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The Freedom to Navigate and Demonstrate in the Exclusive Economic Zone

LAGF03 Essay in Legal Science

Bachelor Thesis, Master of Laws programme
15 higher education credits

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Term: Autumn term 2019

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Summary

In the exclusive economic zone a coastal State enjoys the sovereign rights to explore, exploit, conserve and manage the natural resources, whether living or non-living. That is provided by the United Nations Convention on the Law of the Sea. Also in the exclusive economic zone other states enjoy freedoms typically known for the high seas, were no state has jurisdiction apart from the flag State of a vessel. The freedom of navigation is a fundamental principle of the international law of the sea that dates back hundreds of years. It is a freedom that is still to be enjoyed by all in the exclusive economic zone, although it cannot have the same practical application because of the many limitations inherent in the exclusive economic zone regime. The coastal state can impose some jurisdiction in the exclusive economic zone on foreign vessels, but only when it relates to its exclusive rights within the zone. The thesis examines cases from the International Tribunal for the Law of the Sea, where foreign vessels have been arrested in the exclusive economic zone. In the *Arctic Sunrise Case* there was environmental activists protesting an oil platform outside the coast of Russia. The activists were arrested and detained by Russian authorities due to illegal activities according to Russian law. They were arrested in the exclusive economic zone, where Russia did not have jurisdiction to do so. Some activists had come within the safety zone of the oil platform, a zone were Russia had exclusive jurisdiction. Unfortunately the case did not provide a full judgment on the legality of the merits, since Russia refused to partake in the proceedings. But the above are some of the legal aspects being discussed.

Sammanfattning

I den exklusiva ekonomiska zonen har kuststaten suveräna rättigheter att utforska, exploatera, bevara och hantera de naturliga resurserna, levande eller icke-levande. Detta stadgas i de Förenta Nationernas Havsrättskonvention. I den exklusiva ekonomiska zonen har även andra stater vissa friheter, som typiskt sett åtnjuts på de fria haven, där ingen stat har jurisdiktion bortsett från flaggstaten ombord ett fartyg. Friheten att navigera är en fundamental princip av den internationella havsrätten som härstammar hundra år tillbaka. Det är en frihet som också ska åtnjutas av alla i den exklusiva ekonomiska zonen, även om den inte kan ha samma praktiska tillämpning på grund av de många begränsningar som finns i den exklusiva ekonomiska zonens karaktär. Kuststaten kan utöva viss jurisdiktion över utländska fartyg i den exklusiva ekonomiska zonen, men bara när det relaterar till dess exklusiva rättigheter i zonen. Uppsatsen utforskar fall från den Internationella Havsrättsdomstolen, där utländska fartyg blivit gripna i den exklusiva ekonomiska zonen. I *Arctic Sunrise*-fallet demonstrerade miljöaktivister en oljerigg utanför Rysslands kust. Aktivisterna blev gripna och kvarhållna av ryska myndigheter för att de hade begått olagliga handlingar enligt rysk lag. De greps i den exklusiva ekonomiska zonen, där Ryssland inte hade jurisdiktion att göra så. Vissa av aktivisterna hade befunnit sig inom säkerhetszonen av oljeriggen, en zon där Ryssland hade exklusiv jurisdiktion. Tyvärr kunde inte fallet ge en fullvärdig dom på de rättsliga aspekterna, eftersom Ryssland vägrade delta i processen. Men ovan är några av de rättsliga aspekter som har diskuterats.

1 Introduction

1.1 Background

The international law of the sea belongs to the international law of coexistence. That means that it is an issue where two or more states have colliding interests and it is based on the issues' content, such as for example the seas being accessible for all states.[1]

The sea is by the articles of the United Nations Convention on the Law of the Sea (UNCLOS) partitioned into zones. States have different rights in different zones, which will be explained briefly below. In the Exclusive Economic Zone (EEZ) coastal States have exclusive rights to what can be economically sourced from the ocean. This thesis will especially look at this zone and what constitute rights and duties for different states within.

On 19 September 2013 environmental activists from Greenpeace was on a vessel called Arctic Sunrise in the Arctic Sea outside of Russia demonstrating Russian oil drilling platforms. The activists tried to climb onto a platform and were detained and held on suspicion of piracy.[2] A couple of weeks later, Russia dropped the piracy charges against the 30 activists who were being held and they were instead charged with hooliganism for their acts[3]. In November of 2013 the case was brought before the International Tribunal for the Law of the Sea (ITLOS) by the Kingdom of Netherlands.

There have been many events on the sea regarding this kind of problem, often regarding environmental activists. Free navigation on the sea is an important freedom for the world society. On the one hand for the transport of goods, but

[1] A. Henriksen (2019), p. 143.
[2] BBC News: *Russia: Greenpeace activists held on suspicion of piracy*, 24 Sep 2013 <www.bbc.com/news/av/world-europe-24225148/russia-greenpeace-activists-held-on-suspicion-of-piracy> accessed 2019.12.21.
[3] BBC News: *Russia 'drops Greenpeace piracy charge'*, 23 Oct 2013 <www.bbc.com/news/av/world-europe-24647092/russia-drops-greenpeace-piracy-charge> accessed 2019.12.21.

on the other for transport of people and for example their freedom to demonstrate, as in the above case.

