opted to define reef baselines by means of coordinates. For example, the territorial sea baseline of Pohnpei is prescribed to 'comprise of a series of successive geographical coordinates located on the outermost reef edge points around Pohnpei Island classified as normal baseline'.[100] A high degree of detail in the location and shape of the line is given by the 1789 prescribed points over a distance of approximately 107 kilometres, illustrated in Figure 10. In contrast to the legislation relating to, for example, Anuta in the Solomon Islands, this legislative approach gives legal significance to the list of coordinates derived from the reef. In this way, it may be seen as an analogous method to that in Part 3.2, insofar as this approach defines the location of the baseline not by reference to the reef itself but to coordinates as a digital representation of that reef.

3.4. Observations on Implementation of Reef Baselines

While it has not been possible to conduct an exhaustive study of State practice on the implementation of reef baselines, the selected examples illustrate that coastal States implement reef baselines in a range of ways. Of the three main approaches observed, legislation defining a reef baseline on the basis of charts or coordinates is most common. It is also worth mentioning that some coastal States adopt a mixed approach to implementing reef baselines by using both coordinates and charts. One example is the baseline around Moorea Island (French Polynesia). Here, legislation gives a list of coordinates, and specifies that for certain segments, the baseline is 'the low-water mark as shown on the large-scale nautical charts in force published by the hydrographic and oceanograph-

100. Permanent Regulation on the Maritime Boundaries and Maritime Zones of the Federated States of Micronesia Pursuant to 18 F.S.M.C. §§101, 102, 104, 105a, and 107, as Amended by Public Law No. 19-172.

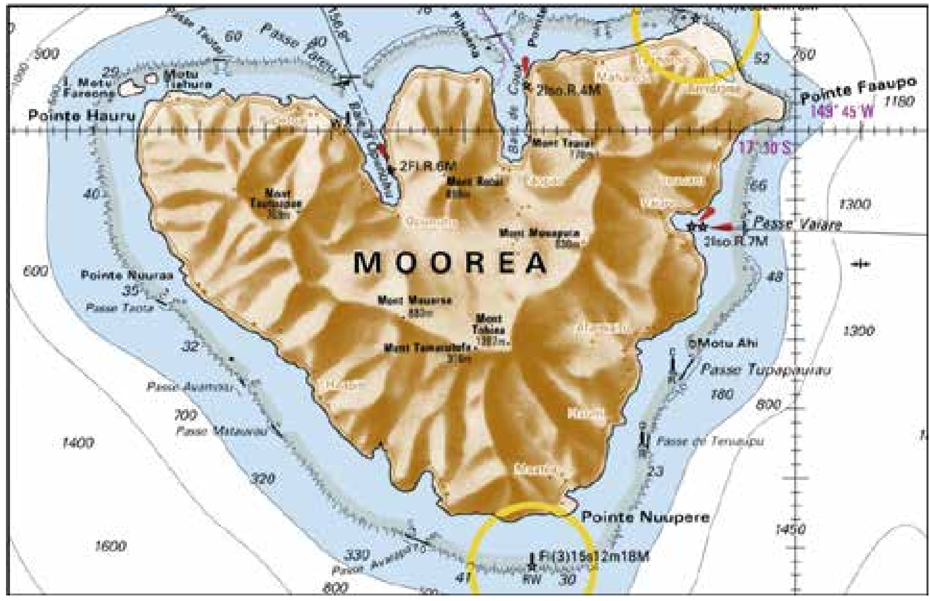

Figure 11: Extract from Chart of Moorea, French Polynesia[102]

ic service of the Navy (SHOM)'.[101] The effect of this legislation is that, for example, in the segment from Passe Vaiare Sud to Passe Tupapaurau Nord, the baseline is the charted seaward edge of the reef.

We may also observe that reef closing lines are often integrated within these approaches to create a single continuous baseline (for example, closing the multiple gaps in the fringing reef of Pohnpei), and that coastal States implement reef baselines in combination with other types of baselines (for example, the Solomon Islands uses normal and archipelagic baselines).

A key observation is that the two methods — referring to charts or coordinates — have in common that they give legal significance to a

101. Decree No. 2019-319 of April 12, 2019 defining the baselines from which the width of the territorial sea adjacent to French Polynesia is measured, Article 8.

102. Chart obtained from <https://data.shom.fr> accessed 15 December 2021.

representation of the reef, rather than the reef itself. This insight relates to the following discussion on the possible jurisdictional vulnerability of maritime zones drawn from reef baselines: might a coastal State's choice of legislative approach affect jurisdictional vulnerability (or stability)?

4. Reefs and Climate Change Impacts: The Work of the International Law Commission on Sea Level Rise in Relation to International Law

The Intergovernmental Panel on Climate Change (IPCC) has raised concerns in successive reports about climate-induced impacts on reefs. In 2018, it concluded that coral reefs 'are projected to decline by a further 70–90% at 1.5°C (high confidence) with larger losses (>99%) at 2ºC (very high confidence)'.[103] The impacts of ocean warming on coral reefs include reef dissolution, the rate of sea level rise outpacing the growth of reefs, and the exposure of reefs to increasingly frequent weather impacts such as storms.[104]

Legal scholars, too, have considered the potential legal implications of climate change impacts on maritime zones, with many writers focusing on sea level rise impacts. As early as 1990, writers such as Soons[105] raised

103. Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018), [B.4.2].

104. Intergovernmental Panel on Climate Change, *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (2019) 497.

105. AHA Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' (1990) 37 Netherlands International Law Review 207, 216.

concerns about the submergence of low-lying coastlines, and that this would cause the baselines and outer limits of maritime zones to shift landward with the coast. Caron pointed out that fringing reefs are one type of the 'less than substantial'[106] features most threatened by sea level rise, in part because fringing reefs may lie some distance from the island shoreline and their loss may accordingly result in a substantial reduction of area for the relevant maritime zone.[107] The view that baselines and maritime zones are ambulatory — that the legal lines and spaces move landward or seaward as a direct and necessary consequence of the movement of the coast or reef — is the conclusion of most scholars on this question.[108]

However, current discussion in the international community indicates that the question remains an open one. The first issues paper released in 2020 by the co-chairs of the International Law Commission's 'Study Group on sea-level rise in relation to international law' considered maritime zones supported by reefs, referring to baselines established by reference to Article 6 and 47,[109] drawing attention to the 'landward reposi-

106. David D Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level' (1990) 17 Ecology Law Quarterly 621, 636.

107. David D Caron, 'Climate Change, Sea Level Rise And The Coming Uncertainty In Oceanic Boundaries: A Proposal To Avoid Conflict' in *Maritime boundary disputes, settlement processes, and the Law of the Sea* (Brill Nijhoff 2009) 11.

108. There is a broad scholarship on ambulatory baselines. For a synthesis of this scholarship (including those scholars proposing alternative views) see in particular International Law Association, *Baselines under the International Law of the Sea* (Committee on Baselines under the International Law of the Sea 2012) and Coalter G Lathrop, 'Baselines' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015). For a critical appraisal, see Kate Purcell, *Geographical Change and the Law of the Sea* (Oxford University Press 2019).

109. Bogdan Aurescu and Nilüfer Oral, *First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law* (2020). Note the discussion of a range of baseline types in addition to those in Article 6 and 47, and the exclusion of deltaic baselines, for which Article 7 provides expressly: ibid [61].

tioning of the baseline'[110] in the case of inundation of coastal areas, and resulting landward movement of the outer limits of maritime zones (with the exception of the continental shelf).[111] Declining at this stage to affirm the 'ambulatory theory' as a statement of the existing law, the International Law Commission has foreshadowed the need for further work on the topic, including on the basis of increased evidence of State practice.[112]

In this light, this article suggests that there may be more stability available for maritime zones, including those supported by reefs, than the widely held ambulatory theory might initially suggest. Firstly, while global studies conclude reefs and associated islands are under threat, the IPCC recognises that impacts will vary with local conditions.[113] A recent study in the Pacific suggests a counternarrative to 'widespread perceptions that all reef islands are eroding in response to recent sea level rise',[114] concluding that 'reef islands are goemorphically resilient landforms that thus far have predominantly remained stable or grown in area over the last 20-60yr. Given this positive trend, reef islands may not disappear from atoll rims and other coral reefs in the near-future as speculated'. Modelling has similarly shown the morphodynamic resilience of reef islands composed of gravel, demonstrating that 'reef islands will undergo physical transformations in response to [sea level rise] and can maintain island surfaces above sea level'.[115] This is relevant to our understanding of

110. ibid [69].

111. ibid [71].

112. Report of the International Law Commission covering the work of its seventy-second session (26 April - 4 June and 5 July - 6 August 2021), UN Doc A/76/10 [291-4].

113. Intergovernmental Panel on Climate Change, *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* 497.

114. Arthur P Webb and Paul S Kench, 'The dynamic response of reef islands to sea-level rise: Evidence from multi-decadal analysis of island change in the Central Pacific' (2010) 72 Global and planetary change 234, 245.

115. Gerd Masselink, Eddie Beetham and Paul Kench, 'Coral reef islands can accrete vertically in response to sea level rise' (2020) 6 Science Advances 1, 4.

the jurisdictional vulnerability of reef baselines and associated islands because it highlights the need for a greater understanding of the particular reefs which support maritime zones, and their vulnerability or capacity for resilience in relation to climate change impacts.

Secondly, the contributions of States to the International Law Commission process have provided much-needed State practice and shows promise of leading to a more nuanced view of the legal position in current law. For example, the Netherlands and the United States, referring to their own baseline systems as ambulatory,[116] indicated that their respective domestic systems made provisions for review of the baseline as well as for it to remain in place for minor coastline change. This could suggest that a degree of stability afforded by the coastal State's domestic framework is not wholly incompatible with the notion of ambulatory baselines under international law. At the same time, a number of States provided information and made statements on the adoption of 'fixed' baselines, and Aurescu and Oral observe the development of 'State practice [relating] to the establishment of fixed baselines and outer limits of maritime zones'.[117] Consideration of the legal significance of these forms of 'fixed' implementation — examples of which this article has highlighted in relation to reef baselines — might alternatively suggest a shift in the current understanding of 'ambulatoriness' that has thus far dominated scholarship.

116. See Submission of the Kingdom of the Netherlands (available at https://legal.un.org/ilc/sessions/72/pdfs/english/slr_netherlands.pdf) [accessed 15 December 2021] which reports on 'the practice of the Kingdom of the Netherlands with regard to ambulatory baselines'and Submission of the United States of America (available at https://legal.un.org/ilc/sessions/72/pdfs/english/slr_us.pdf) [accessed 15 December 2021] which states that 'coastal baselines are generally ambulatory'.

117. Aurescu and Oral [104(g)]. See also Pacific Islands Forum, *Declaration On Preserving Maritime Zones In The Face Of Climate Change-Related Sea-Level Rise* (2021), available at < https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/> accessed 15 December 2021.

Thirdly, Aurescu and Oral also observe that 'the Convention does not indicate an obligation to draw and notify new baselines when coastal conditions change (or, as a consequence, new outer limits of maritime zones measured from the baselines)'.[118] Reliance on this view can clearly be seen in the comments of the Federated States of Micronesia, which observed when depositing lists of coordinates (including those for Pohnpei, discussed above), that:

> it is not obliged to keep under review the geographical coordinates of points, delineated in accordance with [the Convention] and that the Federated States of Micronesia intends to maintain these maritime zones in line with that understanding, notwithstanding climate change-induced sea-level rise.[119]

It is open to the Commission to elaborate the notion that a coastal State's chosen approach to baseline implementation can affect the degree of stability in its maritime zone. This is consistent with the submissions of the USA and the Netherlands, and supported by the examples discussed in Part 3 showing the implementation of reef baselines by reference to charts and coordinates. The approach taken in implementing legislation matters because, in contrast to a baseline directly identified with the low-water line of the physical reef, a baseline described by reference to charts or coordinates is capable of remaining in place until changed by the coastal State. Representation of the lowwater line of the reef in a chart or coordinates is a means to 'fix' that baseline independently from the reef itself that is commonly, if not also increasingly, chosen by coastal States.

119. Observations made on 24 December 2019, and revised on 15 January 2020, by the Federated States of Micronesia in connection with the official deposit of lists of geographical coordinates of points, accompanied by illustrative maps, for maritime baselines and maritime zones in accordance with the 1982 United Nations Convention on the Law of the Sea, available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/FSM_Observations.pdf> accessed 15 December 2021.

A focus of the Commission must now be to explore the question: where such representative means are used to 'fix' a baseline, what is the legal effect of the absence of any express duty to review or update it as a matter of international law? What, if any, is the significance of the degree of change to the lowwater line (e.g., is there any difference if a reef becomes partly submerged, compared with if a reef is fully submerged)? There seems both a qualitative and quantitative difference between the types of minor changes contemplated in the US and Netherlands' submissions, and those anticipated in the Micronesian submission to be caused by climate change impacts. And is the legal effect of such 'fixing' at international law available solely through practice (e.g., national legislation, enforcement actions), or other requirements as well, such as notifying the international community?[120]

5. Conclusion

This article has presented a critical evaluation of existing scholarship, jurisprudence, and guidance from technical authorities, as well as selected State practice on the implementation of reef baselines, to offer a contemporary viewpoint on the meaning and legal significance of 'fringing reefs' in the LOSC. A key thread in the development of the LOSC's provisions on 'fringing reefs' is the recognition of the 'geographic unity' of island, reef, and lagoon not only where an island has a fringing reef (in the narrow sense), but also in the broader geographic context of 'atolls and other island systems with same features as atolls'. This rationale supports the use of reef closing lines to delineate internal waters and in archipelagic systems to delineate the lagoon waters to be counted as

120. The importance of depositing maritime zones information is emphasised in the PIF Declaration (n 117).

'land' from the territorial sea or archipelagic waters beyond the reef. Another related thread may be seen in the importance of a pragmatic legal approach to the treatment of 'fringing reefs', which is evident in drawing from, but not being limited by, geomorphic understandings of fringing reefs. It may also be seen in the importance of charting practice in the implementation of reef baselines, which requires the generalisation of the reef in its charted representation due to the natural variability of reef heights as well as the needs of safe navigation; the use of coordinates offers a digital form of such representation to similar effect. To address the potential jurisdictional vulnerability of maritime zones to climate change impacts — including maritime zones supported by reefs — the international community will need to continue to follow these twin threads of legal pragmatism and geographic (and geomorphic) understanding.

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Special issue

Enforcing Fishery Legislation in the Exclusive Economic Zone of Non-Parties to UNCLOS: A Commentary to Article 73

*Pierandrea Leucci**

Abstract

Article 73 of the UN Convention on the Law of the Sea (UNCLOS) sets out rules on enforcement jurisdiction for fisheries offences committed in the Exclusive Economic Zone (EEZ) of a coastal State. Article 73 consists of four paragraphs concerned with enforcement measures, prompt release, penalties, and prompt notification. This collection of rules contributes to protecting the flimsy balance existing between coastal State and flag States' interests in the EEZ. Contracting Parties to UNCLOS shall comply with Article 73, but to what extent do the legal obligations encapsulated in the latter provision apply to States that are not contracting Parties to the Convention? This paper aims to assess and comment on the content and legal status of Article 73 against the backdrop of the statutory fisheries legislation of non-Parties to UNCLOS, international

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case law, preparatory works of the Convention, and other sources of international law.

Keywords: EEZ, Fisheries, Enforcement, Non-Parties to UNCLOS, Article 73

1. Introduction

In September 2020, two Italian fishing vessels, the *Antartide* and the *Medinea*, were detained in Libya for fishing without a licence in the Exclusive Economic Zone (EEZ) of the latter State. The two vessels were seized by the Libyan coast guard 35 miles off the coast of Libya. The eighteen Italian fishers on board were arrested and detained for over eighty days.[1] The Italian Government urged Libya to promptly release the vessels and their crews in accordance with international law, as codified in the UN Convention on the Law of the Sea (UNCLOS or 'the Convention').[2] Article 73 of the Convention, inter alia, requires a coastal State to promptly release foreign fishing vessels and crews arrested for fisheries violations in its EEZ upon the posting of a reasonable bond or other (financial) security.[3] Article 73, however, has no binding force on Libya, which is a Non-Contracting Party (NCP) to UNCLOS.

1. Dario Sabaghi, 'Caught in Haftar's nets: Libyan warlord's detention of Italian fishermen sparks diplomatic storm with Rome' (The New Arab, 3 December 2020) <https://english.alaraby.co.uk/analysis/haftars-capture-italian-fishermen-sparks-diplomatic-storm> accessed 21 November 2021; and Davide Piccardo, 'Fishermen Arrested off Libya and Haftar's Attempt to Blackmail Italy' (Daily Sabah, 23 September 2020) <https://www.dailysabah.com/opinion/op-ed/fishermen-arrested-off-libya-and-haftars-attempt-to-blackmail-italy> accessed 21 November 2021.

2. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force, 16 November 1994) 1833 UNTS 397.

3. UNCLOS Article 73(2).

The episode between Libya and Italy is just one of the many incidents that occurred in the EEZs of non-Parties to UNCLOS since the entry into force of the Convention on 16 November 1994.[4] Similar incidents may arise in respect of foreign fishing vessels engaging in catching operations, as well as ships searching for fish or conducting bunkering, shipboard processing, transhipment, and other 'fishing related' activities that are normally regulated under the fisheries legislation of a coastal State.

According to UNCLOS negotiators,[5] one of the major objectives of the EEZ regime, as detailed in Part V of the Convention, is to achieve better conservation and management of the natural resources of such zones, including its marine living resources.[6] For this purpose, Articles 56(1)(a) and 62(4) of UNCLOS[7] recognise the prescriptive authority of a coastal State to adopt fishery laws and regulations in the EEZ. Fur-

4. E.g., 'North Korea released detained Russian fishing boat' (Al Jazeera, 28 July 2019) <https://www.aljazeera.com/news/2019/7/28/north-korea-releases-detained-russian-fishing-boat> accessed 21 November 2021; '7 Egyptian fishermen held in Libya over illegal fishing release' (Egypt Today, 24 December 2020) <https://www.egypttoday.com/Article/1/95690/7-Egyptian-fishermen-held-in-Libya-over-illegal-fishing-released> accessed 21 November 2021; 'Libyan navy arrests 4 Tunisian fishermen and seizes their boat' (Arraed LG Plus, 12 August 2018) <https://www.arraedlg.com/libyan-navy-arrests-4-tunisian-fishermen-and-seizes-their-boat/> accessed 21 November 2021; and 'Iranian Coastguards detain 4 trawlers, 8 foreign nationals in Hormozgan' (MEHR News Agency, 14 May 2020) <https://en.mehrnews.com/news/158708/Iranian-coastguards-detain-4-trawlers-8-foreign-nationals-in> accessed 21 November 2021.

5. Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume II* (Brill/Nijhoff, 1993), 525-544.

6. Shigeru Oda, *The Law of the Sea in Our Time – I: New Developments 1966-1975* (Sijthoff Publications on Ocean Development 1977), 193-196.

7. James Harrison and Elisa Morgera, *Commentary to Articles 61-65* in Alexander Proelß (Ed.), *United Nations Convention on the Law of the Sea: A Commentary*, C. H. Beck/Hart/Nomos 2017) 480-526.

thermore, Article 73 of UNCLOS[8] provides the coastal State authority to enforce fisheries laws and regulations adopted for the EEZ.[9] The latter provision introduces a set of obligations that were not part of the previous regulatory framework established at the first UN Conference on the Law of the Sea (UNCLOS I) in Geneva, on 29 April 1958.[10]

Article 73 consists of four paragraphs, each one dealing with a different aspect of the 'Enforcement of Laws and Regulations of the Coastal State' in the EEZ, namely: measures to ensure compliance with fisheries laws and regulations (paragraph 1); the obligation to promptly release, under certain conditions, vessels and crews arrested and detained for fisheries offences (paragraph 2); limitations involving the type and range of penalties to be imposed for fisheries offences (paragraph 3); and the obligation to promptly notify the flag State of any vessel or crew detained under the same provision (paragraph 4).

The body of rules established under Article 73 contributes to reconciling the interests of coastal States and user States in the EEZ.[11] The

8. UNCLOS, Article 73 (*Enforcement of Laws and Regulations of the Coastal State*): "(1) The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention. (2) Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security. (3) Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment. (4) In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed."

9. Donald R. Rothwell, *The International Law of the Sea* (Hart Publishing 2010) 300-301.

10. Seline Trevisanut, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction and Recent Trends' (2017) Ocean Development and International Law, 48:3-4, 300-312, 301; and Zhen Sun, 'Conservation and Utilization of the Living Resources in the Exclusive Economic Zone – How Far Can We Go?' (2012) LOSI Conference Papers, "Securing the Ocean for the Next Generation", 1-22, 12.

balance of interests is further complemented by other UNCLOS provisions, including Articles 192, 225, 292, 297, 298, and 301, dealing with environmental protection, safeguards, use of force, and judicial residual mechanisms for the implementation of certain UNCLOS requirements.

While this system works and functions well for State Parties to UNCLOS, what happens if fishery violations are committed in the EEZ of a non-Party to the Convention? In other words, to what extent may the legal obligations encapsulated in Article 73 of UNCLOS also apply to NCPs?

As of December 2021, there are fourteen UN-recognised coastal States which are non-Parties to the Convention. These States are Cambodia, Colombia, El Salvador, Eritrea, Iran, Israel, Libya, Democratic People's Republic of Korea (North Korea), Peru, Syria, Turkey, United Arab Emirates (UAE), United States of America (USA), and Venezuela.[12] Seven of them have signed but not ratified the Convention.[13]

The objective of this paper is to preliminarily assess the four paragraphs of Article 73 against the backdrop of the primary fisheries legislation of coastal NCPs, international case law, preparatory works of UNCLOS, and other rules of international law to shed light on the content and legal status of such a provision. The paper does not aim to reach any definite conclusion on the customary international law status of Article 73 of UNCLOS, as that would require, among other things, a thorough examination of the practice and *opinio juris* of the States concerned. Rather, it strives to stimulate further discussion on the topic based on the research findings.

11. *Monte Confurco* case (Seychelles v. France), Prompt Release, Judgment, ITLOS Case No 6, ICGJ 339 (ITLOS 2000), 18th December 2000, International Tribunal for the Law of the Sea (ITLOS), para 70, 108.

12. United Nations Treaty Collection (UNTC), Depositary, UNCLOS Status as at 3 December 20202 <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 3 December 2020.

13. Cambodia, Colombia, El Salvador, Iran, Libya, North Korea, and UAE.

This paper will develop in the following sections: Part 2 will introduce the fisheries legal regime established under Part V of the Convention. Part 3 will discuss the content and legal status of paragraph 1 of Article 73, which regulates enforcement measures to ensure compliance with fisheries laws and regulations adopted by coastal States in the EEZ. Part 4 will discuss the content and legal status of paragraphs 2 and 4 of Article 73 dealing with prompt release and prompt notification respectively. Part 5 will discuss the content and legal status of paragraph 3 of Article 73, focusing on the general prohibition to impose the penalty of 'imprisonment' and other corporal punishment for fisheries offences in the EEZ. In addition, Parts 2 to 5 will include an assessment of the relevant statutory legislation of the NCPs concerned. Finally, Part 6 will comment on the legal status of Article 73 at large, and will address the question raised above, namely, to what extent may the legal obligations encapsulated in Article 73 of UNCLOS also apply to NCPs? Some concluding remarks will be provided in Part 7.

2. Enforcement of Fisheries Legislation in the EEZ

Before stepping into the thick jungle of notions, issues, and definitions that conceptualise the different components of Article 73 of UNCLOS, a closer look at the EEZ fisheries regime established under the Convention is important to familiarise the legal terminology that will be used throughout this paper.

The EEZ is a maritime area beyond and adjacent to the territorial sea extending seaward up to 200 nautical miles (M) to be measured from the territorial sea's baselines.[14] About 90% of the commercially valuable

14. UNCLOS Articles 55 and 57.

fishery resources are located in this zone.[15] Unlike the continental shelf, the EEZ does not exist ipso facto and ab initio. Therefore, an act of proclamation by the coastal State concerned is essential to recognise the rights provided for by UNCLOS over the EEZ. This requirement was not formally envisaged by the text of the Convention, but its practical application is supported by a uniform and consistent state practice,[16] as well as by the UNCLOS *travaux préparatoires* and commentaries.[17] Accordingly, the International Court of Justice (ICJ) in the *Libya/Malta* case observed that:

> [i]t is in the Court's view incontestable that […] the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.[18]

In the EEZ, the coastal State enjoys sovereign rights for the exploration, exploitation, conservation, and management of all marine living resourc-

15. Tommy B. Koh, 'The Third United Nations Conference on the Law of the Sea: What Was Accomplished?' (1983) Law and Contemporary Problems, Vol. 46: No 2, 6; Malcolm Barrett, 'Illegal Fishing in Zones Subject to National Jurisdiction' (1998) AustLll, James Cook University Law Review, 5JCULR, 1-26, 8; and Marion Markowski, 'The International Legal Standard for Sustainable EEZ Fisheries Management', in Gerd Winter, *Towards Sustainable Fisheries Law – A Comparative Analysis* (IUCN Environmental Policy and Law Paper No 74, 2009) <https://www.iucn.org/downloads/fisheries_management_eplp_74.pdf> accessed 22 May 2021.

16. Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne (n 5) 509-510.

17. No express reference to the obligation of a coastal State to establish its EEZ can be found within the text of the Convention; however, it is worth noting that Article 70(2) UNCLOS refers to States which 'claimed' the EEZ.

18. *Continental Shelf* case (Libyan Arab Jamahiriya v. Malta), Judgment, Merits, I.C.J. Reports 1985, 3rd June 1985, International Court of Justice (ICJ), para 34, 33. See also Tullio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2000) RCADI (Vol. 286), in *Collected Courses of the Hague Academy of International Law*, 117.

es, in accordance with Article 56(1)(a) of UNCLOS, except for living organisms belonging to sedentary species, which are not covered by the EEZ legal regime.[19] UNCLOS does not define the terms 'exploration, exploitation, conservation, and management'. However, these terms can be generally described as follows:

(i) Exploration: searching for marine living resources, collection of information relevant for the exploitation of such resources, and the carrying out of studies useful in harvesting stage. Exploration activities differ from applied research operations, which are regulated under Article 246(5)(a) UNCLOS.

(ii) Exploitation: the recovery for commercial purposes of marine living resources. Exploitation activities differ from the recovery of such resources for scientific purposes, which also fall under the marine scientific research regime under Part XIII of UNCLOS.

(iii) Conservation: the optimum utilisation of marine living resources, namely their exploitation at levels which do not exceed the maximum sustainable yield, as it is qualified by the relevant provisions of UNCLOS.[20]

(iv) Management: determining the capacity to exploit marine living resources and establishing terms and conditions to regulate fishing and fishing related activities.[21]

The sovereign rights enjoyed by a coastal State in the EEZ are exclusive in the sense that no other State is allowed to use them without the coastal State's express consent. These rights, however, are not absolute, as they shall be exercised to the extent allowed by and 'in a manner compatible

19. UNCLOS Articles 56(1)(a), 68, and 77(4).

20. UNCLOS Article 61.

21. UNCLOS Article 62.

with' UNCLOS.[22] The same rights, inter alia, provide coastal States with both a prescriptive and enforcement authority extending to all vessels fishing in the EEZ, including vessels flying the flag of another States. The International Tribunal for the Law of the Sea (ITLOS) in the *M/V Virginia G* case noted that: '[t]he term "sovereign rights" in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures'.[23]

The way ITLOS interpreted the term 'sovereign rights' is in line with the definition and scope that the International Law Commission (ILC) recognised to such term in 1956.[24]

UNCLOS further provides in Articles 62(4)(k) and 73(1) for the power of a coastal State to take measures to ensure compliance with its fisheries laws and regulations. Notably, Article 73 establishes rules on the enforcement of laws and regulations in the EEZ. This provision has a limited scope of application, as it does not apply to all measures of enforcement within the EEZ, but only to those involving the exploration, exploitation, conservation, and management of marine living resources, including fishing and fishing related activities. It is worth mentioning here that no similar provision was included in the body of rules established by the four Geneva Conventions on the Law of the Sea in 1958. Instead, the text of Article 73 duplicates almost verbatim Article 60 (Part

22. UNCLOS Article 56(2).

23. *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14th April 2014, International Tribunal for the Law of the Sea (ITLOS), para 211, 67.

24. International Law Commission (1956) *Articles concerning the Law of the Sea with commentaries*, Yearbook of the International Law Commission, 1956, Volume II, p. 297. See also, *Continental Shelf* case (n 18), *Dissenting Opinion* Oda, para 41, 166. See also Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections after 30 Years' (2012) LOSI Conference Papers, "Securing the Ocean for the Next Generation", 1-41, 7, n 22.

II) of the Informal Single Negotiating Texts (ISNT), as adopted in 1975 by the participants at the third United Nations Conference on the Law of the Sea (UNCLOS III).[25] The ISNT are the first informal drafting version of the Convention. They were compiled by the three main UNCLOS III committees to facilitate intergovernmental negotiations.[26] Part II of the ISNT covered the part of the text falling under the mandate of the Second Committee.[27] The ISNT are an important tool to assess the overall level of consensus of participants in the UNCLOS III negotiations, and the drafting history of several UNCLOS provisions, including Article 73.

The prescriptive and enforcement authority of a coastal State in respect of fisheries within its EEZ is preserved by Articles 297(3)(a) and 298(1)(b) of UNCLOS, which exclude disputes concerning the exercise of sovereign rights, such as those involving law enforcement activities for fisheries offences in the EEZ, from the compulsory mechanism entailing binding decision in Part XV, Section 2 of the Convention. The limitation at Article 297(3)(a) operates automatically, while the exception at Article 298(1)(b) needs to be activated by a coastal State before the dispute arises.

25. The United Nations Conference on the Law of the Sea (1975) *Informal Single Negotiating Text and Text on Settlement of Disputes, Office of Law of the Sea Negotiations*, Department of State, Washington, D.C., Part II, p. 25 <https://www.fordlibrarymuseum.gov/library/document/0067/1563045.pdf > accessed 16 May 2021.

26. James Harrison, *Making the Law of the Sea. A Study in the Development of International Law* (Cambridge University Press 2011) 44.

27. I.e., territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the high seas, land-locked countries, shelf-locked States and States with narrow shelves or short coastlines and the transmission from the high seas. Codification Division Publications, Diplomatic Conference, Third United Nations Conference on the Law of the Sea (1973-1982) <https://legal.un.org/diplomaticconferences/1973_los/> accessed 13 November 2021.

2.1. Non-Parties to UNCLOS and EEZ Regime

As of November 2021, there are fourteen UN-recognised coastal States that are non-Parties to UNCLOS: Cambodia, Colombia, El Salvador, Eritrea, Iran, Israel, Libya, North Korea, Peru, Syria, Turkey, UAE, USA, and Venezuela. They all extend their sovereign authority beyond the limits of their territorial seas. Nevertheless, for three of those NCPs it is unclear as to whether the EEZ regime in place covers the whole area of maritime entitlement (full-EEZ) that they would be allowed to claim under international law, or just a smaller part of it. More in detail, Cambodia,[28] Colombia,[29] Iran,[30] Libya,[31] North Korea,[32] Syria,[33]

28. 'Statement issued by the Spokesman of the Ministry of Foreign Affairs of 15 January 1978' <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KHM_1978_Statement.pdf> accessed 21 November 2021; and 'Decree of the Council of State of 13 July 1982', Article 5 <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KHM_1982_Decree.pdf> accessed 21 November 2021.

29. 'Act No 10 of 4 August 1978 establishing rules concerning the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf and regulating other matters', Article 7 <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/COL_1978_Act.pdf>.

30. 'Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea', Article 14 < https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf>.

31. 'General People's Committee Decision No. 260 of A.J. 1377 (A.D. 2009) concerning the declaration of the exclusive economic zone of the Great Socialist People's Libyan Arab Jamahiriya' <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/lby_2009_declaration_e.pdf> accessed 21 November 2021.

32. 'Decree by the Central People's Committee establishing the Economic Zone of the People's Democratic Republic of Korea, 21 June 1977' < https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRK_1977_Decree.pdf> accessed 21 November 2021. The 1977 Decree establishing the EEZ of North Korea refers to 'sovereignty' over the living resources of the EEZ. This is not in line with international law recognising 'sovereign rights' in respect of those resources.

33. 'Law No. 28 dated 19 November 2003 – "Definition Act of Internal Waters and Territorial Sea Limits of Syrian Arab Republic', Article 21 <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/syr_2003e.pdf> accessed 21 November 2021.

UAE,[34] USA,[35] and Venezuela[36] have formally established a full-EEZ by means of proclamation, declaration, statement, or other official acts.

