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Brace for Impact

Military Activities in the EEZ and Varying State Practice

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Abstract

The issue of the legality of military activities conducted in the exclusive economic zones of other states is a contentious issue within the law of the sea. This contentiousness stems from the ambiguity of several key provisions of UNCLOS. In turn, this ambiguousness has resulted in varying interpretations of UNCLOS and a sharply divided state practice. This has also resulted in a number of serious international incidents, including an incident which occurred in early 2022 between Russia and Ireland where the former planned to conduct military exercises in Ireland's exclusive economic zone. In an attempt to settle this contentious issue, the current law regulating the exclusive economic zone, three varying interpretations of UNCLOS as well as state practice is determined and analysed. It is concluded that states have the right under Article 58 of UNCLOS to conduct military activities within the exclusive economic zone of another state without the consent of the coastal state. This right, however, is qualified by the obligation of due regard and the exercise of this right may not amount to a threat or use of force against the coastal state.

Keywords: Exclusive Economic Zone · EEZ · Military Activities · Article 58 of UNCLOS · Due Regard · Peaceful Purposes

Table of Abbreviations

DGPS	Differential Global Positioning System
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishery Zone
GPS	Global Positioning System
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
IMO	International Maritime Organisation
ITLOS	International Tribunal for the Law of the Sea
MSR	Marine scientific research
Nm	Nautical miles (1 nm = 1.852 km)
UK	United Kingdom of Great Britain and Northern Ireland
UN Charter	Charter of the United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS III	Third Conference on the Law of the Sea
US	United States of America

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1 An Ambiguous and Contentious Issue

1.1 Background

The legality of states conducting military activities, such as military exercises and military survey activities, within the exclusive economic zones (EEZs) of other states is a contentious issue within the law of the sea. The United Nations Convention on the Law of the Sea (UNCLOS), the leading authority, is silent regarding the legality of such activities. This has led to states and commentators having different interpretations as to the legality of such activities and state practice appears to be sharply divided. One such interpretation is that states have the right to conduct a variety of military activities within the EEZ of another state without prior notice or consent. This interpretation relies primarily on the legislative history and text of Article 58 of UNCLOS. It is shared by, for instance, the US,[1] Italy and the Netherlands. Others have made the opposite interpretation, arguing that the right to conduct military activities is not included in Article 58 of UNCLOS and/or that military activities breach the principle of peaceful uses of the seas. Consequently, the coastal state has the right to both restrict and prohibit states from conducting military activities within its EEZ. This interpretation is shared by, for instance, Brazil, Bangladesh and China. Another interpretation is that the issue of the right to conduct military activities in foreign EEZs is to be regarded as a matter of residual rights. Therefore, any dispute regarding such activities is to be resolved in keeping with Article 59 of UNCLOS. For example, Cabo Verde and Uruguay claim that residual rights fall to the coastal state while Italy and Germany assert that the coastal state does not enjoy any residual rights in its EEZ.

These varying interpretations and uncertainties as to the legality of such activities under UNCLOS have resulted in several serious incidents. In March 2001, the USNS *Bowditch*, a hydrographic survey ship flying the flag of the US, was confronted by a Chinese frigate when conducting military survey operations in China's EEZ and ordered to leave the area. *Bowditch* complied but returned to complete its survey operations a few days later accompanied by an armed US escort, but not before the US embassy had filed a diplomatic protest with China's Ministry of Foreign Affairs.[2] Soon after, in the so-called EP-3 incident which occurred in

[1] Note that the US is not a state party to UNCLOS. Nevertheless, the US was involved in the negotiations of UNCLOS and has made its view on particular provisions pertaining to the EEZ regime of UNCLOS and their applicability to military activities clear. One must also remember that the EEZ regime is generally considered to be customary international law, thus legally binding the US to the EEZ regime. The customary law nature of the EEZ regime is discussed further under part 2.1.2.

[2] Raul Pedrozo, 'Close Encounters at Sea' (2009) 62 Nav War Coll Rev 101, 101.

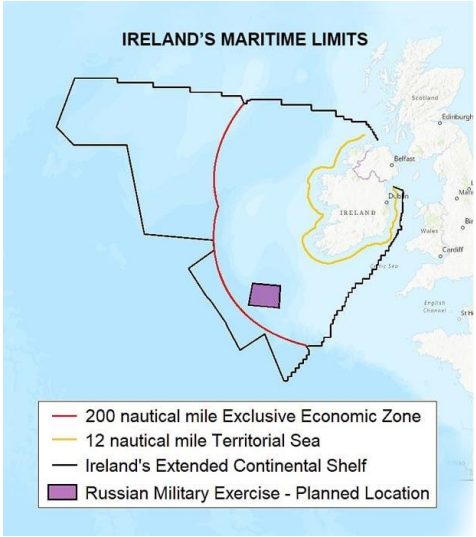
April 2001, a Chinese fighter aircraft intercepted and collided with a US EP-3 aircraft conducting a reconnaissance flight in China's EEZ. After several close approaches, one of the Chinese aircraft lost control and was cut in half while the US aircraft received extensive damage. The US aircraft had to make an emergency landing on China's Hainan Island, however, despite ejecting from the aircraft after the collision, the pilot of the Chinese aircraft was never found and presumed dead.[3] Another incident involving China and the US occurred in March 2009. The USNS *Impeccable*, a US ocean surveillance ship, was operating in China's EEZ when it was harassed and surrounded by five Chinese vessels. After having to take emergency action to avoid colliding with two of the Chinese vessels, the *Impeccable* left the area. The incident was met with protest from the US government which claimed that the actions of the Chinese vessels were unlawful and reckless. In response to this, China argued that the presence of the *Impeccable* had violated both Chinese and international law. Under the escort of a US guided-missile destroyer, the *Impeccable* returned to the area the following day.[4] These incidents show a pattern of conduct: the US enters China's EEZ and conducts its military activity, Chinese vessels intercept and force the US vessels to leave its EEZ with reference to both domestic and international law, only for the US vessels to return to the area escorted by armed vessels.

The aforementioned incidents between China and the US perfectly exemplify the divide in state practice and the varying interpretations of UNCLOS. China has expressed the view that military activities cannot be conducted in its EEZ without its consent, a state practice which corresponds to the interpretation that UNCLOS does not afford states the right to unilaterally conduct military activities in the EEZs of other states without prior notice or consent. The US has made the opposite interpretation, claiming that states do have the right to conduct military activities in foreign EEZs even without prior notice or coastal state consent. The opposing views of China and the US are most likely the reason why these incidents occurred. If China shared the US interpretation it would not have intercepted and restricted the US from conducting the activities in the aforementioned incidents. Likewise, if the US shared the Chinese interpretation it would not have conducted those activities without China's consent. The fact remains, however, that they do not share the same interpretation of UNCLOS and therefore the state practices of these states differ.

[3] Pedrozo, 'Close Encounters at Sea' (n 2) 107.
[4] Pedrozo, 'Close Encounters at Sea' (n 2) 101-102.

The fact that the aforementioned incidents took place some time ago should not, however, give anyone the impression that states are not currently engaging in military activities in foreign EEZs. The planned Russian military exercises due to take place in the Irish EEZ as recently as early 2022 clearly illustrate that the phenomenon of states conducting military activities in foreign EEZs remains a contemporary and contentious issue.

The Russian news agency TASS confirmed on 20 January 2022 that Russia was going to conduct a series of major military exercises. A few days after this confirmation it became evident that one of the areas in which Russia had planned to conduct these military exercises was within the Irish EEZ, approximately 240 km (≈ 130 nm) south-west of the Cork coastline.[5] The military exercises were due to take place from 3 February until 8 February.[6] Ireland was notified by Russia of its intention to conduct military exercises within the Irish EEZ.[7] Simon Coveney, the Irish Minister for Foreign Affairs and Defence, expressed that he had made it clear to the Russian ambassador to Ireland that the proposed military exercises were not welcome, but that Ireland had no power to prevent them.[8] Mr Coveney further expressed that states under UNCLOS and international law are entitled to carry out military exercises within foreign EEZs.[9] During this time, tensions between Russia and Ukraine had heightened and the proposed location and timing of the military exercises caused concern among Irish citizens and within the government.[10]



Shane Mulcahy, 'The law about military exercises in Irish waters' *Law Society Gazette* (Dublin, 5 April 2022) 43 <https://www.lawsociety.ie/globalassets/documents/gazette/gazette-pdfs/gazette-2022/april-2022-gazette.pdf#page=43> accessed 19 September 2022.

[5] Shane Mulcahy, 'The law about military exercises in Irish waters' *Law Society Gazette* (Dublin, 5 April 2022) 41 <https://www.lawsociety.ie/globalassets/documents/gazette/gazette-pdfs/gazette-2022/april-2022-gazette.pdf#page=43> accessed 19 September 2022.
[6] Daniel McConnell and Elaine Loughlin, 'Russian naval exercises 'a significant worry' to Ireland as warships approach' *Irish Examiner* (Cork, 27 January 2022) <https://www.irishexaminer.com/news/arid-40794201.html> accessed 19 September 2022.
[7] EU Reporter, 'Coveney says Russian military exercises 'on the western borders of the EU' are not welcome' (24 January 2022) <https://www.youtube.com/watch?v=hRkPAj0J_ps> accessed 8 November 2022.
[8] BBC, 'Ireland tells Russia live-fire naval exercise is 'not welcome'' *BBC* (24 January 2022) <https://www.bbc.com/news/world-europe-60113233> accessed 19 September 2022.
[9] Jack Horgan-Jones, 'Ireland raises concerns with Russia over planned naval exercises' *The Irish Times* (Dublin, 24 January 2022) <https://www.irishtimes.com/news/ireland/irish-news/ireland-raises-concerns-with-russia-over-planned-naval-exercises-1.4783844> accessed 8 November 2022.
[10] See McConnell and Loughlin (n 6).

In response to being notified of Russia's plan to conduct military exercises within the Irish EEZ, the Irish Aviation Authority gave a notice to airmen that it would temporarily close the airspace above the relevant area for flights.[11] The Irish Department of Transport also issued a marine notice to all seafarers, warning them about the serious safety risks in the area where the exercises were due to take place and advising them to navigate their vessels in such a manner that safety was ensured at all times. In the notice, the Department of Transport also warned that the exercises would include the launching of rockets and naval artillery. This was the first time in the past two decades that the Department of Transport had issued a marine notice in relation to military exercises conducted by a foreign state.[12]

In addition, Irish fishermen planned to peacefully disrupt the Russian plans. The chief executive of the Irish South and West Fish Producers Organisation stated that the area in which the military exercises were due to take place was of high importance for fishermen and that they wanted to protect the marine life and biodiversity. The chief executive also stated that the fishermen should be entitled to fish in the area and that the Russian warships should not conduct war games in that area if they were fishing there.[13] Up to 60 trawlers were expecting to fish in the area of the exercises, an area which Irish fishermen considered to be their traditional fishing grounds.[14] In response to the plans to peacefully disrupt the Russian plans, Tánaiste Leo Varadkar, the deputy head of the government of Ireland, urged the fishermen not to put themselves at risk.[15] Taoiseach Micheál Martin, the prime minister of Ireland, was also concerned for the safety of the fishermen and warned them to exercise caution.[16]

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[11] Horgan-Jones (n 9).
[12] Conor Gallagher and Simon Carswell, 'Maritime warning on Russian navy drills is first for foreign military in 20 years' *The Irish Times* (Dublin, 28 January 2022) <https://www.irishtimes.com/news/ireland/irish-news/maritime-warning-on-russian-navy-drills-is-first-for-foreign-military-in-20-years-1.4788228> accessed 9 November 2022.
[13] Vivienne Clarke, 'Irish fishers to peacefully disrupt Russian plans for naval exercise off Cork coast' *Irish Examiner* (Cork, 25 January 2022) <https://www.irishexaminer.com/news/munster/arid-40792710.html> accessed 19 September 2022.
[14] Sarah Burns and Simon Carswell, 'Russia moves naval exercises outside Ireland's Exclusive Economic Zone' *The Irish Times* (Dublin, 29 January 2022) <https://www.irishtimes.com/news/politics/russia-moves-naval-exercises-outside-ireland-s-exclusive-economic-zone-1.4789024> accessed 8 November 2022.
[15] Daniel McConnell, Elaine Loughlin and Cate McCurry, 'Russian invasion of Ukraine would be 'very difficult for the world to deal with', warns Taoiseach' *Irish Examiner* (Cork, 25 January 2022) <https://www.irishexaminer.com/news/arid-40793067.html> accessed 19 September 2022.
[16] Burns and Carswell (n 14).

On 29 January 2022, Mr Coveney confirmed that he had written to the Russian defence minister Sergey Shoigu requesting Russia to reconsider the proposed military exercises and that he had since received confirmation that Russia would relocate its military exercises outside of the Irish EEZ.[17] Yuriy Filatov, the Russian ambassador to Ireland, stated that Mr Shoigu made the decision to relocate the proposed military exercises as a gesture of goodwill and in an effort not to obstruct the fishing activities of Irish vessels.[18] Mr Filatov had previously expressed that no harm was intended and that the military exercises were in no way a threat to Ireland.[19]

However, was Mr Coveney correct when stating that states in accordance with UNCLOS and international law are entitled to carry out military exercises within foreign EEZs and that Ireland had no power to prevent Russia from conducting military exercises within the Irish EEZ? Would it indeed have been permissible, under the international law of the sea, for Russia to conduct the proposed military exercises? Would it have been permissible to conduct such exercises without prior notification or authorisation? Are there other states which conduct military activities within foreign EEZs? Are there states which restrict or prohibit military activities conducted by other states within their EEZs? This incident is a clear and illustrative example of the tensions and uncertainties that can arise when a state conducts, or plan to conduct, military activities within another state's EEZ.

In light of the various incidents mentioned it is clear that the silence of UNCLOS and the apparent divide in state practice pose a problematic issue on both a theoretical and practical level. In an effort to try and resolve this issue, it is therefore important to further analyse the legality of states conducting military activities within the EEZs of other states as well as state practice pertaining to this issue.

1.2 Purpose, Object and Scope

1.2.1 Purpose

The issue of whether military activities can be legally conducted within the EEZ of another state is problematic not only on a theoretical level but also on a practical level. The ambiguousness of UNCLOS, the primary authoritative source of the international law of the

[17] Burns and Carswell (n 14).
[18] Burns and Carswell (n 14).
[19] Burns and Carswell (n 14).

sea, has resulted in commentators and states alike having starkly different interpretations. This has, as illustrated by the various altercations between the US and China and the Russia-Ireland incident, resulted in several international incidents with occasionally fatal consequences. The varying interpretations and state practices seemingly contribute to discord, which in turn could result in a flare-up of the international law of the sea as we know it.

Accordingly, the purpose of this thesis is to determine and analyse the legality of states conducting military activities within the EEZs of other states as well as determine and analyse state practice pertaining to states conducting such activities within the EEZs of other states.

1.2.2 Object

The aim of the thesis is thus to analyse the legality of states conducting military activities within the EEZs of other states as well as state practice relating to this issue. With the present purpose and aim in mind, the object of the thesis can be summarised as follows:

- What is the current law on military activities conducted by states within the EEZs of other states? How has the law been interpreted?
- What is state practice regarding states conducting military activities within the EEZs of other states? How are the state practices of different states similar to or different from each other? In what way are the state practices compatible or incompatible with the law?

1.2.3 Scope

"Military activities" is a broad term which encompasses activities such as (but not limited to) surveillance and reconnaissance, marine data collection, military survey activities, testing and use of weapons, military exercises, submarine operations, aircraft carrier flight operations et cetera.[20] For the purpose of this thesis, military activities will be analysed generally, however, special attention will be put on military exercises[21] and military survey activities (including

[20] Raul Pedrozo, 'Military Activities in the Exclusive Economic Zone: East Asia Focus' (2014) 90 Int'L L Stud 514, 517.

[21] A *military exercise* can be defined as 'any activity involving the operation of actual military forces in a simulated hostile environment. Here, the key words are *forces* and *simulated*. (…) [T]rue exercises are characterized by real-time operation of ships and aircraft. These forces generally expend real or simulated weapons against some "enemy" forces'. Peter P Perla, 'War Games, Analyses, and Exercises' (1987) 40 Nav War Coll Rev 44, 45.

military surveys[22] and hydrographic surveys[23]). While it is desirable to ascertain and analyse the applicable law and state practice regarding military activities generally, military exercises and military survey activities stand out as some of the most contentious military activities being conducted by states in the EEZs of other states,[24] making these activities especially relevant to analyse. Furthermore, as I will later describe in the methodology, the Russia-Ireland incident (i.e., an incident concerning military exercises) will be used in relation to the analysis of the thesis as I will apply the various interpretations and state practices to the incident. It follows, therefore, that the state practices analysed will primarily be constrained to state practice concerning military exercises and military survey activities. Consequently, state practice in relation to, for example, restrictions upon the freedom of navigation and overflight for military vessels will not be analysed in depth. It is beyond the scope of this thesis to examine state practice in relation to any and all military activities. It is also important to note that only "obvious" state practice will be analysed. By this, I mean that the primary state practice that will be analysed is state declaratory practice where states have clearly given their interpretations of UNCLOS and customary international law as well as domestic legislation. It is outside the scope of this thesis to investigate the state practices of states who have not made a declaration, passed domestic legislation or otherwise made their interpretation of the law evident.

1.3 Methodology and Materials

1.3.1 Methodology

The primary method used in order to fulfil the purpose of this thesis is *the legal dogmatic method*. This method entails using and analysing generally accepted sources of law in an effort to determine the current law or to solve a legal problem. It can also be utilised to suggest changes as well as to present critique of the current legal position.[25] As earlier stated,

[22] A *military survey* in the context of the EEZ can be defined as an activity undertaken in the EEZ which involves marine data collection for military purposes. A military survey may include marine geological, chemical, acoustic, biological, geophysical, hydrographic and oceanographic data. J Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (3rd edn, Martinus Nijhoff 2012) 417.

[23] A *hydrographic survey* is an activity 'undertaken to obtain information for the making of navigational charts and for the safety of navigation'. These surveys include the determination of hazards for navigation, the direction and force of currents, the depth of the water, the nature and configuration of the ocean floor as well as times and heights of tides and water stages. The information collected is then used to produce nautical charts that support the safety of navigation. Roach and Smith (n 22) 416.

[24] See e.g. Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn, Cambridge University Press 2019) 442 and 469.

[25] Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv and Mauro Zamboni (eds), *Juridisk metodlära* (2nd edn, Studentlitteratur 2018) 21-26.

part of the purpose of this thesis is to determine and analyse the current law regulating military activities conducted in foreign EEZs. Utilising the legal dogmatic method will allow me to determine and analyse the current law on the issue at hand as well as to present critique relating to it. Consequently, the determination and analysis of the relevant law will, in accordance with the legal dogmatic method and Article 38(1) of the ICJ Statute, be based on international conventions, international custom, general principles of law as well as judicial decisions and doctrine.

Elements of *the comparative legal method* will also be used. The objective of this method is to compare different legal systems (or parts of legal systems) with each other in an effort to understand the differences and similarities between different legal systems.[26] One part of the purpose of the thesis is to analyse the existing state practice relating to states conducting military activities within the EEZs of other states. During the examination of the state practices of various states influences from their domestic legal system in the form of, for example, domestic legislation will be analysed in relation not only to the applicable international law but also to the state practices of other states. Utilising elements of the comparative legal method will allow me to compare relevant parts of different legal systems not only with the applicable international law but also with each other, something which will deepen the analysis of the thesis.

Furthermore, an illustrative example in the form of a real-life event will be utilised in an effort to make the information presented in the thesis more approachable and understandable for the reader. The real-life event used is the proposed Russian military exercises in the Irish EEZ in early 2022. This particular incident was primarily chosen for two reasons: because it occurred very recently and because the proposed military activity was never actually conducted. As a result, a more theoretical analysis can be conducted rather than simply applying the law to a number of fixed outcomes. By utilising this example, the reader will be able to keep an example in the back of their head when approaching the information, which hopefully will make it easier for the reader to comprehend the complex nature of the issue. The example will also be utilised in relation to the analysis of the thesis. After having analysed the varying interpretations of UNCLOS and state practice, these will be applied to the incident in an effort to highlight the different aspects of the present issue. More specifically, each line of

[26] Filippo Valguarnera, 'Komparativ juridisk metod' in Maria Nääv and Mauro Zamboni (eds), *Juridisk metodlära* (2nd edn, Studentlitteratur 2018) 143.

interpretation and state practice will be used to highlight and analyse the possible outcomes, consequences and possibilities that could have occurred if the military exercises in the incident had taken place. Applying the interpretations and state practices to a real-life event will further illustrate the variations and discord between the different interpretations and state practices and what consequences or possibilities such divergence might bring.

1.3.2 Materials

By virtue of using the legal dogmatic method, the generally accepted sources of law are the main sources used throughout this thesis. Article 38(1) of the ICJ Statute prescribes that international conventions, international custom and the general principles of law recognised by civilised nations are the primary sources of international law. Judicial decisions and the teachings of the most highly qualified publicists (i.e., doctrine) are subsidiary means of determining international law and are not considered to be sources of international law. Judicial decisions and doctrine can nevertheless be used to determine the existence and scope of rules found in the primary sources of international law.[27] In accordance with Article 38(1) of the ICJ Statute, the primary materials used for the thesis will be (where applicable) international conventions, international custom, general principles of law as well as judicial decisions and doctrine.

Furthermore, there is a wide variety of materials and sources that can be used to ascertain state practice. Examples of such materials are treaties, domestic legislation, declarations, policy statements, diplomatic correspondence and reports of military and naval activities.[28] In order to analyse state practice effectively and comprehensively, it is therefore essential to also use additional materials not encompassed by Article 38(1) of the ICJ Statute.

Other materials of relevance which will be utilised are books, journal articles, newspaper articles as well as other secondary sources where appropriate. These materials will primarily be utilised during the analysis of the varying interpretations of the law. They will also be utilised during the determination and interpretation of the current law.

[27] Stephen Hall, 'Researching International Law' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 270-271.
[28] Hall (n 27) 259.