1.2 Research question and aim

The main research question aims to give a solution to the abovementioned problem. Is a coastal State's exclusive right to economical sourcing greater than anyone's right to navigate, and thus protest, in the EEZ? In order to answer the main research question the thesis will examine the extent of the rights to navigate within the EEZ. What does the right to navigate include for a vessel flying another state's flag in the coastal State's EEZ? When can the coastal State infringe on this right? What are the main reasons for a coastal State to stop another state from navigating within the coastal State's EEZ?

The aim of this thesis is to put forth the conflict between the exclusive rights of the coastal State and the independence of a ship under another state's flag, in the coastal State's EEZ. It has often arisen conflicts between coastal States, exercising what they believe to be their exclusive rights, and flag States, protecting the ships flying under their flag in an EEZ. In the international law of the sea this shows through court practice from international tribunals over the last seventy years. This thesis aims to give a solution to the problem that arose when Arctic Sunrise and its crew was hindered from demonstrating by Russia in an area which they according to international law should have been able to freely navigate. There is a clear conflict of interests that will be examined in this thesis.

1.3 Research overview

A.G. Oude Elferink wrote about the Arctic Sunrise Case in the International Law Studies. The article mainly focuses on the Russian Federation's decision to not partake in the proceedings, its arguments and in relation to the proceedings. The article focuses on assessing the case as a whole and to find the appropriate legal rules.[4] J.M. Van Dyke researched "the disappearing right

[4] A.G. Oude Elferink (2016).

to navigational freedom in the exclusive economic zone" in the Marine Policy of March 2005. The article focuses on the freedom to navigate and how it differs in the EEZ from the high seas.[5] This thesis will bring together the aspect of navigational freedom and freedom of expression and look at it from a perspective of the foreign vessel in an EEZ.

1.4 Delimitation

The thesis will not discuss in depth any of the other sea zones other than the EEZ. Some of the other zones will briefly be explained for the purpose of understanding the continuing discussion. Art. 73 of the UNCLOS regarding 'prompt release' is not being dealt with in depth because it regards what happens after a foreign vessel has violated a coastal State's sovereign rights in the EEZ, that falls outside of what is the main research question. The delimitation of the EEZ between opposite and adjacent states will not be discussed in the thesis because it has more to do with the determination of the zone rather than how to deal with foreign vessels' actions in the zone when it has been determined.

1.5 Method and material

The thesis will use a legal dogmatic method, in presenting and applying normative legal material. To answer the main research question the legal basis of the partitioning of the sea will be presented, especially to understand the nature of each zone and how they differ. Most emphasis will be added to the EEZ. The material to be used is basically the UNCLOS and the articles applicable to each zone.

The UNCLOS was concluded after nine years of work by the Third United Nations Conference on the Law of the Sea. The result was put together in 1982 and it contains 320 Articles and nine Annexes. The UNCLOS has become one of the most important treaties for international law. As of 28

[5] J.M. Van Dyke (2005).

November 2019 there are 168 parties and 157 signatories to the UNCLOS[6]. The UNCLOS has played a significant role on customary international law. Thus some of the more generally accepted rules in the UNCLOS are of essential importance, even for non-parties. However, it must be noted that non-parties are never bound by any rule of the UNCLOS.[7] They are bound by the customary rules that have been formed through the implementation of international sea agreements.

To examine the freedom of navigation and what that freedom means in practice, a significant case from the International Court of Justice (ICJ), the Corfu Channel Case, will be presented. Also a case from the ITLOS, the M/V Norstar Case, will showcase how to treat the freedom today and if the aforementioned decision still stands. ITLOS was established by the UNCLOS to adjudicate disputes arising out of the interpretation and application of the UNCLOS. It is an independent judicial body, composed of 21 independent members, elected from persons enjoying the highest reputation for fairness and integrity and of recognised competence in the field of the law of the sea.[8]

A significant case from the ITLOS called the M/V Saiga Case will develop the idea of what a coastal State can infringe in their EEZ. The M/V Saiga Case has been frequently referred to in legal doctrine and gives some answers to sub-questions of this thesis. Furthermore, the questions that was not answered in the previous case was answered in the M/V Virginia G Case, which will be presented accordingly.

To answer the question of whether demonstrating in the EEZ is allowed a case from the ITLOS called The Arctic Sunrise Case will be used. The case involves complicated procedural implications and therefore different

6 United Nations Treaty Collection: *Status of Treaties, Chapter XXI Law of the Sea* <treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#top> accessed 2019.11.28.
7 M. Dixon (2013), p. 218-219.
8 International Tribunal for the Law of the Sea, *The Tribunal*, <www.itlos.org/the-tribunal/> accessed 2020.01.07.

documents from the tribunal will be used, to show the reasoning that could be applied to the problem.

