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Editorial

by Kiara NERI

The articles of the present special issue of the MarSafeLaw Journal are part of MERCRO research project funded by the French National Agency for Research. The project addresses the legal repercussions of the superposition of legal regimes on the efficiency of the police at sea. The MERCRO project posits that the law of the sea is built on a sectoral basis, resulting in a multiplicity of legal regimes. The superposition of these regimes can affect the efficiency of police maritime operations. In particular, the existence of several layers of regulation complicates the organisation of maritime police operations and impairs both the efficiency of operations and the protection of the rights and freedoms of individuals. Furthermore, research at the international and European levels is sectoral. Indeed, a large number of legal studies have focused on one specific aspect of police operations at sea, for example, in the context of migration, maritime crime or the protection of the environment. Their sectoral approach, however, does not allow grasping the legal framework governing police operations at sea in its entirety. This fragmented approach is no longer sufficient. It is against this backdrop that the MERCRO project aims to break down barriers between the different approaches and different legal regimes.

The articles in this special issue were presented at a conference held in Lyon in June 2021. In the first two articles, the authors focus on the technical and practical challenges raised by the existence of two or more legal regimes applicable to the same maritime zone or to the same activity. The first article addresses the consequences of the existence of several actors applying the same rule. Efthymios PASTAVRIDIS examines the challenges raised by the privatisation of policing at sea, in the form of the delegation of police powers to private vessels. Ioannis STRIBIS addresses the technical and practical challenges where there are several sets of rules applicable to a single activity, specifically the implementation of UN arms embargo on Libya by EUNAVFOR MED IRINI. Pascale RICARD and Sacha ROBIN analyse the challenges caused by the superposition of applicable legal regimes in maritime disputed areas.

Bonne lecture!

Table of Contents

<i>Efthymios (Akis) PAPASTAVRIDIS</i> 'Privatisation of Policing at Sea by States and the European Union and its Challenges under International Law'	1
<i>Ioannis STRIBIS</i> 'Operation EUNAVFOR MED IRINI: The Implementation of the United Nations Arms Embargo at Sea by the European Union'	16
<i>Pascale RICARD and Denys-Sacha ROBIN</i> 'The Superposition of National Legal Regimes in Maritime Disputed Areas'	37

Privatisation of Policing at Sea by States and the European Union and its Challenges under International Law

*Efthymios (Akis) PAPASTAVRIDIS**

Abstract

This article discusses the privatisation of policing at sea, in the form of the delegation of police powers by States and the EU to private vessels. Admittedly, such privatisation has significantly increased the last years and gives rise to numerous international law questions, including questions concerning the consistency of such practice with international law, the prerequisites under the law of the sea for the exercise of such law enforcement powers by these private vessels, as well as questions concerning international responsibility and immunities. This article addresses the above questions, exploring *inter alia* the lawfulness of this privatisation under general international law and the jurisdictional bases through which States, or the EU, may lawfully delegate policing powers to private actors. It concludes that, notwithstanding its innovative character, this practice remains subject to the general principles governing law enforcement at sea, including principles of legality and reasonableness.

Keywords: privatisation, law enforcement at sea, immunities of State vessels, international responsibility

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1. Introduction

When reference is made to privatisation of maritime security, consideration is primarily of private armed guards on board merchant vessels.¹ Indeed, the use of privately contracted armed security personnel on board ships operating in, or navigating through, the Western Indian Ocean and the Gulf

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¹ 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* A Petrig, ‘The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates’ (2013) 62 ICLQ 667; C Spearin, ‘Private Military and Security Companies v International Naval Endeavours v Somali Pirates’ (2012) 10 JICJ 823; I Van Hespén, ‘Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements’ (2014) 45 JMLC 361; E Williams, ‘Private Armed Guards in the Fight against Piracy’ in E Papastavridis & K Trapp (eds), *La Criminalité en Mer/Crimes at Sea*, (Martinus Nijhoff 2014) 339.



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 2008-2012.² Private armed guards have also been employed in other regions³ to protect shipping from such acts.

It is not only the shipping industry that employs private maritime security companies to combat threats to maritime security. It is noticeable in recent years that states are also increasingly commissioning private maritime security companies and Non-Governmental Organisations (NGOs) to patrol their waters.⁴ In addition, European Union agencies, such as the European Fisheries Control Agency (EFCA),⁵ and soon the European Border and Coast Guard Agency (FRONTEX),⁶ are chartering private vessels together with their crew to conduct maritime surveillance and enforcement.

This article addresses this aspect of privatisation of policing at sea, namely the delegation of police powers by States and the EU to private entities. Such privatisation gives rise to numerous international law questions, including questions concerning the consistency of such practice with international law, the prerequisites under the law of the sea for the exercise of such law enforcement powers, as well as questions concerning international responsibility and immunities. This article unpacks these issues and discusses the place under international law of private actors in maritime law enforcement. Section 2 provides an overview of the relevant practice. Section 3 considers its lawfulness under general international law, and the law of the sea. Section 4 highlights issues concerning immunities and responsibility under international law. Section 5 concludes that, notwithstanding its innovative character, this practice remains subject to the general principles governing law enforcement at sea, including principles of legality and reasonableness.

2. Relevant Practice

The involvement of private security companies, primarily in land-based armed conflicts, has been recorded since the 2000s.⁷ In the maritime context, it is reported that, in 1999, a private security com-

2 On piracy off Somalia see *inter alia* R Geiss and A Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011); E Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century', in A Abass (ed), *Protecting Human Security in Africa* (OUP 2010) 122.

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

4 V Schatz, 'Marine Fisheries Law Enforcement Partnerships in Waters under National Jurisdiction: The Legal Framework for Inter-State Cooperation and Public-Private Partnerships with Nongovernmental Organizations and Private Security Companies' (2018) 32 *Ocean Yearbook* 329; P Cullen, 'Privatized Maritime Security in Governance in War-torn Sierra Leone' in P Berube and P Cullen (eds) *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century* (Routledge 2012) 101. On the role of the Sea Shepherd Conservation Society see at <<https://seashepherd.org/>> accessed 11 June 2022.

5 Further information at <www.efca.europa.eu/en/content/chartered-means> accessed 11 June 2022.

6 Parliament and Council Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295, art 63 (hereinafter: FRONTEX Regulation).

7 Private military and security companies (PMSCs) have extensively used in armed conflicts since 2000 and have raised many international legal issues. See the non-binding Swiss Government and ICRC 'Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict' (17 September 2008); see also A Petrig, 'Looking at the Montreux Document from a Maritime Perspective' (2016) 2 *Maritime Safety and Security Law Journal* 1.



pany, Southern Cross Security, proposed a contract to Sierra Leone, to create a privatised coast guard and fisheries protection service. Southern Cross Security would board detain, and upon finding proof of illegal fishing, fine trawlers fishing illegally within Sierra Leone's waters.⁸ The government signed the contract in November 1999.⁹ As noted by Cullen, 'three Sierra Leonean police officers were allocated by the government to Southern Cross Security's patrol vessel upon the latter's request, but remained 'under the tactical command of [...] SCS security contractor personnel'.¹⁰ Cullen reports that fines levied by Southern Cross Security fluctuated depending on the specific charges, but averaged US\$15,000 per arrested vessel.¹¹ Southern Cross Security conducted its fisheries protection program between November 1999 and January 2002 and reportedly fined fifty four fishing vessels.¹²

According to Schatz, Southern Cross Security has not been the only private security company that has been engaged by African countries to conduct maritime law enforcement. Another private security company called Marine Protection and Rescue Services was employed by Liberia in a privatised fisheries inspection operation. Similar practices have also been documented in Somalia.¹³

The Sea Shepherd Conservation Society, an environmental NGO, has launched several fisheries law enforcement partnerships with developing coastal States. The first government to enter into a contract with Sea Shepherd Conservation Society was Ecuador, concerning fisheries law enforcement against illegal fishing vessels in the Galápagos marine reserve within 40 miles of the islands, and therefore within the territorial sea and Exclusive Economic Zone (EEZ) of Ecuador. Sea Shepherd Conservation Society dedicated the high-speed patrol vessel *RV Sirenian* to the operation, carrying both conservation officers of the Galápagos National Park and Ecuadorian navy officers who had the authority to board, search, and arrest fishing vessels.¹⁴ Sea Shepherd Conservation Society has engaged in similar partnerships with Costa Rica, Palau, Kiribati, Senegal, Gabon and Sao Tome and Principe.¹⁵

The EU has deployed private patrol vessels for law enforcement at sea: first, in 2017, EFCA chartered *Lundy Sentinel*,¹⁶ initially flagged to the UK and later to Portugal.¹⁷ According to the EFCA, *Lundy Sentinel* is 'deployed primarily as a fisheries patrol vessel in international, EU and where possible non-member country waters in the different joint operations and other operations from the Mediterranean and Black Sea to the North and Baltic Sea. *Lundy Sentinel* can also contribute to multipurpose tasks in the

8 Cullen (n 4) 103.

9 Schatz (n 4) 335.

10 Cullen (n 4) 106.

11 *ibid* 112.

12 Schatz (n 4) 336 with further references.

13 *ibid* 336.

14 *ibid*, 339.

15 *ibid*, 339-40 and further references therein.

16 See more information about *Lundy Sentinel* at <www.sentinel-marine.com/news/sentinel-marine-awarded-contract-by-european-fisheries-control-agency-for-charter-of-patrol-vessel> accessed 11 June 2022.

17 See n 5.



framework of European cooperation on coastguard functions, such as search and rescue, sea border control and detection of pollution, in cooperation with Member State authorities and/or Frontex and EMSA¹⁸ EFCA is in the process of chartering three (3) more private 'offshore patrol vessels'.¹⁹ It must be noted that these vessels are chartered together with the crew required to operate them.

FRONTEX will also soon charter private vessels in order to be deployed in Joint Operations of EU Member States. As provided by Article 63 (1) of the FRONTEX Regulation, '[t]he Agency may acquire, either on its own or as co-owner with a Member State, or lease technical equipment to be deployed during joint operations, pilot projects, rapid border interventions, activities in the area of return, including return operations and return interventions, migration management support team deployments or technical assistance projects in accordance with the financial rules applicable to the Agency'.²⁰

3. Privatising Policing at Sea and its Consistency with International Law

The increased employment of private assets and crew in maritime law enforcement, renders it necessary to determine whether this accords with international law. First, it must be ascertained whether coastal States are entitled to employ private assets for maritime law enforcement purposes (3.1.), before secondly turning to the question of how such law enforcement should be conducted under international law (3.2.) and concluding with an assessment of current practice (3.3.).

3.1 Delegation of Law Enforcement Powers to Private Actors

It is appropriate to begin with the Judgment of the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Virginia G* case (*Panama v. Guinea Bissau*).²¹ In addressing the argument of the Applicant that under the UN Convention on the Law of the Sea (UNCLOS)²² only warships may exercise enforcement powers (in that particular case, against an oil tanker bunkering fishing vessels in the EEZ of Guinea-Bissau) ITLOS clarified that '[i]n the view of the Tribunal, article 110 of the Convention cannot be interpreted to imply that it establishes a principle providing that under the Convention enforcement activities in the exclusive economic zone can only be exercised by a warship. The Convention leaves it for the coastal State to decide which authorities under its national law will be responsible for exercising enforcement activities pursuant to article 73, paragraph 1, of the Convention in accordance with general principles of international law referred to above'.²³

It follows that it rests entirely upon the coastal State concerned which authorities under its national law are

18 *ibid.*

19 Information given after personal communication of the author with EFCA officials.

20 FRONTEX Regulation (n 6), art 63 (1).

21 *M/V 'Virginia G' (Panama/Guinea-Bissau)* (Judgment) [2014] ITLOS Reports 2014 p. 4.

22 Convention on the Law of the Sea (adopted 10 December 1982, entered in force 16 November 1994) 1833 UNTS 3 (UNCLOS).

23 *M/V 'Virginia G'* (n 21) para 345 (emphasis added).



to exercise enforcement powers at sea. Consequently, the coastal State may also delegate such powers to non-state entities. This is also acknowledged in the context of the law of international responsibility, particularly under the rules concerning the attribution of a certain conduct to States. Indeed, as early as the 1930 Hague Conference for the Codification of International Law, the German Government asserted that: 'when, by delegation of powers, bodies act in a public capacity, e.g., police an area ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.'²⁴ In this vein, the International Law Commission (ILC) in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) recognised that possibility in Article 5 addressing the attribution to the State of conduct of bodies which are not State organs, but which are nonetheless authorised to exercise governmental authority.²⁵ In the words of the ILC, 'the article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs.'²⁶ The main prerequisite is that these entities are 'empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority'²⁷

According to the ILC Special Rapporteur Crawford, 'Article 5 has increased in relevance as the modern state has outsourced increasing numbers of what would classically have been considered 'government' functions, resulting in the creation of parastatal entities.'²⁸ Such entities may be employed inter alia to 'control immigration and to run prisons, things that can only be done through the exercise of public powers of detention, arrest and so on.'²⁹ Such public powers of arrest and detention are also ascribed to private actors in the context of this article.

Therefore, a coastal State may lawfully grant policing powers in its EEZ to maritime security companies or NGOs. Significantly, also, while the term 'empowered by the law of that State' may entail that Article 5 requires a specific law enacted for the purpose of empowering a private entity to exercise elements of governmental authority, the more practical view is that 'a delegation or authorization by or under the law of the State' suffices.³⁰ This is in accordance with the general principle that the structure of the State and the functions of its organs are not, in general, governed by international law, being a matter within domestic jurisdiction.³¹ Thus, it rests exclusively with each State to decide how State functions are to be delegated to its organs and to other 'parastatal entities' including NGOs or private security companies. Such delegation, for example, could

24 League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (document C.75.M.69.1929.V), p. 90 (as cited in the ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 43) (ARSIWA Commentary).

25 *ibid.*, art 5: 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.

26 ARSIWA Commentary (n 24) 43.

27 *ibid.*

28 J Crawford, *State Responsibility: The General Part* (CUP 2013) 127.

29 *ibid.* 128

30 J Crawford, ILC, First Report on State Responsibility, 3, U.N. Doc. A/CN.4/490/Add. 6 (24 July 1998); see also Schatz (n 4) 370.

31 See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2 (7).



be made by way of a public contract, such as that between Ecuador and Sea Shepherd Conservation Society.³²

3.2 The Exercise of Law Enforcement Powers by Private Actors

Having clarified that under international law the coastal State may grant enforcement powers to actors like Sea Shepherd Conservation Society, the next question is how these powers are to be exercised. The short answer is no differently than where these powers are exercised by State organs. Both State organs and private actors are subject to the same legal framework governing law enforcement at sea.

Under UNCLOS and general international law, the exercise of enforcement powers at sea, including the power to board, search, and seize a vessel, is accorded to either warships or 'other duly authorized ships or aircraft clearly marked and identifiable as being on government service'.³³ As ITLOS underscored in the *M/V Virginia G* case, 'the Tribunal considers it important to reiterate that general international law establishes clear requirements that must be complied with by all States during enforcement operations, including those carried out pursuant to article 73, paragraph 1, of the Convention [fisheries-related]. These requirements provide, in particular, that enforcement activities can be exercised only by duly authorized identifiable officials of a coastal State and that their vessels must be clearly marked as being on government service'.³⁴

It follows that any enforcement operation carried out by any other vessel than a warship, be it State owned or State authorised, must meet the following requirements: i) there must be 'due authorisation' by the State concerned to the vessel to exercise law enforcement powers and ii) the vessel and the boarding team must be 'clearly marked and identifiable' as being on such governmental service.

Accordingly, the vessel must be properly authorised by the coastal State to exercise law enforcement powers. Such powers are evidently governmental in nature since they pertain to the assertion of law enforcement powers at sea. As outlined, it is for each State to determine how this authorisation will be granted, yet it must be valid, and, as per any authorisation or consent in international law, the conduct to which it refers must be within the authorisation's scope and duration.³⁵

The vessel must be clearly marked and identifiable as being on government service (in this context, law enforcement at sea), in order to lawfully interfere with the navigation of another vessel and exercise enforcement jurisdiction, such as boarding, inspection, diversion, crew detention.³⁶ Such law enforcement vessels usually bear distinctive national markings and fly specific ensigns. However, by contrast with the definition of warships under Article 29 UNCLOS 'neither government ownership nor 'the presence of a

³² See n 14 and corresponding text.

³³ UNCLOS (n 22), arts 107, 110 (5), 111 (5), 224 (5).

³⁴ *M/V 'Virginia G'* (n 21) para 342.

³⁵ ILC, 'Report of the Commission to the General Assembly on the Work of its Thirty-First Session' (1979) Vol 2 Part Two Yearbook of the International Law Commission 112; see also ARSIWA Commentary (n 24) 73.

³⁶ See UNCLOS (n 22), arts 107, 110 and 111.



commissioned officer' is expressly required.³⁷ Thus, it follows that a private vessel chartered and authorised by the coastal state would meet these requirements,³⁸ provided that it bears distinctive markings that would make it identifiable as being on government, and specifically law enforcement, service. If that vessel does not bear these markings, no vessel is required to stop and be subjected to at-sea enforcement action.³⁹

Significantly the crew must not necessarily display special ensigns, however any boarding team must be identifiable as being on government service. Noteworthy in this regard is again the *M/V Virginia G* case, in which ITLOS underlined that '[a]lthough the information provided by the Parties is conflicting, it appears that the boats used by FISCAP inspectors [National Fisheries Inspection and Control Service] were clearly marked, inspectors who boarded the *M/V Virginia G* were dressed in a way identifying them as FISCAP officials and the Navy infantry were wearing military uniform'.⁴⁰

In addition, the private vessel authorised to conduct at-sea enforcement must adhere to requirements under general international law concerning enforcement jurisdiction. It has been consistently held by international courts and tribunals that the exercise of enforcement powers by any State in the maritime context is also governed by certain rules and principles of general international law, in particular the principle of reasonableness, including the principles of necessity and proportionality.⁴¹ Further, the private vessels bound by the rules governing the use of force at sea, as framed by ITLOS in the *M/V Saiga II* case and confirmed in the *M/V Virginia G* case. According to ITLOS '[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law'.⁴²

Finally, any enforcement operation at sea shall ensure the safety of navigation and the protection of

37 D Guilfoyle, 'Article 107' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart 2017) 757; see also N Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in F Francioni and N Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011) 3.

38 T Treves, 'Navigation', in RJ Dupuy and D Vignes (eds), *A Handbook on the New Law of the Sea*, Vol. II (Brill 1991) 835.

39 Needless to say that a boarding operation which involves acts of violence by a non-identifiable/authorized private vessel on the high seas would fall squarely with the definition of piracy; see UNCLOS (n 22), arts 101, 107.

40 *M/V 'Virginia G'* (n 21) para 361.

41 *Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)* (Award) [2014] PCA Case No 2014-07 para 209; *PCA, Arctic Sunrise Arbitration (Netherlands v. Russia)*, (Award on the merits) [2015] PCA Case No 2014-02 para 198.

42 *M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines v. Guinea)* (Judgment) [1999] ITLOS Reports 1999 para 155; see also *M/V 'Virginia G'* (n 21) paras 359-60. On the issue of use of force at sea see *inter alia* K Neri, 'The Use of Force by Military Vessel Protection Detachments' (2012) 51 Rev. droit pénal mil. droit guerr. 73, and E Papastavridis, 'The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)' (2015) 2 JTMS 119.



the marine environment as provided for under Article 225 UNCLOS.⁴³

3.3 Assessment of Current Practice

Against this backdrop, the article addresses the consistency of the use of private vessels and crew with international law.

First, as to the assets employed by Southern Cross Security and Sea Shepherd Conservation Society, it readily appears that there had been due authorisation by the coastal State concerned, in the form of contracts, to conduct fisheries enforcement operations. Moreover, in the case of Sea Shepherd Conservation Society's involvement in Ecuador, the inspection of the vessels suspected of being engaged in illegal fishing was conducted by law enforcement agents of Ecuador⁴⁴ 'shipriding' the NGO's vessel⁴⁵ Notably, also, the Constitutional Court of Ecuador held that the seizure of the Costa Rica-flagged longline fishing vessel *Maria Canela II* by the *RV Sirenian* was lawful, thereby confirming the domestic constitutionality of the partnership.⁴⁶ It is not clear, however, whether this was the case with respect to Southern Cross Security operations in Sierra Leone, since the private maritime security company was conducting the law enforcement operations.⁴⁷

The problem with the law enforcement operations conducted by non-state entities seems to lie not in the authority and the identifiability of the boarding team and the inspectors, but in the identifiability of the private vessels. Apparently, the vessels employed by Southern Cross Security and Sea Shepherd Conservation Society lack the distinctive markings that would make them identifiable as being on government, and specifically law enforcement, service.⁴⁸ As such, this does not meet the identifiability requirement set out by UNCLOS and general international law. As ITLOS in the *M/V/*

43 *M/V 'Virginia G'* (n 21) para 372 'The Tribunal observes that, although article 225 of the Convention is found in Part XII of the Convention concerning protection and preservation of the marine environment, it has general application, as it states that '[i]n the exercise under this Convention of their powers of enforcement against foreign vessels', States shall observe the requirement of this article, namely: not to endanger the safety of navigation or otherwise create any hazard to a vessel, or bring a vessel to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk. It follows from article 225 that all these requirements are applicable to enforcement activities undertaken pursuant to 73, para 1, of the Convention...'