An important factor to consider in relation to the materials is language. The materials used are more or less exclusively in English as I am only fluent in English and Swedish. While there are likely various important and valuable materials in different languages that could contribute to the thesis, the language barrier naturally makes materials not written in English or Swedish inaccessible.

1.3.3 Other Considerations

The referencing style used in this thesis is the fourth edition of OSCOLA (Oxford University Standard for the Citation of Legal Authorities) and OSCOLA 2006 Citing International Law Sources Section.[29]

1.4 Outline

The thesis is divided into five chapters. *Chapter 1* introduced and contextualised the issue of the thesis. This was done by introducing various incidents that have occurred as a direct result of this issue, including the Russia-Ireland incident that will be used in relation to the analysis of the thesis. The purpose, object and scope of the thesis were then described, followed by an account of the methods and materials used. *Chapter 2* begins with an account of the genesis, development and legal status of the EEZ. It then continues with a description of the nature and scope of the sovereign rights, jurisdiction and duties the coastal state enjoys within its EEZ. The nature and scope of the rights and duties third states enjoy within the EEZ of the coastal state are then described. After this description, the issue of the attribution of residual rights is explained. The sovereign immunity of warships and flag state jurisdiction are also briefly touched upon. Finally, an account for the apparent silence of UNCLOS with regard to military activities conducted in foreign EEZs is given. With the silence of UNCLOS in mind, *chapter 3* details and analyses three different interpretations of UNCLOS's provisions. Each interpretation is analysed separately and begins with a description and analysis of arguments made by several commentators in support of each interpretation. State practice supporting each of these interpretations is then described and analysed. This is followed by a summary which further examines and consolidates the main arguments raised in support of each interpretation. In *chapter 4*, the Russia-Ireland incident is analysed in relation to each of the

[29] Donal Nolan and Sandra Meredith (eds), *OSCOLA: The Oxford University Standard for Citation of Legal Authorities* (4th edn, Hart Publishing 2012); University of Oxford, 'OSCOLA: The Oxford University Standard for Citation of Legal Authorities' (*University of Oxford*) <https://www.law.ox.ac.uk/oscola> accessed 14 September 2022.

interpretations detailed and analysed in chapter 3. The chapter begins with an analysis of which interpretation(s) Russia and Ireland, based on the facts of the incident, appear to support. This is followed by an analysis of whether the actions Russia and Ireland took during the course of the incident would be considered to be in conformity with UNCLOS depending on the interpretation applied. *Chapter 5*, the final chapter, describes the key conclusions reached throughout the analysis in chapters 3 and 4. Based on the arguments and state practices raised in support of the various interpretation of UNCLOS I reach a conclusion as to which interpretation I consider the most logical and convincing. Finally, I conclude the thesis by providing some concluding remarks, observations and reflections.

2 The Exclusive Economic Zone – A Revolution

2.1 The Genesis, Development and Legal Status of the Exclusive Economic Zone

2.1.1 Genesis and Development

One of the major motivations for the development of the EEZ 'was the ambition of southern states for a new international economic order in which they would obtain a fair share of coastal marine resources, including both living and non-living resources'.[30] In fact, the origin of the concept of the EEZ can be traced back to the practice of several Latin American states after the Second World War. In 1947, Chile and Peru respectively claimed 200 nm of the sea adjacent to their coasts for the exercise of full sovereignty. By claiming 200 nm, Chile and Peru could reach currents particularly rich in living species. Soon after, Costa Rica (1948), El Salvador (1950) and Honduras (1951) also claimed 200 nm.[31] Subsequently, after the First and Second UN Conferences on the Law of the Sea (1958 and 1960[32]), more Latin American coastal states expanded their marine spaces by claiming 200 nm for the exercise of full sovereignty. Ecuador and Argentina expanded their claims in 1966, Panama in 1967, Uruguay in 1969 and Brazil in 1970.[33]

However, it became clear that the various maritime powers could not allow states to make such extensive territorial sea claims, since this would deter both military and economic

[30] Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn, Hart Publishing 2016) 85.
[31] Tanaka (n 24) 149.
[32] Tanaka (n 24) 28 and 31.
[33] Tanaka (n 24) 150.

interests. Ahead of the Third UN Conference on the Law of the Sea (1973-1982) Kenya proposed, in the spirit of compromise, the concept of the EEZ.[34] The EEZ concept obtained general acceptance early on in the negotiations at UNCLOS III, although a balance had to be struck between the interests of coastal states and the interests of geographically disadvantaged, landlocked and maritime states before the EEZ text was accepted.[35] UNCLOS III ultimately led to the adoption of UNCLOS and its EEZ regime in 1982, something which represents a revolutionary development of the law of the sea.[36] Due to the balancing of interests and the compromise that had to be achieved during the negotiations, UNCLOS is often referred to as a "package deal".[37] This is reflected in Article 309 of UNCLOS, which clearly stipulates that states are unable to make reservations or exceptions to UNCLOS unless expressly permitted by other provisions of UNCLOS.[38] UNCLOS entered into force on 16 November 1994 and has as of July 2020 no less than 168 parties.[39]

With the introduction of the EEZ, the following maritime zones are at present recognised by the international law of the sea: the internal waters, the territorial sea, the contiguous zone, the EEZ, the continental shelf, archipelagic waters, international straits, the high seas and the Area.[40]

2.1.2 Legal Status

Article 55 of UNCLOS prescribes that the EEZ is 'an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in [Part V of UNCLOS] (…)', making it clear that the EEZ is not part of the territorial sea. Consequently, the coastal state does not have territorial sovereignty over its EEZ.[41] Article 86 of UNCLOS stipulates that the provisions applicable to the high seas do not apply to the EEZ, though the freedoms of the high seas apply as far as they are not incompatible with Part V of UNCLOS (see Article 58(2)

[34] Tanaka (n 24) 32 and 150.
[35] Roach and Smith (n 22) 161.
[36] See Tanaka (n 24) 32-37; See Rothwell and Stephens (n 30) 86.
[37] See Julia Gaunce, 'On the Interpretation of the General Duty of "Due Regard"' (2018) 32 Ocean Yearbook 27, 27; See Stuart Kaye, 'State Practice and Maritime Claims: Assessing the Normative Impact of the Law of the Sea Convention' in Aldo Chircop, Theodore McDorman and Susan Rolston (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (Brill/Nijhoff 2009) 146; See Brian Wilson, 'An Avoidable Maritime Conflict: Disputes regarding Military Activities in the Exclusive Economic Zone' (2010) 41 J Mar L & Com 421, 437.
[38] See Gaunce (n 37) 27.
[39] Robin Churchill, Vaughan Lowe and Amy Sander, *The law of the sea* (4th edn, Manchester University Press 2022) 27 and 30.
[40] Tanaka (n 24) 7.
[41] Tanaka (n 24) 152.

of UNCLOS). Consequently, the EEZ is also not part of the high seas. When discussing the relationship between the EEZ, the territorial sea and the high seas, Donald R Rothwell and Tim Stephens explain that:

> The EEZ combines characteristics of the territorial sea and the high seas, but cannot be assimilated to either. It is a *sui generis* zone with its own distinctive regime. Unlike the territorial sea it is not an area in which coastal states have a plenary and *ipso jure* entitlement to sovereignty, and in contrast to the high seas it is not a zone in which other states have unfettered freedoms.[42]

Thus, the EEZ can be described as a *sui generis* zone with its own legal regime which is distinguished from both the regime of the territorial sea and the regime of the high seas.[43]

Whereas possession of the territorial sea is compulsory and not dependent on the will of the coastal state,[44] and whereas the 'entitlement to the continental shelf exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present',[45] the EEZ must be claimed by the coastal state in order for it to be established.[46] According to Article 57 of UNCLOS, states may claim an EEZ not extending beyond 200 nm from the baselines from which the breadth of the territorial sea is measured. Article 55 of UNCLOS prescribes that the EEZ is an area beyond and adjacent to the territorial sea. Since the maximum breadth of the territorial sea is 12 nm (Article 3 of UNCLOS), the maximum breadth of the EEZ is 188 nm (≈ 348 km). The EEZ consist of the seabed, subsoil, the water superjacent to the seabed and the airspace above the waters.[47]

The status of the EEZ as part of customary international law was recognised in 1984 by the ICJ in the case *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States of America)*. In this case, which concerned the delimitation of a single maritime boundary in the Gulf of Maine, the court opined that '[the provisions of Part V of UNCLOS], even if in some respects they bear the mark of the compromise surrounding their adoption,

[42] Rothwell and Stephens (n 30) 87-88.
[43] Tanaka (n 24) 152.
[44] *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 160 (Dissenting Opinion of Judge McNair).
[45] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* Judgment, ITLOS Reports 2012, 4, para 409.
[46] Churchill, Lowe and Sander (n 39) 293.
[47] Tanaka (n 24) 152.

may nevertheless be regarded as consonant at present with general international law (…)'.[48] The following year, the ICJ determined in the case *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, a case concerning the delimitation of the continental shelf, that it was incontestable that 'the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law (…)'.[49] The fact that the ICJ was comfortable enough to give the EEZ status as customary international law only a few years after the adoption of UNCLOS clearly reflects that the EEZ concept had been rapidly accepted in state practice at that moment in time.[50] Nevertheless, some have argued that the EEZ regime in UNCLOS is not to be considered customary international law due to deviating state practice. However, the fact that some states unilaterally deviate from UNCLOS does not mean that those states thereby seek to assert different rules than those contained in UNCLOS. Instead, the actions of those states can be seen as deviations from the rules of customary international law.[51]

An overwhelming majority of coastal states have claimed a 200 nm EEZ.[52] As of 1 May 2021, 133 out of the 151 coastal states of the world claim an EEZ. This amounts to around 88% of all coastal states.[53] Nevertheless, a coastal state may make a lesser claim by, for example, merely claiming an EEZ with a breadth of 100 nm or by claiming an Exclusive Fishery Zone (EFZ) instead.[54] As of July 2015, only six states maintain an EFZ.[55] Only around ten coastal states (apart from those that claim an EFZ) do not claim an EEZ.[56] For example, states located around the Mediterranean Sea and other seas largely enclosed by land are situated very close to their neighbouring coastal states, thus restricting those coastal states from extending their maritime claims. This also makes it more difficult for those states to delimit overlapping maritime zones. Consequently, only around half of the Mediterranean states have claimed an EEZ.[57]

[48] *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States of America)* [1984] ICJ Rep 246, para 94.
[49] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13, para 34.
[50] Rothwell and Stephens (n 30) 86.
[51] See James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011) 56; See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 186.
[52] Tanaka (n 24) 151.
[53] Churchill, Lowe and Sander (n 39) 293.
[54] See Rothwell and Stephens (n 30) 88.
[55] Rothwell and Stephens (n 30) 89 n 24.
[56] Churchill, Lowe and Sander (n 39) 296.
[57] Churchill, Lowe and Sander (n 39) 296-297.

Where a coastal state has also claimed a contiguous zone, that zone is to be considered a part of the EEZ.[58] Furthermore, states with overlapping EEZ claims must delimit their maritime boundary (Article 74 of UNCLOS). This can occur if, for example, there is less than 400 nm between states with opposite coasts or if two or more states have adjacent coasts.

Artificial islands, installations and structures cannot generate an EEZ in their own right (Article 60(8) of UNCLOS). The same applies to rocks (Article 121(3) of UNCLOS) except where they form part of the baselines from which the coastal state measures its marine spaces.[59] Since rocks are islands which cannot sustain economic life or human habitation on their own, the reason why rocks cannot generate an EEZ is due to the fact that the ability to generate an EEZ should not apply to territory that by its very nature lacks the capacity for economic productivity.[60] By denying rocks the capacity to generate an EEZ on their own, Article 121(3) of UNCLOS has the function of preventing excessive EEZ claims.[61] Regardless of this provision, however, it may be noted that some states have asserted EEZ claims around remote and inhabitable islands.[62]

2.2 Sovereign Rights

Within the EEZ, coastal states enjoy sovereign rights over living and non-living resources. Article 56(1)(a) of UNCLOS prescribes that:

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds[63]

These sovereign rights are exclusive to the coastal state; no one is allowed to make a claim to the EEZ or undertake such economic activities unless the coastal state has given its express

[58] Tanaka (n 24) 148.
[59] Tanaka (n 24) 78.
[60] Rothwell and Stephens (n 30) 89.
[61] Tanaka (n 24) 78.
[62] Rothwell and Stephens (n 30) 89; Tanaka (n 24) 78.
[63] Article 56(1)(a) of UNCLOS.

consent.[64] Likewise, these sovereign rights are limited to economic exploration and exploitation.[65] As expressed by ITLOS in the case *M/V 'Virginia G' (Panama/Guinea-Bissau)*, the term "sovereign rights" 'encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures'.[66]

In terms of living resources, one of the most significant resources which the coastal state has exclusive sovereign rights over is fish.[67] Article 61 of UNCLOS prescribes that it is up to the coastal state to determine the allowable catch of the living resources of its EEZ. This determination is to be done by taking into account the best scientific evidence available (Article 61(2) of UNCLOS). The coastal state is also responsible for conserving and managing fisheries in such a way as to make sure they are not endangered by over-exploitation (Article 61(3) of UNCLOS).[68] At the same time, Article 62 of UNCLOS stipulates that the coastal state is to promote the objective of optimum utilisation of living resources. If a coastal state is unable to harvest the allowable catch it has set within its EEZ, it is required to give other states access to the surplus of the allowable catch (Article 62(2) of UNCLOS).[69]

With regard to the non-living resources found in the seabed and subsoil, the EEZ and continental shelf regimes overlap entirely (see Articles 56(3) and 77 of UNCLOS).[70] Coastal states have sovereign rights to explore and exploit the natural resources of the continental shelf (Article 77(1) of UNCLOS). Article 77(2) of UNCLOS prescribes that these rights are exclusive; no one else is allowed to explore or exploit these resources without express consent from the coastal state, even in the event that the coastal state does not explore or exploit the resources itself. Thus, there is no requirement upon the coastal state to share access to these resources nor are there any obligations of conservation or judicious use.[71]

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[64] Tanaka (n 24) 153.
[65] Tanaka (n 24) 153.
[66] *M/V 'Virginia G' (Panama/Guinea-Bissau)*, Judgement, ITLOS Reports 2014, 4, para 211. Henceforth referred to as '*M/V 'Virginia G'*".
[67] See Rothwell and Stephens (n 30) 91.
[68] See Rothwell and Stephens (n 30) 91.
[69] However, as Rothwell and Stephens explain, this right is unenforceable since 'coastal state decisions determining the allowable catch, the extent of harvesting capacity, and the allocation of surpluses, fall within one of the few exceptions to the compulsory dispute settlement system'. Rothwell and Stephens (n 30) 92.
[70] Rothwell and Stephens (n 30) 92.
[71] See Rothwell and Stephens (n 30) 92-93.

Furthermore, Article 56(1)(a) of UNCLOS confers on the coastal state sovereign rights with regard to other economic activities, such as the production of energy from the water, currents and winds. Due to the open-ended nature of this provision, coastal states are able to take advantage of the various developments in technology. Yet, at present, it does not appear as if there are any other economic activities apart from the example given in the provision.[72]

Finally, Article 56(2) of UNCLOS prescribes that coastal states, when exercising their sovereign rights and performing their duties under UNCLOS, must have due regard to the rights and duties of other states. While the coastal state does have sovereign rights for the purpose of economic exploration and exploitation of the various resources of its EEZ, the coastal state is required to consider the rights other states enjoy within its EZZ when exercising these rights, namely the freedoms of navigation and overflight, the freedom to lay submarine cables and pipelines as well as other internationally lawful uses of the sea related to those freedoms (see Article 58 of UNCLOS).

2.3 Jurisdiction

Article 73(1) of UNCLOS confers legislative and enforcement jurisdiction to the coastal state within its EEZ, stating that the coastal state in the exercise of its sovereign rights can take necessary measures to ensure that the laws and regulations it has adopted in conformity with UNCLOS are complied with. Such measures include, but are not limited to, boarding, inspection, arrest as well as judicial proceedings.[73] Furthermore, Article 56(1)(b) of UNCLOS declares:

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) (…)
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment[74]

[72] Churchill, Lowe and Sander (n 39) 266.
[73] See Tanaka (n 24) 153-154.
[74] Article 56(1)(b) of UNCLOS.

Coastal states, therefore, also have jurisdiction over artificial islands, installations and structures, marine scientific research (MSR) and the protection and preservation of the marine environment within its EEZ. Based on the formulation of Article 56 of UNCLOS it is clear that coastal states do not have any general or residual jurisdictional rights in their EEZs.[75]

In accordance with Article 60 of UNCLOS, the coastal state has jurisdiction over artificial islands, installations and structures. The coastal state has the exclusive jurisdiction and right to construct, authorise and regulate the construction, operation and use of artificial islands, regardless of the purpose of such islands (Article 60(1)(a) of UNCLOS). However, the same exclusive jurisdiction over installations and structures only applies if such structures have an economic purpose (Article 60(1)(b) of UNCLOS).[76] The circumstance that installations and structures may only be constructed for a limited purpose while artificial islands can be constructed for any purpose is somewhat paradoxical, especially when considering the fact artificial islands seemingly create greater impediments for other uses of the coastal state's EEZ due to them normally being larger than installations and structures.[77] Nevertheless, the exclusive jurisdiction of artificial islands and installations and structures with an economic purpose includes jurisdiction with regard to safety, health, immigration, customs and fiscal laws and regulations (Article 60(2) of UNCLOS). This jurisdiction seemingly includes both legislative and enforcement jurisdiction and can be exercised in respect of nationals and non-nationals alike.[78] Moreover, the coastal state may establish a reasonable safety zone around an artificial island, installation or structure where necessary, in which the coastal state can take 'appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures' (Article 60(4) of UNCLOS). Measures the coastal state may take in such a safety zone include both enactment and enforcement of laws and regulations designed to ensure the safety of navigation and the safety of artificial islands, installations and

[75] Rothwell and Stephens (n 30) 94; Nevertheless, there have been instances of creeping jurisdiction since the entry into force of UNCLOS, whereby states have attempted to extend their jurisdiction both within and beyond their 200 nm EEZs. See further Erik Franckx, 'The 200-Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage - Some Law of the Sea Considerations from Professor Louis Sohn's Former LL.M. Student' (2007) 39 Geo Wash Int'l L Rev 467.
[76] See Rothwell and Stephens (n 30) 94; See also Tanaka (n 24) 156, where Tanaka discusses the fact that some states have made the interpretation that coastal states also have jurisdiction over the installations and structures with non-economic purposes, such as military purposes, while other states have made the opposite interpretation.
[77] See Churchill, Lowe and Sander (n 39) 268.
[78] Churchill, Lowe and Sander (n 39) 268.

structures.[79] A safety zone cannot extend more than 500 m around an artificial island, installation or structure unless authorised by generally accepted international standards or if recommended by the competent international organisation (Article 60(5) of UNCLOS), the competent international organisation being the IMO.[80]

Nevertheless, the rights and jurisdiction with regard to artificial islands, installations and structures are subject to some obligations. Article 60(3) of UNCLOS prescribes that the coastal state must give due notice of the construction of an artificial island, installation or structure and the coastal state is required to maintain a permanent means for giving warning of their presence. This provision further stipulates that any abandoned or disused installations or structures are to be removed in order to ensure the safety of navigation. If there are any installations or structures which have not been entirely removed, appropriate publicity of their dimensions, position and depth must be given. Moreover, Article 60(7) of UNCLOS declares that it is not permissible for the coastal state to establish artificial islands, installations and structures and safety zones around them in such a way that they interfere with the use of recognised sea lanes essential to international navigation.

Article 246(1) of UNCLOS states that, in the exercises of their jurisdiction, coastal states have the right to regulate, authorise and conduct MSR within their EEZs. No one may conduct MSR within a coastal state's EEZ without its consent (Article 246(2) of UNCLOS). Under normal circumstances, however, the coastal state is expected to give its consent for MSR projects conducted by competent international organisations or other states, granted that such research is conducted 'exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind' (Article 246(3) of UNCLOS). Nevertheless, the coastal state may withhold consent if the MSR project, for example, directly involves the exploration and exploitation of natural resources or it if concerns the construction, operation or use of artificial islands, installations and structures (Article 246(5)(a) and (c) of UNCLOS).

Article 56(1)(b)(iii) of UNCLOS provides that the coastal state, within its EEZ, has jurisdiction over the protection and preservation of the marine environment. This includes

[79] *Arctic Sunrise Arbitration (Netherlands v Russia)*, PCA Case No. 2014-02, Award on the Merits (2015), *RIAA* XXXII (2019) para 211.
[80] Churchill, Lowe and Sander (n 39) 268.

both legislative and enforcement jurisdiction.[81] With regard to marine pollution in the EEZ, a differentiation is made between pollution by dumping (Article 210 of UNCLOS), pollution from seabed activities and in relation to artificial islands, installations and structures (Article 208 of UNCLOS) and incidental pollution from vessels (Article 211 of UNCLOS). Whereas the coastal state has a wide margin of appreciation in relation to dumping and installations and is allowed to adopt measures that are more stringent than the international rules and standards, the powers of the coastal state in relation to vessel-source pollution are more limited since any laws the coastal state adopts must be in conformity with the generally accepted international rules and standards.[82]

In the context of the jurisdiction over the EEZ, bunkering poses a particular issue. UNCLOS does not contain any provision regulating bunkering, something which resulted in the cases *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)* and *M/V 'Virginia G'* being brought before ITLOS. In the former case, the oil tanker *Saiga*, which was registered in Saint Vincent and the Grenadines at the time, was attacked, boarded and arrested by Guinean patrol boats in October 1997 after having supplied gas oil to three fishing vessels approximately 22 nm from a Guinean island, something which was against Guinean customs laws.[83] The tribunal held that coastal states by virtue of Article 60(2) of UNCLOS have the jurisdiction to apply their customs laws and regulations in relation to artificial islands, installations and structures, but that they do not have jurisdiction to apply their customs laws with regard to any other part of the EEZ which is not mentioned in Article 60 of UNCLOS.[84] In the latter case, the M/V *Virginia G*, an oil tanker registered in Panama, was arrested in August 2009 after having supplied several fishing vessels with gas oil within the EEZ of Guinea-Bissau.[85] In this case, the tribunal determined that coastal states have the jurisdiction to regulate bunkering of foreign vessels fishing within their EEZs, arguing that such a measure 'is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under [Article 56 of UNCLOS] read together with [Article

[81] See Tanaka (n 24) 157.
[82] Rothwell and Stephens (n 30) 97.
[83] *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment, ITLOS Reports 1999, 10, paras 31-33 and 36. Henceforth referred to as '*M/V 'Saiga' (No. 2)*'.
[84] *M/V 'Saiga' (No. 2)* (n 83) para 127.
[85] *M/V 'Virginia G'* (n 66) paras 55 and 61-62.

