Coastal State's (Criminal) Jurisdiction in the Exclusive Economic Zone: Recent Case-Law and State Practice

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Abstract

The Exclusive Economic Zone (EEZ) is a maritime zone that due to its sui generis character may give rise to many controversies between States. Lately, it is increasingly noticeable that coastal States extend their domestic legislation, be it their customs laws and regulations regulating oil bunkering, or simply their criminal legislation, to their EEZ. In some cases, coastal States even enforce such legislation. The most recent occasion of coastal States' extension of jurisdiction, observed mainly in the Gulf of Guinea, concerns the operation of private armed guards employed onboard foreign-flagged vessels traversing the EEZ for security reasons.

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International courts and tribunals have occasionally addressed relevant issues, but still is a matter that merits further discussion. International law is well-equipped with various principles and tools to accommodate any conflict of uses in the EEZ. In applying the relevant rules of international law, this article posits that the principle of exclusive jurisdiction of the flag State enshrined in Article 92 of the United Nations Convention on the Law of the Sea (UNCLOS) is applicable to all vessels in the EEZ, and unless justified under UNCLOS and other relevant rules of international law, the coastal State should abstain from the assertion of any prescriptive or enforcement jurisdiction.

Keywords

jurisdiction – Exclusive Economic Zone – UN Convention on the Law of the Sea – piracy – private armed guards

I. Introduction

The Exclusive Economic Zone (EEZ) has been since its inception a maritime zone whose legal nature gives rises to many controversies under the international law of the sea.[1] Conveniently regarded as a 'functional zone of a *sui generis* character',[2] EEZ is a maritime zone in which both coastal and flag States enjoy rights and jurisdictional competences. Inevitably, there is a considerable potential for conflicts between these rights and competences, specifically in view of the propensity towards 'creeping jurisdiction' on the part of the coastal States,[3] and the converse belief of third States that the EEZ is of residual high

1 On the EEZ see Part V of the UN Convention on the Law of the Sea (Montego Bay, 10 December 1982), in force 16 November 1994, 1833 UNTS 3, (hereinafter referred to as UNCLOS).

2 Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edn, Manchester: Manchester University Press 2022), 262. This was also the clear understanding at the time of conception; see Jorge Castañeda, 'Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea', in: Jerzy Makarczyk (ed.), *Essays in International Law in Honor of Judge Manfred Lachs* (The Hague: Martinus Nijhoff 1984), 605-623 (612).

3 The concept of 'creeping jurisdiction' denotes the attempts of coastal States to extend their jurisdiction into areas beyond the territorial sea, or now their EEZ, onto the high seas or to read more jurisdictional rights within their existing maritime zones. See inter alia, Erik Franckx, 'The 200-Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage, GYIL 48 (2005), 117-149 (125-134). In the view of Maria Gavouneli, the majority of claims of creeping jurisdiction 'are not set in regulatory language but are rather based on construing new ways to read the provisions establishing the existing maritime zones'; see Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Leiden: Martinus Nijhoff 2007), 59. In other words, States nowadays do not unilaterally declare that a certain maritime zone is under their jurisdiction, but rather interpret the UNCLOS provisions in an expansive fashion in order to legitimate expansive claims towards the ocean.

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seas character ('international waters').[4] Conflicts with respect to military activities,[5] hydrographic surveying,[6] intelligence gathering,[7] and underwater cultural heritage[8] in the EEZ have long been debated.

Also, there has been a noticeable tendency of coastal States to extend their jurisdiction, including criminal jurisdiction, over foreign-flagged vessels' activities in their EEZ. Recent cases before international courts and tribunals illustrate this trend. Suffice it to mention, first, the '*Enrica Lexie Incident*' case (Italy v. India), in which one of Italy's claims, not eventually addressed by the Arbitral Tribunal, concerned the fact that India had effected a wholesale extension of its Penal Code to its entire EEZ.[9] Second, the discontinued '*San Padre Pio*' case (2019-2021), in which Nigeria had arrested *San Padre Pio*, a motor tanker vessel flagged in Switzerland, while it was engaged in one of several ship-to-ship ('STS') transfers[10] of gasoil in the Nigerian EEZ.[11]

Further, it has recently been observed that States in the Gulf of Guinea impose on foreign-flagged vessels to embark state or state-authorised security personnel in the territorial sea, and even in the EEZ, to protect the vessels from piracy attacks. As reported,

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4 See Churchill, Lowe and Sander (n. 2), 262.

5 See inter alia Ivan Shearer, 'Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance', Ocean Yearbook 17 (2003), 548-562 and Alexander Proelss, 'Article 58' in: Alexander Proelss (ed.), *UN Convention on the Law of the Sea: A Commentary* (München/Oxford/Baden-Baden: C. H. Beck/Hart/Nomos 2017), 453 [MN 18] (hereinafter referred to as Proelss Commentary).

6 See inter alia Proelss (n. 5), 453-454 [MN 19] and Ashley Roach, 'Marine Data Collection: Methods and the Law' in: Myron H. Nordquist, Tommy B. Koh and John N. Moore (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (The Hague: Martinus Nijhoff 2009), 171-208 (175).

7 See inter alia Efthymios Papastavridis, 'Intelligence Gathering in the Exclusive Economic Zone', International Law Studies 93 (2017), 446-474.

8 See Yoshifumi Tanaka, *The International Law of the Sea*, (2nd edn, Cambridge: Cambridge University Press 2015), 136 and Churchill, Lowe and Sander (n. 2), 293.

9 See PCA, *MV Enrica Lexie Incident* (Italy v. India), award of 21 May 2020, case no. 2015-28, para. 278.

10 A ship-to-ship operation entails the transfer of cargo between two seagoing vessels strategically positioned alongside each other. Offshore bunkering, on the other hand, entails the replenishment of a ship's fuel bunkers with fuel intended for the operation of the recipient ship's engines. See David Testa, 'Coastal State Regulation of Bunkering and Ship-to-Ship (STS) Oil Transfer Operations in the EEZ: An Analysis of State Practice and of Coastal State Jurisdiction Under the LOSC', Ocean Development & International Law 50 (2019), 363-386 (364).

11 See further information on the case and the ITLOS Award on Provisional Measures of Provisional Measures at <thttps://www.itlos.org/en/main/cases/list-of-cases/the-m/t-san-padre-pio-case-switzerland-v-nigeria-provisional-measures/>. See also relatedly ITLOS, *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), judgment of 01 July 1999, ITLOS Reports 1999, p. 10; ITLOS, *M/V "Virginia G" Case* (Panama v. Guinea-Bissau), judgment of 14. April 2014, ITLOS Reports 2014, 4.

> 'the prevailing model of embarked maritime security in the Gulf of Guinea involves the contracting of uniformed police or military personnel from coastal or port states onto a vessel in the anchorage, port, or territorial waters (or even Exclusive Economic Zone) of that state. This is most prevalent in Nigeria, Togo, and Benin. The coastal states in this region do not permit private armed security guards of any kind to engage in vessel protection activities in their waters. Instead, the military and/or police forces of the coastal state offer their own security services, for a fee, to private ship-owners in the region.'[12]

The above-mentioned recent cases as well as the State practice concerning private armed guards (PAGs) in the Gulf of Guinea clearly mark another set of occasions of 'creeping jurisdiction' on the part of coastal States in the EEZ, which should be added to the long list of relevant 'conflicts' concerning the sovereign rights and jurisdictional entitlements of the coastal States therein.