44 See n 12.

45 Typically, a 'shiprider' is a law enforcement agent of one State who is authorized to embark on a law enforcement vessel of another State with the purpose to expand the enforcement jurisdiction capacity of the latter State. In the present case, the coastal State authorities are embarked on the private platform in order to exercise enforcement powers in their respective EEZ. On shipriders see *inter alia* M Williams, 'Caribbean Shiprider Agreements' (2000) 31 *University of Miami Inter-American Law Review* 163; I Tesfalidet, 'Shiprider Institution: Questions of Jurisdiction and State Responsibility' in E Papastavridis and K Trapp (eds), *La Criminalité en Mer/Crimes at Sea*, (Martinus Nijhoff 2014) 609.

46 Constitutional Court of Ecuador, Judgment of 12 October 2001, No. 349-2001-III-SALA-RA, Case No. 005-2001-RA; Constitutional Court of Ecuador, Judgment of 25 October 2001, No. 350-2001-III-ROOM-RA, Case No. 491-2001-RA, as reported by Schatz (n 4) 339.

47 To reiterate, 'police officers were allocated by the government to SCS's patrol vessel upon SCS's request but remained 'under the tactical command of [...] SCS security contractor personnel'; see n 7.

48 See, e.g., pictures of *Yoshka*, formerly *Sirenian*, which is currently employed in Galapagos National Park by WWF at <<https://seashepherd.fandom.com/wiki/Yoshka>> accessed 11 June 2022.



Virginia G case clarified, 'enforcement activities can be exercised only by duly authorized identifiable officials of a coastal State *and that their vessels must be clearly marked as being on government service*'.⁴⁹ Hence, the identifiability of the officials alone does not suffice; the vessel must also be identifiable as on government service.

The EFCA-employed *Lundy Sentinel* appears to meet the due authorisation and identifiability criteria under international law for both the vessel and the boarding team.⁵⁰ Indeed, under the EU Regulation 2019/473 amending EFCA's founding Regulation, the latter Agency 'may acquire, rent or charter the equipment that is necessary for the implementation of joint deployment plans' (Article 9 (2)) or 'specific control and inspection programmes' (Article 10 (2)).⁵¹ Member States are responsible to make available the means of control and inspection to be committed to a joint deployment plan,⁵² or to specific control and inspection programmes to be determined by the Commission in concert with Member States.⁵³ Such control and inspections may be carried out by 'Union inspectors', as included in the list referred to in Article 79 of Regulation (EC) No 1224/2009,⁵⁴ in accordance with relevant EU Regulations.⁵⁵ Hence, the employment of inspectors on board the *Lundy Sentinel* meets the due authorisation and identifiability requirements under UNCLOS and general international law. Also, the *Lundy Sentinel* bears the requisite external markings to be identified operating under EU service.⁵⁶

In conclusion, the use of private assets in law enforcement at sea is admittedly a welcome development, which could enhance law enforcement capacity, in particular of developing States and significantly contribute to the fight against transnational organised crime at sea. This use, however, remains subject to the strict rules of general international law, including UNCLOS, which set out, amongst others, that the vessel and the boarding team must be duly authorised by the coastal State concerned and clearly identifiable as being on government law enforcement service. It seems these criteria have not been met in all cases.

49 *M/V 'Virginia G'* (n 21) para 342 (emphasis added).

50 See n 16.

51 Regulation (EU) 2019/473 of the European Parliament and of the Council of 19 March 2019 on the European Fisheries Control Agency [2019] OJ L 83, 25.3.2019, p. 18–37 (EFCA Regulation), arts 9 (2) and 10 (2).

52 *ibid*, art 15 (1).

53 See art 95 of the Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Union control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 [2009] OJ L 343, 22.12.2009, p. 1 (EU Fisheries Compliance Regulation).

54 *ibid*, art 79.

55 Arts 80 and 81 of the EU Fisheries Compliance Regulation and arts 102-104 and 122 of the Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy [2011] OJ L 112, 30.4.2011, p. 1–153.

56 As art 102 (1) Implementing Regulation 404/2011 sets out, 'any vessel used for control purposes including surveillance shall display so as to be clearly visible, a pennant or a symbol as shown in Annex XXVIII'.



4. Immunities and International Responsibility Issues

The use of private actors in the maritime context, in the form of private vessels, may also give rise to questions concerning the immunities, if any, of such vessels, as well as questions related to the international responsibility of the States or the EU that employ them.

4.1. Immunities

Under general international law, including the international law of the sea, warships and other vessels owned or operated by a State and used on government and non-commercial service enjoy immunities from the exercise of any enforcement jurisdiction by a foreign State.⁵⁷ For example, on the high seas, Article 96 UNCLOS, which is reflective of customary law, sets forth that '[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State'.⁵⁸ This provision applies to the EEZ pursuant to Article 58 (2) UNCLOS and thus, effectively, to any maritime area beyond the territorial sea. Insofar the latter zone is concerned, Article 32 UNCLOS posits that '[w]ith such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes'.⁵⁹ As to in-port enforcement, UNCLOS is silent, yet it is widely acknowledged that warships and state vessels enjoy similar immunities and privileges under general international law,⁶⁰ and also, for contracting parties, under the 1926 Brussels Convention.⁶¹ The immunity of warships and government ships used only on government non-commercial service is further upheld by Article 236 UNCLOS, exempting such vessels from the application of UNCLOS provisions on protection and

⁵⁷ Domestic courts have recognised the immunity of State-owned or operated vessels since the early nineteenth century, see *inter alia* *The Schooner Exchange v. McFaddon*, 11 US 116 (1812); *The Prins Frederik* [1820] 4 Dods. 451 (UK); *The Charkeih* [1873] LR 4 A&E 59 (UK); Court of Appeal, *The Parlement Belge* [1880] 5 PD 197 (UK). See also J Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75 Am. J. Int. Law 820, 862 as well as art 16 (2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted on 2 December 2004, not entered into force yet, but largely considered as reflective of customary international law); see on art 16, D Guilfoyle, 'Article 16', in R O'Keefe and others (eds), *The United Nations Convention on Jurisdictional Immunities of States and their Property* (OUP 2013) 259.

⁵⁸ UNCLOS (n 22), art 96 (emphasis added).

⁵⁹ *ibid*, art 32 (emphasis added).

⁶⁰ The general principle of immunity of state vessels at ports was recognised as early as in 1928 by the Institut de Droit International (IDI); see art 26 of Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix, <www.idi-iil.org/idiF/resolutionsF/1928_stock_02_fr.pdf> accessed 11 June 2022.

⁶¹ International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships, 10 April 1926, LNTS 176, 199 and its 1934 Additional Protocol art (1) of the latter refers to 'ships of war, State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service' and stipulates that 'such ships shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem'; see also *Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)* (Provisional Measures Order) [2019] ITLOS Reports 2018-2019, paras 93, 96-97.



preservation of the marine environment.⁶²

For present purposes the question is whether the vessels employed by coastal States or the EU fall within the definition of state vessels, as set out above.

First, they must be 'government vessels' or 'vessels owned or operated by a State'. As Guilfoyle states, '[t]he phrase 'owns or operates' should be broadly interpreted'.⁶³ Indeed, the words appear to be taken from the Brussels Convention, and the ILC suggested that: '[t]he expression 'a State which operates a ship' covers also the 'possession, 'control, 'management' and 'charter' of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise'.⁶⁴ This is also in line with the Protocol to the Brussels Convention which confirmed that the words 'operated by a State' (*exploités par lui*) included vessels chartered by a State 'whether for time or voyage'.⁶⁵ Accordingly, an NGO vessel chartered by a coastal State to patrol its waters meets the above criteria. Also, a vessel, like *Lundy Sentinel*, which is chartered by the EU, *in casu* by its Agency, EFCA, pursuant to the relevant authorisation granted by Member States,⁶⁶ would also fall within this definition.

Second, the vessels concerned shall be 'used only on government non-commercial service'. The terms 'government non-commercial' sets forth a strict cumulative test.⁶⁷ According to Guilfoyle, 'the critical question is obviously by what test 'commercial' (non-immune) service is to be assessed. The standard test under public international law is one of the nature of the act in question: whether a State is exercising powers or rights any other legal person could (acts *jure gestionis*) or is acting in the course of sovereign authority (acts *jure imperii*). On this approach only acts *jure imperii* will enjoy immunity'.⁶⁸ Thus, the decisive criterion is not whether the vessel is a State vessel, but rather the purpose of its use.⁶⁹ Law enforcement is *i* a public function. Hence, in the present context, all the vessels used either by the coastal States or the EU, are employed on 'government non-commercial service'.

In light of the above this article asserts that, when employed for law enforcement purposes, the private vessels under scrutiny enjoy immunities from the enforcement jurisdiction of other States in all maritime zones, including foreign ports and territorial seas and the high seas. Such vessels cannot be boarded without the permission of the commanding officer, and it is argued that immunity

62 UNCLOS (n 22), art 236.

63 D Guilfoyle, 'Article 96' in A Proelss (ed) (n 37) 719.

64 ILC, Report of the International Law Commission: Draft Articles on Jurisdictional Immunities of States and their Property with Commentaries (1991) UN Doc. A/46/10, GAOR, 46th Sess., Suppl. 10, 13, 51-52 (art16).

65 1934 Protocol to the Brussels Convention (n 61) art 1.

66 EFCA Regulation (n 51), art 9 (2) and 10 (2).

67 Guilfoyle (n 63) 719.

68 *ibid* 719.

69 See per this functional test Barnes (n 37) 253, who includes in the definition 'other vessels serving a public function: coastguard vessels, icebreakers, customs and immigration vessels, public operated hydrographic survey and research vessels, royal and presidential ships'.



applies to both the vessel and to personnel, weapons, stores or other property onboard the vessel.⁷⁰ Regarding the personnel, it is of relevance to allude to the ongoing work of the ILC on the ‘Immunity of State Officials from foreign Criminal Jurisdiction’.⁷¹ In his second report, the ILC’s then-Special Rapporteur Kolodkin noted an ‘agreement in the doctrine on the question of the category of persons enjoying immunity *ratione materiae*: all State officials are meant, irrespective of their position within the structure of the organs of State power’.⁷² In its commentary to the provisionally adopted definition of ‘State official’, the ILC recognised in this regard that ‘what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State’.⁷³ Thus, even if the vessel is not treated as a ‘unity’ for immunities purposes, there is room to assert that the personnel employed by the State or the EU to patrol the sea, although not a State or EU official, fall within the category of persons enjoying immunity *ratione materiae*.⁷⁴

4.2. International Responsibility

The final question this article addresses is that of international responsibility, specifically whether the conduct of the private assets may give rise to international responsibility of either the coastal or flag State or the EU.

It is well known that the law of international responsibility has been developed and codified by the ILC. The main text and point of reference is the ARSIWA, which has not taken the form of a treaty, yet it is considered by courts and commentators to be whole or in large part an accurate codification of the customary law of state responsibility.⁷⁵ The ARSIWA was followed in 2011 by the ILC Articles on the Responsibility of International Organizations (ARIO).⁷⁶ Both ARSIWA and ARIO are based on the notion of ‘internationally wrongful act’, that is a breach of an international obligation which may be attributed to a particular State or organization and gives rise to its responsibility.⁷⁷ Therefore the first and foremost question that must be addressed is whether the conduct of the private assets

⁷⁰ *ibid* 253; see also the US Navy, *The Commander’s Handbook on the Law of Naval Operations* (2007) para 2.1.1; art 1 of the Additional Protocol of the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Vessels (24 May 1934) LNTS 179, 199, which refers to cargoes aboard vessels.

⁷¹ See further information at <https://legal.un.org/ilc/guide/4_2.shtml> accessed 11 June 2022.

⁷² R Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 402.

⁷³ International Law Commission, ‘Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction’, provisionally adopted by the International Law Commission, in ‘Report of the International Law Commission on the Work of its 66th Session’ (5 May – 6 June and 7 July – 8 August 2014) U.N. Doc. A/69/10, p. 235.

⁷⁴ *The M/V Enrica Lexie Incident (Italy v India)* (Award) [2020] PCA Case No. 2015-28 paras 873-4.

⁷⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Reports 2007, 43 para 401; and Crawford (n 28) 43.

⁷⁶ Draft Articles on the Responsibility of International Organizations and its Commentaries, ILC Report, Sixty-Third Session (2011) UN Doc A/66/10, 50-170 [hereinafter: ARIO].

⁷⁷ See ARSIWA (n 24), arts 1, 2; ARIO (n 76), arts 3, 4.



can be attributed to the States or the EU under international law.

Regarding coastal States, like Sierra Leone or Ecuador who have employed the services of Southern Cross Security or Sea Shepherd's Conservation Society respectively, the provision of ARSIWA which might find application to the conduct of these NGOs is that of Article 5 concerning the 'conduct of persons or entities exercising elements of governmental authority'. Under Article 5, '[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.⁷⁸ As was stated above, the said NGOs were empowered via contracts by the relevant coastal states to perform functions of governmental authority, in this instance, law enforcement. Hence, all acts that had been performed in that capacity were attributable to the coastal state.

In the alternative, namely if there had been no empowerment by those states or the acts under scrutiny were not included in the scope of empowerment, there is still room for attribution to the coastal state concerned pursuant to Article 8 ARSIWA, according to which 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.⁷⁹ For present purposes, it is possible that, when coastal state's law enforcement officers embark the private vessel,⁸⁰ they may instruct the Master of that vessel or other crewmembers to perform certain acts or omissions. In that case, Article 8 ARSIWA would apply and thus these particular acts or omissions would be attributable to the coastal state and, if they constitute a violation of an international obligation of that state, the state will incur international responsibility. In all cases the conduct of embarked officers would be directly attributable to the coastal state.

A final comment is that the flag State of the private vessels seems not to incur any international responsibility, since there is no obvious basis for the attribution of the conduct of these vessels to their respective flag States under Articles 4 to 11 ARSIWA. That said, this is without prejudice to the possibility of the flag state incurring international responsibility from its failure to comply with its own due diligence obligations under international law related to the conduct of those vessels flying their flag.⁸¹

With respect to the responsibility of the EU for the conduct of *Lundy Sentinel*, or in the future for the conduct of other private vessels employed by EFCA or FRONTEX, evidently, the most perplexing question is whether the allegedly wrongful conduct is to be attributed to the EU itself or to the Member State

78 ARSIWA (n 24), art 5.

79 ARSIWA (n 24), art 8; see also *Genocide case* (n 75) paras 398-408.

80 See text to n 12.

81 Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, (Advisory Opinion) [2015] ITLOS Reports 2015 para 124; Re such due diligence obligations concerning search and rescue at sea see E Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility', in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 161, 165-7.



involved in the Joint Deployment Plans or other inspection programmes. The most relevant rule is set out, mainly, in Article 6 of ARIO, under which ‘the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.’⁸²

It can be argued that any conduct by the EFCA, including by its officials when operating as Union inspectors on board the *Lundy Sentinel* in accordance with Article 19 of EFCA Regulation,⁸³ or the relevant conduct of FRONTEX and its officials in the future, would fall within the scope of Article 6 ARIO, thus being attributable to the EU. Also, the conduct of other EU inspectors seconded to the EU and operating on board *Lundy Sentinel*, or of the private crew of that vessel, would equally trigger the application of Article 6 ARIO, as these persons qualify as EU ‘agents.’ Under Article 2 (d) ARIO, ‘agent of an international organization’ means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.’⁸⁴

Alternatively, if there is no legal basis for the direct attribution to the EU of the conduct of private assets and personnel employed by EU,⁸⁵ there is room for indirect responsibility. Under Chapter IV of ARIO, an organisation may be held responsible if it aids or assists a State in committing an internationally wrongful act (article 14), or if it directs and controls a State in the commission of such an act (article 15), or if it coerces a State or another organization to commit an act that would, but for the coercion, be an internationally wrongful act (article 16).

The most pertinent provision seems to be that of article 14 of ARIO, that is ‘aid or assistance.’⁸⁶ This article provides that: ‘[a]n international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.’⁸⁷

EFCA, for instance, under its current Regulation, is mandated to ‘coordinate control and inspection by Member States related to the control and inspection obligations of the Union; and coordinate the deployment of the national means of control and inspection pooled by the Member States concerned in accordance with this Regulation.’⁸⁸ Also, ‘for the purpose of operational coordination, the Agency

82 ARIO (n 76), art 6.

83 EFCA Regulation (n 51), art 19.

84 ARIO (n 76), art 2 (d).

85 See ARIO (n 76), art 7 according to which ‘[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct’, which however seems of no pertinence here.

86 ARIO (n 76), arts 36-37; A Reinisch, ‘Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts’ (2010) 7 IOLR 63-77.

87 ARIO (n 76), art 14.

88 EFCA Regulation (n 51), arts 3 (a) and (b).



shall establish joint deployment plans and organise the operational coordination of control and inspection by Member States.⁸⁹ Hence, from the moment that EFCA becomes aware of the wrongfulness of the conduct of the Member States, where it continues to actively facilitate the relevant operations, there are sound reasons to hold the EU an ‘accomplice’, provided that the relevant international obligation breached had been also incumbent upon the EU.

5. Conclusion

States or international organisations have increasingly made recourse to new models to combat transnational organised crime at sea. Amongst these models the use of private vessels and crew, by coastal States and the EU, to patrol their waters looms large. This article has shed light on the legal framework governing the use of private assets and address questions regarding its consistency with international law.

Indeed, the practice of various coastal States in Africa and Latin America to outsource the policing of their EEZ to NGOs, like the Southern Cross Security and Sea Shepherd Conservation Society, as well as the use of private assets by EU Agencies (EFCA and, in the future, FRONTEX) to curb transnational organised crime at sea including IUU fishing, was put into question. Notwithstanding its innovative character, the use of private vessels, either by States or the EU, remains subject to the general principles governing law enforcement at sea. In particular, both these vessels and the personnel employed to inspect foreign fishing vessels must have the requisite due authorisation by the State concerned, and must be identifiable as being on government, law enforcement, service. While this seems to be the case for EFCA *Lundy Sentinel’s* activities, there are serious doubts over Southern Cross Security and Sea Shepherd Conservation Society’s employment in fisheries enforcement operations.

In addition, it was made clear that private vessels and their employment are subject to the rules concerning immunities and responsibility under international law. In particular, these vessels enjoy immunities under international law, as ‘vessels operated by States and used only on government non-commercial service’. Their conduct may give rise to the responsibility of either the coastal State concerned or the EU under the relevant rules of the law of international responsibility.

As a general conclusion, it is submitted that international law provides a clear and adequate legal framework for the regulation of the contemporary privatisation of policing at sea, in the form of States and international organisations (currently only the EU) outsourcing police powers to, or chartering, private vessels.

⁸⁹ *ibid*, art 5 (2).



Operation EUNAVFOR MED IRINI: The Implementation of the United Nations Arms Embargo at Sea by the European Union

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Abstract

The article presents the legal framework of EUNAVFOR MED IRINI, a naval force established by the EU to contribute to the implementation of the arms embargo on Libya by UNSC Resolution 1970 (2011). The legal basis of IRINI is to be found both in the EU Council's Decision establishing it, and the UNSC Resolution it aims to implement. The coexistence of two distinct sets of rules, the collective security mechanism (Ch. VII UN Charter and the EU law, poses legal challenges. The main issues that have arisen from the operation of IRINI and that will be studied in this article are the interpretation and application of the rule of the exclusive flag State jurisdiction and the issue of the sovereign immunity of vessels.

Keywords: European Union Naval Force Mediterranean IRINI, arms embargo, Libya, flag State, high seas, sovereign immunity, UN Security Council, UNSC Resolution 1970 (2011).

