

A new cold war at sea:

fishing rights vs. the proliferation of military activities in the EEZ

1. From gunboat diplomacy to fishboat protest

On the 22nd of January 2022, when tension in Europe was rising at the Russo-Ukrainian border, the Irish government received a warning from the Russian military that it was planning military exercises, approximately 130 nautical miles [Nm] off its coast.¹ A small fleet of warships planned to partake in maneuvers involving the use of naval artillery and the launching of missiles.² While Irish Foreign Affairs Minister Simon Coveney considered these exercises unwelcome in a time of heightened tensions in Ukraine,³ the Irish Maritime Administration nevertheless issued a Notice to Mariners announcing the Russian maneuvers and warning civilian ships of the potential dangers when traversing the area.⁴

Calling these exercises unwelcome was however a severe understatement to the Irish fishermen, who claimed the Russian maneuvers threatened a crucial area for marine life and a very important fishing region (Image 1).⁵ In response, they planned to continuously send out a number of fishing vessels to the area, not to engage the Russian navy, but to serve as a form of peaceful protest through presence, actions the Russian embassy believed the Irish Government was to prevent,⁶ especially as the exercises would remain limited in scale.⁷ By the 29th of January however, the Russian navy relented and *"as a gesture of goodwill"* agreed to relocate its planned naval exercises so as *"not to hinder fishing activities by Irish vessels in the traditional fishing areas."*⁸

Regardless of whether the relocation was the result of fishermen protest or skillful diplomacy, this case once again raises the question of concurrent uses of the exclusive economic zone [EEZ]. While the matter was solved via diplomacy this time, with both sides believing they have a right to perform their stated activities in the EEZ, the risk of future disputes continues to exist and - as will be discussed in part 2 - has actually risen significantly over the past number of years. Thus, this article seeks to analyze the interaction between the coastal state right to exploit the EEZ's fisheries resources and the permissibility of military exercises there by another State to determine whether this Irish success can be translated into general international law. Structurally, this article shall first discuss some more examples of recent interactions between fishermen and warships in the EEZ, showing that the Irish case was not a per chance occasion (Part 2). Afterwards, the author will briefly share some thoughts on the potential reasons for this increase in tensions (Part 3) before moving to the legal framework regarding fisheries and military activities in the EEZ under the 1982 Law of the Sea Convention [LOSC]⁹ (Part 4). Finally, this article shall examine one of the most potent tools to reach a balance between the two abovementioned rights: the concept of due regard, utilizing a collection of recent jurisprudence (Part 5).

2. Far from an isolated incident

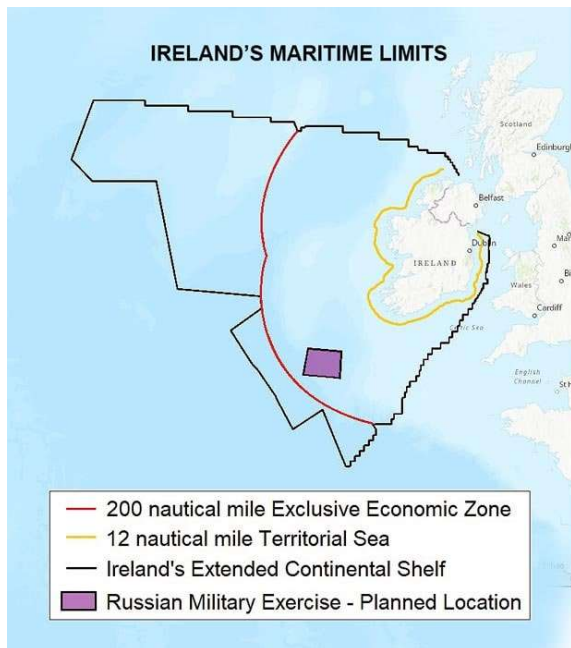
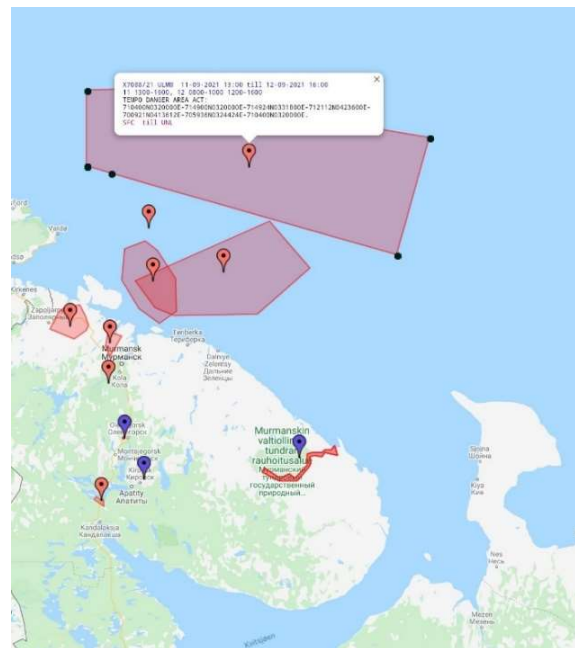


Image 1. Russian exercises in the Irish EEZ (2022)¹⁰



While their Norwegian colleagues are more used to the presence of Russian warships,¹² they too have recently started resisting interference. While in 2021, Norwegian fishermen grudgingly accepted a disruption of their fishing activities due to Russia's Zapad exercises (Image 2),¹³ the same was not true in August 2023. As Russia announced plans for exercises and missile tests in the strategic Bear Gap from 11 to 15 August (Image 3),¹⁴ Norway's fishermen forced the Russian Navy to relocate its exercises using the same tactic as their Irish colleagues, protest through presence.¹⁵



Europe is not the only continent where relations between fishermen and the military have turned sour as of late, however. In 2016, Taiwanese fishermen prevented the nation's Han Kuang military exercises from proceeding after the former sailed into the warning area to prevent the use of live-fire

ammunition and to avoid the destruction of marine habitats and the killing of fish stocks.¹⁷ In 2020, a small stand-off occurred between American fishermen and Russian warships in the Bering Sea. Unlike the Irish or Norwegian cases, where the fishermen received government backing, the US Coast Guard told the American fishermen to follow the Russian orders and leave the area.¹⁸ Finally, Filipino fishermen off the Zambales coast have looked upon the large-scale US exercises with mixed feelings. While many consider the US a necessary counterweight to China, the instigation of no-sail zones in peak fishing season was unwanted by Filipino fishermen,¹⁹ leading the Philippine government to provide compensation and assistance to affected fisherfolk.²⁰ Of course, all of these examples are often dwarfed in the news by the many stand-offs between the Chinese Navy and Maritime Militia on the one hand and Taiwanese, Filipino or Vietnamese fishermen on the other hand.²¹ Finally, and on a national level, the coastal towns of Alaska have for over a decade now been in a veritable cold war with the US Navy, which on a biennial basis uses some of the best fishing grounds for its 'Northern Edge' military exercises. In Cordova, where over half the people are dependent on salmon fishing, the City Council even passed a formal resolution opposing US naval exercises in 2015.²²

