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It's a Gas... Pipeline and Submarine Cable

A Study of the International Legal Framework Protecting Submarine
Pipelines and Cables in the EEZ

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Contents

SUMMARY.....	1
SAMMANFATTNING	2
ABBREVIATIONS.....	3
1 INTRODUCTION	4
1.1 Background.....	4
1.2 Purpose, Research Questions and Delimitations	5
1.3 Method and Material.....	6
1.4 Previous Research	7
1.5 Outline	7
2 MARITIME ZONES	8
2.1 The territorial sea.....	8
2.2 The EEZ.....	8
2.3 The high seas	9
3 LEGAL PROTECTION	10
3.1 The 1884 Convention.....	10
3.2 1958 High Seas Convention	10
3.3 Protection of submarine cables and pipelines through UNCLOS	11
4 MILITARY ACTIVITY IN THE EEZ	14
4.1 Peaceful purposes and residual rights.....	14
4.2 Due regard	17
5 ANALYSIS AND CONCLUSION	20
5.1 The protection of submarine cables and pipelines in the EEZ.....	20
5.2 Foreign military activity in the EEZ	21
5.3 Conclusion.....	23
BIBLIOGRAPHY	25

Summary

The legal protection of underwater pipelines and cables has never been more relevant. After the explosions in Nord Stream 1 and 2 that took place in the EEZ of both Denmark and Sweden, this protection was put in the limelight. Within international law, and especially the law of the sea, it has been disputed whether military activity is permitted at all within a coastal state's EEZ. The answer to that question is significant because it affects the protection of submarine cables and pipelines located within the EEZ. Also relevant for said protection is how far the more specific legal framework protecting pipelines and cables extends.

The essay is based on a legal dogmatic method and aims to investigate how the protection of submarine cables and pipelines is regulated under international law. To fulfill this purpose, the applicable legal framework protecting underwater pipelines and cables in the coastal states' EEZ is identified. It is also investigated whether it is possible to limit foreign military activity in the EEZ and thereby protect underwater cables and pipelines. The questions answered are the following: How are submarine pipelines and cables in the EEZ of a coastal state protected under international law? Can coastal states limit foreign military activity in their EEZ and thereby protect submarine cables and pipelines located in the zone?

There is a prohibition against destroying underwater pipelines either deliberately or through negligence. However, the prohibition is not enforceable, hence its practical impact is not very extensive. Articles 88 and 301 UNCLOS require foreign militaries to act in peaceful purposes in the EEZ of the coastal state, thereby protecting cables and pipelines through the UN Charter's prohibition on the use of force. A military attack directed at a cable or pipeline can nevertheless not always be considered to constitute an act that rises to the level which constitute a use of force. Submarine cables and pipelines are however still protected by being part of the coastal state's exclusive economic rights and thus still protected by the requirement to observe "due regard" in Article 58 UNCLOS.

Sammanfattning

Det rättsliga skyddet för undervattensrörledningar och kablar har aldrig varit mer aktuellt. Efter explosionerna i Nord Stream 1 och 2, vilka inträffade i Danmarks och Sveriges exklusiva ekonomiska zoner aktualiserades frågan om detta skydd. Inom folkrätten, och speciellt havsrätten, har det varit omtvistat huruvida militära aktiviteter överhuvudtaget är tillåtna inom en kuststats exklusiva ekonomiska zon. Svaret på den frågan är betydelsefull eftersom det påverkar skyddet för undervattenskablar och rörledningar placerade inom den exklusiva ekonomiska zonen. Vidare relevant för nämnda skydd är hur långt det specifika skydd som skyddar just rörledningar och kablar sträcker sig.

Uppsatsen utgår ifrån en rättsdogmatisk metod och syftar till att undersöka hur skyddet av undervattenskablar och rörledningar regleras inom folkrätten. För att uppfylla detta syfte identifieras den tillämpliga rättsliga ramen som skyddar undervattensrörledningar och kablar i kuststaternas exklusiva ekonomiska zoner. Vidare undersöks huruvida det går att begränsa utländsk militär aktivitet i den exklusiva ekonomiska zonen och därmed om undervattenskablar och rörledningar skyddas. Frågeställningarna som besvaras är följande: Hur skyddas undervattensrörledningar och kablar i en kuststats exklusiva ekonomiska zon genom folkrätten? Kan kuststater begränsa utländsk militär aktivitet i sin exklusiva ekonomiska zon och därmed skydda undervattenskablar och rörledningar som ligger i zonen?

Det kan fastslås att det finns ett förbud mot att förstöra undervattensrörledningar antingen medvetet eller genom oaktsamhet. Kuststater har dock inte exekutiv jurisdiktion över andra skepp än sina egna, varför det uppställda förbudets praktiska betydelse inte är särskilt omfattande. Genom artikel 88 och 301 UNCLOS måste utländsk militär agera med fredliga syften i en kuststats exklusiva ekonomiska zon, och därmed skyddas kablar och rörledningar genom FN-stadgans våldsförbud. Ett militärt angrepp riktat mot en kabel eller rörledning kan dock inte alltid anses utgöra en handling som uppnår nivån för vad som anses vara våldsanvändning i strid med nämnda förbud. Undervattenskablar och rörledningar är dock ändå skyddade genom att vara en del av kuststatens exklusiva ekonomiska rättigheter och skyddas därmed oavsett av kravet på "tillbörlig hänsyn" i artikel 58 UNCLOS.