El Salvador has not made any similar proclamation for its EEZ. By contrast, Article 83 of its 1983 Constitution[37] indicates that the territorial sovereignty of the State extends up to 200M from the territorial sea's baseline, in line with the old 'patrimonial sea' approach, which was followed by many Central and Latin American countries before the entry into force of UNCLOS. Notwithstanding that, Article 574 of the Code Civil of El Salvador,[38] as amended in 2004, expressly distinguishes between territorial sea (12M) and EEZ (200M), recognising 'soberánia' (sovereignty) in the former area, and 'derechos de soberánia' (sovereign rights) in the latter.[39] The same separation of maritime areas and powers

34. 'Declaration of the Ministry of Foreign Affairs concerning the Exclusive Economic Zone and its delimitation of 25 July 1980' <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARE_1980_Declaration.pdf> accessed 21 November 2021; and 'Federal Law No. 19 of 1993 regarding the Delimitation of Maritime Zones of the United Arab Emirates, 17 October 1993', Article 12 <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARE_1993_Law_pdf.pdf> accessed 21 November 2021.

35. 'Proclamation 5030 by the President of the United States of America on the Exclusive Economic Zone of the United States of America, 10 March 1983' <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1983_Proclamation.pdf> accessed 21 November 2021.

36. 'Act establishing an Exclusive Economic Zone along the coasts of the Mainland and Islands of 26 July 1978' <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/VEN_1978_Act.pdf> accessed 21 November 2021.

37. Constitution of El Salvador, adopted on 20 December 1983, as amended on 2 October 2003 <https://www.constituteproject.org/constitution/El_Salvador_2014.pdf?lang=en> accessed 21 November 2021.

38. Code Civil of El Salvador, adopted on 23 August 1859, as amended by Decree No. 512 of 26 November 2004 <https://www.oas.org/dil/esp/codigo_civil_el_salvador.pdf> accessed 21 November 2021.

39. Code Civil of El Salvador, Article 574: "…La zona de mar adyacente que se extiende más allá del mar territorial hasta las doscientas millas marinas contadas desde la línea base, se denomina zona económica exclusiva, en la cual El Salvador ejerce derechos de soberanía para explorar, explotar, conservar y administrar los recursos naturales vivos y no vivos de las aguas supra yacentesal lecho, del lecho y del subsuelo del mar y para desarrollar cualesquiera otras actividades con miras a la exploración y la explotación económica de esa zona…"

is reflected in other pieces of legislation in force in El Salvador, including the 'Ley General de Ordenación y Promoción de Pesca y Acuicultura' (the fisheries and aquaculture law) adopted on 13 December 2001. Despite the language of the 1983 Constitution, the more recent practice of El Salvador suggests that the State has established a full-EEZ in line with international law.

The situation of Peru also deserves to be discussed further. As with El Salvador, Peru has not made any formal proclamation of its EEZ. Article 54 of the 1993 Political Constitution of Peru indicates that the State exercises sovereignty and jurisdiction over its 'maritime domain' up to 200M from the territorial sea's baseline.[40] However, in the judgment of the *Chile/Peru* case the ICJ held that:

> While Chile has signed and ratified UNCLOS, Peru is not a party to this instrument. Both Parties claim 200-nautical-mile maritime entitlements […] Chile's claim consists of a 12-nautical-mile territorial sea and an exclusive economic zone and continental shelf extending to 200 nautical miles from the coast. *Peru claims a 200-nautical mile "maritime domain". Peru's Agent formally declared on behalf of his Government that "[t]he term 'maritime domain' used in [Peru's] Constitution is applied in a manner consistent with the maritime zones set out in the 1982 Convention". The Court takes note of this declaration which expresses a formal undertaking by Peru.*[41]

In light of the ICJ holding, Peru seems to have in place a full-EEZ in line with international law.

40. Constitution of Peru, adopted on 31 December 1993, as amended on 7 September 2009 <https://www.constituteproject.org/constitution/Peru_2009.pdf> accessed 21 November 2021.

41. *Maritime Dispute* (Peru v Chile), Judgment, ICJ GL No 137, [2014] ICJ Rep 4, ICGJ 473 (ICJ 2014), 27th January 2014, International Court of Justice [ICJ], para 178, 65 (emphasis added).

Finally, with regard to Eritrea,[42] Israel,[43] and Turkey (excluding the Black Sea),[44] at the time of writing these States do not have in place a full-EEZ; rather they exercise sovereign rights on a smaller portion of such a zone, mainly as a consequence of delimitation agreements with neighbouring States or effecting international courts' decisions. That being said, for the limited portion of EEZ claimed by Eritrea, Israel, and Turkey, the regime recognised under international law, including sovereign rights for the exploration, exploitation, and management of marine living resources, applies.

42. As of November 2021, it is unclear if Eritrea has proclaimed a full-EEZ for the country, as the 'Integrated Marine and Coastal Management Zone Proclamation' made by Eritrea on 1 March 1995 refers to the territorial sea and the EEZ "existing now or that may be declared in the future." This condition of uncertainty was highlighted by Dzurek and Schofield, who noted that "even though Eritrea has not formally claimed EEZ jurisdiction, the Eritrea-Yemen Arbitration Tribunal delimited a maritime boundary between those States with reference to their territorial seas, continental shelves and EEZs." Daniel J. Dzurek, Clive Shofield, 'Parting the Red Sea: Boundaries, Offshore Resources and Transit' (2001) International Boundaries Research Unit, Maritime Briefing, Vol 3, No 2, 7.

43. Israel has not made any express EEZ proclamation, although in 2010 the country concluded a delimitation agreement with Cyprus also covering part of the EEZ of Israel in the Eastern Mediterranean Sea. The agreement entered into force in 2011. 2740 UNTS 48387 <https://treaties.un.org/doc/Publication/UNTS/Volume%202740/v2740.pdf> accessed 21 November 2021.

44. By means of Council of Ministers Decree No 86/11264 of 16 December 1986, Turkey formally proclaimed an EEZ in the Black Sea. However, as of November 2021, the State has not made any formal proclamation for an EEZ in the Mediterranean Sea. This being so, in 2019, Turkey concluded a Memorandum of Understanding (MoU) with Libya, which also delimited the EEZs of the two countries in the Mediterranean Sea. The legality of such an MoU has been contented by a number of States and institutions, including by the European Council on 12 December 2019. Notwithstanding that, the author believes that the agreement per se substantiates the intention of Turkey to claim an EEZ in the Mediterranean Sea. This consideration is without prejudice to the limits of any Turkish EEZ in the Mediterranean Sea, which should be determined in accordance with the existing rules of international law.

3. Enforcement Measures - Article 73(1) of UNCLOS

This section will examine and discuss the content and legal status of Article 73(1) of UNCLOS, which provides rules on the measures of enforcement a coastal State may take to ensure compliance with fisheries laws and regulations within its EEZ. In addition, 3.2 will analyse the relevant statutory legislation in force in the NCPs concerned.

3.1 Article 73(1): Content

The sovereign rights of a coastal State to explore, exploit, conserve, and manage marine living resources in the EEZ encompass the authority of a State to take measures of enforcement to ensure compliance with its fisheries laws and regulations.[45] This is a power to be exercised in accordance with the other provisions of the Convention, and subject to 'the specific legal regime established in [Part V]'.[46]

Article 73(1) of UNCLOS reads as follows:

> [t]he coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

The list of enforcement measures at Article 73(1) — i.e., boarding, inspection, arrest, and judicial proceedings — is not exhaustive, as clearly indicated by the language of the provision ('including').[47] For example,

45. Supra, n 21. See also, *Arctic Sunrise* case (Netherlands v. Russian Federation), Final Award on the Merits, PCA Case No 2014-02, ICGJ 511 (PCA 2015), 14th August 2015, Permanent Court of Arbitration (PCA), paras 283-284, 70.

46. UNCLOS Article 55.

47. Malcolm Barrett (n 15) 10.

the ITLOS in the *Tomimaru* case held that the scope of Article 73(1) may also extend to the 'confiscation' of foreign vessels, even if the forfeiture of ships is not specifically indicated in the aforementioned list.[48] The term 'confiscation' differs from 'arrest' at Article 73(1), as the former is normally used to indicate the transfer of ownership from the vessel's owner to the forfeiting State,[49] while the latter has a twofold meaning:

> [i]n relation to a ship or vessel, it is a technical term of Anglo-American admiralty law signifying the intention of an action *in rem* against that ship or vessel. In relation to a person it is a formal procedure by which a suspect is taken into custody preparatory to the initiation of criminal proceedings.[50]

The term 'arrest', in its first meaning, is also used in paragraph 4 of Article 73 together with 'detention' ('arrest or detention'),[51] which generally refers to the act of keeping the vessel in confinement or under constraint.[52] Like 'confiscation', 'detention' is not expressly mentioned in the list of measures at Article 73(1) but arguably falls within its scope, at least insofar as the latter is taken as a measure of enforcement and not as a penalty.[53]

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48. *Tomimaru* case (Japan v. Russian Federation), Judgment, Prompt Release, ITLOS Case No 15, ICGJ 419 (ITLOS 2007), 6th August 2007, International Tribunal for the Law of the Sea (ITLOS), para 73, 23. See also, *M/V "Virginia G"* case (n 23), paras 253-257, 77-78.

49. The transfer of ownership differs from the transfer of nationality. Indeed, the fact that the ownership is transferred from the owner to the forfeiting State does not deprive the State of nationality of the forfeited vessel to exercise its protective jurisdiction over such a vessel (e.g., for the prompt release of a vessel flying its flag); while the transfer of nationality would unlawfully deprive the flag State of its rights and obligations recognised under UNCLOS in respect of the forfeited vessel.

50. Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne (n 5) 795. See also Malcolm Barrett (n 15) 11.

51. UNCLOS, article 73(4): "In cases of arrest *or* detention of foreign vessels…" (emphasis added).

52. *Tomimaru* case (n 48), *Separate Opinion* Lucky, 116.

53. The limitation of someone's own liberty as a penalty or a punishment would be covered by Article 73(3) UNCLOS, which will be discussed below in this paper.

The use of 'confiscation', 'arrest', 'detention', or other enforcement measures is not unconstrained.[54] Article 73(1) provides for such measures to be exercised 'as may be necessary' and 'in conformity with [the] Convention'. The former condition refers to 'general international standards of the resort to force, and the latter to the unstable content of practice respecting the law of the EEZ'.[55] These two conditions are coupled under Article 73(1) and in modern law. Accordingly, Barrett opined that '[a] lthough broadly defined, coastal States' powers of enforcement [in the EEZ] are restricted by [UNCLOS]'.[56] Thus, in contrast with the view expressed by other commentators,[57] the author firmly believes that no measures of enforcement taken pursuant to Article 73(1) could pass the necessity test ('as may be necessary') without also being 'in conformity with [the] Convention', or vice versa. The contrary would generate a contradiction in terms, namely that a conduct which is prohibited under a certain UNCLOS provision may be 'necessary', and therefore permitted, under another provision of the same Convention.[58]

54. *M/V "Virginia G"* case (n 23), *Joint Dissenting Opinion* Hoffmann, Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, para 48, 225.

55. DP O'Connell, *The International Law of the Sea* (Vol. II, Clarendon Press Oxford 1984) 1071, ibid. *Separate Opinion* Paik, para 4, 195-6.

56. Malcolm Barrett (n 15) 11.

57. Dita Lialiansa, 'The Necessity of Indonesia's Measures to Sink Vessels for IUU Fishing in the Exclusive Economic Zone' (2020) Asian Journal of International Law 10(2020), 125-157, 156-157.

58. For instance, the 'sinking' or 'burning' at sea of vessels suspected of fisheries violations in the EEZ of a coastal State may even account for, practically speaking, the most effective enforcement action to be taken in certain cases of non-compliance, being therefore *prima facie* 'necessary' for the purposes of Article 73(1). However, that condition does not change the fact that a similar action would, in any case, be in contrast with a number of UNCLOS provisions, including the obligation to protect and preserve the marine environment (Article 192), and the right of the State of nationality of the sunken or burnt vessel to request its prompt release (Articles 73(2) and 292), in a way therefore non-consistent with the obligation at Article 73(1) UNCLOS to take only those enforcement measures which are "in conformity with [the] Convention."

What is more, the formulation 'in conformity with [the] Convention' at the end of Article 73(1) does not refer to the 'laws and regulations' adopted by the coastal State, but rather to 'such measures' of enforcement taken by it under the same UNCLOS provision. This interpretation is supported by two compelling arguments. First, by a joint reading of Article 73(1) with Article 56(2) of UNCLOS, inter alia, requiring coastal States to exercise 'sovereign rights', including enforcement jurisdiction, 'in a manner compatible with the provisions of [the] Convention'. Second, by the drafting history of Article 73(1) — indeed, according to the text of the draft proposal tabled in 1975 by the Informal Group of Juridical Experts (the Evensen Group),[59] measures of enforcement for fisheries violations in the EEZ could be taken by a coastal State only 'as may be necessary to ensure compliance with its laws and regulations *in accordance with the provisions of this Convention*' (emphasis added). There was no reference to the words 'adopted by it', in respect of laws and regulations, as in the current formulation at Article 73(1).[60] And even after that the words 'enacted by it' (adopted by it)[61] were included in paragraph 1 of Article 60 (Part II) of the ISNT, the proposal tabled by Honduras in 1978, requesting to add 'or compatible with this Convention' at the end of paragraph 1,[62] supports the argument that the formulation 'in

59. The 'Evensen Group' was a non-interest group established during the Second Session of UNCLOS III by Minister Jens Evensen, the head of the Norwegian delegation. The group consisted of legal experts from different delegations mostly engaging in informal exchanges on issues covered by the Second Committee. Mahon Hayes, *The Law of the Sea. The Role of the Irish Delegation at the Third UN Conference* (Royal Irish Academy, NUY Galway 2011) 271-272.

60. Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne (n 5) 791.

61. The words "enacted by it", which appear in the initial ISNT text, were replaced by "adopted by it" only in 1980, at the 9th Session of UNCLOS III, based on a Drafting Committee's recommendation; Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne (n 5) 793.

62. ibid 793.

conformity with [the] Convention' was not meant to apply in respect of 'laws and regulations' adopted by coastal States but rather to 'such measures' of enforcement taken by them.

In conclusion, measures taken by authorised officers of a coastal State pursuant to Article 73(1) shall not exceed what is 'necessary' according to the circumstances of the case, and shall be concordant with UNCLOS, including rules governing the EEZ, some of which will be discussed below in 3.1.1 and 3.1.2.

1. Necessity and Use of Force

According to Article 73(1) of UNCLOS, measures of enforcement for fisheries offences in the EEZ shall be taken 'as may be necessary'. McLaughin opined that 'the use of the term "necessary" [under Article 73(1)] imports a well established conceptualisation of force into the EEZ regime'.[63] Unlike other law of the sea multilateral instruments, such as the UN Fish Stocks Agreement,[64] UNCLOS does not expressly regulate the use of force in enforcement operations for fisheries violations. The Convention, at Article 301, only requires States in the exercise of their rights and in performing their duties to 'refrain from any threat or use of force' against another State. The latter provision duplicates almost verbatim the text of Article 2(4) of the UN Charter.[65] Notwithstanding the silence of UNCLOS, international courts and tribunals on multiple occasions observed that using a certain degree of force in law enforcement

63. Rob McLaughlin, 'Coastal State Use of Force in the EEZ under the Law of the Sea Convention 1982' (1999) University of Tasmania Law Review, Vol 18 No 1 1999, 11-21, 15.

64. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), Article 22(1)(f). Adopted in New York on 4 August 1995. In force, 11 December 2001. 2167 UNTS 3.

65. United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI.

operations is not in contradiction with the Convention, at least in so far as such force is unavoidable, and it is used in a way which is reasonable, and necessary in the circumstances.[66]

Judge Paik in the *M/V Virginia G* case observed that the concept of 'necessity' as encapsulated in Article 73(1) of the Convention strives to balance two conflicting interests at play: on the one hand, 'the freedom of a State to achieve the objective it seeks through means of its choosing' and on the other hand, the duty of the same State to refrain 'from choosing means that would unduly infringe the protected rights or interests' of another State.[67] This calls for an assessment of the 'necessary' nature of the use of force in enforcement operations, which needs to be based on two pillars: first, on a qualitative element, including the specific interests involved and the perception of the risk; and second, on a quantitative element, including the material costs of the act of non-compliance, and any other alternative options that a coastal State may take.[68]

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66. E.g., *M/V "SAIGA"* (No.2) case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1st July 1999, International Tribunal for the Law of the Sea (ITLOS), para 155, 61-62; Guyana v. Suriname, Final Award, ICGJ 370 (PCA 2007), 17st September 2007, Permanent Court of Arbitration (PCA), para 405, 112-113; *M/V "Virginia G"* case (n 23), para 359, 102; *Enrica Lexie* case (Italy v. India), Order, Provisional Measures, ITLOS Case No 24, ICGJ 499 (ITLOS 2015), 24st August 2015, International Tribunal for the Law of the Sea (ITLOS), para 133, 24; and he *M/T "San Padre Pio"* case (Switzerland v. Nigeria), Order, Provisional Measures, 6st July 2019, International Tribunal for the Law of the Sea (ITLOS), paras 83-4, 21, and para 130, 32.