2 The partitioning of the sea

2.1 Internal waters

Art. 8 of the UNCLOS provides the definition of what is considered internal waters for states. Internal waters is under state territory and thus the state has full sovereignty over it. According to Art. 8 internal waters is "waters on the landward side of the baseline". Provisions for how the baseline is to be drawn are found in Art. 5-7 and also Art. 9-16 of the UNCLOS. The most easy way of determining a baseline is the 'normal baseline' in Art. 5, which is to be measured as the low-water line along the coast, marked on large-scale charts officially recognised by the coastal State. The different provisions and measurements for baselines will not be discussed further, but not all coast lines are easy to determine by one simple rule.

2.2 Territorial sea

A central regulation of the UNCLOS is Art. 2, which states that "the sovereignty of a coastal State extends, beyond its land territory and internal waters and [...] its archipelagic waters, to an adjacent belt of sea, described as the territorial sea". Art. 3 states that the breadth of the territorial sea can exceed up to a limit of 12 nautical miles (nm) from the coastal baseline.

There are some restrictions to the coastal State's sovereignty in territorial waters as provided by Art. 27-28 UNCLOS, relating to mostly a foreign ship's immunity against state law enforcement while just passing through territorial waters. These restrictions come from an aspiration of conflict avoidance in international law, since the territorial waters are used by other states frequently.[9]

[9] M. Dixon (2013), p. 220-221.

2.3 Contiguous zone

The contiguous zone, the idea of a zone beyond the territorial waters over which the coastal State has sovereignty, was being implemented before the EEZ was a concept of customary law. After the implementation of the EEZ (see below) it became less interesting to have a contiguous zone, because some rights are covered by the EEZ. Before that it was high seas, that was not subject to any state's jurisdiction. Still all states have the right to a contiguous zone, in which they can claim certain jurisdictional rights, according to Art. 33 UNCLOS. The article states that the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, also punish infringement of the aforementioned laws and regulations committed within its territory or territorial sea. This sounds a lot like the contiguous zone is a part of the state's territory and under full sovereignty, but that should not be assumed, since it is an additional area of jurisdiction for limited purposes. Art. 33 has put the breadth of the contiguous zone to extend up to 24 nm from the baseline. That means that it is an extra 12 nm of contiguous sea from the end of the territorial sea. This zone is not something that automatically falls to the state just upon statehood, it has to be claimed if a state so wishes.[10]

2.4 Exclusive Economic Zone

The development of the Exclusive Economic Zone (EEZ) came with the UNCLOS in 1982, it is one of UNCLOS' more significant features. The EEZ concept came from the Exclusive Fisheries Zone (EFZ), which was recognized in the *Fisheries Jurisdiction Cases*[11] and later developed at the Third UN Conference into EEZ. The International Court of Justice (ICJ) later recognized EEZ as customary law[12].

[10] M. Dixon (2013), p. 224.

[11] *Fisheries Jurisdiction Cases (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 3, 25 July 1974.

[12] See for example; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p. 18, 24 February 1982, paragraph 100; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, ICJ Reports 1984, p. 246, 12 October 1984; and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgement, ICJ, 11 September 1992, p. 259 ff.

It is up to each coastal State to declare an EEZ if they so wish. Some states still only have an EFZ. An EEZ means both obligations and benefits for the coastal state.

Regulations regarding the EEZ is found in Art. 55-75 of the UNCLOS. Art. 55 states that the EEZ is “an area beyond and adjacent to the territorial sea”. Furthermore in this area there are specific rights and obligations for the coastal State and freedoms of other states. Art. 57 provides for what is the extent of the EEZ. The zone can be explained as a belt of sea adjacent to the coast and extending 200 nm from the baseline of the territorial sea. Since the territorial sea exceeds 12 nm from the baseline, that means that the EEZ has a width of 188 nm from the territorial sea to its end. In Art. 56 the exclusive rights that the coastal State has within the EEZ is provided. In the EEZ the coastal State has sovereign rights to “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” (Art. 56(1)(a) UNCLOS). The coastal State also has jurisdiction over “(i) the establishment and use of artificial islands, installations and structures”, “(ii) marine scientific research” and “(iii) the protection and preservation of the marine environment” (Art. 56(1)(b) UNCLOS). Regarding paragraph 2 of Art. 56 the coastal State shall take due regard to the rights and duties of other states, which means that the area should be regarded as high seas (see below) in all other aspects apart from the specific rights as stated above.[13]

2.4.1 Nature of the EEZ

As Dixon states the EEZ provides the coastal State with an exclusive share of the wealth of the sea. This must not be confused with sovereignty, because the coastal State does not have sovereignty in the EEZ. The EEZ does not have the same qualities as a state’s territory, such as the territorial sea and the