Abbreviations

Art	Article
EEZ	Exclusive Economic Zone
ICJ Statute	Statute of the International Court of Justice
ILA	The International Law Association
UN	United Nations
UN Charter	Charter of the United Nations
UNCLOS	1982 United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
1958 Convention	1958 Convention on the High Seas
1884 Convention	1884 Convention for the Protection of Submarine Telegraph Cables

1 Introduction

1.1 Background

Currently, 97% of the internet network runs through submarine cables. Estimates show that over USD 10,000 billion in financial transactions run every day through these so-called seabed highways.¹ The twin Nord Stream pipelines in the Baltic Sea and the Langeled gas pipeline running under the North Sea, is capable of providing an amount of 75 billion cubic meters of natural gas a year to Europe.² In 2007, Vietnamese fishermen cut a subsea internet cable with intent to sell the copper components for profits. As a consequence, Vietnam lost almost 90% of connectivity with the rest of the world for a period of three weeks.³ Last year, on 26 September, two underwater explosions caused four leaks in the pipelines Nord Stream and Nord Stream 2. The magnitude of explosions measured 2.3 and 2.1 on the Richter Scale respectively.⁴ The estimates of the leakage that followed indicate that a total of 500 million cubic meters of gas was lost, which is the equivalent of 8 million tons of carbon dioxide, or 1/5000 of annual global CO₂ emissions.⁵

The importance of protecting the undersea cable and pipeline network cannot be exaggerated. These networks are integral in the functioning of national and international economy, international security, energy supply and global communications. However, the global submarine cable and pipeline system is very vulnerable to peacetime accidents, intentional damage and military operations and attacks.⁶ The Nord Stream incidents illustrate both the vulnerability of the super infrastructure as well as its attractiveness as a target. The explosions have not yet been accounted for and the international community has almost unanimously suggested that it was a deliberate act of military character. However, no evidence has yet been presented revealing the perpetrator.⁷ The purported attacks were undertaken in the EEZ:s of both Denmark and Sweden, which highlights an

¹ Sunak (2017) p. 5.

² Offshore Technology (2014) *Underwater arteries - the world's longest offshore pipelines*.

³ David, R (2022) *Submarine Cables: Risks and Security Threats*.

⁴ Carlsson, M, Wiman, E (2022) *Första Bilderna På Sprängda Nord Stream-Gasledningen*.

⁵ Vakulenko, S (2022) *Shock and Awe: Who Attacked the Nord Stream Pipelines?*.

⁶ Kraska and Pedrozo (2022) p. 179-180.

⁷ Plucinska, J (2022) *Nord Stream Gas 'Sabotage': Who's Being Blamed and Why?*.

unsettled and contentious legal issue within international law; coastal state control over foreign military activity in its EEZ. Following a great divergence in state practice and in doctrine⁸ as well as the implications it may have for submarine cables and pipelines protection, it is of great interest to investigate the ambiguity of the issue.

Before the Nord Stream incidents, ILA issued an interim report concerning international law on submarine cables and pipelines, addressing concern over the challenges of the protection of submarine cables and pipelines from a variety of threats, including natural hazards, accidental and intentional damage.⁹ Cables and pipelines placed within the EEZ are more difficult to protect due to the EEZ not being part of state territory. Following the cruciality of submarine cables and pipelines enjoying rigorous protection it is of great interest to also investigate how these are legally protected and specifically in the EEZ.

1.2 Purpose, Research Questions and Delimitations

The purpose of this study is to examine the protection of submarine cables and pipelines in the EEZ under international law. To fulfil this purpose, the study will identify the applicable legal framework protecting submarine pipelines and cables in the EEZ of coastal states. Furthermore, it will also be investigated to what length coastal states can limit foreign military activity in the EEZ and thereby protect submarine cables and pipelines. To achieve this purpose, the following questions will be answered:

- How are submarine pipelines and cables in the EEZ of a coastal state protected under international law?
- Can coastal states limit foreign military activity in their EEZ and thereby protect submarine cables and pipelines located in the zone?

⁸ Rothwell, Stephens (2016) p. 301.

⁹ ILA (2020) p. 2.

Due to the limited scope of a bachelor thesis, delimitations have been made. The study is limited to the law regulating protection of submarine pipelines and cables during peacetime. International humanitarian law or *jus in bello*, therefore does not fall within the scope of this essay. As the purpose of this study is to investigate the legal protection of submarine cables and pipelines, it will only address the general regulation of laying and maintenance of submarine cables and pipelines in the EEZ to a limited extent.