62(4) of UNCLOS]'.[86] However, the tribunal also opined that coastal states do not have the competence to regulate other bunkering activities unless otherwise determined.[87]

2.4 Freedoms of Third States

In accordance with Article 58(1) of UNCLOS, third states (also called "other states") enjoy, within the EEZ of the coastal state, the following freedoms:

> In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.[88]

A third state operating in the EEZ of the coastal state thus enjoys the freedom of navigation,[89] the freedom of overflight,[90] the freedom to lay submarine cables and pipelines as well as other internationally lawful uses related to those freedoms. The reference to "all States" includes the coastal state, meaning that the coastal state's rights of navigation, overflight and the laying of submarine cables and pipelines (as well as other uses related to those rights) also derive from Article 58(1) of UNCLOS. Therefore, the coastal state's rights of navigation et cetera are no greater than those of other states.[91]

Article 58(2) of UNCLOS declares that Articles 88-115 of UNCLOS and other pertinent rules of international law are applicable to EEZ so far as they are not incompatible with Part V of UNCLOS, meaning that the majority of the rules governing the high seas also apply to the EEZ as long as they are not incompatible with the EEZ regime. According to Robin Churchill, Vaughan Lowe and Amy Sander, international tribunals and courts have specifically found that Articles 88, 90-92, 94, 97, 100 and 110-111 apply in the EEZ. They also explain that

[86] *M/V 'Virginia G'* (n 66) para 217.
[87] *M/V 'Virginia G'* (n 66) para 223.
[88] Article 58(1) of UNCLOS.
[89] Churchill, Lowe and Sander define the freedom of navigation as 'the unrestricted transit of a ship through the EEZ of a coastal State en route between two other areas, which could be the high seas, the EEZ of another State or the territorial sea of the coastal State'. Churchill, Lowe and Sander (n 39) 276.
[90] Churchill, Lowe and Sander assert that the freedom of overflight 'includes the straightforward transit of an EEZ by an aircraft'. Churchill, Lowe and Sander (n 39) 283.
[91] Churchill, Lowe and Sander (n 39) 271.

'other pertinent rules of international law' include the IMO maritime safety conventions and, *inter alia*, the UN Drug Trafficking Convention, the SUA Convention and the Migrants Smuggling Protocol.[92]

By virtue of Articles 58 and 90 of UNCLOS, all states have the right to sail ships flying their flag on the high seas and the EEZ. Consequently, all ships, including warships and vessels carrying hazardous materials, enjoy the freedom of navigation within the EEZ.[93] Likewise, the freedom of overflight does not distinguish between types of aircraft, meaning not only commercial aircraft but also military and government aircraft enjoy the freedom of overflight within the EEZ.[94] However, it may be noted that several states have attempted to put restrictions upon the freedom of navigation. For instance, several states, with reference to military security, require prior notice or authorisation before a warship can traverse their EEZs.[95] Some states have also asserted that they have the right to deny passage to vessels carrying hazardous materials in their EEZs. The states asserting the right to deny such passage do so with reference to their jurisdiction over environmental matters in the EEZ. In their view, 'the ultra-hazardous nature of the cargo poses such a threat to the environment that they have a right to prevent the possibility of irreparable harm occurring'.[96] Therefore, they, at the very least, have the right to be notified in advance.[97]

With regard to the freedom to lay submarine cables and pipelines, third states enjoy this right irrespective of the consent of the coastal state in whose EEZ the cable or pipeline is to be laid. Nevertheless, Article 79(3) of UNCLOS prescribes that a coastal state must give its consent as to the delineation of the course of a pipeline.

Just as the coastal state must have due regard to the rights third states enjoy within its EEZ when exercising its sovereign rights, Article 58(3) of UNCLOS prescribes that third states must have due regard to the rights of the coastal state when exercising their rights and

[92] Churchill, Lowe and Sander (n 39) 277-278.
[93] See Rothwell and Stephens (n 30) 99 and 296; See Stuart Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press 2006) 361; See Cameron Moore, *Freedom of Navigation and the Law of the Sea: Warships, States and the Use of Force* (Routledge 2021) 97-98.
[94] See Rothwell and Stephens (n 30) 165.
[95] According to Kaye, some 60 states have asserted extended rights and put restrictions on the freedom of navigation within their maritime zones. Kaye, 'Freedom of Navigation in a Post 9/11 World' (n 93) 353-356.
[96] Kaye, 'Freedom of Navigation in a Post 9/11 World' (n 93) 361.
[97] Kaye, 'Freedom of Navigation in a Post 9/11 World' (n 93) 361.

performing their duties within the EEZ of the coastal state. The same provision also stipulates that third states must comply with the various laws and regulations that the coastal state has adopted in accordance with UNCLOS as well as other rules of international law as long as those are compatible with Part V of UNCLOS. Unlike on the high seas, the freedoms of navigation, overflight and the laying of submarine cables and pipelines are therefore not as extensive and are qualified by the jurisdiction of the coastal state.[98] For instance, while the freedom of navigation on the high seas encompasses the right to explore and exploit natural resources, navigation in the EEZ for the same purposes requires coastal state consent. In addition, third states should also have due regard to the rights of other states operating in the coastal state's EEZ.[99]

2.5 Residual Rights

Article 59 of UNCLOS concerns the attribution of residual rights and reads as follows:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.[100]

There is thus no presumption which favours either the coastal state or other states, meaning that the attribution of any residual rights will have to be decided on a case-by-case basis.[101] During the early stages of the negotiations at UNCLOS III, several maritime states were fearful of creeping jurisdiction and argued that the EEZ should have had a residual high seas character, which would have meant that any activity which did not explicitly fall within the rights of the coastal state would be subject to the high seas regime. This approach, however, did not find favour during the negotiations. Article 55 of UNCLOS makes it clear that the EEZ is subject to its own legal regime and Article 86 of UNCLOS asserts that the high seas regime does not apply to the EEZ. The EEZ also does not have a residual territorial sea character, something which Article 55 of UNCLOS makes clear. If the EEZ had a residual

[98] Tanaka (n 24) 159; Rothwell and Stephens (n 30) 98.
[99] See Churchill, Lowe and Sander (n 39) 288.
[100] Article 59 of UNCLOS.
[101] Tanaka (n 24) 159; Churchill, Lowe and Sander (n 39) 292.

territorial sea character this would have created an assumption that those rights not clearly falling to other states would fall to the coastal state.[102]

Conflicts regarding the attribution of residual rights can be resolved using a variety of mechanisms. One such mechanism is negotiations between the states in conflict, another is to conclude treaties between the states concerned and a final mechanism that could be utilised to resolve a conflict is the dispute settlement system of UNCLOS.[103]

2.6 The Sovereign Immunity of Warships and Flag State Jurisdiction

One factor to consider in relation to the navigation of military vessels in the EEZ is the sovereign immunity of warships.[104] According to Article 95 of UNCLOS, warships have complete immunity from the jurisdiction of any state other than the flag state. Article 96 of UNCLOS also grants complete immunity for ships owned and operated by a state that are used only for government non-commercial service.

Another factor to consider is the principle of the exclusive jurisdiction of the flag state. It is prescribed that '[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas' (Article 92(1) of UNCLOS). Consequently, the flag state has both legislative and enforcement jurisdiction over its ships in the EEZ.[105] In *M/V 'Saiga' (No. 2)*, ITLOS declared that 'the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant',[106] meaning that the flag state has enforcement jurisdiction over anyone on its ships, irrespective of their nationalities.[107] The principle of the exclusive jurisdiction of the flag state prevents other states from interfering with vessels not flying their flag. This principle further entails that the flag state ensures that vessels flying its flag comply with the relevant national and international laws.[108]

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[102] Churchill, Lowe and Sander (n 39) 262.
[103] Churchill, Lowe and Sander (n 39) 292-293.
[104] Military aircraft are also said to have sovereign immunity under international law. Christopher M Petras, 'The Law of Air Mobility - The International Legal Principles behind the U.S. Mobility Air Forces' Mission' (2010) 66 AF L Rev 1, 68-70; John W Bellflower, 'Contested Airspace: The Legality of Military Use of Airspace above the Exclusive Economic Zone' (2014) 39 Annals Air & Space L 247, 253 n 33.
[105] Tanaka (n 24) 189.
[106] *M/V 'Saiga' (No. 2)* (n 83) para 106.
[107] Tanaka (n 24) 189.
[108] Tanaka (n 24) 190.

Article 94 of UNCLOS outlines the duties of the flag state. All states are required to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag' (Article 94(1) of UNCLOS). States are obligated to maintain a register of ships flying their flag and to assume jurisdiction under their internal laws over their ships and their masters, officers and crew in relation to administrative, technical and social matters (Article 94(2) of UNCLOS). Moreover, states are required to take such measures for their ships as are necessary in order to ensure safety at sea (Article 94(3) and (4) of UNCLOS). Such measures must conform to generally accepted international regulations, procedures and practices and each state is required to take any steps necessary to secure their observance (Article 94(5) of UNCLOS). If a state has clear grounds to believe that the proper control and jurisdiction with respect to a ship has not been exercised, it is entitled to report this to the flag state who upon receiving such a report must investigate the matter and take any necessary action, where appropriate, to remedy the situation (Article 94(6) of UNCLOS). Finally, if there is a marine causality or incident of navigation involving a ship flying its flag and this causes serious damage to ships or installations of another state or to the marine environment, or if it causes loss of life or serious injury to nationals of another state, the flag state is obliged to cause an inquiry. The flag state and the other state involved are obligated to cooperate in the conduct of any inquiry which is held by the other state into marine casualties or incidents of navigation (Article 94(7) of UNCLOS).

2.7 Military Activities Within the Exclusive Economic Zone

While UNCLOS makes it clear that it is not permissible for states to conduct military activities such as exercises and research or survey activities within the territorial sea of another state (see Article 19 of UNCLOS), UNCLOS is completely silent regarding the legality of military activities conducted by states in the EEZs of other states. Whereas Article 56 of UNCLOS provides the coastal state with jurisdiction over artificial islands, installations and structures, MSR and the protection and preservation of the marine environment, it does not explicitly give the coastal state jurisdiction over military activities. At the same time, whereas Article 58 of UNCLOS provides other states with the freedoms of navigation, overflight, the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to those freedoms, it does not explicitly state that other states have the right to conduct military activities within the EEZ of the coastal state. Hence, UNCLOS neither

explicitly authorise nor prohibit states from conducting military activities in foreign EEZs, nor does it explicitly provide the coastal state with rights or jurisdiction to regulate or prohibit such activities.

3 The Silence of UNCLOS and Its Interpretations

The silence of UNCLOS has contributed to different interpretations of the law presented above. A first interpretation is that states in accordance with Article 58 of UNCLOS are free to unilaterally conduct military activities in the EEZs of other states without prior notice, authorisation or consent. Conversely, an opposing interpretation holds that states are not allowed to conduct military activities in a foreign EEZ without the consent of the coastal state, either because the freedom to conduct military activities is not encompassed by Article 58 of UNCLOS or because such activities breach the principle of peaceful uses of the seas as encapsulated by Articles 88 and 301 of UNCLOS. A final interpretation is that this issue is to be regarded as a matter of residual rights, meaning recourse is to be found in Article 59 of UNCLOS.

Consequently, the legality of states conducting military activities in foreign EEZs under UNCLOS is ambiguous and there appears to be no agreed interpretation of its provisions.[109] In addition, as will be described in this chapter, state practice regarding this issue is sharply divided. This uncertainty has resulted in the issue of military activities conducted in foreign EEZs becoming a contentious and problematic issue.[110] Unless resolved, this issue will most likely create further discord and increase the possibility of a flare-up of the international law of the sea.

[109] See Churchill, Lowe and Sander (n 39) 283; See Tanaka (n 24) 471.
[110] Tanaka (n 24) 471; Hyun-Soo Kim, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict' (2006) 80 Int'l L Stud Ser US Naval War Col 257, 257-258; Jing Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS' (2012) 28 Merkourios-Utrecht J Int'l & Eur L 22, 29.

3.1 Another Internationally Lawful Use of the Sea…

3.1.1 Article 58 of UNCLOS = Right to Conduct Military Activities in Foreign Exclusive Economic Zones

According to one interpretation of UNCLOS, all states a free to conduct military activities in foreign EEZs without prior notice or coastal state consent. This interpretation is made primarily with reference to Article 58 of UNCLOS, which provides the rights and duties other states enjoy within the EEZ of the coastal state.

George V Galdorisi and Alan G Kaufman explain that the maritime powers during the negotiations at UNCLOS III wanted to ensure that the EEZ regime that was to be established would not prevent naval operations in the EEZ.[111] However, the Revised Single Negotiation Text drafted during UNCLOS III read in part:

> In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the present Convention, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and *other internationally lawful uses of the sea related to navigation and communication*.[112]

According to the maritime powers, this wording was too restrictive as it would limit the uses of the EEZ to those relating to navigation and communication. Therefore, the wording was subsequently changed to 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention' (Article 58(1) of UNCLOS). In the opinion of Galdorisi and Kaufman, this change of wording incorporates a broader set of uses of the EEZ than the wording 'other internationally lawful uses of the sea related to navigation and communication' used in the Revised Single Negotiating Text.[113] They also argue that, under customary international law, naval manoeuvres have historically been considered 'a lawful use of the high seas associated with the operation of warships exercising freedom of navigation'.[114] In light of this background, and by recognising that the

[111] George V Galdorisi and Alan G Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict' (2002) 32 Cal W Int'l LJ 253, 271.
[112] Galdorisi and Kaufman (n 111) 271.
[113] Galdorisi and Kaufman (n 111) 271-272.
[114] Galdorisi and Kaufman (n 111) 272.

language of Article 58 of UNCLOS intended to preserve military uses in the EEZ, Galdorisi and Kaufman come to the, in their opinion, inescapable conclusion that naval operations are included in the aforementioned phrase of Article 58(1) of UNCLOS.[115]

Similarly to Galdorisi and Kaufman, J Ashley Roach and Robert W Smith opine that military activities are recognised historic uses of the high seas preserved by Article 58 of UNCLOS. Therefore, Article 58 of UNCLOS confers on all states the right to conduct military activities, including military exercises and military surveys, within the EEZ. However, this is, in their view, qualified by the obligation to have due regard to the rights and jurisdiction of the coastal state as well as the rights other states enjoy within the EEZ of the coastal state.[116] Furthermore, Roach and Smith argue that the second sentence of Article 86 of UNCLOS, which stipulates that this provision 'does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58', further reinforces that there is a right to conduct military activities in the EEZ.[117]

Raul Pedrozo contends that military forces have routinely conducted military activities such as military exercises and military surveys in foreign EEZs without prior notice to or consent of coastal states both before and after the adoption of UNCLOS.[118] With reference to this, in his view, long-standing state practice, the phrase 'other internationally lawful uses' in Article 58(1) of UNCLOS includes all lawful military activities.[119] He further argues that state practice clearly shows that it is permissible for states to conduct military activities in the EEZ of another state without prior notice to or consent of the coastal state.[120] Pedrozo therefore concludes that military activities, such as military exercises, conducted in the EEZ are fully consistent with customary international law and UNCLOS.[121] Similarly to Roach and Smith, Pedrozo confirms his conclusion with reference to the second sentence of Article 86 of UNCLOS.[122] Pedrozo asserts that the only limitation to the right to conduct military activities in foreign EEZs is the obligation of due regard.[123]

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[115] See Galdorisi and Kaufman (n 111) 271-272.
[116] Roach and Smith (n 22) 377.
[117] Roach and Smith (n 22) 377-378.
[118] Pedrozo, 'Close Encounters at Sea' (n 2) 102.
[119] Pedrozo, 'Close Encounters at Sea' (n 2) 103-104.
[120] Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9 Chinese J Int'l L 9, 12.
[121] Pedrozo, 'Preserving Navigational Rights and Freedoms' (n 120) 19-20.
[122] Pedrozo, 'Preserving Navigational Rights and Freedoms' (n 120) 20.
[123] See Pedrozo, 'Close Encounters at Sea' (n 2) 104.

John W Bellflower argues that the inclusion and plain language of the phrase 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships [and] aircraft' in Article 58(1) of UNCLOS gives an indication of a reference to something more than mere overflight and navigation of the EEZ.[124] Moreover, Bellflower asserts that there is little doubt that UNCLOS III 'sought to preserve within the EEZ at least those military uses of the EEZ associated with the operation of ships and aircraft'.[125] Bellflower concludes that military uses of the coastal state's EEZ by other states are clearly permissible in accordance with the language of Article 58 of UNCLOS, although states remain subject to the obligation of due regard.[126]

Wolff Heintschel von Heinegg argues that the phrase 'other pertinent rules of international law' in Article 58(2) of UNCLOS preserves military activities that for a long time have been recognised under customary international law.[127] Therefore, Heintschel von Heinegg concludes that military activities conducted in the EEZ of another state continue to be lawful under UNCLOS, without any requirement for prior authorisation unless the military activities are contrary to or impede the sovereign rights or jurisdiction of the coastal state.[128] Although, in accordance with Article 58(3) of UNCLOS, the exercise of this right is subject to the obligation of due regard.[129] Even though reaching a similar conclusion, Heintschel von Heinegg in contrast to Galdorisi and Kaufman, Roach and Smith, Pedrozo and Bellflower reaches his conclusion based on the second paragraph of Article 58 of UNCLOS as opposed to the first.

Churchill, Lowe and Sander argue that warships engaged in naval manoeuvres that do not involve the use of weapons, and which do not involve launching or refuelling aircraft, are essentially only navigating, even if not moving directly from one state to another. Therefore, they argue that such naval manoeuvres likely fall within the freedom of navigation in Article 58(1) of UNCLOS.[130] If a warship engaged in routine navigation in a foreign EEZ gathers

[124] Bellflower (n 104) 272-273.
[125] Bellflower (n 104) 273.
[126] Bellflower (n 104) 274.
[127] Wolff Heintschel von Heinegg, 'Military Activities in the Exclusive Economic Zone' (2014) 47 Rev BDI 45, 56.
[128] Heintschel von Heinegg (n 127) 57.
[129] Heintschel von Heinegg (n 127) 59.
[130] Churchill, Lowe and Sander (n 39) 280.

military intelligence or conducts military surveys, it is argued that such activities also fall within the freedom of navigation.[131] When it comes to military exercises involving the use of weapons, Churchill, Lowe and Sander opine that such exercises may go beyond simple navigation depending on the type of weapon used. Nevertheless, with reference to the phrase 'internationally lawful uses of the sea' in Article 58(1) of UNCLOS and Articles 88 and 301 of UNCLOS, they argue that it is plausible that weapons practice is such a use of the seas related to the freedom of navigation and therefore permissible under UNCLOS. Such exercises, however, are not considered permissible if they amount to a threat or use of force. The state conducting the military exercises is also required to have due regard to the rights of the coastal state as well as the rights of other states operating in the coastal state's EEZ.[132] Furthermore, Churchill, Lowe and Sander clarify that what is said above relating to the permissibility of warships conducting military activities in the EEZ applies *mutatis mutandis* to military aircraft.[133]

Hyun-Soo Kim, with reference to Article 58 of UNCLOS, opines that as a matter of law, states have the right to conduct military activities in the EEZ of another state if due regard has been given to the rights and interests of the coastal state.[134] However, in the event that the military activity interferes with the rights and interests of the coastal state, the rights and interests of the latter would prevail.[135] Similarly to Kim, Boleslaw Adam Boczek and Yann-huei Song also argue that the rights and interests of the coastal state prevail if a military activity conducted by a foreign state in the EEZ of the coastal state interferes with the rights and interests of the coastal state.[136]

According to Bernard H Oxman, it is pointless to speculate on whether or not naval manoeuvres and exercises are permissible within the EEZ because, in principle, they are since it was never agreed upon that such rights would be abandoned in the semi-enclosed seas

[131] Churchill, Lowe and Sander (n 39) 281.
[132] Churchill, Lowe and Sander (n 39) 281.
[133] Churchill, Lowe and Sander (n 39) 284.
[134] Kim (n 110) 260.
[135] Kim (n 110) 259-260.
[136] Boleslaw Adam Boczek, 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries' (1988) 19 Ocean Dev & Int'l L 445, 450; Yann-huei Song, 'The PRC's Peacetime Military Activities in Taiwan's EEZ: A Question of Legality' (2001) 16 Int'l J Marine & Coastal L 625, 638.

around the world.[137] Instead, Oxman argues that the relevant inquiry is whether or not the particular activity in that particular place is consistent with the obligation of due regard.[138]

3.1.1.1 Due Regard

As earlier mentioned, the coastal state, when exercising its rights and performing its duties, is required to have due regard to the rights and duties other states enjoy within its EEZ (Article 56(2) of UNCLOS). Likewise, states exercising their rights and performing their duties in the EEZ of the coastal state are required to have due regard to the rights and duties of the coastal state. States operating in the coastal state's EEZ are also required to comply with any laws and regulations the coastal state has adopted in accordance with UNCLOS as well as other international law rules as long as they are not incompatible with Part V of UNCLOS (Article 58(3) of UNCLOS). Consequently, these duties of due regard can be referred to as reciprocal.[139]

According to Ioannis Prezas, the obligation of due regard in the context of military activities is only applicable if a right to conduct military activities in foreign EEZs actually exists.[140] In his view, a logical reading of UNCLOS suggests that the due regard obligation is only applicable to potentially conflicting rights or duties of a different nature that have been attributed to other states and the coastal state respectively and argues that the purpose of due regard is to 'balance the exercise of the respective rights of different natures attributed to the coastal state and third states by [UNCLOS]'.[141] Prezas argues that the rules which govern jurisdiction in Articles 56 and 58 of UNCLOS do not fulfil the same function, since Article 56 of UNCLOS provides the coastal state with exclusive jurisdiction over certain matters whereas Article 58 of UNCLOS confers freedoms and rights common to all states.[142] Prezas seemingly concludes that there does exist a right to conduct military activities in foreign EEZs in Article 58 of UNCLOS, citing with approval the argument presented by Oxman that military activities in principle are permissible in the EEZ and that the relevant inquiry is whether or not the particular activity in that particular place is consistent with the obligation

[137] Bernard H Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea' (1984) 24 Va J Int'l L 809, 838.
[138] Oxman (n 137) 838.
[139] See Ioannis Prezas, 'Foreign Military Activities in the Exclusive Economic Zone: Remarks on the Applicability and Scope of the Reciprocal 'Due Regard' Duties of Coastal and Third States' (2019) 34 Int'l J Marine & Coastal L 97, 99.
[140] Prezas (n 139) 100.
[141] Prezas (n 139) 103 and 105.
[142] Prezas (n 139) 103-104.

of due regard.[143] Consequently, the reciprocal due regard obligations are applicable to resolve potential conflicts between the rights of the coastal state and the rights of other states.[144]

The line of reasoning presented by Prezas is, in my opinion, both reasonable and convincing. Logically, Articles 56 and 58 of UNCLOS are not identical and fulfil different purposes; the former attributes the coastal state with sovereign rights and jurisdiction while the latter attributes other rights and duties to other states operating in the coastal state's EEZ. Since the rules contained in these provisions are of a different nature, it follows that the due regard obligation is a mechanism to balance rights of a different nature. Realistically, rights can only be balanced if there actually exist rights to balance. In my view, it is therefore reasonable to assert that the obligation of due regard in the context of military activities is only applicable if there does exist a right to conduct military activities in the EEZ of another state (or if in line with the opposing interpretation, if the coastal state has the rights and jurisdiction to regulate such activities).