Against this backdrop, the purpose of this article is to assess these recent trends concerning the extension of coastal State jurisdiction over (criminal) activities in the EEZ, including over PAGs, and explore their legality under international law. In so doing, it will demonstrate that UNCLOS has very clearly delimited the rights and obligations of both coastal and flag States in the EEZ and has provided the appropriate tools and mechanisms to address potential conflicts.

Accordingly, the paper is structured as follows: The next section sets the scene for the ensuing analysis, namely it briefly discusses the legal regime of the EEZ (Section II). Section III considers the legal contours of coastal State's jurisdiction over foreign-flagged vessels in its EEZ and distinguishes this jurisdiction with that of the flag State in relation to activities onboard its vessels in the EEZ. After having set out the jurisdictional framework applicable in the EEZ, Section IV critically assesses the abovementioned and other relevant cases under international law. Section V turns to the specific question of PAGs in the EEZ and explores which State may assert jurisdiction over their employment in the EEZ, arguing that it is the flag State law that principally regulates the operation of PAGs. Section VI concludes underscoring that such unilateral prescriptions as well as enforcement action by coastal States are in violation of the applicable provisions of UNCLOS and general international law.

12 See Sean Duncan, Issue Paper: Coastal States Embarked Personnel, Oceans Beyond Piracy (30 November 2018); available at < https://www.linkedin.com/pulse/issue-paper-coastal-state-embarked-personnel-sean-duncan-mpp/>.

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II. The Legal Regime of the EEZ

The EEZ is an area located beyond and adjacent to the territorial sea not exceeding beyond 200 nautical miles (nm) from the baselines,[13] in which the coastal State enjoys certain sovereign rights and jurisdiction, while other States enjoy freedoms and rights, in accordance with the relevant provisions of the UN Convention on the Law of the Sea and customary international law.[14] In contrast to the continental shelf,[15] the coastal State must claim its EEZ in order to be able to lawfully exercise its sovereign rights and jurisdiction therein.[16]

The EEZ has been the creation of the Third UN Conference on the Law of the Sea (UNCLOS III),[17] which built upon the growing State practice of proclaiming fishing zones since the 1950 s,[18] acknowledged also by the ICJ in the *Fisheries Jurisdiction* cases (1974).[19] As said, the EEZ is widely acknowledged as a *sui generis* zone subject to a 'specific legal regime', located *quasi* 'between' the maritime territory of a coastal state and the high seas.[20] Indeed, Article 55 UNCLOS specifies that the EEZ is subject to a 'special legal

13 See Article 57 UNCLOS (n. 1). Amongst the extensive literature on the EEZ see inter alia: Gemma Andreone, 'The Exclusive Economic Zone' in: Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press 2015), 159-180; David Attard, *The Exclusive Economic Zone in International Law* (Oxford: Clarendon Press 1987); Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (The Hague: Martinus Nijhoff 1989).

14 See on the customary nature of the EEZ: ICJ, *Continental Shelf* (Libyan Arab Jamahiriya v. Malta), merits, judgment of 3 June 1985, ICJ Reports 1985, 13, 33 and ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), merits, judgment of 21 April 2022, para. 56 (hereinafter *Alleged Violations* case).

15 The rights of the coastal State exercises over the continental shelf are inherent. The ICJ stated, in the *North Sea Continental Shelf Cases*, that the continental shelf of a costal State is: 'a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources'. ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Netherlands/Denmark), merits, judgment of 20 February 1969, ICJ Reports 1969, 3, 22.

16 See Alexander Proelss, 'Article 55', in Proelss Commentary (n. 5), 409 (MN 3).

17 See inter alia Castañeda (n. 2), 605-623.

18 See, e. g. the practice of Latin American States that culminated as early as 1952 in the Declaration of Santiago adopted by Chile, Ecuador and Peru, by which the States concerned declared their view that 'they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts'. Declaration on the Maritime Zone of 18 August 1952, para. II, 1006 UNTS 325. See also Ann Hollick, 'The Origins of the 200-mile Offshore Zones', AJIL 71 (1977), 494-500.

19 ICJ, *Fisheries Jurisdiction* (United Kingdom v. Iceland), merits, judgment of 25 July 1974, ICJ Reports 1974, 3 and ICJ, *Fisheries Jurisdiction* (Germany v. Iceland), merits, judgment of 25 July 1974, ICJ Reports 1974, 175.

20 See n. 2 and corresponding text.

regime' established in Part V of the Convention, which governs the rights and jurisdiction of the coastal State and the freedoms of other States in the EEZ.[21] Therefore, the rules on the EEZ no longer allow the use of the traditional principles of sovereignty and freedom in identifying exactly the coastal State's sovereign sphere and the freedoms of other States at sea.[22] As one commentator stated:

> 'in terms of territory, the EEZ is a no man's land (and thus high seas), whereas in terms of function (i. e. usage and protection rights) the EEZ is a *sui generis* zone subject to a "specific legal regime" (Article 55 of LOSC [UNCLOS]), located *quasi* "between" the maritime territory of a coastal state and the high seas.'[23]

In essence, the coastal State does not enjoy territorial sovereignty, but only sovereign rights over economic resources within the EEZ. Under Article 56 UNCLOS, these sovereign rights concern the conservation, management, and exploitation of natural resources, both biological and non-biological, and other activities aimed at the exploration and exploitation of the area for economic purposes, such as the production of energy from water, currents, and winds.[24]

At the same time, under Article 58 UNCLOS, other States enjoy the freedom of navigation, overflight, the laying of submarine cables and pipelines, and 'other internationally lawful uses of the sea related to these freedoms […] and compatible with the other provisions of this Convention.'[25] This list is exhaustive, even if the reference to other lawful uses makes it somewhat flexible.[26] According to the Virginia Commentary,

> 'the "other internationally lawful uses," include, *inter alia*, "those associated with the operation of ships, aircraft and submarine cables and pipelines."[27] Also, significantly for our purposes, Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.'[28]

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21 Article 55 UNCLOS (n. 1).

22 See Umberto Leanza and Maria-Cristina Caracciolo, 'Exclusive Economic Zone', in: David Attard, Malgosia Fitzmaurice and Norman Martinez (eds), The *IMLI Manual on International Maritime Law: The Law of the Sea*, Vol. I (Oxford: Oxford University Press 2014), 177-216 (185).

23 Alexander Proelss, 'The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited', Ocean Yearbook 26 (2012), 87-112 (89).

24 Article 56 UNCLOS (n. 1).

25 Article 58 (1) UNCLOS (n. 1).

26 Leanza and Caracciolo (n. 22), 193.

27 See Myron Nordquist, Satya Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II (Dordrecht/Boston/London: Martinus Nijhoff, 1993), 564 (hereinafter referred to as 'Virginia Commentary').