3. Si vis pacem, para bellum: rising uses, rising tensions ...

These few examples show that tensions between fishermen and navies are on the rise, yet they don't clearly reveal why. While this paper will spend little time on fishing rights or data, some key points might be briefly highlighted. First, while fishing has been a typically human activity since antiquity, it has only in the last century taken on the industrial proportions we know today, with wild fish catch increasing from 56.3 million tons in 1970 to 91.34 million tons in 2020. This last figure has remained relatively constant since the 1990s (image 4). Simultaneously, employment in the industry has remained stagnant over the past 10 years, and has even halved in Europe since its peak in 2000 (image 5), corresponding to increasingly healthy fish stocks in Europe. At least in Europe then, and without being able to present conclusive evidence, fishermen would seem to have little reason to raise tensions at first sight.²³

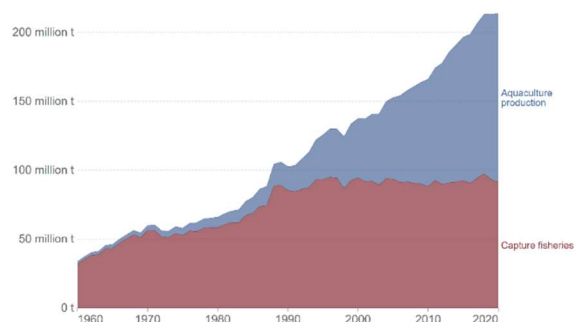


Image 4. Growth of capture fisheries and aquaculture production since 1990.²⁴

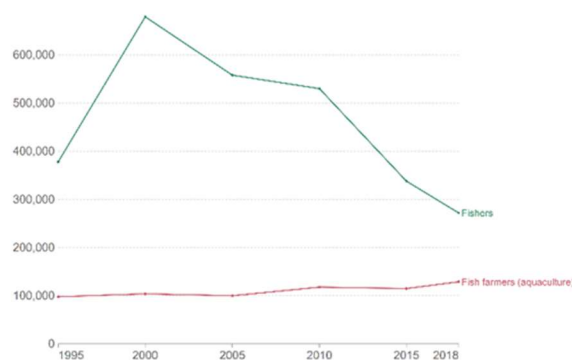


Image 5. Number of people employed in fisheries and aquaculture in Europe since 1995.²⁵

But what of the military activities at the other end of the spectrum? While the world's oceans have been used for military purposes for almost equally as long as they have been fished in,²⁶ one might at first have difficulty imagining what they precisely entail. Indeed, the concept itself has only very recently entered the legal arena. In the 2016 *South China Sea case*, the Tribunal labeled a stand-off as military in nature based on the sole presence of two state military or paramilitary forces.²⁷ In the 2020 *Kerch Strait Case*, the Tribunal followed a different approach and was of the opinion that the mere inclusion of military vessels or the alleged use of physical force could be an indication to speak of "military activities" rather than "law enforcement activities", but was by itself inconclusive.²⁸ Finally, in the 2022 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, the Tribunal

rejected a rigid “either-or” position and considered the “carrying out of military functions” as a necessary threshold.²⁹ All three cases thus fail to present a definition of the concept, and the author shall not attempt to remedy this at the present time. For the purpose of this article, it suffices to present a working definition of the more concrete concept of “military exercises”, namely “the employment of military resources in training operations and simulations involving the maneuvering of forces and the use of weapons, live-fire ammunition, missile launches or explosives.”³⁰

These military exercises help to display military might and are used to send subtle messages to adversaries and allies alike. As such, it is no wonder that in this age of increasing tension and multipolarity, naval exercises have once again increased in scope and intensity. Today, the famous US Freedom of Navigation program³¹ combines real-life training for the US Navy with the sending of diplomatic statements.³² Aside from the US, other famous (Western) exercises include the Malabar joint exercises held since 1992,³³ as well as the French “Mission Jeanne D’Arc”.³⁴ Recently however, non-western aligned states such as Russia and China have also increased their presence at sea and the two have since teamed up in the Indian Ocean for trilateral exercises and live-fire drills with South Africa³⁵ and Iran starting in 2019,³⁶ continuing up to this year.³⁷ With so many navies exercising at sea, it equally becomes clearer why the amount of incidents involving warships has been on the rise lately.³⁸ Just as this proliferation has led to close encounters between different navies however,³⁹ it is now also leading to protests from other users of the ever more crowded seas.

4. Fisheries and military activities in the current legal framework

While striving for a balance in the different activities taking place at sea is undoubtedly a noble idea, one must first consider the legality of the claimed activities within the EEZ, one of the most contentious evolutions following the Third UN Conference on the Law of the Sea [UNCLOS III].⁴⁰

4.1 The UNCLOS III negotiations leading to the EEZ and the fisheries regime

While customary international law historically recognized both the right to perform military exercises as well as the freedom to fish as lawful uses of the high seas,⁴¹ the latter were more expansive before the LOSC than they are today, suffering only the presence of a limited territorial sea, which could range from 3 up to 12 Nm.⁴² Changes to the liberty for all to fish began in the 1950s and 60s as States began proclaiming fishing zones, the precursors to the modern EEZ.⁴³ A first attempt at codifying this practice at UNCLOS II in 1960⁴⁴ even failed by just a single vote.⁴⁵

Developing States nevertheless continued seeking greater control over their natural off-shore resources, including fisheries, leading to – amongst others – the 1972 Yaoundé Conference⁴⁶ and the 1972 Declaration of Santo Domingo.⁴⁷ As these ideas to expand fisheries control took hold, so too did established maritime powers grow increasingly concerned⁴⁸ as to the threat these fisheries zones posed to their military freedom of navigation interests.⁴⁹ Eventually, following Arvid Pardo’s speech at the UN General Assembly on 17 August 1967 and the rising interest in the deep seabed,⁵⁰ the international community opened negotiations on the LOSC, taking the opposing views on fisheries and the freedom of navigation into UNCLOS III. Despite heavily differing views on military exercises,⁵¹ by the conference’s second session in 1974, the idea of a fisheries and resource zone was no longer controversial, with 100 out of 118 participants speaking out in favor. What was up for fierce debate, was the exact legal nature of the zone and whether to include it within the high seas or territorial sea.⁵²

It was the Chair's belief that for the construction to work, the zone would have to be neither.⁵³ In between the fourth and fifth sessions, the US admitted its key aim was to ensure that most of the not-incompatible high seas freedoms – thus excluding the freedom to fish – would continue to apply within the EEZ.⁵⁴ Eventually, the Castañeda Group succeeded in creating a comprehensive set of articles which both reinforced coastal state resource and fishing rights,⁵⁵ while mostly accepting the US view that most high seas freedoms would continue to apply within the EEZ.⁵⁶ Sadly for the reader however, no clear answer is available on the permissibility of foreign military exercises within the EEZ as any expansive discussion was kept off the record. Despite this, in 1984, former Conference president Tommy T. B. Koh believed that while the permissibility of military activities in the EEZ was not included literally, it was the general understanding of the text nonetheless.⁵⁷

This is not the case for the current fisheries regime however. Under art. 56 (1) (a) LOSC, within the EEZ, the coastal State has the "*sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living ...*".⁵⁸ Since over 90% of all commercially exploitable fish stocks are currently caught within 200 Nm from the baseline,⁵⁹ the EEZ is of great importance to fishermen. Defined as "*an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part ...*",⁶⁰ the EEZ is neither part of the territorial sea, nor of the high seas⁶¹ but should be considered a zone *sui generis*,⁶² one that has today become part of customary international law.⁶³ Furthermore, following arts. 61, 62 and 193 the coastal State's right to fish is intricately linked with the duty to protect the marine living resources in its EEZ.

