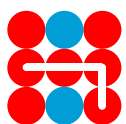


Handbook on maritime hybrid threats: 15 scenarios and legal scans



Hybrid CoE Papers cover work in progress: they develop and share ideas on Hybrid CoE's ongoing research/workstrand themes or analyze actors, events or concepts that are relevant from the point of view of hybrid threats. They cover a wide range of topics related to the constantly evolving security environment.

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Hybrid CoE's mission is to strengthen its Participating States' security by providing expertise and training for countering hybrid threats, and by enhancing EU-NATO cooperation in this respect. The Centre is an autonomous hub for practitioners and experts, located in Helsinki, Finland.

The responsibility for the views expressed ultimately rests with the authors.

The first edition of this handbook, published in 2019, was authored by Jukka Savolainen, Terry Gill, Valentin Schatz, Lauri Ojala, Tadas Jakstas, and Pirjo Kleemola-Juntunen, and edited by Tiia Lohela.

This second edition was authored by Jukka Savolainen, Terry Gill, Valentin Schatz, and Georgios Giannoulis, and edited by Georgios Giannoulis.

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Foreword

Since March 2018, the European Centre of Excellence for Countering Hybrid Threats (Hybrid CoE) has been examining the issue of maritime hybrid threats in a series of events, meetings and training sessions. When first published in 2019, this handbook established a taxonomy of ten potential scenarios. Since then, more experience has been gained, and the second edition of the handbook introduces five additional scenarios. Each of the scenarios is followed by a short legal analysis, allowing the reader to immediately get on the right track as regards relevant parts of the law of the sea and international humanitarian law (IHL). The expansion of the war in Ukraine has demonstrated the validity of the scenarios in the first edition related to underwater weapons, shooting and exercise areas, and damage to pipelines. Elsewhere, serious events may be linked to cyberattacks. It has become evident that disruptions to shipping and other malicious maritime activities may have immediate and/or long-term effects leading to serious economic and political consequences.

The aim of this handbook is twofold:

1. To describe plausible scenarios that hybrid threat actors may benefit from. These scenarios have been widely tested and verified together with experts from Hybrid CoE's Participating States.
2. To provide a brief legal scan on each scenario. The scans are useful for maritime operators and all decision-makers that might be involved in responding to such situations.

Some findings deserve to be highlighted:

Firstly, it seems to be easy for experts to achieve unanimity concerning what can be done legally and what cannot. This is good news – the norms are clear enough. On the other hand, outside of a small circle of legal experts, this knowledge is seldom shared.

Secondly, some of the legal norms are ambiguous: two parties may find support for their conflicting positions in the United Nations Convention on the Law of the Sea (UNCLOS), for example. This calls for readiness to defend one's case with all possible international support.

Thirdly, the contemporary interpretation of IHL is quite relevant. Even a small-scale armed confrontation between two States may be regarded as an international armed conflict. In such a case, the countries are regarded as “belligerent” and IHL replaces UNCLOS. This means that the law on naval warfare would become applicable as well.

Improving understanding of this legal context on all sides will increase predictability.

Hence, the handbook is designed to support the Participating States, the EU and NATO by: Helping them to inform policymakers and maritime operators, such as naval and coast guard officers, about the legal context of possible maritime hybrid operations.

Providing a structure for policy and concept development, operational planning, exercises, and setting technical requirements.

I would like to take this opportunity to thank those who contributed throughout the work-strand leading up to this publication. For the 1st edition, the legal scans were provided by a

group of advisers on international law: Professor Emeritus Dr Terry Gill, Dr Valentin Schatz, Dr Tadas Jakstas and Dr Pirjo Kleemola-Juntunen. Professor Dr Lauri Ojala provided insights on maritime logistics and the economy, and Ms Tiia Lohela kept the process running smoothly while also contributing to the texts.

Professor Dr Lauri Ojala, representing the University of Turku and the EU-funded ResQU2 project platform, contributed by providing valuable information and financial support when it came to content for the events, arrangements and reporting. The European Defence Agency (EDA) also provided important support by co-organizing and co-financing two of the events. I am grateful to these partners for helping us to reach this milestone.

For the 2nd edition, the scenarios were developed largely based on a maritime exercise held on 7 May 2021 together with the Portuguese Presidency for the EU. I would like to thank the

then chair of the EU Horizontal Working Party on Enhancing Resilience and Countering Hybrid Threats, Ms Maria do Rosário Penedos, for providing us with a great opportunity to test reactions to several scenarios.

These additional scenarios were again provided with legal scans by Professor Emeritus Dr Terry Gill and newly appointed Professor Dr Valentin Schatz. The editing of the 2nd edition was undertaken by Georgios Giannoulis.

Finally, I also wish to extend thanks to the numerous participants in our events, where the ideas and ultimate scenarios were developed and tested.

Helsinki, January 2023

Captain Jukka Savolainen (Navy) ret'd

Director, Community of Interest for Vulnerabilities and Resilience Hybrid CoE

Acronyms and abbreviations

| | |
|-------------------|--|
| ADIZ | Air Defence Identification Zone |
| AIS | Automatic Identification System |
| BSR | Baltic Sea Region; political definition used by the EU, which includes Belarus, Denmark, Estonia, Finland, Latvia, Lithuania, Norway, Poland, Sweden, the Northern German States and Northwest Russia |
| CISE | Common Information Sharing Environment (for EU fisheries management) |
| COI | Communities of Interest of Hybrid CoE; e.g., on Vulnerabilities and Resilience |
| COLREGs | International Regulations for Preventing Collisions at Sea (1972; in force 1977) |
| DWF | distant-water fishing |
| EDA | European Defence Agency |
| EEZ | Exclusive Economic Zone (cf. a coastal State's jurisdiction over its waters) |
| EUMSS | European Union Maritime Security Strategy |
| EUROSUR | European Border Surveillance System |
| FONOP | Freedom Of Navigation Operations |
| Hybrid CoE | The European Centre of Excellence for Countering Hybrid Threats |
| IAC | international armed conflict |
| IHL | international humanitarian law; a set of rules that seek, for humanitarian reasons, to limit the effects of armed conflict |
| IMO | International Maritime Organization, a United Nations specialized agency serving as the global standard-setting authority for the safety, security and environmental performance of international shipping |
| ITLOS | International Tribunal for the Law of the Sea |
| IUU | illegal, unreported and unregulated fishing |
| LIVEX | An actual military exercise; "live exercise", typically also using live ammunition |
| NGO | non-governmental organization |
| NM | nautical mile |
| NOTMAR | Notice to Mariners; information or warning to (merchant) shipping operators and vessels issued by a competent authority |
| NSCMIG | North Sea and Channel Maritime Information Group |
| ResQU2 | A project in the EU's Baltic Sea Region Interreg Programme to increase preparedness and coordination of operations in maritime and seaport emergencies (2018–2020) |
| RFMO | Regional Fisheries Management Organization |
| RHIB | rigid-hull inflatable boat |

| | |
|------------------------|--|
| San Remo Manual | The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea; adopted by the International Institute of Humanitarian Law (IIHL), which is an independent, non-profit humanitarian organization founded in 1970 |
| SAR Convention | International Convention on Maritime Search and Rescue |
| SLOC | Sea Lines of Communication |
| SOLAS | Convention for the Safety of Life at Sea |
| SUA Convention | IMO Convention (1988) for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf |
| UNCLOS | United Nations Convention on the Law of the Sea from 10 December 1982 |
| WMD | weapon(s) of mass destruction |
| UNGA | United Nations General Assembly |

1. Introduction – an era of hybrid threats

This is the era of hybrid threats. Both State and non-State actors are challenging countries and institutions that they see as a threat, opponent or competitor to their interests and goals. The range of methods and activities at their disposal is broad, including influencing information; logistical weaknesses like energy supply pipelines; economic and trade-related blackmail; undermining international institutions by rendering rules ineffective; and terrorism or increasing insecurity.

Hybrid threats are methods and activities that target the vulnerabilities of the opponent. Vulnerabilities can be created by many things, including historical memory, legislation, customary law, geostrategic factors, strong polarization of society, technological disadvantages or ideological differences. If the interests and goals of the user of hybrid threat methods and activities are not achieved, the situation can escalate into hybrid warfare, wherein the role of the military and violence will increase significantly.

Accordingly, Hybrid CoE characterizes a hybrid threat as follows:

- Coordinated and synchronized action that deliberately targets democratic States' and institutions' systemic vulnerabilities, through a wide range of means.
- The activities exploit the thresholds of detection and attribution as well as different interfaces (war-peace, internal-external, local-State, national-international, friend-enemy).
- The aim of the activity is to influence different forms of decision-making at the local (regional), State or institutional level to

favour and/or obtain the agent's strategic goals while undermining and/or hurting the target.

Based on experience, hybrid influencing can be roughly divided into two phases: the priming phase and the operational phase. In the priming phase, the adversary constantly monitors the situation, exercising reasonably subtle means of influencing while gradually improving its assets. If decided, it may initiate a more serious hybrid threat operation whereby the effect of measures becomes stronger, the means more violent, and plausible deniability decreases.¹

Threats in the maritime domain tend to be progressively hybrid in nature and difficult to model on account of their complex appearance and cascading nature. These cascading effects pose particularly serious dangers since they exploit the vulnerabilities of different systems and/or spheres at the same time in an interdependent manner. Furthermore, the effects tend to become magnified rather quickly through global supply chains. Thus, societal systems, such as securing sea lines of communication (SLOC) and maintaining a high level of maritime safety and security, are increasingly connected and interdependent.

The 15 scenarios presented in this paper were defined and verified during the following events:

- **The Workshop on Harbour Protection in the Hybrid Threat Environment**, organized jointly with the EDA in its Brussels premises on 29–30 May 2018

¹ The European Centre of Excellence for Countering Hybrid Threats, "Hybrid threats", <https://www.hybridcoe.fi/hybrid-threats/>.

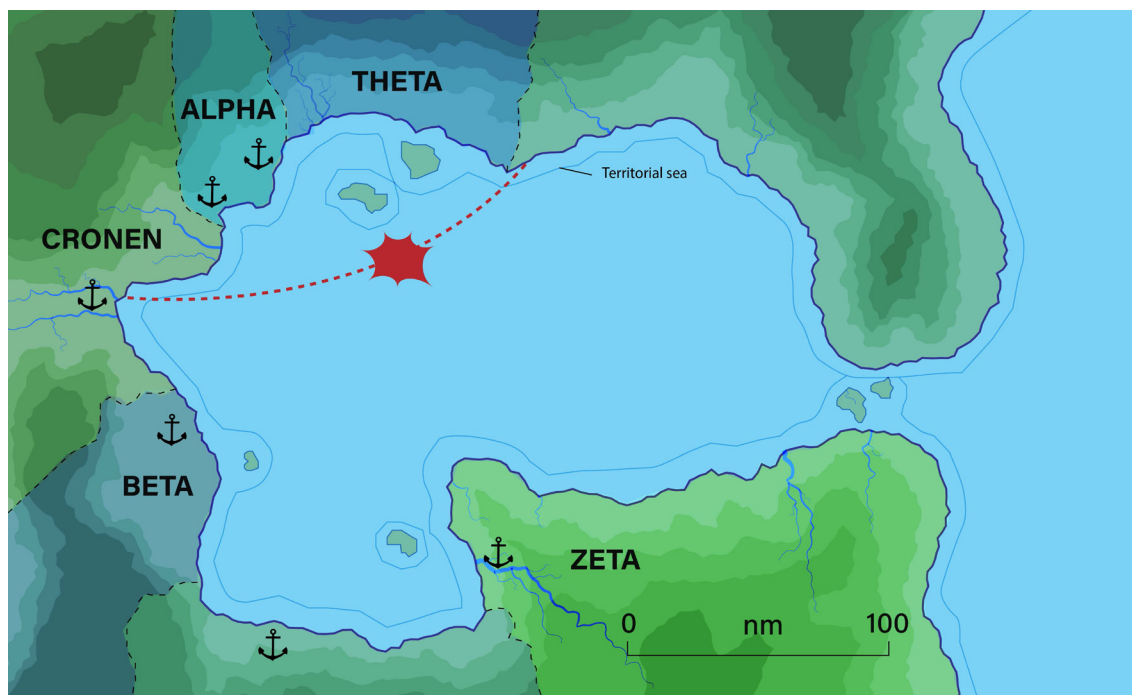
- **The International Symposium on Maritime Security**, organized jointly with the Helmut Schmidt Defence University in Hamburg on 4–5 September 2018
- Conference on **Legal Resilience in an Era of Hybrid Threats**, organized jointly by Hybrid CoE together with the University of Exeter, in which COI V&R hosted a panel on Shipping through the Sea of Azov, on 8–10 April 2019 in the United Kingdom
- **The Workshop on Hybrid Scenarios in the Baltic Sea**, organized in cooperation with the ResQU2 project in the Turku Archipelago, Finland, on 28–29 May 2019
- **The Workshop on Harbour Protection**, organized in cooperation with the EDA and Project PlatformResQU2, on 15–16 October 2019 in Finland
- **The Exercise of Maritime Hybrid Threats**, organized jointly with the Portuguese Presidency of the EU on 7 May 2021
- **The Workshop “Handbook on Maritime Hybrid Threats Update – New Scenarios Presentation”** on 22 Apr 2022, to which experts from Hybrid CoE’s Participating States, the EU and NATO were invited to evaluate and approve these new scenarios

2. Maritime scenarios²

The following section covers topical and realistic maritime hybrid threat scenarios, which have been carefully constructed by a team of legal and logistics experts and Hybrid CoE. Each of the scenarios describes a security measure hampering shipping and global security. The accompanying legal scans place the developments in a valid legal framework.²

² The scenario maps were drawn by Jukka Savolainen and Georgios Giannoulis, artistically directed by Tiia Lohela and digitalized by Esko Tuomisto.

Scenario 1. Protection of an underwater gas pipeline



Weather conditions in the sea have been affected by a storm from the south-east. A large bulk carrier has a blackout and starts drifting into the EEZ of Country Theta, which is an EU coastal State. Emergency anchorage is necessary because the vessel cannot remain on the windward side, or else it risks shifting its load. The vessel's anchor holds badly, and the vessel starts to drift slightly. When drifting stops, the ship is more or less above an underwater gas pipeline belonging to Corporation Eta, the majority ownership of which is in Country Cronen. After some hours, the problem is fixed, the anchor is raised and the vessel moves on.

Two days later, the majority owner of the pipeline Corporation Eta from Country Cronen, with the support of the Ministry of Foreign Affairs of Country Cronen, approaches the government of Country Theta. They demand that Country Theta covers the cost of the pipeline inspection and possible repairs. They argue

that Country Theta should have protected the pipeline by not attempting anchorage next to it and/or should have arranged for towage to help before and during the raising of the anchor.

→ Can Corporation Eta hold Country Theta liable for damage caused by the bulk carrier in distress within the EEZ/on the continental shelf of Country Theta?

Legal scan: Protection of an underwater gas pipeline

Corporation Eta, the owner of the underwater pipeline, with the support of the government of Country Cronen, seeks to hold the government of Country Theta liable for damage caused by a bulk carrier in distress within the EEZ/on the continental shelf of Country Theta.

Corporation Eta and Country Cronen base the claim on an alleged violation by Country Theta of a coastal State obligation to ensure the safety of pipelines. In order for the claim to

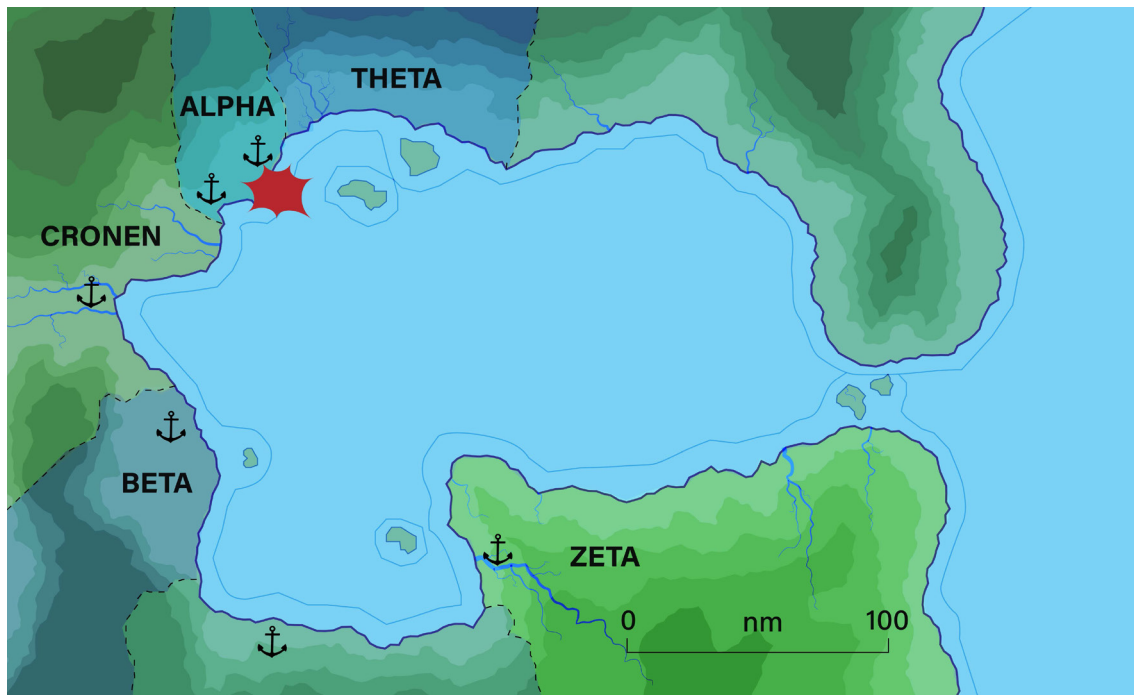
be successful, such an obligation would have to exist under public international law. Such an obligation, which in any case would be an obligation of due diligence that requires only reasonable efforts on behalf of the coastal State and not an absolute prevention of harm, does not exist. There are obligations on the part of coastal States to have due regard for the right of other States to lay submarine cables and pipelines (Article 56(2) of UNCLOS) and to not impede the laying or maintenance of such cables or pipelines (Article 79(2) of UNCLOS). However, these obligations do not extend to the prevention of conduct beyond the jurisdiction of the coastal State – which does not include activities relating to the submarine pipelines or the exercise of the freedom of navigation of foreign vessels (compare Article 58(1) of UNCLOS).

Indeed, the coastal State arguably does not even have the necessary rights to fulfil an obligation to protect foreign submarine pipelines

in its EEZ, as it only has the right to take reasonable measures for the prevention, reduction and control of pollution from pipelines, not a general right to ensure the safety of the pipeline from international shipping. Instead, measures to protect submarine cables in the EEZ against damage by international shipping fall within the responsibility (and exclusive rights) of flag States and the States of nationality of the persons involved (Articles 58(2) and 113 of UNCLOS). Even if one assumes that a due diligence obligation of coastal States to protect foreign submarine pipelines in their EEZs exists, the available facts do not suggest that Theta could have reasonably been expected to prevent the incident at hand. Therefore, Theta has not violated any international obligations and does not bear international responsibility.

Neither Corporation Eta nor Country Cronen can hold Country Theta liable for the damage caused by the EU-flagged ship's anchoring.

Scenario 2. Cyberattacks against shipping



The focal vessel is a tanker registered in the EU Member State of Zeta and owned by a company headquartered in a non-EU Member State named Rho, which is not a party to UNCLOS. When approaching an oil terminal in the EU Member State of Alpha, the vessel loses steering and engine control, the engines go full speed ahead and the ship crashes into a mooring station for an oil terminal. As a result, the mooring station is seriously damaged, and the tanker sustains a minor oil leak.

After two weeks, specialists find advanced malware in the ship's computer systems and an installed communication link allowing external steering. As a result, insurance companies for the ship claim no responsibility for the crash based on their cyber disclaimer.

After three weeks, some criminal actors blackmail another shipping company, demanding 10 million EUR for revealing the names of other ships where the same malware has been installed. After four weeks, attribution to a

State actor (Country Cronen) is discussed and a majority of EU and NATO governments release statements attributing blame to Country Cronen, statements which are deemed credible based on evidence and intelligence.