28 Article 58 (2) UNCLOS (n. 1).

However, as underscored above, these freedoms are subject to the 'special legal regime' of the EEZ and should not be taken at face value as freedoms of the high seas per se. Equally, the coastal States' sovereign rights are not meant to be absolute, but are qualified by specific provisions of the UNCLOS, as well as by the general requirements of the principle of good faith and the prohibition of abuse of rights (Article 300 UNCLOS). In addition, Articles 56 and 58 establish mutual obligations on the part of coastal States (Article 56 (2)) and other States (Article 58(3)) to have 'due regard to the rights and duties' of the other's rights and freedoms under the Convention.[29] Consequently, the general assumption appears to be that user conflicts are to be resolved on a case-by-case basis, based on an individual balancing of the conflicting interests involved.[30] Also, UNCLOS provides the so-called 'residual rule', which is to be applied in cases where the Convention confers no rights on either the coastal State or other States. According to Article 59,

> '[i]n cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole'.[31]

It is argued that regardless of the application of Article 59 UNCLOS, for the overwhelming majority of uses within the EEZ, there exist two rebuttable

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29 See on the obligations of 'due regard' in UNCLOS Shotaro Hamamoto, 'The Genesis of the "Due Regard" Obligations in the United Nations Convention on the Law of the Sea', International Journal of Marine and Coastal Law 34 (2019), 7-24.

30 In scrutinizing Article 56 (2), the Arbitral Tribunal in the *Chagos Marine Protected Area* case reasoned as follows: '[T]he ordinary meaning of "due regard" calls for the [coastal State] to have such regard for the rights of [the other State] as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of [the other State's] rights; nor does it uniformly permit the [coastal State] to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by [the other State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [coastal State], and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State'; PCA, *Chagos Marine Protected Area* (Mauritius v. U. K.), Case No. 2011-03, Award of 18 March 2015, para. 519. In the same vein, PCA, *South China Sea Arbitration (Philippines v. China)*, award of 12 July 2016, case no. 2013-19, para. 744, and PCA, *MV Enrica Lexie* (n. 9), paras 947-955. See also on the relevant case-law Mathias Forteau, 'The Legal Nature and Content of Due Regard Obligations in Recent International Case Law', International Journal of Marine and Coastal Law 34 (2019), 25-42.

31 Article 59 UNCLOS (n. 1). See also Alexander Proelss, 'Article 59' in: Proelss Commentary (n. 5), 458-463.

presumptions:[32] the first in favour of the coastal State in respect of all uses that pertain to resources or, more broadly, have an economic value. Indeed, the Virginia Commentary suggests a shift of emphasis in favour of the coastal State even in situations covered by Article 59 UNCLOS: '[g]iven the functional nature of the exclusive economic zone, where economic interests are the principal concern, this formula would normally favor the coastal State'.[33]

On the other hand, one could contend[34] that there is equally a rebuttable presumption in favour of third States with respect to the use of the sea to safeguard the freedom of communication, i. e. freedoms of navigation, overflight, and laying of submarine cables and pipelines, and other associated uses.[35] Indeed, as the Virginia Commentary acknowledges,

> 'where conflicts arise on issues not involving the exploration for and exploitation of resources, the formula would tend to favor the interests of other States or of the international community as a whole'.[36]

That said however, it must be reiterated here that the rights incorporated in Article 58(1) cannot be regarded as a congruent reflection of the regime of the high seas.[37] This is evident from Article 58(2), which declares Articles 88 to 115 applicable in the EEZ only 'in so far as they are not incompatible with this Part'.[38]

In conclusion, the legal regime of EEZ is truly *sui generis*, balancing between the economic rights of coastal States and the freedoms of communication of third States. The two abovementioned presumptions, along with

32 See in this regard Papastavridis (n. 7), 458-460.

33 See Virginia Commentary (n. 27), 569. See also Attard (n. 13), 75.

34 It is noteworthy that authors such as Proelss speak only about a rebuttable presumption in favour of the coastal State and not third States. In his words, 'accepting that the shift of emphasis in favour of the coastal state is embodied in a rebuttable presumption gives consideration to the nature of the coastal state's rights as constituting an extract of the comprehensive concept of sovereignty […]', Proelss (n. 23), 99.

35 The term 'freedom of communications' (*'jus communicationis')* was used by the ICJ in the *Nicaragua* case, see ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S), merits, judgment of 27 June 1986, ICJ Reports 1986, 14 (paras 214, 253). Also, the same term was employed by the Arbitral Tribunal in the *Croatia/Slovenia Arbitration* to reflect the freedoms of navigation, overflight and laying of submarine cables and pipelines, enshrined in Article 58 (1) UNCLOS; see PCA*, Croatia/Slovenia Arbitration*, award of 29 June 2017, PCA case no. 2012-04, para. 1123. The *jus communicationis*, and, *a fortiori*, the right to trade freely with other nations using high seas routes have been at the centre of all theoretical battles on the freedom of the seas. See Efthymios Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective*:* Mare Liberum *versus* Mare Clausum Revisited', LJIL 24 (2011), 45-69 (62).

36 See Virginia Commentary (n. 27), 569.

37 See also Gavouneli (n. 3), 65-66.

38 See also Tulio Treves, 'Military Installations, Structures, and Devices on the Seabed', AJIL 74 (1980), 808-857 (843).

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the mutual due regard obligations (Articles 56 (2) and 58(3)), significantly assist in addressing any potential conflict of uses.

III. Coastal and Flag State (Criminal) Jurisdiction in the EEZ and Recent Case-Law

This Section focuses on the specific question of jurisdiction in the EEZ, including criminal jurisdiction, and scrutinises when coastal and flag States may assert such jurisdiction over foreign vessels in the EEZ. Obviously, an exhaustive treatment of all potential activities or crimes is outside the scope of this article.

At the outset, however, it must be noted that when reference is made to 'jurisdiction' in international law, as here to 'criminal jurisdiction', a distinction must be drawn between mainly i) *prescriptive or legislative jurisdiction*, i. e. the power to make laws, decisions, or rules, and ii) *enforcement jurisdiction*, that is the power to take executive action in pursuance of or consequent to the making of decisions or rules.[39] Under UNCLOS, these two types of jurisdiction do not always coalesce,[40] and thus in the context of this enquiry the necessary distinctions and qualifications will be made.

1. Coastal State Jurisdiction

Coastal States may indeed exercise prescriptive and enforcement jurisdiction over certain, few crimes committed onboard foreign-flagged vessels in the EEZ.

As to the *entitlement to prescribe,* the coastal State may under UNCLOS, and customary international law legislate as follows:

First, the coastal State has a right of exploration and exploitation, but also the obligation of conservation and management of living resources in the EEZ (Article 56), specified under Article 61 et seq. of UNCLOS. For this purpose, it may exercise its prescriptive jurisdiction, including by criminalis-

39 James Crawford (ed.), Brownlie's *Principles of Public International Law* (9th edn, Oxford: Oxford University Press 2015), 440. On jurisdiction under general international law see inter alia Frederick Alexander Mann, 'The Doctrine of Jurisdiction in International Law', RdC 111 (1964-I), 1-112; Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press 2008), and Michael Akehurst, 'Jurisdiction in International Law', BYIL 46 (1972-1973), 145-257.