4.2 On military activities, a house divided ...?

Due to the uncertainty prevalent in the LOSC, international lawyers might be inclined to consider international practice, jurisprudence or the writings of scholars to look for an answer on the permissibility of military exercises. Sadly for international lawyers, international practice is too scattered and divided to be of use, while creating an overview would require a volume of its own. International jurisprudence on the other hand offers little help as well. While cases like the 1949 *Corfu Channel* case⁶⁴ and the 1986 *Nicaragua* case⁶⁵ possess military components, these both relate to the territorial sea, not the exclusive economic zone. A similar story concerns the *Guyana v. Suriname* Arbitration⁶⁶ and the *Case(s) Concerning Three Ukrainian Naval Vessels*,⁶⁷ which all deal with the differentiation between law enforcement and military action.

While two cases do thread upon the question of competences within the EEZ, they offer different views, one supporting the coastal State, while the other supports the maritime user State. In the 1999 *Saiga* (No. 2) case, The Tribunal accepted the principle that a coastal State may be justified in extending the exercise of its jurisdiction in the EEZ beyond the specific provisions referred to in the LOSC as long as this would not be incompatible with Part V of the Convention.⁶⁸ In casu, the coastal State already possesses an exclusive right to regulate fisheries in its EEZ, while extending a right to fully regulate all military activities in the EEZ would seem to run counter to the freedom of navigation.

A second case that deals with state competences in the EEZ is the 2015 *Arctic Sunrise Arbitration* between the Netherlands and Russia in which the Arbitral Tribunal Recognized that "*Protest at sea is an internationally lawful use of the sea related to the freedom of navigation. The right to protest at sea is necessarily exercised in conjunction with the freedom of navigation.*"⁶⁹ Thus the Tribunal admitted that the freedom of navigation goes beyond the mere movement of vessels but also includes a number of unspecified corollaries, the freedom to perform military exercises could well be considered one such corollary. A corollary that is also recognized by a significant number of international authors.

Speaking of authors, It might come as no surprise that the majority of American authors support this corollary, following – a primarily textual and historical interpretation of the LOSC.⁷⁰ Kraska and Pedrozo represent the most pro-military view, awarding the maritime user State an absolute right to navigate and exercise in the EEZ.⁷¹ While authors like Doran,⁷² Rauch,⁷³ Francioni⁷⁴ and Ishii⁷⁵ might hold more nuanced views, they too see the Convention as not allowing the coastal State to limit traditional non-resource related high seas activities in the EEZ. On the other side of the spectrum authors like Ren Zaifeng, Cheng Xizhong,⁷⁶ Keyuan Zou,⁷⁷ and Hamzah⁷⁸ believe that in light of technological evolutions affecting military equipment, military activities are harmful to the peace, security and good order of coastal States and should be prohibited in the EEZ. A third category of scholars believes there is some merit to both positions. In this last category we find authors such as Galdorisi and Kaufman who emphasize that the practice of States at least seems to hint towards increasing disfavor upon the conduct of military activities in the EEZ.⁷⁹ Djalal from his side believes the era of the freedom of the seas of old has passed, as regulation in the EEZ continues to increase.⁸⁰ Finally, both Stuart Kaye and Natalie Klein believe the crux of the issue will turn around the *due regard* provisions in art. 56 (2) iuncto art. 58 (3) LOSC.⁸¹

In truth, this article could never treat this conundrum in sufficient depth and will not attempt to do so.⁸² For the remainder of this work, the author shall continue on from the hypothesis that exercises are a legal corollary of the freedom of navigation. As concerns the examples in paras. 1-5, none of the parties involved ever considered military exercises in the EEZ as illegal. In Ireland, the Irish Foreign Affairs Minister confirmed before Parliament that under international law, States had a right to perform military exercises in the EEZ.⁸³ A similar statement was made by the Norwegian Minister of Foreign Affairs; at least as long as they are “*carried out in a way that safeguards Norwegian rights under the Law of the Sea and international law in general.*”⁸⁴ Off course, as Kaye and Klein believed above, it’s not because there is a freedom to act, that this freedom is unlimited.

5. A trick from nature’s playbook ... it’s all about balance

Considering the above, the fishermen’s true problem wasn’t the exercises themselves but the military’s ignorance of the potential impact on the fishing grounds. The Irish fishermen contested the Russian exercises because of the very active fishing grounds chosen for the maneuvers,⁸⁵ as well as the dangers of military sonar and live missile launches on the fish’ migratory paths.⁸⁶ The Russians from their side believed there was no scientific data supporting this impact.⁸⁷ The same was true in Norway, where the fishermen took issue with Russia’s choice for the rich and unpolluted waters of the location,⁸⁸ and in the Philippines, where the fear was that the use of explosives might kill or drive away the fish from their – already overexploited – sites.⁸⁹ Such fears are nothing new however, and have led to a particularly interesting legal battle in the US.

5.1 The experiences of the US Navy and Natural Defense Council v. Winter

As already mentioned in para. 5, not everyone in the US agrees with its naval exercise programs. In Alaska, fishermen have become increasingly concerned with the possible pollution and sound effects on the local marine life as a result of the massive ‘Northern Edge’ exercises. As a result, the exercises led to large protests in 2015.⁹⁰ In 2016, Senator Lisa Murkowski of Alaska even wrote to the Secretary of the Navy asking the military to re-examine the exercises’ location and procedure.⁹¹ While this led the Navy to agree to a scaled-back version in 2017,⁹² It again reversed course in 2019 and again in 2022, increasing the size of its exercises to account for the rising strategic importance of the arctic.⁹³

This back and forth game between on the one hand fishermen and environmentalists and on the other hand, the US Navy has been ongoing for the past 20 years. Starting in the early 2000s, scientist began seeing the effect of large-scale sonar use during military exercises: mass strandings of marine mammals.⁹⁴ Following these stories and increasingly strict national regulation,⁹⁵ the Navy agreed to investigate the impacts of its sonar in 2006, though found that it only caused negligible damage.⁹⁶

Unsatisfied, environmental groups challenged Secretary of the Navy Donald D. Winter on the legality of planned naval exercises before the Court in 2007, leading to a back and forth game before numerous US Courts with the Navy being ordered to limit the use of its sonar.⁹⁷ The Ninth Circuit on the 15th of February 2008 specifically referred to the possibility of irreparable injury and a balance of hardships test to decide in favor of the conservationist groups.⁹⁸ Yet, the Ninth Circuit was overruled by the Supreme Court, which finally sided with the Navy and which believed that any risk of irreparable injury was outweighed by public interests.⁹⁹ Despite the difference of opinion however, the Supreme court still turned to a balancing exercise, comparing the interests of the Navy with those of the marine mammals. It placed special emphasis on the importance of “seamless-coordination” between the different units of a Navy strike-group in anti-submarine warfare and took into account the mission-critical nature of the sonar as well as the fact that according to the Navy realistic training could not be accomplished under the restrictions of the District Court.¹⁰⁰

As the stories from Alaska show however (paras. 5 and 20), protest did not abate and indeed in the following years, cases before a plethora of courts continued among others in California¹⁰¹ and Hawaii.¹⁰² In response, the Navy finally agreed on a new instrument to guide its future exercises.¹⁰³ This new instrument arrived in 2018, fulfilling its duty to supply an impact assessment,¹⁰⁴ albeit one that still foresaw the potential death or injury of an approximate 12,5 million marine mammals over the next five years ...¹⁰⁵ While one must of course consider that this overview of American case law concerned the opposite interests of two actors under national law and was heavily influenced by national policies, the arguments presented therein are in many ways similar to those presented under international law in the cases discussed in paras. 1 to 5. Furthermore, the reasoning of the American Courts bears a striking resemblance to the international jurisprudence dealing with the “due regard” concept.