[13] M. Dixon (2013), p. 224-225.

coastal State can only enjoy the rights stated in the UNCLOS. This means that the coastal State cannot interfere with commercial activity by other states in the EZZ. One example of this is that a coastal State cannot enforce its customs laws in the EEZ or exercise a broad, undefined jurisdiction based on 'self-protection', this has been addressed by the ITLOS in a judgment from 1997 called *M/V Saiga* (more on that below). The coastal State can arrest a foreign vessel who are violating its exclusive rights to natural resources within the EEZ. This will subsequently be subject to the provisions of 'prompt release' in Art. 73 UNCLOS. The article says that a coastal State can as a part of the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ take measures including boarding, inspection, arrest and judicial proceedings, if the state has laws regarding such measures in conformity with the UNCLOS. In the second paragraph of the article it is stated that arrested vessels and their crews shall be promptly released upon posting of reasonable bond or other security. Such bond or other security shall usually be posted by the flag State or the owner of the vessel[14].

The coastal State does not only have rights in the EEZ, it is under a number of obligations, which further shows inconsistency with the grant of full sovereignty. According to Art. 61 of the UNCLOS the coastal State is under an obligation to first of all determine the allowable catch of the living resources in the EEZ (first paragraph). Secondly the coastal State shall ensure through proper conservation that the maintenance of the living resources is not endangered by over-exploitation (second paragraph). This is to be ensured through the best scientific evidence available to the coastal State. The article also includes obligations to follow environmental and ecological factors to maintain and restore populations of harvested species (third paragraph). There is a list of obligations for the coastal State in Art. 62. The article regards the optimum utilization of the living resources, which means that the coastal State shall first determine its capacity to harvest the living resources and secondly,

[14] See for example; *M/V "SAIGA" (Saint Vincent and the Grenadines v. Guinea)*, Prompt release, Judgment, ITLOS Reports 1997, p. 16, 4 December 1997; and *"Volga" (Russian Federation v. Australia)*, Prompt Release, Judgment, ITLOS Reports 2002 p. 10, 23 October 2002.

where it does not have the capacity for the entire allowable catch, give other states access to the eventual surplus of the allowable catch, through agreements and arrangements (first and second paragraph). The rest of the article states more in depths factors that should be taken into consideration when choosing which other states shall be given access to fish in the EEZ (third to fifth paragraph). Although the article does not cover how the maximum allowable catch shall be determined, which Dixon means in practice leads to that a coastal State can deny all other states access to the EEZ, simply by setting the allowable catch at the level of its own capacity.[15]

2.5 High seas

The 1958 Convention of the High Seas defined high seas as 'those parts of the sea not within the internal waters or territorial sea of a state'. After the UNCLOS of 1982 that had to be redefined, because also the EEZ are not part of the high seas, although some of the high seas freedoms remain. Art. 86 of the UNCLOS defines high seas negatively as "all parts of sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State". The high seas are *res communis*, which means it is to be open to the enjoyment of every state, and should not be subject to the sovereignty of any state. The high seas must be used only for peaceful purposes (Art. 88 UNCLOS), although weapons testing and military exercises are permitted under some restrictions that will not be discussed any further in this thesis. Art. 87 of the UNCLOS lists the freedoms of the seas. The freedoms are, (a) freedom of navigation, (b) freedom of overflight, (c) freedom to lay submarine cables and pipelines, (d) freedom to construct artificial islands and other installations, (e) freedom of fishing, and (f) freedom of scientific research, the list is not exhaustive. These freedoms must be exercised with due regard to the rights of other states. On board a ship on the high seas it is under the exclusive jurisdiction of the flag State, and the ship should have one flag State except for in specific cases

[15] M. Dixon (2013), p. 225-226.

(Art. 92 UNCLOS). This means that the flag State may exercise criminal and civil jurisdiction in respect of the ship.[16]

[16] M. Dixon (2013), p. 241.

3 Foreign vessels in the EEZ

3.1 Freedom of navigation

The freedom of navigation is a fundamental principle to the law of the sea and it dates back hundreds of years. As seen above it is a freedom of the high seas. Two main freedoms of the high seas still exist within the EEZ. The first freedom is the freedom of navigation and overflight, the second is the freedom of laying of submarine cables and pipelines (Art. 58(1) UNCLOS). Although, the freedom of navigation cannot have the same practical application in the EEZ as it has on the high seas. This is clear because of the many limitations inherent in the EEZ regime. For example if a coastal State intends to take an active part in the environmental protection of its EEZ or to the exploitation of living and/or non-living resources, that coastal State might place installations for such operations interfering with other states' routes of international navigation. It is within the coastal State's rights to do so, but it can also create disturbance for the freedom of navigation. Regarding pollution of marine environment from vessels, such as for example if a vessel carrying hazardous cargo end up in an accident which leads to the cargo falling into the sea, there is both obligations for the flag State (Art. 211(2) UNCLOS) and for the coastal State in their EEZ (see *2.4.1 Nature of the EEZ* regarding the preservation of the ecology). Some coastal States have introduced domestic laws requiring vessels transporting ultra-hazardous cargo to get prior consent from the state before entering their EEZ.[17]