1.3 Method and Material

In this study the legal dogmatic method will be used in order to elucidate, interpret and outline the legal landscape regarding the protection of submarine cables and pipelines in the EEZ within international law. The method consists of interpreting and defining the current legal framework based on the established sources of law.¹⁰ It should be addressed that international law lacks a universal legislator and courts with compulsory jurisdiction. Additionally, it is a decentralized system, with legal obligations originating from more than one source, which means that uncovering the law is more difficult.¹¹ Since the starting point for the legal argumentation is *de lege lata* (the law as it is), the essay will not touch upon arguments *de lege ferenda* (the law as it should be).

To answer the stipulated research questions the study is based on, in accordance with the legal dogmatic method, the official legal sources of international law as stipulated in Article 38 of the ICJ Statute, which comprises of international treaties, customary law, recognized legal principles, judicial decisions and judicial doctrine. For a comprehensive overview of both the legal protection of submarine cables and pipelines in the EEZ and concerning military activity in the EEZ, UNCLOS is the primary legal source used. The convention is both a treaty and representation of customary international law.¹² Other relevant conventions for the protection of submarine cables and pipelines will be used in the study, namely the 1884

¹⁰ Kleinman (2018) p. 21.

¹¹ Henriksen (2021) p. 20.

¹² Churchill et al. (2022) p. 36.

Convention and the 1958 Convention. Subsidiary sources such as doctrine and judicial decisions, enumerated in Article 38(1)(d) in the ICJ Statute, will be used. Both will be used as a complement when determining how UNCLOS and the other relevant provisions of named conventions are to be interpreted, applied and understood.

1.4 Previous Research

The questions raised in this thesis have been discussed in published legal writings and research. Regarding the protection of submarine cables and pipelines as well as military activity in the EEZ, both Kraska and Pedrozo are revered and notable scholars within the field. Hayashi and Yee are prominent scholars of the eastern hemisphere and have both published research concerning the EEZ and military activity. Common for the writings published on the subject of this study is that these are only touching upon the issues raised in this thesis partly or to a limited extent, why a more extensive and in-depth analysis of the subject is in order.

1.5 Outline

The remaining part of the essay has the following outline. The second chapter will present the maritime zones relevant for the research questions. The third chapter will examine the existing legal protection of submarine cables and pipelines. The fourth chapter will investigate the regulation of military activity in the EEZ. The fifth and final chapter will consist of an analysis and a presentation of the drawn conclusions.

2 Maritime zones

UNCLOS¹³ has frequently been referred to as a “constitution of the sea”¹⁴ and regulates the delimitation of the ocean into maritime zones, *inter alia* the internal waters, the territorial seas, the EEZ, and the high seas.¹⁵

2.1 The territorial sea

The territorial sea is an adjacent belt of sea which extends beyond the land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters. Each state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles measured from determined baselines in accordance with UNCLOS. The sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.¹⁶ All resources found in the territorial sea are encompassed by this sovereignty, unlike the regime in the EEZ.¹⁷ In the internal waters a coastal state enjoys full territorial sovereignty and jurisdiction, whereas in the territorial sea state sovereignty is vast but not unhampered due to the right of, and corresponding duty of the coastal state to allow, innocent passage of foreign ships.¹⁸

2.2 The EEZ

The EEZ is an area beyond and adjacent to the territorial sea and does not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.¹⁹ It is a multifunctional zone in which coastal states are not sovereign but enjoy sovereign rights. These sovereign rights are a combination of the characteristics of the territorial sea and high seas; in the territorial sea coastal states have an *ipso jure* entitlement compared to the high seas where other states

¹³ UNCLOS opened for signature in December 1982 and entered into force on 16th November 1994. To date, 161 States and the European Union have joined the convention, see Churchill et al. (2022) p. 26-27.

¹⁴ Ibid. p. 43.

¹⁵ UNCLOS Art. 86.

¹⁶ UNCLOS Art. 2-3.

¹⁷ Rothwell, Stephens (2016) p. 71.

¹⁸ See UNCLOS Art. 17, 24, Rothwell, Stephens (2016) p. 75 and Churchill et al. (2022) p. 111.

¹⁹ UNCLOS Art. 55 and 57.

have unfettered freedom. The EEZ is a *sui generis* zone, with a distinctive legal regime.²⁰

The sovereign rights constitute exploring and exploiting, conserving and managing the natural resources, whether living or non-living, in the zone. Jurisdiction extends over the establishment and use of artificial islands, installations and structures, the protection and preservation of the marine environment and marine scientific research.²¹ The rights and duties of other states in the EEZ are the freedoms of navigation and overflight, the freedom of laying submarine cables and pipelines, and peaceful activity related to these freedoms. In exercising their rights and performing their duties other states shall have “due regard” to the rights and duties of the coastal state in compliance with its laws and regulations.²²

2.3 The high seas

The high seas are open to all states, whether coastal or land-locked and it comprises of all parts of the sea which are not included in the internal waters, the territorial sea or the EEZ of a state.²³ No state can validly claim sovereignty over the high seas and states only have exclusive jurisdiction upon ships which have been granted the right to sail under their flag.²⁴ All states also have the right to exercise the high seas freedoms. These freedoms consist of the freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing and the freedom of scientific research.²⁵

²⁰ Kwiatkowska (1989) p. 4.