5.2 The duty of due regard

Already described as the lubricant within the Law of the Sea Convention, the principle of due regard is meant to balance the rights and interests of States in the use of the seas¹⁰⁶ and to ensure a harmonious reading of the Convention.¹⁰⁷ This duty – one of “the great organizing principles of the law of the sea¹⁰⁸ – is written down in arts. 56 (2) and 58 (3) LOSC, but also in art. 87 (2) LOSC.

Importantly, this does not mean that the performance of one activity automatically prevents another. During the drafting of the 1958 High Seas Convention, the ILC proposed adding a provision that “*States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States.*”¹⁰⁹ During UNCLOS I however, the American representative rightly added that any use of the seas automatically impacts other users of the seas, by not allowing them the use of that particular part of the seas. This led to a British proposal during the Conference that eventually ended up in art. 2 of the High Seas Convention: “*These freedoms ... shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.*”¹¹⁰ During UNCLOS III, this same provision was adapted and incorporated into the LOSC, albeit as the duty of “due regard” rather than “reasonable regard”, however – as will be confirmed in para. 28 – without intention to change the actual meaning of the principle.¹¹¹

5.2.1 More than a mere consideration?

It is clear the duty of due regard was meant to ensure the most conciliatory use of the oceans possible. How to bring this principle in practice is another matter entirely. For scholars like Oxman¹¹² and Myron, the “due regard” principle entails primarily a duty to show restraint.¹¹³ For Scovazzi¹¹⁴ and Forteau it is a balancing exercise, taking into account a right’s importance whilst avoiding strict hierarchies.¹¹⁵ Finally, Kraska believes due regard consists of both an awareness of and consideration of another state’s interests and a weighting of those interests or sources of authority.¹¹⁶ Merely following Kraska’s two elements however would only offer part of the story for as to make the principle work at least some basic procedural elements seem required. Indeed, both Forteau¹¹⁷ and Scovazzi believe some form of consultation might be required to show the principle was given due attention.¹¹⁸ This goes too far for most American authors who consider the due regard obligation as merely a procedural consideration of observance¹¹⁹ to be enforced by the flag State alone.¹²⁰

5.2.2 International jurisprudence to the rescue?

While international doctrine has yet to reach a unified view on the concept of due regard, an evolution is noticeable in international jurisprudence. In what follows, the author shall offer an overview of the case-law that has shaped the due regard principle to this day, specifically the 1974 Fisheries Jurisdiction case,¹²¹ the 2012 Bay of Bengal Case,¹²² the 2015 Chagos Marine Protected Area Case,¹²³ the 2015 Arctic Sunrise Case,¹²⁴ the 2016 South China Sea Case¹²⁵ and finally the 2020 Enrica Lexie Case.¹²⁶

5.2.2.1 The 1974 Fisheries Jurisdiction Case

The Fisheries Jurisdiction case between the UK and Iceland precedes the 1982 LOSC, yet should be included here because it serves as the bridge between the “reasonable regard concept” in art. 2 of the 1958 High Seas Convention and the “due regard” concept in arts. 56 (2) and 58 (3) LOSC. Perhaps somewhat fittingly, in this case, the UK contested the legality of the preferential fishing rights Iceland claimed off its coast following the proclamation of its Fisheries Zone. In Confirming Iceland’s preferential fishing rights, though denying the opposability to the UK of its Fisheries Zone, the Court confirmed “due regard” and “reasonable regard” could be considered synonymous.¹²⁷

Building on the concept of reasonable or due regard, the Court believed it was impossible for one State to ignore the other in the exercise of their freedoms on the – at the time – high seas. For the first time, the concepts of preferential rights, due/reasonable regard and consultations/negotiations became intertwined as the Court clarified that:

*“[...] both states have **an obligation to take full account of each other’s rights** and of any fishery conservation measures the necessity of which is shown to exist in those waters [...] The most appropriate method for the solution of the dispute is clearly that of negotiation [...] The **obligation to negotiate thus flows from the very nature of the respective rights of the Parties.**”¹²⁸ (own markings)*

5.2.2.3 The 2012 Bay of Bengal Arbitral Award

The second case concerned the delimitation of the Bay of Bengal between Bangladesh and Myanmar. Because of the unique nature of the Bay, a situation was created in which the continental shelf of Bangladesh and the EEZ of Myanmar overlapped. Here the Tribunal turned to the principle of due regard for the parties to find a way out of this conundrum and clarified that:

*"476. There are many ways in which the Parties may ensure the discharge of their obligations in this respect, including the conclusion of specific agreements or the establishment of appropriate cooperative arrangements. It is for the Parties to determine the measures that they consider appropriate for this purpose."*¹²⁹ (own markings)

Beyond repeating the preference for cooperation as was already stated by the ICJ in the 1974 Fisheries Jurisdiction case, the Tribunal emphasized that it is in the first place up to the parties themselves to decide upon the best way to fulfill their duty of showing due regard.

5.2.2.4 The 2015 Chagos Marine Protected Area Case

Potentially, the most important case on the duty to show due regard, is the 2015 Chagos Marine Protected Area Arbitration. In this case, the Arbitral Tribunal had to adjudge on the legality of a marine protected area around the Chagos Archipelago, a small group of islands located approximately in the middle of the Indian Ocean, claimed by Mauritius, owned by the UK and possessing an Air Force Base leased to the USA. The Arbitral Tribunal refused to accept the UK's view that the obligation to show due regard merely meant "taking account" or "giving consideration" to the rights of Mauritius.¹³⁰ Instead, the Arbitral Tribunal considered that the UK had violated art. 56 (2) LOSC and its duty to show due regard for the rights of Mauritius:

"519. In the Tribunal's view, the ordinary meaning of "due regard" calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights [...], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State. [...]"

534. [...] With respect to consultations, the Tribunal does not accept that the United Kingdom has fulfilled the basic purpose of consulting, given the lack of information actually provided to Mauritius and the absence of a reasoned exchange between the Parties [...]"

The Arbitral Tribunal thus concluded that there is no universal rule for how to show due regard, but that this will be dependent on the nature and importance of the rights in the dispute as well as the anticipated impairment and available alternatives. In practice, this will almost always involve, timely consultations among the parties involving the proper sharing of information.¹³¹

5.2.2.5 The 2015 Arctic Sunrise Arbitration

A fourth case to be considered is the 2015 Arctic Sunrise Arbitration between the Netherlands and Russia, the latter having apprehended a Dutch-flagged Greenpeace vessel – the Arctic Sunrise – following protest in the Barents Sea. In this case, the Arbitral Tribunal added further guidelines on how to determine whether sufficient due regard was shown. Specifically, the Tribunal added that a coastal State had the right to take measures to prevent interference with its sovereign rights for the exploration and exploitation in the EEZ,¹³² but that such measures had to fulfill tests of reasonableness, necessity and proportionality¹³³ and that the coastal State should at least tolerate some level of nuisance, in this case through civilian protest.¹³⁴ In the current case of fishermen vs. warships, while this would entail a coastal State could take measures to protect its fishing rights, it should accept at least some level of nuisance from the warships exercising their right to perform military exercises. That being said, one might just as easily turn this reasoning around, and force warships to accept some nuisance from the local fishermen.

