A NEW CUSTOM THICKENS: INCREASED COASTAL STATE JURISDICTION WITHIN SOVEREIGN WATERS

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> "History reveals . . . the difficulties of resolving conflicts of laws as between the law of the flag which governs ships and the law of the coastal State which governs offshore zones."[1]

ABSTRACT

Jurisdiction over foreign vessels operates on a sliding scale of authority. This power fluctuates between coastal States and flag States – the State where a vessel is officially registered to sail internationally – depending on the vessel's distance from shore. The United Nations Convention on the Law of the Sea codified this customary approach by separating the world's seas into distinct maritime zones. Within each maritime zone, coastal States possess varying degrees of sovereign rights and jurisdictional authority with respect to foreign vessels and their crew. The scope of a coastal State's sovereign rights and jurisdictional authority increases, or thickens, as a foreign vessel nears its coastline, and diminishes as a foreign vessel approaches the high seas.

Nevertheless, at all times foreign vessels and crewmembers remain subject to the concurrent jurisdiction of their flag State. Consequently, as a coastal State's jurisdictional authority recedes, the jurisdictional authority of the flag State will near exclusivity. However, in recent years, coastal States are asserting jurisdictional authority over an expanding range of foreign vessel activities taking place within their sovereign maritime zones. As the result of a number of treaties and unilateral State actions, I argue that customary international law appears to be shifting towards a new regime, one of increased coastal State jurisdiction within each of the sovereign maritime zones.

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[1] D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 734 (I.A. Shearer ed. 1984).

I. INTRODUCTION

On the afternoon of February 15, 2012, the Indian fishing vessel *St. Antony* was sailing approximately 20.5 nautical miles[2] ("NM") from India's coast when tragedy struck – shots fired from another vessel struck and killed two unarmed fishermen on board.[3] Although this incident took place near India's coast and within India's sovereign waters, it technically occurred outside its territorial sea – those waters regarded by the international community as the literal territory of a coastal State.[4] Indian authorities soon discovered that the Italian oil tanker M/V *Enrica Lexie*, with several armed Marines on board to protect the vessel in the event of a pirate attack, had passed near the *St. Antony* at the time of the shooting.[5] Based on this report, Indian authorities arrested two Italian Marines when the oil tanker docked at Kochi, India on February 19, 2012, charging both with murder.[6]

[2] A nautical mile is approximately 1.15 statute (land measured) miles.

[3] Enrica Lexie (It. v. India), Case No. 24, Order of Aug. 24, 2015, ITLOS Rep. 182, 191 ¶ 43.

[4] *Id.* ¶ 40.

[5] *Id.* ¶¶ 42, 44.

[6] The Enrica Lexie Incident (It. v. India), PCA Case Repository 1, 7 ¶ 28 (2016).

In response, Italy accused India of breaching international maritime law by unilaterally extending its jurisdiction to an incident involving the actions of Italian citizens on board an Italian vessel operating outside of India's territorial sea.[7] Italy claimed that its jurisdiction concerning the matter is exclusive, as if the incident occurred not at sea, but on the steps of the Pantheon in Rome.[8] India, meanwhile, countered that although the incident took place outside of its territorial sea, both vessels were nonetheless operating in waters subject to India's jurisdiction.[9] In order to resolve these conflicting claims of jurisdictional authority, the Permanent Court of Arbitration ("PCA") had to decide an unresolved question: does customary international law permit a coastal State to exercise criminal jurisdiction over foreign vessels and crewmembers for the murder of two nationals that took place within its sovereign waters, yet beyond its territorial sea?

The United Nations Convention on the Law of the Sea ("UNCLOS") governs the laws regulating the rights of States, individuals, and vessels operating on the world's seas.[10] Ratified by 168 nations, UNCLOS is widely considered by the international legal community to be a codification of existing customary international law norms.[11] Fundamentally, UNCLOS seeks to balance two crucial, yet conflicting, principles: freedom of the seas and State sovereignty.[12] In the pursuit of equilibrium, UNCLOS fashions a sliding scale of jurisdiction, dividing all maritime spaces into distinct zones, each of which affords coastal States and flag States discrete jurisdictional authority with respect to a foreign vessel's activities.[13] Broadly speaking, a coastal State's jurisdictional authority swells as a foreign vessel nears its shoreline, and ebbs as a foreign vessel sails towards the high seas.

For the purposes of this Note, the most significant maritime zones are the territorial sea, which extends up to 12NM from a State's coastline; the contiguous zone, extending up to 24NM; the exclusive economic zone ("EEZ"), extending up to 200NM; and the high seas, which includes "all parts

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[7] Enrica Lexie ITLOS Rep. 182 ¶ 28.

[8] *Id.* ¶ 40.

[9] Enrica Lexie (It. v. India), Case No. 24, Written Observations of the Republic of India, 1 ITLOS 29 ¶ 3.5.

[10] *See generally* United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS] (not ratified by the United States).

[11] U.N. Div. for Ocean Affairs and the Law of the Sea, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements (Apr. 3, 2018), http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [https://perma.cc/X826-ZHW5]. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. V at 5 (AM. LAW INST. 1987).

[12] *See* UNCLOS, *supra* note 10, arts. 2, 87.