67. *M/V "Virginia G"* case (n 23), *Separate Opinion* Paik, para 9, 197.

68. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ GL No. 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996) 8th July 1996, International Court of Justice (ICJ), para 245, 41; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Judgment, Merits, J.27.6.1986, ICJ reports 1986, 27th June 1986, International Court of Justice (ICJ), para 176, 94; and *Oil Platform* case (Iran v. United States), Judgment, Merits, ICJ GL No. 90, [2003] ICJ Rep 161, ICGJ 74 (ICJ 2003), 6th November 2003, International Court of Justice (ICJ), para 76, 198; *M/V "Virginia G"* case (n 23), *Separate Opinion* Paik, para 29, 205-206; and *Arctic Sunrise* case (n 25), para 222, 52.

The same assessment purports the application of a general proportionality principle in the use of force, which must take into account the specific circumstances of the case, the regulatory area for which the use of force is rendered necessary,[69] and any relevant considerations that are either ancillary to or dependent on the use of such a force, including in particular 'considerations of humanity'.[70] This proportionality test 'implies that the response must not only be proportionate in terms of the offence committed, but also proportionate in terms of procedure'. For example, in the *Red Crusader* case, the Anglo-Danish Commission of Enquiry considered disproportionate the decision of the *Niels Ebbesen* (Danish vessel) to open fire against the *Red Crusader* (British vessel) after the refusal of the latter to comply with the order to head to the port of Thorshavn to be tried for illegal fishing. In that respect, the Commissioners observed that 'other means should have been attempted, which, if duly persisted in, might have finally persuaded [the skipper] to stop and revert to the normal procedure which he himself had previously followed'.[73]

2. Compliance with Other UNCLOS Provisions

Measures of enforcement taken pursuant to Article 73(1) of UNCLOS shall be 'in conformity with [the] Convention', including the aforemen-

69. For example, according to Guilfoyle and Moore the threshold for the use of force in fisheries crimes is lower than the one for the use of force in "more serious" crimes at sea, such as piracy or drugs smuggling. C Moore (2015) *The Use of Force*, in Robin Warner, Stuart Kaye, *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2015) 33-34.

70. *M/V "SAIGA"* (No.2) case, (n 66), para 155, 61-62; Guyana v. Suriname (n 66), para 405, 112-113; *M/V "Virginia G"* case (n 23), para 359, 102; Enrica Lexie case (n 66), para 133, 24; and he *M/T "San Padre Pio"* case (n 66), paras 83-4, 21, and para 130, 32.

71. Rob McLaughlin (n 63) 16.

72. 'Investigation of certain incidents affecting the British trawler Red Crusader' (Denmark v. UK), Commission of Enquiry, 23 March 1962, 35 Int'l Law Rep. 485 (1962), 538.

73. id.

tioned Article 301 on the 'use of force'. A comprehensive examination of all the provisions directly or indirectly linked with Article 73(1) falls outside the scope of this paper. Nevertheless, it is safe to say that a similar list of provisions would at least cover the set of obligations under UNCLOS that are related to safety at sea and environmental conservation, including those incorporated in Articles 192, 193, 194, and 225 of the Convention. Accordingly, contracting Parties to the Convention should refrain from taking enforcement measures that:

(a) constitute an unjustified interference with the rights and freedoms of other (user) States in the EEZ, including their freedom of navigation, and pose a threat to the safety of vessels and people at sea. For example, measures of enforcement resulting in a serious and unreasonable danger to the life of people on board a vessel, or to international navigation.[74]

(b) infringe upon the coastal State's obligation to protect and preserve the marine environment.[75] For example, the burning, sinking, or bombing of a delinquent fishing vessel,[76] unless these actions incidentally stem from a force proportionally used.[77] Such measures would be in contradiction with the Convention for at least two reasons: first, they render the prompt release mechanism under UNCLOS without object — if the foreign vessel is destroyed it cannot be released; second, they may 'endanger the safety of navigation' and 'expose the marine environment to an unreasonable risk'.[78]

74. UNCLOS Articles 58(1), and 225.

75. UNCLOS Articles 192, 193 and 194.

76. E.g., Article 69 of Law No 31/2004, 6 October 2004 of Indonesia provides the use of similar measures of enforcement to ensure compliance with the domestic legislation of Indonesia in the EEZ.

77. Rob McLaughlin (n 63) 16.

78. UNCLOS Article 225. The ITLOS in the *M/V Virginia G* case (para 373, 105) expressly recognised the interlink existing between Articles 73(1) and 225 UNCLOS.

Furthermore, measures of enforcement taken by authorised officers for the violation of laws and regulations are in contradiction with the Convention if no corresponding prescriptive authority is recognised to the coastal State under UNCLOS. This is, for instance, the case of measures of enforcement taken by the competent authorities of a coastal State for bunkering in the EEZ insofar the supplying of fuel at sea is not 'ancillary' to fishing.[79]

In conclusion, Article 73(1) cannot be read in isolation, for measures taken under such a provision must be consistent with other rules and obligations incorporated into UNCLOS, such as those involving maritime safety and environmental protection. This is a necessary condition to meet the conformity-standard ('in conformity with [the] Convention'), which is established under Article 73(1) and that contributes to informing its content and scope of application.

3.2. Legislation of Non-Parties to UNCLOS: Sovereign Rights and Enforcement Measures

As observed in Part 2.1, all the coastal NCPs have in place an EEZ, although for three of them (Eritrea, Israel, and Turkey) it is questionable as to whether the EEZ regime would apply to the whole entitlement area, or just to a part of it. It follows that, in line with international law, all the NCPs enjoy 'sovereign rights' for the exploration, exploitation, conservation, and management of marine living resources in the EEZ, including the power to enforce any fisheries law and regulation adopted for that

79. *M/V "Norstar"* case (Panama v. Italy), Judgment, Merits, ITLOS Case No. 25, 10th April 2019, International Tribunal for the Law of the Sea (ITLOS), paras 224-5, 63; see also Valentin J. Schatz, 'Combatting Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State' (2016) Goettingen Journal of International Law 7 (2016) 2, 383-414, 389.

purpose. In that respect, 'sovereign rights' have been formally claimed by Cambodia,[80] Colombia,[81] El Salvador,[82] Iran,[83] Libya,[84] Syria,[85] Turkey (only for the Black Sea),[86] UAE,[87] USA,[88] and Venezuela.[89]

Furthermore, all NCPs except Israel specifically refer in their statutory fisheries legislation to one or more of the measures of enforcement listed in Article 73(1) of UNCLOS — i.e., boarding, inspection, arrest, and judicial proceedings — as well as to other not expressly mentioned by the Convention (e.g., confiscation) but inherently covered by the same

80. 'Decree of the Council of State of 13 July 1982', Article 5; supra n 28.

81. 'Act No 10 of 4 August 1978 establishing rules concerning the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf and regulating other matters', Article 8; supra n 29.

82. As it was discussed above in 2.1, despite the language used by the 1983 Constitution, the more recent legislation adopted by El Salvador expressly distinguishes between 'sovereignty' and 'sovereign rights'. supra n 39.

83. 'Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993', Article 14; supra n 30.

84. 'General People's Committee Decision No. 260 of A.J. 1377 (A.D. 2009) concerning the declaration of the exclusive economic zone of the Great Socialist People's Libyan Arab Jamahiriya', Article 2; supra n 31.

85. 'Law No. 28 dated 19 November 2003 – "Definition Act of Internal Waters and Territorial Sea Limits of Syrian Arab Republic', Article 22; supra n 33.

86. 'Decree by the Council of Ministers, No. 86/11264, dated 17 December 1986', Article 2 <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1986_Decree.pdf> accessed 21 November 2021.

87. 'Declaration of the Ministry of Foreign Affairs concerning the Exclusive Economic Zone and its delimitation of 25 July 1980', Article 4; and 'Federal Law No. 19 of 1993', Article 13; supra n 34.

88. 'Proclamation 5030 by the President of the United States of America on the Exclusive Economic Zone of the United States of America, 10 March 1983'; supra n 35.

89. 'Act establishing an Exclusive Economic Zone along the coasts of the Mainland and Islands of 26 July 1978', Article 3; supra n 36.

provision, in line with the broad meaning that international law recognises to the term 'sovereign rights'.[90]

As for Israel, the primary fisheries legislation in force is the 'Fisheries Ordinance No. 6' enacted on 1 January 1937 and complemented by a set of fisheries rules adopted on 1 May 2000. The provisions of the Fisheries Ordinance either specifically refer to the 'territorial waters' of Israel, or directly to 'Israel', which under Article 2 of the same legislation covers only the belt of water up to 6M from the coast of Israel. It is reasonable to believe, therefore, that the existing fisheries legislation of Israel does not apply to that portion of EEZ delimited under the 2010 Cyprus/Israel delimitation agreement.[91]

Finally, the 1977 Decree (EEZ) of North Korea indicates that the living resources of the EEZ are subject to the 'sovereignty' of the State.[92] This is not in line with international law providing 'sovereign rights' over such resources. However, despite the wrong legal qualification of the rights enjoyed by North Korea in the EEZ, the same State would have the authority, under international law, to enforce fisheries laws and regulations

90. E.g., Article 29 of the 'Fisheries Proclamation No. 176/2014' of Eritrea allows authorised officers to take measures of enforcement such as stopping, boarding, searching and arresting; Article 20 of the 1993 'Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea' recognises the power of Iran to exercise civil and criminal jurisdiction, including arrest and detention, for any act of non-compliance with the provisions of the Act (including fisheries); Article 23(b) of the 'Law No. 28 dated 19 November 2003 – "Definition Act of Internal Waters and Territorial Sea Limits of Syrian Arab Republic' provides the right of the competent Syrian authorities to inspect, search and initiate legal action against foreign ships in case of violation of laws and regulations related to the EEZ; and Article 16 of the 'Federal Law No. 19 of 1993' of UAE allows the State to take "such measures, including boarding, inspection, arrest and judicial proceedings against vessels, as may be necessary to ensure compliance with its laws and regulations."

91. Supra n 43.

92. 'Decree by the Central People's Committee establishing the Economic Zone of the People's Democratic Republic of Korea, 21 June 1977'; supra n 32.

adopted for that zone, including the provisions of the 1995 North Korean Fisheries Act, based on the EEZ proclamation made by it in 1977.

None of the domestic legislative sources examined for the purpose of this paper seem to include any reference to possible safety or environmental implications stemming from the use of fisheries enforcement measures in the EEZ.

3.3. Article 73(1): Legal Status

Exclusive rights to explore, exploit, conserve, and manage marine living resources in the EEZ provide coastal States with the authority to take measures — such as boarding, inspection, arrest, detention, and confiscation — to ensure compliance with laws and regulations adopted in that zone. This is an authority that emanates from the coastal State's 'sovereign rights'.[93] This concept was already part of the pre-UNCLOS I discussions within the ILC, and arguably reflects a well consolidated rule of international law that is applicable to all States, including non-Parties to UNCLOS.[94] In other words, all States claiming an EEZ in line with international law enjoy 'sovereign rights' to explore, exploit, conserve, and manage marine living resources therein, including the right to take the 'necessary' measures of enforcement to ensure compliance with laws and regulations adopted for that purpose.

Needless to say, the obligation to take measures of enforcement that are 'in conformity with [the] Convention' could not apply to those States that are not contracting Parties to UNCLOS, unless they otherwise agreed.[95] However, if the conditions mentioned in 3.1.1 and 3.1.2

93. Supra section 2.

94. Yoshifumi Tanaka, *The International Law of the Sea* (1st ed., Cambridge University Press 2012) 12; J. Ashley Roach, 'Today's Customary International Law' (2014) Ocean Development and International Law, 45:239-259, 248.

95. Vienna Convention on the Law of Treaties, 1969, Articles 34-36.

— and in particular those involving the use of force in enforcement operations, safety at sea, and environmental protection[96] — reflect rules of general application, then all States in the exercise of their 'sovereign rights', including enforcement jurisdiction, should abide by such rules. For that reason, an examination of the legal status of the aforementioned rules is necessary.

3.3.1. Use of Force

As mentioned in 3.1.1, UNCLOS does not directly regulate the use of force in enforcement operations. Nevertheless, international case law has recognised the legitimacy of such measures insofar as they are taken under certain conditions. For example, the ITLOS in the *M/V Saiga (No.2)* noted that:

> [a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires 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.[97]

Other international courts and tribunals reached similar conclusions on multiple occasions.[98] For example, the Arbitral Tribunal in the *Guyana/Suriname* arbitration accepted 'the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary'.[99] The legitimacy of the use of

96. Section 3.1.2 also referred to the prompt release, which is not mentioned here as it will be discussed below in Section 4 of this paper.

97. *M/V "SAIGA" (No.2)* case, (n 66), para 155, 61-62.

98. Supra n 35.

99. Guyana v. Suriname (n 66), para 445, 126.

force in enforcement operations is subject to the same proportionality principle (quantitative and qualitative elements) which informs the content of the necessity-test at Article 73(1).[100]

The use of force in enforcement operations constitutes an exception to the general obligation of all States to refrain from the threat or use of force against other States as provided by Article 2(4) of the UN Charter.[101] Accordingly, the ICJ in the *Nicaragua* case observed that 'it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[102] It is in respect of these 'less grave forms', such as the use of force in enforcement operations, that the exception to the general rule applies under international law. This is a functional element of the sovereign authority recognised to States under international law. The exercise of such authority, however, shall be subject to human rights considerations. As early as 1949, the ICJ in the *Corfu Channel* case recognised 'elementary considerations of humanity' to reflect a well-recognised principle of international law.[103] A concept reaffirmed by ITLOS on multiple occasions,[104] and subsequently substantiated in what Judge Treves in the *Juno Trader* case described as a 'common human rights and due process

100. Supra section 3.1.1.

101. UN Charter, Article 2(4): " UN Charter, Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

102. *Military and Paramilitary Activities in and Against Nicaragua* (n 68), para 191, 101; and *Oil Platform* case (n 68), para 51, 29-30.

103. *Corfu Channel* case (United Kingdom v. Albania), Judgment, Merits, I.C.J. Reports 1949, 9th April 1949, International Court of Justice (ICJ), 22.

104. E.g., *M/V "SAIGA"* (No.2) case (n 66), para 155, 61-62; Guyana v. Suriname (n 66), para 405,112-113; *M/V "Virginia G"* case (n 23), para 359, 102; *Enrica Lexie* case (n 66), para 133, 24; and he *M/T "San Padre Pio"* case (n 66), paras 83-4, 21, and para 130, 32.

dimension'.[105] A 'dimension' only incorporated into UNCLOS, and not directly established by it, which belongs to the corpus of rules of international law applying to all States, irrespective of their participation to UNCLOS.[106] The same human rights considerations constitute an essential element of the proportionality principle governing the use of force under international law, as linked to the necessity-test at Article 73(1) of UNCLOS. A principle that according to Shearer 'requires the enforcing State to weigh the gravity of the offence against the value of human life'.[107] In conclusion, it is reasonable to believe that the limitations discussed above in respect of the use of force in (fisheries) enforcement operations do apply to all States, including to non-Parties to the Convention.

3.3.2. Maritime Safety

Formela, Neumann, and Weintrit describe maritime safety generally as 'such desirable condition of human activity at sea that do not endanger human life and property, and are not harmful to the marine environment'.[108] The linkage between maritime safety and enforcement operations — including measures taken pursuant to Article 73(1) — is

105. *Juno Trader* case (Saint Vincent and the Grenadines v. Guinea Bissau), Judgment, Prompt Release, ITLOS Case No 13, ICGJ 346 (ITLOS 2004), 18th December 2004, International Tribunal for the Law of the Sea (ITLOS), *Separate Opinion* Treves, para 1, 71.

106. Angela Del Vecchio, Roberto Virzo, *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019) 424-427.

107. IA Shearer, 'Enforcement of Laws against Delinquent Vessels in Australia's Maritime Zones' (1997) Paper presented at 'Policing Australia's Offshore Zones: Problems and Prospects', Canberra 8-9 April 1997, 15.