→ Has Country Cronen violated international law?

Legal scan: Cyberattacks against shipping

In order to constitute a violation of a rule of public international law, which in turn would constitute an internationally wrongful act, one which engages the responsibility of that State, the cyberattack must first of all be attributable to Country Cronen.

Attribution is always a challenge in such cases, but it is not invariably an insurmountable obstacle. However, attributing legal responsibility requires a fairly high degree of certainty, and this is not always possible.

The question is, thus, whether specific cyber acts could convincingly be attributed to either a State (a governmental agency such as the armed forces, intelligence service, etc.) or to a group of identifiable individuals operating at the behest of and under the direction of a State (so-called “patriotic hackers”). In the scenario at hand, attribution is assumed to be possible.

Therefore, the second question is whether there are international obligations that prohibit cyberattacks on navigation. The international law of the sea, and UNCLOS in particular, do not explicitly deal with cyber-security issues such as cyberattacks on ships. However, interference with a merchant ship’s navigation and damage to that merchant ship constitute a violation of UNCLOS, depending on where the ship is located at the time of the attack.

If the ship is located on the high seas or in an EEZ, a cyberattack by a State violates the flag State’s freedom of navigation, respectively, under Article 87(1)(a) or Article 58(1) of UNCLOS. In the territorial sea, the right of innocent passage comes into play (Article 17 of UNCLOS), as does the coastal State’s sovereignty (Article 2(1) of UNCLOS).

The attack might potentially also violate various other obligations concerning safety at sea arising from treaties, such as the 1972 International Regulations for Preventing Collisions at Sea (COLREGs). If the cyberattack also causes an oil spill or other form of marine pollution, it violates the obligation to protect the marine environment under Article 192 of UNCLOS. Equally, damage caused to port facilities

following a cyberattack on a ship constitutes an internationally wrongful act.

Apart from the law of the sea, two further considerations must be taken into account.

Firstly, in Tallinn Manual 2.0,³ experts identified the existence of a rule of customary international law prohibiting (cyber) acts that violate the sovereignty of another State (Rule 4, Tallinn Manual 2.0). This rule is based on State practice, UN resolutions and various decisions by international courts and tribunals. Notwithstanding the view expressed by some States that sovereignty is simply a foundational principle and not a rule of international law in itself that can be violated, it is probable that the majority position of States is reflected in the Tallinn Manual rule. Hence, a cyber act that violates the sovereignty of a State would constitute a violation of customary international law in addition to the violations of UNCLOS referred to above. By preventing the flag State from exercising its exclusive jurisdiction and control over the navigation of the vessel, the act violated the sovereignty of the flag State. If the act occurred in the territorial sea of a coastal State it would additionally violate the sovereignty of that State as well. This would strengthen the case of the injured State(s).

Secondly, the question arises as to whether the cyber act constituted a use of force. Here, as stated, it is a matter for careful consideration and the positions of experts and States are not uniform, hence conclusions are debatable. But it should be noted that many States and experts take the position that a cyber act that results in physical damage to objects and/

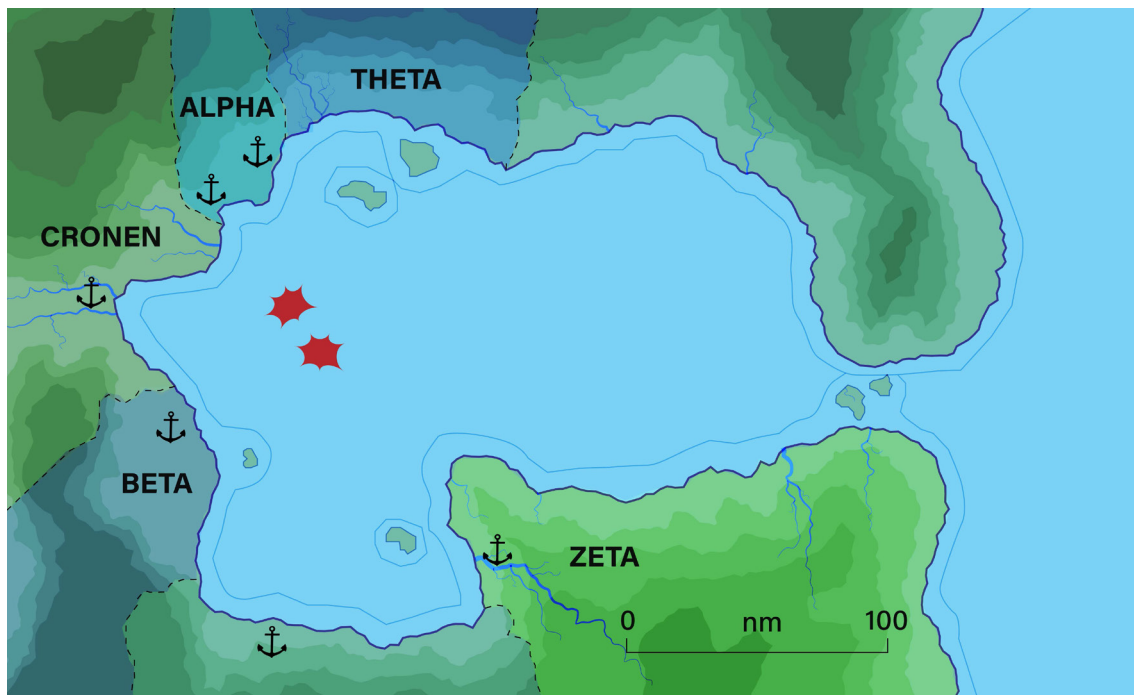
3 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University Press, 2017).

or (potential) injury to persons constitutes a use of force in violation of Article 2(4) of the UN Charter. For example, in the previously mentioned Tallinn Manual, the experts unanimously took the position that subject to a *de minimis* threshold, “consequences involving physical harm to individuals or property will in and of themselves qualify a cyber operation as a use of force”.⁴ On the basis of the characterisation of the damage to the mooring station as “serious”, it would seem likely that the *de minimis* threshold has been met. Note also that even if one were to conclude that this act

constituted a use of force, the majority position of States and experts would almost certainly not characterise it as an “armed attack” under Article 51 of the UN Charter. Hence, any response would have to be confined to the utilisation of settlement procedures in pursuance of a claim for damage arising from the incident. These could potentially be complemented by acts of retorsion and/or non-forceful countermeasures subject to the procedural rules governing the imposition of countermeasures (see Annex on legal responses).

4 Schmitt, *Tallinn Manual 2.0*, Commentary to Rule 69 on p. 334.

Scenario 3. Clandestine use of underwater weapons



During the previous six weeks, three explosions sank two vessels owned by the EU Member States of Alpha and Beta (one of which is also a NATO country) en route to a port in Country Alpha, respectively. Two buoyant WWII contact mines are detected by surveillance planes and eliminated by the Navy.

One week after the latest explosion, the government of Country Zeta released technical evidence compromising the assumption about old contact mines: all damage was deeper under the hull, near the stern, and all explosions hit the engine room. After two weeks, attribution claims are presented against Country Cronen based on circumstantial satellite evidence. All parties also continue widespread efforts to find more evidence on the seabed. Country Cronen regards these claims as a serious offence against itself. What are the consequences if attribution is seriously made to a State actor (Country Cronen)?

→ Has Country Cronen violated international law?

Legal scan: Clandestine use of underwater weapons

The clandestine use of underwater weapons resulting in (potential) damage to vessels and/or injury to, or death of, the crew of the vessels crosses the line from interference to actual use of force under Article 2(4) of the UN Charter.

The planting of any such explosive devices on board a vessel at sea or in port by individuals not in State service would bring the 1988 SUA Convention and, as far as applicable, its 2005 Protocol into play. This provides for criminal jurisdiction and international legal cooperation in suppressing acts directed against the safety of maritime navigation.

Proceeding on the assumption that the use of clandestine weapons in peacetime is directly attributable to a State, such activities should also be incompatible with the prohibition of the use of force under Article 2(4) of the UN Charter, the obligation to use the high seas/EEZ only for peaceful purposes under Articles 88 and

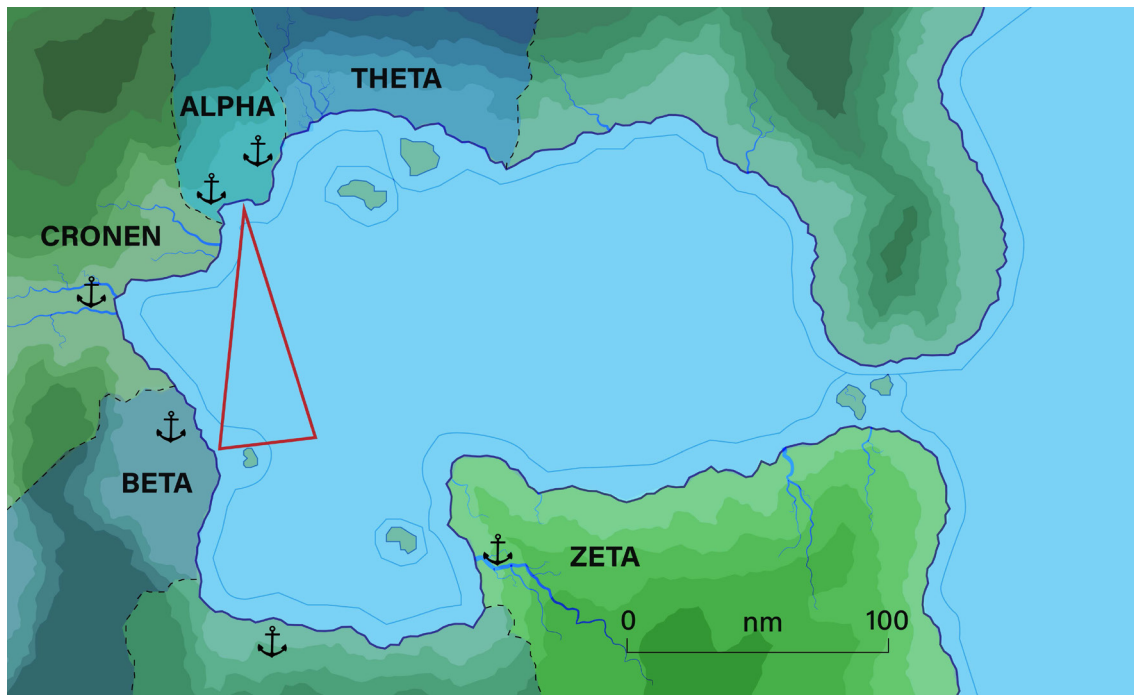
301 in conjunction with 58(2) of UNCLOS, and finally the freedom of navigation on the high seas/in the EEZ under Articles 87(1) and 58(1) of UNCLOS.

This could potentially be a matter for the UN Security Council or other international organizations, such as NATO or the EU, acting within their scope of authority under the UN Charter and their constituent instruments. While sporadic acts of force not resulting in significant harm or injury would probably fall short of an

“armed attack” under Article 51 of the UN Charter, they would nevertheless constitute a serious violation of international law and would result in the responsibility of the State in question.

If the damage were more serious and/or resulted in human casualties, the line between a hybrid threat and an armed attack would be crossed and the right of self-defence under Article 51 of the UN Charter and customary law would come into the picture.

Scenario 4. Declaring a shooting and exercise area and blocking SLOCs



Country Cronen declares a shooting and exercise area dangerous and blocks a sea route to a port of EU Member State Beta, which is also a NATO member. An intense LIVEX, including the use of various arms systems, has been ongoing for two weeks and is situated in the vicinity, involving merchant vessels navigating through the area. As a result, ferry and liner shipping lines have halted their ships, and some companies have suspended activities. The disruption of SLOCs also affects EU Member State Alpha. Exercises are to continue until further notice.

→ Has Country Cronen violated international law?

Legal scan: Declaring a shooting and exercise area and blocking SLOCs

Military exercises in the territorial sea of another State, as presented in this scenario, are completely illegal because they constitute a violation of the sovereignty of the coastal State in

the territorial sea (Article 2(1) of UNCLOS). They are in breach of the regime of innocent passage (see Article 19(1) and 19(2)(b), (e), (f), (l) of UNCLOS). Insofar as they also affect the navigation of vessels of third States, the right of innocent passage of those States has also been violated (Article 17 of UNCLOS).

Military exercises on the high seas and in the EEZ do not per se violate the peaceful purposes clauses in Articles 88 and 301 of UNCLOS. Those provisions do not result in a prohibition of all military activities on the high seas and in EEZs, only those that threaten or use force in a manner inconsistent with Article 2(4) of the UN Charter. However, States conducting military activities on the high seas or in the EEZ of other States must, under Articles 87(2) and 58(3) of UNCLOS, have due regard for the rights and obligations of other States and of the coastal State, respectively.

In essence, these due regard obligations require that the State takes all necessary

measures to ensure that its military activities do not undermine the rights and obligations of other States. In other words, the interference in the rights of other States must be as slight as possible and must be commensurate with the military exercise.

Aspects that have a direct bearing on the proportionality of the operations are, among others:

- 1) the extent of the area of military exercises,
- 2) the duration of the exercises,
- 3) the severity of the restrictions imposed on the rights of other States,
- 4) the availability of less intrusive alternatives, and
- 5) the extent, timeliness and accuracy of the notification (e.g., notice to mariners (NOTMAR)) to affected States.

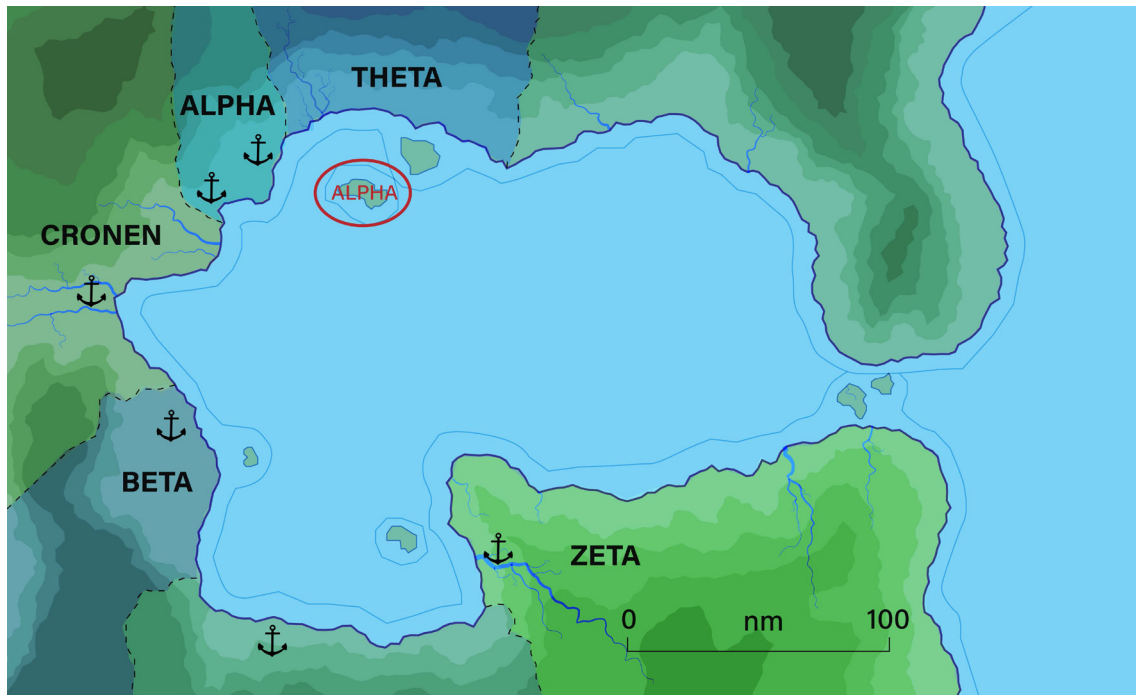
In addition, it is obvious that such an exercise may not involve any use of force against foreign vessels unless a vessel or aircraft posed an immediate threat to the vessels conducting exercises in the exercise zone.

Bearing in mind that live-fire military exercises blocked Country Beta's only port (and potentially one port of EU Member State Alpha), with potentially significant economic losses, and disrupted major civilian (e.g., ferry) shipping

lanes and that the navigational warning procedures were not properly executed (i.e. civilian ships were not notified about the duration of the exercise, and therefore were not able to prepare in advance for disruptions), the naval exercises clearly violated the abovementioned obligations. In addition, further analysis of the relevant circumstances could be required to ascertain, for example:

- 1) the size of the area of Country Beta's exclusive economic zone that was declared dangerous for shipping due to the military exercises;
- 2) how many civilian ships had to stop operations or change the course of their navigation due to the military exercises and how substantial the diversion was compared to the original route;
- 3) whether the other routes that the ships had to use due to the military exercises were equally safe and secure; and
- 4) whether there were any other negative consequences for unrestricted navigation in the sea, such as failure to deliver cargo on time, extra costs incurred in changing course and disruption of the operations of seaports in Country Beta and Country Alpha, in particular.

Scenario 5. Declaration of a control zone around an island



Country Cronen declares a control zone in the sea region around one of the islands belonging to EU Member State Alpha, with implicit impacts also on EU Member State Theta, claiming the following as the motivation for such action:

- 1) an anti-terrorist operation in the area;
- 2) an armed conflict elsewhere outside the sea region;
- 3) an armed conflict elsewhere within the sea region;
- 4) a unilaterally declared (by the offender) armed conflict with the host nation; or
- 5) a bilaterally declared armed conflict.

→ Has Country Cronen violated international law?

Legal scan: Declaration of a control zone around an island

1) An anti-terrorist operation in the area

The imposition of a control zone in peacetime around any island would be incompatible with international law regardless of whether it was based on an anti-terrorist operation or on other grounds. Such a zone would be in violation of the sovereignty of the affected territorial State, of the sovereignty of the coastal State in its territorial sea (Article 2(1) of UNCLOS), and of the sovereign rights of the coastal State in its EEZ and on its continental shelf (Articles 56(1) and 77(1) of UNCLOS).

In addition, it would constitute an impermissible intervention into the domestic affairs of the affected State and, if coupled with the threat or actual use of armed force, would constitute a use of force in violation of Article 2(4) of the UN Charter and, if rising above a

small-scale armed incident not resulting in significant material damage or injury, would also amount to an “armed attack” triggering the right of individual or collective self-defence under Article 51 of the UN Charter along with Article 5 of the NATO Treaty and/or Art. 42(7) of the EU Treaty, as the case may be.

As far as other States exercising navigational rights in peacetime are concerned, the control zone violates the right of innocent passage in the territorial sea (Article 17 of UNCLOS) and the freedom of navigation under Article 58(1) of UNCLOS.

2) *An armed conflict elsewhere outside the sea region; and*

3) *An armed conflict elsewhere within the sea region*

In these sub-scenarios, there is as yet no armed conflict in progress between the State imposing the control zone and the affected territorial State; hence, the law of armed conflict is not applicable to the situation until such time as actual force is employed by either State against the other. The affected territorial State has the status of a neutral State vis-à-vis the armed conflict ongoing elsewhere, unless it has become a party to the conflict by engaging in hostilities against a belligerent State or by providing direct combat support to a belligerent State.

As a neutral State, its territory is inviolable and may not be interfered with or entered by a belligerent party, except in the event of a serious violation of neutrality. Thus, the result is largely the same as in sub-scenario 1).

4) *A unilaterally declared (by the offender) armed conflict with the host nation; or*

5) *A bilaterally declared armed conflict*

In these sub-scenarios, the situation is different assuming that the declaration of a State of armed conflict was either a formal declaration of war or resulted in actual hostilities. In either case, the law of armed conflict would become applicable and would apply to all belligerent States equally, irrespective of other legal considerations, such as which State is the aggressor or is lawfully exercising self-defence. It operates alongside other bodies of law, including the law of the sea, human rights law and other treaties and bodies of law.

To the extent that the obligations arising from more than one body of law are compatible and are applicable to the situation at hand, both bodies of law will be given full application. If a conflict of obligation should arise, the more specific rule will take precedence. In most, but not all, cases, this will mean that the rule of the law of armed conflict (IHL) will take precedence over rules of more general application.