3.1.1 The Corfu Channel Case

The Corfu Channel Case is a seventy years old case, one of the first from the ICJ. The case concerned an incident with British warships. The warships had suffered severe damage and crew members were killed when they passed through the Corfu Channel in 1946 and mines exploded. The part were the incident happened was part of Albanian territorial waters. The United Kingdom filed an Application to the ICJ accusing Albania of having laid or

[17] G. Andreone (2015), p. 177-178.

allowed a third State to lay the mines after mine-clearing operations had been carried out. The court found that Albania was responsible under international law for the explosions that had taken place in Albanian waters, not meaning that Albania had carried out the laying of the mines in any way. The court upheld the freedom of navigation strongly. The court's opinion was that it was of international customary law that states in time of peace had the right to passage through straits used for international navigation with their warships if it was to access another part of high seas, from one part of high seas, and the coastal State did not need to approve the passage beforehand. The decisive criterion was the strait's geographical place of connecting two parts of high seas. The court also said that the United Kingdom had reason to believe that the strait was safe to navigate and that it was Albania's responsibility to see to mine clearing operations.[18]

3.1.2 The M/V Norstar Case

In a much more recent judgment from 10 April 2019 the freedom to navigate was upheld by the ITLOS rigorously. It was about an oil tanker flying the flag of Panama, the *M/V Norstar*. Between 1994 and 1998 the M/V Norstar had supplied gasoil to mega yachts in international waters, outside the territorial waters of Italy, France and Spain. On 24 September 1998 the M/V Norstar was detained and its crew arrested by Spanish officials, at the request of Italy, because the activities the vessel had partaken in was allegedly in contravention with Italian legislation. Panama made an application to the ITLOS regarding the release of the vessel and its crew. The tribunal found that Italy had breached the freedom of navigation in Art. 87(1(a)) UNCLOS on the high seas. The tribunal was very precise regarding the notion that no state's jurisdiction could be applied over a foreign ship on the high seas. The tribunal held that the freedom of navigation would be obsolete if in some cases jurisdiction of a coastal State could be applied, solemnly the flag State had jurisdiction. (paragraph 216 of the judgment) Although, the tribunal could not accept that a ship could be immune to a coastal State's jurisdiction in its internal waters as a right to leave a port and gain access to the high seas. The

[18] *Corfu Channel case*, Judgment, ICJ Reports 1949, p. 4, 9 April 1949.

tribunal said that “it would be inconsistent with the legal regime of internal waters”. (paragraph 221)[19] The tribunal upheld the definitions of the UNCLOS and was clear and consistent in applying what the different zones meant for different states.

3.2 The coastal State’s possibilty to restrict foreign vessels

Even though foreign vessels enjoy the freedom of navigation in the EEZ, it still may be subject to the coastal State’s jurisdiction in some aspects. As seen above the navigation through the EEZ for the purposes of exploration and exploitation must be permitted by the coastal State beforehand. Also navigating through the contiguous zone, which overlaps the EEZ with the first 12 nm, will be subject to coastal State jurisdiction.

3.2.1 The M/V Saiga Case

As stated above a coastal State cannot arrest foreign vessels which go through the EEZ based on ‘customs’ regulations. This was established in the case brought before the ITLOS concerning Guinea’s arrest and detention of an oil tanker called the *M/V Saiga* and its crew flying under the flag of Saint Vincent and the Grenadines. The flag State filed to the ITLOS an application on 13 November 1997 instituting proceedings against Guinea in respect of the dispute concerning the prompt release of the vessel and its crew members that were still detained. The M/V Saiga had refueled two fishing vessels in Guinea’s EEZ and had been arrested due to that among other grounds.

The application to the court by Saint Vincent and the Grenadines was only regarding if Guinea was obliged to release the M/V Saiga and its crew after the posting of reasonable bond or other security from the flag State, according to Art. 73(2) UNCLOS. But since Guinea made the counter claim that they had acted according to regulations of international law, the tribunal had to evaluate that aspect as well. The tribunal had to decide whether this activity

[19] *The M/V “Norstar” Case (Panama v. Italy)*, ITLOS Case No. 25, Judgment of 10 April 2019.

was of such nature as intruding on the coastal State's sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ or if it was an activity of independent nature which would fall under the freedom of navigation. The tribunal noted that it could be regarded, if a state had not enforced laws about bunkering of fishing vessels in their sea, that they did not regard bunkering as connected to fishing activities and thus it would be regarded as an activity within the freedom of navigation (paragraph 58). Then the tribunal went on to pose the question of whether Guinea had any such regulations. If Guinea had such regulations would it matter if they were qualified as 'customs' or 'smuggling' regulations? (paragraph 63) There were some provisions to that extent in Guinean law. It was illegal according to the law of Guinea to refuel fishing vessels in Guinean sea by means other than legally authorized. (paragraph 64) In the end of the judgment the tribunal concluded that even though Guinea had a law prohibiting refueling of fishing vessels, to call it a 'customs' regulation in itself was a violation against international law.[20]

