

April 2002

## Coastal State's Jurisdiction over Foreign Vessels

Anne Bardin

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### Recommended Citation

Anne Bardin, *Coastal State's Jurisdiction over Foreign Vessels*, 14 Pace Int'l L. Rev. 27 (2002)

DOI: <https://doi.org/10.58948/2331-3536.1188>

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# ARTICLES

## COASTAL STATE'S JURISDICTION OVER FOREIGN VESSELS

Anne Bardin

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## I. INTRODUCTION

The freedom to use the world's marine waters is one of the oldest customary principles of international law. However, the freedom of the seas has been under attack since the time of Grotius. Specifically, the shrinking of the areas where such a principle applies started with the First Conference of the United Nations on the Law of the Sea in the 1950s. The main actor in

this diminution of freedom is the coastal State seeking to assert control over maritime areas and resources. The end result is an encroachment on the freedom of the movement of goods, services, and persons, which ultimately interferes with the freedom of navigation.

Frequently, the coastal State claims to assert jurisdiction over foreign vessels in particular zones of the sea. The coastal State attempts to regulate certain activities in these zones by imposing duties on foreign vessels, and thereby flirting with the concept of extraterritoriality. Over the years, the coastal State has been given more power over a wider and wider surface of the sea. Since 1982, the sea has had a constitution regulating not only the rights and duties of the coastal State, but also of vessels navigating in the different sea zones.

The United Nations Convention on the Law of the Sea (UNCLOS)<sup>1</sup> gives to the coastal State sovereign rights in varying degrees over the different zones of the sea. These zones are: 1. internal waters; 2. territorial sea; 3. contiguous zone; 4. exclusive economic zone; and 5. the high seas. It also gives coastal States more or less jurisdiction over foreign vessels depending on where the vessel is located.

This note primarily addresses the coastal State's assertion of jurisdiction over foreign vessels in light of UNCLOS. Part II examines what extent of power is given to the coastal State in the different sea zones, i.e. legislative and jurisdictional powers, as well as what are the activities a foreign vessel is allowed to undertake therein. Part III analyzes how a coastal State can assert jurisdiction over foreign vessels in specific activities such as navigation, fisheries, pollution, and military activities. Finally, Part IV provides an overview of the concepts set forth in this note by examining the first case of the new International Tribunal of the Law of the Sea, the *M/V Saiga* case.<sup>2</sup>

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<sup>1</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, A/CONF.62/122 [hereinafter UNCLOS].

<sup>2</sup> *M/V Saiga* Case (Saint-Vincent and the Grenadines), I.T.L.O.S. Case No. 1 (1997) and 2 (1999) available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html).

## II. THE RIGHTS AND DUTIES OF STATES IN THE DIFFERENT SEA ZONES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

As stated earlier, coastal States have varying degrees of jurisdictional and legislative power in the five zones of the sea. Similarly, foreign vessels are authorized to undertake different activities in the said zones with varying degrees of freedom. This note examines what these rights are, along with the diverse duties of all States in the different zones, starting with a discussion on the internal waters and ending with the high seas.

### A. *Internal Waters*

Internal waters<sup>3</sup> are assimilated to the terrestrial territory, and the coastal State can enjoy full and exclusive sovereignty over them. A foreign vessel, located in internal waters, is subject to the legislative, administrative, judicial and jurisdictional powers of the coastal State with regard to any illicit acts committed on board the vessel or on land by crewmembers. The coastal State does not have to allow innocent passage,<sup>4</sup> except where straight baselines enclose "as internal water areas which had not previously been considered as such. [In those circumstances] a right of innocent passage as provided in [UNCLOS] shall exist through those waters."<sup>5</sup>

#### 1. *Jurisdiction Over Foreign Merchant Vessels*

The coastal State has civil jurisdiction over foreign merchant vessels. Specifically, foreign merchant vessels are subject to the coastal State's regulations on navigation and its sanitary, fiscal, technical and customs controls,<sup>6</sup> which must be implemented without any discrimination between the vessels.<sup>7</sup> Nonetheless, when a dispute arises between crewmembers

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<sup>3</sup> See UNCLOS, *supra* note 1, art. 8. For a definition of internal waters, see R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA* (1988).

<sup>4</sup> This is a characteristic of the territorial sea, see *infra*, Part II(B).

<sup>5</sup> UNCLOS, *supra* note 1, art. 8(2).

<sup>6</sup> See René-Jean Dupuy, *La Mer sous Compétence Nationale*, in *TRAITÉ DU NOUVEAU DROIT DE LA MER*, 219, 221 (René-Jean Dupuy & Daniel Vignes eds., 1985).

<sup>7</sup> See LAURENT LUCCHINI & MICHEL VOECKEL, *DROIT DE LA MER* 155 (1990).

(whatever their nationality may be), the coastal State will usually not assert jurisdiction.<sup>8</sup> When a dispute arises between a crewmember and a non-crewmember, the State will assert jurisdiction.<sup>9</sup>

As for penal jurisdiction, the coastal State has exclusive competence over illicit acts committed on board foreign merchant vessels located within its internal waters.<sup>10</sup> It can also intervene at the request of the captain of the ship or consul of the flag State. The coastal State can also enforce its legislation when its interests are engaged, when the offense affects its peace and good order or when its security is at stake.<sup>11</sup> However, foreign ships will not usually be subject to coastal State jurisdiction if they entered its internal waters because of *force majeure* or distress.<sup>12</sup>

## 2. Jurisdiction Over Foreign Warships

On the other hand, foreign warships, including government vessels used for non-commercial purposes, are exempt from the coastal State's civil jurisdiction due to the principle of sovereign immunity.<sup>13</sup> This immunity, according to UNCLOS Article 32, is subject to the behavior of the vessel that must abstain from any hostile attitude or act of violence. Should a vessel engage in such acts, the coastal State will have a right of self defense.<sup>14</sup> Thus, the coastal State will not intervene in matters exclusively regarding crewmembers of a warship, or when the offence is

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<sup>8</sup> See *id.* at 158.

<sup>9</sup> See Dupuy, *supra* note 6, at 221.

<sup>10</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 158.

<sup>11</sup> See Dupuy *supra* note 6, at 222. In the *Sally and Newton Incident*, the French Conseil d'État had to decide if French jurisdictions had competence over incidents that occurred on two American vessels during which two crewmembers were injured. The Avis of November 20, 1806 stated that, in principle, the port State will not try to repress illicit acts which occurred on board vessels staying in a port. However, the port authorities can intervene in three hypotheses: if the crime is committed by a non-crewmember; if the intervention of local authorities was requested by the Master of the vessel, or if the peace and good order of the port was compromised. See also CHURCHILL & LOWE, *supra* note 3, at 55.

<sup>12</sup> See CHURCHILL & LOWE, *supra* note 3, at 56-57.

<sup>13</sup> See E. DU PONTAVICE & P. CORDIER, *LA MER ET LE DROIT: 1 DROIT DE LA MER: PROBLÈMES ACTUELS* 52 (1984); see also Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AMER. J. INT'L L. 53, 54-61 (1984).

<sup>14</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 150.

committed on board the vessel.<sup>15</sup> But, it will be fully competent if neither the offender nor the victim is a crewmember.<sup>16</sup> Similarly, the coastal State is incompetent regarding acts by officers or crewmembers accomplished as agents of the State.

When an act is committed within the conduct of public affairs, the coastal State may proceed and make an arrest, but it must deliver the offender to the captain of the ship, if he so requests.<sup>17</sup> On the other hand, if the acts have no relationship to the conduct of public affairs, the injured parties can sue before the tribunals of the coastal State.<sup>18</sup> Immunities will also protect warships in regard to seizure, arrest or detention of the vessel and persons on board (police or customs authorities have no right to board), in cases of collision.<sup>19</sup>

Nonetheless, fiscal, navigational, sanitary and port regulations, as well as the competence of the local authorities in charge of policing and maintaining good order, have to be respected by foreign warships.<sup>20</sup> Each coastal State also has specific regulations regarding the duration of stay, the number of warships simultaneously allowed, and the interdiction of research and military exercises.<sup>21</sup>

### 3. *The Right of All Vessels to Free Access to Port*

Foreign vessels have a right of free access to the ports of any coastal State.<sup>22</sup> The coastal State, however, can close its

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<sup>15</sup> See Dupuy, *supra* note 6, at 222.

<sup>16</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 153: the coastal State will be concurrently competent with the flag State if the victim is a crewmember, but not the offender; see also PONTAVICE & CORDIER, *supra* note 13, at 52.

<sup>17</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 153; PONTAVICE & CORDIER, *supra* note 13, at 52 (states that if the delinquent reaches the vessel, the coastal authorities cannot arrest him but can ask that he be deferred to competent tribunals according to the law of the flag).

<sup>18</sup> See PONTAVICE & CORDIER, *supra* note 13, at 52.

<sup>19</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 152; see also International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships, Apr. 10, 1926, 176 LNTS 199 (states that warships are exempt from any seizure, arrest, or detention pursuant to a judicial measure or an in rem procedure in relation to civil obligations arising from a collision by a warship or from assistance or salvage given to it).

<sup>20</sup> See Dupuy, *supra* note 6, at 222.

<sup>21</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 151.

<sup>22</sup> See Article 2 of the Statute on the International Regime of Maritime Ports, Dec. 9, 1923, 25 LNTS 202.

ports when it feels it is necessary for the security of navigation, for reasons of maintaining public internal good order, or for the preservation of the coastal or terrestrial maritime environment, i.e. its vital interests.<sup>23</sup> In such cases, the closure can be made discriminatorily and need only apply to a particular vessel, certain types of vessels,<sup>24</sup> or to vessels flying a specific flag.<sup>25</sup> Concerning commercial vessels, the closure of a port can be authorized for sanitary reasons, for reasons of presence of military installations in the port, or following grave events regarding the security of the port State.<sup>26</sup> There can be more important limitations on warships, such as restrictions on the number of warships admitted to a port at the same time.<sup>27</sup> Except in cases of distress, the access can be discretionally prohibited to a warship or a merchant vessel serving as a warship.<sup>28</sup>

### B. *The Territorial Sea*

According to UNCLOS, the coastal State exercises full competence in the territorial sea<sup>29</sup> with, however, certain concessions. The principal limitation on this sovereignty is the right of innocent passage of foreign vessels, whether private or military.<sup>30</sup> This customary principle can be found in UNCLOS Article 17, which states as follows: "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

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<sup>23</sup> See JEAN-PAUL PANCRACIO, *DROIT INTERNATIONAL DES ESPACES: AIR/MER/FLEUVES/COSMOS* 71 (1997); see also PONTAVICE & CORDIER, *supra* note 13, at 79-80.

<sup>24</sup> For information on nuclear-propulsion vessels, see PONTAVICE & CORDIER, *supra* note 13, at 75-78.

<sup>25</sup> See PANCRACIO, *supra* note 23, at 72; see also PONTAVICE & CORDIER, *supra* note 13, at 80-81.

<sup>26</sup> See Dupuy, *supra* note 6, at 223.

<sup>27</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 151; Dupuy, *supra* note 6, at 223.

<sup>28</sup> See PANCRACIO, *supra* note 23, at 72.

<sup>29</sup> See UNCLOS, *supra* note 1, art. 2(1).

<sup>30</sup> For a good discussion of innocent passage, see FRANCIS NGANTCHA, *THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA* (1990). See also William T. Burke, *Contemporary Developments Affecting Navigation Rights in the Law of the Sea*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 141, 142-48 (Thomas A. Clingan Jr. ed., 1986); Tullio Treves, *Codification du Droit International et Pratique des États dans le Droit de la Mer*, in 223 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 9, 109-24 (1990).



### 1. *Innocent Passage in the Territorial Sea*

UNCLOS Article 18 defines "passage" as navigation through the territorial sea without entering the internal waters of the coastal State or for the purpose of entering or leaving the internal waters, with the condition that the passage be continuous and expeditious, save in cases incidental to navigation, of *force majeure*, distress, or for rendering assistance to other vessels.<sup>31</sup> UNCLOS defines "innocent passage" in Article 19(1) as "innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."

Article 19 lists activities that constitute a threat to the peace and security of the coastal State, and are therefore prohibited in the territorial sea. Those activities are: 1. military activities; 2. activities contrary to the coastal State's customs, fiscal, immigration or sanitary regulations; 3. pollution; 4. fishing activities; 5. research or survey activities; 6. interference with systems of communication or any other facilities or installations; and 7. "any other activity not having a direct bearing on passage."<sup>32</sup> Article 20 also imposes on foreign submarines and other underwater vehicles the obligation to navigate on the surface and show their flags while in the territorial sea of another State.

In 1949, in the *Corfu Channel* case,<sup>33</sup> the International Court of Justice (ICJ) recognized that all vessels have a right of passage through international straits, even warships, as long as they do not engage in activities that are currently listed in UNCLOS Article 19. On May 15, 1946, two British cruisers, while passing through the Corfu Channel, were fired upon by an Albanian coastal battery. The British protested, claiming their right of passage through international straits, while the Albanians replied that foreign warships and merchant vessels had no

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<sup>31</sup> Where the vessels only cruise around in the territorial sea, they would be engaged in activities not having a direct bearing on passage, and thus not protected by Articles 17 through 32 of UNCLOS. See CHURCHILL & LOWE, *supra* note 3, at 69-73; see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

<sup>32</sup> J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS*, 164-66 n.5 (1994). This list refers to activities conducted in the territorial sea only. Thus, the determination of the innocence of the passage must be made on the basis of activities which occurred in the territorial sea only.