During an international armed conflict, the law of naval warfare is applicable between belligerent States. This enables belligerent States to conduct attacks against lawful military objectives of the enemy State (e.g., warships, military aircraft and military installations, such as barracks, naval bases and military airfields) and engage in measures of control and denial of enemy coasts through blockades and similar measures aimed at interdicting commerce.

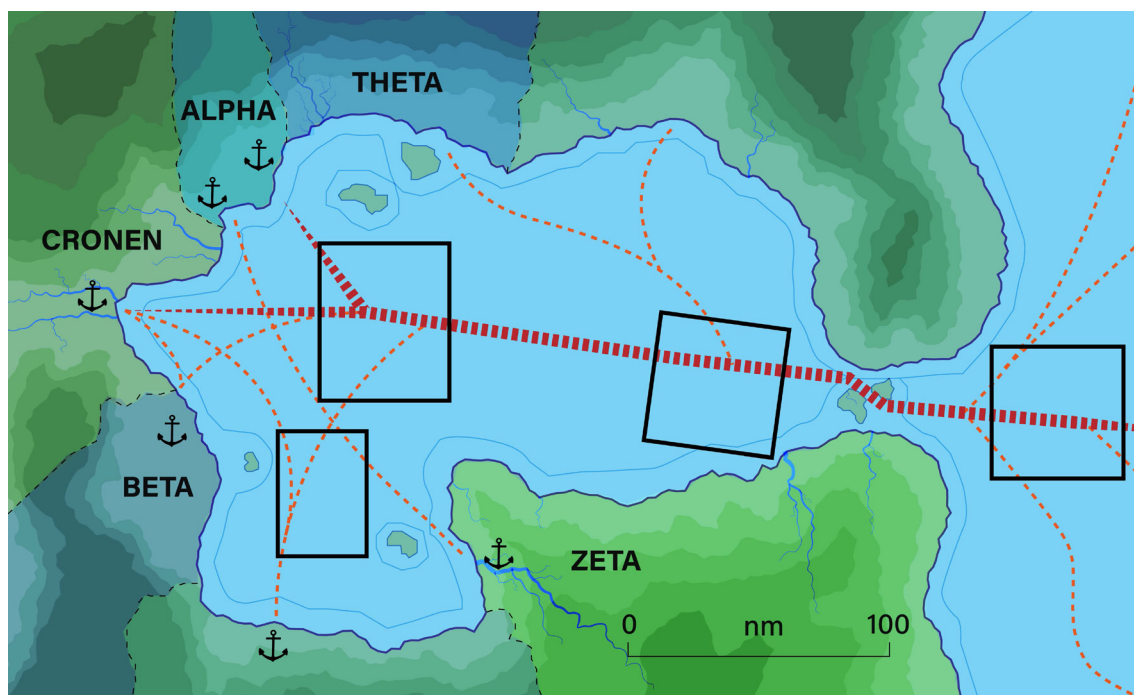
There are detailed rules on how such measures must be conducted. Most of them are now a matter of customary law, as the conventions on naval warfare dating from the beginning of the 20th century are now largely outdated. An authoritative guide to the contemporary law of naval warfare can be found in the San Remo Manual on the Law of Armed Conflict at

Sea (1994), currently in the process of being updated.⁵

However, setting out these rules in detail goes beyond the scope of this condensed legal analysis. The rights of third States not party to the armed conflict are regulated in the law of neutrality and the law of naval warfare.

5 The San Remo Manual was adopted by the International Institute of Humanitarian Law (IIHL), which is an independent, non-profit humanitarian organisation based in San Remo, Italy.

Scenario 6A. Wide force protection areas



Country Cronen declares that its Navy is on full alert and reserves the right to force protection by use of arms against any approaching sea or airborne targets. Merchant ships cannot easily avoid the force protection zones. After 12 hours, two merchant ships are fired upon by light cannons, and they turn back. After three days, the zones are maintained, and traffic has halted.

→ Has Country Cronen violated international law?

Legal scan: Wide force protection areas

The imposition of a wide force protection zone by Country Cronen, particularly in sea areas where navigation and access to a number of States would be impeded or denied due to geographical circumstances, such as narrow straits, is without any doubt unlawful. Such actions would breach the right to innocent passage in the territorial sea (Article 17 of UNCLOS) and the freedom of navigation in the EEZ (Article 58(1) of UNCLOS).

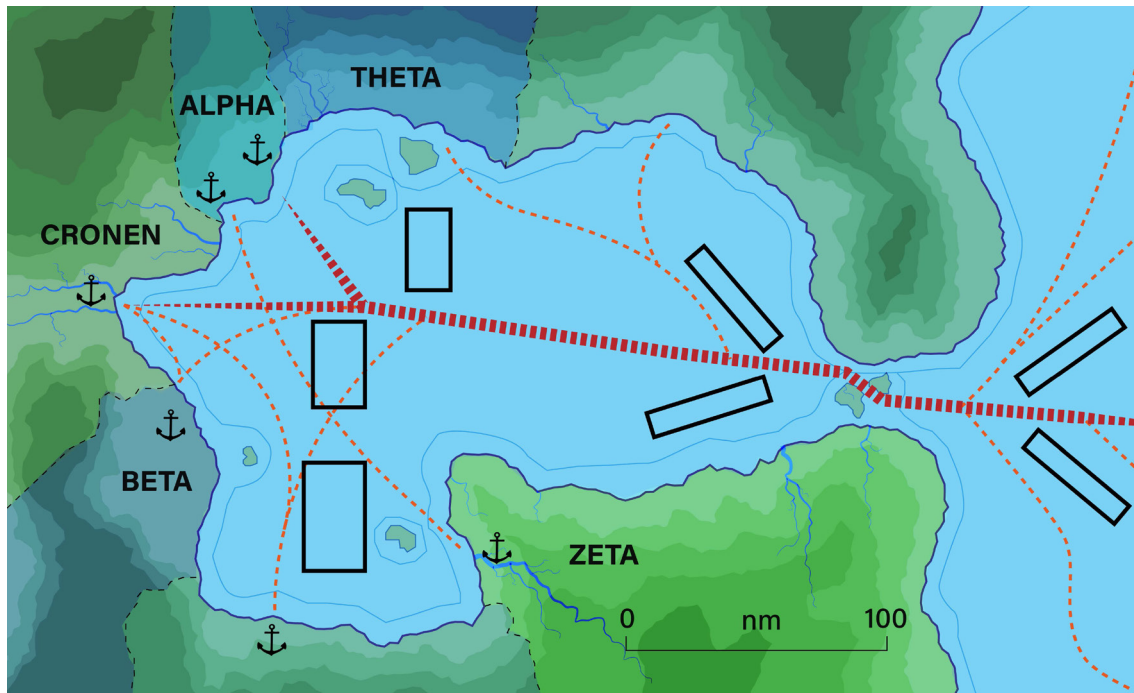
In addition, a wide force protection zone, as indicated in the scenario, would potentially breach due regard obligations (Article 58(3) of UNCLOS) not only with respect to the sovereign rights of the coastal State to explore and exploit, conserve and manage the natural resources of the exclusive economic zone as well as to engage in other activities for the economic exploitation and exploration of the zone, but also the freedoms that all States enjoy in the exclusive economic zone of another State. These include freedoms of navigation and overflight, the freedom to lay submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the Convention (Articles 58 and 87 of UNCLOS). If the zone covers parts of a coastal State's territorial sea, it would also violate that coastal State's sovereignty (Article 2(1) of UNCLOS). If such zones were enforced by treating any

intrusion as grounds for automatically opening fire, it would constitute a serious violation of international law in a number of ways (violation of the law relating to the use of force under Article 2(4) of the UN Charter, violation of human rights law, etc.).

While States have the right to conduct military exercises in international waters and/or take reasonable measures of protection (see analysis concerning Scenario 4), this must be conducted in a way that pays full attention to the due regard requirement for vessels operating in the EEZ of another State, does not impede free navigation and does not involve the indiscriminate use of force. The zone as described here is in violation of all of these criteria.

In the event that such a zone were implemented, the affected States would be within their rights to provide protection to vessels sailing under their national flag and could operate joint patrols to ensure safe and unimpeded navigation, while taking into account any reasonable measures of protection (i.e. a safety zone that others were notified of in advance, that was of a temporary nature and that did not have the effect of denying free navigation or the exercise of the coastal State's rights within its own EEZ). Such measures could be taken alongside traditional diplomatic and economic measures of retorsion or countermeasures in the event of ongoing interference.

Scenario 6B. Narrow force protection areas



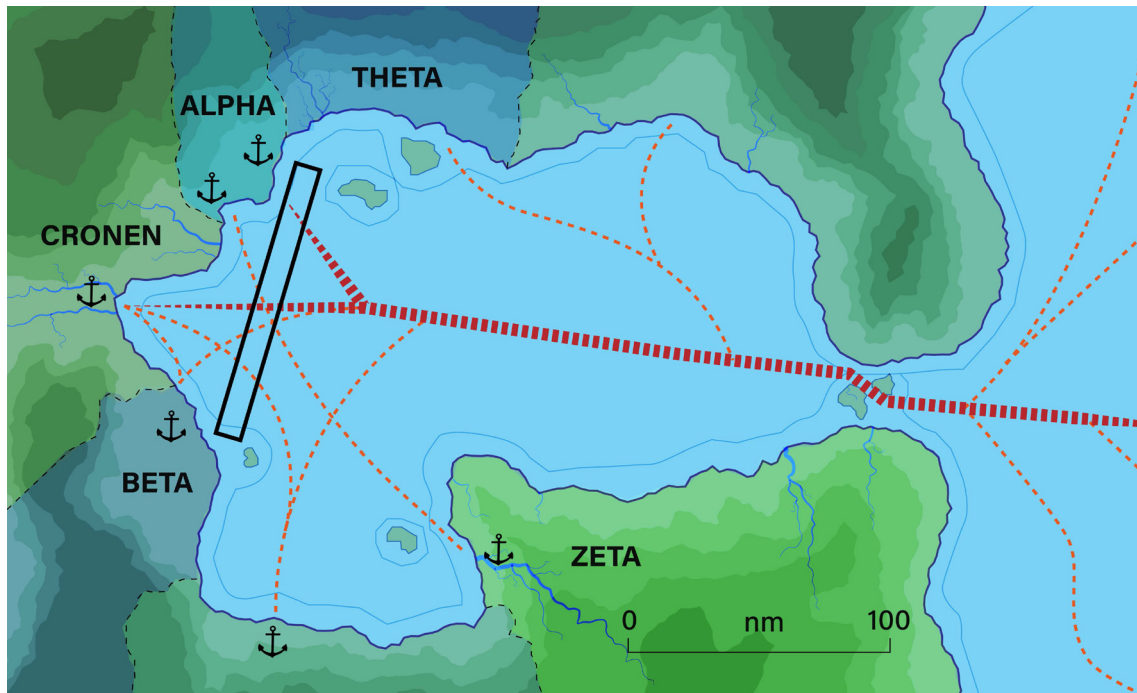
After international reactions, the force protection zones in Scenario 6A are reduced in size, and in most cases, can easily be avoided by merchant ships. After 12 hours, two merchant ships are fired upon by light cannons, and they turn back.

→ Has Country Cronen violated international law?

Legal scan: Narrow force protection areas

Military exercises and activities are not illegal under the conditions analysed in the context of Scenario 4. However, force protection areas in which vessels will be indiscriminately fired upon are completely illegal (see Scenario 6A), and in this scenario two merchant ships have been illegally fired upon (again, see Scenario 6A).

Scenario 7A. Ship inspection zone in front of countries Alpha and Beta



Country Cronen establishes a control zone where ships bound to two EU Member States (Country Alpha and Country Beta, the latter of which is also a NATO member) are stopped and searched by Country Cronen's navy and/or coast guard. The motivation for these acts, as announced by Country Cronen, is a suspected terrorist threat against undefined strategic targets.

Ships are subjected to random controls covering approximately 10% of all vessels within the control zone. Delays ranging from five hours to two days ensue; the average waiting time per vessel is 20 hours.

The first reaction by Country Alpha and Country Beta is to immediately protest the actions. Both countries (Alpha and Beta) send one coast guard vessel each to the site and heighten their naval and air force readiness.

After one week, the controls established by Country Cronen continue. Country Cronen shows evidence of explosives and weapons of mass destruction (WMDs) found on board one Asian-registered ship. This is widely publicised on all of Country Cronen's media channels. Country Cronen declares that it will have to continue controls until further notice and possibly intensify them.

After three weeks, the controls established by Country Cronen have increased to cover approximately 20% of traffic. This increases the average delay per vessel to two days.

Country Cronen demands that Country Alpha and Country Beta allow controls to be made in their territorial waters for shelter purposes, depending on wind speed and direction.

→ Has Country Cronen violated international law?

Legal scan: Ship Inspection zone in front of countries Alpha and Beta

A Ship Inspection Zone outside of internal waters off the coast of any State is unlawful under UNCLOS and the customary international law of the sea. It would clearly be in violation of:

- freedom of navigation in the EEZ (Article 58(1) of UNCLOS; the right of visit under Article 110 in conjunction with Article 58(2) of UNCLOS does not apply),
- the rights of innocent passage of ships passing through the territorial sea in this area (Article 17 of UNCLOS), and
- the coastal States' sovereignty (Article 2(1) of UNCLOS);
- insofar as EEZ areas are affected, there is also likely a violation of the obligation to show due regard to the rights and obligations of the coastal State under Article 58(3) of UNCLOS.

In the event of sporadic interference of a relatively minor nature, diplomatic measures and possible claims potentially combined with

countermeasures (see above, under Scenario 1.2) aimed at halting further interference and providing reparations would be the normal response. If persistent and/or more invasive measures of control were exercised by a State in international waters, the State(s) affected could individually or jointly provide protection for their vessels in the form of a naval escort to ensure safe and unimpeded navigation.

In the event that such a naval escort was met with armed interference (use of weapons, ramming, attempted boarding) directed against either the escorting warship(s) or the vessels under its (their) protection, this could trigger proportionate and necessary measures of protection short of armed force, such as blocking counter manoeuvres or warnings, including warning shots where called for, and, in the event of a direct use of force, measures of self-defence aimed at warding off the unlawful armed interference.

What would constitute a necessary and proportionate measure of protection or self-defence would depend on the nature of the interference and the factual circumstances.

Scenario 7B. Ship inspection zone in front of countries Alpha and Beta / Escalation

One month since establishing a control zone (Scenario 7A), the controlling of SLOCs by Country Cronen continues. There is a clash between Country Cronen's naval ships and coast guard vessels from two EU Member States (Country Alpha and Beta), the latter of which is also a member of NATO. The clash also involves warning shots and ramming. Country Cronen's frigate and destroyer vessels intervene and apprehend one coast guard vessel from both Country Alpha and Country Beta, and the frigate takes the two vessels to Country Cronen's port. During the incident, the frigate uses missiles to shoot down one approaching military fighter jet plane from both Country Alpha and Country Beta. The two planes had flown above the EEZs of the respective countries. The pilots were found dead.

The local media provides strong evidence of provocation from the West, where Country Cronen's coast guard vessels were intentionally damaged and under serious threat of being targeted by the missiles of the jet planes. The frigate acted in self-defence.

Based on increased tension, in two separate cases, 1) and 2), Country Cronen declares measures against:

- 1) Country Alpha, in which hostile Western support is allegedly being prepared. Country Cronen reserves the right to stop and search, and if necessary, prevent all shipping to Country Alpha. In doing so, Country Cronen de facto controls traffic to a substantial part of the coastline of Country Alpha.
- 2) Country Beta, where NATO forces are allegedly gathering for an offensive. Country

Cronen reserves the right to stop and search, and if necessary, prevent all shipping to Country Beta.

→ Has Country Cronen violated international law?

Legal scan: Ship inspection zone in front of countries Alpha and Beta/ Escalation

Based on this scenario, the attacks against ships and the ensuing seizure of Country Alpha and Country Beta coast guard vessels by Country Cronen constitute a direct use of force in violation of Article 2(4) of the UN Charter. In addition, the attacks and seizure, depending on whether they took place in the EEZ or in the territorial sea, violate the coastal States' sovereignty in the territorial sea (Article 2(1) of UNCLOS), the prohibition of non-peaceful uses of the sea under Articles 88 and 301 of UNCLOS, the freedom of navigation under Articles 87(1) and 58(1) of UNCLOS, and the sovereign immunity of government vessels under Articles 32 and 96 of UNCLOS.

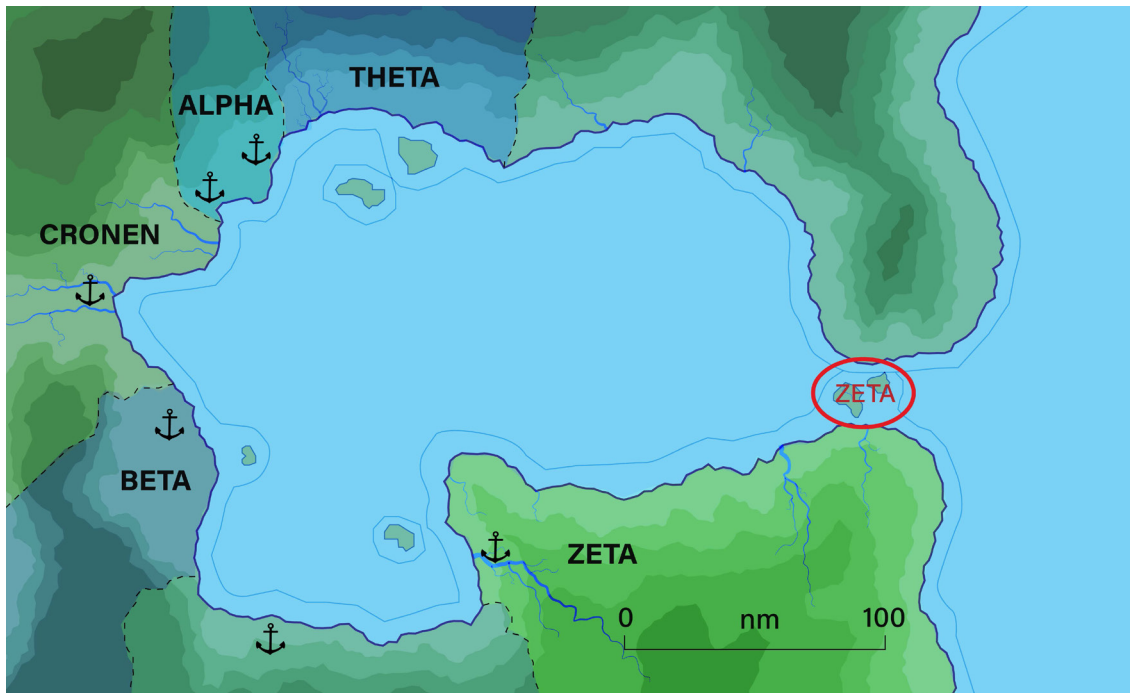
The shooting down of approaching military aircraft during an incident in which Country Cronen is engaged in illegally apprehending coast guard vessels of Country Alpha and Country Beta is a violation of Article 2(4) of the Charter and cannot be plausibly defended as a legitimate measure of self-defence. Firstly, it cannot be defended because the apprehension of the coast guard vessels was in itself illegal and self-defence is the use of lawful force to counter a prior or imminent use of unlawful force. Secondly, it cannot be defended because there is no indication that the approaching aircraft

constituted a direct threat of attack upon Country Cronen's vessels. The shooting down of the two aircraft was consequently neither necessary nor proportionate. The same applies to the measures implemented against Country Alpha and Country Beta following the shooting incident. The measures referred to have no basis in international law, as they do not constitute either lawful measures of self-defence against an armed attack, nor can they otherwise be justified as countermeasures since no unlawful act has been committed and such measures do not conform to the criteria for the taking of countermeasures. Hence, they are illegal and, if they were actually carried out, would clearly consti-

tute a violation of Article 2(4) of the Charter and, to the extent that they were tantamount to a blockade, would additionally reach the threshold of constituting an armed attack (see e.g., Article 3C of the Definition of Aggression annexed to United Nations General Assembly (UNGA) Res. 3314 (XXIX) 12 November 1974).

In the ensuing situations 1) and 2), assuming that an international armed conflict ensues (which would not be the case with a mere declaration, but rather due to naval clashes beforehand), the conduct of Country Cronen would need to be assessed against the law of armed conflict.