5.2.2.6 The 2016 South China Sea Case

In 2016, the South China Sea case added a number of further elements to the duty to show due regard. In this famous case, the primary questions related to the nature of a number of formations in the South China Sea, but also to the actions of Chinese fishermen and naval vessels in Filipino claimed waters. In casu, the Tribunal explicitly linked the due diligence obligation of a State to prevent its fishermen from conducting in IUU fishing to the fulfillment of its duty to show due regard to the rights of the coastal State.¹³⁵ Second, and in the context of this paper even more important, the Tribunal seems to have awarded the coastal State's fishing rights a place of elevated importance within the EEZ, a consideration which could impact the balancing exercise based on the elements mentioned in the Chagos Case as mentioned in para. 31 above:

*"744. [...] Given the importance of fisheries to the entire concept of the exclusive economic zone, the degree to which the Convention subordinates fishing within the exclusive economic zone to the control of the coastal State ... the Tribunal considers that anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention."*¹³⁶

5.2.2.7 The 2020 Enrica Lexie Case

A final case that should be discussed within the confines of this article, is the 2020 Enrica Lexie Case, dealing with the Indian jurisdiction over two Italian mariners accused of shooting two Indian fishermen on suspicions of piracy in the Indian EEZ. As part of the claims, both States accused each other of having violated the duty to show due regard to the rights of the other State. More specifically, in regards to its fishing rights, India posited that *"any interference by one state with the ability of fishing vessels of another state to exploit the fishing resources of that state's EEZ violates sovereign rights and the fundamental object and purpose of Article 56 (1) (a)."*¹³⁷ The Tribunal did not agree with India however, as it believed that the actions of the Italian Marines

*"were not directed at undermining or interfering with India's sovereign rights under Article 56 of the Convention. The Arbitral Tribunal notes, in particular, that the conduct of the Marines in the present case occurred in the context of a singular and isolated incident [...] Such circumstances do not rise to the level of interference with 'sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources' of [EEZ]."*¹³⁸

This conclusion builds on the Arctic Sunrise case, where the Tribunal maintained that some level of nuisance would have to be tolerated. It can be posited that truly singular and isolated incidents would not cross the threshold of going beyond such "nuisances".¹³⁹ That is the case at least in relation to arts. 56 (2) and 58 (3) LOSC, for despite the Tribunal's conclusion in this first matter, it did agree that the actions of the Italian Marines had violated India's right to the freedom of navigation.¹⁴⁰

6. Conclusion: how to reconcile fishermen & warships?

Following the Irish protests, Prof. Raul Pedrozo – unlike other academics¹⁴¹ – believed the fishermen presented false arguments, opened the door to more aggressive disruptive actors, and that Russia's acceptance to relocate the exercises created a dangerous precedent for coastal States to block military exercises by foreign States in their EEZ.¹⁴² Taking all the above into account, and returning to the Irish and Norwegian cases in particular: are these dangerous precedents as prof. Pedrozo believes or are they simply the principle of due regard at work as it was always meant to be and maybe even a model to follow? Perhaps now is the time to give a typically legalese answer: it depends.

On the one hand, there are the rich fishing grounds within the Irish and Norwegian EEZs, both of great importance to local fishermen communities, both of which have seen better days economically. Their coastal States possess the exclusive right to exploit the living resources within these zones, excluding other States under art. 56 (1) LOSC and under arts. 61, 62 and 193 LOSC are under a duty to protect and preserve the marine living resources during this exploitation. Furthermore, unlike the effects of sonar on marine mammals,¹⁴³ the effects on ocean fish species are far less clear, with a 2008 study commissioned by the US Navy leading to a number of contradicting results at best.¹⁴⁴

This corresponds to the largest problem in question: the known unknowns. Either the use of sound waves, or the impact of chemical changes, or the explosive shocks of weapons testing, the effect on fish stocks is unknown.¹⁴⁵ Here, the evolutive character of the due regard principle should come into effect. While in the past, warning areas were seen as a sufficient way of showing due regard to the rights of other States¹⁴⁶ – and in some cases, this might certainly still be enough – this will no longer suffice within rich fishing grounds. For example, in the 1940s, the US would conduct nuclear weapons tests on atolls in the Pacific Ocean, around which warning zones would cover large swathes of the ocean. At the time, it was the interference with the freedom of navigation that was most contested.¹⁴⁷ Today, a plethora of considerations would come into play, from fishing rights to conservation.¹⁴⁸

That is not to say that the duty to show due regard would make military exercises impossible at every single fishing ground. As stated in the Arctic Sunrise Case, some level of nuisance should be accepted and indeed this nuisance can come in the form of military exercises permitted as a corollary under the freedom of navigation. The *Enrica Lexie* Case has further clarified that a warship making only a single passing in formation, or merely launching a number of aircraft (singular incidents) would not be violating a coastal State's rights in the EEZ or overstep its due regard duty. Furthermore, as stated in the Chagos Marine Protected Area Case, the circumstances, the anticipated impairment and the possible alternatives should be taken into account. Richer fishing grounds would as such be less inclined to serve as military training grounds than poorer ones or ones on whom less fishermen are dependent. As the Tribunal has stated in the South China Sea case, the right to fish is one of the primary reasons for the existence of the EEZ and should be awarded a particular level of importance in making this balancing exercise. On the other hand, exercises that can take place anywhere at sea have sufficient alternative locations and should thus not happen in rich fishing grounds if possible.

Returning to the US marine mammals saga, the author very much supports the Supreme Court's statement that the public interest should be the one on the long end of the stick and that a balance of interests should be made. However, the author does not support the view that it will always be the military that comes out on top. As the Arbitral Tribunal Stated in Chagos, and as was already suggested by the Courts in the Fisheries Jurisdiction Case and the Bay of Bengal Arbitral Award, at least some form of information sharing or consultation between the parties will be necessary to determine the best way to show due regard to each other's rights, with the former sufficing in case of smaller singular incidents and the latter being preferred in case of large-scale exercises involving weapons tests. In casu, the Irish and Norwegian fishermen both have the benefit of their rich fishing grounds, and of the importance awarded to the coastal State's right to exploit and regulate the exploitation of fishing in its EEZ. The Russian Navy has the disadvantage that its exercises could have happened anywhere without impairment to its training (as the location chosen was the result of mere political decisions) and that – returning to the earlier mentioned definition – its exercises included weapons tests and explosions, seriously impacting the coastal State's right to fish in the EEZ. If the Russian Navy wants to not be on the short end of the stick next time, it should brush up on how to show due regard to the coastal State's rights ... and maybe plan the exercises out of the fishing season.