<sup>33</sup> See *Corfu Channel case (U.K. v. Albania)*, 1949 I.C.J. 1 (April 9).

right to pass through Albanian territory without prior authorization. On October 22, 1946, two British destroyers were struck by mines while passing through the Channel and suffered serious damage, including loss of life. Subsequently, on November 12 and 13, 1947, the United Kingdom mine-swept the Channel without the authorization of Albania.

The ICJ upheld the United Kingdom's right of passage through international straits and found that the British vessels were effectuating innocent passage in the Corfu Channel.<sup>34</sup> Indeed, as for the first two passages, the Court held that a somewhat robust transit by the United Kingdom of four warships was still innocent passage and the purpose of the transit was intended to be a demonstration of force seeking to test Albanian attitudes.<sup>35</sup> The court, however, condemned the United Kingdom for having swept the mines without Albania's consent.

## 2. *Legislative Competence of the Coastal State*

The coastal State can impose its legislative competence in its territorial sea in eight areas, but such legislation should not impair the right of innocent passage of foreign vessels,<sup>36</sup> nor should it apply to the "design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."<sup>37</sup> Thus, according to UNCLOS Article 21(1), the coastal State can:

- (a) adopt laws regarding the safety of navigation: it can organize maritime traffic and passage of ships by drawing sea-lanes and traffic separation schemes in its territorial sea;<sup>38</sup>
- (b) adopt laws regarding the protection of navigational aids and facilities or installations, which would comprise artificial islands and oil rigs;
- (c) regulate the protection of pipelines and cables;

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<sup>34</sup> See Dupuy, *supra* note 6, at 229.

<sup>35</sup> See Corfu Channel case, 1949 I.C.J., at 30.

<sup>36</sup> See UNCLOS, *supra* note 1, art. 21(1).

<sup>37</sup> *Id.* art. 21(2).

<sup>38</sup> See UNCLOS, *supra* note 1, arts. 22 & 23. Article 22 pertains to "tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials." *Id.* Article 23 states that such vessels have an obligation to be in possession of documents and to take special precautionary measures as established by international agreements. See *id.*

- (d) adopt legislation regarding the conservation of living resources of its territorial sea;
- (e) regulate the fishery activities;<sup>39</sup>
- (f) ensure the preservation of the environment by adopting regulations on the prevention, reduction and control of pollution;<sup>40</sup>
- (g) regulate the activities of marine scientific research and hydrographic surveys;
- (h) apply its customs, fiscal, immigration and sanitary laws.<sup>41</sup>

This list is exhaustive and inclusive.<sup>42</sup> These regulations must be made public,<sup>43</sup> and foreign vessels in the territorial sea must conform to the coastal State's legislation regarding security of navigation.<sup>44</sup>

### 3. *Implementation of Its Legislation by the Coastal State*

In applying its regulations, according to UNCLOS Article 24, the coastal State cannot impose requirements on foreign vessels that have as a consequence the denial or impairment of the right of innocent passage. Nor can it discriminate against vessels of any State or vessels transporting cargoes to, from, or on behalf of any State. Furthermore, the coastal State has the duty to appropriately warn others of any danger to navigation in its territorial sea of which it has knowledge.<sup>45</sup> The coastal State may also not levy charges on foreign vessels for the sole reason of their passage in its territorial sea, but it may do so as payment for services rendered to the vessel.<sup>46</sup>

Notwithstanding the provisions of UNCLOS Article 24, according to Article 25, the coastal State may take steps necessary to prevent passage in its territorial sea that is not innocent. The coastal State can, without discrimination among foreign vessels, temporarily suspend the innocent passage of foreign ships in specific areas of its territorial sea, if it is essential to the pro-

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<sup>39</sup> See ROACH & SMITH, *supra* note 32, at 143 n.5.

<sup>40</sup> See UNCLOS, *supra* note 1, art. 21(1)(f).

<sup>41</sup> See PANCRACIO, *supra* note 23, at 89.

<sup>42</sup> See ROACH & SMITH, *supra* note 32, at 144.

<sup>43</sup> See UNCLOS, *supra* note 1, arts. 21(3) & 22(4).

<sup>44</sup> See *id.* art. 21(4); see also PANCRACIO, *supra* note 23, at 90.

<sup>45</sup> See UNCLOS, *supra* note 1, art. 24(2); see generally Corfu Channel case, 1949 I.C.J. 1.

<sup>46</sup> See UNCLOS, *supra* note 1, art. 26.

tection of its security.<sup>47</sup> Iran did so when from August 4 to August 6, 1987, it suspended the passage of all foreign vessels in its territorial sea on the pretext of naval exercises, following the arrival of the American fleet in the Persian Gulf. However, this interdiction was illicit in regard to international law because it fulfilled only four out of the five conditions set forth by UNCLOS Article 25(3), i.e. 1. a temporary suspension; 2. in specific zones of the territorial sea; 3. without discrimination between the vessels; 4. for a national security necessity; and 5. with prior notification. The Iranian suspension did not concern a specific zone of its territorial sea, but rather included the entire zone. Moreover, it had as a consequence the effect of blocking access to the strait of Ormuz, the only way to get to and from the Persian Gulf.<sup>48</sup>

#### 4. *Criminal Jurisdiction of the Coastal State*

Criminal jurisdiction, i.e., arresting a person or conducting an investigation, should normally be exercised only if the consequences of the crime extend to the coastal State. Examples of when criminal jurisdiction should be exercised include: 1. if the crime was committed on board the ship during its passage in the territorial waters and if it is of a nature to disturb the peace and good order of the coastal State; 2. if the assistance of the local authorities has been requested by the master of the vessel or a diplomatic agent of the flag State; or 3. if the crime is the illicit trafficking of narcotic drugs or psychotropic substances.<sup>49</sup> However, the coastal State is not permitted to take actions if the vessel is only passing through the territorial sea without entering internal waters and the crime was committed before the vessel entered its territorial sea.<sup>50</sup> The coastal State has the same criminal jurisdiction over government vessels operated for commercial purposes, pursuant to UNCLOS Article 27.

Under UNCLOS Article 28, the coastal State can arrest a foreign vessel that has infringed upon its local laws. While under the same Article, the coastal State cannot take conserva-

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<sup>47</sup> See *id.* art. 25(3); see also CHURCHILL & LOWE, *supra* note 3, at 73-74; ROACH & SMITH, *supra* note 32, at 145-46.

<sup>48</sup> See PANCRACIO, *supra* note 23, at 92.

<sup>49</sup> See *id.* at 89; UNCLOS, *supra* note 1, art. 27(1).

<sup>50</sup> See UNCLOS, *supra* note 1, art. 27(5).

tory or executionary measures against a foreign vessel in passage in its territorial sea, it could do so "in respect of obligations or liabilities assumed or incurred by the ship itself in the course [of] or for the purpose of its voyage through the waters of the coastal State," or against a foreign ship lying in the territorial sea or passing through it after leaving the internal waters of the coastal State. The right to arrest a vessel in its territorial sea also gives the coastal State the right of hot pursuit of a vessel that flees toward the high seas if the pursuit started in the territorial sea.<sup>51</sup>

A good example of the coastal State asserting criminal jurisdiction can be found in the *McRuby* case.<sup>52</sup> In that case, nine stowaways who boarded the *McRuby* vessel (which was registered in the Bahamas) during a stop in Ghana were discovered while on the high seas by the crewmembers of the *McRuby*. Not wanting to bring the stowaways back to Ghana, the Ukrainian crew decided to make them disappear by savagely killing them and throwing their bodies overboard.<sup>53</sup> However, one of the stowaways succeeded in hiding and was able to go to the police upon arrival in Le Havre, France.

The French court based its finding of jurisdiction on two grounds.<sup>54</sup> First, part of the crime had been committed in the territorial waters of France. Indeed, when the *McRuby* entered the French territorial sea, the crewmembers were still searching for the last survivor. The court found that these searches were subsequent to the sequestrations and executions, and all the facts constituted an indivisible whole. It is common practice in France for the courts to hear matters concerning acts committed outside the country by foreigners, if the acts are indivisible and part of them are undertaken on French territory. The second ground used by the French court was UNCLOS Article

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<sup>51</sup> See *infra*, Part III(B).

<sup>52</sup> See Arnaud De Raulin, *La Répression dans les Eaux Internationales*, in XV ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 189, 214-26 (1997).

<sup>53</sup> See *id.* at 214; see generally Arnaud De Raulin, *A Propos de l'Affaire du McRuby*, 7 ESPACES ET RESSOURCES MARITIMES 217 (1993).

<sup>54</sup> See Cour D'Assises du Département de la Seine -Maritime (10 Décembre 1995).

101 regarding the universal competence in cases of piracy, which seems to be an erroneous qualification.<sup>55</sup>

### 5. *Warships*

The flag State will be held responsible for Warships, including government vessels operated for non-commercial purposes,<sup>56</sup> if the coastal State suffers any loss or damage of any nature, caused by such vessels as a result of non-compliance with the laws and regulations of the coastal State,<sup>57</sup> provisions of UNCLOS or other rules of international law.<sup>58</sup> If a Warship is asked to comply with regulations and fails to act as directed, the coastal State may require it to leave its territorial sea immediately<sup>59</sup> and may use any force necessary to compel it to do so.<sup>60</sup> In any case, the flag State will be liable for damages caused by a warship or any other government vessel operated for non-commercial purposes, pursuant to UNCLOS Article 31.<sup>61</sup>

### C. *The Contiguous Zone*

The concept of the contiguous zone seems to be obsolete. It should be noted that the contiguous zone is part of the exclusive economic zone (EEZ), and thus of the high seas where the principle of freedom of navigation applies.<sup>62</sup> Therefore, in its contiguous zone, the coastal State does not exercise sovereignty, but rather only has specialized competences. According to UNCLOS Article 33, the coastal State can exercise the control necessary to prevent and repress violations of its legislation concerning customs, taxes, immigration and sanitation within its territorial sea. Warships are immune; therefore, this provision applies only to private vessels.<sup>63</sup>

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<sup>55</sup> See De Raulin, *supra* note 52, at 223 (according to the author, this last qualification is however erroneous).

<sup>56</sup> For a definition of warship, see UNCLOS, *supra* note 1, art. 29.

<sup>57</sup> Particularly, regulations relating to passage through the territorial sea.

<sup>58</sup> See UNCLOS, *supra* note 1, art. 31; Dupuy, *supra* note 6, at 231.

<sup>59</sup> See UNCLOS, *supra* note 1, art. 30.

<sup>60</sup> See CHURCHILL & LOWE, *supra* note 3, at 83.

<sup>61</sup> See *infra*, Part III(E).

<sup>62</sup> For a discussion about the contiguous zone, see CHURCHILL & LOWE, *supra* note 3, at 112-19; LUCCHINI & VOECKEL, *supra* note 7, at 198-200; Treves, *supra* note 30, at 137-40.

<sup>63</sup> See PONTAVICE & CORDIER, *supra* note 13, at 70.

Furthermore, pursuant to UNCLOS Article 303(2), "to control traffic in historical and archeological objects, the coastal State may presume that the removal of such objects from the contiguous zone without the State's consent would violate the laws mentioned in [UNCLOS] Article 33, and the State may act accordingly."<sup>64</sup> In addition, because the contiguous zone is a part of the EEZ, the coastal State will also have all the rights and duties, without exception, that pertain to the EEZ.

Thus, the coastal State can board, search, and ultimately bring to port vessels infringing upon its legislation in order to submit them to justice.<sup>65</sup> These powers of the coastal State can be exercised to protect both its contiguous zone and its terrestrial territory. However, the coastal State must act on the basis of a palpable threat to its public order and must have great doubts against the said vessel, such as suspect behavior, suspect information, or a beginning of a proof.<sup>66</sup> This also includes the right of hot pursuit.<sup>67</sup> However, the coastal State can exercise such powers only in respect to private vessels en route toward or from its coast.<sup>68</sup>

#### D. *The Exclusive Economic Zone (EEZ)*

The EEZ<sup>69</sup> "does not follow either the concept of sovereignty, prevailing in the territorial sea, or the concept of freedom, which characterizes the high seas."<sup>70</sup> According to UNCLOS Article 55, the EEZ is "more similar to a list and allocation of rights or corresponding duties than to an abstract legal category."<sup>71</sup>

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<sup>64</sup> ARND BERNAERT, BERNAERT'S GUIDE TO THE LAW OF THE SEA, THE 1982 UNITED NATIONS CONVENTION 30 (1988); see also Treves, *supra* note 30, at 140-41.

<sup>65</sup> See PANCRACIO, *supra* note 23, at 137.

<sup>66</sup> See *id.*

<sup>67</sup> See UNCLOS, *supra* note 1, art. 111.

<sup>68</sup> See PANCRACIO, *supra* note 23, at 137.

<sup>69</sup> See CHURCHILL & LOWE, *supra* note 3, at 133-52; Treves, *supra* note 30, at 194-202; see generally BARBARA KWAITKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA (1989); FRANCISCO ORREGO VICUÑA, THE EXCLUSIVE ECONOMIC ZONE (1989).

<sup>70</sup> Tullio Scovazzi, *Coastal State Practice in the Exclusive Economic Zone: The Right of Foreign States to Use this Zone*, in THE LAW OF THE SEA: WHAT LIES AHEAD, *supra* note 30, at 310.