However, what does the obligation of due regard actually entail? Although there has yet to be a judicial decision directly dealing with due regard in the context of military activities, there have been a few cases detailing the meaning and scope of the reciprocal due regard obligations. In the *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* the tribunal considered the scope and meaning of the due regard obligation contained in Article 56(2) of UNCLOS. The tribunal opined that the coastal state must have 'such regard for the rights of [the other state] as is called for by the circumstances and by the nature of those rights'.[145] This, however, does not entail that any and all impairments to the rights of the other state must be avoided, but it also does not mean that the coastal state is free to always proceed as it wishes.[146] Rather, the tribunal opined that:

> [T]he extent of the regard required by the Convention will depend upon the nature of the rights held by [the other state], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [coastal state], and the availability of alternative approaches. In the majority of

[143] Prezas (n 139) 104-105.
[144] See Prezas (n 139) 104-105.
[145] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (2015), PCA Case No. 2011-03, *RIAA* XXXI (2018) para 519. Henceforth referred to as '*Chagos Marine Protected Area Arbitration'.*
[146] *Chagos Marine Protected Area Arbitration* (n 145) para 519.

> cases, this assessment will necessarily involve at least some consultation with the rights-holding State.[147]

Therefore, as expressed by the tribunal, there are a number of factors to consider in order for the due regard obligation of Article 56(2) to be satisfied, such as the nature and importance of the respective rights and the availability of alternatives. Additionally, the tribunal expressed that such an assessment will necessarily involve at least some consultation in the majority of cases. However, there is no requirement for the consultations to continue indefinitely or until the opposing party is happy.[148] On the facts, the tribunal held that the UK's (the coastal state) obligation to have due regard to the right and duties of Mauritius (the other state) entailed 'at least, both consultation and a balancing exercise with its own rights and interests'[149] and found that the UK had breached its obligation of due regard since it had failed to balance its own rights and interests with those of Mauritius as well as failed to properly consult with Mauritius.[150]

With regard to the availability of alternatives and weighing the importance of the activity mentioned in the aforementioned case, Eduardo Cavalcanti de Mello Filho questions whether there, given that the coastal state has its own EEZ and the high seas at its disposal, really are no other alternatives available for states to conduct military exercises and manoeuvres except within the EEZ of another state.[151] In his view, the likelihood that other alternatives are available entails that the coastal state is able to raise any legitimate activity relating to its jurisdiction or sovereign rights compromised by military activities.[152] The question raised by Cavalcanti de Mello Filho is interesting, although in my opinion it seemingly oversimplifies the availability of alternatives. Whereas some states have easy access to vast areas of their own EEZs or the high seas (or both), others do not. For example, geographically disadvantaged states and states bordering semi-enclosed seas, such as Mediterranean states bordering the Mediterranean Sea and Baltic states bordering the Baltic Sea, sometimes do not have vast EEZs of their own or easy access to the high seas, meaning the availability of alternatives is limited. Implying that other alternatives often exist therefore neglects to

[147] *Chagos Marine Protected Area Arbitration* (n 145) para 519.
[148] *Chagos Marine Protected Area Arbitration* (n 145) para 531.
[149] *Chagos Marine Protected Area Arbitration* (n 145) para 534.
[150] *Chagos Marine Protected Area Arbitration* (n 145) paras 534-536.
[151] See Eduardo Cavalcanti de Mello Filho, 'The legal regime of the exclusive economic zone and foreign military exercises or maneuvers' (2021) 2 Nuova Antologia Militare 361, 376.
[152] Cavalcanti de Mello Filho (n 151) 376.

account for the availability of alternatives for geographically disadvantaged states. At the same time, if a state does in fact have a vast EEZ of its own or easy access to the high seas, Cavalcanti de Mello Filho does raise a fair point when questioning whether there really are no other alternatives available other than the EEZ of another state. Under such circumstances, the obligation of due regard as described by the tribunal in the aforementioned case might possibly be stricter on such states given the easy availability of alternatives.

In the *'Enrica Lexie' Incident (Italy v India)*, the obligation of due regard in Article 58(3) of UNCLOS was considered. The tribunal held that 'the object and purpose of the obligation of "due regard" is to ensure balance between concurrent rights belonging to coastal and other States'.[153] The tribunal explained that the nature and scope of the due regard obligation contained in Article 56(2) of UNCLOS as expressed by the tribunal in the *Chagos Marine Protected Area Arbitration* applied equally to the due regard obligation in Article 58(3) of UNCLOS.[154] In the view of the tribunal, it followed from the *Chagos Marine Protected Area Arbitration* that 'the extent of the "regard" required by [UNCLOS] depends, among others, upon the nature of the rights enjoyed by a State. In other words, [Article 56(2)] and [Article 58(3)] are structured so as to guarantee observance of the concurrent respective rights and duties of coastal and other States'.[155] This entails balancing the rights and duties of the coastal state with those of other states as well as refraining from any activities which unreasonably interfere with the exercise of the respective rights of the coastal state and the other state.[156] On the facts of the case, the tribunal determined that the due regard obligation had not been breached.[157]

With reference to the scope and nature of the due regard obligation as expressed by the tribunal in the *Chagos Marine Protected Area Arbitration*, Prezas argues that a state wishing to conduct military activities in the EEZ of another state must notify the coastal state of its intention. This is to be done in order for the coastal state to be able to challenge, based on the protection of its rights, whether the military activity conforms to the due regard obligation.[158] Even if no infringement of the economic rights of the coastal state has occurred, Prezas

[153] *'Enrica Lexie' Incident (Italy v India)* (2020), PCA Case No. 2015-28, para 975. Henceforth referred to as '*'Enrica Lexie' Incident*'.
[154] *'Enrica Lexie' Incident* (n 153) paras 976-977.
[155] *'Enrica Lexie' Incident* (n 153) para 978.
[156] *'Enrica Lexie' Incident* (n 153) para 978; See also Churchill, Lowe and Sander (n 39) 290.
[157] *'Enrica Lexie' Incident* (n 153) para 981.
[158] Prezas (n 139) 106.

asserts that the obligation of due regard is violated if the other state conducts the military activity in the coastal state's EZZ without prior notice or consultation.[159] However, Prezas explains that prior notice is not the same as prior consent and that if a dispute concerning a proposed military activity in the coastal state's EEZ by another state persists, the coastal state is unable to prevent the activity.[160] Moreover, Prezas emphasises that the nature of the military activity determines the standard of due regard, arguing that an assessment of the conformity with due regard must be done on a case-by-case basis. Prezas distinguishes between military activities having a more pronounced material dimension and those of a more intellectual nature. With regard to the former, he opines that military activities such as exercises and weapons testing are more likely to infringe on the coastal state's rights under Article 56 of UNCLOS. With regard to the latter, he argues that activities like marine intelligence gathering are seemingly less likely to encroach upon the rights and jurisdiction of the coastal state.[161] According to Cavalcanti de Mello Filho, the obligation to consult the opposing state certainly applies to military exercises and manoeuvres given the risks imposed by military activities having a more material dimension.[162]

The line of reasoning presented by Prezas is, in my opinion, once again convincing. Given that the aforementioned cases show that consultation is needed in the majority of cases, it is reasonable to assert that some form of notification or consultation is needed in order for the obligation of due regard to be satisfied. If the coastal state is not informed by a state that it plans to conduct a military activity in its EEZ, the coastal state is unable to assess whether the military activity will encroach upon its sovereign rights and jurisdiction. Leaving this assessment solely in the hands of the other state would perhaps result in that state prioritising its own interest to conduct the activity over the rights and interests of the coastal state. As the aforementioned cases make it clear that a balancing exercise must be conducted between the respective rights of the coastal state and the other state, I find it difficult to envision how such a balancing exercise could be considered sufficient if it is done unilaterally by the other state. At the same time, leaving the assessment solely in the hands of the coastal state would possibly lead to the opposite result, with the coastal state prioritising its own rights and interests within its EEZ. Prior notice or consultations, therefore, appear to have an important

[159] Prezas (n 139) 106.
[160] See Prezas (n 139) 107.
[161] Prezas (n 139) 109.
[162] See Cavalcanti de Mello Filho (n 151) 377.

function in enabling a proper balancing of the rights, interests and jurisdiction of the coastal state with the rights and interests of other states. Similarly to Prezas, I do not believe that prior notice and consultations are equal to prior consent. If the coastal state does not give a sufficient reason as to why it does not want the other state to conduct the military activity within its EEZ, or if the consultations prove futile, I cannot see how the obligation of due regard would restrict the other state from conducting the military activity. Moreover, the differentiation between military activities having a more material dimension and those of a more intellectual nature seems sensible given that certain military activities by their very nature appear more likely to infringe upon the rights, duties and jurisdiction of the coastal state. As Oxman notes, a weapons exercise causing damage to valuable natural resources that are being exploited by the coastal state within its EEZ would be difficult to justify.[163] It is thus reasonable to assert that a determination of whether a particular military activity is compatible with the due regard obligation is to be done on a case-by-case basis.

3.1.2 State Practice

An avid advocate for the interpretation that states have the right to unilaterally conduct military activities in the EEZ of another state without prior notice, authorisation or consent is the US. The US is known to diplomatically protest EEZ claims it deems excessive and which, in its view, contradicts the freedom of navigation and overflight. The US is also known to frequently conduct military operations in foreign EEZs in an effort to assert its freedom of navigation as well as demonstrate its non-acquiescence to claims it deems excessive.[164] In March 1983, the US declared that:

> [A]ll States continue to enjoy in the [EEZ] traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone. This is the import of article 58 of the Convention.[165]

[163] Oxman (n 137) 838.
[164] See Galdorisi and Kaufman (n 111) 289-291.
[165] A/CONF.62/WS/37 and Add. 1-2, 'Official Records of the Third United Nations Conference on the Law of the Sea', vol. XVII, 244

The US thus unequivocally assert that all states have the right to conduct military activities in foreign EEZs. Since the US claims that the rights imported into Article 58 of UNCLOS remain both quantitatively and qualitatively the same as those on the high seas, it rationally follows the US believes that states have the right to conduct military activities in foreign EEZs without prior notice or consent, as is the case on the high seas.

Another state supporting this interpretation is the Netherlands, declaring that:

> [UNCLOS] does not authorize the coastal state to prohibit military exercises in its EEZ. The rights of the coastal state in its EEZ are listed in article 56 of the Convention, and no such authority is given to the coastal state. In the EEZ all states enjoy the freedoms of navigation and overflight, subject to the relevant provisions [of the] Convention.[166]

The Netherlands is thus clear that it does not believe that states have the right to prohibit military exercises since this right is not listed in Article 56 of UNCLOS. The subsequent reference to the freedom of navigation and overflight suggests that the Netherlands considers military exercises a part of those freedoms, meaning that states with reference to those freedoms have the right to conduct military exercises in foreign EEZs.

Similarly, Italy has declared that 'the rights and jurisdiction of the Coastal State in [the EEZ] do not include the right to obtain notification of military exercises or manoeuvres or to authorize them'.[167] Italy therefore shares the opinion of the Netherlands, namely that UNCLOS does not provide the coastal state with a right to prohibit foreign military exercises within its EEZ. By contrast, however, Italy also asserts that the coastal state does not have the right to obtain prior notification. In addition to its declaration, Italy made an objection to the declarations of India, Brazil, Cabo Verde and Uruguay, reiterating its declaration that coastal

<https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_17/a_conf62_ws_37_and_add1_2.pdf> accessed 17 October 2022.

[166] Declaration of the Netherlands made upon ratification of UNCLOS (28 June 1996). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

[167] Declaration of Italy made upon signature (7 December 1984) and confirmed upon ratification of UNCLOS (13 January 1995). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

states do not have the right to obtain notice or to authorise military exercises or manoeuvres within their EEZs.[168] The fact that Italy not only deemed it necessary to make a declaration to assert that coastal states, in its view, do not have the right to obtain notice or to authorise such military activities but also felt it necessary to object to claims contrary to its interpretation of UNCLOS clearly shows that Italy in no way, shape or form believe that the coastal state has the rights or jurisdiction to control such activities within its EEZ. Upon accession to UNCLOS, Germany made a declaration more or less identical to the declaration of Italy, stating that 'the rights and jurisdiction of the coastal State in [the EEZ] do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them'.[169] Germany thus clearly shares the same opinion and identical interpretation of UNCLOS as Italy.

Another state appearing in support of the present interpretation is the UK. Upon accession to UNCLOS in 1997, the UK declared:

> The United Kingdom considers that declarations and statements not in conformity with articles 309 and 310 include, *inter alia*, (…) [t]hose which are not in conformity with the provisions of [UNCLOS] relating to the exclusive economic zone or the continental shelf, including (…) those which purport to require consent for exercises or manoeuvres (including weapons exercises) in those areas (…).[170]

Although the UK does not plainly declare that it believes that states have the right to conduct military manoeuvres or exercises, including weapons exercises, within the EEZ of another state without prior consent, asserting that declarations which claim otherwise are not in conformity with UNCLOS suggest that the UK does indeed deem such military activities permissible in foreign EEZs without prior consent from the coastal state. If the UK was unsure of its own interpretation, or if it did not share the interpretation that states have the

[168] Objection of Italy (24 November 1995). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.
[169] Declaration of Germany made upon accession to UNCLOS (14 October 1994). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.
[170] Declaration of the UK made upon accession to UNCLOS (25 July 1997). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

right to conduct the military activities mentioned in its declaration, the UK would logically not have made that declaration. The UK, therefore, almost certainly share the interpretation asserted by the US, the Netherlands, Italy and Germany.

The states mentioned above thus appear in support of the interpretation that states have the right to conduct military activities in the EEZ of another state without prior notice and/or consent. Given that the Netherlands, Italy, Germany and the UK have expressed that states have the right to conduct military exercises in the EEZ of another state, which is probably one of the military activities which may cause the most disruption and damage to the coastal state and its natural resources, these states likely also, similarly to the US, believe that states have the right to conduct military activities generally in the EEZ of another state without consent. Moreover, the fact that these states felt the need to declare their interpretation of UNCLOS in relation to the issue of military exercises conducted in foreign EEZs shows that the issue at the time of giving their respective declarations was uncertain. In addition, the circumstance that these declarations are mostly in relation to military exercises and manoeuvres and not military activities generally illustrates the fact that those activities were and still are among the most contentious activities about which states and commentators disagree the most.

It is also interesting to observe that all these states, with the exception of the US, are European states and that all of them are generally considered to be developed states, as opposed to developing states.

3.1.3 Summary

In summary, this interpretation of UNCLOS entails that states are free to conduct military activities in foreign EEZs without prior notice or the consent of the coastal state. Although, it is acknowledged that the obligation of due regard and the principle of peaceful uses of the seas must be observed.[171] The main sources of justification for this interpretation appear to be the language of Article 58(1) of UNCLOS, the legislative history of that provision as well the historical military uses of the high seas areas now considered EEZ.

[171] The principle of peaceful uses of the seas and the peaceful purposes provisions (Articles 88 and 301 of UNCLOS) and their implication upon the permissibility of states conducting military activities in foreign EEZs will be analysed more in-depth under part 3.2.1.2.

Galdorisi and Kaufman, Pedrozo, Bellflower as well as Churchill, Lowe and Sander all reference the phrase 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines' contained in Article 58(1) of UNCLOS to justify their interpretation that states have the right to conduct military activities in foreign EEZs. With further reference to the legislative history of that provision, which entailed that the wording was drafted to preserve military uses in the EEZ, and the fact that military activities have generally been considered lawful uses of the high seas, Galdorisi and Kaufman reach the "inescapable" conclusion that Article 58(1) of UNCLOS permits states to conduct naval manoeuvres in foreign EEZs. However, is such a conclusion and interpretation really "inescapable"? Clearly, as will later be discussed in depth, several commentators and states alike have not reached the same conclusion. The fact remains that nothing in the wording of Article 58 of UNCLOS explicitly references military activities and the existence of opposing interpretations of the same provision shows, in my view, that their conclusion is indeed not inescapable.

Similarly, Roach and Smith assert that military activities are recognised historic uses of the high seas preserved by Article 58 of UNCLOS, leading them to the conclusion that all states have the right to conduct military activities in foreign EEZs. However, unlike Galdorisi and Kaufman, Roach and Smith reach their conclusion without giving any further explanation, reasoning or argumentation. They reach their conclusion swiftly, without giving a hint that other interpretations of the same provisions, in fact, exist. To reach a conclusion about such a contentious and widely disputed issue as the permissibility of military activities in foreign EEZs without further argumentation or reasoning renders their conclusions, in my opinion, less compelling.

Pedrozo also appears to reach his conclusion swiftly and without presenting compelling arguments to support it. For example, Pedrozo references 'long-standing state practice' and that 'state practice clearly shows' without actually giving a sufficient account of the state practice he is referring to. In my opinion, simply stating that there is long-standing state practice and that this state practice clearly supports his conclusions without proper reference to that state practice weakens his conclusion.

With reference to the aforementioned phrase of Article 58(1) of UNCLOS and the circumstance that UNCLOS III wanted to preserve military uses of the EEZ, Bellflower

concludes that military uses of another state's EEZ are "clearly" permissible. Once again, given that Article 58 of UNCLOS is silent regarding the permissibility of such uses and has been interpreted differently by commentators and states alike, the conclusion reached is perhaps not clear.

Notwithstanding the critique raised, the conclusions and argumentation presented are, in my view, not without reason or logic. Although Galdorisi and Kaufman's claim that their conclusion is "inescapable" can be questioned, their argumentation and reasoning leading them to their conclusion are, in my opinion, compelling. Based on the argumentation presented, it seems reasonable to argue that several states during the negotiations of UNCLOS III wanted to preserve military uses of the EEZ and that the language of Article 58 of UNCLOS was changed in a way which arguably incorporates a broader set of uses than a previous draft. Similar argumentation has also been presented by Bellflower and (although implicitly) Roach and Smith as well as Heintschel von Heinegg. In addition, Galdorisi and Kaufman state that naval manoeuvres have historically been considered a lawful use of the high seas. This is supported by Roach and Smith, Pedrozo and Heintschel von Heinegg. Consequently, it is seemingly clear that it was lawful under customary international law to conduct military activities on the high seas areas now encompassed by EEZs prior to the adoption of UNCLOS.

Given the ambiguous wording of Article 58 of UNCLOS, its legislative history and the circumstance that military activities have historically been regarded as lawful uses of the high seas, the argument that Article 58 of UNCLOS gives states the right to conduct military activities in foreign EEZs without coastal state consent is, in my opinion, both reasonable and convincing. Nevertheless, as has been noted by several of the commentators discussed above, the obligation to have due regard to the rights and duties of the coastal state as well as the rights and duties of other states qualifies this right. In addition, as will later be analysed in depth, the military activity may not breach the principle of peaceful uses of the seas (see Articles 88 and 301 of UNCLOS).

With regard to the obligation of due regard, I agree with the argumentation presented by Prezas that due regard is only applicable to resolve potential conflicts if a right to conduct (or regulate) military activities exists, given that the purpose of due regard is to balance different rights of a different nature. A right which does not exist cannot be balanced. As evidenced by

the *Chagos Marine Protected Area Arbitration* and the *'Enrica Lexie' Incident*, there are a number of factors which must be taken into account when determining whether an activity is in conformity with the reciprocal due regard obligations. Such factors include the importance of the respective rights, the nature and importance of the proposed activity, the extent of the impairment as well as the availability of alternative approaches. Moreover, it has been clarified that this, in the majority of cases, would entail at least some consultation between the parties. Consequently, the reciprocal due regard obligations require, in the majority of cases, both consultation and a balancing of the respective rights and interests of the coastal state and the other state. In the context of a state conducting military activities in a foreign EEZ, the obligation of due regard that it is owed the coastal state thus, in the majority of cases, would mean that the other states must give prior notice to or consult with the coastal state. As detailed previously, this is to be done in order for the coastal state to make sure that its rights and interests will indeed be respected. While it can be argued that activities of a more material dimension, such as military exercises and weapons testing, fall within the majority of cases and thus require consultation with the coastal state, it is not as clear whether activities of a more intellectual nature, such as military survey activities, also fall within the majority of cases. Nevertheless, the nature of a particular military activity determines the standard of due regard and an assessment of the conformity with due regard is to be done on a case-by-case basis.