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- ² Daniel McConnell & Elaine Loughlin, 'Russian naval exercises "a significant worry" to Ireland as warships approach', *The Irish Examiner*, 27 January 2022, last consulted on 23/08/2023 via <https://www.irishexaminer.com/news/arid-40794201.html>
- ³ Soraya Ebrahimi, 'Russian military exercises off Irish coast "not welcome"', *The National News*, 25 January 2022, last consulted on 25/08/2023 via <https://www.thenationalnews.com/world/2022/01/25/russian-military-exercises-off-irish-coast-not-welcome/>.
- ⁴ Irish Maritime Administration, 'Marine Notice No. 06 of 2022', *Irish Department of Transport*, 26 January 2022.
- ⁵ Louis Westendarp, 'Irish fishermen plan to disrupt Russian navy exercises', *Politico Europe*, 25 January 2022, last consulted on 24/08/2023 via <https://www.politico.eu/article/irish-fishermen-plan-disrupt-russia-navy-exercise/>.
- ⁶ X, 'Fishermen plan to disrupt Russian military exercise', *RTE News*, 25 January 2022, last consulted on 24/08/2023 via <https://www.rte.ie/news/ireland/2022/0125/1275728-ireland-fishing-russia/>.
- ⁷ Simon Carswell, 'Russian naval exercise "no threat" to Ireland – ambassador', *The Irish Times*, 24 January 2022, last consulted on 24/08/2023 via <https://www.irishtimes.com/news/ireland/irish-news/russian-naval-exercise-no-threat-to-ireland-ambassador-1.4784811>.
- ⁸ *Statement by Ambassador Yuriy Filatov – Ambassador of Russia to Ireland*, Embassy of the Russian Federation in Ireland, 29 January 2022; see also Russian naval drills to be relocated outside Irish exclusive economic zone – embassy, *TASS*, 29 January 2022, last consulted on 21/08/2023 via <https://tass.com/politics/1394959>.
- ⁹ United Nations Convention on the Law of the Sea, 10 December 1982 Montego Bay, entered into force on 16 November 1994, UNTS vol. 1833, 3.
- ¹⁰ Lieutenant Commander Shane Mulcahy, 'The Law about military exercises in Irish waters', *Law Society Gazette Ireland*, 5 April 2022, last consulted on 23/08/2023 via <https://www.lawsociety.ie/gazette/in-depth/military-exercises-in-irelands-eez>.
- ¹¹ *Notice to Mariners*, 7 September 2021, last consulted on 21/08/2023 via https://twitter.com/The_Lookout_N/status/1435173983855460355/photo/2.
- ¹² Jenny Hjul, 'Fishermen angered by Russian naval exercises', *Fish Farmer*, 19 October 2016, last consulted on 21/08/2023 via <https://www.fishfarmermagazine.com/news/fishermen-angered-by-russian-naval-exercises/>
- ¹³ Thomas Nilsen, 'Fishermen troubled by escalating Russian war games', *The Barents Observer*, 9 September 2021, last consulted on 22/08/2023 via <https://thebarentsobserver.com/en/security/2021/09/fishermen-troubled-escalating-russian-war-games>.
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- ¹⁶ Supra note 14, Thomas Nilsen.
- ¹⁷ Liu Yu-Ching, 'Penghu fishermen sail into danger to block offshore military live-fire event', *Taipei Times*, 12 September 2014, last consulted on 22/08/2023 via <https://www.taipeitimes.com/News/taiwan/archives/2014/09/12/2003599566>
- ¹⁸ Kyle Mizokami, 'Not Cool: Russian Warships Harassed American Fishermen Near Alaska', *Popular Mechanics*, 16 November 2020, last consulted on 23/08/2023 via <https://www.popularmechanics.com/military/weapons/a34673427/russian-warships-harass-american-fishermen-near-alaska/>; see also The Associated Press, 'Coast Guard did not warn US fishermen about Russia military exercises', *Navy Times*, 13 December 2020, last consulted on 23/08/2023 via <https://www.navytimes.com/news/your-navy/2020/12/13/coast-guard-did-not-warn-us-fishermen-about-russia-military-exercises/>.
- ¹⁹ Mark Saludes, 'In Philippines, joint military drills leave locals torn on US presence', *The Christian Science Monitor*, 28 April 2023, last consulted on 21/08/2023 via <https://www.csmonitor.com/World/Asia-Pacific/2023/0428/In-Philippines-joint-military-drills-leave-locals-torn-on-US-presence>.
- ²⁰ 'AFP to provide aid to Zambales fishers affected by "Balikatan"', *ABS-CBN News*, 12 April 2023, last consulted on 22/08/2023 via <https://news.abs-cbn.com/news/04/12/23/afp-to-give-aid-to-fishers-affected-by-balikatan>
- ²¹ The author is cautious not to refer to too many examples from the South and East China Seas. Not only would this risk drawing away the attention from stand-offs from other parts of the globe, the other mentioned

examples also benefit from a reduced debate in regards to questions of sovereignty, the nature of the Chinese Maritime Militia, the actions of Chinese fishermen vis-à-vis the fishermen of other nations, etc. Some examples of stand-offs can be found *here* Ashish Dangwal, 'Dramatic Video Shows Chinese Coast Guard Corvette Firing Water Cannon To Warn Vietnamese Fishing Boat', *The Eurasian Times*, 17 January 2023, last consulted on 22/01/2024 via <https://www.eurasiantimes.com/dramatic-video-shows-chinese-coast-guard-056-corvette/>; *here* Agence France-Presse, 'Vietnam fisherman recounts attacks by China coast guard in South China Sea', *South China Morning Post*, 14 October 2022, last consulted on 22/01/2024 via <https://www.scmp.com/news/asia/southeast-asia/article/3196026/vietnam-fisherman-recounts-attacks-china-coast-guard-south>; *here* Shirin Bhandari, 'Philippine fishermen netted by South China Sea geopolitics over Scarborough Shoal: 'we're always being harassed'', *South China Morning Post*, 7 October 2023, last consulted on 22/01/2024 via <https://www.scmp.com/week-asia/politics/article/3237108/philippine-fishermen-netted-south-china-sea-geopolitics-over-scarborough-shoal-were-always-being>; *here* Ankit Panda, 'Taiwan Coast Guard Reports Chinese Speed Boat Harassment Near Kinmen', *The Diplomat*, 23 March 2020, last consulted on 22/01/2023 via <https://thediplomat.com/2020/03/taiwan-coast-guard-reports-chinese-speed-boat-harassment-near-kinmen/>.

²² *A Resolution of the City Council of the City of Cordova, Alaska to oppose Navy Training Exercises in the Gulf of Alaska in June 2015*, 25 June 2015; The story of Cordova will be treated in more depth in part 5.1.

²³ Hanna Ritchie & Max Roser, 'Fish and Overfishing', *Our World in Data*, October 2021, <https://ourworldindata.org/fish-and-overfishing>.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ken Booth, *Navies and Foreign Policy*, Routledge Revivals, Milton Park/New York, 2014, 26.

²⁷ *South China Sea Arbitration* (The Republic of the Philippines v. The People's Republic of China), Arbitral Award of the Permanent Court of Arbitration of 12 July 2016, P.C.A. Case No. 2013-19, paras. 1158-1161.

²⁸ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. The Russian Federation), Arbitral Award of the Permanent Court of Arbitration of 21 February 2020, P.C.A. Case No. 2017-06, paras. 331-336.

²⁹ *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine vs. Russian Federation), Arbitral Award of the Permanent Court of Arbitration of 27 June 2022, P.C.A. Case No. 2019-28, paras. 107-121; *See also Case Concerning the Detention of Three Ukrainian Naval Vessels* (Ukraine v. Russian Federation), Order for the prescription of provisional measures of the International Tribunal for the Law of the Sea of 25 May 2019, ITLOS Case No. 26, paras. 64-75.