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1. Introduction

This article addresses the legal framework of the European Union Naval Force Mediterranean IRINI (hereinafter EUNAVFOR MED IRINI or IRINI),¹ established by the Council of the European Union (EU Council) primarily to contribute to the implementation of the arms embargo on Libya decreed by the United Nations Security Council (UNSC) Resolution 1970 (2011).² The legal foundation of Operation IRINI is found both in the EU Council's Decision and the UNSC Resolution. This double legal foundation is generating legal challenges due to the coexistence of two distinct though interconnected (in this respect) sets of rules: the UN Charter Chapter VII collective security mechanism, mandatory for all UN members,³ and EU law, binding upon the Union and its Member

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1 Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI), [2020] OJ L101/4.

2 In addition to the above primary duty, IRINI has been assigned with some additional tasks, namely to prevent the illicit export of petroleum products, including crude oil and refined petroleum products, from Libya and to monitor and gather information on such illicit exports, to contribute to the capacity building and training of the Libyan Coast Guard and Navy in law enforcement tasks at sea, and to contribute to the disruption of the business model of human smuggling and trafficking networks through information gathering and patrolling, *ibid.*, respectively arts 3, 4 and 5.

3 Charter of the United Nations (adopted 26 June 1945, entered into force on 24 October 1945) art 25.



States. The main issues that have arisen from the operation of IRINI relate to the interpretation and application of the rule of exclusive flag State jurisdiction on the high seas and the exceptions to and limitations of this rule in the operation of IRINI as well as the issue of the sovereign immunity of vessels on the high seas. These two themes also involve wider issues of public international law as well as admiralty law, further complicating the legal challenges to the operation of IRINI. This complexity becomes greater by the - not unusual - practice of States to submit the participation of their national assets in international military operations to additional legal and operational requirements imposed by their domestic law. This article analyses the challenges involved in the interpretation and application of rules originating in different legal orders. The understanding of these challenges necessitates situating IRINI in its political and legal context and in particular understanding the objectives pursued by the main actors (|EU, UN, EU Member States, actors in the Libyan conflict(s)), as these objectives may shed light through a teleological approach to the interpretation and application of the relevant applicable legal rules.

2. EUNAVFOR MED IRINI

The launching of Operation IRINI to contribute to the implementation of the arms embargo on Libya occurred nine years after the UN decision imposing the embargo. It is important, therefore, to understand the general political and legal background of the decision and the process that led to the launch of IRINI in the form and with the aims and means with which it was endowed by EU Council decision 2020/472.

2.1. Launch of EUNAVFOR MED IRINI

In the process of consultation on Libya (launched by the UN and Germany), the German Government in January 2020 hosted in Berlin an international conference to address the situation in Libya: a failed State afflicted by a civil war with numerous competing factions, holding parts of the territory of the country in its pre-2011 extent. The participants of the Berlin Conference⁴ acknowledged that the situation in the country was deteriorating to a critical point and required urgent action.

The EU and those of its Member States present at the Berlin Conference committed to support a political process aimed at bringing peace to the war-torn country. The EU has repeatedly underscored that it 'has a strong interest in a stable, secure, united and prosperous Libya' and that '[t]hrough diplomatic action and bilateral support, [it] seeks to assist the country and the Libyan people to return to peace and resume the transition to democracy.'⁵ The particular interest and commitment

⁴ The permanent members of the UN Security Council (China, France, Russian Federation, UK, USA), Algeria, Egypt, Germany, Italy, Turkey, Congo (Republic of the), United Arab Emirates, along with representatives of the UN, including the Secretary-General and his Special Representative for Libya, the African Union, the European Union, and the League of Arab States.

⁵ European External Action Service (EEAS), 'EU-Libya relations Factsheet' (EEAS, 2 March 2021) <https://eeas.europa.eu/headquarters/headquarters-homepage/19163/eu-libya-relations-factsheet_en> accessed 20 November 2021.



of the EU is explained by the fact that Libya is an immediate neighbour to three EU Member States: Greece, Italy and Malta, and is therefore a priority for the EU for many reasons, including migration.⁶

The participants at the Berlin Conference recognised ‘the implementation of the United Nations arms embargo ... as a failure and as a priority’⁷ and underscored their commitment, *inter alia*, to ‘unequivocally and fully respect and implement the arms embargo established by United Nations Security Council (UNSC) Resolution 1970 (2011) and the Council’s subsequent Resolutions [at the time of the Berlin Conference, on 19 January 2020, resolutions 2292 (2016) and 2473 (2019)], including the proliferation of arms from Libya’⁸ and ‘call[ed] on all international actors to do the same.’⁹

Against this background, the EU Council on 17 February 2020 reached a political agreement to launch a new Common Security and Defence Policy (CSDP) military operation in the Mediterranean, aimed at implementing the UN arms embargo on Libya.¹⁰ By this initiative the EU and its Member States underscored their determination to increase their efforts to enforce the UN arms embargo on Libya and thus to contribute to the peace process in this war-torn and lawless country.¹¹

For the implementation of the above political accord the EU Council on 31 March 2020 adopted

6 The EU is one of the largest providers of assistance in Libya. In addition to the EUNAVFOR MED IRINI, the topic of the present paper, the EU has set up the Integrated Border Assistance Mission in Libya (EUBAM Libya) to support the Libyan authorities in their efforts to disrupt organised criminal networks involved in smuggling of migrants, human trafficking and terrorism. EUBAM works with the Libyan authorities on border management, law enforcement and criminal justice, and facilitates donor coordination in these areas. The EU operates also the EU Liaison and Planning Cell (EULPC) to provide key security, intelligence and planning expertise to the EU and to the UN Support Mission in Libya (UNSMIL).

7 Josep Borrell Fontelles, EU High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission, ‘Operation Irini: Speech by High Representative/Vice-President Josep Borrell at the Sigonella Naval Air Station Airport’ (EEAS, Speech at the Sigonella Naval Air Station Airport, Sicily, 19 March 2021) <https://eeas.europa.eu/headquarters/headquarters-homepage/95365/operation-irini-speech-high-representativevice-president-josep-borrell-sigonella-naval-air_en> accessed 19 November 2021.

8 The Berlin Conference on Libya, ‘Conference Conclusions, 19 January 2020’, Annex I to the letter dated 22 January 2020 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council (22 January 2020) UN Doc. S/2020/63, 4, para 18.

9 *ibid.*

10 Council of the EU, Foreign Affairs Council (Meeting n 3747) ‘Outcome of the Council Meeting’ (17 February 2020) Brussels <www.consilium.europa.eu/en/meetings/fac/2020/02/17/> accessed 3 November 2021: ‘The Council was debriefed about the outcome of the recent follow up meeting on the Berlin process in the margins of the Munich Security Conference, and had an exchange of views on Libya. In this context, ministers reached a political agreement on the launch of a new operation in the Mediterranean, aimed at implementing the arms embargo imposed by the UN Security Council. Secondary tasks may include fighting the organised crime responsible for migration, and training the Libyan coast guard and navy. The new operation will comprise aerial, satellite and maritime assets and its area of operations will be defined in accordance with the agreed mandate. Ministers agreed that the potential impact on migration flows would be monitored carefully and could, in some cases, lead to the withdrawal of maritime assets from the relevant area’.

11 EU institutions have repeatedly called for an immediate cessation of hostilities and urged all Libyan parties and international actors to refrain from military action that could further exacerbate the conflict. In addition to the establishment of IRINI, the EU adopted complementary measures for promoting the end of conflict and the stabilization in Libya, including sanctions against spoilers of the political process in that country, violators of human rights and international humanitarian law as well as people involved in trafficking and smuggling.



Decision 2020/472 launching EUNAVFOR MED IRINI as an EU military crisis management operation in the Mediterranean. On this occasion the High Representative of the Union for Foreign Affairs and Security Policy and President of the Foreign Affairs Council (EU HR), Josep Borrell, declared that ‘Only political solutions and the full respect of the UN arms embargo will bring a solution to the Libyan crisis. But diplomacy cannot succeed unless it is backed by action. This operation will be essential and a clear contribution to promoting peace in our immediate neighbourhood through a permanent ceasefire.’¹²

IRINI is closely scrutinised by EU Member States, which exercise political control and strategic direction through the Political and Security Committee (PSC), under the responsibility of the EU Council and the EU HR. The PSC is authorised with the powers to amend the planning documents, including the Operations Plan, the Chain of Command and the Rules of Engagement (ROE), and to appoint the Operation Commander and the Force Commander.¹³

2.2. Mission and Means of EUNAVFOR MED IRINI

IRINI shall be deployed on the high seas off the coast of Libya.¹⁴ To allow maximum flexibility, the exact extent of its Area of Operation (AOO) in the above wide geographical space is left to the decision of the EU Council.

Operation IRINI’s initial annual mandate expired on 31 March 2021. On 26 March 2021 the EU Council extended the mandate of the Operation until 31 March 2023. Announcing the planned extension one week before its formal adoption, the EU HR underlined the success of IRINI as ‘a unique and impartial instrument to support the implementation of the United Nations arms embargo and to support the peace process’ and its uniqueness in ‘carrying out this task’. Taking stock of the track record of IRINI he added that ‘We [the EU] can be criticised for not doing enough, but we do a lot. And, in any case, we are the only ones acting. One year later, it is fair to say that Operation Irini has achieved remarkable results. ... Operation Irini is not only delivering on its task of securing the Central Mediterranean, but also delivering to the United Nations, reporting on all the cases it has been observing and following up.’¹⁵

In order to fulfil its core task (implementation of the UN arms embargo on Libya) IRINI is entitled to carry out inspections of vessels on the high seas off the coast of Libya suspected to be carrying arms or related materiel to and from Libya. Operation IRINI can use, in addition to maritime, also aerial and satellite assets. 24 EU Member States are contributing assets to the Operation,¹⁶

12 Council of the EU, Press release ‘EU launches Operation IRINI to enforce Libya arms embargo’ (31 March 2020) <www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/> accessed 22 November 2021.

13 Council Decision 2020/472 (n 1) art 8.

14 Council Decision 2020/472 (n 1) arts 2(3) and 6. See UNSC Res 2292 (2016) UN Doc S/RES/2292, para 3.

15 EU HR Borrell, Operation Irini (n 7).

16 *ibid.*



which commenced at-sea operations on 4 May 2020. Full operational capability was declared on 10 September 2020, the date on which the first boarding activity took place.

Many practical issues of crucial importance for IRINI operations are regulated in its ROE.¹⁷ The relevant provisions of the ROE are technical and may appear long-winded.¹⁸ For the purposes of this article it suffices to refer to some points of general importance which are relevant for the subsequent developments.

The ROE specify the measures that can be taken for the vessel inspections. These include, in an increasing scale of intervention against a foreign ship: instructions, challenges, warning, open display of weapons, physical obstruction, use of riot control means, use of warning shots, non-disabling fire, disabling fire, and other escalatory steps, including deadly force. Boarding includes the right to visit and, if suspicion remains after checking vessel documentation, the right to search the vessel. Furthermore, the ROE provide for the possibility of temporary restriction of freedom of the crew of the vessel (either on board the intercepted and inspected vessel or on board the inspecting IRINI vessel), when necessary for inspecting or diverting a suspected vessel and commensurate to this necessity. The ROE authorise also the seizure of arms and related materiel trafficked in breach of the UN arms embargo on Libya. As an overall requirement, the action of IRINI in taking the above measures shall be always directed by the guiding principles of proportionality, necessity and minimum force.

3. Superposition of Legal Regimes Applicable to operation IRINI

IRINI as an EU military operation is subject to EU law, in particular Council Decision (CFSP) 2020/472 of 31 March 2020. IRINI is also subject to relevant provisions of the primary (in particular art. 42(2) and (4) and 38 of the Treaty on European Union) and secondary EU law, that is the relevant planning documents approved by the EU Council (including the Operations Plan, the Chain of Command, the ROE).

In addition, IRINI has to operate in full conformity and compliance with the UNSC Resolutions which regulate its core mission, the implementation of the UN arms embargo on Libya. These include the aforementioned Resolution 1970 (2011) and all its subsequent resolutions¹⁹ concerning the strict implementation of the arms embargo on the high seas off the coast of Libya. Equally binding upon IRINI are the UNSC Resolutions on combating migrant smuggling and human trafficking into, through and from the Libyan territory and off the

¹⁷ An edited version of IRINI's ROE is in file with the author.

¹⁸ The importance, however, of detail in documents regulating the conduct of military operations, which may involve the use of lethal force, cannot be overestimated.

¹⁹ UNSC Res 2292 (2016) UN Doc S/RES/2292; UNSC Res 2357 (2017) UN Doc S/RES/2357; UNSC Res 2420 (2018) UN Doc S/RES/2420; UNSC Res 2473 (2019) UN Doc S/RES/2473; UNSC Res 2526 (2020) UN Doc S/RES/2526 ; and UNSC Res 2578 (2021) UN Doc S/RES/2578.



coast of Libya²⁰ or enacting measures related to the illicit export from Libya of oil and petroleum products.²¹

It should be underlined that the EU has been so far the sole regional actor implementing the arms embargo on Libya (as well as other measures supporting the Libyan peace process) enacted by the UNSC, and that EUNAVFOR MED operation IRINI is the only arrangement acting under the relevant UNSC authorisations.²²

With regard to the legal regime applicable to IRINI, the most relevant from the above UNSC Resolutions is Resolution 2292, adopted on 14 June 2016, whose duration has been extended annually,²³ authorising in paragraph 3: 'Member States, acting nationally or through regional organizations [...] in order to ensure strict implementation of the arms embargo on Libya, to inspect, without undue delay, on the high seas off the coast of Libya, vessels bound to or from Libya which they have reasonable grounds to believe are carrying arms or related materiel to or from Libya.'

The superposition of applicable legal regimes becomes more conspicuous when taking into account that the conduct of IRINI, as a military maritime operation on the high seas, shall abide by the international law of the sea, as codified in the 1982 UN Convention on the Law of the Sea (UNCLOS). In addition, the rules of general international law apply. These include rules on self-defence, sovereign immunity or the contents of indeterminate concepts like good faith.

Another layer of regulation that equally applies to EU military operations is the domestic one, that is, the particular rules (enacted in their respective municipal legal orders), to which EU Member States contributing to IRINI subject the conduct of their assets. These domestic rules are included in the national caveats and limitations, specific to each asset-contributing nation. The concerned national troops and units operating under the IRINI ensign, are bound to act in accordance with the normative texts adopted at EU level, in particular the ROE of IRINI, and also the domestic provisions applicable to them (pursuant to the international obligations, national legislation, as well as regulations and practices of the individual contributing EU Member State). This is a practice applied already by those EU Member States that participate in the North Atlantic Treaty Organization (NATO) with respect to their contribution to NATO operations, and is expressly provided for in IRINI's ROE.

20 UNSC Res 2240 (2015) UN Doc S/RES/2240; UNSC Res 2312 (2016) UN Doc S/RES/2312; UNSC Res 2380 (2017) UN Doc S/RES/2380; UNSC Res 2437 (2018) UN Doc S/RES/2437; UNSC Res 2491 (2019) UN Doc S/RES/2491; UNSC Res 2546 (2020) UN Doc S/RES/2546; UNSC Res 2598 (2021) UN Doc S/RES/2598.

21 UNSC Res 2146 (2014) UN Doc S/RES/2146; UNSC Res 2441 (2018) UN Doc S/RES/2441; UNSC Res 2473 (2019) UN Doc S/RES/2473.

22 See Report of the Secretary-General 'Report on the Implementation of Security Council resolution 2526 (2020)' (5 May 2021) UN Doc. S/2021/434, paras 16 and 17, 'I would like to express my appreciation for the efforts of the European Union, through operation IRINI, acting under the authorizations renewed by the Security Council in resolution 2526 (2020). The contribution of operation IRINI to the implementation of the arms embargo by sharing information on potential violations with the Panel of Experts on Libya can help enhance its support to the Council and the Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya. [...] I reiterate my call upon all Member States to complement the efforts of operation IRINI'.

23 UNSC Res 2357 (2017) UN Doc S/RES/2357 ; UNSC Res 2420 (2018) UN Doc S/RES/2420; UNSC Res 2473 (2019) UN Doc S/RES/2473; UNSC Res 2526 (2020) UN Doc S/RES/2526 ; and UNSC Res 2578 (2021) UN Doc S/RES/2578.



Dual regulation exists for example with respect to the conditions for the use of lethal force by IRINI assets: while this issue is regulated in detail in the IRINI's ROE,²⁴ additional restrictions have been stipulated by certain contributing EU Member States, which do not allow their forces to use lethal force when there is no risk to human life. Consequently, the requirements for the use of lethal force by IRINI assets may differ, though operating in the same incident. More crucial for the effectiveness of IRINI and the consistent implementation of its task, some contributing Member States do not, in any case, allow their assets to proceed to non-consensual interdiction of foreign vessels on the high seas, though the IRINI's ROE authorise and regulate, in accordance with the relevant UNSC Resolutions, non-cooperative inspections. In such cases the concerned national assets shall inform the IRINI command of the existence of a national caveat and abstain from the specific operation.

For an operation with power to affect international maritime navigation and transport (through vessel interdiction on the high seas), admiralty law should be added as a further layer of regulation applicable to IRINI operations, to the extent it provides the normative tools for the determination of some issues of jurisdiction on vessels and operation of vessels, in particular when the question of sovereign immunity of vessels is raised.

The operation of IRINI provides concrete examples of the issues arising from this situation of parallel layers of regulation of activities at sea: These challenges concern the application of the rule of the exclusive flag State jurisdiction on the high seas and of the rules on sovereign immunity of vessels in the operational activities of IRINI.

3.1. Exclusive Flag State Jurisdiction

Exclusive flag State jurisdiction on vessels sailing on the high seas is a general rule of international law of the sea, provided in Article 92(1) UNCLOS. The same provision stipulates that in exceptional cases expressly provided for in UNCLOS or other international treaties, a derogation can be made. One such derogation is envisaged by the Chapter VII of the UN Charter, through the legally binding actions of the UNSC.

IRINI operates precisely in such a normative framework: the aforementioned UNSC Resolution 2292 (2016) stipulates in its paragraph 3 of the operative part that the UNSC:

Decides, with a view to addressing the threat posed by unsecured arms and ammunitions in Libya and their proliferation, to authorize, in these exceptional and specific circumstances ... Member States, acting nationally or through regional organizations, ... in order to ensure strict implementation of the arms embargo on Libya, to inspect, without undue delay, on the high seas off the coast of Libya, vessels bound to or from Libya which they have reasonable grounds to believe are carrying arms or related materiel to or from Libya, directly or indirectly, in violation of ... resolution 1970 (2011), as modified ..., provided that those Member States make good-faith efforts to first obtain the consent of

²⁴ ROE (n 17) rules 132, 162, 992(B).



the vessel's flag State prior to any inspections pursuant to this paragraph, and calls upon all flag States of above-mentioned vessels to cooperate with such inspections.

By this decision, the UNSC authorises the interdiction of vessels suspected to violate the arms embargo on Libya instituted by Resolution 1970 (2011).

In the context of IRINI three further elements are critical: Firstly Resolution 2292 (2016) defines the scope of the authorisation to interdict vessels on the high seas: *ratione loci*, the geographical area is 'the high seas off the coast of Libya'; *ratione materiae*, the reason justifying the interdiction is the existence of 'reasonable grounds to believe' that there is a case of breach of the UNSC imposed arms embargo on Libya; and finally *ratione personae*, all vessels 'bound to or from Libya' are concerned, as the relevant paragraph 3 does not contain any other qualification in this respect except from the port of departure or destination.

The second crucial element contained in the above paragraph 3 of Resolution 2292 (2016) is the derogation from exclusive flag State jurisdiction provided that the intervening force 'make[s] good-faith efforts to first obtain the consent of the vessel's flag State prior to any inspections'. The UNSC coupled this authorisation with a call 'upon all flag States of above-mentioned vessels to cooperate with such inspections'.

The acceptance of the above derogation had been contentious during the negotiations among UNSC members in view of the adoption of Resolution 2292 (2016): permanent members China and Russia were cautious about the omission of the requirement of flag State consent, which, in their opinion, would be against the general principle of exclusive flag State jurisdiction, as well as against the principle of freedom of navigation. Several other UNSC members argued that the Resolution should not subject the implementation of the arms embargo on Libya to the requirement of flag State consent, as attaining flag State cooperation could at times be difficult and that the inclusion of that requirement in the Resolution would hinder the timeliness and effectiveness of interdictions.²⁵ The 'good-faith efforts' solution above has been the compromise that allowed the adoption of Resolution 2292 (2016).