40 However, as Gavouneli asserts, '[i]t is quite clear, however, that ultimately the legal basis of all aspects of Jurisdiction remains the same, namely State sovereignty – and whatever the label attached, jurisdiction remains the external manifestation of the power of the State'; Gavouneli (n. 3), 7.

ing certain offences related to fisheries.[41] Notably, in the light of recent case-law, such laws and regulations may also include the bunkering, namely, the replenishment with fuel,[42] of illegal fishing vessels in the EEZ. Indeed, in its judgment in the *Virginia G* case (2014), the International Tribunal for the Law of the Sea (ITLOS) concluded that, under UNCLOS, the bunkering of foreign vessels fishing in the EEZ is lawfully subject to regulation by the coastal state, and that confiscation of a vessel and its cargo is a permissible penalty for violation of the coastal state's fisheries regulations in the EEZ.[43]

Second, the coastal State may assert prescriptive jurisdiction, including criminal jurisdiction, over artificial islands, and other installations in the EEZ. Under Article 60 (2) UNCLOS,

> 'the coastal State shall have exclusive jurisdiction over such artificial islands, installations, and structures, including jurisdiction with regard to customs, fiscal, health, safety, and immigration laws and regulations'.[44]

Third, the coastal State has also prescriptive jurisdiction in relation to the protection and preservation of the marine environment. The coastal State's jurisdiction in this regard is addressed in detail in Part XII UNCLOS, in particular Articles 210 (5), 211 (5) and (6), 216, 218, 220 and 234.[45]

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41 On fisheries in the EEZ in general see Camille Goodman, *Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone* (Oxford: Oxford University Press 2021). Coastal States often criminalise fisheries violations in their EEZ; see *inter alia* Togo, Law No. 2015-10 establishing the Criminal Code, Articles 813, 818 and 819; China, Fisheries Law of the People's Republic of China, 2004, Article 46 <https://www.ecolex.org/>.

42 See n. 10.

43 Specifically, addressing the question of bunkering in the EEZ, the Tribunal held as follows: '[t]he regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention read together with article 62, paragraph 4, of the convention. This view is also confirmed by State practice which has developed after the adoption of the Convention; ITLOS, *M/V "Virginia G"* (n. 11), para. 215. For a detailed review of the *Virginia G* case (decided 14 April 2014), see Bernard Oxman and Vincent Cogliati-Bantz, 'The M/V Virginia G', AJIL 108 (2014), 769.

44 See Article 60 UNCLOS and commentary by Alexander Proelss, 'Article 60' in: Proelss Commentary (n. 5), 464 et seq. See also Alex Oude Elferink, 'Artificial Islands, Installations and Structures' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2019).

45 See on the protection of the marine environment in general James Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford: Oxford University Press 2017); and in respect of the coastal State's jurisdiction in the EEZ Alan Boyle and Catherine Redgwell, *International Law and the Environment* (4th edn, Oxford: Oxford University Press 2021), 542-544, and Erik Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (The Hague: Kluwer 1998), Chapter 10.

 DOI 10.17104/0044-2348-2023-2-307

Fourth, the coastal State's prescriptive jurisdiction under Article 56 (1)(b) covers also marine scientific research as substantiated by the provisions of Part XIII, in particular Articles 246-249, 253 and 259-262.[46]

As to *enforcement powers,* the coastal State may exercise enforcement jurisdiction in its EEZ and over foreign-flagged vessels in order to ensure compliance with the laws and regulations concerning fisheries in the EEZ. Indeed, under Article 73 UNCLOS, the coastal State may adopt all necessary measures, including detention, inspection, arrest, and judicial proceedings to this end.[47] In addition, the coastal State has enforcement jurisdiction over artificial islands and other installations in the EEZ pursuant to Article 60 (2) UNCLOS and limited enforcement jurisdiction to take the appropriate measures within their safety zones under Article 60 (4) of the said Convention.[48] Lastly, the coastal State has limited enforcement jurisdiction in the EEZ, including the right to request information, board, inspect the vessel or even arrest, vessels committing serious violations of international environmental law, resulting in a substantial discharge causing or threatening significant pollution of the marine environment (Article 220 UNCLOS),[49] which might also amount to criminal offences under the coastal State's domestic laws.[50]

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46 See on marine scientific research inter alia Alfred Soons, *Marine Scientific Research and the Law of the Sea* (Deventer: Kluwer 1982); Tim Stephens and Donald Rothwell, 'Marine Scientific Research' in: Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens (eds), The Oxford Handbook of the Law of the Sea (Oxford: Oxford University Press 2015), (n. 13), 559-581.

47 See James Harrison, 'Article 73' in: Proelss Commentary (n. 5), 556 and James Harrison, 'Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone – Law and Practice' in: Henrik Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden: Brill Nijhoff 2015), 217-248.

48 In the *Arctic Sunrise* case, the Arbitral Tribunal clarified that in case of terrorist or other violent acts against platforms, the coastal States do have the authority to take the requisite law enforcement measures and arrest the suspects within the safety zone. This can include measures taken within the zone, including the boarding, seizure, and detention of a vessel, where the coastal State has reasonable grounds to suspect the vessel is engaged in terrorist offences; see PCA, *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, award on the merits of 14 August 2015, case no. 2014-02, para. 278. See also Efthymios Papastavridis, 'Protecting Offshore Energy Installations under International Law of the Sea' in: Lawrence Martin et al (eds), *Natural Resources and the Law of the Sea: Exploration, Allocation, and Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (New York: Juris Publications 2017), 197-214.

49 For the drafting history of Article 220, see Virginia Commentary (n. 27), 281 et seq. See also Boyle and Redgwell (n. 45), 545-546.

50 See, e. g. the famous case of *Prestige*, flying the flag of the Bahamas, which was sailing in the Spanish EEZ off the coast of Galicia, carrying 70,000 tonnes of fuel oil, and at a distance of 28 miles from Cape Finisterre it sent out an SOS after sustaining sudden and severe damage which produced a leak and caused the contents of its tanks to spill into the Atlantic Ocean. By a decision of 17 November 2002, the Corunna no. 4 investigating judge remanded the Master of the Prestige, Mr Mangouras, in custody and set bail at 3,000,000 euros (EUR), after finding that the facts of the case justified the opening of a criminal investigation. The case has even gone to the European Court of Human Rights see ECtHR, *Mangouras v. Spain* (Grand Chamber), judgment of 28 September 2010, application no. 12050/04, available at <https://hudoc.echr.coe.int/>.

It follows thus that the jurisdiction that the coastal State may exercise over foreign-flagged vessels in its EEZ, both in terms of prescriptive and enforcement jurisdiction, is not extensive.

2. Jurisdiction of the Flag State

As stated, in the EEZ all States enjoy the freedom of navigation according to Article 58 (1) UNCLOS and customary international law. Article 58 (2) UNCLOS renders applicable Articles 88 to 115, whose main focus is on shipping and flag State jurisdiction, and other pertinent rules of international law in the EEZ, but only if and to the extent to which they are not incompatible with Part V of the Convention, i. e. that of the EEZ.[51] Amongst the abovementioned provisions, those on the exclusive jurisdiction of the flag State on the high seas (Article 92) and on piracy (Articles 100-107) are of relevance for present purposes.

Indeed, the principle of exclusivity of flag-state jurisdiction, namely that ships on the high seas, and for our purposes in the EEZ, are, as a general rule, subject to the exclusive jurisdiction and authority of the State whose flag they lawfully fly,[52] is key to our enquiry. As Article 92 stipulates,

> '[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'.