<sup>71</sup> *Id.* at 311; see also FRANCISCO ORREGO VICUÑA, *La Zone Économique Exclusive dans la Législation et la Pratique des États*, in JEAN COMBACAU and PIERRE-MARIE

### 1. *Rights of the Coastal State in Its EEZ*

Pursuant to UNCLOS Article 56(1), the coastal State has sovereign rights only for the purpose of exploring, exploiting, conserving, and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.<sup>72</sup> UNCLOS Article 56 also gives jurisdiction to the coastal State regarding artificial islands and installations, marine scientific research, and the protection and preservation of the marine environment. However, the coastal State, in exercising its rights, must have due regard for the rights of other States in the EEZ.<sup>73</sup> In summary, we can say that the EEZ created by UNCLOS Article 56 provides the coastal State with exclusive jurisdiction over the economic uses of the 188 miles located seaward of the territorial sea, where fishing is most important.<sup>74</sup>

### 2. *Artificial Islands and Scientific Research*

Later we will examine in greater detail the rights and duties of the different States regarding fisheries and pollution, but a few words can be said here about artificial islands and scientific research.

According to UNCLOS Article 246(1), coastal States have a right to regulate, authorize, and conduct marine scientific research in their EEZ and on their continental shelf.<sup>75</sup> No State can conduct research in the EEZ of a coastal State without the consent of that State.<sup>76</sup> The coastal State shall, however, grant

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DUPUY, *DROIT DE LA MER* (VOL. 2) 1, 13-32 (Pedone ed. 1990); see generally ORREGO VICUÑA, *supra* note 69; KWAITKOWSKA, *supra* note 69.

<sup>72</sup> See ORREGO VICUÑA, *supra* note 69, at 24-27.

<sup>73</sup> See UNCLOS, *supra* note 1, art. 56(2).

<sup>74</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 216-17 (quoting J.C. Phillips: "It is clear from this wording that the 'sovereign rights' of the coastal State pertain only to the resources of the zone rather than to the zone itself").

<sup>75</sup> See UNCLOS, *supra* note 1, arts. 238-304 (Articles 238-44 set forth the general provisions promoting international cooperation and peaceful ends); LUCCHINI & VOECKEL, *supra* note 7, at 221; ORREGO VICUÑA, *supra* note 69, at 77-83; KWAITKOWSKA, *supra* note 69, at 134-59; CHURCHILL & LOWE, *supra* note 3, at 288-306; Treves, *supra* note 30, at 162-70.

<sup>76</sup> See UNCLOS, *supra* note 1, art. 246(2).



its consent in normal circumstances.<sup>77</sup> Exceptions to this include: 1. when the project is of “direct significance for the exploitation of natural resources”; 2. when it involves “drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment”; 3. when it involves the construction of artificial islands or installations; 4. when the project contains information due under UNCLOS Article 248<sup>78</sup> but which is inaccurate; or 5. when the foreign State has outstanding obligations to the coastal State.<sup>79</sup>

Furthermore, pursuant to UNCLOS Article 246(8), a foreign State has the obligation to refrain from interfering with the rights and duties of the coastal State when undertaking marine scientific research with the consent of that State. It also has to comply with the conditions stated in UNCLOS Article 249.<sup>80</sup> Finally, under UNCLOS Article 253, the coastal State can require the suspension of any research if it is conducted in such a way that it is contrary to the information provided and upon which the coastal State gave its consent, or if it does not respect the rights and duties of the coastal State listed in UNCLOS Article 249.

Regarding artificial islands, installations, and structures,<sup>81</sup> pursuant to UNCLOS Article 60(1), the coastal State has an “exclusive right to construct and to authorize, and regulate the construction, operation, and use” of these installations for the purposes stated in UNCLOS Article 56 (regarding natural re-

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<sup>77</sup> See *id.* art. 252 (provides for the possibility of an implied consent on the part of the Coastal State).

<sup>78</sup> According to UNCLOS Article 248, the State seeking to undertake marine scientific research must provide the coastal State with a full description of the project, the vessel and equipment to be used, the targeted geographical area, the schedule of the project, the sponsors and persons in charge, and the possibility of participation of the Coastal State in the project.

<sup>79</sup> See *id.* art. 246(5).

<sup>80</sup> According to UNCLOS Article 249, the foreign State must ensure the right of participation of the coastal State, provide the coastal State with preliminary reports and final results, provide access for the coastal State to all data and samples, make the results internationally available, inform the coastal State of any major change in the research programme, and finally, remove any scientific research installations or equipment once the research is complete.

<sup>81</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 220-21; ORREGO VICUÑA, *supra* note 69, at 73-77; KWAITKOWSKA, *supra* note 69, at 103-33; Treves, *supra* note 30, at 176-81.

sources) and other economic purposes.<sup>82</sup> The coastal State has exclusive jurisdiction regarding artificial islands and other installations with regard to customs, fiscal, health, safety, and immigration laws.<sup>83</sup> At the same time, the coastal State must give due notice of the construction and presence of such structures, and it may establish safety zones around them to ensure safety of navigation. Foreign vessels must respect these zones.<sup>84</sup>

### 3. *Rights of Foreign States in the EEZ*

Foreign States are also given rights regarding navigation<sup>85</sup> and non-economic uses of the EEZ.<sup>86</sup> According to UNCLOS Article 58, foreign States shall enjoy some of the freedoms of the high seas as set forth in Article 87. Those freedoms are: 1. navigation; 2. overflight; 3. the laying of submarine cables and pipelines; and 4. "other internationally lawful uses of the sea related to those freedoms."<sup>87</sup> This gives the right to other States to engage in non-economic activities in the EEZ.<sup>88</sup> The other freedoms listed in Article 87 are not included in Article 58 because such activities are exclusively reserved to the coastal State. These freedoms include 1. the freedom to construct artificial islands and other installations; 2. fishing; and 3. marine scientific research.

UNCLOS Article 58 goes further and states that Articles 88 through 115, which apply to the high seas, can be applied to the EEZ as long as they are not incompatible with the UNCLOS Articles pertaining to the EEZ.<sup>89</sup> These Articles, which will be fully discussed under the high seas section of this study, relate to the right of navigation, nationality and status of ships, duties of the flag State, immunities of warships and government vessels, collisions, duty to render assistance, slavery, piracy, drug

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<sup>82</sup> See Francis Rigaldies, *La Zone Économique Exclusive dans la Pratique des États*, 35 C.Y.B.I.L. 3, 31 (1997).

<sup>83</sup> See UNCLOS, *supra* note 1, art. 60(2).

<sup>84</sup> See *id.* arts. 60(3)-(7).

<sup>85</sup> For a discussion of navigation in the EEZ, see ORREGO VICUÑA, *supra* note 69, at 93-108; KWAITKOWSKA, *supra* note 69, at 198-245.

<sup>86</sup> See ORREGO VICUÑA, *supra* note 69, at 27-33.

<sup>87</sup> Among others, the EEZ shall be reserved for peaceful purposes, according to UNCLOS Article 88.

<sup>88</sup> See Scovazzi, *supra* note 70, at 311.

<sup>89</sup> See Treves, *supra* note 30, at 180-94.

trafficking, unauthorized broadcasting, rights of visit and hot pursuit, and submarine cables and pipelines.

#### 4. *Residual Rights*

This brings up the question of residual rights and to whom they should belong.<sup>90</sup> UNCLOS does not give a clear answer on this point, but rather states that, if a conflict arises between the coastal State and a foreign State, it "should be resolved on the basis of equity and in light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as the international community as a whole."<sup>91</sup> In any case, a foreign State and its vessels must have due regard for the rights of the coastal State in exercising its own rights and freedoms, and should comply with the laws and regulations of the coastal State adopted in accordance with UNCLOS and international law.<sup>92</sup>

#### E. *The High Seas*

Freedom is the fundamental principle underlying the legal concept of the high seas. According to UNCLOS Article 87, the general freedom of the high seas include, *inter alia*, the freedom of navigation<sup>93</sup> and overflight,<sup>94</sup> as well as the freedom to lay submarine cables and pipelines,<sup>95</sup> to construct artificial islands and other installations permitted under international law,<sup>96</sup> to fish,<sup>97</sup> and to engage in marine scientific research.<sup>98</sup> After stating that all States should exercise these freedoms with due regard to the rights of others,<sup>99</sup> UNCLOS reminds us that the

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<sup>90</sup> See ORREGO VICUÑA, *supra* note 69, at 35-39; see also Treves, *supra* note 30, at 213-27.

<sup>91</sup> UNCLOS, *supra* note 1, art. 59.

<sup>92</sup> See *id.* arts. 58(3) and 87(2).

<sup>93</sup> See PANCRACIO, *supra* note 23, at 186; see also Tullio Treves, *La Navigation*, in *TRAITÉ DU NOUVEAU DROIT DE LA MER*, *supra* note 6, at 687.

<sup>94</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 279.

<sup>95</sup> See UNCLOS, *supra* note 1, arts. 112-15; PANCRACIO, *supra* note 23, at 188; D. Momtaz, *La Haute Mer*, in *TRAITÉ DU NOUVEAU DROIT DE LA MER*, *supra* note 6, at 337, 368.

<sup>96</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 280.

<sup>97</sup> See UNCLOS, *supra* note 1, arts. 116-20.

<sup>98</sup> See UNCLOS, *supra* note 1, arts. 238-63; PANCRACIO, *supra* note 23, at 189; Momtaz, *supra* note 95, at 344.

<sup>99</sup> See UNCLOS, *supra* note 1, art. 87(2); Momtaz, *supra* note 95, at 350.

high seas "shall be reserved for peaceful purposes."<sup>100</sup> Moreover, under Article 89, "no State may validly purport to subject any part of the high seas to its sovereignty."

### 1. *Freedom of Navigation and Exclusivity of the Flag State*

The freedom of navigation is the oldest of the freedoms of the high seas<sup>101</sup> and cannot be impaired, as stated under UNCLOS and international law. As UNCLOS Article 90 provides, "every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas." The underlying consequence is that a flag State has exclusive jurisdiction over the vessels flying its flag.<sup>102</sup> Similarly, it can be understood from Articles 90 through 92, that each vessel must have only one nationality.<sup>103</sup> Moreover, every State has the right to determine how it will grant nationality to a vessel.<sup>104</sup>

Flag States have several duties listed in UNCLOS Article 94.<sup>105</sup> Additionally, on the high seas, as in other sea zones, warships and government vessels used for non-commercial service have complete immunity.<sup>106</sup> Furthermore, according to Article 97, in the event of a collision or any other accident of navigation involving the penal responsibility of a crewmember, only the flag State or the State of which the responsible person is a na-

<sup>100</sup> UNCLOS, *supra* note 1, art. 88 (Articles 88-115 also apply to the EEZ).

<sup>101</sup> See PANCRAIO, *supra* note 23, at 186.

<sup>102</sup> See UNCLOS, *supra* note 1, art. 92; PANCRAIO, *supra* note 23, at 190; Robert C. F. Reuland, *Interference with Non-National Ships on the High Seas: Peace-time Exceptions to the Exclusivity Rule of the Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1165-69 (1989) (treating the exclusive jurisdiction of the flag state).

<sup>103</sup> For a discussion about convenience flags and vessels without nationality. See *infra*, Part III(A).

<sup>104</sup> See UNCLOS, *supra* note 1, art. 91; Momtaz, *supra* note 95, at 354.

<sup>105</sup> For example, a State must effectively exercise jurisdiction and control over vessels flying its flag; it must maintain a register of ships containing all particulars; it shall assume jurisdiction under its internal law over each vessel and its Master, officers and crewmembers; it must take measures to ensure safety at sea with regard to the construction, equipment and seaworthiness of the ship, the manning of the vessel and labor conditions, the use of signals, the maintenance of communication and the prevention of collision. In doing so, the State must conform to generally accepted international regulations, procedures and practices. See *id.* art. 94; see also JAMES C. F. WANG, HANDBOOK ON OCEAN POLITICS & LAW 398-404 (1992).

<sup>106</sup> See UNCLOS, *supra* note 1, arts. 95 & 96; Momtaz, *supra* note 95, at 360-61.

tional can institute proceedings. Specifically, Article 97 provides that "no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State."

This was not always the case, as illustrated in the *Lotus* case.<sup>107</sup> In that case, the question was whether a State, other than the flag State, could assert penal jurisdiction on the high seas. Indeed, in 1926, after a collision between a French vessel (the *Lotus*) and a Turkish vessel, Turkey filed a lawsuit against the French Master. France opposed these proceedings, and the case was submitted before the CPJI. According to the Court, the principle of exclusivity of the flag State, in applying only to acts of authority, is not an obstacle to the jurisdictional competence of foreign tribunals.<sup>108</sup> However, today, Turkey should recognize the exclusive competence of France,<sup>109</sup> as set forth in the Brussels Convention on penal jurisdiction in matters of collision, and UNCLOS Article 97.<sup>110</sup>

## 2. *Jurisdiction Over Vessels Given to States Other Than the Flag State*

The exclusive jurisdiction of the flag State is not absolute and there are several situations in which other States "are granted in varying degrees a share of legislative or enforcement jurisdiction with the flag State."<sup>111</sup> First, every State has a duty to require the master of a vessel flying its flag to render assistance to any vessel in distress, its crew, its passengers, or any person found at sea, in so far as he can do so without serious danger to the ship, the crew, or the passengers.<sup>112</sup> Second, every State must take adequate measures to prevent and punish the transport of slaves in vessels flying its flag.<sup>113</sup> Third, all vessels are prohibited from conducting piracy, and all States must cooper-

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<sup>107</sup> *Lotus case* (France v. Turkey), 1927 C.P.J.I. (Sept. 7).