108. Kamil Formela, Tomasz Neumann, Adam Weintrit, 'Overview of Definitions of Maritime Safety, Safety at Sea, Navigational Safety and Safety in general' (2019) TransNav, Vol 13, No 2, 285-290, 287.

recognised by Article 225 of UNCLOS, which requires States in the exercise of their powers of enforcement 'under [the] Convention' not to endanger the safety of navigation or otherwise create any hazard to vessels.[109]

The ITLOS in the *M/V Virginia G* case noted that, 'although article 225 of the Convention is found in Part XII of the Convention concerning protection and preservation of the marine environment, it has general application'.[110] The fact that the content of Article 225 has a 'general application' under UNCLOS, and therefore may apply in combination with Article 73, does entail its 'general application' under international law at large. No similar article was included in the text of the four 1958 Geneva Conventions on the Law of the Sea, although Article 34 of the ILC 'Articles concerning the Law of the Sea' (1956) provided rules on the '[s]afety of navigation'. The content of Article 34 of the ILC text was subsequently transposed to Article 10 of the High Seas Convention establishing a flag State's obligation to implement international rules and standards for safety at sea. The same obligation, however, did not also apply in respect of *coastal* States.

Three of the most important international instruments in place to ensure the safety of navigation are: the Collision Regulations (COLREGS);[111] the Safety of Life at Sea (SOLAS) Convention;[112] and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).[113] This 'triumvirate' of instruments establishes a set of rules, standards, and procedures to ensure safety at sea,

109. Valentin J. Schatz (n 79) 394.

110. *M/V "Virginia G"* case (n 23), para 373, 105.

111. Convention on the International Regulations for Preventing Collisions at Sea (COLREG), 1972, 1050 UNTS 16.

112. International Convention for the Safety of Life at Sea (SOLAS), 1974, 1184 UNTS 3.

113. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978, 1361 UNTS 2.

including the integrity of vessels, the safety of their crews, and the prevention of collision at sea. Most of the rules, standards, and procedures established under these three instruments reflect generally accepted international rules and standards (GAIRS),[114] which therefore apply to all States, irrespective of their participation to such instruments.[115]

When measures of enforcement are taken at sea against a fishing vessel, especially if they involve the use of force, a tension may arise between such measures and the safety interests purported by COLREGS, and SOLAS and STCW Conventions. Referring to COLREGS, the Arbitral Tribunal in the *South China Sea* arbitration reached two important conclusions: first, that a violation of the COLREGS as GAIRS 'concerning measures necessary to ensure maritime safety, constitutes a violation of [UNCLOS] itself'[116] and second, that in consideration of the generally accepted status of COLREGS, whenever they are in contradiction with enforcement measures taken at sea, safety rules should prevail.[117]

114. For an examination of the meaning of "generally accepted" under UNCLOS, see George K. Walker, *Definitions for the Law of the Sea. Terms not Defined by the 1982 Convention* (Martinus Nijhoff Publishers 2012) 96-97.

115. Robert Beckman and Zhen Sun, 'The Relationship between UNCLOS and IMO Instruments' (2017) Asia-Pacific Journal of Ocean Law and Policy 2 (2017) 201-246, 225-226; and Bernard H. Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 New York University Journal of International Law and Politics 109-159, 146-147.

116. *South China Sea* arbitration (Philippines v China), Final Award, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12th July 2016, paras 1082-1083, 428-429.

117. "…while the Tribunal is aware that China's statements suggest that its actions were justified as part of general law enforcement activities in the vicinity of a feature which China considers to comprise part of its sovereign territory, the Tribunal also recognises that, where the operational requirements of law enforcement ships stand in tension with the COLREGS, the latter must prevail…" ibid, para 1095, 431. This consideration is also in line with what Treves observed in respect of the prioritisation of activities in the EEZ that, despite being all simultaneously allowed under the law of the sea, hold conflicting interests, like in this case 'enforcement' and 'safety.' Notably, Treves opined that 'a useful criterion [to make such a prioritization] would be that of favouring the activity that entail less risk to human life.' Tullio Treves, 'Human Rights and the Law of the Sea', 28 Berkeley J.Int'l Law.1 (2010), 1-15, 6.

Building on the Tribunal's holding, it is arguable that the same preference for safety interests over enforcement ones should be recognised also to other GAIRS, including those encapsulated in the SOLAS and STCW Conventions. As such, any tension between those GAIRS and measures of enforcement for fisheries offences taken by States, inter alia, in their EEZ should be solved in favour of those safety rules. A similar approach appears to be followed by two important multilateral fisheries instruments, namely the UN Fish Stocks Agreement[118] and the FAO Port State Measures Agreement,[119] which in the context of fisheries enforcement measures recognise the value of safety standards and implications over the interest of applying enforcement measures at sea and in port.

3.3.3. Environmental Protection

Environmental protection is one of the pillars of the 'legal order for the seas and oceans' that UNCLOS aims at establishing.[120] Article 192 of the Convention requires 'all States' to protect and preserve the marine environment. The wording of UNCLOS clarifies that this obligation is not limited to the contracting Parties to the Convention but applies to all States.[121] To discharge their environmental obligation under the Convention and international law, States are prohibited to exercise their

118. UNFSA Article 22(1)(4).

119. Food and Agriculture Organization (FAO), Agreement on Port State Measures to Prevent (PSMA), Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Article 18(2). Adopted in Rome on 22 November 2009. In force, 5 June 2016.

120. UNCLOS Preamble (4).

121. Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume IV* (Brill/Nijhoff 1990) 43; and Alexander Proelss (2017) *United Nations Convention on the Law of the Sea: A Commentary*, Hush/Nishimoto, Marine Scientific Research in the EEZ and on the Continental Shelf (C.H. Beck – Hart – Nomos 2017) 1279.

powers of enforcement in a way that may 'expose the marine environment to an unreasonable risk'.[122] This condition of reasonableness shall be assessed on a case-by-case basis.

The obligation at Article 192 applies in respect of all States, and in 'all maritime areas', as well as 'any source' of pollution and other acts which may contribute to the deterioration of the environmental status of the sea.[123] The Arbitral Tribunal in the *South China Sea* arbitration ruled that:

> the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it [...] Article 192 of the Convention provides that "States have the obligation to protect and preserve the marine environment." [...] This "general obligation" extends both to "protection" of the marine environment from future damage and "preservation" in the sense of maintaining or improving its present condition.[124]

On multiple occasions, international courts and tribunals recognised the customary international law status of several environmental principles included in Part XII of UNCLOS which inform the content of the general obligation to protect and preserve the marine environment at Article 192. The list includes the duty to cooperate for the protection and preservation of the marine environment, whether on a bilateral and regional level, the 'no harm' rule, and the obligation to conduct an environmental

122. UNCLOS Article 225.

123. E.g., *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, para 120; *South China Sea* arbitration (n 116) para 941, 373-4; and *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* (Ukraine v. Russia), Award, Preliminary Objections, PCA Case No. 2017-06 (PCA 300354), 21st February 2020, Permanent Court of Arbitration (PCA), para 295, 86.

124. *South China Sea* arbitration (n 116) paras 940-1, 373.

impact assessment and to share its report.[125] These principles are the cylinder, pistons, and spark plug of the environmental engine under UNCLOS. It is difficult, if not impossible, to recognise the customary international law status of these rules without also accepting the same legal status for the primary obligation included in Article 192. Accordingly, Tanaka observed that:

> [o]wing to the wide ratification of the Convention as well as the degree of acceptance of various treaties on the protection of the marine environment, there may be room for the view that obligations for the protection of the marine environment embodied in [UNCLOS] have become part of customary law.[126]

It therefore follows that, when measures of enforcement taken by a coastal State to ensure compliance with its fisheries legislation result or are likely to result in deleterious effects to the marine environment — including to marine living resources and ecosystems[127] — the same measures will be in contradiction with the general obligation of such State to protect and preserve the marine environment. This rule applies to all States, irrespective of whether they are or are not contracting Parties to the Convention, and in all maritime zones, including in the EEZ.

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125. *Legality of the Threat or Use of Nuclear Weapons* (n 68), para 29, 241-242; *MOX Plant* case (Ireland v. United Kingdom), Order, Provisional Measures, ITLOS Case No. 10, ICGJ 343 (ITLOS 2001), 3rd December 2001, International Tribunal for the Law of the Sea (ITLOS), para 82, 110; *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, Merits, ICGJ 425 (ICJ 2010), 20th April 2010, International Court of Justice (ICJ), para 193, 68; and *South China Sea* arbitration (n 116) para 946, 376-377.

126. Yoshifumi Tanaka (n 94) 264.

127. UNCLOS Articles 1(1)(4) and 194(5). See also *Southern Bluefin Tuna* case (New Zeland v. Japan; Australia v. Japan), Order, Provisional Measures, ITLOS Case No 3, (1999) 38 ILM 1624, ICGJ 337 (ITLOS 1999), ITLOS reports 1999, 27th August 1999, International Tribunal for the Law of the Sea (ITLOS), para 70, 295.

4. Prompt Release and Prompt Notification — Article 73(2) and (4) of UNCLOS

This section will examine and discuss the content and legal status of Article 73(2) and (4) of UNCLOS, which set rules on prompt release and prompt notification following the arrest or detention of foreign vessels and crews for fisheries offences in the EEZ. In addition, 4.2 will analyse the relevant statutory legislation in force in the NCPs concerned.

4.1.1. Article 73(2) and (4): Content

Enforcement jurisdiction against foreign fishing vessels in the EEZ shall be subject to two further requirements established under Article 73(2) and (4) of UNCLOS, namely the 'prompt release' and 'prompt notification' obligations. The content of these two obligations will be discussed in 4.1.1 and 4.1.2.

4.1.2. Prompt Release

Enforcement action against a foreign fishing vessel in the EEZ shall be taken without prejudice to the right of prompt release of the State of nationality of such a vessel. This right is expressly provided for by Articles 73(2) and 292 of UNCLOS, the latter operating as a judicial mechanism in the event that the detaining State fails to comply with the prompt release obligation under the Convention.

According to Article 73(2), '[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security'. This obligation constitutes of three main components:

First, the release must be 'prompt'. As the ITLOS in the *M/V Saiga (No 1)* observed, the 'promptness has a value in itself',[128] and is essential to comply with the release obligation under UNCLOS. Thus, if no

128. *M/V "SAIGA"* case (n 66), para 77, 35.

mechanism of release is established under the national legislation of the coastal State for fisheries offences in the EEZ, or if the promptness of the release is not expressly indicated as a condition for the release, there will be a violation of Article 73(2).

Second, the release obligation covers both the vessel and the crew. If a coastal State provides the right of authorised officers to arrest the crew of a detained vessel, without any corresponding mechanism allowing for its prompt release upon the posting of a reasonable bond or security, there will be a violation of Article 73(2).

Finally, the bond or security, the payment of which the release of the detained vessel and crew are subject, shall be 'reasonable' and of monetary nature only. The reasonableness is to be determined 'in light of the assessment of relevant factors' and the specific circumstances of the case.[129] As for the monetary nature of the security, the ITLOS in the *Volga* case noted that non-financial securities imposed by a coastal State as a condition for the release of a foreign vessel and its crew would be in defiance of the purposes of Articles 73(2) and 292(1) UNCLOS.[130]

4.4.2. Prompt Notification

Whenever a foreign fishing vessel is arrested pursuant to Article 73(1) UNCLOS, the competent authorities of the coastal State which has authorised the arrest 'shall promptly notify the flag State [concerned], through appropriate channels, of the action taken and of any penalties subsequently imposed'.[131]

129. *"Hoshinmaru"* case (Japan v. Russian Federation), Judgment, Prompt Release, ITLOS Case No.14, ICGJ 418 (ITLOS 2007), 6th August 2007, International Tribunal for the Law of the Sea (ITLOS), para 88, 47; and *M/V "Virginia G"* case (n 23), para 270, 81.

130. *"Volga"* case (Russian Federation v. Australia), Judgment, Prompt Release, ITLOS Case No.11, ICGJ 344 (ITLOS 2002), 23rd December 2002, International Tribunal for the Law of the Sea (ITLOS), para 87, 22.

131. UNCLOS Article 73(4).

As the ITLOS in the *M/V Virginia G* case observed, such notification obligation, if violated, deprives the flag State of its right to intervene at the initial stages of actions taken against its detained vessel, and therefore prejudices the right of the same State to apply for the prompt release of such vessel and its crew.[132] Similarly to the release of vessels and crews, the 'promptness' of the notification is an essential aspect of the notification obligation at Article 73(4).

4.2. Legislation of Non-Parties to UNCLOS: Prompt Release and Prompt Notification for Fisheries Offences

Only two of the fourteen NCPs falling under the scope of the research conducted in this paper include in their statutory legislation a mechanism of release and notification similar to the one in Article 73(2) and (4) of the Convention. These countries are Eritrea and UAE.

Article 34 of Proclamation No. 176/2014 ('The Fisheries Proclamation')[133] of Eritrea provides for a release mechanism on receipt of a reasonable bond or other form of security for foreign fishing vessels arrested, inter alia, in the EEZ of Eritrea. Paragraph 1 of the latter provision reads as follows:

> The Minister may order the release of any fishing vessel (together with its gear, stores and cargo), vehicle, fish, other aquatic organism or fishing gear seized under this Proclamation on receipt of a reasonable bond or other form of security.

132. *M/V "Virginia G"* case (n 23), para 328, 93.

133. Proclamation No. 176/2014 – The Fisheries Proclamation, Gazette of Eritrean Laws published by the Government of Eritrea, Vol. 22/2014 No.2 Asmara, 13th October 2014 <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/103959/126618/F-221982642/ERI103959.pdf> accessed 21 November 2021.

Unlike Article 73(2) of UNCLOS, the release mechanism established under the Fisheries Proclamation does not also apply to the crew, does not need to be 'prompt', and is subject to the discretion of the competent Minister. However, with regard to the 'prompt notification' obligation, Article 29(7) of the Fisheries Proclamation expressly indicates that '[i]n case of arrest or detention of foreign vessels, the flag state shall be promptly notified of the action taken and any penalties subsequently imposed'. This is in line with Article 73(4) of UNCLOS.

Regarding the legislation of UAE, Article 16 of the Federal Law No. 19 of 1993[134] states that: 'Arrested vessels and their crews shall not be released until after the posting of bond or security. In cases of arrest of foreign vessels, the flag State shall be notified of the action taken'. This excerpt should be read in the context of the whole Chapter III of the same 1993 legislation dealing with, among other things, the fishing rights of UAE in the EEZ. The possibility to release both vessels and crew members, as well as the obligation to notify the flag State of any action taken, are clearly stated in Article 16 of the Federal Law No. 19 of 1993. However, the same provision does not refer to the 'reasonable' nature of the bond or to the 'promptness' of the release/notification, as is required under Article 73(2) and (4) of UNCLOS.

As for the remaining twelve coastal NCPs, no similar provisions could be found in their primary fisheries legislation, although Article 84 of the Fisheries Decree No. 637/2001 of El Salvador may be interpreted as allowing for a limited-release mechanism in case of foreign fishing vessels detained into a Salvadorean port.[135] Moreover, it is worth mentioning that Section 3 of the U.S. Fishermen's Protective Act, as amended in

134. Supra n 34.

135. Decree No. 637/2001, Article 84: "Las embarcaciones extranjeras infractoras serán detenidas por la Autoridad Marítima competente y llevadas al puerto salvadoreño más cercano bajo custodia policial, las cuales serán liberadas hasta que los infractores cancelen la multa correspondiente, sin perjuicio de cualquier otra responsabilidad legal."

2018,[136] establishes rules on the reimbursement of securities paid by U.S. fishers and fishing vessels for the 'prompt release' of their vessels or crews in case of arrest or detention by a foreign coastal State.[137]

The fact that no specific 'prompt release' and 'prompt notification' mechanisms for fisheries offences in the EEZ could be found in the statutory legislation of most of the NCPs, however, does not exclude ipso facto that similar mechanisms may be applied in practice by the competent authorities of such States, in accordance with their judicial and procedural rules.

4.3. Article 73(2) and (4): Legal status

Paragraphs 2 and 4 of Article 73 of UNCLOS require a coastal State to promptly release upon the posting of a reasonable bond or other (financial) security any vessel or crew arrested for fisheries offences in the EEZ, and to promptly notify the flag State of such vessel about measures of detention or arrest taken against its ship.

The first time that the content of Article 73 of UNCLOS appeared in an international setting was in 1971, when the USA made a proposal

136. Fishermen's Protective Act 1967, 22 USC 1971-1979; 68 Stat. 883, as amended through P.L.115-232, 13 August 2018 <https://www.govinfo.gov/content/pkg/COMPS-1670/pdf/COMPS-1670.pdf> accessed 21 November 2021.