³⁰ The given definition was written by the current author for the purpose of this article and should under no circumstances be understood as an attempt at positing a general definition. However, a number of elements are of importance, specifically the maneuvering of forces and the use of live-fire ammunition, weapons and/or explosives. The choice for the inclusion of these elements was taken based upon the Declarations made by a number of States upon signature or ratification of the 1982 LOSC regarding the permissibility of military activities in the EEZ. Reference can be made to the Declarations of Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, Thailand and Uruguay, *see supra* note 9, United Nations Convention on the Law of the Sea, UNTS via https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

³¹ *Memorandum from Lincoln P. Bloomsfield, National Security Council Staff to Zbigniew Brzezinski, US National Security Advisor*, 31 July 1979.

³² E.g. '7th Fleet Cruiser Conducts Freedom of Navigation Operation in South China Sea', *US Navy Press Office*, 28 November 2022, last consulted on 21/08/2023 via <https://www.navy.mil/Press-Office/News-Stories/Article/3229970/7th-fleet-cruiser-conducts-freedom-of-navigation-operation-in-south-china-sea/>.

³³ Including the US, India, Japan and Australia, *see* Vice Admiral MP Muralidharan, 'Significance of Joint Maritime Exercises', *Indian Defence Review*, Vol 37 (4), 2022, last consulted on 20/08/2023 via <http://www.indiandefencereview.com/news/significance-of-joint-maritime-exercises/>.

³⁴ Xavier Vavasseur, 'French Mission Jeanne D'Arc 2023 to Sail Across Indo-Pacific', *Naval News*, 3 February 2023, last consulted on 30/08/2023 via <https://www.navalnews.com/naval-news/2023/02/french-mission-jeanne-darc-2023-to-sail-across-indo-pacific/>.

³⁵ Oriana Skylar Mastro, 'Russia and China Team Up in the Indian Ocean', *The Maritime Executive*, 20 December 2020, last consulted 20/08/2023 via <https://maritime-executive.com/editorials/russia-and-china-team-up-in-the-indian-ocean>.

³⁶ X, 'China, Russia, Iran hold joint naval drills in Gulf of Oman', *Associated Press News*, 15 March 2023, last consulted on 20/08/2023 via <https://apnews.com/article/china-russia-iran-naval-drills-oman-gulf-gf515b3246e4cbe0d98a35e8399dc177>.

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³⁸ See also, Cameron Moore, *Freedom of Navigation and the Law of the Sea: Warships, States and the Use of Force*, 2021, Routledge, 2.

³⁹ R. Pedrozo, 'Close Encounters at Sea: the USNS Impeccable Incident', *Naval War College Review*, vol. 62, 2009, 101, cited in Jing Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone and under UNCLOS', *Merkourios* 2012, vol. 28, Issue 74, 23.

⁴⁰ Tommy T. B. Koh, Remarks on the Legal Status of the Exclusive Economic Zone in Myron H Nordquist, Tommy T.B. Koh, John Norton Moore (eds.), *Freedom of the Seas, Passage Rights and the 1982 Law of the Sea Convention*, 2009, Martinus Nijhoff Publishers, Leiden – Boston, p. 54-55.

⁴¹ George V. Galdorisi & Alan G. Kaufman, "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict," *California Western International Law Journal* 32, no. 2 (Spring 2002), 272; see in this regard also the respective provisions art. 87 iuncto art. 90 LOSC on the freedom of navigation.

⁴² A number of different limits existed with the 3 nm limit being particularly preferred by the Anglo-Saxon nations, while Scandinavian nations for example utilized a 4 or 6 nm limit, see Sarah Wolf, Territorial Sea, Max Planck Encyclopedia of Public International Law, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1229>

⁴³ See e.g. discussion within the *Memorial on the Merits submitted by the Government of the United Kingdom of Great Britain and Northern Ireland in the Fisheries Jurisdiction case*, 31 July 1973, Vol. 1, p. 353, para. 245.

⁴⁴ General Assembly Resolution 1307 (XIII), Second UN Conference on the Law of the Sea.

⁴⁵ A Canadian-American proposal of a 6 Nm territorial sea and a 6 Nm fishery zone failed to reach a 2/3 majority by just one vote, Canada and United States of America: proposal, 22 April 1960, Doc. A/Conf.19/L.11.

⁴⁶ UN Doc. A/AC.138/79, Conclusion of the General Report of African States Regional Seminar on the Law of the Sea, June 20-30, 1972, Jul. 21, 1972, A/8721 at 73-76.

⁴⁷ Declaration of Santo Domingo, UN Doc. A/AC.138/80, June 7, 1972.

⁴⁸ 'Soviet Frustrations in the Law of the Sea Conference', *CIA Intelligence Memorandum*, 2; See also e.g. UN Documents, A/C.1/PV1524, 15 November 1967, [20] (UK); UN Documents, A/C.1/PV1526, 13 November 1967, [31], [36] (France) as well as UN Documents, A/C.1/PV1525, 10 November 1967, [28] (USSR); see also Pierre Thévenin, 'A Liberal Maritime Power as Any Other? The Soviet Union during the Negotiations of the Law of the Sea Convention', *Ocean Development and International Law*, 2021, vol. 52 nr. 2, 201.

⁴⁹ Letter dated 15 August 1970 from the representatives of Bulgaria, Hungary, Syria and the Union of Soviet Socialist Republics to the United Nations addressed to the Secretary-General, A/8047, 10 September 1970 (XXV session), especially [1], [2]; see also Alan Beesley, 'The Negotiations of UNCLOS III: Developing and Developed Countries as Partners – A Pattern for Future Multilateral International Conferences?', *Law and Contemporary Problems*, 1983, spring vol., 187-188.

⁵⁰ Note Verbale of 17 August 1967 from Malta to UN Secretary-General, A/6695, 18 August 1967; see also UNGA Resolution 2340 (XXII) of 18 December 1967 on the establishment of an Ad Hoc Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.

⁵¹ E.g. from the US which refused any discussion on the subject, see Stuart P. French, director, Law of the Sea Task Force, 'Memorandum for Colonel Frank J. Murray', USMC, Maritime/UN Negotiations Division, J-5, Nov. 18, 1976 (US Naval War College Archive) referred to in James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*, Oxford University Press, 2011, New York, 139; see also UN Doc. A/CONF.62/SR.57-10.

⁵² George V. Galdorisi; Alan G. Kaufman, "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict," *California Western International Law Journal* 32, no. 2 (Spring 2002), 266; see also the Latin American and African proposal on a 200 Nm customs zone, see UN Doc. A/CONF.62/C.2/L78, (23 August 1974) & UN Doc. A/CONF.62/C.2/L.82 (26 August 1974); see also the insistence of the US and USSR for the zone to continue to enjoy high seas status and associated freedoms, Stuart P. French, director, Law of the Sea Task Force, Memorandum for Colonel Frank J. Murray, USMC, Maritime/UN Negotiations Division, J-5, Nov. 18, 1976 (US Naval War College Archive); 'Soviet Frustrations in the Law of the Sea Conference', *CIA Intelligence Memorandum*, 2.