With respect to the kind of jurisdiction that flag States enjoy over their vessels on the high seas, Guilfoyle rightly contends that

> 'despite its wording, Article 92 creates no absolute prohibition on States extending their prescriptive or regulatory jurisdiction to events occurring aboard a foreign vessel. […] The prohibition is upon States exercising enforcement jurisdiction over foreign vessels on the high seas. The interest thus preserved is each State's interest in freedom of navigation.'[53]

Nevertheless, in the light of a very recent pronouncement of ITLOS in the *MV Norstar* case (2019),[54] reiterated also in the *MV Enrica Lexie* case

51 See Article 58 (2) UNCLOS (n. 1).

52 See generally Daniel P. O'Connell, *The International Law of the Sea*, Vol II (edited by Ivan A. Shearer) (Oxford: Clarendon Press 1984), 796; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, Essex: Longman 1992), 737.

53 Douglas Guilfoyle, 'Article 92' in: Proelss Commentary (n. 5), 702-703.

54 ITLOS, *The M/V Norstar Case* (Panama v. Italy), judgment of 10 April 2019, case no. 25, available at <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf>.

(2020),[55] there is room for the argument that the principle of exclusive flag State jurisdiction denotes also exclusive 'prescriptive' jurisdiction. In the view of the Tribunal,

> '[a]s no State may exercise jurisdiction over foreign ships on the high seas, in the view of the Tribunal, any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties'.[56]

It is submitted this is not an accurate statement of general international law, since, besides the treaty exceptions alluded to by the Judgement, there are other heads of jurisdiction under customary international law upon which the prescriptive jurisdiction of third States on board of a foreign-flagged vessel on the high seas may be premised, such as the principle of nationality[57] or the passive personality principle.[58]

In any case, it is significant for present purposes to underline that unless the coastal State enjoys jurisdiction over the foreign-flagged vessel pursuant to the relevant provisions of UNCLOS or general international law, the default rule is that the flag State enjoys exclusive jurisdiction over any criminal activity on board that vessel in the EEZ. This means that the coastal State should not even legislate without any proper justification under UNCLOS or any other relevant rule of international law for an activity occur-

55 PCA, *Enrica Lexie* (n. 9), para. 473.

56 ITLOS, *M/V Norstar* (n. 54), para. 222. See the forceful joint dissenting opinion on this point by *Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge Ad Hoc Treves)* (International Tribunal for the Law of the Sea, case no. 25, 10 April 2019), para. 36.

57 As Guilfoyle rightly contends in this respect, 'despite its wording, Article 92 creates no absolute prohibition on States extending their prescriptive or regulatory jurisdiction to events occurring aboard a foreign vessel. A State can still assert jurisdiction to punish or regulate the conduct of its own nationals for acts committed aboard foreign vessels. The prohibition is upon States exercising enforcement jurisdiction over foreign vessels on the high seas'; Guilfoyle (n. 53), 702-703. See, e. g. Article 117 UNCLOS (duty to cooperate in respect of nationals' fishing activities on the high seas) and Article 97 (1) UNCLOS (flag State and State of nationality have jurisdiction in penal matters arising from a collision) and FAO, International Plan of Action on Illegal, Unreported and Unregulated Fishing 2001, 23 June 2001, available at: <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>. In accord is also Giuliana Lampo, 'Jurisdiction Beyond Territorial Sovereignty: Defining the Scope of Exclusive Flag State Jurisdiction Under Art. 92 UNCLOS', HJIL 82 (2022), 195-222 (200).

58 On the passive personality principle see PCA, *Enrica Lexie* (n. 9), para. 345, and ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), merits, judgment of 14 February 2002, Separate Opinion of President Guillaume, ICJ Reports 2002, 3 (37) (para. 4). Also the protective principle may be applicable here. On the latter head of jurisdiction see Roger O'Keefe, *International Criminal Law* (Oxford: Oxford University Press 2015), 12 et seq.

ring onboard a foreign-flagged vessel in the EEZ. This is, however, without prejudice to the possibility that other – third States – may also have jurisdiction over certain activities, including acts of piracy. In no case whatsoever is the flag State deprived of its jurisdiction over its vessel, which, in accordance with the consistent jurisprudence of ITLOS, extends to everything on it, every person on it, or every person involved or interested in its operation (principle of the unity of vessel).[59]

Hence, any reply to questions such as 'which State has jurisdiction over *X, Y, Z* activity onboard foreign vessels in the EEZ?' would, in principle, be: 'the flag State'. Such jurisdiction would be exclusive, i. e. the flag State would be the only State competent in exercising jurisdiction in particular, enforcement jurisdiction, over the act in question, except for two cases: first, the latter pertains to activities over which the coastal State enjoys both prescriptive and enforcement jurisdiction under Part V UNCLOS (e. g. fisheries, offshore platforms, and marine environment). In that case, the coastal State may lawfully exercise enforcement jurisdiction over the vessel in its EEZ (flag State jurisdiction continues to apply in principle yet is subordinated to that of the coastal State). Second, third States may also enjoy parallel jurisdictional powers under UNCLOS and general international law, which in most of the cases would be prescriptive rather than enforcement, with the important exception of piracy. Indeed, it has been customarily recognised and codified under UNCLOS that all States may arrest on the high seas (and for our purposes, in the EEZ) pirates and subsequently try them before their courts (Article 105 UNCLOS).[60]

IV. Relevant Case-Law

In stark contrast to the above legal framework, according to which the default rule is clearly that of 'flag State jurisdiction', it is noteworthy that some coastal States extend either their contiguous zone legislation, mainly their customs laws

59 See the pronouncement in the *M/V "SAIGA" (No. 2) Case*, which was also referred to in its Judgment in the *M/V "Virginia G" Case*, that, under the Convention, a ship is to be considered a unit, '[t]hus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State' and that '[t]he nationalities of these persons are not relevant', ITLOS, *M/V "SAIGA" (No. 2)* (n. 11), para. 106 and ITLOS, *M/V "Virginia G"* (n. 11), para. 126.

60 Article 105 UNCLOS sets forth that: '[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates and arrest the persons and seize the property on board'. On piracy in general see inter alia Anna Petrig, 'Piracy' in: Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press 2015), 843-865; Alfred Rubin, *The Law of Piracy* (2nd edn, New York: Transnational Publishers 1998).

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and regulations, or their criminal legislation, to acts committed by foreign vessels in their EEZ. This has given rise to various disputes between States, some of which have been adjudicated by international courts and tribunals. Suffice it to mention and shortly discuss a few of them.

First, in the ITLOS, *M/V Saiga* cases, Guinea arrested the *M/V Saiga* for violation of its Customs Code of Guinea and of the law against the smuggling of fuel oil in its EEZ.[61] It argued that the supply of gas oil was not an aspect of the freedom of navigation, but an economic or commercial activity, which Guinea was entitled to control within the EEZ. In considering the question of 'whether, under the Convention, 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 kilometres from the coast',[62] ITLOS, after citing Article 33 UNCLOS, rightly held that 'in the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (Article 60, paragraph 2). In the view of ITLOS, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above.[63]

This is in accordance with the recent judgment of the ICJ in the *Alleged Violations Case* (2022), in which the Court, after affirming the different nature of the two respective maritime zones,[64] underscored that any extension of the regime governing the contiguous zone, either *ratione loci*, i. e. beyond 24 nm from the baselines,[65] such as that by Guinea in the ITLOS, *M/V/ Saiga II* case, or *ratione materiae*, i. e. over matters not included in Article 33 UNCLOS ('fiscal, immigration, sanitary, and customs')[66] would not only

61 For a comprehensive review of the ITLOS, *Saiga I and II* cases (decided 4 December 1997 and 1 July 1999) see Louise de la Fayette, 'ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute', International Journal of Marine and Coastal Law 15 (2000), 355-392.