The requirement of flag State consent for the inspection of vessels pursuant to Resolution 2292 (2016) is envisaged as a procedural obligation: an obligation of conduct, not an obligation of result. Hence, should the good faith efforts of the requesting State (acting nationally or through a regional organisation, as is the case for IRINI) be unsuccessful, the inspection can proceed, in derogation of the rule of the exclusive flag State jurisdiction.²⁶

The fulfilment of the above obligation of conduct raises the question of the meaning and extent of the 'good-faith efforts' that troop-contributing states need to deploy in order to obtain the consent of the suspected vessel's flag State prior to proceeding to the inspection. The concept of good faith - originally

25 Security Council Report 'Vote on a Resolution on Maritime Interdiction to Implement the Arms Embargo on Libya' (14 June 2016) <www.securitycouncilreport.org/whatsinblue/2016/06/vote-on-a-resolution-on-maritime-interdiction-to-implement-the-arms-embargo-on-libya.php> accessed 16 November 2021.

26 Ioannis Stribis, 'Maritime repercussions of Security Council resolutions on terrorism', in Kiara Neri (ed), *United Nations Security Council and the Sea* (Editoriale Scientifica 2018) 209-211.



to be found in international law in the law of treaties - is highly dependent on the particulars of each incident and can be subjective:²⁷ the command of the operation as well as the requesting State in a given case could interpret and assess differently the response/non-response of the flag State as performed in good faith or not. By its very nature, as an indeterminate legal concept as good faith unavoidably leaves a wide margin of discretionary power to parties involved.²⁸ The exact conditions of the fulfilment of the good faith requirement is thus fact-dependent and varies depending on circumstances. The practice of IRINI showcases also this general principle, as discussed further below.

The third relevant principle included in Resolution 2292 (2016) paragraph 3 gives an indication of the time frame necessary in order to determine the above good faith requirement: the text limits the margin of discretion of the parties involved with respect to the time between the start of the 'good-faith efforts' to obtain flag State consent and the reaction of the latter by stipulating that the inspection shall be done 'without undue delay'.

In drafting the operational documents for IRINI, the competent EU authorities integrated the above mentioned general principles. In particular IRINI's ROE sought to avoid diverging or conflicting interpretations of the requirement of good-faith efforts to obtain the consent of the concerned flag State before proceeding to inspect a suspected vessel, and to instill objectivity and uniformity in the Operation's actions: IRINI's ROE specify that good-faith efforts will be considered to have been exhausted if there is no decision in response to a request for consent within four hours from the time of the request. In so doing, the ROE follow what the command of IRINI qualifies as 'a widely recognised model in international maritime practice'²⁹ and, with reference to a number of

²⁷ For a panorama of the issue, see Robert Kolb, *Good faith in international law* (Hart 2017), a revised and shortened version of the author's doctoral thesis (University of Geneva) published as *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000).

²⁸ In this respect there is abundant literature in domestic law, which may enlighten also the discussion in public international law, see, among many others, Reinhard Zimmermann, Simon Whittaker, *Good Faith in European Contract Law* (CUP 2006); Eduardo T. Filho, *O Princípio da Boa-fé no Direito Civil* (Almedina 2020); Roberto Llorente Infante, *De buena fe* (Círculo Rojo 2018); Judith Martins-Costa, *A boa-fé no direito privado: Critérios Para a sua Aplicação* (2nd edn, Saraiva 2018); Fabrizio Piraino, *La buona fede in senso oggettivo* (Giappichelli 2015); Paolo Gallo, *Contratto e buona fede. Buona fede in senso oggettivo e trasformazioni del contratto* (Utet Giuridica 2014); Joan Picó I Junoy, *El principio de la buena fe procesal* (Vallirana 2013); Bawar Bammarny, *Treu und Glauben und UN-Kaufrecht (CISG). Eine rechtsvergleichende Untersuchung mit Schwerpunkt auf dem islamischen Rechtskreis* (P Lang 2011); Camila de Jesus Mello Gonçalves, *Princípio da Boa-fé* (Elsevier 2008); Andrea D'Angelo, Giuseppe Monateri P., Alessandro Somma, *Buona fede e giustizia contrattuale. Modelli cooperativi e modelli conflittuali a confronto* (Giappichelli 2005); Klaus Peter Berger, Thomas Arntz, 'Good faith as a general organising principle of the common law', [2006] LCIA 167; G. Robin, 'Le principe de bonne foi dans les contrats internationaux', [2005] IBLJ 695; Nudrat Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah', [2004] LCIA 97; Roger Brownsword, Norma J. Hird, Geraint G. Howells, *Good Faith in Contract: Concept and Context* (Ashgate 1999); Bernhard Pfister, *Die neuere Rechtsprechung zu Treu und Glauben im Zivilprozess* (P Lang 1998).

²⁹ EUNAVFOR MED IRINI, Report 2526 (2020) (n 22); (Reporting period 31 March 2020 – 18 February 2021) - EUNAVFOR MED IRINI contribution to SG report on the implementation of UNSCR 2526 (2020) 3.



international agreements containing the four-hour rule,³⁰ as ‘a consolidated interpretation of the concept of good-faith efforts mentioned in the UNSC Resolution 2292 (2016).’³¹

In this respect, the EU regulation complements the UNSC Resolutions, which did not provide a time limit for good-faith efforts; however, the question of potential non-conformity of the four-hour rule with the UNSC Resolution can and has been raised.

With regard to seeking flag State consent, two options can be envisaged: consensual and non-consensual inspection. In the former case, the requested consent can be explicit (expressly given by the flag State or the master) or tacit, in case there is no response to the request for consent within four hours from the time the request has been sent to the flag State. When it comes to the non-consensual inspection, ROE distinguish between two variants, on the basis of the likelihood of use of force by the suspect vessel in case of boarding. This distinction is very important for the type of response of IRINI assets. Thus, the ROE consider ‘non co-operative’ inspection the situation when the master of the suspected vessel fails to comply with legitimate instructions by IRINI asset or declares that they will attempt to prevent the boarding by manoeuvre or non-provision of means of access or when physical barriers can be expected to be employed against boarding. When however the master of the suspected vessel is expected, or has explicitly stated, that they will use force to prevent the boarding party gaining access to the vessel, the ROE qualify the situation as ‘opposed boarding.’³²

In fact, for purposes other than the intensity of the measures to be adopted in a situation where a suspected vessel denies inspection by IRINI asset, ‘non co-operative’ ‘opposed’ boarding are two sides of the same coin. In both cases, the IRINI ROE authorise the use of (minimum) force in order to board the vessel.³³

Nevertheless, the reality proved to be more nuanced, as has been shown through a November 2020 incident with the Turkish-flagged vessel *Roseline A*. At the time of the incident this merchant vessel was sailing from Turkish port Ambarlı toward the Libyan port Misurata. Given the pattern of navigation of *Roseline A*, Operation IRINI had reasonable grounds to suspect that she could be acting

30 *ibid.* The referred to international convention are: Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Strasbourg) (adopted 31 January 1995, entered into force 1 May 2000) ETS No. 156; Agreement concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (San José) (adopted 10 April 2003, entered into force 18 September 2008), Registration Number 55538 (no UNTS volume number has yet been determined for this record); 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (London) (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc. LEG/CONF.15/21.

31 See Letter of Minister of Foreign Affairs of Turkey Mevlüt Çavuşoğlu to UNSG António Guterres (29 November 2021) UN Doc. S/2020/1156, 2 December 2020, 2.

32 Respectively ROE (n 17) 172 and 173.

33 In these cases, commensurate force may be used also in order to restrict the freedom of master and crew of the boarded vessel (on board that vessel or an IRINI asset) during the visit and inspection and also for the seizure of illegally trafficked arms and related material in breach of the SC arms embargo on Libya.



in breach of the UN arms embargo.³⁴

Acting on these grounds, an IRINI asset (a helicopter from the German frigate *Hamburg*) undertook the inspection of *Roseline A*. The inspection took place on 22 November 2020, five and a half hours³⁵ after the lack of response by the Turkish authorities to the request addressed to them by IRINI headquarters, and following the cooperative approach of the *Roseline A*'s master and crew.³⁶ More than thirteen hours after the consent request had been sent to Turkey and while the inspection was in progress for six hours (and no prohibited items had been found), Turkish authorities protested the boarding, and, acting on this protest, IRINI Headquarters instructed the German helicopter and staff to cease the inspection and leave the vessel,³⁷ which continued towards Misurata.

This incident gave rise to an exchange of letters between the Minister of Foreign Affairs of Turkey Mevlüt Çavuşoğlu and the EU HR Josep Borrell. It also triggered communications by Turkey to the UN Secretary-General and to the International Maritime Organization (IMO).

In these documents Turkey qualified the boarding of *Roseline A* as 'blatant violation of international law'³⁸ and supported that position with two main points: the rejection of any possibility of non-consensual intervention on foreign flagged vessels on the high seas and the rebuff of the four-hour rule in the assessment of the good-faith efforts to obtain the flag State's consent for the intervention.

With regard to the first point, the Turkish Ministry of Foreign Affairs (MFA) states that 'neither UNSC Resolution 2292 (2016) nor any other UNSCR grants the right to member States or to regional organizations, to arbitrarily board any vessel on the high seas, without the clear consent and authorization of the flag State.'³⁹ This statement goes against the unambiguous language of paragraph 3 of UNSC Resolution 2292 (2016) and disregards the 'good-faith efforts' compromise. Thus, by its protest against IRINI and the EU, Turkey actually attacked the compromise solution reached at a unanimous UNSC not to render the consent of the flag State a prerequisite for the inspection on the high seas of vessels suspected of violating the UN arms embargo on Libya. The Turkish argument

34 *MV Roseline A* has been known to behave in a suspicious manner at sea. For example, as of 20 October 2020 from 09:51 she was not shining the Automatic Identification System (AIS) for a period of 59 hours. She also had her AIS off for a period of 128 hours starting 5 July 2020 at 02:50. Based on the information gathered by IRINI from various sources and also provided by EU Member States, *Roseline A* was included on 16 June 2020 in the IRINI OHQ Vessels of Interest list (vessels fulfilling several indicators that lead to suspect a possible involvement in arms trafficking and requiring further investigations). *Roseline A* undertakes frequent port callings in Libya and in countries suspected of illegal arms trafficking or military support to factions involved in the Libyan conflict. EU Satellite Centre (SatCen) imagery had confirmed that *Roseline A* was at the Libyan port Misurata on 12 June 2020 where she possibly unloaded two armoured vehicles.

35 An additional hour was provided by IRINI to the flag state without however receiving a positive or negative answer to the request for inspection.

36 Turkey contested the cooperation of the master of *Roseline A*, MFA Turkey to UNSG, 29 November 2021 (n 31) 3.

37 Due to weather conditions the inspecting team remained on board *Roseline A* and left her early in the next morning.

38 MFA Turkey to UNSG, 29 November 2021 (n 31) 2 and 3.

39 *ibid* 2.



endeavours to ‘undo the [Security] Council’s actions.’⁴⁰ This point has been made explicitly by Turkey in a document relating to the *Roseline A* incident, submitted in May 2021 to the Legal Committee of the IMO. In this document, the Turkish government asked the IMO Legal Committee to address the question ‘whether the United Nations Security Council has the mandate to lay down a rule which is in clear contradiction to the law of the sea, including the SUA Convention and UNCLOS, such as those requiring clear consent of the flag State for the boarding of its vessel by foreign war ships.’⁴¹

In his reaction to Turkey’s protest, the EU HR did not miss the opportunity to highlight to the Turkish Foreign Minister that ‘Resolution 1970 (2011) and subsequent resolutions are legally binding on all Member States of the United Nations, including the Republic of Turkey.’⁴² Further, the EU HR rejected the Turkish complaint, underlining that ‘Operation IRINI fully complied’ with the obligations out of the applicable UNSC Resolutions and reminded Turkey that ‘pursuant to paragraph 3 of resolution 2292 (2016), all Member States of the United Nations have a duty to cooperate with inspections undertaken in that framework.’⁴³

In a broader perspective, the language of the relevant provisions of UNCLOS (arts. 92, 110) that Turkey invokes in support of its rejection of the possibility of non-consensual interventions in foreign-flagged vessels on the high seas, as well as the existence of other international treaties providing for ‘consent by default’ or ‘implicit consent’ procedures⁴⁴ leave no doubt that the rule of the exclusive jurisdiction of the flag State on the high seas is not a peremptory rule (*ius cogens*) of the international law of the sea and can be derogated from in case such derogation is allowed by provisions of UNCLOS or by any other international treaty. Article 92(1) reads ‘Ships 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’ and Article 110(1) reiterates this principle stipulating that ‘*Except where acts of interference derive from powers conferred by treaty*, a warship which encounters on the high seas a foreign ship, (...), is not justified in boarding it unless there is reasonable ground for suspecting that(...)’.⁴⁵

The authority therefore of IRINI to inspect foreign vessels on the high seas is founded on the aforementioned UNSC Resolutions adopted under Chapter VII UN Charter, which not only are

40 *Aerial Incident at Lockerbie (Libya v. USA)* (Preliminary Objections) [1998] ICJ Rep 129, para 40.

41 IMO Legal Committee, 108th session (21 May 2021) Doc. LEG/108/5/3, 3, para 16.

42 Letter of 4 December 2020 from Josep Borrell, High Representative/Vice-President of the European Commission, addressed to Mr. Çavuşoğlu, (8 December 2020) UN Doc. S/2020/1178, 3; EU HR Borrell also wrote in this respect that the ‘common objective should be to ensure that the arms embargo on Libya imposed by the United Nations Security Council, acting unanimously under Chapter VII of the Charter of the United Nations, is fully *implemented*’.

43 *ibid* 3.

44 See n 31 and n 55.

45 Emphasis added.



binding upon all States, by virtue of the UN Charter itself,⁴⁶ but also prevail, in accordance with Article 103 UN Charter, over obligations under any other international agreement.⁴⁷

While the situation with regard to the legality of the inspection of *Roseline A* being clear from the point of view of the relevant UNSC Resolutions, the legal office of IRINI gave two contradictory pieces of advice: Shortly before, and at commencement of boarding it stated to Turkey that the lack of opposition by the flag State within four hours after the relevant request for consent had been addressed to the flag state, gave the right to IRINI assets to board and inspect a foreign ship: 'Also without the flag State consent, fulfilling the good-faith efforts, an inspection can be undertaken.'⁴⁸ Yet, the very next day, after the interruption of the inspection following Turkey's protest, the same legal office submitted that 'the operation was suspended due to not having received any form of consent, explicit or otherwise, from the flag State',⁴⁹ a consent that the previous day was deemed by the same office not to be required. Turkey did not miss the opportunity to underscore this inconsistency.⁵⁰ The above contradictory statements bring confusion into the mandate of IRINI and its execution in concrete cases: the second statement constitutes a direct challenge, by a subordinate EU body, to the four-hour rule decreed by the competent EU legislator, as at any time any flag State can deny or withdraw its consent. Yet, rendering the consent of the flag State a requirement for the boarding obstructs the effective implementation of the relevant UNSC Resolutions, adding a condition which is deliberately not in the Resolution text. It may be assumed that the contradictory opinions of the IRINI legal office are due to political and not legal reasons. This is one of the detrimental effects of the impact of politics on international law. It is suggested that the command of IRINI did not wish to create friction with Turkey; therefore, the first legal opinion, based on the applicable international and EU law, was set aside by the second, politically motivated, opinion, disregarding the UNSC Resolutions on the strict implementation of the arms embargo on Libya and the EU rules on IRINI. One may understand the political constraints of a military operation such as IRINI, yet in this case the credibility of the Operation and consequently of the EU as a whole is at stake.

The second point of the Turkish protest consisted in the contention that 'the four-hour notice' within which the requested flag State must reply, so that the condition of the good-faith efforts is fulfilled as provided for in UNSC Resolution 2292 (2016), 'is not applicable as far as Turkish-flagged ships are

46 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 54, 'when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter' (para 116).

47 *Aerial Incident at Lockerbie (Libya v. UK)* (Provisional Measures) [1992] ICJ Rep 15, para 39; comp. *Nicaragua v. USA* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 107.

48 Letter 14 December 2021 of Minister of Foreign Affairs of Turkey Mevlüt Çavuşoğlu to EU HR Josep Borrell (17 December 2020), UN Doc. S/2020/1240, 3.

49 *ibid.*

50 The two contradictory legal advices were given within 24 hours.



concerned⁵¹ because '[t]he imposition of arbitrary deadlines and self-proclaimed extensions are not acceptable and cannot be considered as an act of good faith.'⁵²

The four-hour notice rule is not to be found in UNSC Resolution 2292 (2016), or in other relevant resolutions. It has been adopted by the EU organs with reference to IRINI. In this respect, the EU regulation complements the UN one, providing for a practical guide for the application of the relevant paragraph of Resolution 2292 (2016). The EU decision-makers who devised the IRINI rules, adopted the four-hour notice rule justifying this choice as 'a widely recognised model in international maritime practice',⁵³ representing 'a consolidated interpretation of the concept of good-faith efforts mentioned in the UNSCR 2292 (2016) related to the arms embargo on Libya'⁵⁴ and referred to international agreements providing for the four-hour period after which the consent of the flag State is, under concrete modalities, deemed given.⁵⁵

In addition to 'the standard practice' and 'default rule' of the four-hour period⁵⁶ invoked by the EU authorities, a significant consideration in favour of this rule is provided by the language of UNSC Resolution 2292(2016) paragraph 3, which stipulates that the inspection of vessels suspected to violate the arms embargo on Libya shall be done 'without undue delay': the UNSC recognises that there is a sense of urgency imposed by the necessity of strict implementation of the arms embargo. Therefore, a short period of time between the request to the flag State and the reply/non-reply, is both justified and required.

In any case, Turkey did not provide an alternative time frame that would not be considered arbitrary: on the contrary, it claimed that its consent as flag State is always necessary for the inspection of vessels on the high seas, in disregard of UNSC Resolution 2292(2016) and the 'good-faith efforts' rule in its paragraph 3. This effort to move the framework for the assessment of the IRINI's actions from the implementation of the relevant UNSC Resolutions (and the there envisaged non-consensual boarding of foreign vessels violating the arms embargo on Libya, after exhaustion of good-faith efforts) to another set of rules, Turkey brought the case of *Roseline A* also to IMO, in particular its Legal Committee, under the agenda item 'Advice and guidance in connection with the implementation of IMO instruments', as an issue relating to the implementation of the Convention

51 MFA Turkey to UNSG, 29 November 2021 (n 31) 2.

52 *ibid* 3.

53 EUNAVFOR MED IRINI, Report 2526 (2020)(n 22) 3.

54 See MFA Turkey to UNSG, 29 November 2021 (n 31) 2, quoting the reply of 'Operation IRINI officials' to Turkey.

55 From the three cited agreements in the EUNAVFOR (MED IRINI, Report 2526 (2020) (n 22) 3), more relevant are the 2005 Protocol to the SUA Convention (art 8*bis* (5)(d)) and the 2003 Regional Caribbean Regional Maritime Agreement (art 16(3)). On the provided for in these agreements simplified 'consent by default' or 'implicit consent' procedures, see Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 137, 177-181; Kiara Neri, *L'emploi de la force en mer* (Bruylant 2013) 166, 172-174.

56 Fabio Caffio, 'Challenges for cooperation in the Mediterranean after the global pandemic', in EU Headquarter EUNAVFOR MED IRINI, CJE Branch and Media Cell (ed), *Challenges for cooperation in the Mediterranean after the global pandemic, Shared Awareness and Deconfliction in the Mediterranean SHADE MED, 26-27 November 2020 Rome – Italy, Conference Book* (L'Armadillo editore 2021) 30.



for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), as amended by the 2005 Protocol).⁵⁷ This attempt did not achieve its objective, as the SUA Convention and its 2005 Protocol are not relevant for, let alone applicable to, the *Roseline A* incident, and the legal basis for the boarding of the vessel was the UNSC resolutions regarding the arms embargo on Libya.