The question to be answered could have been of whether providing bunkering services to fishing vessels in another state's EEZ is an activity which is allowed and falls under the freedom of navigation. Tanaka explains that the tribunal did not find any answer to that question since it already found that in applying its customs laws in the EEZ, Guinea acted in a manner contrary to the UNCLOS[21]. The question wasn't raised by any of the parties so that the tribunal had to give an answer. Nevertheless what was provided by the M/V Saiga Case was valuable legal norms of customary international law. The tribunal stated that a coastal State can never apply any customs regulations in any other part of the EEZ other than artificial islands, installations and structures. That is because of Art. 60(2) UNCLOS which states that the coastal State shall have exclusive jurisdiction over such entities. (paragraph 127) The tribunal also found that the coastal State could not under Art. 58(3) UNCLOS argue that the arrest was of 'public interest' and 'self-protection',

20 *M/V "SAIGA" (Saint Vincent and the Grenadines v. Guinea)*, Prompt release, Judgment, ITLOS Reports 1997, p. 16, 4 December 1997.
21 Y. Tanaka (2015), p. 555.

because the phrase “other rules of international law” in the article could not be referring to domestic rules of ‘public interest’. The tribunal meant that it would give the coastal State too much freedom to decide whether or not they did not like some activities freely, and that would curtail other states’ freedom of navigation. (paragraph 129 and 131)[22] All of this is part of customary international law.

3.2.2 The M/V Virginia G Case

In the above case the tribunal did not come to a judgment on whether or not bunkering in another state’s EEZ would be allowed or not, because it was more a question of prompt release. In the *M/V Virginia G Case* the issue was brought before the tribunal. The case was also about an oil tanker, the *M/V Virginia G* flying under the flag of Panama, which was carrying out refueling of fishing vessels in the EEZ of Guinea-Bissau. The M/V Virginia G was arrested by authorities of Guinea-Bissau due to its operations. The ITLOS dealt with the question of whether a coastal State could arrest a foreign vessel which carried out bunkering activities towards fishing vessels in its EEZ. The tribunal found that “the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention, read together with article 62, paragraph 4, of the Convention” (paragraph 217).[23] The tribunal concluded that the freedom of navigation did not prevent the coastal State from regulating bunkering of foreign vessels fishing in their EEZ.

[22] *M/V ”SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, 1 July 1999.
[23] *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014.

4 Demonstration on the sea

The right to protest is part of the freedom of expression, which is a fundamental international human right. The freedom of expression is recognised by many international instruments, among others the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The freedom of expression is not an absolute freedom. For example in Art. 19 of the ICCPR restrictions on the freedom are allowed if necessary to protect the rights and reputations of others, national security, public order, public health, or public morals. A prerequisite for such restrictions is though strictly that they are provided by law, and valued to be proportionate.[24] Mossop argues that the freedom of expression is a part of the freedom of navigation. A coastal State must therefore acknowledge that by restricting the right to protest it is also restricting the freedom of navigation.[25]

In the introduction of the thesis a case was introduced, an incident that sparked a lot of media attention. Below is a presentation of the case that was brought before the ITLOS.

4.1 The Arctic Sunrise Case

On 21 October 2013 the Netherlands made an application to the ITLOS on the request for the prescription of provisional measures under Art. 290(5) of the UNCLOS. It was a dispute between the Kingdom of the Netherlands and the Russian Federation concerning the *Arctic Sunrise*, a vessel flying the flag of the Netherlands. Art. 290(5) provides for if a dispute submitted to an arbitral tribunal is pending the constitution or as agreed tribunal between the parties, or failing such agreement within two weeks from the date of the request for provisional measures. Then the ITLOS may prescribe, modify or revoke provisional measures in accordance with this article if it considers that

[24] Mark J. Richards: *Freedom of Expression: Introduction*, 12 May 2017 <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0105.xml> accessed 2020.01.28.
[25] J. Mossop (2016), p. 199.