²¹ UNCLOS Art. 56.

²² UNCLOS Art. 58(3).

²³ UNCLOS Art. 86 and 87.

²⁴ UNCLOS Art. 89 and 92.

²⁵ UNCLOS Art. 87.

3 Legal protection

The 1884 Convention, the 1958 Convention and UNCLOS, protect submarine cables and pipelines during peacetime on the high seas and the EEZ.

3.1 The 1884 Convention

The 1884 Convention presently has 40 state parties and was the first international convention to regulate the protection of submarine cables. The 1884 Convention prohibits breaking or injuring a submarine cable, willfully or by culpable negligence, either wholly or partially, if it might interrupt or obstruct telegraphic communication. The provision does not apply if those who break or injure a cable do so while trying to protect their lives or their ship and they have taken every necessary precaution to avoid breaking or injuring cables.²⁶ If a warship has a reason to believe that a ship, which is not a warship, has breached the provisions of the 1884 Convention, the convention allows boarding the suspect ship to examine documents proving the nationality of the ship. Thereafter the examining officer shall make a report which can be used as evidence in a court which has jurisdiction over the case, either in the flag state or the coastal state.²⁷ Courts competent to take trial of infractions against the 1884 Convention are those of the country to which the vessel accused of committing the offence belongs. In cases where the flag state does not claim jurisdiction, the courts of contracting states have jurisdiction in accordance with the general rules of criminal jurisdiction prescribed by the laws of that state, or by international treaties. To enable such prosecution, contracting parties are required to incorporate the penal provisions of the convention.²⁸

3.2 1958 High Seas Convention

The protection of cables and pipelines of Article 27 of the 1958 Convention is similar to that of the 1884 Convention. Article 27 stipulates that every contracting state shall take the necessary legislative measures to make obstructing or interrupting and breaking or injuring a telephonic or high voltage power cable a punishable offence. This provision is excepted if someone, after taking necessary precautions to avoid

²⁶ 1884 Convention Art. 2.

²⁷ 1884 Convention Art. 10 and Kraska and Pedrozo (2022) p. 182.

²⁸ 1884 Convention Art. 10, 11 and Kraska and Pedrozo (2022) p. 183.

the breaking or injuring, acted in the object of saving lives or their ships.²⁹ In Article 30 it is stated that prior agreements will not be affected by the 1958 convention, which means that Article 10 of the 1884 convention mentioned in 3.1.1 remains in effect for states bound by convention.³⁰

3.3 Protection of submarine cables and pipelines through UNCLOS

Article 87(1)(c) and 112 UNCLOS allow states to lay cables on the deep seabed beyond national jurisdiction.³¹ States are also allowed to lay cables and pipelines in the EEZ of a coastal state according to Article 58(1) and 79 UNCLOS. Correspondent with the provisions of Article 2 in the 1884 Convention and Article 27 of the 1957 Convention is Article 113 UNCLOS. For parties bound by both the 1884 Convention and UNCLOS, due to Article 311(2) UNCLOS, UNCLOS prevails over the 1884 Convention rights incompatible with UNCLOS. Article 113 discloses the protection of submarine cables and pipelines from intentional damage:

Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done willfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offence. This provision shall apply also to conduct calculated or likely to result in such breaking or injury. However, it shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

The provision applies to cables and pipelines laid in a state's EEZ or on their continental shelf, and is therefore applicable to acts committed against all cables and

²⁹ 1958 Convention Art. 27.

³⁰ Kraska and Pedrozo (2022) p. 183.

³¹ See UNCLOS Art. 87 (1)(c) and 112.

pipelines placed beyond the limits of a coastal state's territorial sea.³² A state may only prosecute the perpetrators of such intentional damage to cables consistent with the general principles of criminal jurisdiction under international law.³³ These principles consist of prescriptive jurisdiction and enforcement jurisdiction. Prescriptive jurisdiction refers to the power of which a state may prescribe laws and make them applicable to persons or circumstances. Enforcement jurisdiction gives states the authority to enforce prescribed laws through executive and judicial measures of enforcement. In maritime areas within the territorial sovereignty of coastal states, for example the internal waters and the territorial sea, the coastal state has both prescriptive jurisdiction and enforcement jurisdiction.³⁴ In the EEZ and on the high seas the coastal state has prescriptive jurisdiction if it is recognized in UNCLOS and generally only the flag state can exercise enforcement jurisdiction over vessels.³⁵ Article 113 therefore only addresses prescriptive jurisdiction and not enforcement jurisdiction over perpetrators who intentionally damage submarine cables. Hence, states other than the flag state cannot board vessels suspected of damaging cables or pipelines without the consent of the flag state.³⁶

It has been discussed in doctrine whether intentional destruction of a submarine cable or pipeline outside the territorial sea of a state could constitute the crime of piracy through UNCLOS.³⁷ Piracy is defined in Article 101 UNCLOS as any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.³⁸ It is argued that submarine cables or pipelines can be defined as "property in a place outside the jurisdiction of any state". The implication of this interpretation would make rules concerning piracy applicable, entailing states with the right to seize the pirate ship or aircraft and arrest, prosecute and penalize the perpetrators in courts of the state which carried out the seizure. It would also allow the warship of any nation to take action and to board the vessel suspected of piracy.³⁹ This interpretation of Article 101 UNCLOS has been deemed creative and not in accordance with the original intent of the provision.