62 See ITLOS, *M/V "SAIGA" (No. 2)* (n. 11), para. 126.

63 ITLOS, *M/V "SAIGA" (No. 2)* (n. 11), para. 127.

64 'In the first place, the Court notes that the contiguous zone and the exclusive economic zone are governed by two distinct régimes. It considers that the establishment by one State of a contiguous zone in a specific area is not, as a general matter, incompatible with the existence of the exclusive economic zone of another State in the same area'; see ICJ, *Alleged Violations Case* (n. 14), para. 160.

65 'As is stated above, the 24-nautical-mile rule provided for in Article 33, paragraph 2, is an established customary rule. The coastal State does not have the right to extend the breadth of its contiguous zone as it sees fit', ICJ, *Alleged Violations Case* (n. 14), para. 173.

66 '[T]he Court considers that Article 33 of UNCLOS reflects contemporary customary international law on the contiguous zone, both in respect of the powers that a coastal State may exercise there and the limitation of the breadth of the contiguous zone to 24 nautical miles', ICJ, *Alleged Violations Case* (n. 14), para. 155.

be devoid of legal basis, and thus non-opposable to third States, but it might also engage the international responsibility of that State.[67]

Second, in the Permanent Court of Arbitration (PCA), *M/V Enrica Lexie* (2020), Italy complained that by virtue of the 1976 Maritime Zones Act and the 1981 Notification India effected a wholesale extension of the Indian Penal Code beyond India's territorial sea to its entire EEZ, which as such was incompatible with UNCLOS.[68] Indeed, the Notification of the Ministry of Home Affairs of the Republic of India, No. S. O. 671(E), dated 27 August 1981, made the Indian Penal Code and the Indian Code of Criminal Procedure 'applicable to the entirety of India's exclusive economic zone'.[69] Regrettably, the UNCLOS Annex VII Arbitral Tribunal, even though it implied that questions could arise with respect to the conformity of such legislation with UNCLOS, did not address this issue, because the conduct of India, of which Italy complained, did not have any connection with the respective Indian legislation.[70]

It readily appears, however, that such assertion of prescriptive powers by a coastal State, as here the blanket extension of its criminal legislation to its EEZ, without any specific legal basis under international law (e. g. the principle of territoriality), is not valid with regard to any third State.[71] It is further questioned whether even the mere enactment of such legislation, without any subsequent enforcement measure, could engage that State's international

67 'The Court concludes that, in respect of the maritime areas in which Colombia's "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, Colombia's "integral contiguous zone", which the Court has found to be incompatible with customary international law as reflected in Article 33 of UNCLOS, infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone. Colombia's responsibility is thereby engaged. Colombia has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law […]', ICJ, *Alleged Violations Case* (n. 14), para. 194.

68 PCA, *Enrica Lexie* (n. 9), para. 278.

69 Such extension was upheld as legal from the High Court of Kerala, India on 29 May 2021; see PCA, *Enrica Lexie* (n. 9), para. 180.

70 In the view of the Tribunal, 'in these circumstances, the Arbitral Tribunal does not consider that Italy has established that the conduct of India of which Italy complains in the present Arbitration was in fact based on the 1976 Maritime Zones Act and 1981 Notification. Accordingly, *even if questions may arise as to the compatibility of that legislation with the Convention*, the Arbitral Tribunal sees no need to address that issue in the context of the present dispute'; PCA, *Enrica Lexie* (n. 9), para. 361 (emphasis added).

71 See, e. g. the ruling of the ICJ in the *Alleged Violations Case* with respect to the contiguous zone's legislation of Colombia (n. 14). See also ICJ, *Fisheries Case* (United Kingdom v. Norway): 'the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law', judgment of 18 December 1951, ICJ Reports 1951, 116, 132.

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responsibility. As the International Law Commission (ILC) has observed in its work on the law of State responsibility, the question depends on the specific terms of the obligation concerned and the circumstances of the case.[72]

As explicated above, in the light of the recent pronouncement of ITLOS in the *MV Norstar* case (2019), there is room for the argument that the principle of exclusive flag State jurisdiction denotes also exclusive 'prescriptive' jurisdiction. In particular,

> '[a]s no State may exercise jurisdiction over foreign ships on the high seas, in the view of the Tribunal, any act of interference with navigation of foreign ships or *any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties*'.[73]

In applying this dictum in the case of India, the wholesale extension of its criminal legislation in its EEZ, in defiance of the principle of the exclusive flag State jurisdiction in the EEZ (Articles 58 (2) and 92 UNCLOS) as construed above, is evidently incompatible with India's obligation to respect the said principle, and thus entails its international responsibility in this regard.

Lastly, reference should be made to the '*San Padre Pio*' case which concerned the assertion of enforcement jurisdiction by a coastal State over STS transfers of gasoil in the EEZ.[74] In particular, Switzerland filed an application to ITLOS against Nigeria concerning the 'San Padre Pio', a motor tanker

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72 'The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation prima facie conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down applicable to all cases. Certain obligations may be breached by the mere passage of incompatible legislation. Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility. In other circumstances, the enactment of legislation may not in and of itself amount to a breach, especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.'; Commentary to Article 12 of the ILC Articles on State Responsibility, ILCYB 2001, Vol. II, Part Two, 57, para. 12.

73 ITLOS, *M/V Norstar* (n. 54), para. 222 (emphasis added). As discussed above, it is the view of this author that this pronouncement would have been in harmony with international law, if it also included 'general international law' amongst the legal bases justifying third States' prescriptive jurisdiction on the high seas.

74 See further information on the case and the ITLOS Award on Provisional Measures of Provisional Measures at <https://www.itlos.org/en/main/cases/list-of-cases/the-m/t-san-padre-pio-case-switzerland-v-nigeria-provisional-measures/>.

vessel flagged to Switzerland, which was intercepted and arrested by the Nigerian Navy on 23 January 2018, while it was engaged in one of several STS transfers of gasoil in the EEZ. According to Switzerland, these actions were prohibited under the Convention, in particular Parts V and VII, notably Articles 58, paragraph 2, 87 and 92 UNCLOS. On the other hand, according to Nigeria, the 'San Padre Pio' was arrested while bunkering petroleum products to vessels in support of illicit trafficking of petroleum products extracted from its seabed. Upon agreement of the parties, the case was discontinued.[75]

Even if ITLOS did not have the opportunity to address the question of jurisdiction in that case, the 'San Padre Pio' case underscores the fact that various coastal States do extend their jurisdiction over foreign-flagged vessels that are engaging in STS transfers or oil bunkering in the EEZ. And while the extension of such jurisdiction, both prescriptive and enforcement, over such activities which are linked with fishing activities is lawful under international law,[76] it is questioned whether the same holds true in respect of STS transfers concerning natural resources of the seabed and subsoil of the EEZ. According to Testa,

> 'if bunkering is to be regarded as an activity with a nature ancillary to that of the refueled ship, then bunkering of vessels involved in oil exploration and exploitation should be regarded as an activity that falls under coastal state jurisdiction'.[77]

This could indeed justify the assertion of prescriptive, albeit not of enforcement jurisdiction, since Article 73 UNCLOS provides for enforcement jurisdiction only with respect to living resources.[78] However, in the '*San Padre Pio*' case, Nigeria's jurisdiction concerned vessels that had been trading off petroleum products extracted from its EEZ, which is different than activities concerning living resources. Thus, it seems that the enforcement of such jurisdiction as such had no basis in international law of the sea.