Turkey contested also the appropriateness of the method of communication of the request for its consent to the inspection of *Roseline A*.⁵⁸ The EU rejected this grievance, stating that IRINI sent an official request for consent to relevant points of contact in the Turkish MFA, listing the Turkish officials contacted,⁵⁹ which request was then transferred to, and handled by, the Head of the Maritime Department of Turkey's MFA.⁶⁰ This way of communication has been a standard practice for IRINI (and also for its predecessor Operation SOPHIA), to which no protest had ever been raised by any contacted flag State or by the UN sanctions committee.⁶¹

A noteworthy point arising from the perusal of the correspondence exchange with respect to the *Roseline A* incident is that Turkey, which is not currently a party to UNCLOS, relies explicitly on UNCLOS for its arguments relating to the boarding of *Roseline A* and elaborates on the interpretation of its provisions. This explicit reference to UNCLOS departs from the older position of the government of Turkey to avoid in its documents any reference to UNCLOS and to refer exclusively to customary law, lest such reference be used as an argument in favour of the universal application of UNCLOS.

3.2. The Question of Vessels Entitled to Sovereign Immunity

Critical for the issue of intervention on vessels is also the question of the sovereign immunity. This issue is regulated by UNCLOS in Articles 95 ('Immunity of warships on the high seas') and 96 ('Immunity of ships used only on government non-commercial service'). In accordance with the former 'Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.'

The EU rules on IRINI, following the relevant UNSC Resolution provision (2292 (2016), paragraph 7), specifically provide that the consent procedure does not apply to vessels entitled to sovereign immunity under international law.⁶²

With regard to the immunity of ships, other than warships, Article 96 UNCLOS stipulates that 'Ships

⁵⁷ IMO 2021 (n 41).

⁵⁸ MFA Turkey to UN SG, 29 November 2021 (n 31) 2 and 3.

⁵⁹ Director General for Bilateral Political Issues, Maritime and Aviation; Head of Department for Arms Control and Disarmament; Mission of Turkey to the European Union and Turkish Embassy in Rome (where IRINI is headquartered).

⁶⁰ EU HR/VP to MFA Turkey (4 December 2020) (n 42) 3. Turkey did not contest that the said request was sent to the Turkish Embassy in Rome and the Permanent Delegation of Turkey to the EU in Brussels, MFA Turkey to UNSG, 29 November 2021 (n 31) 2.

⁶¹ EU HR/VP to MFA Turkey (4 December 2020) (n 42) 3. Turkish authorities were moreover invited to designate new or additional contact points if they so wish.

⁶² ROE, Rule GENTEXT 18.



owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.' While the notion of ownership can be in most cases relatively straightforward, the concept of 'operation of a vessel by a State' as a condition for the entitlement to sovereign immunity, and its application, raises complex issues of interpretation.⁶³ To the uncertainty as to the exact scope of the application of the above provision is added the further requirements provided for in Article 96 UNCLOS: the exclusive governmental character of the service and the exclusive non-commercial nature of the service.

Such a situation arose in June 2020 with respect to the Tanzania-flagged MV *Cirkin*, which was escorted by three Turkish warships, sailing from Istanbul (Turkey) to Misurata (Libya). While *Cirkin* was on the high seas, she was hailed by an IRINI naval asset (the Greek frigate *Spetsai*), which had reasonable grounds to believe that *Cirkin* was transporting items prohibited under the arms embargo, to provide information about her cargo and voyage plan. No reply was received, instead, one of the Turkish warships escorting her stated that she was 'under control and protection of the Republic of Turkey'. Later, the Turkish warship specified that '*Cirkin* was chartered by Turkey' to carry medical supplies to Libya. Upon these statements by the Turkish naval officers escorting the *Cirkin*, the IRINI command concluded that the Tanzanian-flagged vessel enjoyed sovereign immunity and, thus, instructed the Greek frigate to allow her to continue her voyage unhindered.⁶⁴

The lawfulness of the decision of IRINI HQ to consider the *Cirkin* immune on the high seas as a vessel 'operated by a State and used only on government non-commercial service' raised serious doubts. The question was whether the 'charter' by a State fulfils the criteria of Article 96 UNCLOS, so that a chartered vessel could also be entitled to sovereign immunity.

The response to the above question required the determination of whether the 'charter' of a commercial vessel by a government satisfies the condition of the operation of the said vessel by the charterer State. In accordance with admiralty law (another layer of legal regime applicable to seagoing vessels), 'charter' is a concept covering many types of relationship between the vessel and the charterer: it can be for example for a time, for a voyage, bare-boat.⁶⁵ This variety of types of charter leads to question whether

63 When the International Law Commission was considering the notion of State-operated aircraft (in another framework, the Draft articles on Jurisdictional Immunities of States and Their Property), 'Some [of its] members raised the question of State-owned or State-operated aircraft engaged in commercial service The Commission, while recognizing the importance of the question, felt that it called for more time and study', ILC 'Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries' (1991) ILC Yearbook, vol. II, part two, 13, para 24.

64 EU HR Borrell, 'Answer given to European Parliament – Question E-003726/2020 by Özlem Demirel (GUE/NGL)' (European Parliament, 19 October 2020) <www.europarl.europa.eu/doceo/document/E-9-2020-003726-ASW_EN.html> accessed 11 December 2021; Claudio Bertolotti, 'EUNAVFORMED'S 'Iriini' Operation: Constraints and two critical issues' (START InSight, 25 September 2020) <www.startinsight.eu/en/eunavformed-irini-operation-constraints-and-two-critical-issues/> accessed 9 September 2021.

65 Evi Plomaritou, Anthony Papadopoulos, *Shipbroking and chartering practice* (8th edn, Informa Law 2018); Yvonne Baatz, *Maritime Law* (3rd edn, Informa Law 2014) 117ff; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011); Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014).



any charter or a type thereof constitute 'operation of a vessel' in the terms of Article 96 UNCLOS.

The question is not new: States have previously tended to invoke this rule in order to claim jurisdictional immunity for commercial vessels they have chartered. Already in the first decades of twentieth century the exact scope of application of the immunity of state-operated vessels created difficulties that required the adoption of specific normative guidance: the International Convention for the Unification of Certain Rules relating to the Immunity of state-owned Vessels (Brussels, 10 April 1926)⁶⁶ provided that 'craft owned or operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service, ... shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings in rem.' (Article 3(1)). The interpretation and application of this provision gave rise to disagreements among the parties and lead them to adopt an authoritative interpretation through an Additional Protocol to the convention, signed at Brussels on 24 May 1934.⁶⁷ Article I of this Additional Protocol states the interpretative predicament created by the condition of the operation of a vessel by a State:

it has been doubted whether, and to what extent, the expression '*exploités par lui*' ['operated by a State'; French is the only original language of the 1926 Brussels Convention] in Article 3 of the Convention extends or could be construed as extending to ships chartered by a State, whether for time or voyage,

and it continues by the adoption of an interpretative declaration in the following terms:

it is hereby declared for the purpose of removing such doubts, as follows: Ships on charter to a State, whether for time or voyage, while exclusively engaged on governmental and non-commercial service, and cargoes carried therein, shall not be subject to any arrest, seizure or detention whatsoever, but this immunity shall not prejudice in any other respect any rights or remedies accruing to the parties concerned. A certificate given by a diplomatic representative of the State concerned in manner provided by Article 5 of the Convention shall be conclusive evidence of the nature of the service on which the ship is engaged.

A similar approach has been advanced with respect to Article 16(2) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property extending jurisdictional immunity to 'vessels owned or operated by a State and used, for the time being, only on government non-commercial service'. In its commentary under this provision in 1991, the International Law Commission suggested that '[t]he concept of the operation of merchant ships or ships engaged in commerce is given some clarification by way of illustration in paragraph 3. The expression 'a State which operates a ship' covers also the 'possession', 'control', 'management' and 'charter' of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise.'⁶⁸ Not only does this passage confuse

66 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, (signed at Brussels, April 10th, 1926) 176 LNTS 200.

67 *ibid* 214.

68 ILC 'Draft articles on Jurisdictional Immunities of States and Their Property' with commentaries (n 63) 52, para 9.



ownership and operation, by stating that the latter covers 'possession', also it proposes an excessively wide interpretation of the term, not warranted by State practice and departing from the understanding of the concept of charter in admiralty law.

Be that as it may, the 2004 Convention on Jurisdictional Immunities of States and Their Property, let alone the commentary on it, could not be usefully invoked in the *Cirkin* incident, as the 2004 Convention has not entered into force. Equally, the 1926 Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its 1934 Protocol are not relevant or applicable in the case, as Tanzania (the flag State of *Cirkin*) is not a party to the 1926 Convention and its Protocol.

More importantly, the value of the above documents for the interpretation of Article 96 UNCLOS is doubtful. A commentary to a convention that has not entered into force offers little to no guidance for the interpretation of an UNCLOS provision. As to the Brussels Convention and its Additional Protocol, they are probably obsolete and, in any case, superseded by the relevant provisions of UNCLOS. In this respect it is significant to note that in its order in the *ARA Libertad* case (*Argentina v. Ghana*, 2012), the International Tribunal for the Law of the Sea, in a dispute where the point at issue was precisely the immunity of a vessel, relies on the UNCLOS provisions, without any reference whatsoever to the 1926 Convention and its Protocol.⁶⁹

In view of the above, and with respect to IRINI which is tasked with contributing to the implementation of UNSC Resolutions explicitly requiring the 'strict implementation' of an arms embargo, for a vessel to be operated by a State (as required by UNCLOS) it is not enough to be chartered by the said State or to be under its protection. Interpretative attempts to broaden the number of vessels that may enjoy immunity on the grounds that are operated by a State, infringe upon the objective of the arms embargo on Libya and ultimately erode the effectiveness of the strict implementation of such embargo.

Later developments in the case of the *Cirkin* show that the EU authorities did not accept the claims that *Cirkin* was operated by Turkey and thus entitled to sovereign immunity under UNCLOS Article 96. The EU Council imposed sanctions on the private Turkish shipping company Avrasya Shipping (headquartered in the Black Sea coast Turkish city Samsun), which 'operates a vessel called *Cirkin* found to have violated the arms embargo in Libya established in UNSCR 1970 (2011) and transposed in Article 1 of Decision (CFSP) 2015/1333.⁷⁰ In accordance with the above EU Regulation 2020/1309, at the time the cause of action arose (June 2020), *Cirkin* was operated by a private maritime company and not by a State. Therefore, the legal basis for the abstention of IRINI to inspect the *Cirkin* cannot

⁶⁹ *ARA Libertad (Argentina v. Ghana)* (Provisional Measures) [2012] ITLOS Rep 332.

⁷⁰ Council Implementing Regulation (EU) 2020/1309 of 21 September 2020 implementing Article 21(2) of Regulation (EU) 2016/44 concerning restrictive measures in view of the situation in Libya, [2020] OJ, Annex, L3051/4, 'Avrasya Shipping is a maritime company which operates a vessel called *Cirkin* found to have violated the arms embargo in Libya established in UNSCR 1970 (2011) and transposed in Article 1 of Decision (CFSP) 2015/1333. In particular, the *Cirkin* has been linked to transports of military material to Libya in May and June 2020. 21.9.2020'.



be found on Article 96 UNCLOS.⁷¹

The issue of a non-state, commercial vessel under the escort of a third State warship is specifically addressed by the IRINI rules.⁷² In accordance with these provisions, in case a suspected vessel is escorted by a third-party warship, the IRINI ROE provide that an IRINI asset purporting to inspect the suspected vessel shall inform accordingly the escorting warship and observe the four-hour rule. Should the escorting warship obstruct the boarding through disruptive behaviour, the concerned IRINI asset shall stop the boarding and limit its action to the collection of information on the event with a view to reporting the situation to the UN via the IRINI command. In addition, the IRINI ROE rule out any use of force to compel compliance with the order to divert to suitable port or to stop any suspected vessel escorted by third-party warship; in this case also the only envisaged action by IRINI is to collect information and report the incident to the UN (specifically the UNSC Libya Sanctions Committee).

4. Conclusion

Since its inception, Operation IRINI has been functioning as a laboratory where different layers of norms coexist and guide the conduct of its military assets. This symbiosis has not been always an easy enterprise. It requires skill and flexibility from the commanders and the decision-makers at the EU level. In addition, the political climate in Libya and international reactions are not conducive to unimpeded operation of this EU Naval Force, because the implementation of the arms embargo on Libya remains a divisive issue in international relations.

The results to date of IRINI warrant prudent optimism for its contribution to the implementation of the UN arms embargo on Libya. Despite the challenges to the fulfilment of its core mission, from political, legal and operational perspectives, IRINI's record shows that most flag States, when requested, give their consent or do not oppose boarding and inspection by IRINI assets of their commercial vessels. With these means, IRINI gathers extensive and comprehensive information on the trafficking of arms and related materiel and shares this information with relevant partners and agencies.

From the legal point of view, the main challenges stem from Turkey, whose authorities protest the legitimacy of IRINI and its basic rules (e.g. the authorisation by the UN SC to proceed, after exhaustion of the good-faith efforts, to non-cooperative inspections or the four-hour rule), and seek to circumvent the application of rules, by means such as escorting commercial vessels by warships. It seems that Turkey, through its proxies a party to the war in Libya, has engaged also in lawfare against EU's operational involvement, through IRINI, in the implementation of the UN policy for a peaceful solution in Libya. The latest Communication Strategy

⁷¹ It seems that initially IRINI HQ tended to adopt such an interpretation of Article 96 UNCLOS, which was not however retained, in view of the facts of the incident.

⁷² ROE (N 17) Rules GENTEXT 16 and 17.



of IRINI (July 2021) names Turkey as the only State opposing inspection of vessels under its flag.⁷³ In this respect, we should not underestimate the challenge originating from the contradictory legal advice provided by IRINI headquarters, as the two decisions in the *Roseline A* incident demonstrate.⁷⁴

There are, however, some encouraging signals from Russia, another State that expressed initially scepticism of the legal authority of IRINI. On the occasion of the yearly renewal of Resolution 2292 (2016) in May-June 2020, Russia expressed doubts whether Operation IRINI's mandate was within the scope of the UNSC's authorisation and attempted (unsuccessfully) to limit the time frame of the extension of Resolution 2292 (2016).⁷⁵ When considering the further one-year renewal of the said Resolution, in May and June 2021, Russia avoided expressing criticism of the Operation IRINI or obstructing the smooth adoption of the relevant UNSC Resolution 2578 (2021)⁷⁶, which was adopted unanimously.⁷⁷ In the most recent extension of the authorization of IRINI by UNSC Resolution 2635 (2022) of 3 June 2022, Russia abstained from the vote⁷⁸ justifying the abstention by the 'very low levels of effectiveness' of the EU naval operation 'in assisting the implementation of the provisions of the Libyan arms embargo'.⁷⁹

73 The Communication Strategy attests the systematic refusal to consent referring to the incidents of a number of Turkish flagged vessels: *Parpali* (February and June 2021), *Kosovak* (February 2021) *Inga A* (April 2021), *Mathilde A* (May 2021) *Mehmet Kahveci* (June 2021) (EEAS, 31 October 2021) <https://eeas.europa.eu/headquarters/headquarters-homepage/106727/results-report-october-2021_en> accessed 29 November 2021.

74 On the importance of communication for the effectiveness of CSDP missions see Anna Molnár, Lili Takács, Anna Urbanovics, 'Strategic communication of EU CSDP missions – measuring the EU's external legitimacy' [2021] TGPPP, 319.

75 Security Council Report 'Libya Sanctions: Vote on a Resolution' (4 June 2020) <www.securitycouncilreport.org/what-sinblue/2020/06/libya-sanctions-vote-on-a-resolution.php> accessed 11 November 2021, 'It seems that Russia was the only Council member showing fundamental skepticism around the renewal of the authorisation. At different Council meetings, Russia had apparently raised the question of whether operation Irini's mandate was still within the scope of the Council's authorisation. The EU and its member states argued that it is, and so did the Secretary-General. It appears that during the 27 May meeting, Russia suggested the authorisation be renewed for six instead of twelve months'. The adopted Resolution 2526 (2020) retained the renewal of the authorisation for twelve months.

76 The negotiations on the draft resolution appear to have been smooth. During the negotiations on resolution 2526 (2020's renewal of 2526 (2020)), Russia was apparently the only member that expressed scepticism around whether IRINI's mandate is within the scope of the Council's authorisation. It seems that during this year's negotiations, Russia was not as vocal in raising such concerns, 'Libya Sanctions: Vote on a Resolution' (n 75).

77 This change of stance of Russia makes a school of thought suggesting to consider Turkey a more important challenger to Western values and leadership in the Mediterranean than Russia, see Pascal Ausseur, 'Challenges for cooperation in the Mediterranean after the global pandemic', in EU Headquarter EUNAVFOR MED IRINI, Challenges for cooperation in the Mediterranean after the global pandemic (n 56) 15: 'we are now entering into a destabilizing period of the Mediterranean, waiting for a new balance of power. The two major strategic players are Russia and Turkey. Both wish to resume their historical imperial position; so, the question is: which one among them poses a real threat to Europe? The traditional answer would be Russia, but the position of Turkey towards its neighbors in the south, its socio-economic characteristics, its religious ideology and its revanchist power could raise new issues'. (emphasis in the text).

78 UNSC Res 2635 (2022) was adopted by a vote of 14 in favour with one abstention

79 UNSC 9053rd meeting, 3 June 2022, UN Doc. S/PV.9053, 2, 'We greatly regret that the EU Naval Force Mediterranean Operation IRINI has, over recent years, demonstrated very low levels of effectiveness in assisting the implementation of the provisions of the Libyan arms embargo. During the entire period of its action, there has been no successful seizure of any contraband goods'.



The current deterioration of the relations between EU and its Member States on the one hand and Russia on the other (in particular due to the armed conflict in Ukraine), may create additional hindrances in the operations of IRINI, or threaten its continuation. The current extension of the authorisation by the UNSC shall expire on 3 June 2023⁸⁰ and, at its end, IRINI may be judged not (or not only) on its merits, its actual contribution to the implementation of the UN arms embargo on Libya.

As the only regional arrangement acting under authorisations given by the UNSC in resolution 2292 (2016) for member States to inspect vessels bound to and from Libya, which they have reasonable grounds to believe are carrying arms or related material, IRINI is of paramount importance, not only for the UN, which has found through it an operational arm it lacks in the region, but foremost for the EU in its venture to enhance its strategic autonomy and strengthen its role as a regional actor in safeguarding peace and stability in its immediate vicinity. It is however this particular endeavour and role that may generate objections from challengers of the political and strategic role of the EU. The 'lawfare' against IRINI analysed in this article is undoubtedly part of this wider challenge and geopolitical design.⁸¹

80 UNSC Res 2635 (2022) UN Doc S/RES/2635 (2022), para 1.

81 See in this regard the explanation of vote of Russia UNSC Res 2635 (2022) (n 80); 'In the coming year, we will continue to closely monitor the work of Operation IRINI to ensure full compliance with the arms embargo. The focus of our attention will be whether it is effective in combating flows of illegal weapons and whether it is in line with the law of the sea and the mandate stipulated in resolution 2292 (2016). We will also provide a legal assessment of the actions of the EU Naval Force.'



The Superposition of National Legal Regimes in Maritime Disputed Areas

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Abstract

Superposition of national legal regimes in maritime disputed areas is governed by a set of international rules provided for in Articles 74 and 83 of the United Nations Convention on the Law of the Sea (UNCLOS). According to those articles, and as the international jurisprudence confirmed, not all activities are permissible in those areas, and claimant States are bound by a general obligation of restraint that, at the very least, imposes a duty not to permanently harm the marine environment. States are also required to negotiate in good faith provisional arrangements of a practical nature aiming to limit conflicting national legislation and conflicting activities. In the absence of provisional arrangements, the legality of States' activities in an area of overlapping maritime claims is not clear. This paper reviews in the light of the international jurisprudence and State practice the regime devoted to disputed maritime areas. It then highlights the main features of the obligation of self-restraint in a context where each State is trying to assert its sovereignty and maximise the benefits of its claim over a maritime disputed area.

Keywords: maritime disputed area (MDA), UNCLOS, effectivity, delimitation, activities in contested areas.

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1. Introduction

Significant parts of the sea remain undelimited, which raises tensions when several States may be deemed to have jurisdiction and, therefore, be entitled to exercise their powers over the same maritime spaces. This phenomenon appears even more prominent in a context where the interests of States for the “blue economy” are growing, which increases competition for maritime space and the probability of conflicting uses of the sea, and calls for more diplomatic dialogue and cooperation.