137. Fishermen's Protective Act 1967, Section 3(a): "In any case where a vessel of the United States is seized by a foreign country under the conditions of section 2 and a fine, license fee, registration fee, or any other direct charge must be paid in order to secure the prompt release of the vessel and crew, the owners of the vessel shall be reimbursed by the Secretary of State in the amount determined and certified by him as being the amount of the fine, license fee, registration fee, or any other direct charge actually paid. For purposes of this section, the term "other direct charge" means any levy, however characterized or computed (including, but not limited to, any computation based on the value of a vessel or the value of fish or other property on board a vessel), which is imposed in addition to any fine, license fee, or registration fee. Any reimbursement under this section shall be made from the Fishermen's Protective Fund established pursuant to section 9."

to the Seabed Committee — at that time working on a 'list of subjects and issues' for UNCLOS III — for the inclusion into the future text of the Convention of a provision covering three out of the four elements constituting the current text of Article 73 UNCLOS: the use of measures of enforcement for fisheries offences (Article 73(1)); the prompt release of vessels — without, however, any reference to crew members (Article 73(2));[138] and the obligation to notify the flag State of any measure of enforcement taken to ensure compliance with fisheries laws and regulations (Article 73(4)).[139]

The 1971 USA proposal was revised in 1974 to also include the prompt release of crews, and the non-imprisonment rule, now at Article 73(2) and (3) of UNCLOS, respectively.[140] The revised USA proposal then became, with some minor drafting modifications, Article 60 (Part II) ISNT, which was endorsed by the participants at UNCLOS III in 1975, and which duplicates almost verbatim the final text of Article 73 UNCLOS, as adopted seven years later in 1982. None of the States participating at the pre-UNCLOS III and UNCLOS III negotiations, including many NCPs to the Convention like Iran, Libya, Peru, Turkey, and the USA, formally objected to the content of Article 60 (Part II)

138. According to Franckx, the U.S. proposal was prompted by the difficulties faced by the U.S. tuna fleet in the Pacific, as U.S. fishing vessels were often detained for a long period of time by certain Latin American countries. Erik Franckx, '"Reasonable Bond" in the Practice of the International Tribunal for the Law of the Sea' (2002) California Western International Law Journal, Vol 32 No 2 [2002], 303-342, 307, n 22.

139. "4. Enforcement of the fisheries regulations adopted pursuant to this Article shall be effected as follows: [...] C. An arrested vessel shall be delivered promptly to the duly authorized officials of the state of nationality. Only the State of nationality of the offending vessel shall have jurisdiction to try any case or impose any penalties regarding the violation of fishery regulations adopted pursuant to this Article. Such State has the responsibility of notifying the enforcing organization or State within a period of six months of the disposition of the case." Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne (n 5) 786-787.

140. id 790.

ISNT. As a consequence, after discussions held during the Fourth Session of UNCLOS III, the content of Article 60 (Part II) ISNT was incorporated almost unchanged in a Revised Single Negotiating Text (RSNT) that was distributed among all delegations on 7 May 1976.[141] In addition, after UNCLOS was opened for signature on 10 December 1982, in the over 90 declarations and statements made by States either signing or ratifying the Convention,[142] no State commented on the content of Article 73(2) or (4) of the Convention.[143]

Prima facie, the high number of participants to UNCLOS, which now counts 168 contracting Parties out of the 193 UN-recognised States, and the overall level of consensus existing on the content of Article 73 during and after its negotiations, may support the view that the obligations at paragraph 2 (prompt release) and paragraph 4 (prompt notification) of its text have crystalised in rules of general application under international law. However, a closer look at the practical implications of considering the customary status of such provisions is herein necessary.

141. All the documents and resources of 11th UNCLOS III Sessions (1973-1982) are available at <https://legal.un.org/diplomaticconferences/1973_los/> accessed 16 May 2021.

142. In its declaration made upon signature (10 December 1982), Iran noted that: "Notwithstanding the intended character of the Convention being one of general application and of law making nature, certain of its provisions are merely product of *quid pro quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character. Therefore, it seems natural and in harmony with article 34 of the 1969 Vienna Convention on the Law of Treaties, that only states parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein […]" In the same declaration, Iran also mentioned the "The notion of "Exclusive Economic Zone" (Part V)" as not constituting *lex lata*.

140. id 790.

143. Declarations and Statements made upon UNCLOS signature, ratification or accession pursuant to Article 310 UNCLOS <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en > accessed 20 July 2020.

4.3.1. Prompt Release

The 'prompt release' rule at Article 73(2) UNCLOS aims at striking a balance between the opposite interests of flag State and coastal State in the EEZ. The effectiveness of such a rule is ensured by Article 292 UNCLOS,[144] which establishes a judicial mechanism of prompt release that the flag State may invoke whenever a detaining State fails to implement, among other things, Article 73(2) of the Convention.

As Judges Wolfrum and Yamamoto in the *M/V Saiga (No. 1)* case observed, 'the prompt release procedure may be seen as exception to the limitations on applicability as contained in article 297 of the Convention',[145] which at paragraph (3)(a) excludes all disputes involving the exercise by the coastal State of fisheries rights — including powers of enforcement — in the EEZ from the compulsory mechanism of disputes settlement at Part XV, Section 2 UNCLOS.

144. Article 292 ("Prompt Release of Vessels and Crews") forms part of Section 2 ("Compulsory Procedures Entailing Binding Decisions") of Part XV ("Settlement of Dispute") of UNCLOS. The provision reads as follows: "1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree. 2. The application for release may be made only by or on behalf of the flag State of the vessel. 3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time. 4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew."

145. *M/V "SAIGA"* case (Saint Vincent and the Grenadines v. Guinea), Judgment, Prompt Release, ICGJ 334 (ITLOS 1997), 4th December 1997, International Tribunal for the Law of the Sea (ITLOS), *Joint Dissenting Opinion* Wolfrum and Yamamoto, paras 14-17, 49.

The set of rules incorporated in Articles 73 and 292 UNCLOS operates as a system of 'weights' that contributes to preserving the balance between coastal States and flag States' interests in the EEZ. Thus, if a coastal State wants to detain a foreign vessel/crew for fisheries offences in the EEZ (weight 1), it first needs to have in place a prompt release mechanism at domestic level (weight 2). In addition, the coastal State concerned shall notify the flag State of the detained vessel about any measure taken against such a vessel (weight 3) in order to allow that State to participate at the initial stages of the proceedings (weight 4), as well as to activate the prompt release procedure (weight 5) by posting a reasonable bond or other financial security (weight 6). If the coastal State does not provide for any mechanism of release under internal law, if the release is not 'prompt', or if the bond or security imposed by the coastal State as a condition for the release is not 'reasonable', the flag State concerned (or someone on its behalf)[146] may ask the ITLOS or another competent judicial body, under certain conditions, to order the release of the vessel (weight 7).

As Judge Vukas in the *Camouco* case pointed out, the prompt release mechanism is an 'innovation', a novelty established under the Convention and '[t]he reason for the introduction of the procedure for prompt release at UNCLOS III was the idea that in same cases of detention, vessels and crews could be promptly released…'[147] Wegelein even refers to the right of prompt release as a 'compensation' by coastal States during UNCLOS III negotiations for the EEZ regime.[148] In that respect, Article 292 UN-

146. Rules of the International Tribunal for the Law of the Sea, Article 110 Rules of the Tribunal <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf> accessed 16 May 2021."

147. *Camouco* case (Panama v. France), Judgment, Prompt Release, ICGJ 338 (ITLOS 2000), 7th February 2000, International Tribunal for the Law of the Sea (ITLOS), *Dissenting Opinion* Vukas, para 3, 60.

148. Florian H. Th. Wegelein, 'The Rules of the Tribunal in the Light of Prompt Release of Vessels' (1999) 30 OCEAN DEVELOPMENT & INTERNATIONAL LAW 265, 266, in Heiki Lindpere, 'Prompt Release of Detained Foreign Vessels and Crews in Matters of Marine Environment Protection' (2005) International Journal of Legal Information: Vol. 33: Iss 2, Article 8, 240-255, 241.

CLOS plays a key role in ensuring the effectiveness and promptness of the release, as well as the reasonableness of any bond or security posted pursuant to Article 73(2). The former provision establishes the right of the flag State (or someone on its behalf) of a detained vessel or crew to submit to a national or international court, including ITLOS, a request for a judicial 'prompt release' on the condition that the detaining State has failed to comply with its obligation under, inter alia, Article 73(2) UNCLOS. Without the judicial mechanism for the effective protection of the flag State's interest as provided for by Article 292, the prompt release obligation in Article 73(2) would lose much of its power, as the flag State of the detained vessel would end up being deprived of any backup solution against an act of non-compliance with Article 73(2) by the detaining State. That was the idea behind the USA proposal on prompt release, with the U.S. Administration describing Article 292 as 'an expedited dispute settlement to address allegations that a State Party has not complied with the Convention's provisions for the prompt release of a vessel'.[149]

Lindpere assessed from a jurisdictional standpoint the possibility to apply Article 292 outside its limited conventional scope. Eventually, he showed sympathy with Lagoni's argument which, based on a certain reading of Article 288(2) UNCLOS,[150] recognised the applicability of Article 292 for non-Parties to UNCLOS as well.[151] However, considering the strict

149. David Anderson, 'Modern Law of the Sea. Selected Essays (2008) Publications on Oceans Development, Vol. 59, 289.

150. UNCLOS Article 288(2): "A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement."

151. Lagoni opined that the formulation "an international agreement" at Article 288(2) UNCLOS also covers *ad hoc* agreements concluded by States that are non-parties to UNCLOS. That would implicitly recognise the jurisdiction of ITLOS, under Article 292 UNCLOS, in respect of cases of prompt release also brought by NCPs to the Convention. Heiki Lindpere (n 148) 249.

procedural character of Article 292, it is difficult to imagine how a similar provision could apply, in practice, without either the express consent by or collaboration of the coastal State concerned. This argument is supported by the language of Article 292(1) UNCLOS, which expressly refers to the situation '[w]here the authorities of a *State Party* have detained a vessel flying the flag of another *State Party…*' (emphasis added).[152] The possibility, if any, to also apply Article 292 for NCPs, therefore, does not entail the obligation of such States to comply with a decision taken by ITLOS, or other international judicial bodies, pursuant to the same UNCLOS provision.

All in all, considering the novelty character of the prompt release mechanism, and that the efficacy of Article 73(2) de facto depends on the possibility to rely on the procedure in Article 292, it is reasonable to believe that the former provision does not reflect a rule of general application under international law.[153] On the same line, referring to the prompt release mechanism in Article 292, Anderson noted that:

> [t]he Article contains provisions and procedures which are novel, having appeared for the first time in the Convention. The Article does not have any antecedents in older treaties […] In other words, this is not one of the general rules of international law, which abound in other parts of the Convention.[154]

4.3.2. Prompt Notification

As observed above, the duty of a coastal State to promptly inform the flag State concerned about the detention or arrest of vessels flying its flag (Ar-

152. More explicitly, Anderson observed that "[Article 292] establishes procedures which are available only as between States Parties of the Convention." David Anderson (n 149) 289.

153. Ted L. McDorman, Alexander J. Bolla, John Duff, *International Ocean Law – Materials and Commentaries* (Carolina Academic Press 2005) 244.

154. David Anderson (n 149) 289. See also Erik Franckx (n 138) 303-305.

ticle 73(4)) is one of the 'weights' provided for by UNCLOS to safeguard the flimsy balance between flag State and coastal State's interests in the EEZ. It allows the flag State to participate at the initial stages of the proceedings and to apply for the prompt release mechanism under Articles 73(2) and 292. The obligation to notify the flag State was already part of the 1971 USA proposal, which then became Article 60 (Part II) ISNT — now Article 73 UNCLOS.[155] The question on the legal status of the 'prompt notification' obligation at Article 73(4) was recently raised by Judge Kittichaisaree in the *M/V Norstar* case, who underlined that international jurisprudence is still reticent on the issue.[156]

The idea to notify the flag State of actions taken against vessels flying its flag emerged long time before UNCLOS III negotiations, and it finds its general justification in the primary responsibility of the flag State under international law and in the principle of good faith. In 1930, in the Final Acts of the Conference on the Codification of International Law (Codification Conference), draft Article 11(3) provided that: '[a] capture on the high seas shall be notified without delay to the State whose flag the capture vessel flies'.[157] In the Observations of Sub-Committee No.1 to draft Article 11 it was specified that, given the 'exceptional' nature of the arrest of a foreign vessel on the high seas, it was 'advisable to require the State of the vessel effecting the capture to notify the other State concerned'.[158] A similar obligation was then included in Article 19(2) of the Geneva Convention on the Territorial Sea and the Contiguous Zone (TSC), which required the coastal State, under certain conditions,

155. Supra (n 83) 20.

156. *M/V "Norstar"* case (n 79), *Decl.* Kittichaisaree, paras 18-20, 9-10.

157. League of Nations (1930) *Acts of the Conference for the Codification of International Law*, Volume I (Plenary meeting, 13 March – 12 April 1930) 130 <https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf> accessed 17 May 2021.

158. id.

'to advise the consular authority of the flag State' before taking certain measures of enforcement on board a foreign vessel in the territorial sea. The content of Article 19(2) TSC is duplicated almost verbatim in Article 27(3) UNCLOS, with the latter using the term 'notify' instead of 'advise'.

What is more, Article 231 UNCLOS requires States exercising measures of enforcement for environmental crimes against foreign vessels to 'promptly notify the flag State and any State concerned of any measures taken pursuant to section 6 [Part XII]'. In this respect, UNCLOS commentaries on Article 231 note that:

> [t]he requirement of notification to the flag State of enforcement measures taken against a foreign vessel reflects the primacy of the enforcement jurisdiction, as well as the responsibility of the flag State for the action of all ships and vessels of its registry or flying its flag, and their crews.[159]

Finally, similarities can be recognised between the concept of 'prompt notification' reflected in Article 73(4) UNCLOS, and the one in Article 36(1)(b) of the Vienna Convention on Consular Relations, which requires States arresting or detaining a foreign national (person) to promptly inform its State of nationality about the action taken.[160]

159. Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne (n 121) 372.

160. Vienna Convention on Consular Relations adopted on 24 April 1963. In force, 19 March 1967. 596 UNTS 261. Article 36(1)(b): "[With a view to facilitating the exercise of consular functions relating to nationals of the sending State:] if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph." See also Martin Scheinin, *Human Rights Norms in 'Other' International Courts* (Cambridge University Press 2019) 361-362.

All the sources mentioned above, including the obligations to promptly notify the flag State of measures taken pursuant to Articles 27, 73, and 231 UNCLOS, support the argument that the prompt notification obligation at Article 73(4) does reflect a rule of general application which pre-dated UNCLOS III negotiations, and which applies to all States, including to NCPs.

5. Penalties — Article 73(3) UNCLOS

This section will examine and discuss the content and legal status of Article 73(3) UNCLOS establishing rules on penalties imposed by coastal States for fisheries offences committed in the EEZ. In addition, 5.2 will analyse the relevant statutory legislation in force in the NCPs concerned.

5.1. Article 73(3): Content

Paragraph 3 of Article 73 UNCLOS conceptualises in negative terms the power of coastal States to impose penalties for fisheries offences committed in the EEZ. The provision reads as follows:

> Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of an agreement to the contrary by the States concerned, or any other form of corporal punishment.

Article 73(3) prohibits coastal States to impose two 'penalties' for fisheries offences in the EEZ, namely imprisonment and corporal punishment, although the penalty of imprisonment may still be imposed subject to 'an agreement to the contrary by the [flag] States concerned'.[161] The lat-

161. The exclusion of "corporal punishment" from the scope of the derogation is made clear by the wording of Article 73(3), which refers to "corporal punishment" at the end of the sentence, after the derogation itself. This interpretation is supported by UNCLOS Commentaries.

ter derogation provides for further clarification on the reason why the verb 'may not', instead of 'shall not', is used in the text of the provision.

It goes without saying that the non-imprisonment clause at Article 73(3) only applies in respect of fisheries offences committed by foreign fishing vessels in the EEZ of a coastal State. For offences committed by local fishing vessels, the coastal State concerned would also act as the State of nationality of such vessels — i.e., the flag State that could provide an 'agreement' to the use of imprisonment under Article 73(3). Furthermore, as Barrett observed, 'imprisonment as a form of punishment may still be imposed against fishers who violate a coastal State's administration of justice'.[162]

UNCLOS does not provide any definition of 'imprisonment' for the purposes of Article 73(3). In that respect, Judge Lucky in the *M/V Virginia G* case noted that,

> [t]he word "imprisonment" is not defined in article 73, paragraph 3, of the Convention. Therefore, a meaning relevant to the circumstances is necessary; the word "imprisonment" in article 73, paragraph 3, must be given a wide and generous meaning. The meaning ascribed ought not to be that the individual must be sent to a prison and confined in cell. The term imprisonment means the restraint of a person contrary to his will; in other words it means a deprivation of one's liberty.[163]

Building on the above, Judge Lucky argued that measures of 'detention' which have the practical effect of depriving someone of its own liberty could fall under the scope of the non-imprisonment obligation at Article 73(3) UNCLOS.[164] As a consequence, coastal States should be prohibited from detaining a vessel or crew any time that the act of detention for

162. "For example, if a fisher wilfully refuses to pay a penalty or breaches a bond condition imposed by a domestic court." Malcolm Barrett (n 15) 15. See also David Anderson (n 149) 292.