<sup>108</sup> See Momtaz, *supra* note 95, at 360.

<sup>109</sup> See De Raulin, *supra* note 52, at 200.

<sup>110</sup> See JACQUES-YVES MORIN ET AL., *DROIT INTERNATIONAL PUBLIC, NOTES ET DOCUMENTS, TOME 1: DOCUMENTS D'INTÉRÊT GÉNÉRAL* 793 (Éditions Thémis 1997).

<sup>111</sup> BERNART, *supra* note 64, at 46; see also Reuland, *supra* note 102, at 1169.

<sup>112</sup> See UNCLOS, *supra* note 1, art. 98(1); see also Momtaz, *supra* note 95, at 366-67; UNCLOS Article 98 also states that the coastal State shall promote the maintenance of an adequate and effective search and rescue service.

<sup>113</sup> See UNCLOS, *supra* note 1, art. 99; Reuland, *supra* note 102, at 1190-96.

ate in repressing acts of piracy.<sup>114</sup> If a warship or a government vessel should commit such acts, it is assimilated to acts committed by a private ship, and thus loses its immunity.<sup>115</sup> According to UNCLOS Article 105, every State may seize a pirate vessel on the high seas (or in any other place outside the jurisdiction of any State), arrest the persons controlling this vessel, and seize the property on board.<sup>116</sup> The seizing State can also institute proceedings before its courts to decide on the penalties to be imposed and the action to be taken with regard to the offending vessel.<sup>117</sup> Similarly, coastal States are given the right of intervention on the high seas in cases of collision entailing pollution.<sup>118</sup> Fourth, UNCLOS Article 108 imposes a duty on all States to "cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas."<sup>119</sup> Thus, the Article permits any State, if it has reasonable doubt, to request the cooperation of others to suppress the traffic of a ship flying its flag, which is believed to be engaged in the trafficking of narcotics or psychotropic substances.

The same cooperation is put forward in UNCLOS Article 109 regarding the suppression of unauthorized broadcasting

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<sup>114</sup> See UNCLOS, *supra* note 1, arts. 100-1. According to Article 101, piracy is: 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 [. . .] directed (i) on high seas, against another ship [. . .] or against persons or property on board such ship [. . .] (ii) against a ship, [. . .] persons or property in a place outside the jurisdiction of any State.

*Id.*

See PANCRACIO, *supra* note 23, at 192-95; Reuland, *supra* note 102, at 1177-90; see generally Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AMER. J. INT'L L. 269 (1988).

<sup>115</sup> See UNCLOS, *supra* note 1, art. 102.

<sup>116</sup> According to UNCLOS Article 107, only "warships or military aircrafts, or other ships or aircrafts clearly marked and identifiable as being on government service and authorized to that effect" can carry out a seizure on account of piracy. UNCLOS, *supra* note 1, art. 107.

<sup>117</sup> However, according to UNCLOS Article 106, the State making the seizure will be liable to the State of the nationality of the ship for all losses and damages if the seizure was effectuated without adequate grounds.

<sup>118</sup> See *id.* art. 221; see also LUCCHINI & VOECKEL, *supra* note 7, at 289-90.

<sup>119</sup> PANCRACIO, *supra* note 23, at 197; see also De Raulin, *supra* note 52, at 205; Tullio Treves, *Intervention en Haute Mer et Navires Étrangers*, in XLI ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 651, 658-61 (1995); Treves, *supra* note 30, at 221-24.

from the high seas.<sup>120</sup> If a vessel is engaged in such an activity, several States have jurisdiction to arrest the ship.<sup>121</sup> Those states are: 1. the flag State; 2. the State of registry of the installation of a broadcasting system; 3. the State of which the person broadcasting is a national; and 4. the State where the transmission can be received, or the State where authorized radio communication is suffering interference.<sup>122</sup>

Thus, according to UNCLOS Article 110, a warship of any nationality may board a vessel it encounters on the high seas, if it has reasonable grounds to suspect that such a vessel is engaged in piracy, slave trade, unauthorized broadcasting, or if it has a reasonable suspicion that the vessel is without nationality.<sup>123</sup> Moreover, as we have seen regarding the territorial sea, a government vessel of the coastal State can pursue a foreign vessel if it has good reason to believe it has violated its laws and regulations according to the right of hot pursuit<sup>124</sup> provided for in UNCLOS Article 111. However, damages caused by an arrest based on insufficient motives engage the responsibility of the seizing State.<sup>125</sup> Finally, outside the specified cases of piracy, slavery, drug trafficking and unauthorized broadcasting, States can only exercise a right of visit to identify the flag of the vessel.<sup>126</sup>

### III. THE RIGHTS AND DUTIES OF STATES REGARDING CERTAIN SPECIFIC MATTERS

Now that the general rights and duties of coastal States and foreign vessels in the different zones of the sea have been discussed, this note will examine what these international actors can and must do in a few particular situations. However, before determining the rules applicable to fisheries and pollution, it is important to understand the concept of freedom of navigation, as well as the rules set forth in UNCLOS on the rights of visit and hot pursuit, as they are the underlying princi-

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<sup>120</sup> See Momtaz, *supra* note 95, at 370.

<sup>121</sup> See UNCLOS, *supra* note 1, art. 109(4).

<sup>122</sup> See *id.* art. 109(3).

<sup>123</sup> See *id.* art. 120.

<sup>124</sup> See PANCRACIO, *supra* note 23, at 198-99; see also LUCCHINI & VOECKEL, *supra* note 7, at 287-89; Momtaz, *supra* note 95, at 362-63.

<sup>125</sup> See De Raulin, *supra* note 52, at 201-02.

<sup>126</sup> See *id.* at 206.

ples prohibiting or permitting the coastal State to take actions against a foreign vessel. Additionally, this note clarifies the possibility of military uses of the sea, and the accompanying concept of self-defense. Finally, as an overview of our study, this note analyzes the interesting *Saiga* case settled by the International Tribunal of the Law of the Sea.

#### A. *Freedom of Navigation and Nationality of Ships*

##### 1. *Freedom of Navigation*

Freedom of Navigation in the high seas is provided for in UNCLOS Article 87. This provision is thought to give each State the right to assume, with the exceptions set forth by international law, that a vessel flying its flag will not sustain any interference from any other State.<sup>127</sup> However, the freedom of navigation is not a positive right (for example, the freedom of a vessel to navigate) but rather a negative one; a restriction as to the interferences a State can put on the navigation of a foreign vessel. Hence, the following conclusion: a State can exercise any interference it wants on vessels flying its own flag. Therefore, on the high seas, vessels are only subject to the exclusive jurisdiction of the State under the flag of which they sail.<sup>128</sup>

##### 2. *Stateless Vessels*

According to UNCLOS Article 110(1), on the high seas, a warship<sup>129</sup> can board a vessel if "the ship is without nationality; or though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship." UNCLOS also assimilates a vessel sailing under the flags of two or more States, using them according to convenience, to a ship without nationality.<sup>130</sup> The conclusion, which is true concerning a merchant vessel, a warship, or a government vessel used for non-commercial purposes, is that a vessel should sail under the flag of one State only, and is not allowed to change its flag during a voyage or at port (unless a real transfer of ownership or

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<sup>127</sup> See Treves, *supra* note 119, at 688.

<sup>128</sup> See *id.* at 688; see also the *Lotus* case, 1927 C.P.J.I. at 25.

<sup>129</sup> For a definition of warship, see UNCLOS, *supra* note 1, art. 29.

<sup>130</sup> See *id.* art. 92(2); see Reuland, *supra* note 102, at 1196-207.



change of registry takes place),<sup>131</sup> as exemplified in the *Asya* Case.<sup>132</sup>

In that case, the *Asya* was arrested by a British warship in the High Seas. It had previously flown the Turkish flag, without having any papers proving its right to fly such a flag, and later the Zionist flag, i.e. the flag of a country that did not yet exist. In its decision of March 2, 1948, the Privy Council stated that the lawfulness of the arrest of the *Asya* by the British warship was based on the fact that the *Asya* could invoke the protection of no State and no State could claim that a principle of international law had been violated by the seizure of the vessel.<sup>133</sup>

The freedom of the open sea, whatever those words connote, is a freedom of the ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations. The *Asya* did not satisfy these elementary conditions. No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails. . .the *Asya* could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure.<sup>134</sup>

Indeed, this comes from the principle of the exclusive jurisdiction of the flag State, which is the only State that can assert jurisdiction over its vessels on the high seas. However, when a vessel does not fly a flag, no State can assert the right not to suffer interference.

### 3. *Nationality of Ships*

Each vessel must have one and only one nationality.<sup>135</sup> Under UNCLOS Article 90, each State, coastal or land-locked, has a right to sail ships flying its flag.<sup>136</sup> It is left to each State to fix the conditions for the grant of its nationality to vessels, for the registration of vessels in its territory, and for the right to fly

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<sup>131</sup> See UNCLOS, *supra* note 1, art. 92(1).

<sup>132</sup> *Molván v. Attorney-General for Palestine (Asya case)*, 1948 App. Cas. 351 (P.C.).

<sup>133</sup> See Treves, *supra* note 93, at 689.

<sup>134</sup> *Asya case*, 1948 App. Cas. at 369-70.

<sup>135</sup> See CHURCHILL & LOWE, *supra* note 3, at 205-09; see also LUCCHINI & VOECKEL, *supra* note 7, at 282. Government vessels and warships are faced with different problems regarding nationality, and will thus not be treated in this study.

<sup>136</sup> See PONTAVICE & CORDIER, *supra* note 13, at 46-49.

its flag.<sup>137</sup> The only condition stated in UNCLOS is that there is to be a “genuine link” between the ship and the State.<sup>138</sup> This latter requirement purports to ensure that, where a State has sovereign competence to grant its nationality, the international effects of this nationality can be enforced.<sup>139</sup> This condition is intended to counterbalance the appearance and spreading of flags of convenience.<sup>140</sup> If the conditions are not respected, the flag State will be held liable, the vessel’s flag will not be recognized, and the vessel will lose the protection of the flag State.<sup>141</sup>

Another problem concerns the exercise, by the State, of the law of the flag.<sup>142</sup> In the high seas, the flag State has exclusive jurisdiction over its vessels.<sup>143</sup> However, in the other zones of the sea, the flag State’s jurisdiction is limited by the rights and competences given to the coastal State. Moreover, even on the high seas, other States might have a right to board and visit a vessel suspected of one of the activities listed in UNCLOS Article 110. Those activities are: 1. slavery; 2. piracy; 3. unauthorized broadcasting; and 4. drug trafficking.

## B. *The Right of Visit and the Right of Hot Pursuit*

### 1. *The Right of Visit*

Pursuant to UNCLOS Article 110, a warship, or “any other duly authorized ship or aircraft clearly marked and identifiable

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<sup>137</sup> See UNCLOS, *supra* note 1, art. 91(2) (states that this principle is from jurisprudential origin); see also LUCCHINI & VOECKEL, *supra* note 7, at 283.

<sup>138</sup> See UNCLOS, *supra* note 1, art. 91(2). Under UNCLOS Article 92 the State must also issue documents evidencing the fact that it has granted the right to fly its flag on the vessel; see also Momtaz, *supra* note 95, at 355-57 (for a discussion on genuine link).

<sup>139</sup> See the famous obiter dictum of the *Nottebohm* case (*Liech v. Guat.*), 1955 I.C.J. 4, at 20 (Apr. 6). These conditions of registration are more thoroughly and strictly defined in the United Nations Convention on the Conditions of Registration of Ships adopted in Geneva on February 7, 1986, TD/RS/Conf.23 or 7 Law of the Sea Bulletin 85 (April 1986), available at <http://www.admiraltylawguide.com/conven/registration1986.html>.

<sup>140</sup> For a discussion on open registry, see Burke, *supra* note 30 at 141-42. See also Wang, *supra* note 105, at 398-404.

<sup>141</sup> For a good overview of the sanctions in cases of non-observance of the conditions of nationality attribution, see Momtaz, *supra* note 95, at 357-59.

<sup>142</sup> See LUCCHINI & VOECKEL, *supra* note 7, at 285.

<sup>143</sup> See PANCRACIO, *supra* note 23, at 190-91.

as being on government service,"<sup>144</sup> may board a vessel it encounters on the high seas or the EEZ, if it has reasonable grounds to suspect such a vessel is engaged in piracy, slave trade, unauthorized broadcasting, or if it has a reasonable suspicion that the vessel is without nationality.<sup>145</sup> This right of visit<sup>146</sup> gives a government vessel the authority to verify the ship's right to fly its flag by checking its documents and, if suspicion remains, to further examine the ship.<sup>147</sup> However, if suspicions are unfounded, the ship must be compensated for any loss or damage, as long as it has not committed any act justifying such suspicions.<sup>148</sup> However, this right of visit cannot be exercised by a government vessel of one State against warships and government vessels of another State, pursuant to their immunity set forth in UNCLOS Articles 95 and 96.