Scenario 7C. Blockage of straits



In the event of Country Cronen's international armed conflict (IAC) with Country Alpha (EU Member State) and with Country Beta (both an EU Member State and a member of NATO), the EU's and also NATO's reactions are considered. In addition, the legality of possible blockage of the straits against Country Cronen, which is also a littoral State, is evaluated.

→ Is there any room for manoeuvre below the threshold of war?

Legal scan: Blockage of straits

During peacetime, naval blockades (or other measures of control impeding free passage) are breaches of UNCLOS, as they interfere with the sovereignty and sovereign rights of coastal States and freedom of navigation on the high seas and in the EEZ, among other rules (see analysis of scenarios above), unless they are measures imposed by the UN Security Council to maintain international peace and security.

(Note that a blockade is not synonymous with an embargo ordered on the basis of a resolution of the UN Security Council under Chapter VII of the UN Charter.) A blockade is a measure imposed by a State that prevents free access to a coast or ports of the State against which it is directed. A blockade is considered to constitute a use of force, which would constitute a violation of the prohibition of force under Article 2(4) UN Charter, unless it had justification under the right of (collective) self-defence (see e.g., the "Definition of Aggression", UNGA RES. 3314, Art. 3C). Whether or not it would qualify as a lawful use of force in the context of (collective) self-defence would depend on whether it met the criteria for the exercise of (collective) self-defence (a prior or imminent armed attack, a request by an attacked State or States for assistance, and necessity and proportionality *ad bellum*).

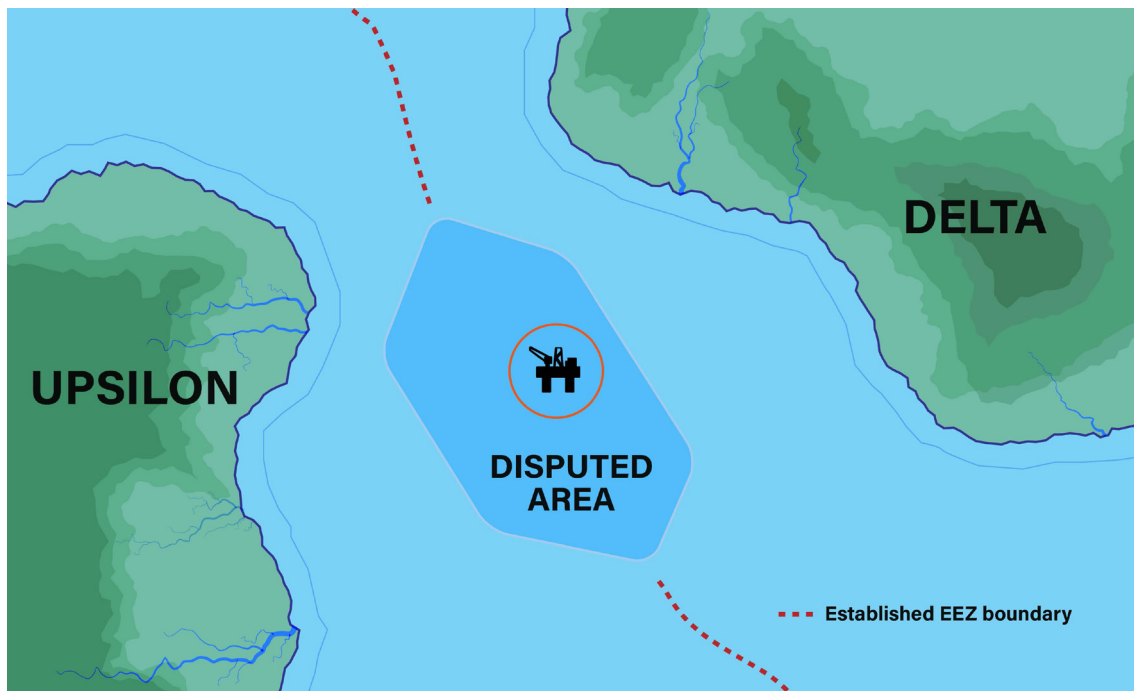
A blockade that is simply rhetorical, that is, not enforced, is an unfriendly act, but not a

real blockade factually or legally, and hence, it would not qualify as a use of force, nor would it violate UNCLOS or trigger an armed conflict as long as it was strictly verbal. However, a closure of international straits linking a third State and others with the open sea constitutes a de facto blockade, regardless of which term is used to describe it. Since a blockade constitutes a use of force, it would trigger an international armed conflict between the State(s) imposing it and the State it was directed against, and consequently, the applicability of the law of armed conflict.

Assuming that Country Cronen is engaged in an international armed conflict with either Country Alpha or Country Beta, and the (other) MS, EU and NATO States have not (yet) entered the armed conflict, they cannot lawfully take any measures against Country Cronen in terms of blocking the straits used for international

navigation. Therefore, any kind of enforced blockade would be completely illegal. Once the States made the decision to exercise self-defence, their act would have to conform to the criteria for the lawful exercise of self-defence set out above for it to be legal under the UN Charter and the customary law relating to self-defence. It would additionally have to conform to the conditions for the imposition of a blockade under the law of naval warfare referred to above, irrespective of its legality as a measure of self-defence. It must be stressed that the question of applicability of IHL, including the law of naval warfare regulating blockades, is completely separate from whether an act is lawful under the law regulating the use of force. As stated above, once a blockade is imposed and enforced, it triggers an international armed conflict regardless of other considerations.

Scenario 8. Exploitation of a contested continental shelf/EEZ



Country Upsilon and Country Delta have a long-standing historical dispute over their continental shelf/EEZ boundary, with a large maritime area being contested by these two countries.

Country Upsilon has moved an oil rig into the disputed maritime area and drilled for oil there, claiming that it is exercising its sovereign rights to exploit the natural resources of its continental shelf/EEZ. Country Delta has frequently, but unsuccessfully, requested that Country Upsilon stop its drilling activities and negotiate a provisional boundary agreement.

Country Upsilon has declared a 3000-metre safety zone around the oil rig. Coast guard ships from Country Upsilon are patrolling in the vicinity of the oil rig and harassing any approaching coast guard ships and fishing vessels from Country Delta in the safety zone. This has led to some material damage of the vessels and economic losses due to reduced fishing activity,

and potential economic losses due to exploitation of the disputed resources.

→ Can Country Delta successfully claim that Country Upsilon has violated international law?

Legal scan: Exploitation of a contested continental shelf/EEZ

Country Delta can pursue two separate legal arguments against Country Upsilon based on:

- 1) the latter's oil drilling activity in the disputed area and
- 2) the interference with Country Delta's coast guard ships and fishing vessels.

Concerning the oil drilling activity in an area of disputed EEZ and/or continental shelf, Country Delta can invoke Articles 74 and 83 of UNCLOS, respectively. These provisions, framed in

identical terms, provide that the delimitation of the EEZ and continental shelf between States with coastlines on opposing or adjacent sides of a body of water shall be affected by agreement (Articles 74(1) and 83(1) of UNCLOS). Pending such agreement, as is the case in this scenario, both States have an obligation to make every effort to enter into provisional arrangements of a practical nature and an obligation not to hamper or jeopardise the reaching of a final agreement on the maritime boundary (Articles 74(3) and 83(3) of UNCLOS). The obligation “not to hamper or jeopardise” entails a prohibition against unilateral activities that might affect the other coastal State’s rights in the disputed area in a permanent manner – such as making physical changes to the marine environment.⁶ Oil drilling is such an activity. Therefore, by drilling for oil in the disputed area, despite refusing to negotiate a provisional boundary arrangement in light of Country Delta’s attempts to initiate negotiations, Country Upsilon has violated both obligations in Articles 74(3) and 83(3) of UNCLOS.

Concerning the harassment of Country Delta’s coast guard ships and fishing vessels by Country Upsilon’s coast guard vessels in the vicinity of the oil rig, Country Delta may invoke its freedom of navigation in the EEZ, which also applies to disputes in EEZ/continental shelf areas (Article 58(1) of UNCLOS) and its right to fish in the disputed area, pending delimitation of the maritime boundary pursuant to Article 56(1)(a) of UNCLOS (to the extent that such fishing does

not constitute a permanent physical change to the marine environment of the area).

The harassment of vessels not posing an immediate danger violates these rights, as it is not justified as an enforcement and protection measure in the safety zone around the oil rig (Articles 60(4) and 80 of UNCLOS). Safety zones around artificial islands, installations and structures – such as oil rigs – in the EEZ/continental shelf may not exceed a limit of 500 m unless authorised by the applicable international standards or by the International Maritime Organization (IMO) (Articles 60(5) and 80 of UNCLOS).⁷ The safety zone established by Country Upsilon extends to 3000 m, and therefore it far exceeds the permissible limits. It cannot be used to justify measures taken against foreign vessels, at least in its outer 2500 m.

In addition, Country Upsilon’s coast guard ships, by harassing any approaching coast guard ships and fishing vessels from Country Delta, have likely violated obligations to take measures to prevent collisions at sea. Flag States are under an obligation to effectively exercise their jurisdiction and control over vessels flying their flag (Articles 94(1) and 58(2) of UNCLOS). In particular, they shall take such measures as are necessary to ensure safety at sea with regard to the prevention of collisions (Articles 94(3)(c) and 58(2) of UNCLOS). In taking these measures, Country Upsilon is required to conform to generally accepted international regulations, procedures and practices, and to take any steps that may be necessary to secure their observance (Articles 94(5) and 58(2) of UNCLOS).

6 PCA, *Guyana v. Suriname*, Award of the Arbitral Tribunal, 17 September 2007, paras. 465–470; ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, 23 September 2017, paras. 624–634.

7 IMO, Report to the Maritime Safety Committee, IMO NAV, 56th Session, Agenda Item 20, IMO Doc. NAV 56/20, 31 August 2010.

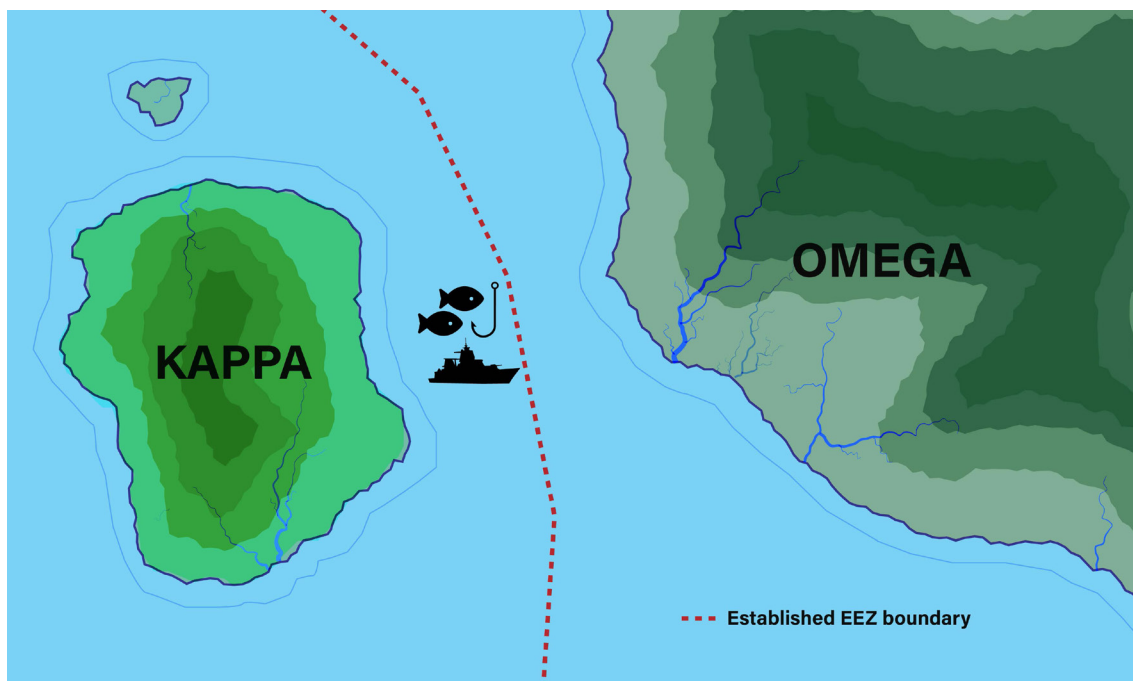
It has been accepted in international jurisprudence that these accepted international regulations include COLREGs.⁸ Here, Country Upsilon's own coast guard ships, whose conduct is directly attributable to Country Upsilon, have intentionally harassed and possibly even rammed fishing vessels from Country Delta (although the latter is not entirely clear based on the facts of the case). Irrespective of whether material damage has resulted from deliberate collisions or as a result of recklessness, the actions are in violation of these regulations and Country Upsilon is ipso facto liable

for any damage resulting from them, as the conduct of coast guard vessels is, as mentioned, directly attributable to the State.

Finally, based on the facts available, the harassment activities by Country Upsilon's coast guard ships do not amount to a use of force as prohibited by Article 2(4) of the UN Charter. However, depending on the extent and intensity of force used, the threshold for a violation of the use of force could hypothetically be crossed by conduct like that of Country Upsilon – particularly when directed at government vessels of the coastal State.

⁸ PCA, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award, 11 July 2016, paras. 1081–1109.

Scenario 9. Fishing vessels as non-State actors



Country Omega and Country Kappa have had a long-term historical dispute over their EEZ boundary. Recently, the disputed area has been allocated to Country Kappa via a decision taken by an international judicial body, which is binding upon both States.

There are concerns that Country Omega is utilising politically motivated fishing vessels under its flag in the EEZ of Country Kappa. It has been suspected that these fishing vessels have harassed Country Kappa's fishing vessels by disrupting them, blocking their navigation through dangerous navigational practices and intentional ramming. The fishing vessels of Country Omega are escorted by a frigate from Country Omega's navy. Country Kappa claims that these actions are motivated by Country Omega's claim to traditional fishing rights in the area. No bilateral fisheries access agreement exists between the two States.

→ Can Country Kappa successfully claim that Country Omega has violated international law?

Legal scan: Fishing vessels as non-State actors

In this scenario, Country Omega appears to be using State-controlled "private actors", namely fishing vessels, as a proxy to assert its claim to traditional fishing rights in the EEZ of Country Kappa. However, Country Omega also maintains a presence in Country Kappa's EEZ with a warship that escorts its fishing vessels – likely to prevent enforcement actions by the coastal State against them.

As the coastal State, Country Kappa has sovereign rights over the marine life resources of its EEZ (Article 56(1)(a) of UNCLOS), which includes prescriptive jurisdiction (Article 62(4) of UNCLOS) and enforcement jurisdiction (Article 73(1) of UNCLOS). In the EEZ, all States enjoy freedom of navigation (Article 58(1) of

UNCLOS). However, freedom of navigation does not include fishing in these waters without the consent of Country Kappa. So-called “traditional fishing rights” by third States in the EEZ have been held by international courts and tribunals to have been extinguished by the EEZ fisheries regime of UNCLOS, meaning that they cannot form a valid legal basis for the conduct of Country Omega’s fishing vessels.⁹ Therefore, Country Kappa can take enforcement measures against Country Omega’s fishing vessels in order to ensure compliance with its law and regulations.

Against this background, Country Omega has potentially violated international law in several ways:

- 1) If the conduct of the fishing vessels can be attributed to Country Omega because the seemingly “private” fishing vessels are in fact acting under its control and following its orders, then Country Omega would have violated Country Kappa’s sovereign rights over fisheries in the EEZ (Article 56(1)(a) of UNCLOS).
- 2) Failing such attribution, Country Omega has evidently failed to take the necessary measures to prevent the fishing vessels under its flag from fishing illegally in the EEZ of Country Kappa. The presence of its frigate as an escort to its fishing vessels is clear proof of Country Omega’s knowledge of the illegal conduct by its fishing vessels and its ability to intervene. Article 58(3) of UNCLOS imposes a due regard obligation on all third States to respect the laws and regulations of the coastal State, which has been interpreted (sometimes in conjunction with Article 62(4) of UNCLOS) by both the international tribunal for the law of the sea and an UNCLOS Annex VII arbitral tribunal as an obligation to ensure that fishing vessels under their flag do not fish illegally in the EEZs of other States. The omission by Country Omega of any measures to prevent illegal fishing by its fishing vessels constitutes a violation of its corresponding due diligence obligation under Article 58(3) of UNCLOS.¹⁰
- 3) Any interference with Country Kappa’s enforcement measures taken against the fishing vessels of Country Omega by that State’s warship would constitute a violation of Country Kappa’s sovereign rights over fisheries in the EEZ (Article 56(1)(a) of UNCLOS).
- 4) As the flag State of the fishing vessels, Country Omega is under an obligation to effectively exercise its jurisdiction and control over them (Articles 94(1) and 58(2) of UNCLOS). In particular, it shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard to the prevention of collisions (Articles 94(3)(c) and 58(2) of UNCLOS). In taking these measures, Country Omega is required to conform to generally accepted international regulations, procedures and practices and to take any steps that may be necessary to secure their observance (Articles 94(5) and 58(2) of UNCLOS). It has been accepted in international jurisprudence that these accepted international regulations include COLREGs.¹¹ By failing to take measures to

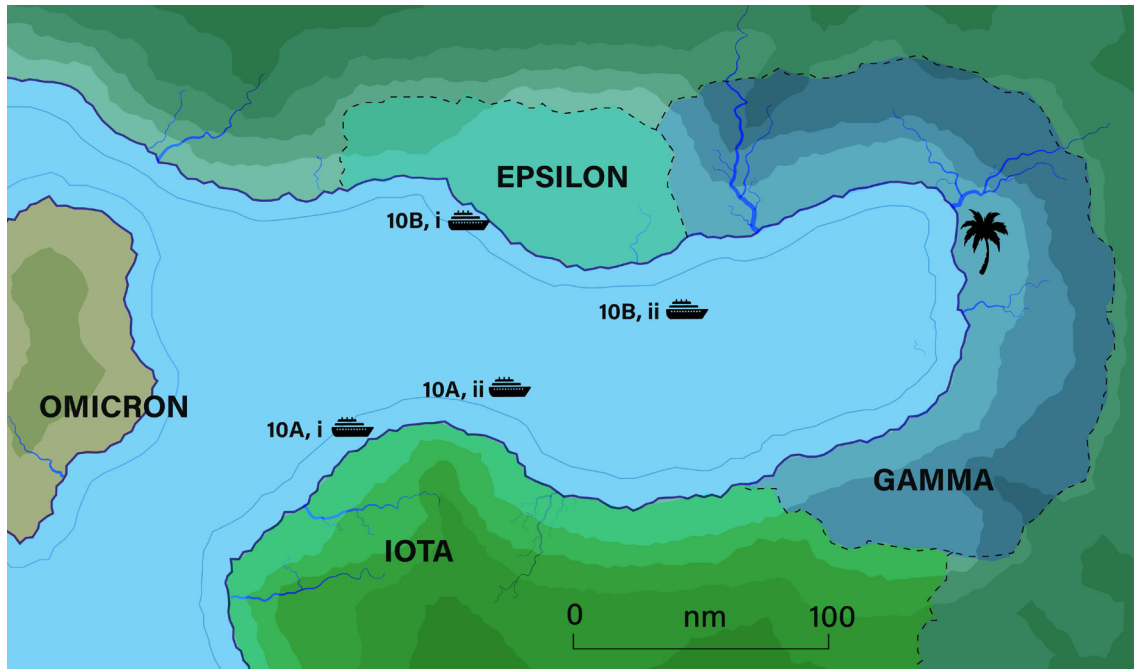
9 PCA, *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award, 11 July 2016, paras. 239–262.

10 Ibid., paras. 735–757.

11 Ibid., paras. 1081–1109.

prevent its fishing vessels from ramming Country Kappa's fishing vessels, Country Omega has violated its due diligence obligation to ensure that its vessels respect international standards for the prevention of collisions.

Scenario 10A. Detention of a vessel by a coastal State based on an alleged terrorist attack



Political tension between Country Gamma and Country Iota is growing. A passenger cruise ship, sailing under the flag of Country Gamma and owned by Company X in Country Omicron, with over 2,000 passengers from several nations, receives warning of a terrorist attack on board. The crew of 500 persons also represents several different nations.