Nevertheless, prior notice and consultations are not equal to prior consent. Yet, asserting that states are free to conduct military activities in foreign EEZs without prior notice may result in a breach of the obligation of due regard given that, as opined by the tribunals in the aforementioned cases, at least some consultation is needed in the majority of cases. At the same time, if the other state notifies the coastal state of its intention to conduct military activities in its EEZ, or if consultations between the states drag on, and the coastal state gives no sufficient reason as to why its economic rights, interests or jurisdiction would be violated if the other states conduct its activities, I am unable to see how the obligation of due regard would restrict the other state from conducting the military activity.

3.2 A Non-Peaceful and Internationally Unlawful Use of the Sea…

3.2.1 Articles 58, 88 and 301 of UNCLOS ≠ Right to Conduct Military Activities in Foreign Exclusive Economic Zones

This interpretation of UNCLOS asserts that states are not allowed to conduct military activities in foreign EEZs without the consent of the coastal state. This is because the freedom to conduct military activities is not encompassed by Article 58 of UNCLOS and/or because such activities are not in conformity with the principle of peaceful uses of the seas as encapsulated by the peaceful purposes provisions (Articles 88 and 301 of UNCLOS).

Ren Xiaofeng and Cheng Xizhong argue that military activities in the EEZ are not a part of the freedom of navigation and overflight, because such activities violate 'the national security interests of the coastal State, and can be considered a use of force or a threat to use force against that State'.[172] Ren and Cheng assert that it is clear the EEZ is only to be used for peaceful purposes and concludes that military activities violate Article 301 of UNCLOS,[173] which states that:

> 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.[174]

Ren and Cheng, therefore, more or less equate military activities to a threat or use of force inconsistent with the UN Charter, rendering military activities in foreign EEZs illegal. They further assert that those military activities considered prejudicial to the peace, good order or security of coastal states when conducted in the territorial sea are also to be considered prejudicial to the peace of coastal states when conducted within the EEZ and should, therefore, be deemed non-peaceful and be prohibited.[175] Moreover, Ren and Cheng argue that the freedom to conduct military activities in foreign EEZs is not included in the term 'other internationally lawful uses of the sea' (Article 58(1) of UNCLOS). Consequently, they

[172] Ren Xiaofeng and Cheng Xizhong, 'A Chinese Perspective' (2005) 29 Marine Policy 139, 142.
[173] Ren and Cheng (n 172) 142.
[174] Article 301 of UNCLOS.
[175] Ren and Cheng (n 172) 143-144. According to Article 19 of UNCLOS, military activities considered prejudicial to the peace, good order or security of coastal states when conducted in the territorial sea include, among other things, any threat or use of force contrary to the UN Charter, practice or exercises with weapons and research or survey activities.

conclude that the coastal state has the right to both restrict and prohibit military activities conducted by foreign military aircraft and vessels within its EEZ.[176] In relation to the obligation of due regard, Ren and Cheng argue that, logically, the exclusive jurisdiction and sovereign rights of the coastal state are to be considered superior when resolving conflicts.[177]

Li Guangyi, Wan Binhua and Zhu Hongjie argue that other states only enjoy what they refer to as the "freedom of passage" within the EEZ of the coastal state which, naturally, does not include the right to conduct military activities that threaten the national security or safety interests of the coastal state, such as military intelligence gathering and weapons testing, without prior consent.[178] With reference to Article 58 of UNCLOS Li, Wan and Zhu explain that a foreign warship or warplane exercising the freedom of navigation or overflight in the coastal state's EEZ must have due regard to the rights of the coastal state. Although UNCLOS does not contain a detailed explanation, they argue that some scholars have made the interpretation that the rights of the coastal state include those rights that the coastal state is entitled to under customary international law, such as the right that the safety, sovereignty and national interests of the coastal state are not to be obstructed. Li, Wan and Zhu, therefore, conclude that activities such as military exercises, weapons testing, military surveying, military intelligence gathering as well as activities affecting the coastal state's exercise of its sovereign rights and jurisdiction affect or threaten the safety, sovereignty or national interests of the coastal state, resulting in such activities being illegal.[179] The coastal state may therefore restrict or prohibit any foreign military activities obstructing its jurisdiction or sovereignty.[180]

With reference to the principle of the peaceful uses of the seas as detailed in Article 301 of UNCLOS, Keyuan Zou argues that military activities 'with threatening potentials should not be carried out in the EEZs of other countries'.[181] While Zou does acknowledge that military activities are allowed within the EEZ, he claims that the factor of national jurisdiction has to be considered.[182] Zou argues that military activities that by their very nature are threatening and have clear bad intentions or are conducted in a hostile manner should be banned within

[176] Ren and Cheng (n 172) 142.
[177] Ren and Cheng (n 172) 145.
[178] Li Guangyi, Wan Binhua and Zhu Hongjie, 'On the Rights and Obligations of Military Activities in the Exclusive Economic Zone' (2011) 2011 China Oceans L Rev 148, 150.
[179] Li, Wan and Zhu (n 178) 154-155.
[180] Li, Wan and Zhu (n 178) 159.
[181] Keyuan Zou, 'Peaceful Use of the Sea and Military Intelligence Gathering in the EEZ' (2016) 22 Asian Yearbook of International Law 161, 162.
[182] Zou (n 181) 164.

the EEZ. With regard to other military activities, Zou believes that these activities 'can be allowed under certain conditions laid down by the coastal State, similar to the marine scientific research regime under [UNCLOS]'.[183] As earlier mentioned, Article 246 of UNCLOS declares that no one is allowed to conduct MSR within the coastal state's EEZ without its consent. However, the coastal state should under normal circumstances give its consent to research conducted solely for peaceful purposes. Therefore, Zou seemingly argues that foreign states may not conduct military activities within the EEZ of the coastal state without its consent. Zou concludes that since coastal states are allowed to regulate MSR there is no reason why they would be prevented from regulating military activities conducted by foreign states within their EEZs.[184]

3.2.1.1 Military Survey Activities v. Marine Scientific Research

Military survey activities (including hydrographic surveying and military surveying) are some of the most contentious military activities being conducted in foreign EEZs. The question asked in this context is whether such activities are to be regarded as MSR given that neither the term "marine scientific research", "military survey", "hydrographic survey" nor "survey activities" are defined in UNCLOS.[185] If regarded as MSR, this would put military survey activities under the jurisdiction of the coastal state. Even if not considered to be within the scope of MSR, it is still not entirely clear if hydrographic and military surveys may be lawfully conducted by states in foreign EEZs without the consent of the coastal state.

With regard to hydrographic surveying, the UNCLOS text supports the view that it falls outside the scope of MSR since a distinction is made between surveying and scientific research in several places throughout the convention. Churchill, Lowe and Sander explain:

> [A]rticle 19(2)(j) provides that a foreign ship navigating through a coastal State's territorial sea is not in innocent passage if it engages in 'the carrying out of research *or* survey activities' (emphasis added). Article 21(1)(g) provides that the matters on which a coastal State may legislate in relation to ships in innocent passage include 'marine scientific research *and* hydrographic surveys' (emphasis added). In similar vein, article 40 provides that 'foreign ships, including marine

[183] Zou (n 181) 167.
[184] Zou (n 181) 167.
[185] See Sam Bateman, 'Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research' (2005) 29 Marine Policy 163, 164.

> scientific research and hydrographic survey ships', when exercising the right of transit passage through an international strait, 'may not carry out any research or hydrographic activities, without the prior authorization' of the strait State(s). Articles 52 and 54 make those provisions applicable to foreign ships exercising the rights of innocent passage and archipelagic sea lanes passage through archipelagic waters. Hydrographic surveying is not mentioned at all in Part XIII, which is entitled 'Marine Scientific Research'.[186]

Given this distinction, Churchill, Lowe and Sander claim that there are good arguments supporting the view that hydrographic surveys are not considered MSR under UNCLOS.[187] Similar arguments have been presented by Heintschel von Heinegg,[188] Roach and Smith[189] as well as Pedrozo.[190] Due to the clear distinctions made between research and hydrographic surveying in the UNCLOS text and the lack of reference to hydrographic surveying in Part XIII of UNCLOS, I do not consider hydrographic surveying as MSR. However, this, in itself, does not make it obvious whether such activities may be lawfully conducted by states in foreign EEZs as there is no reference to these activities in Part V of UNCLOS.

Li, Wan and Zhu argue that military hydrographic surveying falls within the scope of MSR, even if the data is used for military purposes, as opposed to scientific purposes. Therefore, they claim that military survey activities conducted within the EEZ are under the jurisdiction of the coastal state, meaning that the coastal state can withhold consent for any foreign military survey activities conducted within its EEZ.[191] Zhang Haiwen observes that UNCLOS does not explicitly state which activities are to be considered MSR or that military activities are not to be considered MSR.[192] Zhang argues that because of the use of modern technology and equipment 'it is now difficult to distinguish between marine survey, marine data collection and marine scientific research from the perspective of the types and potential uses of collectable marine data'.[193] Therefore, Zhang concludes that such marine data collection activities could be considered MSR subject to the jurisdiction of the coastal state.[194] Based on

[186] Churchill, Lowe and Sander (n 39) 785.
[187] Churchill, Lowe and Sander (n 39) 785.
[188] Heintschel von Heinegg (n 127) 58.
[189] Roach and Smith (n 22) 435.
[190] Pedrozo, 'Close Encounters at Sea' (n 2) 106-107.
[191] See Li, Wan and Zhu (n 178) 158.
[192] Zhang Haiwen, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States - Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ' (2010) 9 Chinese J Int'l L 31, 35.
[193] Zhang (n 192) 36.
[194] Zhang (n 192) 36.

Article 56(2)(b) and Part XIII of UNCLOS, the coastal state, therefore, has jurisdiction.[195] Zhang also argues that simply claiming that a marine data collection activity has a military purpose does not prove that such an activity does not fall within the scope of MSR.[196] Moreover, Churchill, Lowe and Sander argue that because Part XIII of UNCLOS does not distinguish research for civilian purposes from research for military purposes, it appears, in their view, 'difficult to regard military surveying that goes beyond hydrographic surveying as excluded from the scope of Part XIII'.[197]

However, the interpretation that hydrographic and military surveys fall within the jurisdiction of the coastal state is challenged by several commentators. Heintschel von Heinegg argues, based on a systematic interpretation of Articles 19(2)(j), 21(1)(g) and 40 of UNCLOS, that military surveys are not considered MSR and concludes that 'any form of marine data collection that is not covered by the term "MSR" is a right granted under "other pertinent rules of international law" [Article 58(2) of UNCLOS], which may neither be impeded nor interfered with by the coastal State'.[198] Similarly, Roach and Smith claim that survey activities are not MSR and that Article 58(1) of UNCLOS guarantees that all states have the right to conduct surveys within the EEZ.[199] Since no general competence is given to the coastal state with regard to military activities in the EEZ, Roach and Smith conclude that coastal states cannot regulate military surveys conducted by foreign states within their EEZs.[200] Pedrozo argues that the military use of the data collected distinguishes military surveys from MSR, even if the means used to collect the data often are similar. Therefore, coupled with the plain language of UNCLOS, Pedrozo concludes that military surveys may be conducted within foreign EEZs without prior notice to or the consent of the coastal state in accordance with Article 58 of UNCLOS.[201]

In addition to the discussion of whether hydrographic surveys are to be considered MSR, Sam Bateman offers an interesting perspective. Bateman explains that many of the technologies used for hydrographic surveying and MSR are substantially the same.[202] He further explains

[195] See Zhang (n 192) 36.
[196] Zhang (n 192) 38.
[197] Churchill, Lowe and Sander (n 39) 786.
[198] Heintschel von Heinegg (n 127) 58-59.
[199] Roach and Smith (n 22) 435-436.
[200] Roach and Smith (n 22) 437.
[201] Pedrozo, 'Close Encounters at Sea' (n 2) 106; Pedrozo, 'Preserving Navigational Rights and Freedoms' (n 120) 22.
[202] Bateman (n 185) 166.

that prior to the introduction of the DGPS and GPS, shore control was essential in order to get accurate positing fixing. This means that it would only have been possible to conduct the majority of surveys in the EEZ with the support of the coastal state. Given the realities of conducting surveys prior to the introduction of the GPS, Bateman says that it is probably not a coincidence that the issue of conducting hydrographic surveys in the EEZ only became controversial once the GPS had indeed been introduced.[203] Moreover, Bateman explains that apart from using hydrographic knowledge for navigational safety, such knowledge can be used to plan the exploration and exploitation of natural resources, delimit maritime boundaries, determine the seaward limits of national jurisdiction and for national development (e.g., to build new harbours or ports).[204] Given the economic value of the knowledge gathered from hydrographic surveying, Bateman opines that:

> [The] relevance of hydrographic surveying to economic development supports the view that hydrographic surveying in an EEZ should come within the jurisdiction of the coastal State. Hydrographic data in the EEZ clearly has economic value to the coastal State and the coastal State should be in a position to manage and control the release of such data, regardless of how and by whom it was collected. It is virtually impossible these days to identify any hydrographic data, including that conducted by military surveying ships, which would not have some potential value to the coastal State.[205]

Bateman thus argues that the coastal state should have jurisdiction over hydrographic surveying due to its economic value to the coastal state and not because it should be considered MSR.[206] Similarly to Zhang, and as opposed to Pedrozo, Bateman argues that it is not sufficient to say that hydrographic surveys are outside coastal state jurisdiction simply by claiming that the data collected is intended to be used for military purposes.[207]

3.2.1.2 The Principle of Peaceful Uses of the Seas

Ren and Cheng, Li, Wan and Zhu as well as Zou in one way or another argue that the principle of peaceful uses of seas restricts states from conducting military activities in foreign

[203] Bateman (n 185) 168.
[204] Bateman (n 185) 169.
[205] Bateman (n 185) 169.
[206] Although Bateman's reasoning is interesting and worthy of consideration, I have been unable to find substantial support for it.
[207] Bateman (n 185) 170.

EEZs without coastal state consent. Ren and Cheng, for example, more or less equate military activities to a threat or use of force inconsistent with the UN Charter, meaning that military activities within foreign EEZs are illegal under Articles 88 and 301 of UNCLOS. However, is this interpretation "correct"? Do all military activities conducted in foreign EEZs actually equate to a threat or use of force inconsistent with Article 2(4) of the UN Charter?[208]

Article 88 of UNCLOS, which is applicable to the EEZ by virtue of Article 58(2) of UNCLOS, stipulates that the high seas are reserved for peaceful purposes. Yoshifumi Tanaka explains that Article 88 of UNCLOS is generally not considered to prohibit conventional weapons testing or naval manoeuvres on the high seas.[209] Jing Geng asserts that it does not follow from Article 301 of UNCLOS that military activities are to be considered inherently non-peaceful and that military exercises and manoeuvres have historically been considered compatible with Article 88 of UNCLOS and the freedom of the high seas.[210] Similarly to Geng, Prezas argues that Article 301 of UNCLOS does not equate military activities to a threat or use of force against the coastal state and therefore, in principle, all military activities not considered an unlawful use of force are entirely lawful.[211] Prezas further argues that whether a military activity is lawful in accordance with Articles 88 and 301 of UNCLOS is to be assessed on a case-by-case basis.[212] Charlotte Beaucillon argues that only those military activities contrary to the UN Charter are forbidden and that Article 301 of UNCLOS 'does not prohibit any and all military activities in each and every maritime zone, including the EEZ (…)'.[213] Churchill, Lowe and Sander assert that the prevailing view is that Article 88 of UNCLOS only prohibits aggressive military acts that contravene the UN Charter.[214] They also opine that military activities constituting a threat or use of force not authorised by the UN Security Council are lawful if they are an act of collective or individual self-defence.[215] Given the underlying ideas and factors contributing to the maritime powers' acceptance of the EEZ concept, Said Mahmoudi argues that 'it is hardly tenable to argue that the convention has, through the inclusion of provisions concerning peaceful uses, forbidden military activities in

[208] 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Article 2(4) of the UN Charter.
[209] Tanaka (n 24) 188.
[210] Geng (n 110) 27.
[211] Prezas (n 139) 113.
[212] Prezas (n 139) 114.
[213] Charlotte Beaucillon, 'Limiting Third States' Military Activities in the EEZ: 'Due Regard Obligations' and the Law on the Use of Force Applied to Nuclear Weapons' (2019) 34 Int'l J Marine & Coastal L 128, 131-132.
[214] Churchill, Lowe and Sander (n 39) 281.
[215] Churchill, Lowe and Sander (n 39) 283.

the sea and particularly in the EEZ'.[216] Finally, Boczek provides compelling argumentation for why Articles 88 and 301 of UNCLOS do not have the intention of imposing restrictions upon military activities, stating that:

> It is obvious that this is the only logical and realistic interpretation of the peaceful purposes provisions; there are numerous indications that [UNCLOS] accepts military activities at sea as a normal fact of life. First, it accepts the existence of warships and even grants them a privileged status. Second, it lists among the activities incompatible with the meaning of innocent passage in the territorial sea some military [activities] such as exercise or practice with weapons of any kind and the launching, landing, or taking on board of any aircraft or military device. This special exclusion clause implies that such activities are permissible outside the territorial sea. Finally, the optional exclusion from compulsory judicial settlement of disputes concerning military activities, including military activities of warships and other governmental vessels and aircraft, would make no sense if such activities were illegal under the peaceful purposes clauses of [UNCLOS].[217]

Given the reasonable and uniform argumentation presented by these commentators, I do not consider any and all military activities equal to a threat or use of force inconsistent with the UN Charter. The general consensus appears to be that Articles 88 and 301 of UNCLOS do not impose restrictions on military activities other than prohibiting those activities that do in fact constitute a threat or use of force against the coastal state. If the purpose of these provisions was to prohibit any and all military activities in the EEZ, I find it very hard to believe that the drafters of UNCLOS would not have made this as obvious as when stipulating that certain military activities are inconsistent with innocent passage within the territorial sea. Furthermore, the circumstance that states in accordance with Article 298(1)(b) of UNCLOS are allowed to exclude disputes concerning military activities from compulsory judicial settlement would make no logical sense if military activities by their very nature were considered equal to a threat or use of force against the coastal state. In fact, numerous states have opted to exclude disputes concerning military activities from compulsory judicial settlement.[218] Consequently, any claim or insinuation that Articles 88 and 301 of UNCLOS

[216] Said Mahmoudi, 'Foreign Military Activities in the Swedish Economic Zone' (1996) 11 Int'l J Marine & Coastal L 365, 374.
[217] Boczek (n 136) 457-458.
[218] States that have excluded disputes concerning military activities from compulsory judicial settlement include Argentina, Chile, Cabo Verde, Thailand, China, Ecuador, the UK, Russia, Algeria, Belarus, Canada, France, Greece, Mexico, Togo, Tunisia, Ukraine, Egypt, Kenya, Portugal, South Korea and Saudi Arabia. United

prohibit military activities other than those contradicting Article 2(4) of the UN Charter are inconsistent with UNCLOS. Whether a particular military activity contradicts these provisions should reasonably be assessed on a case-by-case basis.

3.2.2 State Practice

Several states appear in support of the interpretation that states do not have the right to conduct military activities in the EEZ of another state without prior notice and/or consent of that state. Upon ratification of UNCLOS in 1988, Brazil declared that:

> The Brazilian Government understands that the provisions of [UNCLOS] do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives, in the Exclusive Economic Zone without the consent of the coastal State.[219]

Brazil not only made a declaration stating that military exercises cannot be conducted without the consent of the coastal state, but it also passed legislation in 1993 stating that the Brazilian government must give its consent before a state is allowed to conduct military exercises (particularly those involving explosives or weapons) within its EEZ.[220] Almost identical declarations have been declared by India,[221] Bangladesh,[222] Malaysia[223] and Pakistan.[224]

Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 3 November 2022.

[219] Declaration of Brazil made upon ratification of UNCLOS (22 December 1988). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

[220] Article 9 of Law No. 8.617 of 4 January 1993 on the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf, available at DOALOS <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BRA_1993_8617.pdf> accessed 17 October 2022.

[221] Declaration of India made upon ratification of UNCLOS (29 June 1995). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

[222] Declaration of Bangladesh made upon ratification of UNCLOS (27 July 2001). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

[223] Declaration of Malaysia made upon ratification of UNCLOS (14 October 1996). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

[224] Declaration of Pakistan made upon ratification of UNCLOS (26 February 1997). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea'

These states, therefore, clearly support the interpretation that military exercises, particularly those involving weapons and explosives, cannot be lawfully conducted within foreign EEZs without the consent of the coastal state.

Similarly to Brazil, Iran passed domestic legislation in 1993 stating that '[f]oreign military activities and practices, collection of information and any other activity inconsistent with the rights and interests of the Islamic Republic of Iran in the exclusive economic zone and the continental shelf are prohibited'.[225] Iran thus appears to restrict any and all foreign military activities conducted within its EEZ.

With regard to military exercises with weapons conducted in foreign EEZs, Cabo Verde declared that:

> In the exclusive economic zone, the enjoyment of the freedoms of international communication, in conformity with its definition and with other relevant provisions of [UNCLOS], excludes any non-peaceful use without the consent of the coastal State, such as exercises with weapons or other activities which may affect the rights or interests of the said state; and it also excludes the threat or use of force against the territorial integrity, political independence, peace or security of the coastal State.[226]

Uruguay has made a more or less identical declaration.[227] A similar declaration was also made by Thailand in 2011.[228] The declarations of Cabo Verde, Uruguay and Thailand thus express

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<https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

[225] Article 16 of the Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea (1993), available at DOALOS <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf> accessed 17 October 2022.