## 2. *Right of Hot Pursuit*

According to UNCLOS Article 111(1), the right of hot pursuit is given to a State having serious reasons to believe that the pursued vessel has violated the laws and regulations of the coastal State.<sup>149</sup> The limitations on the exercise of this right are that such a pursuit must be commenced when the foreign vessel is "within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing State," and the pursuit must not be interrupted.<sup>150</sup> Moreover, the pursuit can begin only "after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship."<sup>151</sup> Another condition is that the right of hot pursuit can only be exercised by warships or military aircraft, "or other ships or aircraft clearly marked and identifiable as being

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<sup>144</sup> UNCLOS, *supra* note 1, art. 110(5); see Robert C. Reuland, *The Customary Right of Hot Pursuit onto the High Seas*, 33 VA. J. INT'L L. 557, 561-64 (1993).

<sup>145</sup> See Reuland, *supra* note 144, at 568-69.

<sup>146</sup> See PANCRACIO, *supra* note 23, at 197-98; see also Momtaz, *supra* note 95, at 371-72; Reuland, *supra* note 102, at 1170-76.

<sup>147</sup> See UNCLOS, *supra* note 1, art. 110(2).

<sup>148</sup> See *id.* art. 110(3); see also Reuland, *supra* note 144, at 586-87.

<sup>149</sup> See PANCRACIO, *supra* note 23, at 49-51, 198-99; see also LUCCHINI & VOECKEL, *supra* note 7, at 287-89.

<sup>150</sup> See UNCLOS, *supra* note 1, art. 111(1); Reuland, *supra* note 144, at 573-76, 584.

<sup>151</sup> UNCLOS, *supra* note 1, art. 111(4); see Reuland, *supra* note 144, at 582-84.

on government service and authorized to that effect.”<sup>152</sup> The right of hot pursuit also applies to violations in the EEZ of laws and regulations of the coastal State applicable to this zone under UNCLOS.<sup>153</sup>

The right of hot pursuit, however, ceases as soon as the pursued vessel enters the territorial sea of its own State or that of another State.<sup>154</sup> Nonetheless, the release of a vessel, arrested pursuant to UNCLOS Article 111 and escorted to a port of the coastal State may not be claimed simply because bringing the vessel to port necessitated sailing across a portion of the EEZ or the high seas.<sup>155</sup> Finally, as in any other case, if the vessel has been stopped or arrested outside the territorial sea in circumstances that did not justify the exercise of hot pursuit, the arresting State must compensate the vessel for any loss or damages sustained.<sup>156</sup>

The *I'm Alone* case<sup>157</sup> is a good example of what is prohibited in the exercise of hot pursuit. In that case, the Arbitral Commission condemned the destruction of a Canadian vessel that was intercepted following the exercise of the right of hot pursuit by an American Coast Guard vessel.<sup>158</sup> Evidently, this destruction was an abusive means of exercising the right of hot pursuit, not supported by any principle of law.<sup>159</sup> Indeed, the pursuit, although justified by a necessity to ensure the effective exercise of jurisdiction by the coastal State, should not have gone beyond the capture of the vessel.<sup>160</sup>

### C. Fisheries

#### 1. Full Sovereignty of the Coastal State in Internal Waters and the Territorial Sea

UNCLOS recognizes the right of coastal States to exercise full sovereignty over their internal waters and territorial seas

<sup>152</sup> *Id.* art. 111(5).

<sup>153</sup> *See id.* art. 111(2).

<sup>154</sup> *See id.* art. 111(3); *see also* Reuland, *supra* note 144, at 576-81.

<sup>155</sup> *See* UNCLOS, *supra* note 1, art. 111(7).

<sup>156</sup> *See id.* art. 111(8).

<sup>157</sup> *I'm Alone* case (Canada v. U.S.) 29 AMER. J. INT'L L. 326 (1935).

<sup>158</sup> *See* A.V. Lowe, *National Security and the Law of the Sea*, in XVII THESAURUS ACROASIMUM 129, 189 (1991).

<sup>159</sup> *See* Momtaz, *supra* note 95, at 363.

<sup>160</sup> *See id.*

and the fisheries located therein.<sup>161</sup> Access to these resources by foreign vessels may be prohibited by the coastal State,<sup>162</sup> and "any regulations affecting exploitation are those of the coastal State, except as may be modified by agreement."<sup>163</sup> UNCLOS, however, does not contain provisions requiring the coastal State to conserve or optimally utilize the biological resources located in its internal waters or territorial sea, giving such States a wide margin of discretion in regulating the use of those resources subject to their sovereignty.<sup>164</sup>

## 2. *Preference of the Coastal State in Its EEZ and Its Duty of Conservation*

The coastal State can also regulate fishery activities within its EEZ by applying and enforcing its regulations, and its tribunals are competent to decide questions on this subject.<sup>165</sup> According to UNCLOS Article 56(1)(a), the coastal State has sovereign rights for the purposes of exploring, exploiting, conserving, and managing the natural resources, i.e. the fish stocks, of its EEZ.<sup>166</sup> As we have seen, however, the coastal State is not allowed to adopt and apply regulations as to the construction and equipment of foreign vessels that would render impossible a foreign vessel's right to fish, which is recognized by international law.<sup>167</sup> The coastal State must also exercise its rights in light of the general provision of "good faith and non-abuse of rights" contained in UNCLOS Article 300.<sup>168</sup>

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<sup>161</sup> For a good summary of fisheries in the different sea zones, see CHURCHILL & LOWE, *supra* note 3, at 223-40. See generally JOSÉ A. DE YTURRIAGA, *THE INTERNATIONAL REGIME OF FISHERIES* (1997).

<sup>162</sup> See Grant Hewison, *Balancing the Freedom of Fishing and Coastal State Jurisdiction*, in *DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW* 161, 175-76 (Ellen Hey ed. 1999).

<sup>163</sup> W.T. Burke, *The Law of the Sea Convention Provisions on Condition of Access to Fisheries Subject to National Jurisdiction*, 63 *ORE. L. REV.* 73, 75 (1984).

<sup>164</sup> For a good discussion of the rights and duties regarding fisheries, see Ellen Hey, *The Fisheries Provisions of the LOS Convention*, in *DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW* 13, 20 (Ellen Hey ed., 1999).

<sup>165</sup> See C.A. Fleischer, *La Pêche*, in *TRAITE DU NOUVEAU DROIT DE LA MER*, *supra* note 6, at 819, 930; see also PONTAVICE & CORDIER, *supra* note 13, at 278-89; ORREGO VICUÑA, *supra* note 69, at 49-67; KWAITKOWSKA, *supra* note 69, at 45-102; Treves, *supra* note 30, at 149-62; see generally M. DAHMANI, *THE FISHERIES REGIME OF THE EXCLUSIVE ECONOMIC ZONE* (1987).

<sup>166</sup> See CHURCHILL & LOWE, *supra* note 3, at 232.

<sup>167</sup> See C.A. Fleischer, *supra* note 165, at 930.

<sup>168</sup> See BERNAERT, *supra* note 64, at 38.

However, unlike the rights enjoyed by coastal States in their internal or territorial waters, a coastal State must promote the optimal utilization of the living resources in its EEZ in accordance with UNCLOS Articles 61 and 62. According to Article 61, the coastal State must determine the allowable catch of each fish stock in its EEZ in order to ensure that fish stocks are not endangered by over-exploitation.<sup>169</sup> It can also adopt measures of conservation and management in order to maintain the stability of the stock.<sup>170</sup> Under Article 62, the coastal State must then evaluate its own capacity of catch. If such capacity is inferior to the total allowable catch, the coastal State must authorize other States, by means of agreements or arrangements, to exploit the remainder of the allowable volume of catch.<sup>171</sup>

Thus, with regard to fisheries, the EEZ should be qualified as a "preferential" economic zone.<sup>172</sup> The coastal State must make the evaluation and authorizations taking due account of the needs of developing, landlocked, and other disadvantaged countries,<sup>173</sup> as well as the possible rights of countries historically fishing in the zone.<sup>174</sup> On the other hand, such countries to which a right to fish has been granted must respect the coastal State's regulations as to the conservation of the resources, notably the species and size of fish that can be caught, quotas of catch, seasons of fishing, gear to be used, fishing zones, number and type of vessels allowed, observers on board foreign vessels, etc.<sup>175</sup> This right gives the coastal State great latitude, which in turn seriously impairs the "right" of access to the surplus of the catch recognized to third countries by UNCLOS.<sup>176</sup>

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<sup>169</sup> See CHURCHILL & LOWE, *supra* note 3, at 232.

<sup>170</sup> See UNCLOS, *supra* note 1, art. 61(2); LUCCHINI & VOECKEL, *supra* note 7, at 219.

<sup>171</sup> See UNCLOS, *supra* note 1, art. 62(2); see also PANCRACIO, *supra* note 23, at 143. For a discussion of the coastal State requirements for foreign fishing and access to surplus, see GERALD K. MOORE, COASTAL STATE REQUIREMENTS FOR FOREIGN FISHING, F.A.O. LEGISLATIVE STUDY NO. 21, REV. 2, at 6 (1985).

<sup>172</sup> See Francis Rigaldies, *L'entrée en Vigueur de la Convention de 1982 sur le Droit de la Mer*, 29 REVUE JURIDIQUE THÉMIS 213, 239 (1995).

<sup>173</sup> See Kiriakoulas Hatzikiriakos, *La Zone Économique Exclusive*, 3 REVUE D'ÉTUDE JURIDIQUE 161, 168 (1996).

<sup>174</sup> See UNCLOS, *supra* note 1, arts. 62(2),(3); PANCRACIO, *supra* note 23, at 143.

<sup>175</sup> See UNCLOS, *supra* note 1, art. 62(4).

<sup>176</sup> See Rigaldies, *supra* note 172, at 251 n. 53.

According to UNCLOS Article 73(1), the coastal State can take any necessary measures to ensure compliance with its legislation relating to the exploration, exploitation, conservation and management of the living resources within its EEZ, such as boarding, inspection, arrest, and judicial proceedings. The coastal State then has a duty to promptly notify the flag State of the arrest and penalties.<sup>177</sup> Moreover, the arrested vessel must be promptly released upon payment of a reasonable security.<sup>178</sup> Furthermore, the penalties imposed for such violations cannot include imprisonment nor any form of corporal punishment.<sup>179</sup>

### 3. *Freedom to Fish in the High Seas and Duties on All States*

On the high seas, beyond the EEZ, every vessel of every State has an unlimited right to fish, as stated in UNCLOS Article 116.<sup>180</sup> However, it is recognized that 90% of the living resources of the oceans are now concentrated in zones subject to the sovereignty of a coastal State. Consequently, the freedom to fish beyond these zones has little real significance.<sup>181</sup> Moreover, even this right to fish is subject to treaties in force,<sup>182</sup> i.e., the rights and duties of coastal States under Articles 63(2), 64 through 67, and Articles 117 through 120. Under Article 63(2), the coastal State and other States shall make arrangements as to the necessary measures to take in order to ensure the conservation of stocks occurring within the EEZ of two or more coastal States, or both within the EEZ and in an area beyond and adjacent to it. As for Articles 64 through 67, they relate to the rights and duties of the coastal State with regard to the exploitation and conservation of highly migratory species, marine mammals, anadromous stocks, and catadromous species and their conservation.

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<sup>177</sup> See UNCLOS, *supra* note 1, art. 73(4).

<sup>178</sup> See *id.* art. 73(2);

<sup>179</sup> See *id.* art. 73(3).

<sup>180</sup> See also Treves, *supra* note 30, at 225-34; see generally ORREGO VICUÑA, *supra* note 69.

<sup>181</sup> See BERNART, *supra* note 64, at 120.

<sup>182</sup> For a discussion on the 1995 Agreement on Straddling and Highly Migratory Fish Stocks, see generally Moritaka Hayashi, *Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 9 GEO. INT'L ENV'T'L L. REV. 1 (1996); Christopher J. Carr, *Recent Developments in Compliance and Enforcement for International Fisheries*, 24 Ecology L.Q. 847 (1997); Treves, *supra* note 119, at 667-73.

In addition, UNCLOS Article 117 imposes a duty on interested States to cooperate and take measures for the management and conservation of the biological resources applicable to their own nationals.<sup>183</sup> In order to do this, the State must cooperate with, and take account of the special interests of the coastal State.<sup>184</sup> This can be done with the help or under the auspices of international fishery commissions.<sup>185</sup> Any conservation measure adopted pursuant to UNCLOS should not discriminate, in form or in fact, against nationals of any State.<sup>186</sup> Finally, on the high seas, UNCLOS provides only for flag State jurisdiction regarding all high seas fishing activities undertaken by vessels flying their flag. Hence, the coastal States cannot take enforcement actions.<sup>187</sup>

#### 4. *The Canada/Spain Turbot War*

The Canada v. Spain Turbot War is one of the most publicized disputes on the law of the sea.<sup>188</sup> In March 1995, after having complained that Spanish fishing vessels violated the international quotas designed to protect turbot straddling Canada's jurisdictional lines in the Grand Banks region off the

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<sup>183</sup> See PANCRACIO, *supra* note 23, at 187; see also Serge Pannatier, *Problèmes Actuels de la Pêche en Haute Mer*, CI REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 421, 426-32 (1997); S. Duchemin, *La Pollution du Milieu Marin et la Protection de la Mer dans le Cadre de la Convention sur le Droit de la Mer*, in XVII THESAURUS ACROASIMUM 789 (1991).

<sup>184</sup> See Pannatier, *supra* note 183, at 432-36; see also Treves, *supra* note 119, at 665-67.

<sup>185</sup> See CHURCHILL & LOWE, *supra* note 3, at 235; see also Pannatier, *supra* note 183, at 436-40.

<sup>186</sup> See CHURCHILL & LOWE, *supra* note 3, at 235.