The cruise ship is currently in passage through the territorial sea of Country Iota to its destination, a popular tourist port in Country Gamma. The threat is issued by a small group of individuals, under instructions from Country Iota, who are threatening to blow up the cruise ship unless their demands are met.

Country Iota's law enforcement authorities rapidly launch a counter operation to allegedly eliminate the severe threat. The ship is boarded and detained by Country Iota for further inspections and action until further notice.

No passenger or crew casualties, or material damage were reported, while Country Iota claims to have neutralised the alleged threat.

At the time of the unilateral actions taken by Country Iota, the cruise ship is located i) in the territorial sea of Country Iota or ii) in the EEZ of Country Iota.

→ Can Country Gamma successfully claim that Country Iota has violated international law?

Legal scan: Detention of a vessel by a coastal State based on an alleged terrorist attack

In this scenario, the coastal State (Country Iota) apparently stages a terrorist threat against a cruise ship sailing under the flag of its political opponent, Country Gamma, in order to intercept and detain the ship and damage Country Gamma's tourist industry.

From an international legal perspective, it might be difficult to attribute the terrorist threat to Country Iota due to a lack of evidence. This is the main challenge for an assessment of the legality of the conduct of Country Iota. For this reason, it is useful to first analyse the situation by assuming that there was a real terrorist threat without any role played by Country Iota. Subsequently, the situation will be analysed on the basis of the assumption that sufficient evidence exists to attribute the terrorist incident to Country Iota.

Situation i): Territorial Sea of Country Iota

The coastal State has sovereignty in its territorial sea (Article 2(1) of UNCLOS), which also involves criminal jurisdiction (cf. Article 27 of UNCLOS). However, all States have a right of innocent passage through the territorial sea (Article 17 of UNCLOS), and coastal States are prohibited from hampering the innocent passage of foreign vessels (Article 24(1) of UNCLOS) except where they are expressly permitted to do so by UNCLOS or where the flag State has given its consent (Article 27(1)(c) of UNCLOS).

There is a general presumption that passage by foreign vessels is an innocent act (Article 19(1) of UNCLOS), but passage may be non-innocent if it is “prejudicial to the peace, good order or security of the coastal State” (Article 19(1) of UNCLOS). Article 19(2) of UNCLOS contains a non-exhaustive list of activities that are non-innocent. Terrorist activity is not explicitly included within one of the listed examples. However, terrorist activity can nonetheless be considered non-innocent either on the basis

of the “backup” category in Article 19(2)(l) of UNCLOS or directly on the basis of Article 19(1) of UNCLOS, as it is “prejudicial to the peace, good order or security of the coastal State”. Here, it should be noted that UN Security Council resolutions 1368 (2001) and 1373 (2001), adopted under Chapter VII of the UN Charter, indicate that terrorist attacks may be considered to pose a threat to international peace and security.

In this case, the coastal State may take “the necessary steps in its territorial sea to prevent passage which is not innocent” (Article 25(1) of UNCLOS). Depending on the circumstances, the boarding of a vessel may be a “necessary step” to prevent its non-innocent passage.

In any case, the coastal State may exercise criminal jurisdiction on board a foreign ship in passage “to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage”, at least “if the consequences of the crime extend to the coastal State” or “if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea” (Article 27(1)(a) and (b) of UNCLOS). In the case of terrorist activity, both these requirements may be fulfilled and the coastal State (in this scenario Country Iota) may lawfully board the affected vessel in order to neutralise the threat and exercise criminal jurisdiction.

However, the coastal State may only detain the vessel and crew for as long as it is necessary to neutralise the threat, make arrests/collect evidence and conclude its investigations.

To conclude: if there had been a real terrorist threat, Country Iota may have lawfully exercised

jurisdiction over the cruise ship, but the legality of the ongoing detention depends on the circumstances of the case.

If, on the other hand, it is assumed that Country Iota has staged the terrorist threat, and if there is sufficient evidence to attribute the orchestrated threat to Country Iota, then Country Iota has clearly violated international law. The boarding and detention of the cruise ship would violate the right of innocent passage of Country Gamma (Article 17 of UNCLOS) and its obligation to not hamper innocent passage (Article 24(1) of UNCLOS). Given the malicious intent of Country Iota, as evidenced by the staging of the terrorist threat (assuming that sufficient evidence exists), these violations likely amount to bad faith and thus also involve a breach of Article 300 of UNCLOS.

Potentially, and depending on the human rights obligations of Country Iota arising from the human rights instruments it is a party to, Country Iota would likely also violate the rights of the individuals on board the vessel (both passengers and crew) to not be subjected to illegal detention or restriction of liberty.

Situation ii): EEZ of Country Iota

If the interception and detention of the cruise ship takes place in the EEZ of Country Iota, and if it is assumed that the terrorist threat was real and not attributable to Country Iota, then the State's conduct nonetheless constitutes a prima facie violation of international law, which might be justified under exceptional circumstances.

As the flag State of the cruise ship, Country Gamma enjoys freedom of navigation in the EEZ of Country Iota (Article 58(1) of UNCLOS)

and exclusive enforcement jurisdiction (Articles 92(1) and 58(2) of UNCLOS). The issue of terrorist activity is not covered by coastal State jurisdiction (e.g., Article 56(1) of UNCLOS) and does not fall within an exception to exclusive flag State enforcement jurisdiction (e.g., Articles 110 and 58(2) of UNCLOS). Therefore, boarding and arrest are subject to the consent of the flag State (Country Gamma). However, no consent was obtained in the present scenario.

So even if the terrorist threat was real, Country Iota's interception and detention of the cruise ship constitutes a prima facie violation of Article 58(1) of UNCLOS and Articles 92(1) and 58(2) of UNCLOS. Notwithstanding the foregoing, there could be circumstances in which a boarding of the vessel might exceptionally be justified. In a situation where a clear threat to the safety of the vessel and the lives and safety of its passengers and crew appeared to be imminent and grave based on reliable information available at the time, a non-consensual boarding could potentially be justified under the rubric "state of necessity" under the law of State responsibility if it was the only means available to prevent the threat of detonating the vessel, endangering the lives of more than 2,000 persons, and there was no realistic prospect of receiving timely consent from the flag State.

However, if the terrorist threat was staged by Country Iota and was attributable to that State based on the available evidence, then the staging of the terrorist threat itself might amount to a violation of the freedom of navigation of Country Gamma (Article 58(1) of UNCLOS). In any case, the interception and detention of

the cruise ship would constitute a violation of Country Gamma's freedom of navigation (Article 58(1) of UNCLOS) and its exclusive flag State jurisdiction (Articles 92(1) and 58(2) of UNCLOS). Given the malicious intent of Country Iota, as evidenced by the staging of the terrorist threat (if sufficient evidence is available), these violations likely amount to bad faith and thus also involve a breach of Article 300 of UNCLOS.

If the staging of the terrorist threat involves armed force, it could also constitute a violation of Article 2(4) of the UN Charter. However, the facts provided in the present scenario do not unequivocally point to such a conclusion. However, the persons responsible for a staged terrorist threat and ensuing seizure of the vessel and the persons on board in the context of a bogus criminal investigation may be subject to criminal prosecution under the laws of Country Gamma or those of the States whose nation-

als were subjected to intimidation and unlawful detention by agents of Country Iota or persons acting under its instructions. The owners of the vessel would be entitled to compensation for its unlawful seizure and detention under private law.

The assessment would be the same if the interception and detention had been conducted on the high seas, as the applicable legal rules are essentially the same (Articles 87(1)(a) and 90 of UNCLOS for the freedom of navigation and Article 92(1) of UNCLOS for exclusive flag State jurisdiction).

Potentially, and depending on the human rights obligations of Country Iota arising from the human rights instruments it is a party to, Country Iota's conduct would certainly constitute a serious violation of the rights of the individuals on board to not be subjected to threats of physical and psychological violence.

Scenario 10B. Detention of a vessel by a third State based on an alleged terrorist attack

Political tension between Country Gamma and Country Iota is growing. A passenger cruise ship, sailing under the flag of Country Gamma and owned by Company X in Country Omicron, with over 2,000 passengers from several nations, many of whom are from Country Iota, receives warning of a terror attack on board. The crew of 500 persons also represents several different nations.

The cruise ship is currently in passage close to Country Epsilon's waters, on its way to a popular tourist port in Country Gamma. The threat is issued by a small group of individuals, who are threatening to cause an explosion on board the cruise ship unless their demands are met.

After receiving a distress call from the cruise ship, law enforcement authorities from Country Gamma and Country Epsilon are preparing to launch a counterterrorism operation to eliminate the severe threat. However, Country Iota unilaterally executes a counterterrorism operation in order to protect its citizens before the operation by Country Gamma and Country Epsilon has begun.

In the execution of its counterterrorism operation, Country Iota uses special forces to board the cruise ship and escorts it to a port in Country Iota for further investigation. No passenger or crew casualties nor material damage were reported, while Country Iota claims to have neutralised the alleged threat.

At the time of the unilateral actions taken by Country Iota, the cruise ship was located i) in the territorial sea of Country Epsilon or ii) in the EEZ of Country Epsilon.

→ Can Country Gamma and/or Country Epsilon successfully claim that Country Iota has violated international law?

Legal Scan: Detention of a vessel by a third State based on an alleged terrorist attack

In this scenario, a third State (Country Iota) that is neither the flag State nor the coastal State intercepts and detains a cruise ship sailing under the flag of its political opponent, Country Gamma, under the veil of an antiterrorism/rescue operation in order to damage Country Gamma's tourist industry. Both the flag State (Country Gamma) and the coastal State (Country Epsilon) might claim violations of international law.

Situation i): Territorial sea of Country Epsilon

The coastal State (Country Epsilon) has sovereignty in its territorial sea (Article 2(1) of UNCLOS), which extends to combatting criminal activity that affects its security and the good order of the territorial sea (Articles 25(1) and 27(1) of UNCLOS). There is no room for similar enforcement action by other States. Therefore, by intercepting and detaining the cruise ship in the territorial sea of Country Epsilon, Country Iota violated the sovereignty of Country Epsilon (Article 2(1) of UNCLOS).

In addition, all States have a right to innocent passage through the territorial sea (Article 17 of UNCLOS), which provides for unimpeded passage through the territorial sea of a coastal State (subject to some exceptions set out earlier). However, in this case it is not the coastal State (Country Epsilon) that intercepts and

detains the cruise ship, but a third State (Country Iota). Third States have no jurisdiction whatsoever in the territorial sea of a coastal State and must respect the right of the flag State vis-à-vis vessels sailing under its flag. Hence, any act of law enforcement would be subject to the consent of the coastal State and would have to respect the flag State's rights.

However, Country Iota has not obtained the consent of Country Gamma to intercept and detain the cruise ship. Furthermore, none of the exceptions from exclusive flag State jurisdiction on the high seas apply in the territorial sea (e.g., Article 110 of UNCLOS). In addition, the duty to render assistance to ships in distress (Article 98 of UNCLOS),¹² which might also apply in the territorial sea, does not constitute an exception to exclusive flag State jurisdiction that can be used for the interception of foreign vessels.

In the absence of a legal basis for its conduct in UNCLOS, Country Iota could try to argue that it has a right under customary international law to rescue and evacuate its nationals from the cruise ship in light of the severe danger to their lives and safety. However, no such right is clearly established. Even if one accepts that such a right may allow for rescue operations in certain circumstances, it is unlikely that the criteria for forcible protection/evacuation of nationals in this case have been met, as it appears that no attempt was made to coordinate the operation with the coastal State and there is no reason to assume that the coastal State was not capable of addressing the threat. Alternatively, Country Iota could recognise the initial illegality of its operation but make a similar

argument based on the defence of necessity under the law of State responsibility. However, it is unlikely that such a plea would be successful in this case for the reasons relating to the other putative justification, particularly in the absence of any attempt to coordinate their actions with the authorities of Country Gamma and Country Epsilon. At any rate, a right to rescue its nationals from the ship would not have entailed a right for Country Iota to detain the ship and escort it to one of its ports.

Against this background, the interception and detention of the cruise ship by Country Iota constitutes a violation of the flag State rights of Country Gamma.

Situation ii): EEZ of Country Epsilon

If the interception and detention of the cruise ship sailing under the flag of Country Gamma by Country Iota takes place in the EEZ of Country Epsilon, the legal situation differs slightly. The reason is that no coastal State rights of Country Epsilon are at issue if the events take place in its EEZ, where it does not have sovereignty and where the high seas regime of navigation applies largely *mutatis mutandis* (Articles 58(1), (2) of UNCLOS).

However, with respect to the rights of the flag State in an EEZ (Country Gamma), the situation is one whereby the flag State enjoys freedom of navigation (Article 58(1) of UNCLOS) and exclusive jurisdiction over its vessels (Articles 92(1) and 58(2) of UNCLOS) vis-à-vis third States, except for matters regulated under Articles 110, 111 or 105 of UNCLOS (each in conjunction with Article 58(2) of UNCLOS). Neither of

¹² The duty to rescue is further clarified in a number of treaties, including the Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR Convention).

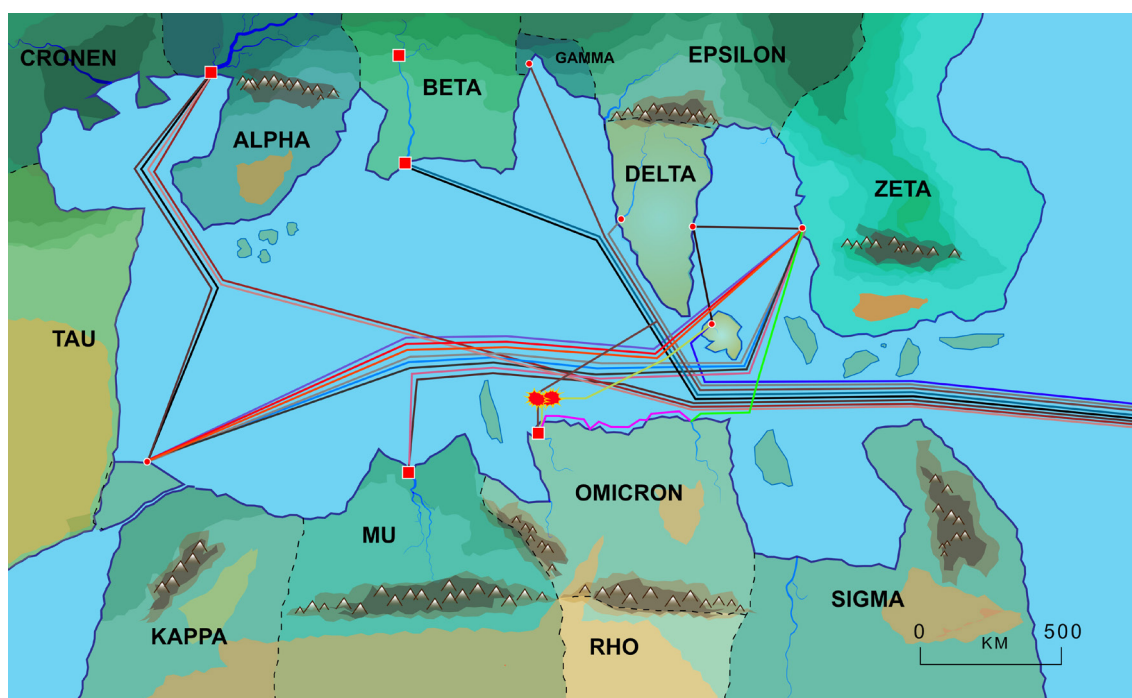
these conditions is relevant here. In the circumstances of the present scenario especially, it is not tenable to maintain that piracy is at issue because the events are taking place on the same ship, without an attack on another ship, and are not undertaken for private ends (cf. Articles 101 and 105 of UNCLOS). While some commentators have argued that maritime terrorism should be considered tantamount to piracy, the prevailing position of both experts and States is that it is a separate category of unlawful acts against the safety of navigation, which is regulated by a separate convention.¹³ Even if this were the case, the view that maritime terrorism constitutes piracy is generally rejected, although a minority opinion supports such an interpretation. Finally, the obligation to render assistance in cases of distress (Article 98 of UNCLOS) does not constitute an exception to exclusive flag State jurisdiction that could be used as a legal basis for the interception and detention of a foreign vessel.

In the absence of a legal basis for its conduct in UNCLOS, Country Iota could try to argue that it has a right under customary international law to rescue and evacuate its nationals from the cruise ship in light of the severe danger to their safety and life. However, as shown with respect to Situation i) above, such an argument would not be successful. In any case, a right to rescue its nationals from the ship would not have entailed a right for Country Iota to detain the ship and escort it to one of its ports.

Against this background, the interception and detention of the cruise ship by Country Iota constitutes a violation of Country Gamma's freedom of navigation (Article 58(1) of UNCLOS) and its exclusive flag State jurisdiction in the EEZ (Articles 92(1) and 58(2) of UNCLOS). The assessment would be the same if the interception and detention had been conducted on the high seas, as the applicable legal rules are essentially the same (Articles 87(1)(a) and 90 of UNCLOS for the freedom of navigation and Article 92(1) of UNCLOS for exclusive flag State jurisdiction).

13 For the majority view, see R. Churchill, "The piracy provisions of the UN Convention on the Law of the Sea: Fit for purpose?", in *The Law and Practice of Piracy at Sea: European and International Perspectives*, eds. P. Koutrakos and A. Skordas (Oxford: Hart Publishing, 2014), p. 9.

Scenario 11. Undersea cable cuts



During a night of severe adverse weather conditions with stormy winds and rain, there was a general interruption of communication and internet provision in a large part of Country Omicron. Soon after the event, a local IT service provider found out that the interruption was caused by a discontinuity of two main underwater fibre-optic communication cables that connect Omicron with the global network in Omicron's territorial sea at an approximate distance of 1.5 NM from the coast and at a depth of 80 m.

As a result of the incident, a relatively large number of public and private services, including critical infrastructure dependent on online services, were shut down, causing significant public unrest. Moreover, this situation resulted in cascading financial losses to Omicron and to directly linked foreign collaborators. A back-up underwater line along the coastline together with the underground interconnection

Mu-Omicron-Sigma and some access to limited satellite communications were able to provide access to internet services for a limited and prioritized number of consumers.

Due to a lack of availability of specialized personnel and appropriate equipment for repairing the submarine cables, and given the urgency of the situation, Omicron requested assistance from the neighbouring and technologically advanced EU Countries Beta and Delta, with which it maintains close trade relations.

Two special offshore multi-mission vessels (one from Delta and one from Beta) arrived, along with a specialized team and equipment, and started the operation of detection, repair and restoration of the connectivity of the two cables. The whole operation (from occurrence to restoration) took approximately 10 days.

An investigation of the incident indicated that it probably resulted from a suspected sabotage action by Country Cronen. Nevertheless,

no conclusive evidence could be found to attribute this operation to Cronen.

- What rights and jurisdiction does the coastal State (Omicron) have in relation to the protection of submarine cables in the territorial sea?
- What obligations does the coastal State (Omicron) have in relation to the protection of submarine cables in the territorial sea?
- Has Cronen violated international law and what measures can the coastal State (Omicron) take against Cronen in response to the suspected sabotage operation in the territorial sea?

Legal Scan: Undersea cable cuts

What rights and jurisdiction does the coastal State (Omicron) have in relation to the protection of submarine cables in the territorial sea?

In the territorial sea, the coastal State has sovereignty (Article 2(1) of UNCLOS). Therefore, the coastal State has prescriptive and enforcement jurisdiction in relation to submarine cables in the territorial sea. Accordingly, the laying, maintenance and operation of a submarine cable in the territorial sea requires permission by the coastal State (in contrast to the EEZ, see Article 58(1) of UNCLOS). The prescriptive jurisdiction of the coastal State concerning the protection of cables and pipelines is confirmed by Article 21(1)(c) of UNCLOS. That said, the coastal State's sovereignty is exercised subject to UNCLOS and other rules of international law (Article 2(3) of UNCLOS). Most importantly, the

limitations imposed by UNCLOS and general international law include the right of innocent passage under Article 17 of UNCLOS.