prima facie (sufficient to establish unless disproven) the tribunal which is to be constituted (according to Section 2, Part XV UNCLOS) would have jurisdiction and that the urgency of the situation so requires. Also when a tribunal has been constituted, the tribunal may modify, revoke or affirm those provisional measures. The Netherlands wanted an *interim* decision from the ITLOS on the dispute regarding the release of the Arctic Sunrise. The Netherlands stated in its request that the authorities of the Russian Federation had boarded and detained the Arctic Sunrise, on 19 September 2013, in the EEZ of the Russian Federation and detained the vessel's crew without the prior consent of the Netherlands. The Netherlands had then filed a request for arbitral procedure and notified the Russian Federation in a diplomatic note on 4 October 2013. In that note the Netherlands also requested the Russian Federation to adopt and implement provisional measures to immediately release the Arctic Sunrise and its crew. Since the Russian Federation did not respond to the request, continued to detain the crew, formally seized the Arctic Sunrise, which aggravated and extended the dispute, and the time-limit of two weeks had passed, the Netherlands submitted the request for provisional measures to the ITLOS. The Netherlands meant that the actions the Russian Federation had taken against the Arctic Sunrise in its EEZ injured the Netherlands' right to protect a vessel flying its flag, the diplomatic protection of its nationals and its right to seek redress on behalf of crew members of a vessel flying its flag. It especially disturbed the vessel's freedom of navigation. (paragraph 19 of the request) The Netherlands argued that the Russian Federation by boarding, investigating, inspecting, arresting and detaining 'Arctic Sunrise' in its EEZ had violated the Netherlands' right to exclusive jurisdiction under the freedom of navigation on the basis of being the flag State (paragraph 20).[26]

The Russian Federation responded with a note from the Embassy in Berlin. Russian authorities would continue to carry out the actions in respect of Arctic Sunrise to exercise its criminal jurisdiction in order to enforce laws and

26 *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures*, ITLOS Case No. 22, *Request for provisional measures submitted by the Netherlands*, 21 October 2013.

regulations of the Russian Federation as a coastal State. The Russian Federation also stated that upon ratification of the UNCLOS on 26 February 1997 it made a statement which said, among else, that "it does not accept procedures provided for in Section 2 of Part XV of the Convention , entailing binding decisions with respect to disputes […] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction". Therefore the Russian Federation informed the Netherlands and the ITLOS that it did not accept the arbitration procedure under Annex VII to the UNCLOS initiated by the Netherlands. The Russian Federation expressed succinctly that it did not intend to participate in the proceedings of the ITLOS in respect of the request from the Netherlands for the prescription of provisional measures.[27]

The order of the ITLOS came on 22 November 2013. The tribunal stated that the absence of a party or failure of a party to defend its case did not constitute a bar to the proceedings and did not preclude the tribunal from prescribing provisional measures, provided that the parties had been given an opportunity of presenting their observations (paragraph 48 of the order), which they had. The Russian Federation had declined. The tribunal also held that a non-appearing State was still a party and should accept the consequences and was bound by the eventual order (paragraph 51-52). The tribunal deemed the requested provisional measures by the Netherlands, the release of the vessel and its crew, to be appropriate to preserve the rights of the Netherlands (paragraph 86). Other aspects that was considered in the decision was that the Arctic Sunrise in its detention was deteriorating because of that it was an old boat that needed constant maintenance and the release of bunker oil could pose a serious environmental risk, it did not cope with the harsh climate. Also there was the individual rights of the 30 crew members, the tribunal put fourth that they should not suffer due to unsolved conflicts between states. The tribunal concluded that if the individuals was kept any longer it would have irreversible consequences. (paragraph 87) The tribunal held that the

[27] *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures*, ITLOS Case No. 22, *Note Verbale of the Embassy of the Russian Federation in Berlin*, 22 October 2013.

Netherlands had previously, in a note *verbale*, asked if the Russian Federation would release the vessel and its crew by the posting of a bond or other financial security (paragraph 91). The Russian Federation had not responded. Thus the ITLOS decided that the Russian Federation should immediately release the Arctic Sunrise and all persons who had been detained, upon the posting of a bond or other financial security by the Netherlands which should be in the amount of 3,600,000 euros.[28] The order can be seen as some sort of compromise between on the one hand the fair and reasonable request by the Netherlands and on the other not to make Russia totally overruled in its absence.

The legality of the actions taken by the Russian Federation and respectively the crew of the Arctic Sunrise was not discussed in the order because of the restrictive approach taken concerning the jurisdiction of the tribunal under Art. 290(5) UNCLOS. For the same reasons the tribunal did not discuss human rights issues, although the Netherlands argued it. The tribunal mainly came to a diplomatic solution which was the aim. In the Joint Separate Opinion of Judge Wolfrum and Judge Kelly these issues were discussed. The judges deemed it important to touch on that the Arctic Sunrise was arrested within the EEZ of the Russian Federation when only several of its inflatable rubber boats entered the safety zone of the platform and only very few persons attempted to scale the installation. Although, the judges pointed out that there was a factual deficit in the proceedings due to the Russian Federation's non-participation. They expressed that the Order should have taken into account that a coastal State only has limited enforcement jurisdiction in its EEZ, foremost those regarding the exercise of its sovereign rights (Art. 73 UNCLOS). The judges pointed out that it was different regarding artificial islands and installations where the coastal State according to Art. 60(2) UNCLOS enjoyed exclusive jurisdiction and also in the safety zones around these entities. Therefore the Russian Federation would have limited possibilities to enforce its jurisdiction in the situation and the judges put fourth that it was rather the flag State's responsibility to take such