163. *M/V "Virginia G"* case (n 23), *Separate Opinion* Lucky, para 50, 189.

164. id para 58-61, 191.

fisheries offences in the EEZ would de facto constitute a 'deprivation of one's liberty'.

While understanding the rationale behind Judge Lucky's argument, in the author's opinion this 'wide and generous meaning' applied to the term 'imprisonment' does not appear to be supported by the language of Article 73,[165] which draws a clear line between 'imprisonment' as a penalty, and other forms of 'deprivation of one's liberty' (e.g., arrest and detention) as measures of enforcement. Article 73 uses the word 'imprisonment' only in its paragraph 3, which specifies that '[c]oastal States *penalties* […] may not include imprisonment' (emphasis added). By contrast, the words 'arrest' and 'detention' are used in paragraphs 1 and 4 of Article 73 in respect of *measures* of enforcement that coastal States may take to ensure compliance with their fisheries laws and regulations. As Anderson noted, measures listed in Article 73(1) 'amount to an exercise of public authority (or police powers)' that precedes any possible criminal proceedings where the penalty of imprisonment may eventually be imposed.[166] It follows that, in so far as the 'deprivation of one's liberty' is just the result of a measure of enforcement or police power, such a measure would not qualify as imprisonment for the purposes of Article 73(3) UNCLOS.

Finally, with regard to the prohibition to impose 'any other form corporal punishment' as a penalty for fisheries offences in the EEZ, the interpretation used by Article 73(3) is broad enough to cover a wide range of corporal punishments, including physical violence and even death. No flag State's derogation exists in respect of such a limitation, as it finds its primary justification in universal human rights considerations which apply in respect of all vessels, whether local or foreign, as well as in all maritime zones.[167]

165. id *Dissenting Opinion* Jesus, para 14, 340.

166. David Anderson (n 149) 292..

167. Bernard H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 Colum. J. Transnat'l L. 399(1997), 399-429, 424.

5.2. Legislation of Non-Parties to UNCLOS: Penalty of Imprisonment and Corporal Punishment for Fisheries Offences

The author carried out a preliminary examination of the statutory fisheries legislation and criminal legislation in place in all the coastal NCPs to assess whether the penalty of imprisonment and/or corporal punishment are imposed as penalties for fisheries violations committed in the EEZ of such States. The findings of the research indicate that:

First, in none of the laws scrutinised for the purposes of this paper fisheries offences are expressly sanctioned with corporal punishment or other inhuman treatment. However, it should be noted that the 'reform through labour'[168] imposed by North Korea for certain fisheries offences raises serious concerns on the compatibility of such a penalty with those 'elementary considerations of humanity' that shall apply in the law of the sea, as they do under international law at large.[169] This should be read in light of the report's findings of the UN Commission of Inquiry on Human Rights on Democratic People's Republic of Korea (the UN Commission) published in 2014.[170] In its report, the UN Commission

168. The Criminal Law of North Korea does not provide for a general definition of "reform through labour", although such a penalty is in part described under Article 30 ("Life and Limited Term of Reform Through Labour") of the Criminal Law of North Korea, which states that: "Life-time and limited term of reform through labour shall be executed by sending an offender to a long-term prison labour camp where he or she will engage in labour. During the period of life-time and limited term of labour reform, an offender's civil rights are partially suspended…"

169. Article 8 of the 'Additional Clauses of Criminal Law' introduced in the Criminal Law of North Korea by means of Decree No. 2483/2007, provides for the penalty of death in case of "extremely grave" violations concerning the smuggling of, *inter alia*, fishery products. But this is more a fishery crime connected with illegal fishing, rather than a fishery violation per se. Therefore, it was not considered as relevant for the purposes of this research.

170. United Nations, General Assembly, *Report of the Commission on Inquiry on Human Rights in the Democratic People's Republic of Korea*, A/HRC/25/63 (7 February 2014) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/108/66/PDF/G1410866.pdf?OpenElement> accessed 25 November 2021.

expressly noted, among other things, that '[s]ystematic, widespread and gross human rights violations [including torture, enslavement, starvation, rape, and murdering] have been and are being committed by the Democratic People's Republic of Korea, its institutions and officials' in labour reform centers.[171] The UN Commission also underlined that the violations committed in labour centers by North Korea 'are not mere excess of the State; they are essential components of a political system that has moved far from the ideals on which it claims to be founded'.[172] Building on the UN Commission's findings, it is reasonable to believe that an institutionalisation of inhuman treatments in labour reform centres has been undertaken by the State. As such, the legality of the penalty of 'reform through labour' imposed by North Korea for, inter alia, fisheries offences might be put into question.

With regard to the other findings, a preliminary assessment of the relevant NCPs legislation shows that all NCPs except for Eritrea[173] and Venezuela[174] punish one or more fisheries violations with the penalty

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171. ibid 15.

172. id.

173. Article 36 of Proclamation No. 176/2014 ("The Fisheries Proclamation") of Eritrea, see *note 133*, only provide for monetary penalties for fisheries offences, including those committed by foreign vessels in the EEZ. In addition, no criminal offence with regard to fisheries could be found in the Penal Code of Eritrea <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101051/121587/F567697075/ERI101051%20Eng.pdf> accessed 21 November 2021.

174. Articles 89 to 122 of Decree No. 1.408 of 13 November 2014 (the statutory fisheries legislation in Venezuela) provide penalties for all the fisheries offences under the same legislation: all the penalties imposed by such provisions are monetary only; including Article 113 specifically applying to fisheries violations committed by vessels flying the flag of another State <http://extwprlegs1.fao.org/docs/pdf/ven147977.pdf> accessed 21 November 2021. In addition, no criminal offence with regard to fisheries could be found in the Criminal Code of Venezuela <docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhshX84epH%2FmHxfR5zIRlHa%2ByNmns6Sin6NKh4GWPBTzTbvAAfjUgqBWY8%2Bz%2FOvYDRA9MzfwCfzq13%2F0tHuiW0FpVdu1bP%2BymwYPFT2VrFVjGv> accessed 21 November 2021.

of imprisonment, without necessarily specifying the *locus delicti* (e.g., territorial sea or EEZ) and/or the nationality of the delinquent vessel or person (local, foreign, or both). In particular:[175]

Cambodia: Article 89(1) and (2) of the Fisheries Law of Cambodia,[176] as amended in 2018, provide the penalty of imprisonment for all the offences qualified as *class 1* and *class 2* offences under the law, including several fisheries violations.

Colombia: The list of sanctions at Article 55 of the 1990 Fisheries Law[177] of Colombia, as modified by Law No. 1851/2017,[178] does not include the penalty of imprisonment for fisheries offences. However, Article 335 of the Penal Code of Colombia punishes with imprisonment the use of destructive practices in fisheries or the act of fishing in prohibited areas.[179]

El Salvador: Article 79(a) of the Fisheries Decree No. 637/2001[180] provides a list of fisheries offences to be considered as 'serious' under the law. The latter provision was amended by Decree No. 683/2011,[181] which indicated that all the serious infringements falling under Article 79(a) qualify as 'an act of piracy'. It is not clear from the text of the legislation the legal implications of a similar qualification, but it should be noted that piratical acts are punished under Article 368 of the Penal Code of El Salvador with

175. As observed above in this paper, it is reasonable to believe that the Fisheries legislation of Israel does not extend to the EEZ. Therefore, Israel will not be included in the following list of States.

176. Preah Reach Kram NS/RKM/506/011 on promulgation of the Fisheries Law of 21 May 2006 <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/93364/109112/F-1218625063/KHM93364%20Eng.pdf> accessed 21 November 2021.

177. Law No. 13/1990 – General Fisheries Statute, adopted on 15 January 1990.

178. Law No. 1851/2017, adopted on 19 July 2017.

179. Law No. 599/2000 – Penal Code, adopted 24 July 2000.

180. Supra n 135.

181. Decree No. 683/2011, adopted on 26 August 2011 <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC086107> accessed 21 November 2021.

imprisonment from 5 to 15 years.[182] In addition, the same Penal Code imposes the penalty of imprisonment also for fishing with destructive practices (Article 260) and fishing for endangered species (Article 261).

Iran: Article 22(A) to (C) of the 1993 Fisheries Law[183] provide for monetary penalties only for fisheries offences under the law. However, paragraph (D) of the same provision imposes the penalty of imprisonment (90 days to 6 months) for the '[c]atch, processing, supply, sale, transportation, maintenance, import and export of various species of sturgeon and caviar without the permission of Shilat'.[184]

Libya: Article 21 of Law No. 14 of 1989[185] indicates that foreign vessels 'with the intention' to fish without a license in the territorial sea of Libya shall be punished with, inter alia, imprisonment and a fine; while Article 22 of the same Law prescribes that if such vessels are in areas subject to the 'sovereign rights' of Libya only a monetary penalty could be imposed. Nevertheless, Articles 23 and 24 of the Law sanction with the penalty of imprisonment also fisheries offences that may be committed in the EEZ — e.g., fishing without a license in the waters of Libya.

North Korea: Article 49 of the 1999 Fisheries Act indicates that: '[a]ny responsible personnel from organs, enterprises, associates or any individual citizen infringing the law, seriously affected to people's livelihood and fisheries resources shall be accountable to the administrative or penal responsibil-

182. Decree No. 1030/1997 – Penal Code < http://www.unifr.ch/derechopenal/legislacion/sv/cp_elsalvador01.htm> accessed 21 November 2021.

183. Law of the Protection and Exploitation of the Fisheries Resources of the Islamic Republic, adopted on 5 September 1995 <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/91768/106587/F-950829657/IRN91768.pdf> accessed 21 November 2021.

184. It should be noted, however, that sturgeons are anadromous species that normally do not live very far from the coastline; therefore, it is questionable to what extent imprisonment may be imposed, in practice, for fisheries offences in the EEZ of Iran.

185. Law No. 14 of 1989 regulating the exploitation of marine resources <http://extwprlegs1.fao.org/docs/pdf/lib11252.pdf> accessed 21 November 2021.sults/details/en/c/LEX-FAOC086107> accessed 21 November 2021.

ity according to the consequence of the act'.[186] In that respect, the Criminal Law of North Korea provides for the penalty of 'reform through labour', consisting in imprisonment, for several violations involving fisheries.[187]

Peru: Article 78 of the General Fisheries Law[188] provides a list of sanctions for fisheries offences under the law. These are complemented by the provisions of the fisheries implementing regulations adopted on 12 March 2001.[189] All the penalties established for violations under these pieces of legislation are monetary only. Nevertheless, Article 309 ('Illegal Extraction of Aquatic Species') of the Penal Code of Peru[190] provides the penalty of imprisonment for the crime of fishing for prohibited species or using prohibited fishing methods.

Syria: Article 53 of the Legislative Decree No. 30/1964 establishing rules on the protection of aquatic resources provides a list of penalties for fisheries offences, including the penalty of a fine 'and' imprisonment (from 6 months to 3 years).[191]

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186. Fisheries Act, Democratic People's Republic of Korea Adopted by the decision of the Supreme People's assembly No.49, on 18 Jan.18 1995 Amended and supplemented by the decree of the standing committee of the Supreme People's Assembly No.383, on 4 February 1999 <www.ilo.org/dyn/natlex/docs/ELECTRONIC/85436/95663/F1485649242/PRK85436.pdf> accessed 21 November 2021.

187. Criminal Law of the Democratic People's Republic of Korea (2009), Articles 8, 18, and 154 <https://www.hrnk.org/uploads/pdfs/The%20Criminal%20Law%20of%20the%20Democratic%20Republic%20of%20Korea_2009_%20(1).pdf> accessed 21 November 2021.

188. Legislative Decree No. 25977/1992, adopted on 21 December 1992 <http://faolex.fao.org/docs/pdf/per1377.pdf> accessed 21 November 2021.Democratic%20Republic%20of%20Korea_2009_%20(1).pdf> accessed 21 November 2021.

189. Decreto Supremo No. 012-2001-PE, adopted on 13 March 2001 <https://cdn.www.gob.pe/uploads/document/file/418473/Decreto_Supremo_N%C2%BA_012-2001-PE.pdf> accessed 21 November 2021.

190. Penal Code (Legislative Decree No. 635 of 3 April 1999) <https://www.legal-atlas.net/sites/default/files/law/Peru_CriminalCode_1991.pdf> accessed 21 November 2021.

191. Legislative Decree No. 30/1964, adopted on 25 August 1964 <http://faolex.fao.org/docs/pdf/syr2167A.pdf> accessed 21 November 2021.

Turkey: Article 36 of Law No. 1380 of 1971, as recently amended by Article 11 of Law No. 7191 of 2019[192] provides for a list of 'administrative sanctions' for acts of non-compliance with the fisheries rules established under Turkish law. Most of the penalties are monetary only, although for several offences imprisonment may be imposed in case of recidivism.

UAE: Articles 51 to 54 of Federal Law No. 23 of 1999[193] punishes a number of fisheries offences, including the use of destructive practices, fishing endangered species, and unauthorised fishing from foreign vessels with the penalty of a fine 'and' imprisonment.

USA: Section 307 of the Magnuson Fisheries Conservation and Management (MFCM) Act[194] provides a long list of 'Prohibited Acts'. The list covers most of the fishery violations under U.S. law, some of which constitute 'civil offences' punishable under Section 308, and other 'criminal offences' punishable under Section 309. For this latter category a penalty of a fine 'or' imprisonment 'or' both can be imposed. Nonetheless, the MFCM does not specify in which circumstances the penalty of imprisonment might be used. Similar language can be found in Section 41 of the U.S. Crimes and Criminal Procedure law.[195]

192. Law No. 1380/1971, as amended by Law No. 7191/2019 adopted on 6 November 2019 <http://faolex.fao.org/docs/pdf/tur191413.pdf> accessed 21 November 2021.

193. Supra n 34.

194. Magnuson-Stevens Fisheries Conservation and Management Act (Public Law 94-265), as amended by the Magnuson-Stevens Fisheries Conservation and Management Reauthorization Act (Public Law 109-479), 12 January 2007 <https://media.fisheries.noaa.gov/dam-migration/msa-amended-2007.pdf> accessed 30 November 2021.

195. Title 18 of the United States Code: Crimes and Criminal Procedure (Public Law 91-452, title II, §201(b), Oct. 15, 1970, 84 Stat. 928, added Part V) <https://www.govinfo.gov/content/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18.pdf> accessed 30 November 2021.

All in all, the vast majority of NCPs appear to rely on administrative penalties, in particular monetary penalties, for fisheries offences. The penalty of imprisonment is mainly imposed for fisheries offences that have a direct environmental implication (e.g., the use of explosives in fisheries), or for offences connected with crimes related to fisheries (e.g., smuggling of fishery products or obstruction to the work of officials).

5.3. Article 73(3): Legal Status

The content of Article 73(3) was already part of Article 60 (Part II) ISNT.[196] However, unlike the other three paragraphs of Article 73, the text of paragraph 3 was tabled at a later stage of the UNCLOS III negotiations in 1974, in the USA (revised) proposal.[197] Then, in 1975, the same text was included in the proposal submitted by the Informal Group of Juridical Experts (the Evenson Group), ultimately transposed in the text of Article 60 (Part II) ISNT.[198]

The underlining principle purported by Article 73(3) is the need to preserve the primary jurisdiction of the flag State for offences committed by vessels flying its flag, as well as to avoid the imposition of disproportionate or inhuman penalties for fisheries offences committed in the EEZ. No similar provision can be found under UNCLOS for fisheries offences in the territorial sea or other maritime areas to which the sovereignty of the coastal State extends. The same 'non-imprisonment' approach was pursued by UNCLOS III negotiators in respect of envi-

196. Supra section 2.

197. Supra n 140.

198. The United Nations Conference on the Law of the Sea (1975) *Informal Single Negotiating Text and Text on Settlement of Disputes, Office of Law of the Sea Negotiations*, Department of State, Washington, D.C., Part II, 25 <https://www.fordlibrarymuseum.gov/library/document/0067/1563045.pdf > accessed 16 May 2021.

ronmental crimes in the EEZ,[199] as provided for by the current text of Article 230(1) UNCLOS.[200]

Article 73(3) provides for two limitations to the coastal State powers of enforcement for fisheries offences in the EEZ: first, the prohibition to impose the penalty of imprisonment, except with an agreement to the contrary by the flag State concerned; and second, the prohibition to impose 'any other form of corporal punishment'. Only the former limitation will be discussed here, as the latter should be read in light of those 'elementary considerations of humanity' already examined above, and which all States, including NCPs, are required to apply under international law.[201]

As observed above in Part 2, non-Parties to UNCLOS also enjoy, subject to international law, exclusive rights to explore and exploit marine living resources beyond the limits of their territorial seas.[202] Such rights emerged and consolidated into the practice of States well before the adoption of UNCLOS, as recognised by the ICJ in the *Fisheries Jurisdiction* case.[203] The EEZ regime established under the Convention is now largely accepted to reflect customary international law.[204] Crawford

199. Mahon Hayes (n 59) 85; and Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution. International Law, State Practice and EU* Harmonization (Martinus Nijhoff Publishers 2013) 188.