‘Maritime disputed area’ (MDA) are commonly defined as areas where the claims of two or several States over a specific maritime zone (in general the Exclusive Economic Zone (EEZ) or the continental shelf) overlap, and no final delimitation, whether by agreement or judicial award, has been reached.¹ An MDA is, then, an area where two different States (or more) advance a plausible legal entitlement

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1 British Institute of International and Comparative Law, ‘Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas’, London, 2016 [BIICL Report (2016)] 1; David Anderson, Youri van Logchem, ‘Rights and Obligations in Areas of Overlapping Maritime Claims’ in Shunmugam Jayakumar, Tommy Koh and Robert Beckman (eds), *The South China Sea Disputes and the Law of the Sea* (Edward Elgar 2014) 192. Various positions exist among scholars on the distinction between the terms “undelimited” and “disputed”, see BIICL Report (2016) 29-31; Nicholas Ioannides, ‘Rights and Obligations of States in Undelimited Maritime Areas: The Case of the Eastern Mediterranean Sea’ in Stefan Minas and Jordan Diamond (eds), *Stress Testing the Law of the Sea: Dispute Resolution, Disasters & Emerging Challenges* (Brill Nijhoff 2018) 312; Tara Davenport, ‘The Exploration and Exploitation of Hydrocarbon Resources in Areas of Overlapping Claims’ in Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport, Leonardo Bernard (eds), *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar 2013) 106.



and indicate, in their respective views, what the correct delimitation line should be, whether by a formal claim at the international level or by their national practice.² In this context, on the one hand, an MDA is the typical area of superposition of national legislations emanating from both States. On the other hand, superposition of national legal regimes is the consequence – as well as the empirical evidence – of an existing MDA.

According to customary international law and specific provisions of the United Nations Convention on the Law of the Sea (UNCLOS),³ States with opposite or adjacent coasts shall reach agreements for the delimitation of their EEZ (Article 74(1)) or continental shelf (Article 83(1)). There is no such a provision concerning the territorial sea but, according to Article 15, if two States have opposite or adjacent coasts, they shall not extend it beyond a median line, except where they can found their claim on historic title or special circumstances. Besides, even for the delimitation of their territorial sea, States are bound by a general duty to cooperate (UNCLOS Preamble) and to act in good faith (Article 300 UNCLOS).

When studying MDA, scholars focus in general on the EEZ and continental shelf because of the specific provisions of Articles 74 and 83 UNCLOS. Indeed, both articles include a provisional regime in the case where no final agreement has been reached. In such a situation, Articles 74(3) and 83(3) provide that ‘the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.’

The exact meaning and the scope of such a provision remains unclear. Yet, the issues and interests at stake can be tremendous. On the one side, it recognises a *de facto* transitional period during which overlapping claims as well as the national legal regimes of States are supposed to co-exist. The provisional regime provided for in Articles 74(3) and 83(3) UNCLOS may, therefore, limit the probability of conflicting legislation and practice at sea. On the other side, practice shows that the existence of a disputed area and the lack of cooperation between the claimant States can lead to the unilateral enforcement of national law. This can impact navigation, the exploration and exploitation of marine resources, the protection of the marine environment or even lead to the search and seizure of vessels or crew detention.⁴

In such a situation, the co-existence of several national legal regimes creates a presumed balance

2 Sean Murphy, ‘Obligations of States in Disputed Areas of the Continental Shelf’ in Tomas Heidar (ed), *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill Nijhoff 2020) 185. See also *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Judgment)* [2012] ICJ Rep 624, para 159: ‘The relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap’.

3 United Nations Convention on the Law of the Sea [1982] 1833 UNTS 3.

4 Anderson, van Logchem (n 1) 193. Youri van Logchem, ‘The Scope for Unilateralism in Disputed Maritime Areas’ in Clive Schofield, Seokwoo Lee, Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff Publishers 2014) 175.



of power between the claimant States, which are each pursuing effectivity. States will try to maximise the scope of their jurisdiction and powers in the disputed area, and hope for validation of their unilateral practice after an extended period. It is even more the case when the delimitation dispute is linked to a sovereignty dispute.⁵

However, according to the provisional regime established by Articles 74(3) and 83(3) UNCLOS, the claimant States are bound by a general duty of restraint in an MDA, an obligation to make every effort to enter into provisional arrangements of a practical nature, and an obligation not to jeopardise or hamper the reaching of a final agreement. It is therefore important to identify what States can or cannot do in an MDA. The interpretation of those provisions implies the determination of the existence and the substance of an international legal framework limiting the respective powers of the claimant States in an MDA. It also raises the question of the opposability of the unilateral practice of one claimant State to the other, as well as the question of the entitlement of one claimant State to react to the unilateral practice of the other. To that extent, it is interesting to shed some light on the interactions between superposition of national legal regimes and the provisional regime applicable to MDAs.⁶

Section 2 of this article focuses on the effects of superposition of national legal regimes in MDAs from the perspective of the international law of the sea and the provisional regimes provided for in Articles 74(3) and 83(3) UNCLOS. Section 3 presents the various responses of States to the superposition of national legal regimes in MDAs.

2. The Effects of the Superposition of State Legal Regimes in MDAs

The superposition of the national legal regimes of two (or more) States which have plausible entitlements to extend their jurisdiction over a maritime zone can be seen as both a cause and a consequence of the existence of an MDA. Firstly, superposition leads to the identification of a disputed area. Indeed, it contributes to the precise determination of the area covered by States' overlapping claims (subsection 2.1.). Secondly, since a maritime zone appears disputed between two States, which both consider they have jurisdiction, a situation of superposition of national legal regimes ensues (subsection 2.2.). Such a situation logically entails a series of practical problems, and, more broadly, legal uncertainty for various actors at sea, as well as diplomatic tensions between the claimant States. For this reason Articles 74(3) and 83(3) UNCLOS provide for a specific provisional regime. This regime in some respects remains unclear (subsection 2.3.).

⁵ See the examples below in Part 3.1. (Scattered Islands, Mayotte, South China Sea...).

⁶ To this end, the great amount of data on State practice gathered by the Observatory of Maritime Disputed Zones and the "ZOMAD/DAMOZ" team (University of Angers – France) appears very useful. See the website of the Observatory of Maritime Disputed Zones (dir. Prof. Alina Miron, University of Angers): < <https://zomad.eu> > accessed 17 November 2021.



2.1 The Identification of a Dispute

The process of identification of an MDA is based on the comparison of States' claims over a maritime space. An MDA may be identifiable where two or more claims overlap. For this purpose, any State's internationally notified position statement or national legislation, especially legislation defining maritime limits, or practice related to the concerned area can be seen as evidence of a claim and, therefore, of a dispute. A dispute can also be characterised by a State's protestation to legislation adopted by another State or to activities conducted in the relevant area.

Then, superposition of national legislation and practice may help to determine the geographical scope of the disputed area: national legislation of States can be seen as evidence of their claims. In a judicial context, it could also constitute a proof of the crystallisation of the dispute and could be used to establish the admissibility of a request.

In this context, practice reveals two sorts of situations. On the one hand, a State proceeds to the unilateral determination of its maritime zones and notifies its claim internationally by depositing charts, lists of geographical coordinates and sometimes maps with the UN Secretary-General, in accordance with Articles 75(2) and 84(2) UNCLOS. On the other hand, a State may determine its maritime zones by adopting national law, without international notification. In both cases, the degree of precision of the relevant official documents will be essential in the process of comparison of States' claims and, therefore, to the determination of an MDA.⁷ Multiple MDAs may be identified this way.⁸

For instance, in the case concerning France and Spain and the delimitation of their respective EEZs in the Gulf of Lion, Spain utilised equidistance as a method of delimitation. France argued that this would result in an inequitable solution considering the concave shape of its Southern coast.⁹ In this situation, the superposition of both States' claims led to the identification of a large disputed zone spreading from the mouth of the Gulf of Lion to the latitude of the Balearic Islands.¹⁰

7 See for more details Nicholas A Ioannides, 'A Legal Appraisal of the Interplay between the Obligations to Publish/Deposit Charts and Lists of Geographical Coordinates and Unilateral Maritime Claims' [2021] 34 IJMCL 599.

8 See all the studies realized so far by the researchers of the Observatory on Maritime Disputed Areas (all available online < <https://zomad.eu> >): concerning the Mediterranean Sea (France/Spain; Lebanon/Israel; Algeria/Spain/Italy; France/Italy; Croatia/Slovenia; Spain/Morocco), the Indian Ocean (France/Comoros; France/Mauritius; France/Madagascar), and the Atlantic Ocean (France/Canada).

9 See Ysam Soualhi, 'Le golfe du Lion, France/Espagne', (ZOMAD, un observatoire de la pratique des zones maritimes disputées, May 2020) < <https://zomad.eu/fr/med01-france-spain/> > accessed 17 November 2021.

10 Deposit by France of a list of geographical coordinates of points, pursuant to article 75 paragraph 2 of the Convention [2013] M.Z.N.94.2013.LOS; Spain, verbal note transmitted to the UN Secretary-General, 23 March 2013 < https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn94_2013_esp_e.pdf > accessed 14 July 2022; Spain adopted Real Decreto 236/2013 por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental [5 April 2013] Boletín Oficial del Estado 92. A list of geographical coordinates resuming the latter decree has been transmitted to the UN Secretary-General, Deposit by Spain of a list of geographical coordinates of points, pursuant to article 75 paragraph 2 of the Convention [2018] M.Z.N.139.2018.LOS.



An MDA between Algeria, Spain and Italy can be identified by superposing their respective claims.¹¹ On 20 March 2018, Algeria adopted a presidential decree establishing an EEZ in the Mediterranean Sea.¹² The Algerian delimitation extends to 12 nautical miles (NM) determining the territorial sea of Mallorca (Balearic Islands – Spain) and Sardinia (Italy). However, the decree specifies that the limits of the Algerian EEZ can be modified by international agreement.¹³ In a letter to the Algerian Ambassador to Spain on 12 July 2018, the Spanish Minister of Foreign Affairs vigorously protested the claim describing it as ‘clearly disproportionate with respect to the median line of equidistance’.¹⁴ On 28 August 2018, Spain deposited with the UN Secretary-General the list of geographical coordinates related to the EEZ declared by the royal decree adopted in 2013.¹⁵ For its part, Italy established an Ecological Protection Zone (EPZ) with the adoption of the law n° 61 of 8 February 2006.¹⁶ The law specifies that the limits of the EPZ are established in accordance with an equidistance line between the Italian coast and the coasts of neighbouring States. No list of coordinates has been deposited by Italy with the UN Secretary-General. However, on 28 November 2018, the permanent representation of Italy to the UN transmitted a letter to the Secretary-General stating its disagreement with the limits established by Algeria, whose claim overlaps with the EPZ. In response, Algeria sent two official protestation letters to Spain¹⁷ and Italy¹⁸ oppositng their respective delimitations.

2.2. The Triggering of a Specific Provisional Regime

The existence of an MDA triggers the application of the provisional regime provided for in Articles 74(3) and 83(3) UNCLOS. Overlapping claims as well as conflicting national legislation concerning a given MDA are then supposed to co-exist. Until an agreement on delimitation is reached (Article 74(1) and Article 83(1), the claimant States ‘shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement’.

11 See Pascale Ricard and Wissem Seddik, ‘Les chevauchements entre revendications maritimes Algérie/Italie et Algérie/Espagne’ (ZOMAD, un observatoire de la pratique des zones maritimes disputées, June 2020) 9 < <https://zomad.eu/fr/med05-algeria-spain-italy/> > accessed 17 November 2021.

12 Décret présidentiel 18-96 instituant une zone économique exclusive au large des côtes algériennes [21 March 2018] Journal officiel de la République algérienne 4.

13 Algeria deposited the list of relevant geographical coordinates to the UN Secretary-General, Deposit by Algeria of a list of geographical coordinates of points, pursuant to article 75 paragraph 2 of the Convention [2018] M.Z.N.135.2018.LOS.

14 The letter was transmitted to the UN Secretary General, Letter from Spain to Algeria of 12 July 2018 < https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DZA_2018_noteverbale_en.pdf > accessed 17 November 2021.

15 See n 9.

16 Law 61 on the Establishment of an ecological protection zone beyond the outer limit of the territorial sea [8 February 2006] < https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_2006_Law.pdf > accessed 17 November 2021.

17 Algeria, Verbal note n° 18.01056 [25 November 2018] < https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DZA_2018_noteverbale_Fre.pdf > accessed 17 November 2021.

18 Algeria, Verbal note n° 15-423/MAE/DAJ/2019 [20 June 2019] < <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/AlgDza20Jun-3.pdf> > accessed 17 November 2021.



The exact meaning of paragraph 3 of respective Articles 74 and 83 remains undefined by UNCLOS.¹⁹ A textual analysis, however, leads at least to the following three sets of observations.

The first observations concern the temporal scope of the provisional regime. The expression ‘pending agreement as provided for in paragraph 1’, logically, must be read in relation to paragraph 1 which provides that delimitation shall be ‘effected by agreement.’ In this context, it appears that obligations derived from paragraph 3 are not applicable if there is no need for a delimitation between two States, or if States are likely to reach an agreement easily.²⁰

The other expression employed in paragraph 3 (‘during this transitional period’), which is related to the obligation not to jeopardise or hamper the reach of a final agreement, has been interpreted in the same way by the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) in the *Ghana/Côte d’Ivoire* case. According to the Special Chamber, ‘the transitional period referred to means the period after the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved.’²¹ Hence, the temporal scope of the obligations under paragraph 3 seems directly related to the superposition of States’ claims and national legal regimes. In such a context, superposition appears particularly relevant and can be seen as practical evidence of States’ overlapping claims and, therefore, as one element triggering the provisional regime provided for in UNCLOS. In practice, the need for provisional arrangements of a practical nature is most apparent when unilateral activities in a given MDA, such as fishing or mineral exploration/exploitation, need regulation.²²

Secondly, the fact that paragraph 3 requires the claimant States to make every effort ‘to enter into provisional arrangements of a practical nature.’ The overall purpose of such an obligation has been clarified by the Arbitral Tribunal (Tribunal) in the *Guyana v Suriname* case (award of 17 September 2007) in which both parties made claims regarding breaches of Articles 74(3) and 83(3) UNCLOS. According to the Tribunal, ‘this obligation constitutes an implicit acknowledgment of the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement. Such arrangements promote the realisation of one of the objectives of the Convention, the equitable and efficient utilization of the resources of the seas and oceans.’²³ Then, the goal of the obligation provided for in paragraph 3 is to promote interim measures that could strengthen relations between claimant States and, thus, pave the way to the eventual adoption of a final agreement on delimitation.²⁴

19 The wording of paragraph 3 is the result of a compromise between conflicting views of States on several but intertwined issues of discussion that emerged during the Third United Nations Conference on the Law of the Sea (a criterion on delimitation, rules on the settlement of disputes, and interim measures pending a final agreement on delimitation), Anderson, van Logchem (n 1) 199-205.

20 BIICL Report (2016) (n 1) 17.

21 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire) (Judgment)* [2017], ITLOS Rep 2017 [630].

22 Anderson, van Logchem (n 1) 209.

23 *In the Matter of an Arbitration between Guyana and Suriname (Award of the Arbitral Tribunal)* [2007] PCA Rep [460].

24 In its footnote 532, the Tribunal cites Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (Martinus Nijhoff 1993) 815, and Rainer Lagoni, ‘Interim Measures Pending Delimitation Agreements’ [1984] 78 AJIL 354. See also Anderson, van Logchem (n 1) 212-215 and Nicholas A. Ioannides, ‘The legal framework governing hydrocarbon activities in undelimited maritime areas’ [2019] 68 ICLQ 346.



However the use of the expression ‘to make every effort’ suggests that paragraph 3 imposes an obligation of conduct, not of result, related to a more general – and customary – obligation to negotiate in good faith.²⁵

As to the nature and characteristics of ‘provisional arrangements of a practical nature’, States are free to conclude any kind of agreement in both form and substance. UNCLOS gives no definition. In practice, a wide variety of arrangements have been adopted by States.²⁶

The term ‘arrangement’ appears flexible. It does not have to be a formal binding treaty and could be limited to simple informal cooperation. It does not have to explicitly refer to Articles 74(3) and 83(3) UNCLOS. It could also remain in force without any limit of duration as soon as it does not appear as a means of jeopardising or hampering the reaching of a definitive delimitation agreement. Regarding their content, arrangements of a practical nature are meant to avoid conflicting legislation or conflicting activities in the disputed area. Then, any kind of arrangement dedicated to the joint exploration or exploitation of marine resources or to the regulation/management of any other activity in the area can be regarded as falling under paragraph 3 (see examples presented in Section 3, considering that the adoption of provisional arrangements appears as a reaction to the superposition of national legislation in an MDA). Lastly, paragraph 3 specifies that provisional arrangements are without prejudice to final delimitation. Such provisional arrangements can then be modified or abandoned if needed, which for the claimant States reduces the potential risks in reaching a compromise.

Thirdly, according to paragraph 3 of Articles 74 and 83, States are required to make every effort not to jeopardise or hamper the reaching of a final agreement (often referred to as the ‘obligation of self-restraint’). UNCLOS does not define this. Preparatory works reveal that while States had general concerns over the conduct of unilateral activities in MDAs they did not intend to exclude them completely, in order not to mitigate the economic development of the coastal State.²⁷ The use of the expression ‘to make every effort’, applicable to both the obligation to enter into provisional arrangements and not to jeopardise or hamper, indicates that it is again an obligation of conduct and not one of result. As to the rest of the paragraph, the wording is drafted in a particularly broad and imprecise manner, in order to leave room for interpretation. According to Anderson and van Logchem, the obligation ‘limits both the scope for unilateral activities by States in areas of overlapping maritime claims, and in addition curtails the ways in which States can respond to unilaterally conducted activities there.’²⁸ They consider it difficult to establish an abstract standard for such an obligation of restraint seems difficult. Prohibited unilateral actions related to the disputed area are to be concrete and ‘somehow alter the *status quo ante* or prejudge the outcome of boundary negotiations or involve taking (or attempting to take) resources, especially non-renewable resources, from the area of overlaps.’²⁹ However, there is a consensus that the obligation of self-restraint does not prohibit all activities in an MDA.³⁰

25 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [461].

26 See, among others, BIICL Report (2016) (n 1) 14-16; Anderson, van Logchem (n 1) 212-215.

27 van Logchem (n 4) 179-181; Lagoni (n 25) 349-354.

28 Anderson, van Logchem (n 1) 216.

29 *ibid.*

30 Alexander Pröelss, Amber Rose Maggio, Eike Blitza, Oliver Daum (eds), *United Nations Convention on the Law of the Sea: A Commentary* (Beck-Hart-Nomos 2017) 578–579, 663; Kentaro Nashimoto, ‘The Obligation of Self-Restraint in Undelimited Maritime Areas’ [2019] 3 Jap Rev 29; BIICL Report (2016) (n 1) 24.



A textual analysis of paragraph 3 of Articles 74 and 83 does not reveal which activities conducted by the claimant States in MDAs fall under the obligation not to jeopardise or hamper. Yet, practical issues can be significant, considering the large number of MDAs and the growing interest of States in exploiting marine resources.

2.3. The Difficult Distinction between Lawful and Unlawful Activities in MDAs

Determining what unilateral activities breach the obligation of self-restraint can be complex. The first answers come from the limited international case law. The decisions of international courts and tribunals concern only activities conducted on the continental shelf, and not the EEZ. In *Guyana v Suriname*, Guyana had granted licenses for oil exploration in the disputed area to several private companies. During exploratory drilling, the Surinamese navy ordered the Canadian company CGX Resources Inc. to leave the disputed area and justified its acts by claiming that Guyana had breached the obligation of self-restraint (Articles 74(3) and 83(3) UNCLOS). The Tribunal first noted that the obligation was not intended to prohibit all activities in an MDA.³¹ Then, it made a distinction between activities which do not cause a physical change to the marine environment, which would 'generally' not breach the obligation of restraint, and acts that do cause a physical change, and which may jeopardise or hamper the reaching of a final agreement on delimitation.³² To that extent, the Tribunal stressed the need not to 'stifle the parties' ability to pursue economic development in a disputed area' in relation to the fact that unilateral activities should not 'affect the other party's rights in a permanent manner'.³³ Therefore, it erected the criteria of the absence of 'permanent physical impact' on the marine environment³⁴ as the threshold to evaluate the possibility to carry out activities in the disputed area, in coherence with the 'no harm' or prevention customary principle of international environmental law.³⁵ Based on this consideration, the Tribunal concluded that exploratory drilling constituted a breach of Guyana's obligation of restraint. However, it declared that allowing seismic exploration did not violate such an obligation 'in the circumstances at hand', that is, considering that both parties had issued licenses for exploration and no objections were expressed from the other. This fact-specific decision from the Tribunal means that this approach could vary in future cases, depending on context.³⁶

In the more recent *Ghana/Côte d'Ivoire* case, Ghana had authorised oil exploration and exploitation activities in the disputed area. Côte d'Ivoire argued that the activities undertaken by Ghana constituted a violation of the obligation of self-restraint as provided for in Article 83(3) of UNCLOS. The proceedings before the Special Chamber of the International Tribunal for the Law of the Sea followed two phases. Firstly, Côte d'Ivoire presented a request for provisional measures that required Ghana to suspend all ongoing activities and to abstain from granting any new licenses. The Special

³¹ *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [465].