<sup>187</sup> See Hewison, *supra* note 162, at 183.

<sup>188</sup> See W. M. Von Zharen, *The Shrinking Sea and Expanding Sovereignty: The Fate of Fisheries*, 15 NAT. RESOURCES & ENV'T 24, 65 (2000); see also Okon Akiba, *International Law of the Sea: The Legality of Canadian Seizure of the Spanish Trawler (Estai)*, 37 NAT. RESOURCES J. 809 (1997); Andrew Schaefer, *1995 Canada-Spain Fishing Dispute (The Turbot War)*, 8 GEO. INT'L ENV'T L. REV. 437 (1996); David A. Teece, *Global Overfishing and the Spanish-Canadian Turbot War*, 8 COLO. J. INT'L ENV'T L. & POL'Y 89 (1997); William T. Abel, *Fishing for an International Norm to Govern Straddling Stocks: The Canada-Spain Dispute of 1995*, 27 U. MIAMI INTER-AM. L. REV. 553 (1996); A. Anna Zumwalt, *Straddling Stock Spawn Fish War on the High Seas*, 3 U.C. DAVIS J. INT'L L. & POL'Y 35 (1997); Patrick Shavloske, *The Canadian-Spanish Fishing Dispute: A Template for Assessing the Inadequacies of the United Nations Convention on the Law of the Sea and a Clarion Call for Ratification of the New Fish Stock Treaty*, 7 IND. INT'L & COMP. L. REV. 223 (1996).



Newfoundland coast, a Canadian gunboat seized a Spanish-flagged vessel, the *Estai*, which was fishing for turbot.<sup>189</sup> The gunboat pursued the Spanish fishing trawler, fired warning shots across her bow, and confiscated the vessel.<sup>190</sup> On board the *Estai*, Canadian investigators found that nearly 80 percent of the catch was illegal: "young, small fish caught by nets with small holes."<sup>191</sup>

Spain immediately instituted proceedings against Canada before the ICJ maintaining that the Court should declare the boarding of the *Estai* by the Canadian Coast Guard and the temporary detention of her Spanish crew as violative of the freedoms of navigation and fishing on the high seas that exist under international law. Canada responded that the ICJ lacked jurisdiction over this dispute because of its own law "specifically excluding the compulsory jurisdiction of the ICJ in conservation and management disputes, as well as in measures taken by Canada with respect to vessels fishing in the North Atlantic Fisheries Organization's regulatory area of the high seas."<sup>192</sup> Indeed, on December 4, 1998, the ICJ decided by a twelve to five vote that it lacked jurisdiction over the dispute.<sup>193</sup>

#### D. *Pollution*

##### 1. *Protection: A Duty for All States*

Part XII of UNCLOS regulates pollution and states that each State has an obligation to protect and preserve the marine environment.<sup>194</sup> Thus, each State has a duty to take all mea-

<sup>189</sup> See Von Zharen, *supra* note 188, at 65.

<sup>190</sup> See Jeremy Faith, *Enforcement of Fishing Regulations in International Waters: Piracy or Protection, is Gunboat Diplomacy the Only Means Left?*, 19 LOY. L.A. INT'L & COMP. L.J. 199, 204 (1996).

<sup>191</sup> Pannatier, *supra* note 183, at 65.

<sup>192</sup> *Id.* at 66.

<sup>193</sup> See Fisheries Jurisdiction case (Spain v. Canada), 1998 I.C.J. 96 (December 4).

<sup>194</sup> See UNCLOS, *supra* note 1, art. 192; PONTAVICE & CORDIER, *supra* note 13, at 508-25; see also Mario Valenzuela, *Enforcing Rules Against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction*, in DAVOR VIDAS & WILLY ØSTRENG, *ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 485* (Kluwer Law International ed., 1999); David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. INT'L L. 497 (1998); David M. Dzidzornu, *Coastal State Obligations and Powers Respecting EEZ Environmental Protection Under Part XII of the UNCLOS: A Descriptive Analysis*, 8 COLO. J. INT'L ENV'T'L L. & POL'Y 283, 291-

asures necessary and compatible with UNCLOS to prevent, reduce, and control pollution of the marine environment from all sources, including land-based sources,<sup>195</sup> sea-bed activities,<sup>196</sup> dumping,<sup>197</sup> the atmosphere,<sup>198</sup> and vessels.<sup>199</sup> For this purpose, States must use the best practicable means within their capabilities, and they should endeavor to harmonize their policies.<sup>200</sup> Similarly, each State must take necessary measures to ensure that activities under its jurisdiction or control do not cause damage by pollution to other States and that pollution arising from incidents or activities under its jurisdiction or control does not spread beyond the areas where it exercises sovereign rights.<sup>201</sup> Measures thus taken should deal with all sources of pollution, but they should not be designed as to unjustifiably interfere with the rights and duties of other States.<sup>202</sup> Moreover, States must not transfer hazards or transform one type of pollution into another.<sup>203</sup>

States shall cooperate on a global or regional basis "in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention [UNCLOS], for the protection and preservation of the marine environment, taking into account characteristic regional features," such as notice of damages in the region and contingency plans against pollution, studies and research programs, etc.<sup>204</sup> Additionally, States are required to give technical assistance to developing countries.<sup>205</sup> A failure to fulfill these obligations can result in liability.<sup>206</sup>

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95 (1997); ORREGO VICUÑA, *supra* note 69, at 83-90; KWAITKOWSKA, *supra* note 69, at 160-97; CHURCHILL & LOWE, *supra* note 3, at 241-87.

<sup>195</sup> See UNCLOS, *supra* note 1, art. 207; see also Duchemin, *supra* note 183, at 801-02; De Raulin, *supra* note 52, at 209-11.

<sup>196</sup> See UNCLOS, *supra* note 1, arts. 208-09; see also Duchemin, *supra* note 183, at 795.

<sup>197</sup> See UNCLOS, *supra* note 1, art. 210.

<sup>198</sup> See *id.* art. 212.

<sup>199</sup> See *id.* art. 211.

<sup>200</sup> See *id.* art. 194(1).

<sup>201</sup> See *id.* art. 194(2).

<sup>202</sup> See *id.* arts. 194(3) and (4).

<sup>203</sup> See UNCLOS, *supra* note 1, art. 195.

<sup>204</sup> *Id.* art. 197.

<sup>205</sup> See *id.* arts. 197-203.

<sup>206</sup> See *id.* art. 235(1).

## 2. *Implementing Powers Given to Coastal States*

According to UNCLOS Article 211(1), States with the help, or under the auspices of international organizations must “establish international rules and standards to prevent, reduce, and control pollution of the marine environment” by vessels. To accomplish these goals, States can adopt routing systems designed to minimize the threat of accidents, which might cause pollution of the marine environment, including the coastline and damage to any related interest of the coastal State. Moreover, coastal States can establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition to the entry of foreign vessels into their ports or internal waters, as long as they give due publicity of such requirements.<sup>207</sup> Similarly, coastal States can “adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels” within their territorial sea, but such laws and regulations should not impair innocent passage of foreign vessels.<sup>208</sup> According to UNCLOS Article 211(5), coastal States have the same rights in their EEZ, as long as they are “conforming to and giving effect to generally accepted international rules and standards established through competent international organizations or general diplomatic conferences.”

When a vessel is voluntarily within a port or at an off-shore terminal of a State, pursuant to UNCLOS Article 220(1), that State can “institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention [UNCLOS] or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea [or the EEZ] of that State.”<sup>209</sup> Moreover, if the coastal State has clear grounds to believe that a vessel navigating in its territo-

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<sup>207</sup> See *id.* art. 211(3); see also Dzidzornu, *supra* note 194, at 295-96.

<sup>208</sup> See UNCLOS, *supra* note 1, art. 211(4).

<sup>209</sup> For a discussion of the enforcement powers of the Coastal State and its regulations concerning environmental protection in the EEZ, see Dzidzornu, *supra* note 194, at 304-10; see also Amy de Genes Berret, *UNCLOS III: Pollution Control in the Exclusive Economic Zone*, 55 LA. L. REV. 1165, 1170-74 (1995); Claude Douay, *Les Sanctions en Matières de Pollution dans la Zone Économique Exclusive*, in PERSPECTIVES DU DROIT DE LA MER À L'ISSUE DE LA 3<sup>E</sup> CONFÉRENCE DES NATIONS UNIES 210 (Colloque de Rouen, Société pour le Droit International, 1983).

rial sea has, during its passage therein, violated its laws and regulations or international rules concerning pollution, this State can exercise its right of visit and inspect the vessel, and can, "where the evidence so warrants, institute proceedings, including detention of the vessel."<sup>210</sup>

If the vessel is in the EEZ, the coastal State will only be able to require the vessel to "give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred."<sup>211</sup> On the other hand, if the coastal State doubts that the violation has resulted in a substantial discharge causing or threatening significant pollution to the marine environment of its territorial sea or its EEZ, it can inspect the vessel for "matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection."<sup>212</sup> If this discharge is believed, on clear grounds, to have caused major damage or the "threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, the State may. . . provided that the evidence so warrants, institute proceedings including detention of the vessel."<sup>213</sup>

In accordance with UNCLOS Article 226, States should not delay a foreign vessel longer than is essential for purposes of the investigations provided for in Articles 216, 218 and 220. Such an inspection must be limited to an examination of the vessel's certificates, records, or other documents. Further inspection of the vessel can only be undertaken when there are clear grounds to believe that the condition of the vessel or its equipment does not correspond to the particulars of the documents, when the content of the documents are not sufficient to confirm or verify a suspected violation, or when the vessel is not carrying valid certificates and records.<sup>214</sup>

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<sup>210</sup> UNCLOS, *supra* note 1, art. 220(2); see Dzidzornu, *supra* note 194, at 304-08.

<sup>211</sup> UNCLOS, *supra* note 1, art. 220(3); see Duchemin, *supra* note 183, at 798-99.

<sup>212</sup> UNCLOS, *supra* note 1, art. 220(5).

<sup>213</sup> *Id.* art. 220(6); Douay, *supra* note 209, at 214-16.

<sup>214</sup> See UNCLOS, *supra* note 1, art. 226.

Once again, if a reasonable security is paid, the coastal State must promptly release the vessel.<sup>215</sup> Obviously, in accordance with UNCLOS Article 224, only military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect, have the power of enforcement against foreign vessels. Finally, in the exercise of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk,<sup>216</sup> nor should States discriminate in form or in fact against vessels of any other State.<sup>217</sup> Finally, according to Article 236, the power of enforcement of the coastal State cannot be applied against warships or government vessels used for non-commercial purposes, due to their immunity.<sup>218</sup>

An interesting illustration of the problem of how and when the coastal State can act against a polluting vessel is given by the *Torrey Canyon* incident.<sup>219</sup> In 1967, the *Torrey Canyon* grounded off the English coasts, and was later bombed by British planes in order to prevent an already significant oil pollution problem from increasing.<sup>220</sup> As a result of British actions, the bombs ignited the oil. The United Kingdom based its actions on the doctrine of the "state of necessity and self-defense," in order to intervene on a foreign vessel which represented an immediate threat to the security of the British coasts.<sup>221</sup> According to Robert Reuland, "the United Kingdom's action was of questionable legality; [and] the bombing of the vessel was not clearly justifiable under then-existing customary international law, because the landing occurred on the high seas and not within British territorial waters."<sup>222</sup>

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<sup>215</sup> See *id.* arts. 220(7) & 292; Dzidzornu, *supra* note 194, at 305.

<sup>216</sup> See UNCLOS, *supra* note 1, art. 225.

<sup>217</sup> See *id.* art. 227.

<sup>218</sup> See Douay, *supra* note 209, at 223.

<sup>219</sup> See Treves, *supra* note 93, at 711. See also Reuland, *supra* note 102, at 1221.

<sup>220</sup> See Treves, *supra* note 93, at 711.

<sup>221</sup> See PANCRACIO, *supra* note 23, at 197.

<sup>222</sup> Reuland, *supra* note 102, at 1221.

### E. *Military Uses of the Sea and Self Defense*

As has already been mentioned, UNCLOS promotes peaceful uses of the sea. Article 301 states that "in exercising their rights and duties under this Convention [UNCLOS], States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."<sup>223</sup> This is confirmed by UNCLOS Articles 88 and 301.<sup>224</sup> Furthermore, State Parties must fulfill their obligations in good faith and refrain from abusing their rights.<sup>225</sup> However, the use of force is subject to the exception of self-defense recognized by Article 51 of the United Nations Charter and customary law which conditions are defined by the ICJ in the *Nicaragua* case.<sup>226</sup> The two criteria set forth by the Court were: 1. necessity; and 2. proportionality of the measures taken.<sup>227</sup>

#### 1. *Internal Waters*

In internal waters, the coastal State has full sovereignty. Consequently, there is no right for foreign vessels to enter internal waters. As a result, "there are no general restrictions upon the right of the coastal State to deploy defensive or offensive military systems in its internal waters, apart from those arising in connection with the duty not to impede any right of innocent passage which might exist through newly-enclosed waters."<sup>228</sup> However, a problem arises when determining the limits of permissible action against unauthorized intruders in internal waters.

Professor Ingrid Delupis maintains that "the immunity of a submarine is not even relevant to unlawful intrusions, which

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<sup>223</sup> See the United Nations Charter Articles 1 and 2 for a discussion regarding maintaining peace and security, preventing and removing threats to peace, strengthening universal peace, and refraining from the threat and use of force against territorial integrity or political independence of any State.