In conclusion, the above-mentioned case-law demonstrates aptly that coastal States often extend their jurisdiction (prescriptive, and enforcement in some instances) over activities by foreign vessels in their EEZ without any legal basis in international law. International courts and tribunals may be

75 See at <https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_318_EN.pdf>.

76 See ITLOS, *M/V "Virginia G"* (n. 11), para. 215.

77 Testa (n. 10), 376.

78 'Article 73 (1) confers authority on a coastal State to board, inspect, arrest, and commence judicial proceedings against a ship where that may be necessary to ensure compliance with its laws and regulations over its living resources. There is no equivalent provision relating to non-living resources in the EEZ', see PCA, *Arctic Sunrise* case (n. 48), para. 279 et seq.

given the opportunity to address these jurisdictional claims, as has happened in the ITLOS, *M/V Saiga* case, yet it mainly rests with third States to challenge them.

V. The Regulation of PAGs Onboard Foreign Vessels in the EEZ

Another illustration of 'creeping jurisdiction' by coastal States is the recent effort by some African States, mainly in the Gulf of Guinea, to regulate the operation of privately contracted armed security personnel on board foreign-flagged vessels in the EEZ.

It is true that the rising levels of piracy in the Gulf of Aden and the Western Indian Ocean during the last twenty years necessitated the employment of PAGs on board merchant vessels for protection when navigating in the region.[79] Indeed, the use of PAGs on board ships operating in, or navigating through, the Western Indian Ocean and the Gulf of Aden proved instrumental to the rapid decrease of acts of piracy and armed robbery in that region that had loomed large in the period 2008-2012.[80] PAGs have also been employed in other regions to protect shipping from such acts, including in the Gulf of Guinea, which has been suffering from piracy attacks the last years.[81]

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79 See IMO MSC.1./Circ.1405/Rev.2 (25 May 2012). See also IMO 'Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', (25 May 2012) MSC.1/Circ.1406/Rev.; IMO 'Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012), MSC.1/Circ.1408/Rev.1; and IMO 'Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships' (12 June 2015), MSC.1/Circ. 1333/Rev.1. For a thorough academic analysis of the use of private armed security services, see inter alia Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates', ICLQ 62 (2013), 667-701; Eniola Williams, 'Private Armed Guards in the Fight against Piracy', in: Efthymios Papastavridis and Kimberley Trapp (eds), *La Criminalité en Mer/Crimes at Sea*, Hague Academy of International Law (Leiden: Martinus Nijhoff 2014), 339-377; Christofer Spearin, 'Private Military and Security Companies v. International Naval Endeavours v. Somali Pirates', Journal of International Criminal Justice 10 (2012), 823-837.

80 On piracy off Somalia see inter alia Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea. The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford: Oxford University Press 2011); Efthymios Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century', in: Ademola Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press 2010), 122-154.

81 On piracy off the Gulf of Guinea see UNSC Res 2634 of 31 May 2022, S/RES/2634; see also Anastasia Eruaga and Max Mejia, 'Piracy and Armed Robbery against Ships: Revisiting International Law Definitions and Requirements in the Context of the Gulf of Guinea', Ocean Yearbook 33 (2019), 421-455.

The interesting question however is not the utility of PAGs in fighting piracy in the Gulf of Guinea, but apparently whether the coastal States in the region are entitled to regulate the employment and operation of such personnel on board of foreign-flagged vessels in their EEZ. As noted above, some States impose on foreign vessels the duty to employ only State or State-authorised security personnel, whilst they are in their EEZ.[82] Is this a matter falling within the jurisdiction of the coastal or the flag State concerned? And, if the latter is the case, is this imposition by coastal States permissible under international law?

First, insofar coastal States are concerned, it is submitted that they are not entitled to regulate the operation of PAGs on board foreign vessels in their EEZ, as this would fall outside the ambit of their sovereign rights and jurisdiction in that zone. In no way is the presence and use of PAGs on board linked to the exploration and exploitation of natural resources, the use of offshore installations, marine scientific research, or the protection and preservation of the marine environment.[83] Thus, on the face of the relevant UNCLOS provisions, it readily appears that the coastal State lacks any legal basis to prescribe laws and regulations over PAGs, including on their nationality, terms of employment, operation etc.

It merits recalling the ITLOS, *Virginia G* case in this regard: the Tribunal held that

> 'the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under Article 56 of the Convention read together with Article 62, paragraph 4, of the Convention'.[84]

Further, the Tribunal held that Article 58 UNCLOS does not 'prevent coastal States from regulating, under Article 56, bunkering of foreign vessels fishing in their exclusive economic zones'.[85] However, it emphasised that this rule would not apply to bunkering activities not related to fishing activities. Applying the analysis of ITLOS in the case of PAGs on board foreign vessels in the EEZ it becomes evident that their operation cannot be the object of regulation by coastal States as it is not related to activities for which the coastal State has jurisdiction.

82 See n. 12 and corresponding text. The author has corroborated that this is an increasing practice in the Gulf of Guinea area in communications with State officials, both of coastal States in the region and flag States of vessels operating therein, under conditions of anonymity and confidentiality.

83 Article 56 UNCLOS (n. 1).

84 ITLOS, *M/V "Virginia G"* (n. 11), para. 217.

85 ITLOS, *M/V "Virginia G"* (n. 11), para. 222.

On the other hand, the default jurisdiction applicable onboard any vessel in the EEZ is that of the flag State, pursuant to Article 92, in conjunction with Article 58 (2) UNCLOS. As ITLOS held in the *M/V Norstar* case,

> 'the notions of the invalidity of claims of sovereignty over the high seas and of exclusive flag State jurisdiction on the high seas are inherent in the legal status of the high seas being open and free. When Article 87 of the Convention is being interpreted, therefore, Articles 89 and 92 of the Convention may be relied upon'.[86]

Thus, the freedom of navigation reserved for third States in the EEZ pursuant to Article 58 (1) UNCLOS must be read together with the principle of flag State jurisdiction under Article 92 UNCLOS, since they appear to be inexorably linked. Flag State jurisdiction evidently includes matters concerning the safety and security of its vessels, which are inherent in its freedom of navigation, as evidently is the matter of PAGs employed to protect vessels from piracy attacks in high-risk areas.

That said, notably Article 58 (3) UNCLOS posits that

> 'in exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part'.

The question that follows would be: is the regulation of PAGs by the flag State in a foreign EEZ incompatible with Part V or in defiance of the 'due regard' obligation under Article 58 (3) UNCLOS? It has been evinced that the flag State may regulate all activities onboard a vessel flying its flag even in a foreign EEZ, since this regulation pertains to the freedom of navigation (Article 87 read together with Article 92 UNCLOS). Moreover, such prescriptive powers of the flag State are neither incompatible with Part V (Article 58 (2) UNCLOS), nor are in violation of the due regard obligation under Article 58 (3) UNCLOS.