³² Beckman (2014) p. 288.

³³ Ibid. p. 284-285.

³⁴ Nelson (2012) p. 1117.

³⁵ See UNCLOS Art. 89, 94, 58(2) and Beckman (2014) p. 285-286.

³⁶ Beckman (2014) p. 288-289.

³⁷ Burnett and Green (2008) p. 574-575.

³⁸ UNCLOS Art. 101.

³⁹ See UNCLOS Art. 105, 110 and Burnett and Green (2008) p. 574.

Furthermore, it is argued that states, if destroying or cutting a submarine cable or pipeline is defined as piracy, would likely object to boarding vessels without the consent of the flag state, irrespective of the vessel's involvement in piracy.⁴⁰ Also, Article 101 limits piracy to acts perpetrated with private ends. This means that acts driven by political objectives are ruled out, which puts a limitation to defining military operations and terrorism as piracy.⁴¹

⁴⁰ Beckman (2014) p. 289.

⁴¹ Burnett and Green (2008) p. 576.

4 Military activity in the EEZ

4.1 Peaceful purposes and residual rights

The EEZ is structured in a way that entails that coastal states do not have higher security interest in its EEZ than the rest of the international community does. In other words, the law does not prescribe additional security-related rights for the coastal state in the EEZ.⁴² Article 88 UNCLOS prescribes that the high seas is to be reserved for peaceful purposes and this provision is also to be applied in the EEZ.⁴³ Every state has the right to sail a ship with its flag on the high seas and in the EEZ of any coastal state. This effectively means that warships enjoy freedom of navigation within the EEZ of a coastal state.⁴⁴ UNCLOS is however silent on what constitutes the freedom of navigation and whether this freedom is extended to allow warships the right to conduct weapon exercises and military operations.⁴⁵

It is repeatedly emphasized in UNCLOS that the sea is reserved for “peaceful purposes”.⁴⁶ Article 301 UNCLOS stipulates the “peaceful uses of the seas”, which is not substantially different to “peaceful purposes”.⁴⁷ The provision mirrors Article 2(4) of the UN Charter prohibiting the use of force.⁴⁸ Article 301, which is widely applicable as a constitutional principle within UNCLOS, dictates that while exercising their rights and duties under UNCLOS, states must 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 UN Charter.⁴⁹ During the draft negotiations of UNCLOS, the meaning of “peaceful purposes” was heavily debated and competing interpretations formed. Some states argued that the exact wording of the provision of Article 88 implicated that the seas were exclusively and completely destined for peaceful purposes, meaning complete demilitarization and exclusion of

⁴² Kraska (2011) p. 244.

⁴³ UNCLOS Art. 58(2) and 88.

⁴⁴ UNCLOS Art. 58(2) and 90.

⁴⁵ Rothwell, Stephens (2016) p. 300.

⁴⁶ See UNCLOS Art. 88, 141, 143(1), 147(1), 155(2), 240, 242(1), 246(3), 301.

⁴⁷ Hayashi (2005) p. 123.

⁴⁸ Article 2(4) of the UN Charter stipulates that “All member states 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.”

⁴⁹ UNCLOS Art. 301 and Hayashi (2005) p. 124.

military activity. The opposing view, which gained support amongst many maritime states, among them the United States, held that “peaceful purposes” was to be determined wholly by the UN Charter and other international law obligations.⁵⁰ As for now, many coastal states, for instance Brazil and India, have clarified through declarations that they oppose foreign military exercises, maneuvers and testing of weapons in the EEZ, and that such activities are only permissible with consent from the coastal state. This interpretation has been contested by, for example the United Kingdom and France, whilst the United States hold the view that peaceful military activity is included as one of the lawful uses of the sea.⁵¹ The UN Secretary-General agreed in line with the latter position in a 1985 report. The report concludes that military activities are not prohibited if performed in line with principles of international law and in particular with Article 2(4) and Article 51 of the UN Charter.⁵²

Kraska also argues for this position, meaning that the opposing view, accepting military activities as inconsistent with “peaceful purposes”, would entail that one must accept the same regime for the high seas. This would be a *reductio ad adsurbum*, since that would suggest that no state is permitted to operate military vessels or aircrafts in the EEZ nor the high seas. Kraska argues that such an inference would go against numerous decisions by the UNSC, state practice and other sources of international law.⁵³ Hayashi also discusses this and concludes, based on UNCLOS’ drafting history, various provisions of UNCLOS⁵⁴ and various resolutions adopted by the UNGA and the UNSC, that the most logical conclusion is to interpret “peaceful purposes” in Articles 88 and 301 so that it does not implicate a prohibition of all military activities in the EEZ nor the high seas. Only those that threaten or use force in a manner inconsistent with the UN Charter would be in conflict with “peaceful purposes”. Hayashi asserts that this is self-evident from the wording of Article 301.⁵⁵ Kraska discusses the term further and concludes that it cannot be applied elastically by coastal states since Article 103 of the UN Charter

⁵⁰ Kraska (2011) p. 254–255.