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- ⁵³ A/CONF.62/WP.8/Rev.1/Part II RSNT 1973, Introductory Note, paras. 14-18.
- ⁵⁴ United States, 1976, art. 75 RSNT II, IV Platzöder 357.
- ⁵⁵ A/CONF.62/WP.10/Add.1 (1977), "Part II of the RSNT", first para., VIII Off. Rec. 65.
- ⁵⁶ Supra note 70, "Part V: Exclusive Economic Zone" in Myron H. Nordquist, 1985, 563.
- ⁵⁷ Jon M. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention*, The Law of the Sea Institute, University of Hawaii, Honolulu, 1985, 304-304.
- ⁵⁸ See also art. 61 onwards LOSC for further provisions on the right to fish in the EEZ.
- ⁵⁹ Yoshifumi Tanaka, *The International Law of the Sea*, Third Edition, Cambridge University Press, Cambridge, 2019, 285.
- ⁶⁰ Art. 55 LOSC.
- ⁶¹ See art. 86 LOSC on the Application of the regime of the High Seas: "*The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, ...*".
- ⁶² Keyuan Zou, 'Peaceful Use of the Sea and Military Intelligence Gathering in the EEZ', *Asian Yearbook of International Law*, Volume 22 (2016), 161; see also supra note 59, Tanaka, 151-152 who clarifies: "Unlike on the high seas, the freedoms of the seas may be qualified by coastal state jurisdiction in the EEZ. For instance, overflight in the EEZ for the purpose of exploration and exploitation is subject to the permission of the coastal State. The freedoms enjoyed by foreign States in the EEZ are not exactly the same as those enjoyed on the high seas."
- ⁶³ *Libya v. Malta Continental Shelf case*, ICJ Reports 1985, p. 33.
- ⁶⁴ *Corfu Channel Case* (Albania v. United Kingdom), Judgment on the Merits of the ICJ of 9 April 1949, ICJ Reports 1949, p. 4, p. 28-31.
- ⁶⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment on the Merits of the ICJ of 27 June 1986, ICJ Reports 1986, p. 14, paras. 212-215 & 253.
- ⁶⁶ *Guyana v. Suriname*, Award of the Annex VII Arbitral Tribunal of 17 September 2007, No. 2004-04, paras. 441-447.
- ⁶⁷ *Case Concerning the Detention of Three Ukrainian Naval Vessels* (Ukraine v. Russian Federation), Order on Provisional Measures of the ITLOS of 25 May 2019, Case No. 26, paras. 63-77; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. Russian Federation), Award on the Preliminary Objections of the Russian Federation of the Annex VII Arbitral Tribunal of 27 June 2022, Case No. 2019-28, paras. 107-125.
- ⁶⁸ *M/V Saiga (No. 2) case* (Saint Vincent and the Grenadines v. Guinea), Judgment on the Merits of the ITLOS of 1 July 1999, Case No. 2, para. 131.
- ⁶⁹ *Arctic Sunrise Arbitration* (Kingdom of the Netherlands v. Russian Federation), Award on the Merits of the Annex VII Arbitral Tribunal of 14 August 2015, Case No. 2014-02, para. 227.
- ⁷⁰ Capt. Raul Pedrozo, 'Military Activities In and Over the Exclusive Economic Zone in Myron H Nordquist, Tommy T.B. Koh, John Norton Moore (eds.), *Freedom of the Seas, Passage Rights and the 1982 Law of the Sea Convention*, 2009, Martinus Nijhoff Publishers, Leiden – Boston, p. 237.
- ⁷¹ James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*, Oxford University Press, New York, 2011, 146-148.
- ⁷² Walter F. Doran, 'An Operational Commander's Perspective on the 1982 LOS Convention', *The International Journal of Marine and Coastal Law*, 1995, vol. 10, No. 3, 341.
- ⁷³ Elmar Rauch, 'Military Uses of the Oceans', *German Yearbook of International Law*, 1985, vol. 28, 252.
- ⁷⁴ Francesco Francioni, 'Peacetime Use of Force, Military Activities, and the New Law of the Sea', *Cornell International Law Journal*, 1985, vol. 18, 215.
- ⁷⁵ Yurika Ishii, *Japanese Maritime Security and Law of the Sea*, Brill Nijhoff, Leiden|Boston, 2022, 124.
- ⁷⁶ Ren Xiaofeng and Senior Colonel Cheng Xizhong, 'A Chinese Perspective', 29 *Marine Policy*, 2005, vol. 29, 144.
- ⁷⁷ Keyuan Zou, 'Towards the Code of Conduct for the South China Sea: maritime security dimensions', in Malcolm D. Evans & Sofia Galani (eds.), *Maritime Security and the Law of the Sea: Help of Hindrance*, Edward Elgar Publishing, Cheltenham, 2020, 207; Supra note 9, Keyuan Zou, 2016, 162.
- ⁷⁸ Ba Hamzah, 'Military Activities in the EEZ: Preliminary Views from Malaysia', in Shicun Wu and Keyuan zou (eds.), *Securing the Safety of Navigation in East Asia: Legal and Political Dimensions*, Chandos Publishing, 2015, 161-169.
- ⁷⁹ George Galdorisi & Alan Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict', *California Western International Law Journal* 32, Spring 2002, vol. 32, No. 2, 285-289.
- ⁸⁰ Hasjim Djalal, 'Remarks on the Concept of "Freedom of Navigation"', in Myron H Nordquist, Tommy T.B. Koh, John Norton Moore (eds.), *Freedom of the Seas, Passage Rights and the 1982 Law of the Sea Convention*, Martinus Nijhoff Publishers, Leiden|Boston, 2009, 69-70.

⁸¹ Stuart Kaye, 'Freedoms of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in David Freestone, Richard Barnes, and David Ong (eds.) *The Law of the Sea, Progress and Prospects*, Oxford University Press, Oxford, 2006, 352; Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford University Press, 2012, 49, 301-302, 322.

⁸² Due to the limited size and scope of this article, the author did not tackle the question as to whether military exercises could be allowed under the residual rights clause included in art. 59 LOSC, nor was there a discussion on the relation with the laws of naval warfare, under which belligerent parties are allowed to conduct hostilities within the EEZ of neutral parties, but not in their territorial seas, thus pointing towards a clear distinction between these two zones and a clear similarity with the high seas, see art. 10 (c) San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.

⁸³ *Debate on Maritime Jurisdiction*, Houses of the Oireachtas: Dáil Éireann Debate, Thursday 23 June 2022, last consulted on 22/08/2023 via <https://www.oireachtas.ie/en/debates/question/2022-06-23/97/?highlight%5Bo%5D=watching#pq-answers-97>.

⁸⁴ Thomas Nilsen, 'Northern Fleet kicks off major Barents Sea command and staff exercise', *The Barents Observer*, 11 August 2023, last consulted on 20/08/2023 via <https://thebarentsobserver.com/en/security/2023/08/northern-fleet-kicks-major-barents-sea-command-and-staff-exercise>

⁸⁵ Statement Connor Kane, 'Russia to move military drills outside Ireland's EEZ', *RTE News*, 30 January 2022, last consulted on 23/08/2023 via <https://www.rte.ie/news/ireland/2022/0129/1276645-russia-ireland/>.

⁸⁶ Jennie O'Sullivan, 'Fishermen plan to protest French military exercises this week', *RTE*, 20 June 2022, last consulted on 21/08/2023 via <https://www.rte.ie/news/2022/0619/1305811-fishermen-to-block-fish-military/>.

⁸⁷ X, 'Fishermen plan to disrupt Russian military exercise', *RTE News*, 25 January 2022, last consulted on 24/08/2023 via <https://www.rte.ie/news/ireland/2022/0125/1275728-ireland-fishing-russia/>.

⁸⁸ Thomas Nilsen, 'Defiant Norwegian fishermen unwilling to leave impact areas for Russian missiles', *The Barents Observer*, 13 August 2023, last consulted on 20/08/2023 via <https://thebarentsobserver.com/en/security/2023/08/defiant-norwegian-fishermen-unwilling-leave-impact-area-russian-missiles>

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