[226] Declaration of Cabo Verde made upon signature (10 December 1982) and confirmed upon ratification of UNCLOS (10 August 1987). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

[227] Declaration of Uruguay made upon signature (10 December 1982) and confirmed upon ratification of UNCLOS (10 December 1992). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

[228] Declaration of Thailand made upon ratification of UNCLOS (15 May 2011). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 17 October 2022.

that they, similarly to Brazil, Pakistan, Bangladesh, India and Malaysia, do not believe that states have the right to conduct military exercises within the EEZ of another state without its consent. However, Cabo Verde, Uruguay and Thailand also reference the principle of peaceful uses of the seas and, on the face of it, it looks as if they claim that military exercises are inherently non-peaceful. Yet, as explained earlier, military activities are not inherently non-peaceful. Consequently, these declarations are seemingly not in complete conformity with UNCLOS. It may also be remembered that Italy objected to the declarations of Uruguay and Cabo Verde, as well as those of Brazil and India.

Moreover, Ecuador made the following declaration upon its accession to UNCLOS in 2012:

> The Ecuadorian State declares, in accordance with articles 5 and 416 of the Constitution of the Republic, that its maritime spaces constitute a zone of peace; consequently, no military exercises or manoeuvres of any type, nor any shipping activities that threaten or could threaten peace and security, may be conducted without its express consent.[229]

Ecuador therefore clearly asserts that military exercises or manoeuvres cannot be conducted within the EEZ of another state without the express consent of the coastal state. Several states objected generally to the declaration made by Ecuador upon its accessions to UNCLOS,[230] with Italy once again reiterating that the coastal state neither has the rights or jurisdiction to obtain notification nor authorise military exercises or manoeuvres within its EEZ.[231]

Another state supporting this interpretation of UNCLOS is China. China is opposed to states engaging in military activities within its EEZ without its consent.[232] Particularly, China has made the interpretation that both hydrographic and military surveying falls under the

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[229] Declaration of Ecuador made upon accession to UNCLOS (24 September 2012). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 3 November 2022.
[230] Several states (including Germany, the Netherlands, Ireland, Finland, Sweden, Belgium and Latvia) objected generally to the declaration made by Ecuador upon accession to UNCLOS, questioning whether it constituted a reservation contrary to Articles 309 and 310 of UNCLOS. United Nations Treaty Collection (n 218).
[231] Objection of Italy (23 October 2013). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 3 November 2022.
[232] Zhang (n 192) 47.

jurisdiction of the coastal state as they are considered MSR.[233] According to Chinese domestic legislation, all mapping and surveying activities conducted in areas under Chinese jurisdiction must be approved by the relevant Chinese authorities.[234] Similarly, the domestic legislation of India, Malaysia and Tanzania suggests that these states require prior consent before *any* research can be conducted within their respective EEZ. According to Indian domestic legislation, no person or foreign government is allowed to carry out any research within the Indian EEZ without a license or agreement.[235] Malaysian domestic legislation asserts that no person is allowed to conduct any MSR or carry out any search within the Malaysian EEZ without authorisation.[236] Likewise, the domestic legislation of Tanzania prescribes that no person is allowed conduct any research within the Tanzanian EEZ without an agreement with the government.[237]

In addition, it has been understood that both Canada and Australia ask the coastal state for permission before conducting hydrographic surveying within the EEZ of another state.[238] By contrast, the US and the UK do not consider hydrographic and military surveys as MSR and believe that these military activities can be conducted in a foreign EEZ without the authorisation of the coastal state.[239]

It is thus clear that several states support the interpretation that states are not allowed to conduct military activities such as military exercises and military survey activities within foreign EEZs without the consent of the coastal state. This is not only evidenced with reference to state declaratory practice but also to domestic legislation. With the exception of Iran, none of the states mentioned above appears to assert that any and all military activities require the consent of the coastal state before they can be lawfully conducted within the EEZ

[233] Tanaka (n 24) 442; Churchill, Lowe and Sander (n 39) 786; Zou (n 181) 172-173.
[234] Articles 2 and 7 of the Surveying and Mapping Law of the People's Republic of China (Order of the President No. 75) (2002), available at <http://www.asianlii.org/cn/legis/cen/laws/samlotproc506/> accessed 17 October 2022.
[235] Article 7(5) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act (Act No. 80 of 28 May 1976), available at DOALOS <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IND_1976_Act.pdf> accessed 17 October 2022.
[236] Article 5 (b) and (c) of the Exclusive Economic Zone Act (Act No. 311) (1984), available at DOALOS <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf> accessed 17 October 2022.
[237] Article 10(1)(c) of the Territorial Sea and Exclusive Economic Zone Act (1989) available at DOALOS <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TZA_1989_Act.pdf> accessed 17 October 2022.
[238] Bateman (n 185) 170.
[239] Tanaka (n 24) 442; Churchill, Lowe and Sander (n 39) 786.

of that state. The fact that these states only restrict military exercises (with or without the use of weapons) and not all military activities could be interpreted in different ways. Either these declarations only purport to restrict military exercises because these states only considered military exercises conducted in a foreign EEZ without the consent of the coastal state as incompatible with UNCLOS, or they only mention military exercises as an example of a military activity that, in their view, requires coastal state consent. In addition, some states have enacted domestic legislation which purports to regulate any research conducted within their respective EEZs, meaning that these states purport to regulate military surveying activities.

The circumstance that these states felt the need to declare their interpretation of UNCLOS illustrates that the issue of military activities conducted in foreign EEZs was not resolved or certain at the time of making their respective declarations. Also, the fact that these declarations and domestic legislations are primarily in relation to military exercises and military survey activities as opposed to military activities generally demonstrates that these activities are among the most controversial military activities that can be conducted by a state within the EEZ of another state.

It is evident that the state practice presented here is in sharp contrast to the state practice supporting the first interpretation. While states such as the US, Italy, Germany, the UK and the Netherlands assert that states cannot regulate foreign military exercises conducted in their EEZs, the various states mentioned above have made the opposite interpretation. This sharp divide in state practice shows that although they are all state parties to the same convention (with the notable exception of the US), the ambiguous nature of UNCLOS has resulted in states having vastly different interpretations. As evidenced by the various altercations between the US and China and the Russia-Ireland incident presented in the introduction, these varying interpretations result in real-life conflicts which under the worst of circumstances can even result in people dying. Consequently, these opposing interpretations and state practices pose a problematic issue not only in theory but also in practice.

Moreover, it is interesting to observe that the majority of the states supporting the present interpretation are generally considered to be developing states, whereas the opposing interpretation is supported mainly by developed states.[240]

3.2.3 Summary

In summary, this interpretation of the provisions of UNCLOS asserts that states do not have the right to unilaterally conduct military activities within the EEZ of another state without prior consent. This interpretation is based on the argument that Article 58 of UNCLOS does not include such a right and/or because the peaceful purposes provisions (Articles 88 and 301 of UNCLOS) restrict or prohibit states from conducting such activities.

Ren and Cheng argue that military activities are not a part of the freedom of navigation and overflight nor included in the term 'other internationally lawful uses of the sea' (Article 58(1) of UNCLOS) and that the coastal state, therefore, can restrict or prohibit foreign military activities within its EEZ. With reference to Article 301 of UNCLOS, they more or less equate any and all military activities to an illegal threat or use of force. While the ambiguous wording of Article 58 of UNCLOS may well enable the interpretation that that provision does not include the right to conduct military activities in foreign EEZs without coastal state consent, their interpretation of Article 301 of UNCLOS is not in conformity with UNCLOS. As explained, the peaceful purposes provisions do not restrict or prohibit military activities generally; they only restrict those that are contrary to the UN Charter. Moreover, Ren and Cheng reach their conclusions swiftly without referring to legislative or historic background, something which, in my opinion, makes their conclusions less convincing.

Li, Wan and Zhu also assert that states do not have the right to conduct military activities in foreign EEZs and that the coastal state, therefore, may restrict or prohibit any military activities that obstruct its jurisdiction or sovereignty. With reference to the obligation of due regard to the rights of the coastal state, they also argue that activities such as military exercises and military surveying are illegal since they affect or threaten the safety, sovereignty or interests of the coastal state. They reach this conclusion with reference to an interpretation made by "some scholars" that the rights of the coastal state include the right that the safety, sovereignty and national interests of the coastal state are not to be obstructed.

[240] See Tanaka (n 24) 470; See Churchill, Lowe and Sander (n 39) 282.

However, they neglect to reference or even indicate who these scholars are. Concluding that certain activities are illegal without adequate argumentation and reference, in my opinion, makes their argumentation unconvincing.

In contrast, Zou acknowledges that military activities are allowed within the EEZ, but that the factor of national jurisdiction must be considered. Zou goes on to argue that those military activities that are threatening, have clear bad intentions or are conducted in a hostile manner should be banned within the EEZ. With regard to other military activities, Zou opines that a similar regime to that of MSR should be used. MSR is under the coastal state's jurisdiction and may only be conducted with its consent. Therefore, Zou seemingly concludes that the coastal state must give its consent before any foreign military activity can be conducted within its EEZ and argues that there is no reason why the coastal state would be prevented from regulating military activities conducted by foreign states within its EEZ given that the coastal state has jurisdiction over MSR. I do not agree with Zou's conclusion that there is "no reason" why the coastal state is prevented from regulating military activities conducted by foreign states within its EEZ since the coastal state can regulate MSR. MSR and military activities are arguably not the same type of activity and UNCLOS does not explicitly mention military activities conducted by foreign states in the EEZ anywhere. The fact that states through Part XIII of UNCLOS have been given jurisdiction over MSR does not in itself mean that other activities conducted in the EEZ should be subject to a similar regime.

As noted, it is a contentious issue of whether states can regulate the conduct of military survey activities such as hydrographic and military surveying. Based on the various distinctions made between scientific research and surveying throughout UNCLOS and the absence of reference to hydrographic surveying in Part XIII of UNCLOS, I concluded that hydrographic surveying is not to be considered MSR. Consequently, I consider the argumentation that hydrographic surveying is MSR presented by Li, Wan and Zhu as well as Zhang as contrary to UNCLOS. However, it is less clear whether military surveys are considered MSR. Churchill, Lowe and Sander observe that Part XIII of UNCLOS does not distinguish between research for civilian purposes and research for military purposes and argues that if a military survey goes beyond hydrographic surveying it would be difficult to consider that military survey as excluded from Part XIII of UNCLOS. Zhang argues that simply claiming that data is collected for military purposes does not mean that such data collection activities are not to be considered MSR. By contrast, Pedrozo argues that even if the means used to collect the data are similar, the

military use of the data collection distinguishes military surveys from MSR. Given that Part XIII of UNCLOS nowhere distinguishes between research for military purposes and research for civilian purposes, I find it hard to see how a MSR project that would be considered MSR if conducted for civilian purposes would suddenly not be considered MSR if the exact same project was conducted for military purposes. Similarly to Churchill, Lowe and Sander, I find it difficult not to regard military surveys that go beyond hydrographic surveying as MSR.

By contrast to the first interpretation presented, namely that states do have the right to conduct military activities within the EEZ of another state without prior notice or consent, the arguments presented by the aforementioned commentators supporting the present interpretation do not refer to the legislative history of the relevant provisions of UNCLOS or to the historic uses of the seas. Although the present interpretation may be valid based on the ambiguous wording of Article 58 of UNCLOS, the absence of reference to legislative history or historic background supporting this interpretation makes it less convincing than the first interpretation. Nevertheless, the state practice supporting this interpretation of UNCLOS shows that there is indeed no agreed interpretation. By comparison to the state practice presented in support of the first interpretation, there is seemingly more state practice in support of the present interpretation. So far, the state practices of 19 states have been mentioned, 18 being state parties to UNCLOS. Given that UNCLOS has 168 parties, the interpretation of the vast majority of the state parties to UNCLOS remains ambiguous. Does the silence of the majority of state parties to UNCLOS mean that only a select few states actually consider it unclear whether UNCLOS permits states to conduct military activities within foreign EEZs? Does this silence imply that the majority of states by acquiescence support the first interpretation? Or does it imply that the majority of states by acquiescence support the present interpretation? It is unclear how both the presence and lack of state practice are to be interpreted. It therefore follows that the circumstance that more states appear in support of the present interpretation does not necessarily mean that it is more supported, valid or in conformity with UNCLOS.

3.3 A Matter of Residual Rights…

3.3.1 Article 59 of UNCLOS Shall Apply

According to the third and, for the purposes of this thesis, last interpretation of UNCLOS, the issue of whether states have the right to conduct military activities within the EEZ of another

state is to be considered as a matter of residual rights, meaning that the attribution of this right is to be attributed in accordance with Article 59 of UNCLOS. If a conflict arises between the interests of the coastal state and another state with regard to rights or jurisdiction not attributed to either the coastal state or other states, the conflict is to be 'resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole' (Article 59 of UNCLOS). This provision is thus only applicable to resolve conflicts in cases where UNCLOS has not attributed rights or jurisdiction to the coastal state or other states. Consequently, this provision is only applicable if (1) the right to conduct military activities is not covered by Article 58 of UNCLOS and (2) if the coastal state does not have the rights or jurisdiction to regulate such activities.

But how is Article 59 of UNCLOS supposed to be interpreted? On the one hand, if the EEZ is considered to be fundamentally territorial sea, any unattributed residual rights would fall to the coastal state. This would result in the coastal state being attributed the right to regulate foreign military activities within its EEZ. On the other hand, if the EEZ is considered to be essentially high seas, any unattributed residual rights would fall to all states. This would mean that all states would be attributed with the right to conduct military activities in foreign EEZs.[241] As previously explained, however, there is generally no presumption in favour of either the coastal state or other states when attributing residual rights in accordance with Article 59 of UNCLOS, meaning that the attribution of any residual rights is to be decided on a case-by-case basis.[242]

AV Lowe claims that in the case of unattributed rights, there is no presumption to fall back on, even though some specific rights (e.g., jurisdiction over natural resources) have been given to the coastal state while other rights have been given to other states (e.g., the freedom of navigation and overflight).[243] With reference to Article 59 of UNCLOS, Lowe says that it is easy to foresee conflicts. As an example, Lowe discusses the declarations of Uruguay, Brazil and Cabo Verde, which declare that UNCLOS does not give states the right to conduct military exercises, manoeuvres or weapons tests within the EEZ of another state without

[241] See Galdorisi and Kaufman (n 111) 273.
[242] Tanaka (n 24) 159; Churchill, Lowe and Sander (n 39) 292.
[243] AV Lowe, 'Some legal problems arising from the use of the seas for military purposes' (1986) 10 Marine Policy 171, 179.

consent, in relation to the declaration of Italy, which declares that the coastal state neither has the right to obtain notification nor authorise foreign military exercises within its EEZ.[244] Lowe goes on to say that there is no doubt that some states support the position of Brazil but that it is also certain that other states support the Italian view given the notion that it was the general understanding at UNCLOS III that UNCLOS would permit states to conduct military activities within the EEZ. Lowe opines, however, that this general understanding was not actually translated into UNCLOS and concludes that 'as a matter of law it is difficult to avoid the conclusion that the legality of unauthorized naval maneouvres in the EEZ should be settled according to Article 59'.[245] At the same time, Lowe opines that Article 59 of UNCLOS 'is so utterly vague that in the absence of any compulsory dispute settlement procedure for disputes concerning military activities (…) there seems to be little chance of an authoritative determination of the legality of such activities emerging'.[246] This lack of clarity will, in Lowe's opinion, likely result in international friction since states with conflicting interpretations of UNCLOS will exercise their respective rights as they understand them.[247] As evidenced by the aforementioned incidents and the sharply divided state practice, it is safe to say that Lowe's prediction is entirely accurate.

Considering the entirety of the text, object, purpose, context and drafting history of the relevant UNCLOS provisions, Sienho Yee claims that the existence of Article 59 of UNCLOS as a balancing mechanism appears to favour the view that rights other than resources rights are envisioned. Therefore, in Yee's opinion, the framework of Article 59 of UNCLOS seems to 'favour the view that that the security interest of the coastal State is envisioned under the provisions on the EEZ'.[248] Even if UNCLOS does not contain any express language regarding the security interest of the coastal state, Yee argues that the framework appears to contain the means to deal with the security interest of the coastal state and that it militates in favour of the coastal state given the importance of the security interest in light of the EEZ's proximity to the coastal state.[249] Yee goes on to question what the point would be with all the rights to the natural resources of the EEZ if the security interest of the coastal state cannot be assured in a way that the life of the coastal state cannot be maintained. Yee concludes that the coastal

[244] Lowe (n 243) 179.
[245] Lowe (n 243) 179.
[246] Lowe (n 243) 179.
[247] Lowe (n 243) 179.
[248] Sienho Yee, 'Sketching the Debate on Military Activities in the EEZ: An Editorial Comment' (2010) 9 Chinese J Int'l L 1, 3.
[249] Yee (n 248) 3-4.

state's security interest has to be given paramount importance since it is an issue of primal importance and that the resource rights of the EEZ presume that there is a coastal state that has the ability to protect its security interests.[250] Yee thus appears to assert that Article 59 of UNCLOS attributes the coastal state with a security interest over its EEZ. With reference to peaceful purposes (Article 88 of UNCLOS), Yee argues that it would be impossible for a state to conduct military activities that respect this limitation if those activities are threatening to the coastal state. He further opines that the same impossibility applies to the obligation of due regard.[251]

Cavalcanti de Mello Filho opines that Article 58(1) of UNCLOS is unambiguous and that it does not include the right to conduct military exercises or manoeuvres.[252] At the same time, he argues that the coastal state has not been attributed with jurisdiction over military activities. Because neither the freedom to conduct such activities nor jurisdiction over them has been attributed, he concludes that Article 59 of UNCLOS shall apply.[253] Cavalcanti de Mello Filho argues that military exercises and manoeuvres often have the intention of intimidating the coastal state, even in contradiction to the UN Charter's prohibition on the threat or use of force.[254] With reference to Yee's argument that the security interest of the coastal state is within the scope of Article 59 of UNCLOS and the circumstance that military exercises and manoeuvres often have the intention of intimidating the coastal state, Cavalcanti de Mello Filho concludes that the coastal state's security interest should always prevail, meaning that 'the right to regulate these activities in the EEZ is attributed to the coastal State, including absolute discretion over consent for the practice of these activities'.[255] Similarly to Zhang, Cavalcanti de Mello Filho opines that the ideal form would be that the coastal state should require consent for any military exercises or manoeuvres but that it would only be allowed to withhold consent if the military activity affects its rights, i.e. the same way as consent to conduct MSR in the coastal state's EEZ works.[256]

Prezas counters Yee's and Cavalcanti de Mello Filho's assertion that Article 59 of UNCLOS confers a security interest to the coastal state, arguing that even in the event that Article 59 of

[250] Yee (n 248) 4.
[251] Yee (n 248) 4.
[252] Cavalcanti de Mello Filho (n 151) 371.
[253] Cavalcanti de Mello Filho (n 151) 372.
[254] Cavalcanti de Mello Filho (n 151) 374.
[255] Cavalcanti de Mello Filho (n 151) 374-375.
[256] Cavalcanti de Mello Filho (n 151) 376.

UNCLOS could be used to justify the security interest of the coastal state, the same provision and its vague guidelines would have to be used to resolve conflicts between the interest of other states to conduct military activities in the coastal state's EEZ and the coastal state's security interest.[257] Therefore, even if it was determined that the coastal state has a security interest with reference to Article 59 of UNCLOS, this would not mean that the same provision would no longer have to be applied to resolve conflicts between the security interest of the coastal state and the interests of other states.

It can be observed that both Prezas and Lowe refer to Article 59 of UNCLOS as "vague". Although it is quite clear that Article 59 of UNCLOS does not favour either the coastal state or other states in relation to the attribution of residual rights, it is still unclear as to what this provision actually entails. Rothwell and Stephens argue that the wording of Article 59 of UNCLOS suggests that there are several factors that could be used to determine whether naval manoeuvres and weapons testing are permissible within the EEZ. Such factors include the potential implications for the marine environment, the impact on the freedom of navigation, the length of the operations as well as the distance from the territorial sea of the coastal state.[258] Similarly, Geng argues that circumstances matter and that the impact on the marine environment, the nature and scope of the activity and the proximity to the coastal state are all variables that can be used to determine whether or not certain military activities are permissible within foreign EEZs.[259] The argumentation raised by these commentators suggests that there are several important factors that ought to be considered when determining whether a particular military activity (or military activities generally) is permissible within the EEZ of another state.

3.3.2 State Practice

There is some state declaratory practice in relation to the issue of residual rights. For instance, Uruguay[260] and Cabo Verde have made more or less identical declarations to UNCLOS, with Cabo Verde declaring that:

[257] Prezas (n 139) 103.
[258] Rothwell and Stephens (n 30) 300-301.
[259] Geng (n 110) 27.
[260] Declaration of Uruguay made upon signature (10 December 1982) and confirmed upon ratification of UNCLOS (10 December 1992) (n 227).

> The regulations of the uses or activities which are not expressly provided for in [UNCLOS] but are related to the sovereign rights and to the jurisdiction of the coastal State in its exclusive economic zone falls within the competence of the said State, provided that such regulation does not hinder the enjoyment of the freedoms of international communication which are recognized to other States.[261]

Likewise, Ecuador declared upon accession to UNCLOS that 'it has the exclusive right to regulate uses or activities not expressly provided for in the Convention (residual rights and jurisdiction) that relate to its rights within the 200 nautical miles, as well as any future expansion of the said rights'.[262]

By contrast, Italy[263] and Germany have made identical declarations, with Germany declaring that 'the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them'.[264] Similarly, the Netherlands declared that '[t]he coastal state does not enjoy residual rights in the EEZ. The rights of the coastal state in its EEZ are listed in article 56 of the Convention, and can not be extended unilaterally'.[265] Likewise, Sweden stated in its objection to the declaration of Ecuador that:

> The rights and duties of States in the EEZ are expressly described by UNCLOS. The Convention is also clear on the fact that for residual rights, those rights that are not attributed, there is no presumption in favour of either the Coastal State or other States. Any conflict between the interests of the coastal State and any other State or States shall be resolved on the basis of equity and in light of all relevant circumstances.[266]

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[261] Declaration of Cabo Verde made upon signature (10 December 1982) and confirmed upon ratification of UNCLOS (10 August 1987) (n 226).
[262] Declaration of Ecuador made upon accession to UNCLOS (24 September 2012) (n 229).
[263] Declaration of Italy made upon signature (7 December 1984) and confirmed upon ratification of UNCLOS (13 January 1995) (n 167).
[264] Declaration of Germany made upon accession to UNCLOS (14 October 1994) (n 169).
[265] Declaration of the Netherlands made upon ratification of UNCLOS (28 June 1996) (n 166).
[266] Objection of Sweden (18 October 2013). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 3 November 2022.