In addition, as put forth above, there is a rebuttable presumption in favour of third States with respect to the use of the sea to safeguard the 'freedom of communications', i. e. freedoms of navigation, overflight, and laying of submarine cables and pipelines, and other associated uses. Indeed, to reiterate the Virginia Commentary in this regard,

> 'where conflicts arise on issues not involving the exploration for and exploitation of resources, the formula would tend to favor the interests of other States or of the international community as a whole'.

86 ITLOS, *M/V Norstar* (n. 54), para. 218.

Obviously, the safety of navigation and the protection of the vessel from acts of piracy pertain to the safeguarding of the freedom of navigation rather than the exploration of resources by the coastal State and thus the presumption indubitably works in favour of the flag State to this end. It thus follows that the flag State is the State entitled under international law to regulate all issues concerning PAGs in the EEZ, including the terms for their employment, their nationality et al. Such regulation would be in due regard of the coastal States rights and jurisdiction and thus in accordance with Article 58 (3) UNCLOS.

The power of the flag State to regulate the operation of PAGs is also acknowledged by the International Maritime Organization (IMO), which is the competent international organisation in respect of maritime security and safety under UNCLOS.

In its 2015 revised 'Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships', the IMO sets forth in respect of the use of privately contracted armed security personnel on board ships that

> 'the carriage of such personnel and their weapons is subject to flag State legislation and policies and is a matter for flag States to determine in consultation with shipowners, companies, and ship operators, if and under which conditions this will be allowed'.[87]

Also,

> 'flag States should require all ships operating in waters where attacks occur to have measures to prevent attacks and attempted attacks of piracy and armed robbery against ships and on how to act if such an attack or attempted attack occurs, as part of the emergency response procedures in the safety management system, or part of the ship security plan. Such measures should include a full spectrum of appropriate passive and active security measures.'[88]

A final remark in this regard is in order: Article 100 UNCLOS imposes on States a duty to cooperate in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State. The Arbitral Tribunal in *Enrica Lexie* case observed that Article 100 does not stipulate the forms or modalities of cooperation States shall undertake in order fulfil their duty to cooperate in the repression of piracy.[89] It then cited the commentary to

87 Recommendation No. 7, in: IMO, 'Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships', MSC.1/Circ.1333/Rev.1 (12 June 2015).

88 Recommendation No. 30, in: MSC.1/Circ.1333/Rev.1 (n. 87).

89 PCA, *Enrica Lexie* (n. 9), para. 722.

Article 38 of the ILC Draft Articles Concerning the Law of the Sea, the forerunner of Article 100 of the Convention, where the ILC made the following observation:

> 'Any state having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case.'[90]

More importantly, the Tribunal underscored that

> 'it clearly follows from the articles of the Convention related to the fight against piracy that all States can take the necessary measures, including enforcement measures consistent with the Convention and the Charter of the United Nations, *to protect their vessels against pirate attacks. Such measures cannot be viewed as* a violation of Article 88 of the Convention or as *an infringement on the rights of the coastal State in its exclusive economic zone*.'[91]

Thus, the Tribunal affirmed, first, that it rests exclusively with the flag State to take all the necessary measures to protect their vessels against pirates, including through the use of PAGs in a foreign EEZ; second, any such measure in no way infringes the sovereign rights of the relevant coastal State.[92]

In conclusion, it has been substantiated that all issues concerning the use of PAGs on board vessels fall squarely within the remit of flag State jurisdiction. The flag State is exclusively responsible to regulate such issues, as they pertain to the operation, the safety and security of their vessels. It bears repeating that according to the principle of the 'unity of the vessel', a ship is to be considered a unit; '[t]hus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State'.[93] That said, there might be other States, like the State of the nationality of the PAGs or the State of the incorporation of the respective private maritime security company, that may also regulate certain aspects of the deployment or operation of PAGs,[94] however, the primary jurisdictional authority rests with the flag State.

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90 International Law Commission, 'Articles Concerning the Law of the Sea with Commentaries', ILCYB, Vol. II, 265 (282) (commentary to Article 38, para. 2) (1956).

91 PCA, *Enrica Lexie* (n. 9), para. 1074 (emphasis added).

92 See Katina Svanberg, 'The Use of Private Maritime Guards as an Innovative Means to Fulfil States Duty to Cooperate in the Repression of Maritime Piracy', International Journal of Maritime Crime and Security 1 (2020), 31-53.

93 See for the relevant references to case-law n. 59.

94 See IMO PMSC Guidance (n. 79).

Having clarified which State enjoys jurisdiction over PAGs, it is questioned relatedly whether the unilateral prescriptions of coastal States in the Gulf of Guinea would be in violation of the applicable provisions of UNCLOS and general international law.

In light of the foregoing analysis, it is submitted that coastal States shall abstain from regulating matters related to PAGs onboard foreign vessels in their EEZ, including by contracting State or State-authorised security personnel from those coastal States and placing them onto foreign-flagged vessels in their EEZ. Such regulatory measures fall afoul of the 'due regard' duty under Article 56 (2) UNCLOS,[95] as well as Article 58 (1) safeguarding the freedom of navigation in the EEZ.[96]

In respect of the latter provision, it bears repeating that in the light of the recent pronouncement of ITLOS in the *MV Norstar* case (2019),

> 'any act of interference with navigation of foreign ships *or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties*'.[97]

In the case at hand, there is no ground justifying the coastal States in the region to exercise prescriptive jurisdiction over foreign vessels in relation to matters concerning the deployment of PAGs in their EEZ. Hence, any such prescription would be in breach of the freedom of navigation enjoyed by the flag States in their EEZ (Article 87 in conjunction with Article 58 (1) and (2) UNCLOS).

VI. Epilogue

The EEZ is a maritime zone that due to its *sui generis* character may give rise to many controversies between States. Lately, it is increasingly noticeable that coastal States extend their domestic legislation, be it their customs laws and regulations regulating STS transfers, or simply their criminal legislation, to their EEZ. In some cases, coastal States even enforce such legislation by arresting foreign-flagged vessels and the suspected offenders either in the EEZ or in their ports. The most recent occasion of coastal States' extension of jurisdiction, observed mainly in the Gulf of Guinea, concerns the operation of PAGs employed onboard foreign-flagged vessels traversing the EEZ for security reasons.

95 Article 56 (2) UNCLOS (n. 1).
96 Article 58 (1) UNCLOS (n. 1).
97 ITLOS, *M/V Norstar* (n. 54), para. 222 (emphasis added).

Evidently, the above-mentioned incidents consist contemporary manifestations of 'creeping jurisdiction' that coastal States often exercise in areas within and even beyond their national jurisdiction. International courts and tribunals have addressed some but not all aspects of such 'creeping jurisdiction' in the EEZ. However, they have offered many useful insights concerning the latter maritime zone and its legal regime, which this article used to address these contemporary manifestations of coastal States' creeping jurisdiction.

Indeed, international law of the sea has very clearly delimited the respective jurisdictional powers between coastal and flag States within the EEZ and has set out conflict-resolution mechanisms, like the mutual 'due regard' duty under Articles 56 (2) and 58 (3) UNCLOS. In applying the relevant rules of international law, this article posited that the principle of exclusive jurisdiction of the flag State enshrined in Article 92 UNCLOS is applicable to all vessels in the EEZ in so far as it is not incompatible with Part V UNCLOS (EEZ), and argued that most of the instances of 'creeping jurisdiction' by coastal States under scrutiny were in defiance of this rule of 'flag State jurisdiction' and in violation of international law.

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