200. UNCLOS Article 230(1): "*Monetary penalties* only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea" (emphasis added).

201. Supra section 3.3.1.

202. WT Burke, 'Customary Law of the Sea: Advocacy or Disinterested Scholarship?' (1989) Yale Journal of International Law, Vol. 14:508, Issue 2, 516.

203. *Fisheries Jurisdiction* case (United Kingdom v. Iceland), Judgment, Merits, 1974 I.C.J. 3 (July 25), 25th July 1974, International Court of Justice (ICJ), para 51-54, 23-24.

204. Valentin J. Schatz (n 79) 387; John G. Laylin, Emerging Customary Law of the Sea (1976) International Lawyer Vol. 10, No 4, 669-680, 674-675; and David Anderson (n 149) 210.

noted that the customary law version of the EEZ is very similar to the one codified into UNCLOS, as the rights enjoyed by States in their EEZ are optional and limited in scope.[205] The same rights also encompass the functional authority of a coastal State to punish violations of its fisheries legislation in the EEZ. Unlike NCPs, however, States Parties to UNCLOS specifically agreed to limit such authority by accepting the prohibition to impose the penalty of imprisonment for fisheries offences in the EEZ. The exceptional nature of the limitation at Article 73(3) is confirmed by the history of the provision, and by the fact that some of the major international and regional fisheries instruments in place do not provide for any similar limitation.[206] As such, by virtue of the exceptional nature of the non-imprisonment obligation, it is questionable as to whether the prohibition at Article 73(3) could apply beyond the legal realm of UNCLOS.

205. J. Ashley Roach (n 94) 246-247.

206. E.g., UNFSA (n 64); PSMA (n 119); FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement), Rome, 29 November 1993. In force, 24 April 2003; General Fisheries Commission for the Mediterranean (GFCM), Basic Texts (2016) <https://www.fao.org/3/i5450e/i5450e.pdf> and Compendium of Decisions (2013) <https://www.fao.org/3/ax391e/ax391e.pdf> accessed 30 November 2021; International Commission for the Conservation of Atlantic Tunas (ICCAT), Compendium of Management Recommendations and Resolutions adopted by ICCAT for the Conservation of Atlantic Tunas and Tuna-Like Species (2021) <https://www.iccat.int/Documents/Recs/COMPENDIUM_ACTIVE_ENG.pdf> accessed 30 November 2021; Western and Central Pacific Fisheries Commission (WCPFC), Conservation and Management Measures and Resolutions (2021) <https://www.wcpfc.int/system/files/booklets/31/CMM%20and%20Resolutions.pdf> accessed 30 November 2021; and Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), Canberra, 20 May 1980. In force, 7 April 1982 <https://www.ccamlr.org/en/organisation/camlr-convention-text> accessed 30 November 2021.

6. Comments on the Legal Status of Article 73

The research conducted in this paper aimed at exploring to what extent the legal obligations encapsulated in Article 73 UNCLOS may also apply to NCPs.

Whereas no ultimate conclusion on the customary nature of Article 73 could be reached without a thorough examination of the practice of all the relevant non-Parties to UNCLOS; a preliminary look at the fisheries legislation of such States provides some grounds for assessing its legal status. This research showed that some of the rules encapsulated in Article 73 are based on very old principles of international law, while others emerged during UNCLOS III negotiations or have a rather limited scope of application. These elements are not determinative per se, but they can help the reader in assessing the overall level of consensus of States, including NCPs, on the content of Article 73.

Starting with Article 73(1), to be read in conjunction with Articles 192, 193, 194, 225, and 301 of the Convention, the nature of this provision is twofold. On the one hand, it substantiates the power of coastal States to ensure compliance with their fisheries laws and regulations in the EEZ — a power which finds a legal justification in the 'sovereign rights' of coastal States, and which therefore does not depend on UNCLOS participation. All the NCPs covered by this paper have established an EEZ, although not always extending to the whole area of entitlement.[207] On the other hand, Article 73(1) subjects the exercise of that power to other provisions of UNCLOS, including those laying down rules on the use of force, safety at sea standards, and environmental obligations. It is reasonable to expect that the same set of rules, or at least the major legal obligations incorporated therein, would extend to NCPs in the exercise of their enforcement power in the EEZ. As such,

207. Eritrea, Israel and Turkey (excluding the Black Sea). Supra section 2.1.

all States should be allowed to use the force in enforcement operations only when it is unavoidable, reasonable, and necessary, according to the circumstances of the case, and subject to 'elementary considerations of humanity'. Furthermore, measures of enforcement taken to ensure compliance with fisheries offences in the EEZ shall not endanger the safety of navigation, including the integrity of vessels and the safety of people at sea, and shall not expose the marine environment, including its marine living resources and ecosystems, to any unreasonable risk or damage.

As for Article 73(2) and (4) UNCLOS, an examination of the content and drafting history of these provisions, including the text of Article 60 (Part II) ISNT, indicates a certain level of consensus of participants at UNCLOS III negotiations on the language and principles underpinning the prompt release and prompt notification obligations. Article 73(4) encapsulates a rule (prompt notification) which emerged and consolidated under the law of the sea almost 50 years before the beginning of UNCLOS III negotiations, while the 'prompt release' obligation at Article 73(2) is novel under the law of the sea. The effectiveness of this obligation depends on other UNCLOS rules — or 'weights' — which have the practical effect of counterbalancing the interests of flag States and coastal States in the EEZ. One of these 'weights' is Article 292 UNCLOS, which provides for a judicial mechanism of release in case of non-compliance by a detaining State *Party* with Article 73(2). Without Article 292, the flag State of a detained vessel would be deprived of any backup solution against an act of non-compliance with Article 73(2) by the detaining State. The key role played by Article 292 to ensure the promptness of the release and the reasonableness of the bond under Article 73(2) is confirmed by the long list of prompt release judgments delivered by ITLOS since the *M/V Saiga (No.1)* case in 1997. As such, considering the limited procedural scope of application and the language ('State Party') of Article 292, the functional link existing between Articles 73(2) and 292, as well as the novel character of the 'prompt release' mechanism under UNCLOS, it is hard to imagine how a similar

mechanism could reflect a rule of general application under international law. This preliminary conclusion is supported by the domestic legal framework of NCPs. Indeed, as of November 2021, only two out of the fourteen coastal NCPs covered by this paper (Eritrea and UAE), include in their fisheries statutory legislation rules reflecting, at least in part, the content of Article 73(2) of the Convention.

Finally, regarding Article 73(3) UNCLOS, this provision prohibits coastal States to impose the *penalty* of imprisonment or other corporal punishment for fisheries offences committed in the EEZ. This provision of limitation was included at a later stage of UNCLOS III negotiations and cannot be found in other pre- or post-UNCLOS codifications. Whereas the prohibition to impose 'any other corporal punishment' finds its legal justification in the duty of all States to apply human rights considerations in the use of their enforcement powers, any restriction of the 'sovereign rights' enjoyed by NCPs in their EEZs cannot be presumed, and needs to find a basis either into UNCLOS, or in a uniform and consistent State Practice. At the time of writing, only two NCPs — Eritrea and Venezuela — seem to prohibit in a systematic way the penalty of imprisonment for, inter alia, fisheries offences by foreign vessels in the EEZ. The remaining twelve NCPs allow for the use of such a penalty in certain circumstances, although most of the fishery violations are sanctioned with monetary penalties only.

In conclusion, to what extent may the legal obligations encapsulated in Article 73 UNCLOS also apply to NCPs?

Further to the findings of this paper, some of the rules established under Article 73 would also apply to non-Parties to UNCLOS, as they arguably reflect rules of general application. These are: paragraph 1, to be read in conjunction with Articles 192, 193, 194, 225, and 301 UNCLOS; paragraph 3, although only in respect of the 'corporal punishment' prohibition; and paragraph 4 concerning the obligation to promptly notify the flag State concerned of measures taken against its vessel or crew. As for the

'prompt release' mechanism at Article 73(2) and the non-imprisonment obligation at Article 73(3), the findings of this paper indicate that there is still no compelling evidence about the customary status of such rules.

7. Conclusions

This paper opened with the arrest and detention of two Italian vessels and their crews by Libya in 2020. During the last three years, similar incidents occurred within the waters of non-Parties to UNCLOS. The list includes fishing vessels flying the flag of Egypt and Tunisia (in the Mediterranean Sea),[208] Guyana (in the Caribbean Sea),[209] Yemen and Kuwait (in the Persian Gulf),[210] and Russia and South Korea (in the East Sea).[211]

Most of the maritime regions of the world are bordered by coastal States that are non-Parties to UNCLOS, which exercise exclusive fishing

208. '7 Egyptian fishermen held in Libya over illegal fishing release' (Egypt Today, 24 December 2020) <https://www.egypttoday.com/Article/1/95690/7-Egyptian-fishermen-held-in-Libya-over-illegal-fishing-released> accessed 21 November 2021; and 'Libyan navy arrests 4 Tunisian fishermen and seizes their boat' (Arraed LG Plus, 12 August 2018) <https://www.arraedlg.com/libyan-navy-arrests-4-tunisian-fishermen-and-seizes-their-boat/> accessed 21 November 2021.

209. M Nurse, 'Support for Guyana following Detention of fishing vessels crew in Venezuela', CARICOM Today, 2 February 2021 <https://today.caricom.org/2021/01/28/support-for-guyana-following-detention-of-fishing-vessels-in-venezuela/> accessed on 20 May 2021].

210. 'Iranian Coastguards detain 4 trawlers, 8 foreign nationals in Hormozgan' (MEHR News Agency, 14 May 2020) <https://en.mehrnews.com/news/158708/Iranian-coastguards-detain-4-trawlers-8-foreign-nationals-in> accessed 21 November 2021; and 'Iran seizes 3 trespassing Kuwaiti fishing boats, arrests crew' (MEHR News Agency, 19 January 2020) <http://www.marsecreview.com/2020/01/iran-seizes-3-kuwaiti-fishing-vessels-allegedly-trespassing-arrests-all-9-crew/> accessed 21 November 2021.

211. 'North Korea released detained Russian fishing boat' (Al Jazeera, 28 July 2019) <https://www.aljazeera.com/news/2019/7/28/north-korea-releases-detained-russian-fishing-boat> accessed 21 November 2021; and 'North Korea confirms it seized South Korean Fishing Boats' (VOA News, East Asia, 18 August 2010) <https://www.voanews.com/a/north-korea-confirms-it-seized-south-korean-fishing-boat-101071969/166234.html> accessed 21 November 2021.2020) <http://www.marsecreview.com/2020/01/iran-seizes-3-kuwaiti-fishing-vessels-allegedly-trespassing-arrests-all-9-crew/> accessed 21 November 2021.

rights, including powers of enforcement, beyond the limits of their territorial seas, as allowed under international law. The Convention subjects the exercise of sovereign rights in the EEZ to certain conditions. As for fisheries laws and regulations, Article 73 UNCLOS establishes rules on enforcement measures, prompt release, penalties, and prompt notification. This paper investigated to what extent the *longa manus* of Article 73 could extend to NCPs. It concluded that some of the rules encapsulated in Article 73, and in particular those established under its paragraphs 1, 3 (partially), and 4, arguably apply to NCPs. To support its preliminary conclusions, this research relied on three major sources: first, international jurisprudence, UNCLOS commentaries and academic literature; second, the *travaux préparatoires* of UNCLOS, including its informal drafting texts, and previous law of the sea codifications; and finally, the statutory fisheries and criminal legislation of the fourteen UN-recognised coastal NCPs. To the best knowledge of the author, similar research on Article 73 covering all the coastal States that are non-Parties to the Convention has never been conducted before.

This paper did not aim to reach any ultimate conclusion on the legal status of Article 73. There are a number of sources and grey areas that would require further examination and discussion. For example, with regard to the non-imprisonment obligation, it is true that the majority of NCPs do impose the penalty of imprisonment for certain fisheries offences, especially violations involving the use of destructive fishing practice, but it is also true that many UNCLOS Parties actually do the same under their fisheries legislation, in a way not fully consistent with Article 73(3). Does it mean that a new practice is emerging? Perhaps, a practice distinguishing between pure fisheries offences and fisheries offences with environmental implications? [212]

212. Although, Article 230(1) UNCLOS also requires States to impose monetary penalties only for environmental offences committed in their EEZ by foreign vessels.

Another area of interest is how Article 73 contributes to achieving the 'object and purpose' of UNCLOS — i.e., establishing a legal order for the seas and the oceans, which is based on, inter alia, the conservation of marine living resources. In that respect, Article 18(a) of the Vienna Convention on the Law of Treaties requires signatories to a treaty not to act in a way that would defeat its object and purpose pending its ratification. As we know, six NCPs are signatories to UNCLOS.[213]

But returning to the scope of this research: why was a discussion on the legal status of Article 73 needed in the first place? Because the 142 words that compose Article 73 contribute to establishing a new paradigm of compliance with fisheries rules, which embraces the cross-sectoral nature of enforcement under international law at large. As such, this paper sought to understand 'if' this new paradigm of compliance could provide the international community with a tool to preserve the flimsy balance existing between coastal State and user State interests in what Judge Paik described as 'a zone of tensions' — the EEZ. A better understanding of the status of Article 73 is key to prevent the escalation of fisheries disputes between Parties and non-Parties to UNCLOS, and to identify some guiding principles, rules, and procedures applying whenever such disputes arise. Keeping a ship and its crew under constraint for months, using the force in a disproportionate manner against a fishing vessel at sea, or sending people responsible for fisheries violations to jail or 'labour' camps are issues going, way beyond the exquisite legal nature of the discussion. UNCLOS III negotiators made clear in the Convention's Preamble that 'problems of ocean space are closely interlinked and need to be considered as a whole'. Article 73 is just a little piece of the puzzle, but a very important one, as its full and widespread implementation can have extensive human rights, environmental, and

213. Supra n 13.

socio-economic consequences for all the maritime regions of the world. There is no golden route to Samarkand, but the author believes that an informed discussion on the content and legal status of this provision could be a very good step in that direction.

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Concluding Remarks

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The collection of articles selected for this volume has underlined how either the presence or the absence of definitions in international legal instruments can represent an obstacle in the implementation of some of the provisions thereof. The failure of the UN Convention on the Law of the Sea (UNCLOS) to regulate non-State actors at sea, or the ambiguity revolving around the meaning and legal scope of terms such as 'ship', 'nationals', 'fringing reefs', 'charts', 'jurisdiction' and 'private ends' are just some of the problems discussed in this volume. What is more, the authors looked at missing or existing law of the sea definitions through a contemporary lens. In doing that, they assessed the (re)conceptualisation of legal terms from an evolutionary standpoint, for instance in light of recent international jurisprudence, or contemporary challenges faced by modern society, including COVID-19, climate change, and forced migration at sea. But what is the invisible link connecting all the issues addressed by them in this volume? In two words: legal uncertainty.

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It is against this backdrop, that as lawyers, practitioners, and academics we shall reflect on the value of definitions and their role in a given legal system. When do they become a tool of clarification, a tool to foster legal certainty? Or when do they became cages, petrified concepts uncapable of approaching an ever-changing reality? While finding an answer to these questions has never been the goal of this volume, I do believe it makes a timing and critical contribution in drawing attention to the need of addressing specific law of the sea terms, including those encapsulated into UNCLOS, particularly due to their impact on the interests of states and private actors. While stressing the importance of analysing certain terms, the volume also questions whether the mechanisms envisaged by UNCLOS, and international law at large, are up to the task of introducing and revisiting definitions fitting these changing times. As international law, like society, is in a state of constant evolution,[1] we should be encouraged to develop *fora* and initiatives – like this Yearbook – that create a space to advance ideas aimed at accompanying and supporting the international community in this arduous task.

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