The right of innocent passage under Article 17 of UNCLOS has two requirements, namely that the relevant activity constitutes "passage" (Article 18 of UNCLOS) and that it is "innocent" (Article 19 of UNCLOS). Neither of these requirements is fulfilled in the present case. First, a foreign ship conducting a sabotage operation to cut a submarine cable is not in "innocent" passage:

1. It likely constitutes an "act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State" (Article 19(2)(k) of UNCLOS).
2. Such an operation has no direct bearing on passage (Article 19(2)(l) of UNCLOS).
3. In any event, a sabotage operation can be broadly regarded as "prejudicial to the peace, good order or security of the coastal State" (Article 19(1) of UNCLOS).

Therefore, the coastal State may lawfully take "the necessary steps in its territorial sea to prevent passage which is not innocent" (Article 25(1) of UNCLOS). If the sabotage operation violated the domestic law of the coastal State (such as criminal law enacted to protect submarine cables from intentional damaging), the "necessary steps" would include boarding and arrest as well as subsequent prosecution of the perpetrators before the coastal State's criminal courts. Additionally, the coastal State's jurisdiction extends to civil liability for any damage caused.

In any event, a sabotage operation in the territorial sea will generally not even constitute “passage”, which means “navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters [or] proceeding to or from internal waters or a call at such roadstead or port facility” (Article 18(1) of UNCLOS). Therefore, the coastal State can make use of its general enforcement jurisdiction flowing from its sovereignty in the territorial sea without the limitations of the regime of innocent passage (including boarding, arrest and prosecution). If the perpetrators flee the territorial sea after their sabotage operation, the coastal State can still intercept their vessel in the contiguous zone (Article 33(1)(b) of UNCLOS) or exercise its right of hot pursuit under Article 111(1) of UNCLOS to pursue it into the high seas or a foreign EEZ and intercept the vessel there.

Any such exercise of enforcement jurisdiction would, however, not be possible in relation to a foreign warship¹⁴ or other vessel in non-commercial State service due to the sovereign immunity of such vessels (Article 32 of UNCLOS). Nevertheless, a foreign State vessel engaged in activities that constituted non-innocent passage or

no passage at all can be obliged to leave the territorial sea (Article 30 of UNCLOS). While it is usually necessary to request the offending warship to comply with the regime of innocent passage prior to ordering it to leave the territorial sea, in a case such as this that would not be necessary in view of the nature of the violation. In the event that the offending vessel refused to comply with orders to leave the territorial sea, the coastal State could take necessary and proportionate measures to induce compliance, including the escort of the warship out of the territorial sea and the use of graduated force if the warship forcibly resisted.¹⁵ The flag State would be responsible for any damage caused by a warship in the context of non-compliance with the laws and regulations of the coastal State concerning passage through the territorial sea or other applicable rule of international law (Article 31 of UNCLOS).

What obligations does the coastal State (Omicron) have in relation to the protection of submarine cables in the territorial sea?

Part II of UNCLOS is silent about the obligations of the coastal State in relation to the protection of submarine cables. Therefore, it is difficult to deduce a positive obligation of the coastal State to protect such cables directly from UNCLOS.

14 Article 29 of UNCLOS defines a “warship” as “a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline”.

15 In the commentary to the UN Charter by Simma/Khan/Nolte/Paulus (eds.) *The Charter of the United Nations: A Commentary* (OUP, 3rd ed. 2012), Dörr and Randelzhofer state on p. 215 that Art. 2(4) “does not apply to military acts of protection against intruding persons ships or aircraft on the State’s own territory”. Consequently, according to this view, such measures of protection would not violate the prohibition of the use of force and would not constitute self-defence. Other authors take a different approach and classify refusal of intruding warships or military aircraft as a use of force and forcible resistance to acts of protection, such as refusal to comply with orders to leave the territorial sea as an (incipient) armed attack to which the right of self-defence applies. See, inter alia, Ruys, “Armed Attack” and Article 51 of the Charter (CUP, 2010), 195–197. See also, Dinsteine, *War, Aggression and Self-Defence* (CUP, 6th ed. 2017), 214–215.

However, there is arguably a general obligation of States under customary international law to take the necessary measures to prevent conduct within their territorial jurisdiction and control (including the internal waters and territorial sea) resulting in harm to other States, including in relation to submarine cables and pipelines.¹⁶

This obligation is one of conduct rather than of achieving a result, meaning that the coastal State is expected to exercise due diligence by taking preventive measures that can reasonably be expected from it and are within its power and capacity. Based on existing jurisprudence by international courts and tribunals, it can be argued that coastal States must have due regard to this customary international law obligation in exercising their sovereignty in the territorial sea under Article 2(3) of UNCLOS.¹⁷

In any event, flag States and States of nationality have a parallel responsibility to take the necessary measures to ensure that activities under their jurisdiction do not result in intentional damage to submarine cables (compare Article 113 of UNCLOS, which is not, however, directly applicable in the territorial sea).

Depending on the circumstances of the individual case, a bilateral or multilateral treaty could be in place that provides for additional obligations. Moreover, the coastal State may have obligations under an agreement reached

with the operators of the cable (but these are not public international law obligations, but rather obligations governed by domestic law). Finally, there could be State obligations of protection directly under the domestic law of the coastal State. In any case, in view of these various possible sources of obligation, it is likely that Omicron would be required to prevent harm that was reasonably foreseeable and within its power to prevent. On the basis of the available facts, it cannot be ascertained with certainty whether Omicron has violated any of these obligations.

Has Cronen violated international law and what measures can the coastal State (Omicron) take against Cronen in response to the suspected sabotage operation in the territorial sea?

A State-sponsored operation to sabotage a submarine cable in the territorial sea of another State constitutes a violation of that coastal State's sovereignty in the territorial sea (Article 2(1) of UNCLOS). If the sabotage caused more than minimal physical damage, it is arguable that it could constitute a use of force against the coastal State (Article 2(4) UN Charter). If the damage was severe in terms of its effects on the coastal State it could also qualify as an armed attack under Article 51 of the UN

¹⁶ Compare, for example, *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, ICJ Reports 1949, p. 4, at p. 22; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, at para. 29. The exact contours and limits of application of this principle remain unclear, but there is increasing support for a wide application to a variety of subject matters: Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017), 30 (with further references); see also generally Brunnée, "Sic utere tuo ut alienum non laedas", in Peters (ed.), *Max Planck Encyclopedia of International Law*, 2022, paras. 15–17; Koivurova/Singh, "Due Diligence", in Peters (ed.), *Max Planck Encyclopedia of International Law*, 2022, paras. 41–45; Kulesza, *Due Diligence in International Law* (Brill 2016).

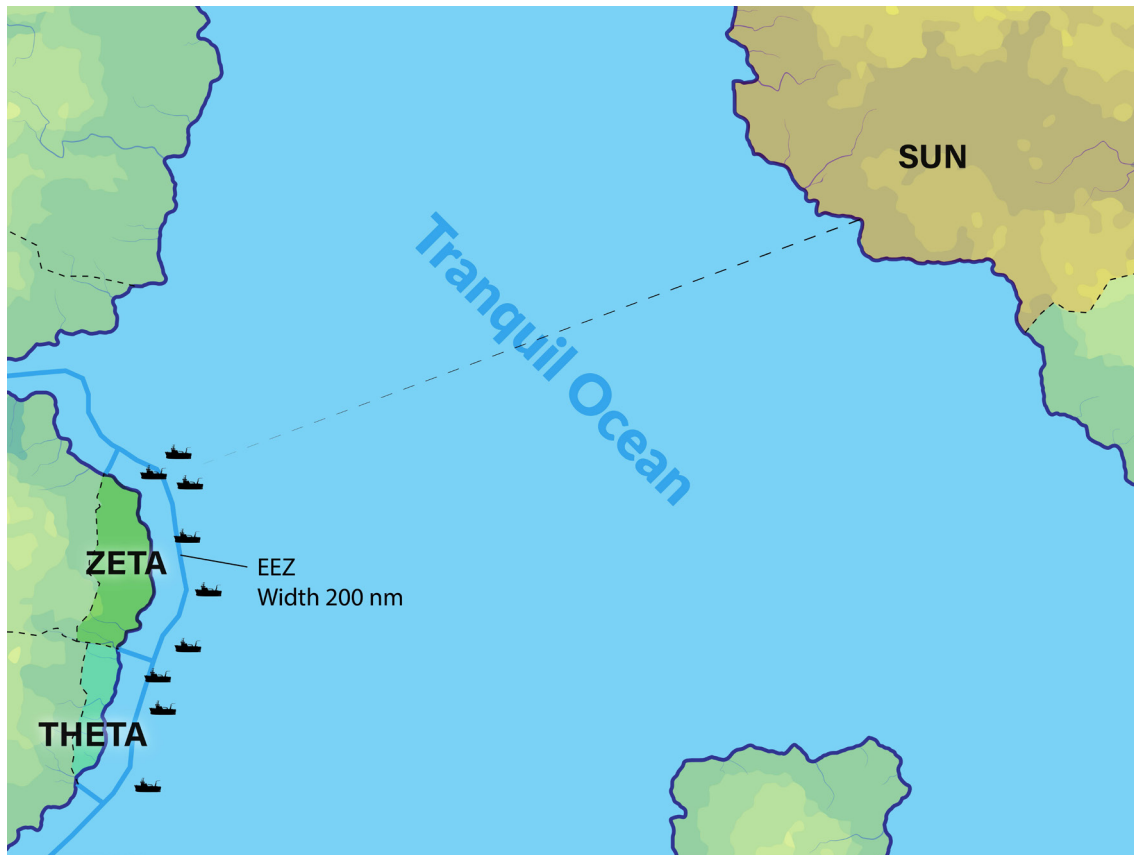
¹⁷ See e.g., *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), Award, 18 March 2015, <https://pca-cpa.org/en/cases/11/>, paras. 499–516.

Charter. However, in order to establish a breach of international law by Cronen and to adopt suitable responses under international law (such as countermeasures), there must be sufficient evidence to prove that a sabotage operation has occurred, and that this operation is attributable to Cronen. As this is not the case here, no (attributable) violation of international law can be established. As mentioned, if Omicron captures the perpetrators of the sabotage operation, it can take lawful enforcement

measures against these perpetrators for violations of its domestic law protecting submarine cables, including relevant criminal law. In the event that the perpetrators were State agents of Cronen, they could not rely on functional immunity as a bar to prosecution as this was an act committed on another State's territory in the absence of a legal basis or ad hoc authorization. Moreover, reliance on State immunity would be a clear indication of Cronen State involvement in the sabotage operation.¹⁸

¹⁸ State agents acting in an official capacity are deemed to have "functional immunity" for their acts connected to the exercise of those official functions as a matter of customary international law. However, such immunity is usually predicated upon lawful presence of such officials on another State's territory on the basis of a recognized legal basis to be there or lawful consent by the territorial State to their presence and exercise of official functions. See, inter alia, R. van Alebeek, *The Immunity of States and their Officials under International Criminal Law and International Human Rights Law*, Oxford University Press (2008), 125–126 citing, inter alia, the Rainbow Warrior case between New Zealand and France whereby French State agents were held criminally responsible under New Zealand criminal law for acts of sabotage committed on New Zealand territory.

Scenario 12. Distant-water fishing



Sun is an overpopulated global emerging super-power. To meet its growing domestic demand for fish products without having to rely exclusively on its depleted Exclusive Economic Zone's (EEZ) fish stocks, Sun has made the expansion of its distant-water fishing (DWF) fleet – numbering approximately 3,000 vessels – a national priority. Recent media reports indicated that a significant number of Sun's DWF vessels are conducting extensive fishing operations just outside the EEZ of Zeta and Theta on the other side of the Tranquil Ocean. These fishing operations involved spending hundreds of thousands of hours harvesting living resources just outside the EEZs of these two developing coastal States. According to these reports, there is strong evidence that Sun's DWF vessels are

fishing for a broad variety of species, including threatened and endangered species such as sharks. Moreover, they are believed to engage in uncontrolled and harmful fishing practices such as bottom trawling in sensitive marine ecosystems such as reefs. Furthermore, the coast guard authorities of Zeta and Theta accuse Sun's vessels of turning their Automatic Identification Systems (AIS) off at certain times and potentially engaging in clandestine illegal fishing within their EEZs. Against this background, the DWF fleet of Country Sun has been accused of illegal, unreported, and unregulated (IUU) fishing, which threatens the environmental and resource security of coastal States Zeta and Theta and the broader region.

→ What measures can Zeta and Theta take under international law to address the situation?

Legal Scan: Distant-water fishing¹⁹

From the viewpoint of international law, two ‘spatial’ perspectives can be taken on this scenario: First, the perspective of Zeta and Theta as coastal States, adjacent to whose EEZ Sun’s DWF fleet conducts its operations. Second, the perspective of Zeta and Theta as non-flag States on the high seas vis-à-vis the vessels of Sun.

The EEZ perspective

As coastal States, Zeta and Theta have jurisdiction to prescribe laws and regulations concerning fisheries in their EEZs (Articles 56(1)(a), 61 and 62(4) of UNCLOS) as well as jurisdiction to enforce these laws and regulations against foreign vessels (Article 73(1) of UNCLOS). Importantly, these powers end at the boundary of their EEZ, meaning that coastal States cannot take EEZ-based enforcement measures against foreign vessels fishing on the high seas just outside the EEZ – even if such fisheries are harmful for fish stocks and ecosystems within the EEZ. In other words, the phenomenon of EEZ-adjacent high seas fisheries poses management challenges because there is an abrupt transition between two fundamentally different legal regimes rather than a gradual transition. That said, enforcement measures can be taken against foreign vessels caught fishing illegally

in the EEZ. Moreover, if the fishing vessel tried to evade enforcement measures by fleeing into the high seas or the EEZ of another State, the coastal State could exercise the right of hot pursuit and arrest the vessel on the high seas and even in a foreign EEZ (Article 111(2) of UNCLOS). Enforcement measures can include boarding, inspection, arrest, and judicial proceedings but fishing vessels must be promptly released upon the posting of reasonable bond or other security (Article 73(2) of UNCLOS). Penalties for violations may not include imprisonment or any other form of corporal punishment unless agreed otherwise with the respective flag State (Article 73(3) of UNCLOS).

If Zeta and Theta are convinced that Sun’s vessels are conducting illicit fishing activities in their EEZs after turning off their AIS, they could try to increase monitoring, for example through at sea maritime or aerial patrols, or other forms of surveillance (e.g., satellite-based). If they independently lack capacity, they could also enter into cooperative monitoring and enforcement arrangements to conduct such patrols. A further possibility is to enter into so-called shiprider agreements with other States or with non-governmental organizations (NGOs) that have their own maritime assets. As part of such arrangements, the coastal State places a duly authorized coast guard or fisheries officer on board a vessel of another State or NGO, thereby supplying this vessel with the necessary authority to conduct enforcement operations.²⁰

19 For further reading, see Millicent McCreath & Valentin Schatz, “EEZ-adjacent distant-water fishing as a global security challenge: An international law perspective”, Hybrid CoE Working Paper 19, 12 September 2022, <https://www.hybridcoe.fi/publications/hybrid-coe-working-paper-19-eez-adjacent-distant-water-fishing-as-a-global-security-challenge-an-international-law-perspective/>.

20 See Valentin Schatz, “Marine Fisheries Law Enforcement Partnerships in Waters under National Jurisdiction: The Legal Framework for Inter-State Cooperation and Public-Private Partnerships with Non-governmental Organizations and Private Security Companies”, *Ocean Yearbook* 32 (2018), 329–375.

If Zeta and Theta have gathered the necessary evidence of infractions by Sun's fishing vessels, they can directly enforce their laws against these vessels and/or confront Sun – as the responsible flag State – with its own failure to exercise jurisdiction and control over its vessels. This is because Sun is under a due diligence obligation to exercise the jurisdiction and control necessary to prevent illegal fishing in the EEZ of other States (Article 58(3) of UNCLOS).²¹ If diplomatic means did not improve the situation and sufficient evidence of a violation by Sun of its flag State obligations were available, Zeta and Theta could consider taking counter-measures under international law or instituting compulsory dispute settlement proceedings under Part XV of UNCLOS.

The high seas perspective

If Sun's vessels were exclusively fishing on the high seas or could not be interdicted following hot pursuit to the high seas or a foreign EEZ, Zeta and Theta – as non-flag States – could not lawfully take enforcement measures against them. This is because all States enjoy (qualified) freedom of fishing on the high seas (Articles 87(1)(e) and 116 of UNCLOS). Sun, as the flag State, has exclusive enforcement jurisdiction over its fishing vessels on the high seas (Article 92(1) of UNCLOS) and no general exception to this rule exists for non-flag State enforcement regarding high seas fisheries (compare Article 110(1) of UNCLOS). If both the coastal States and Sun were parties to the UN Fish Stocks Agreement and/or a regional fisheries management organization (RFMO) that has non-flag State procedures for high seas

boarding and inspection in place, duly authorized vessels of Zeta and Theta could then board and inspect Sun's fishing vessels. This would only be for the purpose of monitoring compliance with applicable high seas fisheries law and without the right to take enforcement measures themselves (Articles 21 and 22 of the UN Fish Stocks Agreement). This would also be possible if Sun granted Zeta and/or Theta permission to board and inspect its vessels either in advance for an unlimited number of cases (e.g., in a bilateral treaty) or ad hoc in relation to a specific vessel.

Zeta and Theta could exert diplomatic pressure on Sun in order to induce Sun to improve the exercise of its jurisdiction and control over its fishing vessels in order to enhance monitoring and compliance and to prevent harmful fishing practices. If the fisheries targeted by Sun's fishing vessels fell within the competence of an RFMO, Zeta and Theta could try to use the RFMO as a forum to tackle the issue. Measures could include the submission of reports of non-compliance, proposals to have non-compliant vessels of Sun listed on the RFMO's IUU vessel list (which can result in port State and market State measures), proposals to improve the regulatory framework for the relevant fish stocks (including monitoring and compliance), or invoking the RFMO's dispute settlement mechanisms. If diplomatic means and/or measures at the RFMO level did not improve the situation and sufficient evidence of a violation by Sun of its flag State obligations was available, Zeta and Theta could consider taking counter-measures under international law or instituting compulsory dispute settlement proceedings under Part VIII of the UN Fish Stocks Agreement or Part XV of UNCLOS.

²¹ Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, 2015 ITLOS Reports 4, para. 129(3).

Scenario 13. Freedom of navigation operations



Rich in mineral and living resources, Sea of Peace has long been a source of contention between neighbouring coastal States Sun, Alpha, Beta and Delta. Sun, which is a global emerging superpower, has started establishing a status quo whereby all foreign warships must notify it when passing through what it sees as its EEZ. Moreover, it is Sun's position that any form of military exercise or any kind of military activity (surveillance, intelligence gathering, etc.) in this area requires Sun's express permission. In a similar vein, Sun has also established an Air Defence Identification Zone (ADIZ) in the airspace superjacent to the aforementioned contested EEZ.

In recent weeks, Beta, Delta and Alpha have requested assistance from Sigma, a distant established superpower, and Oz, which is a regional medium power allied with Sigma. Sigma and Oz agree to conduct a joint freedom of

navigation operation (FONOP)²² in the contested EEZ together with warships from the three neighbouring States of Sun. The intention to conduct this FONOP is publicly announced and a joint flotilla of 7 warships is formed under operational control of a rear admiral of Sigma's navy on board the flagship of the flotilla.

The flotilla proceeds to sail through the contested EEZ without prior notification and begins conducting a series of exercises. These include the launching of surveillance drones, the deployment of remotely controlled underwater vessels to conduct a minehunting exercise, the testing of a new system of loitering munitions designed to neutralize air defence radar systems, and a search and rescue (SAR) exercise to practise recovery of downed aircrew members. None of these exercises were conducted on the basis of prior permission by any State including Sun, although a notification to mariners and

²² "FON operations" and "FONOPs" are designed to challenge coastal State maritime claims that unlawfully restrict navigation and overflight rights and freedoms and other internationally lawful uses of the sea related to these freedoms guaranteed in international law as reflected in the 1982 Law of the Sea Convention.

aircraft was posted via the usual international channels informing all ships and aircraft of the location of the exercises and imposing a security zone of 500 metres around the flotilla and in the airspace to an altitude of 10,000 feet above the flotilla to avoid collisions or other incidents.