<sup>224</sup> See UNCLOS, *supra* note 1, arts. 141 (area), 58(2) (EEZ), 246 (marine scientific research), 88 (high seas).

<sup>225</sup> See *id.* art. 300.

<sup>226</sup> See generally *Nicaragua* case, 1986 I.C.J. 14.

<sup>227</sup> See *id.* at ¶ 194.

<sup>228</sup> Lowe, *supra* note 158, at 150.

give rise to the right of proportional self-defense.”<sup>229</sup> Since a foreign vessel has no right to be in the internal waters of another State, it may be asked to leave. If it refuses to leave, or refuses to surface in the case of a submarine, the coastal State can request it to leave, “using force if necessary.”<sup>230</sup> Moreover, the coastal State has a right, to be distinguished from the right to expel unauthorized entrants, to use force against unauthorized entrants in certain ill-defined circumstances and subject to certain limitations. The protection of security interests is the most frequently used reason to justify use of force against foreign vessels.<sup>231</sup> This use of force is, however, limited by the necessity of such counteractions that must be proportionate to the threat and have the removal of the threat as an end. Thus, an accidental intrusion into an insignificant bay would not be considered a threat while a foreign vessel monitoring activities near a naval base would be a threat.<sup>232</sup>

## 2. *The Territorial Sea*

In the territorial sea, coastal States as well as foreign vessels have the duty to respect the principle of innocent passage. A study of UNCLOS Article 19(2) leads to the conclusion that most of the activities listed as incompatible with innocent passage are activities that are characteristic of warships.<sup>233</sup> Thus, for self-protection, some States require notification prior to entry into their territorial sea by warships, while others require prior authorization, and some oppose any pre-condition to innocent passage.<sup>234</sup> All in all, “there appears to be in practice a *modus vivendi* according to which warships do give prior notice of the intended passage, not at the diplomatic level, but informally to the local coastal authorities.”<sup>235</sup>

Under UNCLOS Articles 25 and 30, the coastal State can ask a foreign warship to comply with its regulations and with

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<sup>229</sup> Delupis, *supra* note 13, at 74.

<sup>230</sup> Lowe, *supra* note 158, at 151.

<sup>231</sup> *See id.* at 152.

<sup>232</sup> *See id.*

<sup>233</sup> For example, threat or use of force, weapons exercises, and launching and receiving aircraft or military devices.

<sup>234</sup> *See* F. David Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625, 639-44 (1984).

<sup>235</sup> Lowe, *supra* note 158, at 157.

the rules of passage through the territorial sea. If the latter fails to do so, the coastal State can request it to immediately leave the territorial sea.<sup>236</sup> The violation of the coastal State's legislation does not automatically render the warship's passage non-innocent.<sup>237</sup> However, if a warship disregards requests for compliance, the coastal State may require it to leave its territorial waters. According to UNCLOS Article 25, if a warship does not obey such a request, the coastal State can take the necessary steps, including "a degree of force proportionate to the threat which the continuing presence of the ship represents," to compel them to leave.<sup>238</sup>

Finally, as R.R. Churchill and A.V. Lowe noted, "States enjoy a general right of self-defense in international law and, if they are facing an imminent attack from foreign vessels in their territorial sea and have no other means of protection, they may use any necessary force against the vessels in order to defend themselves."<sup>239</sup>

The *USS Pueblo* incident<sup>240</sup> illustrates the right of the coastal State to protect its security. In 1968, an American warship, the *Pueblo*, was seized by North Korea. It was not disputed that the vessel was equipped with electronic devices for collecting information on North Korea's coastal defenses, but while the United States claimed the vessel to be on the high seas, North Korea maintained it was in its territorial waters. However, the U.S. stated that:

Even if the *Pueblo* had been in the territorial waters of North Korea, its seizure would have been improper [ . . . ] in the absence of [an] immediate threat of [an] armed attack (the *Pueblo* was armed with only two machine guns)[,] escorting foreign naval vessels out of the territorial waters is the strongest action a coastal State should take. The seizure of foreign war ships or other attacks upon them are much too dangerous and provocative acts to be permitted by international law. This restriction on the use of force by a coastal State is set forth in Article 23 of the 1958 Con-

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<sup>236</sup> See UNCLOS, *supra* note 1, art. 30.

<sup>237</sup> See Froman, *supra* note 234, at 660.

<sup>238</sup> Lowe, *supra* note 158, at 161-62.

<sup>239</sup> CHURCHILL & LOWE, *supra* note 3, at 83-84.

<sup>240</sup> See generally *Contemporary Practice of the U.S. Relating to International Law - Seizure of the USS Pueblo*, 62 AMER. J. INT'L L. 754 (1968).



vention [UNCLOS] on the territorial sea, which authorizes, as sole remedy, requiring a war ship to leave the territorial sea.<sup>241</sup>

According to Natalino Ronzitti, the U.S. position in the *Pueblo* case was contrary to the doctrine of "necessary steps."<sup>242</sup> Indeed, as illustrated, if a vessel does not leave when requested to do so, it becomes non-innocent and thus loses its right to passage in the territorial sea. According to Article UNCLOS 19(2)(c), "collecting information to the prejudice of the defense or security of the coastal State" also renders passage non-innocent. In such cases, the coastal State can take necessary steps, which includes the use of force.

In the *Corfu Channel* case,<sup>243</sup> however, the ICJ recognized the right of States to demonstrate force in order to vindicate or protect the right of innocent passage of foreign vessels unjustly denied by the coastal State. Indeed, as to the issue of passage through the Channel itself the Court stated:

The legality of this measure taken by the Government of the United Kingdom [i.e. sending the warships through the Corfu Channel to carry out a passage for purposes of navigation] cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The "mission" was designed to affirm a right which had been unjustly denied. The government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.<sup>244</sup>

The ICJ recognized the lawfulness of the first two passages through the Corfu Channel even if they were undertaken not only for the purpose of navigation, but also "to demonstrate such force that she [Albania] would abstain from firing again on passing ships,"<sup>245</sup> and ordered Albania to pay for all damages caused by its unlawful actions.<sup>246</sup> The ICJ condemned the

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<sup>241</sup> *Id.* at 757.

<sup>242</sup> Natalino Ronzitti, *The Right of Self-Defense at Sea and its Impact on the Law of Naval Warfare*, in XVII THESAURUS ACROASIMUM 266, 270-71 (Constantopoulos ed. 1991).

<sup>243</sup> See *Corfu Channel* case, 1949 I.C.J., at 13; see generally D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L.J. 283 (1999).

<sup>244</sup> *Corfu Channel* case, 1949 I.C.J., at 30.

<sup>245</sup> *Id.* at 31.

<sup>246</sup> See Ronzitti, *supra* note 242, at 273.

United Kingdom for having swept the mines in the Albanian waters without Albania's consent and stated that it could not condone the United Kingdom for the action taken, "be it motivated by the reason of securing the *corpa delicti* or as a measure of self-help aimed at protecting the safety of passage."<sup>247</sup>

Similarly, on October 27, 1981, a Soviet submarine, the *Wiskey-137*, grounded on the coasts of Sweden near a naval base, and was unable to move without assistance.<sup>248</sup> This act was regarded as highly suspicious by Swedish authorities since they require, prior to the entry of any foreign warships into their territorial sea, the official notification of the flag State. The Swedish authorities inspected the submarine and conducted a complete inquiry. However, the immunity of warships was not claimed by the Soviet Union.<sup>249</sup> Similarly, on February 24, 1982, a Soviet submarine entered the Italian Gulf of Tarento, which was claimed by Italy to be a historic bay, and thus internal waters. The Italian Navy intercepted the submarine and was ready to use force in order to oblige the submarine to surface if it represented a threat to Italy.<sup>250</sup> The difficulty in such cases is the interference of the sovereign immunity of warships and other government vessels.

### 3. *The Exclusive Economic Zone*

The determination as to the legality of military uses of the EEZ poses problems because of the following ambiguous wording of UNCLOS Article 58(1): "and other internationally lawful uses of the sea" and because of the problem of attribution of the residual rights in the EEZ.<sup>251</sup> Some States maintain that military operations, exercises, and activities have always been regarded as lawful uses of the sea, while other countries point out that UNCLOS does not authorize such activities without the consent of the coastal State.<sup>252</sup> According to UNCLOS Articles 58 (authorizing lawful uses of the sea related to the "operation

<sup>247</sup> *Id.* at 272; see also *Corfu Channel case*, 1949 I.C.J., at 34-35.

<sup>248</sup> See Delupis, *supra* note 13, at 53.

<sup>249</sup> See PANCRAIO, *supra* note 23, at 93.

<sup>250</sup> See Ronzitti, *supra* note 242, at 271.

<sup>251</sup> Claude Emanuelli, *Le Nouveau Droit de la Mer et les Conflits Entre États*, in XVI ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 209, 222 (Pedone ed., 1998).

<sup>252</sup> Scovazzi, *supra* note 70, at 319 (examples of countries requiring the consent of the coastal State include Cape Verde, Uruguay, and Brazil, while countries such

of ships, aircraft and submarine cable and pipelines") and 59 (on residual rights in the EEZ), warships may "engage in military maneuvers, collect information, carry out tests of weapons of any kind, lay mines and other arms on the sea-bed, at least when the latter activity is not prohibited by general international law or treaties,"<sup>253</sup> provided that they do so "with due regard to the rights of the coastal State and other States."<sup>254</sup> On the other hand, it would be much more difficult to justify, under international law, "an extended exercise with weapons, such as launching torpedoes and firing artillery, or [the] secret laying of arms within an EEZ" as included in the right of navigation or other freedoms of the high seas.<sup>255</sup>

Also controversial are the countermeasures that can be taken against a warship violating coastal State laws in the EEZ. Unlike the rules pertaining to the territorial sea, the coastal State has no similar right to request a warship to leave its EEZ. A refusal on the part of the vessel to comply with the regulations of the coastal State does not eliminate the right of the vessel to be in the EEZ, where the rule is freedom of navigation. Furthermore, foreign warships are protected by their sovereign immunity and cannot be arrested.<sup>256</sup>

#### 4. *The High Seas*

In the high seas, there is no doubt that warships enjoy the freedom of navigation as well as other freedoms of the high seas. Thus, the "stationing of naval fleets. . . with the clear threat of armed intervention in the coastal State," the "deployment of missiles and other weapons, nuclear and non-nuclear," and the "testing of weapons and conduct of naval manoeuvres" are generally recognized as included in the freedom of the high seas, provided they are undertaken with reasonable and due regard for the rights of others.<sup>257</sup> Since the phrase "reasonable and due regard for the rights of others" is of little practical

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as the United States, France, and Italy do not require the consent of the Coastal State).

<sup>253</sup> *Id.* at 319.

<sup>254</sup> ROACH & SMITH, *supra* note 32, at 249.

<sup>255</sup> Scovazzi, *supra* note 70, at 319.

<sup>256</sup> See Lowe, *supra* note 158, at 193.

<sup>257</sup> See *id.* at 181.

value, the potential for conflict is great, as is illustrated in the following examples.

On August 19, 1981, the United States Sixth Fleet shot down two Libyan aircrafts, while the United States was conducting naval exercises in the Gulf of Sidra, approximately 60 miles from the Libyan coast. Libya claimed that the American fleet was in its internal waters because it claimed the Gulf of Sidra to be a historic bay. The two planes were shot down while they were trying to attack an American aircraft carrier.<sup>258</sup> The U.S. claimed that the Libyan attack was unprovoked and that the American aircraft were participating in a routine naval exercise in international waters that had been publicly announced.<sup>259</sup>

The second incident was factually quite similar to the first one. On March 24, 1986, the U.S. Sixth Fleet was attacked by Libyan missiles fired from the coast, while conducting similar exercises in the Gulf of Sidra. As a response, the U.S. forces bombed the Libyan battery located on the coast and attacked three Libyan vessels.<sup>260</sup> President Reagan qualified this response as a lawful exercise "of self-defense necessary to protect [the U.S. forces] from continued attack."<sup>261</sup>

The lawfulness of the United States' actions depends on the validity of the Libyan claim regarding the status of the Gulf of Sidra. The United States did not regard the Gulf of Sidra as a historic bay and accordingly disagreed with Libya on this point. Moreover, the Libyan contention had met the protest of many States. As a consequence, it was found that the U.S. could thus continue to exercise all rights recognized by the regime of the high seas in the Gulf of Sidra, including naval exercises.<sup>262</sup> According to Ronzitti, by taking into account the decision in the *Corfu Channel* case, one can conclude that "if foreign warships dispatched to exercise navigational rights stemming from the regime of high seas are attacked by the coastal State, the armed response is to be seen as a lawful exercise of the right of self-

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<sup>258</sup> See Ronzitti, *supra* note 242, at 273.

<sup>259</sup> See America's Blueprint for Controlling Nuclear Weapons, August 19, 1981, DEP'T ST. BULL., Aug. 1981, No. 2055, at 60.

<sup>260</sup> See Ronzitti, *supra* note 242, at 274.

<sup>261</sup> Gulf of Sidra Incident, March 26, 1986, DEP'T ST. BULL., Mar. 1986, No. 2111, at 72.

<sup>262</sup> See Ronzitti, *supra* note 242, at 274.

defense, since the coastal State cannot claim it was compelled to resort to force in order to protect its territorial sovereignty."<sup>263</sup>

States have also resorted to quarantine or blockades in times of peace. "This was generally considered a lawful measure of self-help to which naval powers resorted against the wrongdoer."<sup>264</sup> While it is difficult to state the limits of the right of self-defense, it is clear that the immediacy of the threat and the proportionality of the response are essential to the legality of the self-defense operations,<sup>265</sup> as exemplified in the Cuban and Algerian crises.