³² *ibid* [467].

³³ *ibid* para [470].

³⁴ *ibid*.

³⁵ Consecrated for instance by the ICJ in the *Pulp Mill on the River Uruguay (Argentina v. Uruguay) (Judgement)* [2010] ICJ Rep 14 [14]. On the "no harm" principle, see also, BIICL Report (2016) (n 1) 19-21.

³⁶ *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [481].



Chamber, however, refused to order provisional measures. It recognised that exploration and exploitation activities could entail a physical change of the disputed area or that the acquisition and the use of information gathered on mineral resources could generate a risk of irreversible prejudice to the plausible rights of Côte d'Ivoire in the disputed area. It asked Ghana to 'take all necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area'. Nevertheless, the Special Chamber found that suspending all ongoing activities undertaken by Ghana could entail a risk of considerable financial loss and harm the marine environment.³⁷ Thus, Ghana could continue its activities in the MDA even though these activities could have a permanent physical impact on the continental shelf. This approach reflects the nature of the proceedings concerning provisional measures. The threshold for ordering such provisional measures is considerably higher than the one for establishing a breach of paragraph 3 of Articles 73(3) and 84(3) UNCLOS. Finally, in the phase concerning the merits, the Special Chamber considered that Ghana's exploration and exploitation activities did not constitute a breach of the obligation not to jeopardise or hamper. However, it is not certain that the Special Chamber took a different approach to the Tribunal in the *Guyana v Suriname* case. Côte d'Ivoire claimed a violation of its rights in the "Ivorian maritime area",³⁸ but activities were conducted in a maritime area that was ultimately determined to be Ghanaian. In this context, by adopting a strict interpretation of Côte d'Ivoire's claim, the Special Chamber refused to make any comment or take any decision concerning the potential violation of the obligation of self-restraint in the rest of the disputed area that was assessed to be Ivorian.

In the International Court of Justice (ICJ) case concerning *Maritime delimitation in the Indian Ocean (Somalia v Kenya)*, Somalia claimed that exploration and drilling activities in the disputed area were conducted by Kenya in violation of its obligation of restraint under Articles 74(3) and 83(3) UNCLOS. Concerning exploration activities, the ICJ decided these were 'not of the kind that could lead to a permanent physical change in the marine environment', founding its consideration on the standard established in the *Guyana v Suriname* case.³⁹ As to drilling activities, 'which are of the kind that could lead to permanent physical change in the marine environment', the ICJ considered it did not have sufficient certainty that they took place after 2009 which was the critical date of dispute.⁴⁰ The reasoning of the ICJ, which is rather short, is entirely based on the standard established by the Tribunal in the *Guyana v Suriname* case, without adding further clarification.

The contribution of these international court and tribunal decisions does not entirely satisfactorily determine the substantive scope of the obligation not to jeopardise or hamper the reaching of a final agreement. International case law offers only one standard (the 'permanent physical impact' on the marine environment) and this raises several issues. First, it seems mostly applicable to activities that take place on the continental shelf, which is more likely to suffer from a 'permanent' and 'physical' impact. Second, if such a standard is recognised as providing guidance for the interpretation of the obligation of restraint, it remains unclear. Besides, it is largely acknowledged that establishing an

37 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Provisional Measures) [2015] [88-102].

38 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (n 22) [632-633].

39 *Maritime delimitation in the Indian Ocean (Somalia v. Kenya)* (judgment) [2021] ICJ Rep 2021 [207].

40 *ibid* [209].



absolute and abstract standard based on the nature of the activities conducted in an MDA might be difficult and unnecessary.⁴¹ For instance, according to Judge Paik in a separate opinion to the judgment rendered in the *Ghana/Côte d'Ivoire* case, the obligation of self-restraint should be perceived as a result-oriented notion related to the effect of endangering or impeding the reaching of a final agreement. Accordingly, the analysis carried out by international courts and tribunals should consider the whole context in which activities are conducted, including the diplomatic relations between the claimant States.⁴² In the *Somalia v Kenya* case, the ICJ did not mention such a debate, despite the argument being raised by Somalia during the proceedings.⁴³

International case law does not clarify the application of the obligation of self-restraint to activities conducted in the EEZ. Questions can be raised but answers remain scarce. For instance, under UNCLOS, States are bound by provisions concerning the management of living resources of the sea. In particular, Article 61(2) provides that States must ensure that living resources of their EEZ are not endangered by over-exploitation. Further, States shall cooperate for the management of their shared stocks. To that extent, there is a 'delicate balance'⁴⁴ to be found between activities that permit economic development of the coastal States and those which could have a permanent impact on the marine environment. In this context, fishing in a disputed EEZ does not appear, in itself, to be a breach of the obligation not to jeopardise or hamper (considering the renewable character of fish stocks), but over-exploitation could be qualified as a breach. Therefore, claimant States should exchange information and cooperate to make sure that their fishing activities in a disputed area are sustainable.⁴⁵ The question becomes even more complicated if one claimant State decides to control or arrest vessels of the other claimant State fishing in the disputed area. It could be seen as a provocation, but it could also constitute the only means for one claimant State to force the other to abide by the obligation of restraint (see below Section 3). In such a situation, the qualification of a violation of the obligation not to jeopardise or hamper should take into consideration all the relevant circumstances.⁴⁶

3. States' Responses to the Superposition of their Legal Regimes in MDAs

The implementation by each State of its national legislation and its projects (such as seismic or other research, creation of marine protected areas) illustrates a search for effectivity ("effectivités" in French), as States are looking for confirmation of their claims. Indeed, the effective occupation of a territory is traditionally a legal means of acquiring sovereignty in international law.⁴⁷ As Anderson and van Logchem recall, the respective Articles 74 and 83 paragraph 3 UNCLOS are confined to the question of the maritime boundary and do 'not apply to the sovereign issue as such, with the result that each

41 Nashimoto (n 31) 32; BIICL Report (2016) (n 1) 24.

42 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (n 21) Separate Opinion of Judge Paik [6].

43 *Maritime delimitation in the Indian Ocean (Somalia v. Kenya)* (Reply of Somalia) [2018] [4.20-4.24].

44 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [470].

45 In that sense, see BIICL Report (2016) (n 1) 28.

46 *ibid.*

47 *ibid* 34-35.



side remains entitled, in principle, to seek by lawful means to strengthen its claim to sovereignty⁴⁸. This search for effective occupation at sea must, however, be consistent with the provisions of UNCLOS and specifically of Articles 74 and 83 when the sovereign dispute entails maritime delimitation.

Seeking to achieve effective occupation and administration in MDAs usually takes the form of a strategy of long-term validation by practice, which could lead to the abandonment of contrary claims by the other party. This unilateral reaction and the corresponding practice taking place in areas of superposition of national legal regimes is not prohibited by UNCLOS, neither is it prohibited by general international law, to a certain extent (section 3.1). However, as regards the superposition of national legal regimes resulting from disputes over maritime boundaries, obligations of cooperation and negotiation in good faith do apply in order to set a transitional legal regime for activities in the area, conducting to non-unilateral or collective reactions to the *de facto* superposition of national legal regimes, mainly through bilateral cooperation (section 3.2).

3.1. Unilateral Reactions to the Superposition of State Legal Regimes

In the period when an area of overlapping maritime claims is not covered by any provisional arrangements, the fundamental question is not only what activities may or may not be carried out unilaterally, in the disputed area (see sections 2.2. and 2.3.), but also how these activities and the legislative frameworks of the claimant States may be implemented, and how the other State can respond. Efforts toward an effective occupation through the unilateral implementation of national law by the claimant States may lead to different situations and strategies. The outcome is dependent upon several factors, such as the sovereign nature of the dispute, the relationship between the two States, their historical reaction to the dispute or their cooperation in other fields. In areas characterised by the superposition of the legal regimes of claimant States, various scenarios can be observed: either a balance between the exercise of their rights by the conflicting States, through an implementation of their obligation of restraint (section 3.1.1.); or, which is usually the case when the dispute involves issues of sovereignty, one of the two States can clearly take or try to take the upper hand over the other, through a historic and dominant *de facto* enforcement of its laws and regulations (section 3.1.2.) or through a 'robust' enforcement of its legal regime, through the mobilisation of the police at sea (section 3.1.3.). The compatibility of those reactions to UNCLOS and general public international law appears more doubtful and the latter State has consequently several means to respond.

3.1.1. The difficulty to Assess the Reasonable Exercise of their Unilateral Rights and Obligation of Self-restraint

Reading the respective Articles 74 and 83 paragraph 3 of UNCLOS – and in the light of what have been developed in sections 2.2. and 2.3. of this article – it appears that the drafters of UNCLOS found themselves facing a dilemma: on the one hand, they clearly wanted to prevent unilateral exploitation of natural resources in undelimited areas; on the other, it was not their intention to

48 See Anderson, van Logchem (n 1) 222. A distinction must therefore be made between maritime boundary questions and related sovereignty disputes to determine what activities are covered by Articles 74 and 83.



freeze all activity.⁴⁹ The balance to be struck between unilateralism and self-restraint is not easy. Indeed, does self-restraint equal complete abstention from activity? Does the absence of unilateral acts and activities in a disputed area necessarily traduce a self-limitation by a State, in the absence of an express declaration? Or is it simply the result of a lack of means, technology, or willingness to carry out activities in an area, for example because it is located too far offshore? How can we distinguish between these situations? State practice in this area is interesting but not very enlightening as to whether or not there is a deliberate and stated desire of States to restrain themselves.

Sometimes, the duty of restraint is explicitly referred to by the State themselves. For example, in a letter addressed by the Algerian Minister of Foreign Affairs to Spain on 20 June 2019, noting the overlap between the newly created EEZ of that State⁵⁰ and the Spanish EEZ,⁵¹ Algeria expressly recalls that ‘international law and State practice require that Algeria and Spain refrain, as an interim measure, from engaging in activities in this area related to their discovery rights, in particular the exploration and exploitation, conservation and management of natural, biological or non-biological resources, as provided for in Article 56 of the United Nations Convention on the Law of the Sea.’ This precision, that could be interpreted as a unilateral engagement, is particularly broad as it refers not only to activities concerning mineral resources and drilling, which are usually problematic, but also to fisheries and conservation activities, which are less likely to cause irreparable damage.

When the obligation of self-restraint is not expressly referred to, implicit respect can be deduced from unilateral state practice. For instance, in the disputed area between France and Spain, both States are conducting unilateral activities reasonably, in a peaceful manner: both have issued offshore research permits in or near this area but did not authorise the renewal of those permits nor the exploitation phase. They are cooperating in the fields of fisheries and surveillance of maritime spaces, as well as designated protected areas overlapping the disputed area, but no incidents have been reported.⁵²

These examples show that in the absence of provisional agreements of a practical nature, communication and cooperation in the conducting of activities in or near a disputed area is the most appropriate, moderate and the easiest reaction for States not to jeopardise the reaching of a final delimitation agreement, without surrendering their claims.

However, such an equilibrium appears possible only in areas where the geopolitical stakes are low and where relations between States are otherwise good and not subject to a sovereignty dispute. When the unilateral behaviour of one of the claiming States is considered as unbalanced and unlawful by the other, the latter can counter it and respond by several means. The obligation of self-

49 See the statement by the Chairman of Negotiating Group 7, NG 7/26, 26 March 1979, cited by Nicholas A. Ioannides, ‘The China-Japan and Venezuela-Guyana Maritime Disputes: how the law on undelimited maritime areas addresses unilateral hydrocarbon activities’ (2019) EJIL: Talk!, < <https://www.ejiltalk.org/the-china-japan-and-venezuela-guyana-maritime-disputes-how-the-law-on-undelimited-maritime-areas-addresses-unilateral-hydrocarbon-activities/> > accessed 17 November 2021.

50 Presidential Decree n 1896 instituant une zone économique exclusive au large des côtes algériennes [20 March 2018] Journal officiel de la République Algérienne 18.

51 Algeria, Verbal Note n 15-422/MAE/DAJ/2019 [20 June 2019] < <https://www.un.org/depts/los/LEGISLATION-ANDTREATIES/PDFFILES/AlgSpain.pdf> > accessed 14 July 2022. See Ricard, Seddik (n 11).

52 See Soualhi (n 9).



restraint limits somewhat the ways in which a State can meaningfully respond to a unilateral activity undertaken in an undelimited area. De Herdt explores several answers to the question of what responses are permissible and meaningful under international law to bring about a halt of unilateral acts conducted in disputed areas.⁵³ First, the most usual and useful means to respond to a situation considered as illegal is protestation;⁵⁴ it can be combined with a claim to an international body (for instance, the UN Security Council, as occurred in the 1976 continental shelf dispute between Greece and Turkey). Then, States can seek an adjudication through compulsory dispute resolution under Article 283 and 298 UNCLOS, as well as request the prescription of provisional measures under Article 290 UNCLOS. As we will see below in sections 3.1.2. and 3.1.3., maritime law enforcement is usually preferred by States to address unilateral conduct, potentially accompanied or justified as a countermeasure. However practically, ‘the fact remains that to delineate the legal line separating maritime law enforcement from the use of force seems to be a far from clear-cut exercise’,⁵⁵ as well as its compatibility with Articles 74(3) and 83(3) UNCLOS, as it may exacerbate the dispute.

3.1.2. The Exclusive and Prevailing De Facto Enforcement and Effectiveness of the Regime of one State over the Other

The co-existence of unilateral States’ rights and legal regimes in disputed areas may not be as balanced as has been seen elsewhere, especially when maritime claims are combined with sovereignty claims. In this context, the situation of the islands claimed by France and other States in the Indian ocean is relevant, especially regarding the Scattered Islands and the island of Mayotte, which are a ‘legacy’ of the French colonisation in this area.

Indeed, in the Scattered Islands, only France is actually exercising its *de facto* sovereignty⁵⁶. While a cooperation for the management of the islands was once envisaged, it is clear that both French and Malagasy’s authorities would interpret such cooperation as a renouncement of their sovereignty, which encourages unilateral action. The Scattered Islands are fully integrated in the French legal framework.⁵⁷ France, for instance, created a national natural park around the Glorieuses archipelago and expressed its intention to extend it to its whole EEZ.⁵⁸ Two permits for the exploration of petroleum were granted

53 Sandrine De Herdt, ‘Meaningful Responses to Unilateralism in Undelimited Maritime Areas’ [2019] 6 JMS 5.

54 Christophe Eick, ‘Protest’, *Max Planck Encyclopedia of Public International Law* (2006).

55 *ibid* 17.

56 See for a historical perspective Ricard, Robin ‘Tensions dans le canal du Mozambique et autour des îles Éparses (France / Madagascar)’, in Miron, Robin, *Atlas des espaces maritimes de la France* (2022) 223. See also the website of the TAAF, Antarctic and Austral French Territories Authority: < <https://taaf.fr/collectivites/presentation-des-territoires/les-iles-eparses/> > accessed 17 November 2021.

57 Law attaching the Scattered islands to the Antarctic and Austral French Territories (TAAF) [21 February 2007], Arrêté n°2007-18 bis creating the “Scattered District” [23 February 2007].

58 Décret no 2021-734 portant création de la réserve naturelle nationale de l’archipel des Glorieuses (Terres australes et antarctiques françaises) [8 June 2021] Journal Officiel de la République Française 0133.



in 2008.⁵⁹ France ensures the permanent presence of French military on the islands; fisheries activities are regulated by French law and scientific research activities are frequently authorised by the island's prefect. The Malagasy legal framework does not ignore the islands, but it does not either explicitly apply to their maritime areas and no control activity or effective occupation is to be mentioned.

In the archipelago of Mayotte, the situation is different but the stakes are similar. The effective application of French national legislation did not stop with the declaration of independence of the Federal Islamic Republic of the Comoros⁶⁰ and only France is exercising its jurisdiction in the maritime areas around Mayotte, without having, however, conducted activities susceptible to have permanent detrimental impacts (such as offshore drilling). Nonetheless, the Republic of the Comoros has maintained a claim of sovereignty over Mayotte, with the full support of the United Nations General Assembly (UNGA).⁶¹ Article 6 of the Comoros' Constitution includes Mayotte in the territory of the Union of the Comoros and its preamble states that it seeks to 'make the return of the island of Mayotte in its natural whole, a national priority'. Article 122 specifies that 'The Institutions of Maoré will be established as soon as the occupation of the Island ends'.

In those cases, neither France nor Madagascar or Comoros set precise coordinates for their claimed EEZ around the islands, nor date have they claimed any extended continental shelf – probably because of the absence of the criteria to make such a claim to the Commission on the Limits of the Continental Shelf –, which can be interpreted, to a certain extent, as a consideration of the claims of the other State and potentially as a 'soft' application of the obligation of restraint, according to Articles 74(3) and 83(3) UNCLOS.

These examples of an unbalanced superposition of national legal regimes in MDAs illustrate the situation in which one of the States takes precedence over the other in terms of effectivity, due to the historical context. However, this does not mean that the other State renounces its claims, so far as it keeps protesting the exercise of unilateral acts by the former. Protest and adjudication are the main means available for the other claiming State to respond. As long as the prevailing State is exercising its unilateral rights peacefully and do not cause irreversible and permanent damage to the marine environment, this behaviour may be seen as compatible not only with UNCLOS obligations but also with wider public international law.

59 The first permit has been extended until 2018 but stopped after the declaration by the French government of the end of offshore drilling in France according to the Loi no 2017-1839 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement [30 December 2017] Journal Officiel de la République Française 0305. See Léna Kim, 'The End of Offshore Drilling in France' (ZOMAD, Un observatoire de la pratique des zones maritimes disputées, 2 September 2020) < <https://zomad.eu/fr/2020/09/02/the-end-of-offshore-drilling-in-france/> > accessed 17 November 2021.

60 See Loi no 76-1212 relative à l'organisation de Mayotte [24 December 1976] Journal Officiel de la République Française 112; and Loi organique no 2010-1486 relative au Département de Mayotte [7 December 2010] Journal Officiel de la République Française 0284, article LO6111-1.

61 Which condemns the presence of France in the island of Mayotte and invite it to renounce to its project to separate this island to the rest of the Comoros archipelagos See UNGA Res 3385 (XXX) (12 November 1975) A/RES/3385(XXX) on the admission of the Comoros to membership in the United Nations, or 'Question of the Comorian Island of Mayotte', UNGA Res 31/4 (21 October 1976) A/RES/31/4.



3.1.3 The 'Robust' Enforcement of its Legal Regime by One of the Claimant States over the other through police action at sea: the limits of unilateral reactions

In their efforts to secure effectivity, some States use all the means at their disposal to assert – or impose – their sovereignty or jurisdiction over a land and/or maritime area, including through forcible action. Police activities are used as a means of strengthening the effectiveness of the regime. According to Jimenez Kwast, 'While incidents involving unilateral action against vessels of the other party quite commonly occur, they tend to cause further contention and intensify the conflict'.⁶² The distinction between law enforcement (including forcible actions authorised under the law of the sea) and use of force (in application to the Article 2.4 UN Charter) is particularly blurred.⁶³ The examples of China in the South China Sea, and Lebanon and Israel in the Mediterranean Sea illustrate this phenomenon and this difficult distinction.