During the exercises, Sun warships sail into the safety zone on what appears to be a collision course with the lead vessels at the vanguard of the flotilla and only adjust course at the last minute to narrowly avoid collision. They issue verbal warnings via loudspeaker to cease all exercises and leave the contested EEZ because no notification was made to the Sun authorities. This is followed by warning shots in front of the lead vessels in the flotilla. Sun military aircraft also fly over the flotilla at low altitude and conduct a mock attack, but no weapons guidance radars lock on to the flotilla on this occasion. A warning is given that further exercises by the flotilla may encounter “necessary and appropriate countermeasures” by Sun’s defence forces.

The flotilla commander continues with the FONOP, temporarily suspending weapons exercises, and takes the necessary measures to defend the flotilla and ensure free navigation and use of airspace by assuming a defensive position enabling the vessels to support each other in case of a live-fire incident. Sun’s authorities repeat their demand that the flotilla should leave the contested EEZ as a consequence of its “unauthorized presence and provocative behaviour prejudicial to the security of Sun and its sovereign authority in its EEZ”.

Small high-speed craft without visible markings as warships use swarming tactics to manoeuvre into the safety zone of the flotilla. The commander of the flotilla decides to proceed on course and ignores the potential threat posed by the high-speed craft. When Sun’s air force repeatedly sends aircraft through the safety zone, the flotilla commander gives a warning that the vessels will take the necessary measures to defend themselves unless the aircraft stop breaching the safety zone. The aircraft leave after a short interval. The FONOP continues without further incident for another two days until the flotilla leaves the contested EEZ.

- Does a coastal State (in this case Sun) have a right to impose conditions or restrictions on the passage of foreign warships and the conducting of routine naval exercises in a claimed or established EEZ? If not, is a FON operation a lawful response to the imposition of such conditions or restrictions?
- Does the conducting of weapons exercises in a State’s EEZ by foreign warships constitute an unlawful form of activity that would amount to a threat of force against the coastal State or otherwise infringe on the principle of “peaceful use of the sea”?
- At what point would any form of physical interference or intimidation like mock attack or potential collision cross the line into constituting an (incipient) armed attack? What kind of measures would such conduct justify in response to activity which constituted an (incipient) armed attack?

Legal Scan: Freedom of navigation operations

Freedom of navigation in the EEZ

While there are a number of States which take the position that passage of warships through their EEZ requires prior notification or in some cases even authorization, the prevailing legal opinion is that States only exercise functional rights and jurisdiction over, inter alia, the living and non-living natural resources located in the EEZ (Article 56(1) of UNCLOS). Consequently, freedom of navigation and overflight, including by foreign warships and military aircraft, are not impaired in the EEZ (Article 58(1) of UNCLOS). Hence, no restrictions or conditions on navigation may be imposed other than those that stem from a lawful exercise of the coastal State's rights and jurisdiction in the EEZ, such as ensuring unimpeded exploitation of natural resources and maritime safety measures in the proximity of platforms or wind turbine installations (Article 60 of UNCLOS). In the event that a coastal State imposes any conditions on foreign warships and military aircraft which would infringe on the freedom of navigation and overflight, a FONOP conducted in conformity with UNCLOS and other rules of international law, such as the rules in the UN Charter prohibiting the threat or use of armed force (Article 2(4) of the UN Charter) would be permissible.

Military exercises in the EEZ

Under the prevailing legal opinion, conducting military exercises in the EEZ of another State, including the use of weapons or means of surveillance, falls within the scope of freedom of navigation and use of international airspace

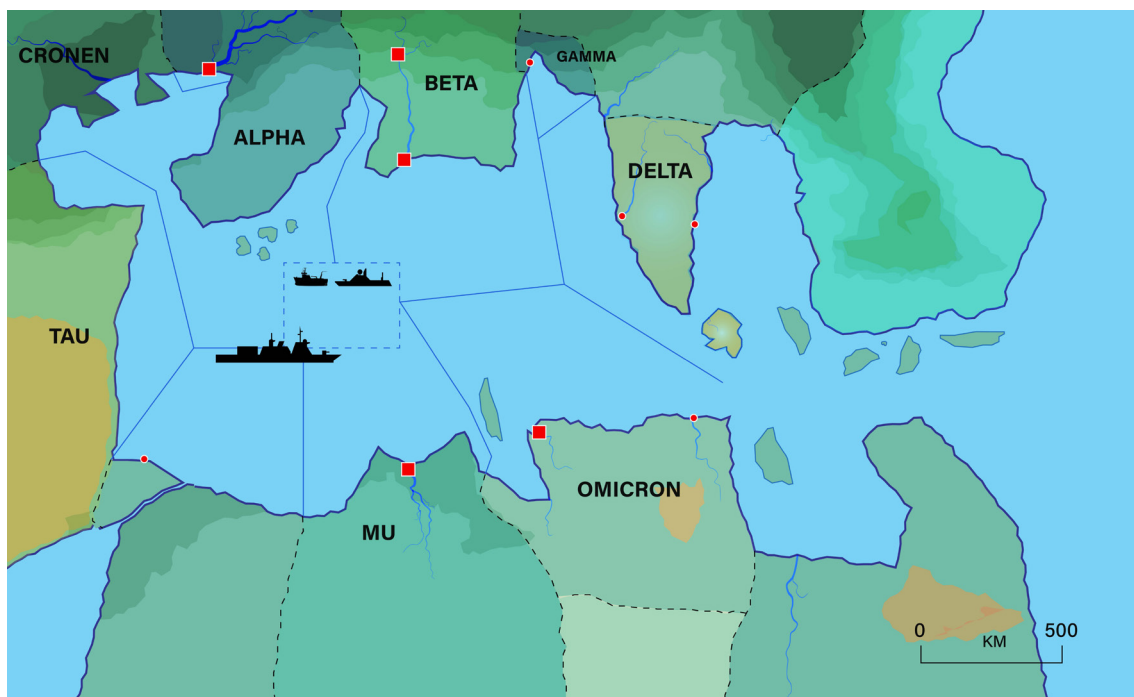
(Article 58(1) of UNCLOS). However, due regard must be given to the rights and obligations of the coastal State and third States in the EEZ (Article 58(3) of UNCLOS). Live-fire exercises conducted in the proximity of shipping lanes, commercial flight routes, and near to activities related to natural resource exploitation should be avoided. Notifications to mariners and airmen giving the location and duration of any live-fire exercises should be posted through the appropriate international channels. A threat of force under Article 2(4) of the Charter is a threat of unlawful force by one State directed against another State. The conduct of routine military exercises including the testing of weapons and other military systems does not constitute a threat of force or infringement of the peaceful use of the sea unless it is accompanied by intimidation or coercive action directed against another State (Article 301 of UNCLOS).

Threshold of an armed attack

An armed attack under Article 51 of the UN Charter and customary international law, which would give rise to the right of self-defence, is a use of force which rises to a particular level of gravity. What the exact level amounts to is a point of some controversy. Some States and particularly authors take the view that a use of force must be on a reasonably substantial scale to amount to an armed attack. Another position is that any use of force can constitute an armed attack. A middle position is that a use of force that rises above a de minimis threshold is an armed attack that justifies necessary and proportionate defensive measures. By any of these definitions, an attack on a single warship

or flight of aircraft would allow for localized defensive measures sufficient to ward off the attack. An armed attempt to board a warship by the coastal State's authorities activates the right of self-defence, which would justify necessary and proportionate measures to prevent such boarding or capture of a warship. These could include the use of non-lethal and lethal force to repel boarders or prevent the vessel from coming under the control of another State in addition to evasive manoeuvres and warning shots.

Scenario 14. Exploitation of marine resources in contested EEZ



Country Mu is a coastal State with long-lasting political and military ties with the global emerging superpower Sun. One day, Mu declares an expansion of its EEZ. The area now covered by Mu's expanded EEZ claim is located within 200 nautical miles (NM) of both Mu's coast and the coasts of Alpha and Beta, which are EU Member States with opposite coasts to Mu. At the time, neither Alpha nor Beta had declared an EEZ in the relevant area.

Alpha and Beta protest Mu's claimed EEZ as disproportionately extensive and infringing on their respective entitlements to an EEZ. They accuse Mu of unilateral maritime expansion at their expense, hindering their ability to exploit natural resources, and of redefining international maritime boundaries without prior consultations. A few months later, Alpha declares an EEZ of its own, which overlaps with the EEZ claimed by Mu in the contested area. In response, the government of Mu announces

that it does not recognize Alpha's claims and sends a note verbale stating that Alpha is violating Mu's sovereign rights in its EEZ under international law.

Despite the ongoing dispute, Mu continues to permit its fishing vessels to fish in the contested EEZ area. Alpha considers Mu's fishing illegal and decides to send coast guard vessels into the contested EEZ area to stop these fishing activities. Alpha's coast guard subsequently stops several Mu-flagged trawlers in the contested EEZ area and orders them to leave. The trawlers comply with the orders. Mu sharply protests the deployment and measures of Alpha's coast guard. Tensions between the two States are also fuelled by a media campaign in Mu, with influential media accusing "rich EU countries" of depriving Mu fishing communities of their livelihood, thus returning to colonial policies.

Shortly thereafter, the captain of a Mu-flagged trawler refuses to leave the contested EEZ area following an order to do so by Alpha's coast guard. A boarding team of Alpha's coast guard takes control of the deck of the trawler, and forced towage is used with the aim of taking the arrested trawler into a port of Alpha for investigation. During the incident, some members of the trawler's crew offer physical resistance but are subdued by means of police tactical measures.

After this incident, Mu-flagged fishing vessels avoid the parts of the contested area nearest to Alpha's coast. A media campaign condemning the incident is waged allegedly by Mu but heavily amplified by Sun state media. Footage of the arrest onboard the Mu-flagged vessel is used to accuse Alpha's authorities of inhuman treatment of Mu fishermen and colonial behaviour. This is followed by a disinformation campaign that further amplifies this narrative. Anti-Alpha and anti-EU demonstrations are held in Mu's capital and fishing ports.

Suddenly, the government of Mu enters into a bilateral agreement with Sun that provides for maritime law enforcement assistance by Sun's navy to protect Mu's fishing fleet in Mu's EEZ. For these purposes, a duly authorized Mu coast guard officer is placed on board Sun warships to provide the necessary authority in the EEZ. The reason for this request is Mu's lack of a coast guard of its own and naval capabilities. Shortly thereafter, Sun sends naval assets to provide protection for Mu-flagged vessels in the disputed EEZ area. The fishing by Mu-flagged vessels returns to the previous level and they resume fishing in the area nearest to Alpha's coast.

In response, Alpha once again sends its coast guard. This leads to an incident during which an Alpha coast guard cutter orders a Mu-flagged trawler to stop fishing and leave the contested EEZ area near Alpha's coast. The trawler does not comply, and Alpha's coast guard cutter sends a boarding team on board to ensure that the trawls are lifted and forced towage is prepared. While the team is on board, a Sun-flagged warship arrives at the scene and orders the Alpha coast guard to withdraw immediately. Otherwise, "all necessary measures" to ensure the lawful exercise of fishing rights by Mu's trawler would be taken.

→ What is the situation under international law?

Legal Scan: Exploitation of marine resources in contested EEZ

Alpha's exclusion of Mu fishing vessels from the contested EEZ area

In the scenario, Alpha proceeds to take unilateral action to totally exclude Mu fishing vessels from a disputed maritime area in which both Alpha and Mu claim EEZs. Given that the contested EEZ area is within 200 NM of both Alpha and Mu, neither of the two States can unilaterally claim sovereign and therefore exclusive rights over the marine living resources in the area based on Article 56(1)(a) of UNCLOS. Rather, before either Alpha or Mu can claim parts of the contested area as their own EEZ and exclude fishing vessels of the other State, their EEZ boundary must be delimited in accordance with Article 74(1) of UNCLOS and customary

international law, which is typically done by agreement. The delimitation can also be conducted by a competent international court or tribunal, but depending on whether the parties to the dispute have optionally excluded compulsory dispute settlement under Part XV of UNCLOS via declarations under Article 298(1)(a) of UNCLOS, the compulsory dispute settlement mechanism of UNCLOS may not apply to maritime delimitation disputes. In any event, the ongoing maritime delimitation dispute must be settled by peaceful means (Articles 279 and 301 of UNCLOS).

Pending the conclusion of a delimitation agreement, as is the case in this scenario, both States have an obligation to make every effort to enter into provisional arrangements of a practical nature and an obligation not to hamper or jeopardise the reaching of a final agreement on the maritime boundary (Articles 74(3) of UNCLOS and customary international law). While this obligation does not absolutely preclude any use of the resources by either party, it does require that they do so in a way which does not exacerbate tensions, thereby hampering a final agreement, and that they make every effort to arrive at a settlement by negotiations in good faith, or failing negotiated agreement through recourse to a dispute settlement procedure of their own mutual choice. For example, the obligation “not to hamper or jeopardise” entails a prohibition against unilateral activities that might affect the other coastal State’s rights in the disputed area in a permanent manner – such as making physical changes to the marine environment.²³ While oil drilling is such an activity, fishing that does not permanently

harm ecosystems or fish stocks arguably is not a prohibited activity. In other words, both Alpha and Mu jointly have sovereign rights over the fisheries in the entirety of the disputed EEZ area, which they can exercise vis-à-vis other States (Article 56(1)(a) of UNCLOS). This includes both prescriptive jurisdiction (Article 62(4) of UNCLOS) and enforcement jurisdiction (Article 73 of UNCLOS).

As these rights are jointly exercised by both claimant States, they are both subject to the obligation “not to jeopardize or hamper the reaching of the final agreement”, which entails an obligation to have due regard for the rights and obligations of the other claimant State (compare Article 56(2) of UNCLOS). This is also supported by Article 300 of UNCLOS, which reflects the general legal obligation to act in good faith and refrain from any act which constitutes an abuse of rights. In other words, both Mu’s and Alpha’s fishing activities in the contested EEZ area are in principle lawful. The same applies (in principle) to their fisheries law enforcement activities, but only to the extent that due regard is given to the rights and obligations of the other claimant. Against this background, Alpha’s attempt to exclude any fishing activity by Mu violates Article 74(3) of UNCLOS. This likewise applies to the actions taken by Alpha in the incident preceding the involvement of the SUN warship. Rather than entering into any meaningful negotiations aimed at finding some kind of practical arrangement pending settlement of the maritime boundary, Alpha decides to go several steps further, forcefully excluding any Mu-flagged trawler which does not comply with its measures aimed at totally

23 Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146, para. 89.

excluding fishing activities by Mu-flagged trawlers.

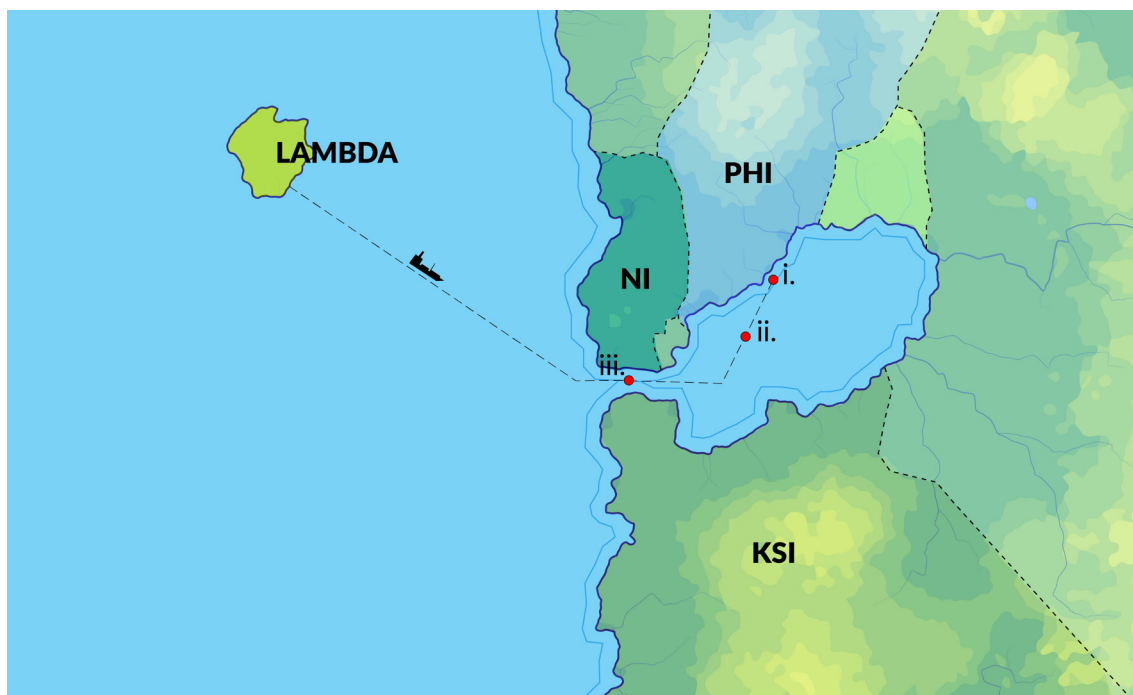
Sun's fisheries law enforcement assistance to Mu

In principle, coastal States may conclude cooperative agreements with other States, based on which they place duly authorized coast guard officers on board foreign governmental vessels to conduct fisheries law enforcement measures.²⁴ However, no action by either State in enforcing its rights in the contested EEZ may involve the use of force against a public

vessel of the other State. Sun may not act on behalf of Mu in any way which violates its own or Mu's obligations under UNCLOS and the duty to resolve disputes peacefully and refrain from actions likely to prejudice a peaceful settlement. As stated, neither Mu, Sun, nor Alpha may use force against each other's public vessels on any pretext, except in the event of an armed attack. In such severe cases, there is a right to self-defence. In any other case, to do so would constitute a serious breach of international law and a threat to international peace and security.

24 See also: Valentin Schatz, "Marine Fisheries Law Enforcement Partnerships in Waters under National Jurisdiction: The Legal Framework for Inter-State Cooperation and Public-Private Partnerships with Non-governmental Organizations and Private Security Companies", *Ocean Yearbook* 32 (2018), 329–375.

Scenario 15. RHIB attack



A shipping company in Country Lambda operates, on a weekly basis, a commercial line connecting Lambda and Phi. Recently, the ships have been approached and fired upon by small craft whose nationality and ownership cannot be verified. They obviously originate from a territory controlled by a rebel movement acting against the government of Phi. Lambda and Phi have agreed to share responsibility in protecting the shipping line by escorting the ships.

During a routine voyage by a cargo vessel from Lambda to its destination in Phi, a seven-crew 35ft grey rigid-hull inflatable boat (RHIB), with a 12.7 mm heavy machine gun installed on the bow and without any visible flag or other sign of registration, approaches the cargo vessel at high speed, and proceeds to open fire on it when a short distance away. The cargo vessel's captain immediately calls for assistance through the emergency radio channel

because he is under attack. The escorting coast guard vessel arrives at the scene almost immediately.

→ What measures could Lambda and/or Phi take against armed RHIBs without nationality that attack commercial ships?

Legal Scan: RHIB attack

The incident occurs in the territorial sea of Phi

Phi has sovereignty over its territorial sea and can take protective and law enforcement measures to protect the vessels of any nationality (Article 2(1) of UNCLOS). This could include interception of any unmarked craft, arrest, and prosecution for offences under Phi's domestic law and, if applicable, the 1988 SUA Convention. Unlawful acts under the SUA Conven-

tion would include attacks on merchant vessels or other acts that would pose a danger to safe navigation such as planting explosive devices on board vessels while in a port in Lambda or Phi. An escort of merchant vessels within its territorial sea in order to prevent such incidents would also fall within its competence as the coastal State. Phi could also authorize coast guard or naval vessels of Lambda to exercise the same type of escort and law enforcement functions within its territorial sea on the basis of their cooperation agreement to protect their shipping lines.

The incident occurs in the EEZ of Phi

Within the EEZ, the coastal State has sovereign rights and functional jurisdiction over the natural resources located there and certain other related matters under Article 56(1) of UNCLOS. This would not normally include the provision of protection to foreign flag merchant vessels since law enforcement over matters not falling within the coastal State competence related to the EEZ is reserved exclusively for the flag State (Articles 58(2) and 92(1) of UNCLOS).