During the Cuban Missile Crisis, by the presidential decision of October 23, 1962, the United States reserved the right to arrest and inspect any vessel on the high seas that was traveling toward Cuba, in order to ascertain whether they carried missiles.<sup>266</sup> For the United States, this maritime quarantine was based on the fact that the Soviet Union had installed long-range missiles in Cuba that were a threat to hemisphere security. The United States wanted to stop any transfer of missiles to Cuba, and have those already installed removed:

Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, [ . . . ] to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond or to comply with directions shall be subject to being taken into custody. Any vessel or craft which is believed is en route to Cuba and may be carrying prohibited material or may itself constitute such material shall, whenever possible, be directed to proceed to another direction of its own choice [ . . . ] All vessels or craft taken into custody shall be sent into a port of the United States for appropriate disposition. In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.<sup>267</sup>

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<sup>263</sup> *Id.* at 275.

<sup>264</sup> *Id.*

<sup>265</sup> See Lowe, *supra* note 158, at 184.

<sup>266</sup> See Momtaz, *supra* note 95, at 365.

<sup>267</sup> The Soviet Threat to Americans, Nov. 12, 1962, DEP'T ST. BULL., Nov. 1962, at 717.

According to Ronzitti, "this maritime quarantine. . . was contrary to the principle of the freedom of the high seas, even though armed force was not actually used."<sup>268</sup>

France undertook a similar surveillance against Algeria. During the Algerian Revolution, French authorities arrested and inspected, on the high seas and even outside the Mediterranean, numerous foreign commercial vessels suspected of supplying arms and munitions to the Algerian rebels, without previous recognition of belligerence.<sup>269</sup> The conduct of France was contested before French courts by the shipping companies, but was "not held subject to trial, since it bore upon the international relations of the French State."<sup>270</sup> However, it is important to note that in the case of the *Duizar* (an Italian vessel boarded on the high seas), the French Minister of Defense argued that the boarding of the vessel was a lawful measure of self-defense, while the Paris Administrative Tribunal held that the operation of the French Navy was a "measure of police affecting the external safety of the State [which was] necessary for safety reasons, and had no vexatious character."<sup>271</sup> Nonetheless, the number of vessels arrested and the area of operation "seemed to many disproportionately too large,"<sup>272</sup> and the defensive response was found to be "far out of proportion to the perceived threat." Thus, the international community condemned France's actions.<sup>273</sup>

#### F. *The Saiga Case*

The *Saiga* case<sup>274</sup> is the first case of the new International Tribunal on the Law of the Sea (Tribunal), and provides a good overview of some of the elements that were previously discussed in this note.

On October 27, 1997, the M/V *Saiga*, flying the flag of Saint Vincent and the Grenadines, refueled fishing vessels at sea off

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<sup>268</sup> Ronzitti, *supra* note 242, at 276.

<sup>269</sup> See Momtaz, *supra* note 95, at 365.

<sup>270</sup> Ronzitti, *supra* note 242, at 282.

<sup>271</sup> Tribunal administratif de Paris, 22 Octobre 1962, Société Ignazio Messina et Cie c. l'Etat (Ministère des Armées "Marine") 8 Annuaire Français de Droit International, 920-21 (1962); see Reuland, *supra* note 102, at 1218-19.

<sup>272</sup> Lowe, *supra* note 158, at 184.

<sup>273</sup> See Reuland, *supra* note 102, at 1218-19.

<sup>274</sup> M/V *Saiga* case, I.T.L.O.S., Case No. 1.

the coast actually in the EEZ, of Guinea. The next day, Guinean customs patrol boats arrested the Saiga off the coast of Sierra Leone, during which two arrested crewmembers were injured. The vessel and its crew were then brought to Conakry, Guinea, detained, and the cargo of oil was ordered to be discharged.<sup>275</sup>

As a result, Saint Vincent and the Grenadines moved for provisional measures for the prompt release of the Saiga before the new Tribunal.<sup>276</sup> After declaring its jurisdiction, the Tribunal decided that it was sufficient, for the moment, to note the non-compliance with UNCLOS Article 73 for the application to be admissible.<sup>277</sup> Indeed, Saint Vincent and the Grenadines argued that Guinea failed to promptly release the Saiga and its Master. Thus, more importantly, the Tribunal arrived at the conclusion that:

77. There may be an infringement of [A]rticle 73, paragraph 2, of the Convention [UNCLOS] even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable.

78. In the case under consideration Guinea has not notified the detention as provided for in [A]rticle 73, paragraph 4, of the Convention [UNCLOS]. Guinea has refused to discuss the question of the bond and the ten-day time-limit relevant for the application for prompt release has elapsed without indication of willingness to consider the question. In the circumstances, it does not seem

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<sup>275</sup> See Bernard Oxman, *International Decision: The M/V "Saiga,"* 92 AM. J. INT'L L. 278, 279 (1998). For a factual background on both cases, see *M/V Saiga* case, I.T.L.O.S., Case No. 1, ¶¶ 25-33; *M/V Saiga* case, I.T.L.O.S., Case No. 2, ¶¶ 31-39.

<sup>276</sup> See generally *M/V Saiga* case, I.T.L.O.S., Case No. 1.

<sup>277</sup> See *M/V Saiga* case, I.T.L.O.S., Case No. 1, ¶ 59; in paragraph 56 of the Case, the Tribunal put forward the question to be decided in the case: "is bunkering (refueling) of a fishing vessel within the exclusive economic zone of a State to be considered as an activity the regulation of which falls within the scope of the exercise by the coastal State of its 'sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone?'" If the answer to this question was yes, the Tribunal continued, bunkering would violate the laws and regulations of the coastal State concerning the regulation of fisheries; hence the arrest of a vessel allegedly violating such rules would fall within Article 73(1) of the 1982 Convention. Accordingly, the prompt release of the vessel upon posting of a reasonable bond would be an obligation of the coastal State under Article 73(2). But, the Tribunal concluded, such a determination is not necessary for the case.

possible to the Tribunal to hold Saint Vincent and the Grenadines responsible for the fact that a bond has not been posted.<sup>278</sup>

The Tribunal found that Guinea must promptly release the M/V Saiga and its crewmembers who were being detained.<sup>279</sup> It also decided that a reasonable bond should be posted by Saint Vincent and the Grenadines, equivalent to the amount of oil discharged from the Saiga, plus \$400,000.<sup>280</sup>

In *Saiga No. 2*, the Tribunal had to decide whether “the laws applied or the measures taken by Guinea against the Saiga were compatible with the Convention [UNCLOS] [. . .and] [w]hether, under the Convention [UNCLOS], there was justification for Guinea to apply its customs laws in the exclusive economic zone within a customs radius extending to a distance of 250 kilometers from the coast.”<sup>281</sup> After noting that while the coastal State can apply its customs laws and regulations in its territorial sea (UNCLOS Articles 2 and 21), and that it may exercise control necessary to prevent infringement of its customs in its contiguous zone (Article 33(1)), the Tribunal concluded that the coastal State had jurisdiction to apply its customs laws in its EEZ only in respect to artificial islands, installations and structures (Article 60(2)), and not “in respect of any other parts of the exclusive economic zone not mentioned above.”<sup>282</sup>

The Tribunal further rejected the Guinean argument of “public interest” as it found that it would be incompatible with UNCLOS Articles 56 and 58 regarding the rights of the coastal State in the EEZ because it would “entitle it to prohibit any activities in the said zone which it decides to characterize as activities which affect its economic ‘public interest’ or entail ‘fiscal losses’ for it.”<sup>283</sup> Furthermore, no evidence had been presented by Guinea that its essential interests were in grave and imminent peril.<sup>284</sup>

The Tribunal, therefore, finds that, by applying its customs laws to a customs radius which includes parts of the exclusive eco-

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<sup>278</sup> *Id.* ¶¶ 77-78.

<sup>279</sup> *See id.* ¶ 79.

<sup>280</sup> *See id.* ¶ 85.

<sup>281</sup> M/V Saiga case, I.T.L.O.S., Case No. 2, ¶ 126.

<sup>282</sup> *Id.* ¶ 127.

<sup>283</sup> *Id.* ¶ 131.

<sup>284</sup> *See id.* ¶ 135.



nomic zone, Guinea acted in a manner contrary to the Convention [UNCLOS]. Accordingly, the arrest and detention of the Saiga, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention [UNCLOS].<sup>285</sup>

Regarding hot pursuit, the Tribunal concluded that several of the conditions set forth under UNCLOS Article 111 were not met. As for the first pursuit on October 27, 1997, at the time the order was given by the government of Guinea to arrest the Saiga, the authorities of Guinea could have had no more than a suspicion, while under UNCLOS, a good reason to believe that a vessel has violated the law is necessary. Furthermore, no visual or auditory signals to stop were given to the Saiga. Finally, the patrol boat was recalled, interrupting the alleged pursuit, when Guinea received information that the Saiga had changed its course.<sup>286</sup> As for the second pursuit on October 28, 1997, again, no auditory or visual signals to stop were given to the Saiga prior to the commencement of the pursuit.<sup>287</sup> Thus, the Tribunal concluded that the Saiga was stopped and arrested by Guinea "in circumstances which did not justify the exercise of the right of hot pursuit in accordance with the Convention [UNCLOS]."<sup>288</sup>

The last question to be decided by the Tribunal was related to the degree of the use of force by Guinea in stopping and arresting the Saiga:

Although the Convention [UNCLOS] does not contain express provisions on the use of force in the arrest of ships, international law [. . .] 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.<sup>289</sup>

The Tribunal went further by indicating steps that must be taken in arresting a vessel:

The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized

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<sup>285</sup> *Id.* ¶136.

<sup>286</sup> *See id.* ¶¶ 146-47.

<sup>287</sup> *See* M/V Saiga case, I.T.L.O.S., Case No. 2, ¶ 148.

<sup>288</sup> *Id.* ¶ 150.

<sup>289</sup> *Id.* ¶ 155.

signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ships. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered.<sup>290</sup>

The Tribunal noted that, at the time of its arrest, the *Saiga* was fully laden and low in the water, and therefore incapable of high speed. Consequently, Guinean officers could have boarded it without much difficulty. Therefore, "there is no excuse for the fact that the officers fired at the ship with live ammunition [. . .] without issuing any of the signals and warnings required by international law and practice."<sup>291</sup> Even worse, the Guinean officers also used excessive force on board the *Saiga*, injuring two persons and damaging the vessel because of use of gunfire.<sup>292</sup>

For these reasons, the Tribunal found that Guinea violated the rights of Saint Vincent and the Grenadines under UNCLOS and international law, by arresting the vessel, detaining the crewmembers, prosecuting and convicting its Master, and by seizing the *Saiga* and confiscating its cargo. The Tribunal further decided that in arresting the *Saiga*, "Guinea acted in contravention of the Convention [UNCLOS] on the exercise of the right of hot pursuit and thereby violated the rights of Saint Vincent and the Grenadines, . . . that while stopping and arresting the *Saiga*, Guinea used excessive force contrary to international law and thereby violated the rights of Saint Vincent and the Grenadines."<sup>293</sup> The court granted compensation for Saint Vincent and the Grenadines.<sup>294</sup>

#### IV. CONCLUSION

Throughout this note it has been shown that the coastal State has broad powers over the oceans, and more particularly over its territorial sea. Even if the coastal State does not exercise sovereignty over its EEZ, it still retains the most important

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<sup>290</sup> *Id.* ¶ 156.

<sup>291</sup> *Id.* ¶ 157.

<sup>292</sup> *See id.* ¶ 158.

<sup>293</sup> *M/V Saiga* case, I.T.L.O.S., Case No. 2, ¶ 183(8).

<sup>294</sup> *See id.* ¶ 183(12).

sovereign rights: the exclusive economic use of this zone, mainly for fisheries.

With its right to legislate in varying degrees in the different zones, the coastal State can impose a great burden on foreign vessels by forcing them to comply with the State's regulations. It can also assert jurisdiction over infringing vessels, and bring them before its courts. However, the ancient principle of freedom of the seas has not completely disappeared, and coastal States are confronted with a few limits to their powers.

Indeed, we have seen that foreign vessels have a right of free navigation on the high seas, including the EEZ and the contiguous zone. They must, however, respect the coastal State's regulations in these different zones. Foreign vessels also have a right of innocent passage in the territorial sea, as long as they comply with the coastal State's duly publicized legislation that is permitted under UNCLOS.

In the event that foreign vessels do not respect coastal States' laws and regulations, the latter can take several actions depending on where the non-complying vessel is located. The concept of self-defense underlies the possibility of such actions. Although the best way to resolve such an incident is by diplomatic means, the coastal State is allowed to take forceful measures if the foreign vessel refuses to obey demands of compliance. However, the use of force against the vessel must be necessary and proportionate to the offense committed. Even on the high seas, the foreign vessel can be arrested if it has committed crimes that are deemed so important that any State can take actions against them.

Thus, because of the economic importance of the resources of the sea, coastal States are given broad powers to intervene against a foreign vessel. However, if such a vessel respects the rules set forth in international conventions such as UNCLOS, and national legislation adopted in compliance with those conventions, it will be allowed to freely navigate on the oceans. Moreover, arresting a vessel and creating an international incident is not always politically acceptable by the international community.