⁵¹ Rothwell, Stephens (2016) p. 301.

⁵² Virginia Commentaries (1995) p. 88-89.

⁵³ Kraska (2011) p. 256.

⁵⁴ Provisions relating to the freedom of military vessels to navigate in Article 87, the privileged status granted to military vessels in UNCLOS, the prohibition of certain military activities within the territorial sea but not outside the territorial sea, and the option of avoiding compulsory judicial settlement of disputes regarding military activities in Article 298 UNCLOS, see Hayashi (2005) p. 125.

⁵⁵ Hayashi (2005) p. 125.

stipulates that if the terms of any other treaty and the UN Charter are inconsistent, the UN Charter shall prevail. Neither is the consideration of whether military activity is to be deemed a “threat to international peace and security” a subjective test by coastal states, but instead to be determined by the application of Article 2(4) and 51 of the UN Charter. Kraska means that this entails that a state cannot loosely invoke the “peaceful purposes” provisions to characterize every activity in the EEZ with which that state disagrees with. The provision does not create new or change rights or obligations in the law of jus ad bellum. He also stresses that the term does not impose further or new restraints on military operations. It is to be understood within the context of the UN Charter and customary international law.⁵⁶

Other commentators disagree with the view that military activity cannot be controlled by coastal states. Yee and Mello Filho refer to Article 59 in UNCLOS, which decides the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the EEZ. The article stipulates the following:

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.

Mello Filho suggests that since rules dictating the conduct of foreign military activities in the EEZ are not identified specifically in UNCLOS, these become part of what will be decided as the “residual rights” of Article 59 UNCLOS. From this follows a “residual attribution” of the rights, to either the coastal state or the foreign state. This would in subsequence mean that states have jurisdiction and dictate military activity in the same way it dictates the other sovereign rights of the EEZ.⁵⁷ Yee argues that if the security interest of the coastal state cannot be guaranteed, there is no point of having all the rights to the resources in the EEZ. He means that the EEZ resource rights presume the existence of the coastal state and its ability to

⁵⁶ Kraska (2011) p. 259.

⁵⁷ Mello Filho (2021) p. 369.

safeguard its security interest, why there should be residual attribution of these rights to the coastal state through Article 59.⁵⁸ Mello Filho also asserts that the residual attribution should confer the jurisdiction over foreign military activities to the coastal state, which he means is justified by the prevalence of the coastal state's security interest over the strategic interests of the foreign states' military activities. Mello Filho adds that these military activities are not only used strategically by foreign states but also as means to intimidate coastal states, which he thinks further implicates that the jurisdiction should be attributed to the coastal state according to Article 59. Through an integration of the territorial status of the coastal State as a residual right, Mello Filho also argues that the violation of this residually attributed right, depending on the hostility, may be an injunction of the prohibition on the use of force.⁵⁹ Kraska asserts that this interpretation, including military activities in the definition of "residual rights", would not only deprive the international community millions of square kilometers of non-economic use of the sea, but also be in contrast with the original intent of the EEZ, which was balancing the use of the zone between the international community and the coastal states, rather than diluting and diminishing the rights of land-locked and geographically disadvantaged states.⁶⁰

4.2 Due regard

In tandem with acting with peaceful purposes on the high seas and in the EEZ, states must act in accordance with "due regard" to the coastal state when exercising their rights and performing their duties under UNCLOS.⁶¹ Simultaneously, a coastal state exercising its sovereign rights shall have due regard to the rights and duties of other states in the EEZ, in accordance with Article 56(2) UNCLOS. "Due regard" is also mentioned regarding the high seas freedoms, and shall be observed to not infringe on other states' interest of exercising their high seas freedoms.⁶²

The standard of "due regard" has been interpreted by some scholars that states must only be considerate and aware of the interests and rights of other states and refrain to adversely affect the use of these rights of nationals of other states.⁶³ Other scholars suggest that "due regard" gives further rights and grants the coastal state the right to

⁵⁸ Yee (2010) p. 3-4.

⁵⁹ Mello Filho (2021) p. 374-375.

⁶⁰ Kraska (2011) p. 277-278.

⁶¹ UNCLOS Art. 58(3).

⁶² UNCLOS Art. 87(2).