However, if there is an agreement between a flag State and the coastal State, it is perfectly permissible to allow the coastal State to exercise law enforcement activities over, and provide protection to, the merchant vessels of the other party to the agreement within its EEZ or on the high seas. The flag State can also grant such consent ad hoc for a specific case. Consequently, Phi's coast guard vessels could exercise those powers pursuant to the agreement

between Phi and Lambda and take protective measures against attacks by non-State craft against this cargo vessel.

Irrespective of the agreement between Lambda and Phi, both States may also exercise the right of visit vis-à-vis the attacking craft given that they are apparently vessels without nationality (Articles 58(2) and 110(1)(d) of UNCLOS). This right may be exercised by warships, any other duly authorized ships or aircraft clearly marked and identifiable as being on government service (Articles 58(2) and 110(5) of UNCLOS), and allows for the boarding of a vessel to establish its nationality, including a prior security sweep (Articles 58(2) and 110(2) of UNCLOS).

The incident occurs in an international strait bordered by Ni and Ksi

Within international straits, vessels (and in some cases aircraft) have the right of transit passage (Article 37 of UNCLOS) or non-suspendable innocent passage (Article 45 of UNCLOS), respectively. However, since straits fall within the territorial sea of the state(s) bordering them, no law enforcement activities by non-straits States may be exercised within them. Consequently, while Phi coast guard vessels may accompany the cargo ship through the strait, they may not exercise protective or law enforcement powers in foreign territorial waters except in case of self-defence in reaction to an ongoing attack on the merchant vessel by a non-State armed craft.

3. Legal responses to maritime hybrid threat scenarios

Where it has been established that a State has violated another State's rights under public international law, and specifically the international law of the sea, various responses may be considered. These may be operational, political or legal options. This section specifically addresses legal responses available to states willing to hold other states accountable for violations of their rights.

Reactive measures: diplomatic summons, sanctions, countermeasures and self-defence

There is a variety of reactive measures that a State can take in response to violations of public international law. Diplomatic responses such as consultations or negotiations are usually the least escalating measures. The severity of the issue and the extent of disapproval can also be highlighted, for example by a public summons of high-level diplomats from another State. Additionally, States may have recourse to self-help measures, such as economic sanctions (including sanctions by a political bloc such as the EU) and the withholding of certain benefits in order to induce the perpetrator to comply with its international obligations. In some cases, self-help measures (retorsion) may include physical acts not involving the use of force, such as providing protection at sea to vessels of the protecting State's nationality against threats of unlawful interference, and engaging in freedom of navigation exercises to affirm a right that is being challenged. It is important to bear in mind that while such self-help measures do not in themselves violate international law, they must be carried out in a way that strictly conforms to

international law and does not pose a threat to international peace and security.

Where appropriate, the injured State(s) may also choose to adopt countermeasures against the perpetrator under the law of state responsibility (see, in particular, the Articles on Responsibility of States for Internationally Wrongful Acts of 2001 drafted by the International Law Commission).²⁵ Countermeasures are subject to a number of conditions, which must be met in order for them to be lawful. These include a prior demand for redress whenever feasible, proportionality of the measures to the harm inflicted, no measures violating fundamental human rights and no use or threat of armed force (as prohibited by Article 2(4) of the UN Charter), to name the most important.

However, where a State is subject to an illegal use of force by another State that amounts to an armed attack, it may use force in self-defence (Article 51(1) of the UN Charter). Additionally, the injured State may consider seeking assistance from the UN Security Council (Articles 39 ff. of the UN Charter) or under another multilateral system, such as NATO. Whatever measures are taken, ideally parallel diplomatic efforts should continue.

Proactive means of peaceful dispute settlement: diplomatic means and binding third-party dispute settlement procedures

As a basic principle of the international legal order, disputes must be resolved peacefully (Article 2(3) of the UN Charter). Proactive means of peaceful dispute settlement listed in Article 33(1) of the UN Charter include:

25 See: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

- Negotiation
- Enquiry
- Mediation
- Conciliation
- Arbitration
- Judicial settlement
- Resort to regional agencies or arrangements
- Other peaceful means of their own choice

Diplomatic means, particularly negotiation, provide the greatest degree of control and flexibility by the disputing States. They are also the least intrusive with respect to the sovereignty of the disputing States. For this reason, negotiation is usually the first step in international dispute settlement – and also most often the final one. Procedures such as enquiry, mediation and conciliation involve a third party that supports the negotiation process without, however, rendering any binding decisions. The ultimate decision remains with the disputing States.

In addition to diplomatic means, the injured State may seek to take the dispute to binding third-party dispute settlement (arbitration or judicial settlement) before an international court or tribunal. Such litigation is supplementary to other measures and is usually considered when diplomatic means do not resolve the dispute in a timely fashion. In such cases, the relationship between the two disputing States is usually such that this step is warranted and does not undermine, for example, fruitful ongoing diplomatic talks.

Perhaps the most important aspect of litigation before international courts and tribunals is the question of jurisdiction, meaning the question of whether a court or tribunal is compe-

tent to decide on a given dispute. As there is no court or tribunal of general jurisdiction in public international law, and because States must have given consent to jurisdiction over their disputes, in many cases no legal avenue is available that can be pursued for the purposes of litigation. The situation is relatively positive with respect to the international law of the sea – at least with respect to disputes concerning the interpretation and application of UNCLOS.

For present purposes, the most important avenues of inter-state litigation concerning maritime disputes are the International Court of Justice and the compulsory dispute settlement mechanism of Section 2 of Part XV of UNCLOS. Litigation before the International Court of Justice has been excluded from the scope of this analysis as it entails an ad hoc analysis of declarations by the disputing States under Article 36(2) of the Statute of the International Court of Justice. Therefore, the present analysis is confined to the dispute settlement mechanism of UNCLOS as it applies to all States Parties to UNCLOS (note that various important States are not parties to UNCLOS).

Litigation under Section 2 of Part XV of UNCLOS

The obligation to settle disputes peacefully is also enshrined in UNCLOS (Articles 279 and 301 of UNCLOS). Various optional means are listed in Section 1 of Part XV (Articles 280–282 and 284 of UNCLOS). In addition, States have an obligation to proceed expeditiously to an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means (Article 283 of UNCLOS). Only where

recourse to Section 1 of Part XV (including an exchange of views) has not led to a resolution of the dispute can States turn to binding dispute settlement under Section 2 (Article 286 of UNCLOS).

Choice of forum

States can at any time (but prior to the initiation of proceedings in a given dispute) select one or more of four fora for the settlement of their dispute under UNCLOS (Article 287(1) of UNCLOS):

- the International Tribunal for the Law of the Sea (ITLOS)
- the International Court of Justice
- an arbitral tribunal constituted in accordance with Annex VII of UNCLOS
- a special arbitral tribunal constituted in accordance with Annex VIII of UNCLOS for one or more of the categories of disputes specified therein (fisheries, protection and preservation of the marine environment, marine scientific research or navigation, including pollution from vessels and by dumping)

If the two disputing States have selected the same forum for their dispute, the selected forum will be competent to hear the dispute (Article 287(4) of UNCLOS). If that is not the case, or if no selection has been made at all, an arbitral tribunal under Annex VII of UNCLOS will be deemed competent to hear the dispute by default (Article 287(3)-(5) of UNCLOS). In practice, this means that most disputes are

decided by an arbitral tribunal under Annex VII of UNCLOS. For certain specific categories of disputes, which are not of particular interest for present purposes, ITLOS has exclusive jurisdiction. Importantly, however, ITLOS is competent to grant provisional measures pending the constitution of an arbitral tribunal under Annex VII or Annex VIII of UNCLOS (Article 290(5) of UNCLOS). This procedure is frequently used.

Subject-matter jurisdiction

The extent of subject-matter jurisdiction of fora under Section 2 of Part XV of UNCLOS is a key issue in most cases. If no subject-matter jurisdiction exists, the case will not proceed to the merits, even if there has been a violation of international law.

Step 1: In principle, subject-matter jurisdiction is limited to “any dispute concerning the interpretation or application of [UNCLOS]” (Article 288(1) of UNCLOS). This means that disputes concerning other treaties or customary international law (such as the law of naval warfare) in principle fall outside the scope of Article 288(1) of UNCLOS. However, disputes concerning the interpretation or application of other treaties may in exceptional cases be decided under Section 2 of Part XV if the relevant treaty so provides (Article 288(2) of UNCLOS).

Step 2: Even where Article 288(1) of UNCLOS provides for subject-matter jurisdiction, this subject-matter jurisdiction is automatically limited by Article 297 of UNCLOS. The limitations concern issues potentially relevant in the present context, namely coastal State measures

concerning marine scientific research activities of third States in the EEZ/continental shelf (Article 297(2) of UNCLOS) and coastal State fisheries measures (Article 297(3) of UNCLOS).

Step 3: Finally, even where a dispute falls within Article 288(1) of UNCLOS and is not subject to one of the limitations in Article 297 of UNCLOS, it may still be excluded from the scope of subject-matter jurisdiction if a State has excluded it by lodging a declaration on the basis of Article 298(1) of UNCLOS. The types of disputes that can be excluded are maritime delimitation disputes and disputes concerning historic bays or titles (Article 298(1)(a) of UNCLOS), disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, as well as disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(2)-(3) of UNCLOS (Article 298(1)(b) of UNCLOS). In addition, States can exclude disputes in respect to which the UN Security Council is exercising the functions assigned to it by the UN Charter (Article 298(1)(c) of UNCLOS).

Given the importance of the question of subject-matter jurisdiction, **it is of utmost importance to streamline legal narratives** released publicly and vis-à-vis the other perpetrating States in accordance with the narratives to be pursued in a potential litigation phase of the dispute. This is especially the case where maritime hybrid threat operations are concerned, as such operations often exploit legal grey zones and ambiguities – including the not always clearly defined line between maritime law enforcement operations and military operations. For example, where a coastal State conducts a hybrid military operation under the veil of a maritime law enforcement narrative, this might backfire when the same State tries to rely on its declaration under Article 298(1)(b) of UNCLOS to argue that an international court or tribunal established pursuant to Section 2 of Part XV of UNCLOS lacks jurisdiction over “military activities”.²⁶ Conversely, the injured State in such an operation might have to contradict itself if it chooses to classify a maritime hybrid threat operation by its opponent as a military activity, a use of force (Article 2(4) of the UN Charter) or a measure in an armed conflict subject to IHL.

²⁶ ITLOS, Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, Order, 25 May 2019, paras. 33–77.

4. Conclusions

The purpose of the previous chapters was to illustrate how public international law, and specifically the international law of the sea, can be harnessed as a tool for detrimental security measures at sea. **By juxtaposing the rights contained in the international maritime law, the malicious hybrid threat actor has the opportunity to create a confusing and challenging situation, in which the target may have the utmost difficulty, and the larger international community as well, in forming an accurate situational awareness and making the necessary decisions on proper counter responses in a timely fashion.** During the past few years, the world has already witnessed several such activities, highlighting how preparedness at all levels needs to be improved to meet, counter and recover from such situations.

At worst, malicious security measures at sea may lead to significant damage. A minor but deadly military measure, provoked or not, may trigger international armed conflict to enter into force, which would allow one State to apply such measures as confiscations, controls and even blockades. In a hybrid conflict, these kinds of measures would enable one State to put a stranglehold on the shipping and to

from another State. Particularly, if a third party implements IHL/naval warfare against an EU/NATO member leading to international armed conflict, this will put NATO collective defence Article 5 and the mutual defence clause Article 42(7) of the Treaty on European Union under a tough, concrete test.

When a hybrid conflict emerges at sea, it is recommended that mitigation and proactive multinational measures be launched at the earliest possible convenience. This may prevent controversial situations from escalating into serious conflict, or worse. There should be low tolerance for infringements and a low threshold for initiating consultations with EU/NATO/United Nations. A unified, multinational response and/or presence at an early stage is likely to lower the risk of facing more serious impacts. Here, attribution (technical and political) plays a key role in defining countermeasures and as a tool of deterrence. The search for solutions at a multilateral level and common ways to better identify vulnerabilities in the maritime domain should continue in order to make such vulnerabilities fewer and weaker and to increase the overall resilience of the operational environment.

Annex 1: Jurisdiction under Article 288 of UNCLOS concerning scenarios 1–15

| Scenario | Rights and obligations violated (depending on factual circumstances, no provision is listed if no violation was found in the analysis) | Jurisdiction (Article 288(1)) | Exclusion of Jurisdiction (Articles 297, 298) |
|----------|--|--------------------------------|--|
| 1 | – | – | – |
| 2 | Depending on location: Article 2(1) UNCLOS (coastal state) Article 17 UNCLOS (flag state) Article 87(1)(a) UNCLOS (flag state) Article 58(1) UNCLOS (flag state) Depending on facts: Article 2(4) UN Charter | Yes Yes Yes Yes No | Classification of measures as “military activities” under Article 298(1)(b) UNCLOS may be attempted (success unclear). |
| 3 | Article 2(4) UN Charter Articles 88, 301 and 58(2) UNCLOS (flag state) Article 58(1) UNCLOS (flag state) | No Yes Yes | (Article 298(1)(b) UNCLOS) Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS |
| 4 | Depending on location: Article 2(1) UNCLOS (coastal state) Article 17 UNCLOS (flag state) Article 87(2) UNCLOS (flag state) Article 58(3) UNCLOS (coastal state) | Yes Yes Yes Yes | Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS |
| 5(i) | sovereignty of the territorial state (Article 2(4) UN Charter) Depending on location: Article 2(1) UNCLOS (coastal state) Article 17 UNCLOS (flag state) Articles 56(1) and 77(1) UNCLOS (coastal state) | No No Yes Yes Yes | Classification of measures as “military activities” under Article 298(1)(b) UNCLOS may be attempted (success unclear). |
| 5(ii) | See Scenario 5(i). | | |
| 5(iii) | See Scenario 5(i). | | |
| 5(iv) | After international armed conflict ensues: Mainly potential breaches of law of naval warfare, not of UNCLOS | No | (Article 298(1)(b) UNCLOS) |
| 5(v) | See Scenario 5(iv). | | |

| Scenario | Rights and obligations violated (depending on factual circumstances, no provision is listed if no violation was found in the analysis) | Jurisdiction (Article 288(1)) | Exclusion of Jurisdiction (Articles 297, 298) |
|----------|---|---------------------------------------|--|
| 6A | Article 2(4) UN Charter Depending on location: Article 2(1) UNCLOS (coastal state) Article 17 UNCLOS (flag state) Article 58(1) UNCLOS (flag state) Article 58(3) UNCLOS (coastal state) | No Yes Yes Yes Yes Yes | (Article 298(1)(b) UNCLOS) Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS |
| 6B | Article 2(4) UN Charter Depending on location: Article 2(1) UNCLOS (coastal state) Article 17 UNCLOS (flag state) Article 58(1) UNCLOS (flag state) Article 58(3) UNCLOS (coastal state) | No Yes Yes Yes Yes Yes | (Article 298(1)(b) UNCLOS) Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS Article 298(1)(b) UNCLOS |
| 7A | Depending on location: Article 2(1) UNCLOS (coastal state) Article 17 UNCLOS (flag state) Article 58(1) UNCLOS (flag state) Article 58(3) UNCLOS (coastal state) | Yes Yes Yes Yes | Classification of measures as “military activities” under Article 298(1)(b) UNCLOS may be attempted (success unclear). |
| 7B | After international armed conflict ensues: Potential breaches of law of naval warfare, not of UNCLOS | No | (Article 298(1)(b) UNCLOS) |
| 7C | If blockade is imposed without justification: Navigational rights under UNCLOS Article 2(4) UN Charter Measures once blockade is established: Potential breaches of law of naval warfare, not of UNCLOS | Yes No No | Article 298(1)(b) UNCLOS (Article 298(1)(b) UNCLOS) (Article 298(1)(b) UNCLOS) |
| 8 | Article 74(3) UNCLOS (coastal state) Article 83(3) UNCLOS (coastal state) Article 56(1)(a) UNCLOS (coastal state) Article 58(1) UNCLOS (flag state) Articles 94 and 58(2) UNCLOS in conjunction with COLREGs (flag state) | Yes Yes Yes Yes Yes | Article 298(1)(a) UNCLOS Article 298(1)(a) UNCLOS No No No |
| 9 | Article 56(1)(a) UNCLOS (coastal state) Article 58(3) UNCLOS (coastal state) Articles 94 and 58(2) UNCLOS in conjunction with COLREGs (flag state) | Yes Yes Yes | No No No |
| 10A(i) | Article 17 UNCLOS (flag state) Article 24(1) UNCLOS (flag state) | Yes Yes | No No |

| Scenario | Rights and obligations violated (depending on factual circumstances, no provision is listed if no violation was found in the analysis) | Jurisdiction (Article 288(1)) | Exclusion of Jurisdiction (Articles 297, 298) |
|----------|--|-------------------------------|---|
| 10A(ii) | Article 58(1) UNCLOS (flag state) Articles 92(1) and 58(2) UNCLOS (flag state) | Yes Yes | No No |
| 10B(i) | Article 2(1) UNCLOS (coastal state) Article 17 UNCLOS (flag state) | Yes Yes | No No |
| 10B(ii) | Article 58(1) UNCLOS (flag state) Articles 92(1) and 58(2) UNCLOS (flag state) | Yes Yes | No No |
| 11 | – | – | – |
| 12 | – | – | – |
| 13 | Article 58(1) UNCLOS | Yes | Article 298(1)(b) UNCLOS |
| 14 | Article 74(3) UNCLOS | Yes | Article 298(1)(a) and (b) UNCLOS |
| 15 | – | – | – |

Annex 2: States that are not States Parties to UNCLOS

- Afghanistan
- Andorra
- Bhutan
- Burundi
- Cambodia
- Central African Republic
- Colombia
- El Salvador
- Eritrea
- Ethiopia
- Iran
- Israel
- Kazakhstan
- Kyrgyzstan
- Libya
- Liechtenstein
- North Korea
- Peru
- Rwanda
- San Marino
- South Sudan
- Syria
- Tajikistan
- Turkey
- Turkmenistan
- United Arab Emirates
- United States of America
- Uzbekistan
- Vatican City State/Holy See
- Venezuela

Annex 3: States that have lodged declarations under Article 298(1) of UNCLOS

| State | Military activities (lit. b) | Law enforcement activities in the EEZ (lit. b) | UN Security Council exercising its functions (lit. c) | Delimitation and historic bays or titles (lit. a) |
|----------------------------------|------------------------------|--|---|---|
| Algeria | X | X | X | X |
| Angola | | | | X |
| Argentina | | X | X | X |
| Australia | | | | X |
| Belarus | X | | X | X |
| Canada | X | X | X | X |
| Cabo Verde | X | X | | |
| Chile | X | X | X | X |
| China | X | X | X | X |
| Cuba | X | X | X | X |
| Democratic Republic of the Congo | | | | (X) |
| Denmark | X | X | X | X |
| Ecuador | X | X | X | X |
| Egypt | X | X | X | X |
| Equatorial Guinea | | | | X |
| France | X | X | X | X |
| Gabon | | | | X |
| Greece | X | X | X | X |
| Guinea-Bissau | X | X | X | X |
| Iceland | | | | (X) |
| Italy | | | | X |
| Kenya | | | | X |
| Malaysia | | | | X |

| State | Military activities (lit. b) | Law enforcement activities in the EEZ (lit. b) | UN Security Council exercising its functions (lit. c) | Delimitation and historic bays or titles (lit. a) |
|-----------------------|---------------------------------|--|---|---|
| Montenegro | | | | X |
| Nicaragua | (X) | (X) | (X) | (X) |
| Norway | (X) | (X) | (X) | (X) |
| Palau | | | | X |
| Portugal | X | X | X | X |
| Republic of Korea | X | X | X | X |
| Russian Federation | X | X | X | X |
| Saudi Arabia | X | X | | X |
| Singapore | | | | X |
| Slovenia | (X) | (X) | (X) | (X) |
| Spain | | | | X |
| Thailand | X | X | X | X |
| Togo | | | X | X |
| Tunisia | X | X | X | X |
| Ukraine | X | | | X |
| United Kingdom | X | X | X | |
| Uruguay | | X | | |

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