Uruguay, Cabo Verde and Ecuador therefore assert that unattributed residual rights fall to the coastal state if these are related to the coastal state's sovereign rights and jurisdiction, whereas Italy, Germany, the Netherlands and Sweden make it clear that they do not believe that the coastal state enjoys any residual rights in its EEZ. As earlier established, I do not consider that Article 59 of UNCLOS favours either the coastal state or other states. To assert that residual rights automatically fall to the coastal state, even if they are in fact related to the sovereign rights and jurisdiction of the coastal state, is not in conformity with Article 59 of UNCLOS. Likewise, an assertion that unattributed residual rights automatically fall to all states would not be in conformity with Article 59 of UNCLOS.

3.3.3 Summary

In summary, this third and final interpretation of UNCLOS and its provisions entails that the issue of whether it is permissible for a state to conduct military activities within the EEZ of another state is a matter of residual rights. Therefore, the attribution of the right to conduct such activities, or the right to regulate them, is to be attributed in accordance with Article 59 of UNCLOS. As noted, Article 59 of UNCLOS is only applicable in cases where UNCLOS has not attributed rights or jurisdiction to either the coastal state or other states and a conflict arises between the interests of the coastal state and other states. Consequently, this provision will only be applicable if there is a conflict and if UNCLOS has neither attributed the right to conduct such activities to other states nor attributed the right to regulate them to the coastal state. Accordingly, if one regards either the first or second interpretation of UNCLOS as the correct interpretation, Article 59 of UNCLOS will not be applicable since the right to conduct or regulate military activities would already be considered attributed (implicitly) through the provisions of UNCLOS.

Lowe claims that in the case of unattributed rights, there is no presumption to fall back on and that it is easy to foresee conflict. Although there was a general understanding during the drafting of UNCLOS that it would permit military activities in the EEZ, Lowe argues that this understanding was never translated into the text of UNCLOS. Therefore, Lowe asserts that it is difficult to avoid the conclusion that Article 59 of UNCLOS should be used to settle whether naval manoeuvres are permissible within the EEZ. Given that Lowe does not consider that the right to conduct such activities is already covered by UNCLOS, or that the coastal state has jurisdiction to regulate them, it would indeed be difficult to not reach the same conclusion as Lowe. However, the fact remains that numerous commentators and states

alike are of the opinion that UNCLOS already give states the right to either conduct or regulate foreign military activities within the EEZ, meaning that his conclusion would not be so difficult to avoid. Nevertheless, I agree with Lowe's argument that Article 59 of UNCLOS is utterly vague and that it is unlikely that an authoritative determination of whether such activities are legal will emerge given the absence of compulsory dispute settlement. Moreover, Lowe's prediction that the lack of clarity would result in international friction is absolutely correct given the various international conflicts that have indeed occurred due to the varying interpretation of UNCLOS.

Yee, on the other hand, concludes that a consideration of the entirety of the text, purpose, object, context and drafting history of UNCLOS seems to favour the interpretation that the security interest of the coastal state is envisioned under UNCLOS, thus seemingly asserting that Article 59 of UNCLOS attributes the coastal state with a security interest over its EEZ. However, Yee neglects to account for neither the text, purpose, object, context nor drafting history that he claims to have considered and upon which he makes his conclusion. In my opinion, simply stating that one has considered these various elements without explaining how this consideration was done or describing what these elements actually entail renders Yee's conclusion unfounded and unconvincing. Moreover, Yee claims that it is impossible to conduct military activities that respect both peaceful purposes and due regard if those activities are threatening to the coastal state. Yet, Yee does not explain what is meant by "threatening". As earlier noted, the peaceful purposes provisions only prohibit those military activities which are contrary to the UN Charter. By not explaining what is meant by threatening, I consider Yee's assertion unconvincing.

Cavalcanti de Mello Filho claims that Article 59 of UNCLOS shall apply because neither the right to conduct military activities nor jurisdiction over them has been attributed. He further claims that it often is the intention of military exercises and manoeuvres to intimidate the coastal state. Accordingly, Cavalcanti de Mello Filho concludes the coastal state has the right to regulate (including the right to require consent) foreign military exercises and manoeuvres conducted within its EEZ given that the coastal state's security interest should always prevail. Similarly to Yee, he appears to argue that Article 59 of UNCLOS attributes the coastal state with a security interest over its EEZ. However, Cavalcanti de Mello Filho does not provide any basis for his claim that military exercises and manoeuvres often have the intention of intimidating the coastal state. By not providing any basis or evidence for why these activities

often have the intention of intimidating the coastal state, I consider Cavalcanti de Mello Filho's conclusion unconvincing.

In the absence of well-founded and convincing argumentation, I find it hard to believe that the coastal state with reference to Article 59 of UNCLOS has a security interest over its EEZ. Yet, even if this was the case, Prezas rightly observes that Article 59 of UNCLOS would still have to be applied in order to resolve a potential conflict between the security interest of the coastal state and the interest of other states to conduct military activities.

As observed by Prezas and Lowe, I agree that Article 59 of UNCLOS is vague and that is unclear how this provision is supposed to be interpreted and applied. Nevertheless, I consider it quite clear that there is no presumption in favour of either the coastal state or other states when attributing residual rights in accordance with this provision. Moreover, given the argumentation presented by Rothwell and Stephens as well as Geng, it seems reasonable that this provision entails consideration of various factors when determining whether a particular military activity is permissible within the EEZ of another state, such as the impact on the marine environment, the impact on the freedom of navigation (and overflight), the nature and scope of the activity, the duration of the activity as well as the proximity to the coastal state and its territorial sea.

By contrast to the two previously presented interpretations of UNCLOS, this interpretation does not appear to have as much support in scholarly writing or state practice. In my view, whereas there is a considerable amount of scholarly writing supporting the first and second interpretations, the same cannot be said about the present interpretation. While the majority of commentators whose work I have read and analysed in one way or another mentions Article 59 of UNCLOS and its basic function, most of them appear to subscribe to the notion that UNCLOS already either confers all states with the right to conduct military activities within the EEZ of another state or the coastal state with the rights and jurisdiction to regulate such activities. Based on the analysis of these three interpretations of UNCLOS, there is thus seemingly a consensus that UNCLOS already (at least implicitly) regulates the issue of military activities conducted within the EEZ of another state. I, therefore, do not believe that the issue of whether it is permissible for a state to conduct military activities within the EEZ of another state should be considered a matter of residual rights. The relevant inquiry is

instead whether UNCLOS gives all states the right to conduct military activities in foreign EEZs or if it gives coastal states the rights and jurisdiction to regulate such activities.

4 The Russia-Ireland Incident – Applying the Varying Interpretations of UNCLOS

4.1 General Considerations

As detailed above, the ambiguous nature of UNCLOS and the absence of a clear prohibition or authorisation of military activities conducted in foreign EEZs has resulted in various interpretations of UNCLOS, three of which I have described and analysed. In turn, these varying interpretations have resulted in a sharp divide in state practice. Given the ambiguous nature of UNCLOS and its varying interpretations coupled with the sharply divided state practice, it is not entirely certain as to whether it is internationally lawful under UNCLOS to conduct military activities within the EEZ of another state.

In an effort to further analyse this issue, the varying interpretations and their accompanying state practices will now be applied to the Russia-Ireland incident. In brief,[267] Russia planned to conduct military exercises within the Irish EEZ approximately 130 nm (≈ 240 km) south-west of Ireland's Cork coastline. The exercises were due to take place for a period of around six days. Ireland had been notified by Russia beforehand that it planned to conduct military exercises within the Irish EEZ although Ireland had not given Russia its express consent to conduct them. However, although stating that the exercises were not welcome, the Irish Minister for Foreign Affairs and Defence claimed that Ireland had no power to prevent them from taking place and that it is permissible for states to conduct military exercises in foreign EEZs under UNCLOS. The planned exercises were not only met with concern from Irish citizens and the government but also by fishermen, with the chief executive of the Irish South and West Fish Producers Organisation stating that the area where Russia had planned to conduct its military exercises was very important for the Irish fishermen. The fishermen even planned to peacefully disrupt the Russian exercises, claiming that they wanted to protect marine life and biodiversity. In the end, however, the military exercises were relocated outside the Irish EEZ after diplomatic exchanges between the Irish Minister for Foreign

[267] For a more detailed account of the incident see part 1.1.

Affairs and Defence and the Russian defence minister, with the Russian defence minister reportedly relocating the exercises as a gesture of goodwill and in an effort not to disrupt fishing activities. As both these states have ratified UNCLOS, it is applicable to the incident.[268]

With regard to the actions of Russia, it is quite clear from the absence of a request for permission to conduct the military exercises in the Irish EEZ that Russia considers it permissible under UNCLOS to conduct military exercises within a foreign EEZ without coastal state consent. It can also be observed that Russia has a history of conducting military exercises and other military activities within foreign EEZs without coastal state consent.[269] Moreover, Russia (including its predecessor the Soviet Union) is often referred to as a "maritime power".[270] Given that Russia unilaterally planned to conduct military exercises in Ireland's EEZ without asking for permission, its history of conducting military activities in foreign EEZs and its status as a maritime power, it is reasonable to assert that Russia, in line with the first interpretation presented, believes that states have the right to conduct military exercises within the EEZ of another state without the prior consent of the coastal state. In addition, it may be noted that Russia has excluded disputes concerning military activities from compulsory judicial settlement.[271]

In regard to Ireland, the interpretation and state practice of this state with regard to the issue of military activities conducted in foreign EEZs are not as evident. As of 19 December 2022, Ireland has not made a declaration or objection to UNCLOS pertaining to military activities conducted within the EEZ nor excluded military activities from compulsory judicial settlement.[272] In addition, I was unable to find any reference to Ireland in relation to military activities conducted by states within foreign EEZs during the course of my research for this

[268] Russia ratified UNCLOS on 12 March 1997 and has claimed a 200 nm EEZ (including a 24 nm contiguous zone). Ireland ratified UNCLOS on 21 June 1996 and has claimed a 200 nm EEZ (including a 24 nm contiguous zone). Vaughan Lowe and Stefan Talmon (eds), *The Legal Order of the Oceans: Basic Documents on the Law of the Sea* (Hart Publishing 2009) 906 and 972-973.
[269] See James Kraska, *Maritime power and the Law of the Sea* (Oxford University Press 2011) 269-271; See Moore (n 93) 7; See Pedrozo, 'Preserving Navigational Rights and Freedoms' (n 120) 15.
[270] Galdorisi and Kaufman (n 111) 264; Boczek (n 136) 447 and 451; Stephen A Rose, 'Naval Activity in the EEZ - Troubled Waters Ahead' (1990) 39 Naval L Rev 67, 68.
[271] Declaration of Russia made upon ratification of UNCLOS (12 March 1997). United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 3 November 2022.
[272] See United Nations Treaty Collection (n 218).

thesis. Nevertheless, the statements made by the Irish Minister for Foreign Affairs and Defence, Mr Coveney, in response to the present incident can be examined in an effort to deduce the position of Ireland. Mr Coveney asserted that under UNCLOS and international law, states are allowed to conduct military exercises within the EEZ of another state. Moreover, he stated that although the Russian military exercises were not welcome Ireland could not prevent them from happening. Read together, these statements seem to express that Ireland considers it lawfully under UNCLOS to conduct military exercises in foreign EEZs without the consent of the coastal state. Logically speaking, if Ireland considered it unlawful for Russia to conduct military exercises within its EEZ the country's foreign affairs and defence minister would not have made statements stating that such activities are lawful and that Ireland cannot prevent them from occurring. Based on the unambiguous statements made by the Mr Coveney, I consider it reasonable to assert that Ireland's interpretation of UNCLOS corresponds to the first interpretation presented above, at least in relation to military exercises.

4.2 Peaceful Purposes and Due Regard

With regard to the nature of the proposed military exercises and their compatibility with the peaceful purposes provisions (Articles 88 and 301 of UNCLOS), it has been observed that the Russian ambassador to Ireland expressed that the exercises in no way were a threat to Ireland and that no harm was intended. As the exercises never actually took place, it is obviously impossible to accurately determine whether they would have been compatible with the peaceful purposes provisions. What is certain, however, is that if the military exercises indeed took place they would only have breached Articles 88 and 301 of UNCLOS if they were conducted in a manner contrary to the UN Charter, i.e. if they constituted a threat or use of force against the political independence or territorial integrity of Ireland. In light of the statements made by the Russian ambassador and in the absence of anything contradictory to them, there is no indication that Russia planned to conduct the military exercises in such a way that they would have amounted to a threat or use of force against Ireland.

In relation to the obligation of due regard, it is clear that Ireland in its capacity as the coastal state must have due regard to the rights and duties Russia enjoys in its capacity as another state within the Irish EEZ (see Article 56(2) of UNCLOS). Conversely, it is equally clear that Russia must have due regard to the rights and duties of Ireland (see Article 58(3) of UNCLOS). As earlier argued, the due regard obligation entails prior notice or consultations in

the majority of cases in order for it to be satisfied. A balancing exercise between the interests of the coastal state and the other state is also required. With regard to the first of these requirements, Russia had indeed notified Ireland of its intention to conduct military exercises within the Irish EEZ beforehand. This enabled Irish authorises like the Irish Aviation Authority and the Department of Transport to issue warnings and temporarily close the area where Russia planned to conduct its exercises. It also enabled Ireland time to determine whether the exercises would encroach upon its economic rights and interests. Given that Mr Coveney stated that Ireland could not prevent them, Ireland might have determined that Russia's exercises would have due regard to the rights and interests of Ireland or at least that any possible impairments would not have been significant enough for Ireland to object to the exercises. Yet, after diplomatic exchanges between Ireland and Russia, the latter opted to relocate the exercises outside the Irish EEZ, supposedly in an effort not to disturb Irish fishing activities and as a gesture of goodwill. Does this mean that Russia after having balanced its interest to conduct the exercises with the resource interests of Ireland decided to relocate the exercises? Or was it purely a diplomatic and political decision made as a "gesture of goodwill"?

Regardless, the exercises never took place and the rights and interests of Ireland were never encroached upon. Russia, therefore, by default fulfilled its obligation of due regard as it never had the chance to violate Ireland's rights and interests since it decided to relocate the exercises outside the Irish EZZ. Russia's prior notice to Ireland about its intention to conduct the exercises was also done in conformity with its obligation of due regard. With regard to Ireland's obligation of due regard, I believe that it also fulfilled its obligation. Ireland did not object or indicate that it would physically restrict Russia from entering the area. The relevant Irish authorities issued warnings to airmen and seafarers and temporarily closed the airspace above the area, which would have enabled Russia to conduct the exercises without disruption. The plan to peacefully disrupt the exercises by Irish fishermen was not encouraged by the Irish government or the Irish authorities, with both the Irish prime minister and the deputy head of the Irish government urging the fishermen not to put themselves at risk and to exercise caution. As UNCLOS and international law govern the relationship between states and not the relationship between a state and individuals, any action taken by the fishermen independent of the Irish government would not have been subject to the obligation of due regard. However, in the event that the Irish government or the Irish authorities actively and knowingly encouraged the fishermen to disrupt the Russian exercises, this could well have

constituted a breach of the obligation of due regard if the first interpretation of UNCLOS is applied given that Russia would have the right to conduct the exercises. If the opposing interpretation is applied, the same action would likely not breach the obligation of due regard as Ireland would be considered to have the right to restrict and prohibit the exercises from ever occurring. Nevertheless, the exercises never took place and it is thus not possible to make a comprehensive assessment of whether these states have, or would have, fulfilled their respective obligations of due regard.

4.3 Varying Interpretations Bring Varying Outcomes

Depending on the interpretation of UNCLOS applied, the relevant inquiry is whether the actions of Ireland and Russia respectively were in conformity with UNCLOS. According to the first interpretation presented, all states have the right to conduct military activities within the EEZ of another state without prior notice and/or consent. Both Russia and Ireland seemingly share this interpretation of UNCLOS. Russia unilaterally decided to conduct military exercises within the Irish EEZ and notified Ireland of its intentions. Ireland clearly stated through its foreign affairs and defence minister that UNCLOS permits such exercises in foreign EEZs and that Ireland had no power to prevent Russia from conducting them. In anticipation of the exercises, Irish authorities gave seafarers and airmen warnings of the location of the proposed exercises and closed the airspace above it, enabling Russia to conduct the exercises without interference. Moreover, there is no indication that the exercises would have constituted a threat or use of force against Ireland, which suggests that Articles 88 and 301 of UNCLOS would not have been breached. Also, the states' respective obligations of due regard would assumably be fulfilled. The actions of both these states thus correspond to their shared interpretation of UNCLOS, resulting in these actions being in conformity with UNCLOS if this interpretation is applied. The actions and shared interpretation of Russia and Ireland correspond to the state practices of the US, the UK, the Netherlands, Italy and Germany.

Conversely, the actions of these states would not be in complete conformity with UNCLOS if the opposite interpretation is applied. According to this interpretation, states do not have the right to conduct military activities within the EEZ of another state, meaning that the coastal state has the right to restrict or prohibit such activities. It follows, therefore, that if Russia indeed conducted the military exercises without Ireland's express consent this would have

been unlawful and not in conformity with UNCLOS. Moreover, the statements made by Ireland's foreign affairs and defence minister would not be in conformity with UNCLOS as Ireland would indeed be considered to have the power to prevent Russia from conducting the exercises. Whereas there is no indication that the exercises would have amounted to a threat or use of force and thus not breach Articles 88 and 301 of UNCLOS, the obligation of due regard would be breached. As it would be considered unlawful for Russia to conduct the exercises, this reasonably also means that it would not have due regard to the rights and interests of Ireland given that Ireland would have the right to restrict or prohibit the exercises. If Ireland was indeed considered to have the right to restrict or prohibit Russia from conducting these exercises within its EEZ and, accordingly, decided to use this right, this would be in conformity with the state practices of Brazil, India, Bangladesh, Malaysia, Pakistan, Iran, Cabo Verde, Uruguay, Thailand and Ecuador.

At the same time, it may be remembered that Russia has excluded disputes concerning military activities from compulsory judicial settlement. This means that if Russia indeed conducted the exercises against Ireland's will and a dispute arose, this dispute would not be subject to compulsory judicial settlement. This is a very strange and paradoxical result. If the correct interpretation of UNCLOS is determined to be that states do not have the right to conduct military activities within the EEZ of another state without coastal state consent, it is certainly quite odd that a state would not be allowed to conduct such activities without consent but that, upon doing so against the will of the coastal state, the other state would be able to avoid judicial settlement by having excluded disputes concerning military activities from compulsory judicial settlement in accordance with Article 298(1)(b) of UNCLOS.[273]

When applying the final interpretation described in this thesis, it is less clear whether the actions of Russia and Ireland would be in conformity with UNCLOS. According to this interpretation, the present issue is to be considered a matter of residual right and is therefore to be resolved in accordance with Article 59 of UNCLOS. As previously detailed, however, Article 59 of UNCLOS is quite vague and it is unclear as to what an assessment under this provision actually entails. One thing that is clear is that it is only applicable in situations where UNCLOS has not attributed rights or jurisdiction and a conflict arises between the

[273] It may be noted that Article 299 of UNCLOS does allow a state which has excluded disputes concerning military activities from compulsory judicial settlement to submit such a dispute for judicial settlement if the disputing party agrees.

interests of the coastal state and the interests of other states. In the present incident, a conflict did not occur. Russia notified Ireland of its intentions to conduct military exercises within the Irish EEZ and although it raised a few concerns Ireland did not outright object to the exercises or try to prevent them. In the absence of a conflict, Article 59 of UNCLOS is not applicable. Nevertheless, if a conflict indeed arose and Ireland objected to the exercises, the provision would be applicable. As earlier established, there is no presumption in favour of either Ireland (the coastal state) or Russia (the other state) when attributing the residual right to regulate or conduct military exercises. Yet, it has been noted that some states in state practice assert that the coastal state automatically enjoys residual rights within its EEZ, including Ecuador, Cabo Verde and Uruguay. By contrast, Italy, Germany, the Netherlands and Sweden have expressed that the coastal state does not enjoy residual rights within the EEZ.

Instead of a presumption in favour of either the coastal state or other states, 'the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole' (Article 59 of UNCLOS). It is thus clear that all relevant circumstances are to be considered, including the importance of the interests of Ireland, Russia and the international community. Factors of importance that may be considered in this assessment include the nature and scope of the exercises, the duration of the exercises, the proximity to Ireland and its territorial sea, the impact on the marine environment and the impact on the freedom of navigation and overflight.

The nature and scope of the proposed military exercise are a bit unclear. It is not entirely clear whether they would have involved the use of weapons as the exercises never took place, although the Department of Transport warned in its maritime notice to seafarers that the exercises would include the launching of rockets and naval artillery. Exercises involving rockets and naval artillery would certainly have the capacity of creating more adverse effects on the sovereign rights and interests of Ireland than exercises without the use of weapons. The exercises were due to take place for approximately six days. In my opinion, this does not seem to be a considerable amount of time. The area in which they were due to take place was about 130 nm (≈ 240 km) south-west of the Cork coastline.[274] As Ireland has claimed a 200 nm EEZ, conducting the exercises 130 nm off the coast is, in my view, quite a distance away

[274] See the picture pinpointing the location under part 1.1.

from Ireland's coast and its territorial sea. In theory, Russia could have planned to conduct its exercises a single nautical mile outside the outer edge of the territorial sea (i.e., 13 nm off the coast) and the exercise would still have been conducted within the Irish EEZ. The possible impact on the marine environment is also uncertain, although concerns were raised in relation to biodiversity and marine life. Nonetheless, military exercises involving rockets and naval artillery would indeed have a greater capacity to negatively impact the marine environment than exercises not using weapons. Finally, the freedom of navigation and overflight in the area would be affected during the duration of the exercises given that the airspace would be temporarily closed and marine notices warning seafarers of the dangers of the area had been published. Yet, a six-day interference would not appear to be substantial.