China currently claims the entire South China Sea, and, more precisely, since the mid twentieth century, all waters within the 'nine-dashed line' which overlaps with waters claimed by almost every other regional State. The diverse claims became more assertive and widespread from the 1970s onwards, due to the evolution of the law of the sea and the discovery of hydrocarbon deposits. Several States of the region began occupying the different islets to demonstrate their rights. This occupation and long-term strategy of control of the islets have since taken a decidedly robustly military turn, illustrated by the construction by China of military bases in the claimed islands.⁶⁴ China transformed the natural state of several islets, initially unsuitable for permanent habitation, into artificial islands capable of hosting naval aviation activity – but also effected transformation by the continuous occurrence of altercations. Vietnam began military occupation of islands, but was forcibly removed from the Paracels in 1974; in 1988, 64 Vietnamese military personnel were killed in a Chinese intervention on Johnson Reef in the Spratly islands; on 12 March 2011, two Chinese patrol vessels approached a Philippine vessel conducting a seismic survey near Reed Bank, demanding that it cease operations. In response, the Philippines deployed an aircraft and two warships to escort the seismic vessel until it completed its mission.⁶⁵ Chinese naval militias are moreover concentrated near islands occupied by the Philippines, to control the area.⁶⁶ In Scarborough shoal, Filipino fishermen are harassed, and

62 Patricia Jimenez Kwast, 'Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Surinam Award' [2008] 13 IJCSL 49, 69-70.

63 *ibid* 58, 61, 71 and following. The author offers a detailed study on the criteria to distinguish between law enforcement at sea and the use of force, using diverse criteria: the functional objective of the forcible action, the legal basis and the purpose of the actions, the status of the subjected foreign vessel, or the location of the incident.

64 See for instance 'China Acknowledges Militarization of its Spratly Islands Bases' *The Maritime Executive* (4 November 2018) < <https://www.maritime-executive.com/article/china-acknowledges-militarization-of-its-spratly-island-bases> > accessed 17 November 2021.

65 See Jean-Paul Pancracio, 'La sentence arbitrale sur la mer de Chine méridionale du 12 juillet 2016' [2017] 18 AFRI 639, 640.

66 As well as in reaction to the arbitral award of the Permanent Court of Arbitration in the case brought to the Court by the Philippines in 2013, that China refused to implement. *In the matter of the South China Sea arbitration, before an arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the law of the sea, between the Republic of the Philippines and the People's Republic of China* (Award) [2016] PCA Rep; see also Peter Kreuzer, 'One Year after the Permanent Court of Arbitration's Decision on the South China Sea' (PRIF Blog 12 July 2017) < <https://blog.prif.org/2017/07/12/one-year-after-the-permanent-court-of-arbitration-decision-on-the-south-china-sea/> > accessed 17 November 2017.



Chinese authorities are accused of illegally exploiting protected species. Vietnam's legislature has recently passed a law that would allow the Vietnamese coast guard to fire on adversaries in disputed areas, if necessary, to 'protect sovereignty and sovereign rights in defence and security situations'.⁶⁷ Leaving aside China's excessive claims in this space, as well as the behaviours that were found to be contrary to UNCLOS in the 2016 arbitration award, one can question the compatibility of this forcible seizure of islets and adjacent maritime areas by China and the resulting increasing militarisation of the area for all the States with general public international law and particularly with the articles 74 and 83 UNCLOS.

In the Mediterranean Sea, the dispute between Israel and Lebanon is relevant. Both States have declared and fixed limits of EEZs that overlap, and have protested against the other claim. Officially, the States are at war: the maritime dispute is an aspect of a much more complex situation and a prolongation of the territorial one. The conflict was enhanced by the recent discovery of natural resources in the disputed area. Both States are conducting offshore exploitation activities, near the disputed areas, and plan to conduct activities inside the disputed areas. Therefore, to protest to the conducting of activities by each other, they strongly reinforced their military assets not only near the disputed areas⁶⁸ but also directly around gas fields and platforms.⁶⁹ To Lebanon, the unilateral exercise of sovereign authority by Israel in the region could threaten international peace and security,⁷⁰ and according to Israel, 'any non-consensual, unauthorized, economic activity in its maritime areas (...) can only jeopardize and hamper the prospects of reaching a peaceful solution to this issue'.⁷¹

These robust reactions to the superposition of national legal regimes in MDAs, including an important military dimension, appear far from the obligation to cooperate in good faith and to make every effort not to jeopardise or hamper the reaching of a final agreement. If States have a unilateral right to enforce their jurisdiction in MDAs, this right is clearly limited and conditioned by other rights and obligations. Importantly, according to Article 301 UNCLOS, 'in exercising their rights and performing their duties under this Convention, 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', the objective of UNCLOS being to promote the peaceful uses of the oceans. Therefore, as Ryzka Darmawan summarises, 'repressive and

67 'China Acknowledges Militarization of its Spratly Islands Bases' (n 65).

68 For Lebanon, through the UNIFIL peacekeepers maritime task force, UN Security Council Res 1701 (11 August 2006) S/RES/1701 (2006): see for instance Toi Staff, 'Israeli navy ship crosses into Lebanese water – report' *The Times of Israel* (Tel Aviv, 15 July 2019). See also Identical letters dated 27 February 2012 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council [2012] A/66/725-S/2012/123.

69 For instance, 'Méditerranée: Israël renforce son dispositif militaire autour de ses gisements de gaz', *La Tribune* (Paris, 22 July 2012); Nicolas Falez, 'Des drones pour surveiller les gisements de gaz en mer', *Rfi* (Jerusalem, 9 August 2011).

70 Lebanon, *Protestation letter of the Republic of Lebanon* [3 September 2011] < https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_isr_listofcoordinates_e.pdf > accessed 14 July 2022 : 'International peace and security could thus be imperiled, particularly if Israel, the occupying Power, should decide to pursue any economic activity in the aforementioned maritime area'; Lebanon, *Letter of protestation of the Permanent Mission of Lebanon to the United Nations* [26 January 2018] < https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/2018_01_26_lbn.pdf >: 'The Republic of Lebanon will not hesitate to avail itself of its inherent right to self-defense if an armed attack occurs against the economic activities carried-out in its maritime areas'.

71 Israel, *Protestation letter of the Permanent Mission of Israel to the United Nations* [11 July 2019] NV-11JULY-2019-SG.



excessive law enforcement may disrupt the maritime boundary delimitation process being carried out by both countries in undetermined waters. In addition, law enforcement by excessive use of military might also threaten international peace and security.⁷²

The incompatibility of those unilateral military measures with States' obligations under UNCLOS respecting MDAs has been underlined by the Tribunal in *Guyana v. Suriname*. Indeed, the deployment of Surinamese naval vessels to remove from the area of overlapping claim the oil rig licensed by Guyana to engage in exploratory drilling appeared to the Tribunal to be excessive, which considered that the way in which Suriname responded to unilateral drilling did not correspond to a lawful robust enforcement of the law at sea, but 'a threat of force in contravention of the Convention, the UN Charter and general international law'.⁷³ Of course, other means were available to Suriname to challenge the legality of the unilateral activities of Guyana, for example, in addition to protestation, entering into consultation or requesting urgent interim protection before an international judicial body, as occurred in *Ghana v. Côte d'Ivoire*. The Tribunal recognised, however, that force may be used in law enforcement activities if it is 'necessary, unavoidable and proportional',⁷⁴ which could then amount to countermeasures, adding to the difficulty of interpreting the rights and duties of States. The circumstances of the case appear to be of fundamental importance in applying this distinction between law enforcement operation and use of force.⁷⁵

3.2 Collective Responses to the Superposition of Legal Regimes

Although unilateral responses to assert their positions in MDAs are often their priority, State practice also shows that (1) bilateral and (2) multilateral responses are of great importance in the context of the superposition of States' legal regimes in MDAs.

3.2.1. Bilateral Cooperation: the Conclusion of Provisional Arrangements, According to UNCLOS

Bilateral cooperation is the outcome of the obligation of conduct to 'make every effort to enter into provisional arrangements of a practical nature', 'in a spirit of understanding and cooperation', in accordance with Articles 74(3) and 83(3) UNCLOS.⁷⁶ Bilateral cooperation for the conduct of activities at sea is actually the only means to make the superposition of States' legal regimes compatible, but it needs a peaceful context to be effective. Such a context is further complicated and less frequent when issues of territorial sovereignty are at stake, as States may feel that they are ceding part of their sovereignty claims and acting contrary to their traditional effective occupation-seeking conduct. The

⁷² Aristyo Rizka Darmawan, 'Law enforcement in unresolved maritime boundary: Indonesian border experience' 15.

⁷³ *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [445].

⁷⁴ *ibid.*

⁷⁵ Jimenez Kwast (n 63) 78 and 81.

⁷⁶ *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [460]. See also the BIICL Report (2016) (n 1) 14.



cooperation is also further complicated where more than two States are claiming the same maritime area, as for example regarding the Spratly islands. Bilateral cooperation, when possible, may therefore take various forms, from implicit arrangements consisting only of prior notification to moratorium or to a joint management regime.⁷⁷

Cooperation is usually sectoral. For example, France and Canada developed a strong cooperation in the field of fisheries in the maritime area surrounding Saint-Pierre-et-Miquelon. The cooperation regarding fisheries activities began in 1972 with the signature of the Agreement between Canada and France on their Mutual Fishing Relation on 27 March, modified in 1994.⁷⁸ Recalling that ‘no provision of the present agreement shall be interpreted as prejudicing the views and future claims of either party concerning internal waters, territorial waters or jurisdiction with respect to fisheries or the resources of the continental shelf’, it provides for a principle of reciprocal access to certain fishing zones, i.e. each party must allow nationals of the other party access to fishing zones under its jurisdiction. The States allocate to each other quotas for scallops, cod and other groundfish, a portion of which must be processed in the Saint Pierre and Miquelon plant to maintain some employment there. An ‘Advisory Board’, made up of Canadian and French representatives, meets at least once a year to recommend to the parties’ annual total allowable catch (TAC). Canada must also consult with France before taking any measures relating to the management and conservation of Canadian waters surrounding the French EEZ.

Sectoral bilateral cooperation may also concern mineral resources, usually embodied with the notion of ‘joint development agreements’. According to the Tribunal in *Guyana v. Suriname*, ‘joint exploitation of resources that straddle maritime boundaries has been particularly encouraged by international courts and tribunals’, as it was the case in the *North Sea Continental Shelf* case.⁷⁹ Such agreements are well developed, for instance, in the Asia-Pacific region, where they have been concluded to allow for the exploitation of maritime resources, pending final delimitation. In 1974, for instance, the Japan-South Korea Agreement concerning joint development of the continental shelf adjacent to the two countries, with a fifty-year duration was concluded.⁸⁰ Another example from West Africa is the Treaty between the Federal Republic of Nigeria and the Democratic Republic of São Tomé e Príncipe on the joint development of petroleum and other resources, in respect of

77 Following the BIICL Report, ‘the term ‘arrangements’ indicates that it need not be a treaty but may be informal or even non-binding, and ‘of a practical nature’ indicates content of an operational rather than legislative nature, consistent with the requirement that it not prejudice the final delimitation”. *ibid.* See *supra*, Section 2.2.

78 Agreement between Canada and France on their mutual fishing relations (with annex, map and exchange of letters) [1972] 862 UNTS 12353.

79 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [463]. See the *North Sea Continental Shelf Cases (Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands) (Judgement)* [1969] ICJ Rep 3 [97-99].

80 Iain Scobbie, ‘The utilization of resources in disputed waters: possible mechanisms for cooperation in the South China Sea’ [2018] 14 *Soochow Law Review* 147, 159 and following.



areas of the EEZ of the two States, of 21 February 2001⁸¹. It establishes a joint development zone, in an area where their EEZs overlap, for the orderly exploration and exploitation of petroleum and other resources and for a duration of 45 years. The agreement creates joint bodies to manage the development of the zone, the sharing of revenue between the parties, the laws and regulations to be applied in the zone, and environmental protection. Its preamble refers to Article 74(3): the agreement is ‘without prejudice to the eventual delimitation of their respective maritime zones by agreement [...]’. The long period of validity of these agreements can be explained by the fact that oil companies need security for their investments.⁸²

Bilateral cooperation can even be broader and advanced, going as far as providing for ‘co-management’ of disputed areas. As regards the disputed islet and maritime areas around Tromelin, in the Indian Ocean,⁸³ France and Mauritius initiated the idea of a co-management agreement in the 1990s. This idea, broadly supported by the Summit of Heads of State and Government of the Indian Ocean Commission (IOC) held in Saint-Denis de la Réunion on 3 December 1999, led to the signature, on 7 June 2010, of the ‘Framework Agreement between the Government of the French Republic and the Government of the Republic of Mauritius on the economic, scientific and environmental co-management of the island of Tromelin and its surrounding maritime areas.’⁸⁴ Recalling naturally the ‘without prejudice clause’,⁸⁵ fisheries, archaeological activities and protection of the environment are regulated by this instrument, through the institution of a co-management committee. An implementing agreement is annexed for each of these fields. The committee would represent each State in an egalitarian way and deliver, notably, fishery licenses. However, concerning surveillance and control activities, which have a strong sovereignty dimension, states only plan to reinforce their cooperation. Nevertheless, the ratification of this agreement has been blocked, since 2012, especially by the French National Assembly: some deputies still fear that the agreement would lead to the recognition of the validity of Mauritian claims, and amount to a renunciation of French sovereignty over the island. The process is also blocked on the Mauritian side, for the same reasons. Following Article 18 of the Vienna Convention on the Law of Treaties, the signature of this agreement obliges, nonetheless, parties at least ‘not to defeat the object and purpose’ of the treaty before its entry into force, ‘until it shall have made its intention clear not to become a party to the treaty’.

81 Treaty between the Federal Republic of Nigeria and the Democratic Republic of São Tomé e Príncipe on the joint development of petroleum and other resources, in respect of areas of the EEZ of the two States [2001].

82 See BIICL Report (2016) (n 1) 15.

83 See Denys-Sacha Robin, ‘Le récif de Tromelin, France/Maurice’ (ZOMAD, Un observatoire de la pratique des zones maritimes disputées, May 2020) 7 <<https://zomad.eu/fr/ind03-france-mauritius/>> accessed 17 November 2021 and Denys-Sacha Robin ‘La zone maritime disputée entre la France et Maurice autour du récif de Tromelin’ [2020] 65 AFDI 579.

84 Accord-cadre entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur la cogestion économique, scientifique et environnementale relative à l’île de Tromelin et à ses espaces maritimes environnants (ensemble deux annexes et trois conventions d’application) [2010].

85 Article 2: «rien dans le présent accord, ni aucun acte en résultant, ne peut être interprété comme un changement de la position [française ou mauricienne], en ce qui concerne la question de la souveraineté ou des compétences territoriales et maritimes sur l’île de Tromelin et les espaces maritimes environnants».



Finally, the claiming States can directly agree on a 'provisional boundary line', in order to clarify the areas where each can operate in a temporary manner. The Agreement on provisional arrangements for the delimitation of the maritime boundaries concluded between Algeria and Tunisia on 11 February 2002 is one example: it established, after a 1995 incident that resulted in the death of two trawler fisherman, a provisional single maritime boundary between the two States, while referring to UNCLOS, and including a without prejudice clause. It was conducted for six years, after which the parties undertook to agree on a definitive maritime boundary or extend or revise the agreement (art 9 and 10). The final agreement was reached on 11 July 2011.⁸⁶

3.2.2 Multilateral Responses

Bilateral cooperation being the outcome of the obligation of conduct contained in Articles 74(3) and 83(3) UNCLOS, one may wonder if there is some room for plurilateral or multilateral cooperation, or, rather, plurilateral or multilateral responses. Indeed, third parties to a dispute often take a stand and either affirm their position by recognising a State or a situation, or through protest. Does this reaction of third parties have a role in the persistence or otherwise the settlement of the dispute? A few examples show that although third-party States or organisations may in theory have an important role in the settlement of the dispute, in practice their intervention does not really influence the situation and is more akin only to position-taking.

The case of Cyprus is a good example of the regional consequences of a situation and the possible involvement of third States and organisations in a territorial dispute. Indeed, the activities located off the coast of Cyprus crystallise the tensions between the Republic of Cyprus and Turkey, but also the tensions that arise from it with the other regional States. These activities are numerous and include hydrocarbon exploration or drilling activities, laying of submarine cables, scientific research, electrical connections. It is mainly the activities relating to hydrocarbons which have prompted the greatest number of incidents between the States, ranging from the denunciation of the 'harassment' of Cypriot vessels by Turkish frigates to the arrest by Turkish authorities of Egyptian fishermen working on a Cypriot-flagged vessel. Turkey and the Turkish federal State of Cyprus concluded an agreement on 21 September 2011, delimiting their continental shelves, in order to allow for exploration permits. This is contested by the Republic of Cyprus, and further fuelled the dispute.⁸⁷

To overcome the impasse of this complex and historic dispute, solutions have been proposed by different actors, though without an agreement being reached. The European Union, and a large number of third States comment, therefore, on the current situation of this dispute by frequently attributing to Turkey violations of international law. For instance, the EU, which recognises 'only the

86 Scheyma Djaziri, 'La délimitation des espaces maritimes entre la Tunisie et l'Algérie' [2017] 22 ADM 43.

87 See Letter dated 25 April 2014 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General [29 April 2014] A/68/857 and Nikolaos Ioannidis, 'The Continental Shelf Delimitation Agreement Between Turkey and "TRNC"' (2014) *EJIL: Talk!* < <https://www.ejiltalk.org/the-continental-shelf-delimitation-agreement-between-turkey-and-trnc/> > accessed 17 November 2021.



Republic of Cyprus as a subject of international law,⁸⁸ has expressed several times its 'serious concern about the renewed tensions in the Eastern Mediterranean and urged Turkey to show restraint and to respect Cyprus' sovereignty over its territorial sea and Cyprus' sovereign rights in its exclusive economic zone'.⁸⁹ It 'urgently calls on Turkey to cease these actions and respect the sovereign rights of Cyprus to explore and exploit its natural resources in accordance with EU and International Law',⁹⁰ and 'strongly condemns Turkey's continued illegal actions in the Eastern Mediterranean and the Aegean Sea'.⁹¹ The EU, moreover, decided to impose sanctions on Turkey in July 2019.⁹² Some States, like France or the United Kingdom, officially adopted the same position.⁹³

The role of the United Nations in these contexts can also be stressed. The Security Council as well as the UNGA adopted several resolutions where they took position for one claimant State, recalling the obligation to comply with international law. The Security Council asked Turkey, after the de facto separation of the island between the Republic of Cyprus and the Turkish Federated State of Cyprus in the 1970s, to respect the sovereignty of the Republic of Cyprus.⁹⁴ In other cases, it is the UNGA that condemned, for instance and as mentioned above, the presence of France in the archipelago of Mayotte, inviting it to renounce to its project to separate this island to the rest of the Comoros archipelago.⁹⁵

4. Conclusion

Superposition of national legal regimes in MDAs is a classic and normal phenomenon. It is however governed by a set of international rules provided by UNCLOS: not all activities in MDAs are permissible. Claimant States are bound by a general obligation of restraint that, at the very least, imposes a duty not to harm the marine environment in a permanent way. Besides and in order to achieve this obligation, States are also required to negotiate in good faith provisional arrangements of a practical nature that are meant to limit conflicting national legislation and conflicting uses at sea. In the period when a maritime overlapping claims area is not covered by any provisional arrangement

88 Council of the European Union, Enlargement: Turkey; Declaration by the European Community and its Member States, C/05/243.

89 See, for instance, the document European Council (23 and 24 October 2014) – Conclusions [24 October 2014] EUCO 169/14, CO EUR 13, CONCL 5.

90 European Council (22 March 2018) – Conclusions [23 March 2018] EUCO 1/18, CO EUR 1, CONCL 1.

91 *ibid.*

92 European Council (20 June 2019) – Conclusions [20 June 2019] EUCO 9/19, CO EUR 12, CONCL 5 [17].

93 See, for instance, the website of the French Ministry of Foreign Affairs, France-Diplomatie, Chypre (5 October 2019), and of UK Ministry of Foreign Affairs, Press release, 'The President of the Republic received the UK's Minister for Europe' (4 October 2019).

94 Security Council Res 541 (18 November 1983) S/RES/541(1983) and Security Council Res 550 (11 May 1984) S/RES/550(1984).

95 See for instance UNGA Res 3385 (XXX) (12 November 1975) A/RES/3385(XXX) on the admission of the Comoros to membership in the United Nations, or 'Question of the Comorian Island of Mayotte', UNGA Res 31/4 (21 October 1976) A/RES/31/4.



and bilateral cooperation is not possible because of the tense context between the States, the activities in the area and the legislative frameworks of the claimant States may be challenged by the other State. Their legality is not always clear. To date, conflicts arising from the overlapping legal orders of States in MDAs have been resolved by international courts on a case-by-case basis, without a consensual and generalised interpretation of the self-limitation obligation emerging. Nevertheless, case law, combined with observation and analysis of State practice, is likely to shed more light on how States interpret UNCLOS and this obligation in the future.