⁶³ Virginia Commentaries (1995) p. 86.

be consulted before being subjected to foreign military activity in its EEZ. Mello Filho and Prezas both reference the Chagos Arbitration, where the tribunal ruled that:

[t]he ordinary meaning of “Due Regard” calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius’ rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding States.⁶⁴

Prezas claims that although this judgement was not made in relation to military activities, and concerned Article 56 and not 58, it gives some clarity on the duty of a third state wishing to conduct military activities in another state’s EEZ. He discusses that a balanced approach would be that, as the coastal state may not subject all military activities in the EEZ to the requirement of prior consent, third states may not engage in activities likely to impede the exercise of a coastal state’s economic rights without any prior notice or consultation. Prezas argues that a third state should not engage one-sidedly in the assessment of deciding if an activity will be performed with due regard or not. It should be decided through prior exchange with the coastal state. If not done this way, the procedural component of due regard duty will be violated, even in the absence of any specific infringement of the economic rights of the coastal state.⁶⁵ Mello Filho, in light of the tribunal’s judgement, asserts that military activity always requires prior consultation with the coastal state. After a consultation is made and the coastal state then objects to the military activity and the third State later disagrees with the objection, a dispute arises. Through Article 279

⁶⁴The Chagos Arbitration, par. 519.

⁶⁵ Prezas (2019) p. 105–106.

UNCLOS, and 2(3) in the UN Charter the third state must seek to resolve such a dispute peacefully. Mello Filho asserts that ignoring such an objection made by the coastal state can subsequently result in a violation of said provisions and, by the forceful nature of military activity, in a threat or use of force incompatible with the principles of the UN Charter, and possibly an infraction of the territorial integrity of the coastal state.⁶⁶ Kraska opposes this argument, and stresses that the coastal state has a predominant right in the EEZ, but only to those rights enumerated in Article 56 UNCLOS regarding economic activities. In everything else concerning the EEZ, especially military activity, foreign-flagged states there exist an equal right. He asserts that the term “due regard” does not create any substantive new legal rights for the coastal state, it only requires foreign states to observe and respect the existing right of another party. To conclude whether a coastal state’s rights have been interfered with, a test of reasonableness must be done. He argues that for example a submarine transiting through a coastal state’s EEZ, accidentally hurting fish or different mammals, is not reasonable to deem as an action not taken with due regard to the rights of the coastal state. An aggressive action, diminishing the coastal state’s resources on purpose would on the other hand not be an observance of due regard to the rights of the coastal state.⁶⁷

⁶⁶ Mello Filho (2021) p. 384.

⁶⁷ Kraska (2011) p. 267-268.

5 Analysis and conclusion

5.1 The protection of submarine cables and pipelines in the EEZ

The 1884 Convention, the 1958 Convention and UNCLOS all protect submarine cables and pipelines in the EEZ from intentional damage during peacetime. Said conventions have corresponding provisions safeguarding submarine cables, pipelines are only protected through UNCLOS. However, since UNCLOS is joined by 161 states and in majority of parts considered international customary law, the convention is almost universally applicable, and pipelines therefore protected in the same extension as submarine cables. Article 113 UNCLOS is almost word-for-word the same as Article 27 of the 1958 Convention, which in turn builds upon Article 2 of the 1884 Convention and protects both telephonic, high voltage power cables and pipelines from breaking or injury either by willful or culpable negligence. Breaking or injury done with cause of saving life or vessels shall however be exempt. Therefore, all intentional or culpable mishaps and damages to submarine cables or pipelines are prohibited within the EEZ, with exemption to damaging or breaking cables or pipelines with lifesaving intentions.

The prohibition is enforceable through Article 10 of the 1884 convention and extended through Article 30 of the 1958 Convention, allowing warships to board ships suspected of breaking the prohibition, and later use the findings in court. However, UNCLOS generally places enforcement jurisdiction only on the flag state of a vessel in the EEZ. In consequence only the flag state has jurisdiction over the vessel. This means that the flag state must consent in order for another state's vessel to board the suspected vessel. This in turn means that even though a ship is highly suspected, or seen, breaking or damaging a submarine cable, no other ship may board the ship without prior consent of the suspected ship's flag state under UNCLOS. This makes Article 113 UNCLOS quite toothless in comparison to Article 2 of the 1884 Convention considering that no executive power is in practice bestowed upon

the coastal state. This is rather problematic considering that the 1884 Convention only has 40 state parties and the 1958 Convention 63 state parties⁶⁸ and gives only these states their warships the power to board another state party's vessel through article 10 of the 1884 Convention, not a state which has only entered UNCLOS. Also, in accordance with Article 311 UNCLOS, for those parties which have joint both UNCLOS and the 1884 Convention, UNCLOS prevails. This meaning that UNCLOS governs the executive power, not the 1884 Convention.

Some scholars solve this problem by interpreting that "property" in Article 101 UNCLOS encompass submarine cables and pipelines and consequently gives any vessel the right to seize the suspected ship and thereafter arrest, prosecute and punish the perpetrators. However, many scholars are sceptical of this interpretation as it is too extensive in comparison to the provision's original intent. Anyhow, if admitting that theft or destruction of a submarine cable constitutes piracy, this creates further problems. Firstly, Beckman means that it will have no effect on the practical enforcement of crime against cables and pipelines because ships will be reluctant to seize vessels without the flag state's consent, irrespective of an actual right to arrest. Secondly, if destruction or damage of cables or pipelines could constitute piracy, a suspecting ship is not permitted to seize the suspected vessel if the destruction of the pipelines or cables is motivated by political ends, such as military attacks. This is a consequence of the so-called private ends limitation, which means that Article 101 UNCLOS prescribes solely acts of violence, detention or depredation committed with *private ends* as piracy.