[28] *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures*, ITLOS Case No. 22, Order of 22 November 2013.

enforcement actions. The judges then pointed to a court decision carried out by the Netherlands which prohibited Greenpeace International to enter into the safety zone of a platform in the EEZ off the coast of Greenland. The judges meant that it should have been shown in the Order that the Russian Federation enjoyed enforcement functions in respect of the protection of the platform within the safety zone, but had no such right in its EEZ towards the Arctic Sunrise as the facts were presented. The judges concluded by saying something about that Greenpeace could invoke the freedom of expression in the EEZ, but in the safety zone such rights might have had to yield to the safety interests of the operator of the platform.[29]

[29] *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures*, ITLOS Case No. 22, *Joint separate opinion of Judges Wolfrum and Kelly*, 22 November 2013.

5 Conclusion

5.1 The freedom to navigate within the EEZ

The EEZ is a concept that stems from the exclusive fisheries zone, a way to give the coastal State an advantage in the near parameter of the sea to economically source, without disruption from other states. The EEZ is never meant to be a further way to widen the territory.

The freedom of navigation on the seas is a principle that has been pivotal for the law of the sea for hundreds of years. It gives every nationality access to go onto the seas without disruption. The freedom to navigate still exists within the EEZ, according to Art. 58(1) UNCLOS. In the *Corfu Channel Case* from 1949 the ICJ drew the notion that the world society should help each other so that all ships can access high seas easily via navigational routes sometimes through territorial waters. It was a wide notion of the freedom of navigation. The approach have some accuracy with the coastal State's responsibility in its EEZ, even though in the case it concerned territorial waters. In the EEZ the same approach but less harsh would be sufficient to apply.

In the *M/V Norstar Case* there was also a clear stand point from the ITLOS towards the upkeep of the freedom of navigation on the high seas and the importance of it to not fall short of any state's interest. Solemnly the flag State has jurisdiction over a ship on high seas. But still when it comes to leaving a harbour in the purpose of accessing the high seas a ship can not claim freedom of navigation just for that purpose. In internal and territorial waters a ship is still under the sovereignty of the coastal State. The argument that the tribunal held was based on the precise definition of the different zones of the sea and to uphold their character.

However, in the *M/V Saiga Case* the question of whether regulations regarding bunkering of fishing vessels in the EEZ could have impact on

foreign vessels carrying such activity was brought up. The question was not answered in the case since the tribunal instead concluded that just upon the regulation being called 'customs' it could not be attributed to foreign vessels in the EEZ. Neither can regulations based on 'public interest' or 'self-protection' be applicable to foreign vessels in the EEZ, it is crucial that foreign vessels can carry out commercial activities in the EEZ. In the *M/V Virginia G Case*, the tribunal concluded that a coastal state had some possibility to regulate the EEZ. The possibility to regulate the EEZ must relate to the exclusive rights of the coastal State, because that is what foreign vessels need to respect when navigating the EEZ, as stated in Art. 58(3) UNCLOS.

5.2 Demonstration within the EEZ

With free navigation on the open seas comes also the freedom of expression as a human right. In the *Arctic Sunrise Case*, although limited in its ruling, the tribunal gave an order which meant that the Russian Federation had to release the vessel and its crew members upon the posting of a bond from the Netherlands. What can be said about the application of the tribunal is that they first of all only dealt with a *provisional measure* proceeding, which had its limitations on the discussions of the merits. The tribunal deemed the release a justifiable request from the Netherlands and said something briefly about the individuals' human rights and that they should not be undertaken due to conflicts between states.

Instead to find answers on the merits of the case a look into the Joint Separate Opinion of Judges Wolfrum and Kelly is helpful. The judges brought up a few points to the legality of the actions taken by both parties. The judges first stated that a coastal State only has limited jurisdiction enforcement in its EEZ, the vessel had been arrested in that zone. The judges spoke of that there is a safety zone around installations such as the oil platform, according to Art. 60(2) UNCLOS, in which zone the coastal State has exclusive jurisdiction. Several inflatable rubber boats entered the safety zone of the platform and some of the activists tried to enter the platform, from the information that was provided by the Netherlands.

In conclusion it is important to remember that a separate opinion does not hold as high of a legal value as a judgment or court decision. But some guidance can be gained from Judge Wolfrum and Kelly. It is safe to say that there is some possibility for a coastal State to govern its EEZ. The safety zone around installations for economical sourcing is under the coastal State's exclusive jurisdiction. Also the coastal State can regulate aspects of its right in the EEZ, such as fishing or other economical sourcing, for foreign vessels. But it has to be clear that such approach is given to the regulation and the international courts have a restrictive application towards it. In all, the freedom of navigation and also the freedom to demonstrate is upheld strongly and follows the concept of the EEZ as being in its own right, *sui juris*.

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