In order for these and other important factors to be sufficiently considered, it would be ideal for a conflict of this kind to be settled by judicial settlement. Yet, in reality, Russia has excluded disputes concerning military activities from compulsory judicial settlement. Therefore, if it indeed was the case that the issue of military activities conducted in foreign EEZs was considered a matter of residual rights and a conflict arose between Ireland and Russia, the conflict would not be subject to compulsory judicial settlement. Hence, the likelihood of a court or tribunal settling such a conflict would not be high. The likelihood that a court or tribunal would settle a theoretical conflict between the two states is made even lower when considering that the Russian military vessels have sovereign immunity. Nevertheless, a conflict never arose and Article 59 of UNCLOS was therefore never applicable. Consequently, when applying the third and final interpretation of UNCLOS it is not possible to say whether the actions of Russia and Ireland would be considered compatible with UNCLOS.

In summary, it is evident that depending on the interpretation applied, the conformity or non-conformity with UNCLOS differs greatly. If the first interpretation presented in this thesis is applied, all the actions taken by Ireland and Russia respectively are in conformity with UNCLOS and it would have been considered lawful for Russia to conduct the military exercises within the Irish EEZ with or without the consent of Ireland. Conversely, if the opposing interpretation is applied, the statements made by Ireland's foreign affairs and defence minister would be factually incorrect and it would have been considered unlawful for Russia to conduct the military exercises within the Irish EEZ without Ireland's express consent. Finally, when applying the third and final interpretation it is less clear whether the

actions of Russia and Ireland would be in conformity with UNCLOS as a conflict between the two never arose. What is clear, however, is that there would be no presumption in favour of either Ireland or Russia when attributing the right to regulate or conduct military exercises within the EEZ. It is equally clear that all relevant circumstances are to be taken into account, such as the duration of the exercises, the scope and nature of the exercises, the impact on the marine environment, the impact on navigation and overflight as well as the distance from Ireland and its territorial sea. Regardless of which interpretation of UNCLOS is applied, Russia's decision to exclude disputes concerning military activities from compulsory judicial settlement renders it highly unlikely that a potential dispute between the two states regarding these exercises would have been put before a court or a tribunal. Thus, whereas the lawfulness of the exercises differs greatly depending on the interpretation applied, the outcome in terms of a potential judicial settlement is the same. The circumstance that the outcome in terms of legality varies greatly depending on which interpretation is applied provides further proof of why it is essential to determine and analyse the legality of military activities conducted in foreign EEZs in order to prevent discord and a flare-up of the international law of the sea.

5 Summary and Conclusion

The EEZ regime was first introduced into the international law of the sea with the adoption of UNCLOS in 1982 and is generally considered to be customary international law. The EEZ is often referred to as a *sui generis* zone as it combines characteristics from the high seas and the territorial sea yet is a distinct and separate regime. Within its EEZ, the coastal state enjoys sovereign rights for the economic exploration, exploitation, managing and conserving of living and non-living resources. These rights are exclusive in the sense that no one else can lawfully engage in them within the coastal state's EEZ without its consent. In relation to its sovereign rights, the coastal state has both legislative and enforcement jurisdiction and is able to take those measures which are necessary to ensure that the laws and regulations it has adopted in conformity with the provisions of UNCLOS are complied with. The coastal state is also given jurisdiction over artificial islands, installations and structures, MSR and the protection and preservation of the marine environment. At the same time, third states enjoy the freedoms of navigation, overflight and the laying of submarine cables and pipelines as well as other internationally lawful uses of the seas related to those freedoms within the coastal state's EEZ.

Yet, while UNCLOS confers on the coastal state sovereign rights and jurisdiction concerning a limited number of matters, it does not explicitly grant the coastal state rights or jurisdiction over military activities. Likewise, while UNCLOS provides third states with numerous high-seas freedoms, it does not explicitly give other states the right to conduct military activities within the EEZ of the coastal state. Hence, there is no explicit authorisation for or prohibition against states conducting military activities within the EEZs of other states. This silence and the ambiguousness of UNCLOS's provisions have resulted in both commentators and states having vastly different interpretations of the law. This, in turn, has resulted in a sharply divided state practice.

5.1 An Internationally Lawful Use of the Exclusive Economic Zone

Based on the analysis of the various interpretations of UNCLOS and their accompanying state practices, I believe that the arguments raised in support of the first interpretation presented in this thesis are the most reasonable and compelling. The main source of support for this interpretation is the phrase 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention' (Article 58(1) of UNCLOS). It is primarily with reference to this wording of Article 58(1) of UNCLOS that several commentators and states have concluded that Article 58 of UNCLOS includes (and preserves) the right to conduct military activities within the EEZ of another state without prior notice and/or consent. Throughout the analysis of the various interpretations, I believe it is safe to conclude that it had been considered permissible under customary international law prior to the adoption of UNCLOS for states to conduct military activities on the high seas areas that now form part of the EZZs of various states. I also consider it reasonable to assert that the maritime powers during the negotiations of UNCLOS wanted to preserve military uses of the areas that with the adoption of UNCLOS would become EEZ instead of high seas. Furthermore, it has been argued that a previous draft of the text of Article 58 of UNCLOS was altered at the behest of the maritime powers. The present wording of that provision is arguably more inclusive and encompasses a broader set of uses than the wording used in the draft. If we look at other parts of UNCLOS in support of this interpretation, it is clear that UNCLOS does acknowledge military uses of the seas. For instance, Article 95 of UNCLOS, which is applicable to the EEZ by virtue of Article 58(2) of UNCLOS, gives warships

complete immunity on the high seas and the EEZ. This is also seen, for instance, in Article 19 of UNCLOS where it is stipulated that certain military activities, including military exercises and survey activities, are prejudicial to innocent passage through the territorial sea. The circumstance that certain military activities have been specifically stipulated to be incompatible with UNCLOS only in relation to the territorial sea and not in relation to the EEZ further speaks to the fact that it is implicitly acknowledged that such military activities would be able to be lawfully conducted outside the territorial sea. If this was not the intention of the drafters of UNCLOS, they would reasonably have been as clear in stipulating that such activities were also not permitted within the EEZ. Moreover, the circumstance that states have the option to exclude disputes concerning military activities from compulsory judicial settlement provides further support for the interpretation that UNCLOS permits states to conduct military activities within foreign EEZs. As seen during the analysis of the Russia-Ireland incident, a strange and paradoxical result occurs if the opposing interpretation is favoured. Under those circumstances, it would be considered unlawful for a state to conduct military activities within the EEZ of another state without its approval, yet if the other state conducts a military activity without the consent of the coastal state it would be able to avoid judicial settlement by having used its right under Article 298(1)(b) of UNCLOS to exclude disputes concerning military activities from compulsory judicial settlement. This result, in my view, favours the first interpretation of UNCLOS rather than the second. In my opinion, it would make little sense if states would be allowed to exclude disputes concerning military activities from compulsory judicial settlement if they were considered unequivocally unlawful without coastal state consent.

Considering the circumstance that military activities have historically been considered permissible under customary international law, the legislative background and wording of Article 58(1) of UNCLOS, the acknowledgement of military use of the seas in the UNCLOS text, the sovereign immunity of warships and the optional exclusion of disputes concerning military activities from compulsory judicial settlement, I consider the first interpretation of UNCLOS presented in this thesis to be the most logical, well-founded and convincing interpretation. This is especially evident when considering the arguments raised in support of the other two interpretations described in this thesis.

Although I acknowledge that the ambiguousness and silence of Article 58 of UNCLOS leave room for the interpretation that it does not include the right to conduct military activities

within the coastal state's EEZ without its consent, the arguments and evidence raised in support of this conclusion are, in my opinion, not as well-founded or convincing. As shown by the analysis of this interpretation of UNCLOS, its main source of support is the lack of explicit reference to military activities in Article 58 of UNCLOS and the argument that the peaceful purposes provisions (Articles 88 and 301 of UNCLOS) put restrictions on the exercise of such activities within foreign EEZs. Yet, as I have concluded with reference to several commentators, the peaceful purposes provisions only prohibit those military activities which are contrary to the UN Charter (i.e. those constituting a threat or use of force against the coastal state), not any and all military activities. I am therefore not convinced by the argument that these provisions support the notion that Article 58 of UNCLOS does not include the right to conduct military activities in foreign EEZs. In contrast to the arguments raised in support of the first interpretation, the arguments raised in support of this interpretation do not clearly give an account of historic military uses of the seas or legislative history supporting this interpretation. Given the lack of reference to historical background, legislative history or other compelling factors for why this interpretation of UNCLOS is to be favoured, I do not consider the arguments raised in support of the second interpretation as well-founded or convincing as the arguments raised in support of the first interpretation.

As explained during the analysis of the third interpretation of UNCLOS, this interpretation is only applicable where the right to conduct or regulate military activities in foreign EEZs is not already attributed through UNCLOS. Although Article 59 of UNCLOS and its basic function are often mentioned in the materials I have read during the course of my research, most commentators and states appear to subscribe to either the first or second interpretation of UNCLOS. Hence, the underlying consensus seems to be that UNCLOS already regulates military activities conducted in foreign EEZs. As I consider the arguments raised in support of the first interpretation of UNCLOS to be the most logical and compelling, I naturally do not consider the issue a matter of residual rights. Moreover, I do not consider that Article 59 of UNCLOS confers a security interest over the EEZ to the coastal state. There is no presumption in favour of the coastal state (or other states for that matter) and all relevant circumstances must be considered, including the interests of the international community. Furthermore, Article 59 of UNCLOS is only applicable in the event of a conflict, meaning that it is difficult to argue that this provision attributes a residual right to the coastal state without reference to a judicial decision settling a conflict between two states as support. Nonetheless, the arguments raised in support of the view that there are various factors to

consider in relation to military activities in foreign EEZs could still be of some value. Factors such as the distance from the coastal state and its territorial sea, the duration of the activities, the scope and nature of the activities, the impact on the marine environment and the impact on navigation and overflight all likely contribute to whether the rights and interests of the coastal state and other states operating in the coastal state's EEZ will be encroached upon. For instance, a lengthy military exercise using rockets and various other weapons involving a great number of military vessels conducted 13 nm outside the coastal state's coastline causing great disruption to the economic exploration and exploitation of the natural resources and immense damage to the marine environment would probably not conform to the obligation of due regard. On the other hand, data collected by a military vessel while simply navigating through the coastal state's EEZ for a short period of time would perhaps not have the same capacity of encroaching upon the rights and interests of the coastal state.

In light of all the arguments and state practices raised in support of the various interpretations of UNCLOS regarding the issue of military activities conducted in foreign EEZs, I conclude that I support the first interpretation presented. I therefore consider it permissible for states under Article 58(1) of UNCLOS to conduct military activities within the EEZ of another state without consent, including military exercises, hydrographic surveying and military surveying not going beyond hydrographic surveying. However, given the nature and scope of the obligation of due regard as detailed above, I do not believe that Article 58(1) of UNCLOS gives states the right to conduct any and all military activities in foreign EEZs without prior notice. As evidenced by the analysis of due regard, this obligation entails a balancing exercise between the rights and interests of the coastal state and the rights and interests of the other state. This obligation also, in the majority of cases, requires consultation (or at least, prior notice) between the coastal state and the other state. The exact extent of this obligation depends on the circumstances and an assessment of whether a certain military activity in a certain place is compatible with due regard is reasonably to be assessed on a case-by-case basis, meaning that there is no uniform standard to rely on. A differentiation can be made between activities having a more material dimension (e.g., military exercises) and those having a more intellectual nature (e.g., marine intelligence gathering), with the activities having a more material dimension being generally more capable of infringing upon the rights and interests of the coastal state. In the majority of cases, there is thus a need for prior notice or consultation in order for the due regard obligation to be satisfied as this will give the coastal state the opportunity to assess whether the military activity will be in conformity with

the other state's obligation of due regard.[275] This will also enable a more comprehensive balancing of the rights and interests of the coastal state and the other state respectively. In view of the nature and scope of due regard, I do not consider that Article 58(1) UNCLOS unequivocally give states the right to conduct military activities without prior notice. It must be remembered, however, that prior notice is not equal to prior consent. At the same time, I do not consider that the coastal state has the right to require prior notification for any and all military activities with reference to the obligation of due regard as this is not required in all cases.

Consequently, the state practices presented in support of the first, and in my view correct, interpretation are compatible with UNCLOS. The declaration made by the US in 1983 that Article 58 of UNCLOS preserves the right to conduct military activities in the EEZ is correct, yet the assertion that the high seas freedoms applicable to the EEZ remain quantitatively and qualitatively the same is not entirely accurate since these freedoms are qualified by the obligation of due regard to the rights and interests of the coastal state when exercised in the EEZ. The additional declarations and objections of Italy, the Netherlands, Germany and the UK were also done in conformity with UNCLOS. Although, while it is indeed correct to declare that the coastal state cannot require prior notification for military exercises within its EEZ, it must be remembered that the obligation of due regard will necessitate prior notice or consultations in the majority of cases. Conversely, the state practices of those states expressing that the second interpretation of UNCLOS is correct are not in conformity with UNCLOS. Hence, the declarations of Brazil, Bangladesh, India, Pakistan, Malaysia, Cabo Verde, Uruguay, Ecuador and Thailand purporting to restrict military exercises conducted in their EEZs by requiring coastal state consent are not in conformity with UNCLOS. Likewise, the Brazilian domestic legislation restricting foreign military exercises in its EEZ without the consent of the government and the Iranian domestic legislation prohibiting all foreign military activities are not in conformity with UNCLOS. In addition, China's opposition to foreign military activities conducted within its EEZ and its interpretation that all hydrographic and military surveys fall under the jurisdiction of the coastal state is contrary to the provisions of UNCLOS. It follows, therefore, that the Chinese domestic legislation requiring consent for all

[275] Prior notice, however, could potentially have the effect of becoming an alert to coastal states wishing to restrict or prohibit military activities within their EEZs, thus giving them a prior "warning" enabling them to unlawfully restrict the other state from conducting an otherwise lawful military activity. Prior notice or consultations is to be made in order for the coastal state to assess whether the proposed military activity conforms with due regard and not in order for it to try and prevent it from occurring.

surveying activities conducted within the Chinese EEZ is contrary to UNCLOS. Similarly, the domestic legislations of India, Malaysia and Tanzania that seemingly assert that all research activities conducted within their EEZs require their consent do not conform to UNCLOS if these legislations indeed purport to require consent for research not considered MSR. While Canada and Australia tend to ask the coastal state for consent before conducting hydrographic surveying in another state's EEZ, this is not required. Yet, asking for consent when it is not required does not in itself result in the actions of Canada and Australia being contrary to UNCLOS. Moreover, as has already been established, the state practices of Ecuador, Uruguay and Cabo Verde asserting that the coastal state enjoys residual rights within its EEZ is incorrect and not in conformity with UNCLOS. Conversely, the declarations of the Netherlands, Germany, Italy and Sweden expressing that the coastal state does not enjoy residual rights within its EEZ are correct.

In conclusion, the right to conduct military activities within the EEZ of another state is implicitly included in Article 58 of UNCLOS by virtue of the phrase 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention' (Article 58(1) of UNCLOS). Consequently, the coastal state has the right to conduct military activities, including military exercises and military survey activities, within the EEZ of another state without the consent of the coastal state. This right, however, is qualified by the reciprocal due regard obligations. The coastal state is required to have due regard to the rights and interests of other states to conduct military activities within its EEZ, while the other state must have due regard to the rights and interests of the coastal state. The other state should also have due regard to the rights and duties other states enjoy within the EEZ of the coastal state. It follows from the meaning and scope of the due regard obligation that a balancing exercise between the rights and interests of the coastal state and the rights and interests of the other state planning to conduct a military activity within the coastal state's EEZ must be undertaken. In the majority of cases, there is also a requirement for prior notice or consultations between the rights-holding states. This will enable the coastal state to assess whether the planned military activity will have due regard to its rights, interests and duties. It will also enable a more comprehensive balancing of interests, as both the other state and the coastal state will be able to properly balance their respective rights and interests. The determination of whether a particular military activity conducted in a particular place conforms to the obligation of due regard is to be assessed on a case-by-case basis. Thus, while

states have the right to conduct military activities in foreign EEZs without consent, the obligation of due regard qualifies this right and may, depending on the circumstances, require prior notice to or consultations with the coastal state. Factors that may be useful to consider in this context, or perhaps generally, are factors such as the impact on navigation and overflight, the impact on the marine environment, the duration of the activity, the scope and nature of the activity and the distance to territorial sea and coast of the coastal state.

Finally, as detailed in the analysis of the Russia-Ireland incident, the actions of both Russia and Ireland show that these states support the first interpretation and that their actions correspond to their chosen interpretation. As I favour the same interpretation of UNCLOS as both Russia and Ireland and considering the circumstances of the incident, I believe that their respective actions were consistent with the relevant provisions of UNCLOS.

5.2 Concluding Remarks

After having conducted a deep dive into the issue of military activities conducted in foreign EEZs, I have made some interesting observations. One observation of note is that there appears to be a trend that those states generally considered to be developed states favour the first interpretation of UNCLOS, whereas those states generally considered to be developing states seem to favour the opposing interpretation. Although it is outside the scope of this thesis, it would certainly be interesting to get to the bottom of why this is. Is it because only developed states have the capacity to conduct military activities in foreign EEZs and the means to protect themselves from those who oppose them? Does it have to do with historical or political factors? Or is it simply a coincidence? In my view, further research on this matter would surely be valuable in order to understand the underlying factors contributing to this sharp divide in state practice.

Another (and perhaps the most important) observation is that the reason behind all these uncertainties and discord seems to stem from the ambiguousness of several key provisions of UNCLOS. The ambiguousness of Article 58 of UNCLOS is perhaps the main source of confusion as it does not explicitly attribute states with a right to conduct military activities within the EEZ of another state. This ambiguousness has left ample room for interpretation. Although I am confident in my own conclusion of which interpretation is correct, it is by no means absolutely guaranteed that the interpretation I favour is correct. The circumstance that

several states have made the opposite interpretation illustrates that the issue of the lawfulness of military activities in foreign EEZs is anything but clear and that there is no preferred interpretation. Moreover, the ambiguousness of Part XIII of UNCLOS, which governs MSR, has also resulted in discord. The circumstance that UNCLOS does not define the terms "marine scientific research", "military survey", "hydrographic survey" or "survey activities" enables states and commentators to make their own interpretation of what these terms mean. This has resulted in some states arguing that activities like hydrographic and military surveying are encompassed by MSR while others oppose this assertion.

One further observation is the fact that I felt it necessary to analyse as many as three different interpretations of UNCLOS before I could reach a conclusion as to which interpretation of UNCLOS I deem the most logical and convincing. Certainly, it should not require an in-depth analysis of arguments from numerous different states and commentators before you are able to comfortably ascertain what the current law on the issue is. Yet even upon doing so, it is still unclear as to whether your chosen interpretation of the law is correct. This raises the question of whether it is even possible to definitively determine the legality of military activities conducted in foreign EEZs.

Until the ambiguousness of Article 58 of UNCLOS is resolved, the issue of whether it includes the right to conduct military activities in foreign EEZs will remain. States will continue to make the interpretation of UNCLOS that best suits their own interests and act accordingly. The same can be said in relation to the ambiguousness of whether military survey activities are included within the scope of MSR. Until these ambiguities are resolved, there will likely be further international tension and discord, which may possibly result in a flare-up of UNCLOS and the international law of the sea as it stands today. As a general recommendation, I thus urge the international community to work together to finally resolve these problematic ambiguities.

Yet, identifying and resolving these ambiguities is also relevant in the wider context of the ongoing transition from a unipolar world to a multipolar world. During the twentieth century and up until the present time, the world has been a unipolar world with the US (accompanied by Europe) as the predominant power. However, with the increase of substantive economic and military power and the emergence of, for instance, China as a superpower capable of rivalling the US in the twenty-first century, the power constellations of the world are

changing. As law can be said to, at least in part, reflect power, the question is how the change of power constellations may impact international law and the international law of the sea.[276] As demonstrated above, the US is probably the biggest supporter of the notion that the freedom of the seas includes the right to conduct military activities while China opposes this notion. As an emerging power, will China's interpretation become even more prevalent and more capable of rivalling the notion that states have the right to conduct military activities in foreign EEZs without coastal state consent? Or, might China possibly by virtue of its significant increase in economic and military power change its current interpretation to best suit its prospective interest of asserting its newfound military power? Another relevant question in this context is whether the world will transition from unipolar to multipolar in all aspects, not just economically and military but also informationally, ideationally and intellectually. If the predominant West-centric ideational, intellectual and informational frameworks and perceptions persist and do not conform to the prospective power constellations of the world, this might contribute to serious international discord.[277] Hence, the ambiguity of UNCLOS and its consequences are relevant in a much wider context than simply the international law of the sea. In this emerging multipolar world with a change of power constellations, will the international community even be able to hold on to the multilateral treaty that is UNCLOS? Will UNCLOS remain relevant or will it become obsolete?[278] Given this future multipolar reality, one wonders if the ambiguities of UNCLOS will ever be resolved…

[276] See Yasuaki Onuma, 'International Law and Power in the Multipolar and Multicivilizational World of the Twenty-first Century' in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (Oxford University Press 2012) 149-152.
[277] Onuma (n 276) 181-182.
[278] See further Charles E Pirtle, 'Military Uses of Ocean Space and the Law of the Sea in the New Millennium' (2000) 31 Ocean Dev & Int'l L 7, 33-34.

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