5.2 Foreign military activity in the EEZ

The EEZ is reserved for peaceful purposes according to article 88 UNCLOS. The meaning of the term is contested in both doctrine and in state practice. This dissension spans between regarding foreign military activity in the EEZ as permitted as long as the maritime state does not threaten or use force in a

⁶⁸See *United Nations, Treatie Collections: Convention on the High Seas*.

manner inconsistent with Article 2(4) and 51 of the UN Charter, or regarding foreign military activity as completely prohibited unless there is consent from the coastal state. The supporters of the first view hold that it is evident from the wording of Articles 88 and 301 UNCLOS that it does not prescribe any further rights for the coastal state and that the provisions cannot be applied elastically. The provisions only protect the EEZ to the same extent the prohibition on the use of force does, through the laws of *jus ad bellum*. Supporters of the opposing view regard the control of military activity as one of the rights attributed through Article 59 UNCLOS. The security interest of the coastal state triumphs the maritime states' strategic interests and a residual attribution is therefore legitimized. The scholars suggest that this entails that without consent from a coastal state to perform military activity in an EEZ, only entering the EEZ with military vessels may be an injunction of the territorial integrity, attributed through Article 59. This as a consequence would also be an infraction of the prohibition on the use of force. In conjunction with having peaceful purposes in the EEZ, other states must also observe due regard to the rights of the coastal state. This is also contested by states and scholars. Kraska argues that the term "due regard" entails maritime states to be aware of and respect the existing rights of the coastal state. Other scholars argue in light of the Chagos Arbitration, suggesting that a prior exchange with the coastal state should be done to decide if the military activity may or may not infringe the rights of the coastal state. Mello Filho asserts that if not done this way it may be a threat or use of force incompatible with the principles of the UN Charter.

As stated, the nature of international law is that its creation is decentralized and decided and upheld by states, which means that both these views have bearing. It is possible that one coastal state accepts military activity, and one does not. This being said, an argument can be made from a standpoint of the legal sources available. Out of the wording of article 301 UNCLOS, mirroring the provisions of the UN Charter, it is obvious, as Kraska and Hayashi assert, that the prohibition on the use of force has been incorporated into UNCLOS, and it is solely that which decides whether military activity in the EEZ is lawful. That the zone would be exclusively reserved for economic use is

illogical, as that would mean that military activity is completely forbidden even on the high seas, which it is not. Regarding the attribution of residual rights, it is as Kraska argues, the EEZ was not intended to be an extension of the territorial sea. It is a *sui generis* zone with a distinctive regime, not an extension of the territorial sea only open for economic utilization by other states.

Concerning “due regard” it is possible to argue that a consultation must be made with the coastal state before conducting military activity. However, as Kraska argues, the rights held by the coastal state are the economic rights enumerated in Article 56 UNCLOS, while the remaining are non-exclusive and belong to the international community. This may entail that the states shall consult one another, but only if the economic rights might be infringed. The nature of due regard entails a maritime state to respect a coastal state’s rights in the EEZ. As stated in the Chagos Arbitration “the extent of the regard required by the Convention will depend upon the nature of the rights [...] their importance, the extent of the anticipated impairment the nature and importance of the activities contemplated [...] and the availability of alternative approaches”. This means that there *might* be a need of consultation, and this of course depends on what kind of military activity is planned. A uniform right to always oblige to what the coastal state say does not exist through UNCLOS. However, observing “due regard” gives the coastal state the right to have its economic rights respected and not infringed, as these rights are what the regime of the EEZ entitles them to. A consultation is a way to ensure this.

5.3 Conclusion

UNCLOS offers a certain protection of submarine cables and pipelines by prohibiting breaking or damaging of cables or pipelines with intent or culpable negligence. This prohibition only addresses prescriptive jurisdiction. Without enforcement jurisdiction as provided in the 1884 Convention and 1958 Convention, the prohibition may not have practical value as the provision in UNCLOS is not enforceable by all UNCLOS parties.

Regarding military activity in the EEZ, this also has implications on the protection of submarine pipelines and cables. Through Articles 88 and 301 UNCLOS, foreign military must act with peaceful purposes in the EEZ, protecting cables and pipelines by prohibiting the use of force. However, a military attack targeted at a cable or pipeline may not always constitute use of force. Nevertheless, undersea cables and pipelines are part of the rights of the coastal state⁶⁹ and thereby still protected by the “due regard” requirement in Article 58 UNCLOS. A maritime state might, especially if endangering the economic rights, also need to consult the coastal state before endeavoring in a military activity to accommodate the requirement of observing “due regard”. An attack directed against a cable or pipeline is certainly not in due regard of the coastal state’s rights, and consequently, prohibited by UNCLOS. Hence, although military activity cannot be entirely controlled by coastal states, cables and pipelines placed in the EEZ are protected from military activity with malicious intent.

⁶⁹ Or rights of another state exercising its high seas freedoms in the EEZ, see Art. 87 UNCLOS.

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