[13] *See id*. arts. 2 (territorial sea), 8 (internal waters), 33 (contiguous zone), 55 (exclusive economic zone), 87 (high seas).

of the sea that are not included in the [EEZ], in the territorial sea or in the internal waters of a State . . . ."[14] Hereafter, all maritime zones besides the high seas will be generally identified as sovereign waters of a coastal State.

Within each of the maritime zones, including both sovereign and non-sovereign waters, UNCLOS delineates the scope and application of a coastal State's jurisdiction over foreign vessels,[15] while simultaneously requiring that the flag State assume jurisdiction with respect to all "administrative, technical and social matters concerning the ship."[16] Thus, while sailing in a coastal State's sovereign waters and, therefore, subject to its jurisdiction, foreign vessels remain, at least conceptually, a floating piece of the national "territory of the State whose flag the ship flies."[17]

While seemingly straightforward, this sliding scale of jurisdictional authority often leads to instances of concurrent, and conflicting, jurisdiction between the coastal and flag States. This should not be surprising: even when a foreign vessel is in sight of land, UNCLOS preserves the law of the flag and fundamentally restricts the coastal State's ability to enforce its own domestic laws within its sovereign waters.[18] In recent years, however, coastal States have started to push back against the UNCLOS-imposed restrictions placed upon their jurisdictional authority by expanding the reach of their domestic laws to a wider range of foreign vessel activities taking place within their sovereign waters. As the result of a number of treaties and unilateral State actions, customary international law is undergoing a shift towards a new regime, one of thickening coastal State jurisdiction within the existing sovereign maritime zones.[19]

This Note will proceed first with a brief description of customary international maritime law and an overview of the historical development of currently recognized maritime zones. Next, the Note will detail the modern customary international law principles governing coastal State and flag State jurisdiction. Finally, the Note will explore developments that demonstrate an emerging change in customary international maritime law, including the proliferation of treaties and recent cases, such as the *Arctic Sunrise* Case

[14] *See id.* arts. 2, 33, 57, 86; *see also id.* art. 8 (defining internal waters as those "on the landward side of the baseline of the territorial sea," including estuaries, lakes, and rivers).

[15] *See id.* arts. 27-28, 33(1), 56(1)(b), 73.

[16] *Id.* art. 94(2)(b).

[17] S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7).

[18] UNCLOS, *supra* note 10, arts. 27-28, 33(1), 56(1)(b), 73. *See also* Guy Manchuk, *The Law of the Flag and Maritime Criminal Jurisdiction: A New Rule to Replace an Outdated, Inconvenient Doctrine*, 32 TUL. MAR. L.J. 221, 222 (2007).

[19] *See* Wayne S. Ball, *The Old Grey Mare, National Enclosure of the Oceans*, 27 OCEAN DEV. & INT'L L. 97, 103 (1996) (referring to this type of expanse as a "thickening jurisdiction," or the regulation of more activities in a defined area; in contrast to "creeping jurisdiction," whereby coastal States "expand[ ] the reach of their regulation beyond 200 miles").

(Netherlands v. Russia)[20] and the *Enrica Lexie* Incident (Italy v. India),[21] wherein coastal States are pushing the bounds of their domestic jurisdiction beyond the territorial sea. Ultimately, this Note argues that customary international law is moving towards a rule that permits a coastal State to exercise jurisdiction when a foreign vessel violates its domestic laws anywhere within its sovereign waters, especially when such conduct has consequence within coastal State waters which the coastal State reasonably reprehends.[22]

II. CUSTOMARY INTERNATIONAL LAW

Customary international law is vital to the interpretation and development of the international law of the sea.[23] To qualify as customary international law, there must be "a general and consistent practice of [S]tates followed by them from a sense of legal obligation."[24] Identifying a customary international law norm goes beyond merely finding evidence of State practice from sources like statements of government officials, domestic legislation, treaties, and conventions.[25] The State practice should also be uniform, consistent, and represent the interests of specially affected States.[26] This means that any development in the customary international law of jurisdiction in maritime zones is necessarily derived from the practice of coastal, as opposed to landlocked, States. In addition, States must engage in the relevant practice under the belief that they are legally bound, or legally permitted, to do so.[27] One scholar referred to this requirement, known as *opinio juris*, as "[t]he intellectual device that bridge[s] the void between

[20] Arctic Sunrise (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, ITLOS Rep. 230.

[21] Enrica Lexie (It. v. India), Case No. 24, Order of Aug. 24, 2015, ITLOS Rep. 182.

[22] *Cf.* United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

[23] DONALD R. ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 22 (2d ed. 2016). *See also* James Kraska, *Excessive Coastal State Jurisdiction: Shipboard Armed Security Personnel*, *in* JURISDICTION OVER SHIPS: POST-UNCLOS DEVELOPMENTS IN THE LAW OF THE SEA 167, 167-68 (Henrik Ringbom ed., 2015) ("Excessive maritime claims are those that are inconsistent with customary international law or the rules set forth in [UNCLOS].").

[24] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2).

[25] *Cf.* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 73-74 (4th ed. 2015). *See also* Martin Lishexian Lee, *The Interrelation Between the Law of the Sea Convention and Customary International Law*, 7 SAN DIEGO INT'L L.J. 405, 407 (2006).

[26] DUNOFF, *supra* note 25, at 73-74.

[27] North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, 44 (Feb. 20) (stating that customary international law requires "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"). *See* DUNOFF, *supra* note 25, at 75-76.

describing the conduct of States and prescribing for it."[28]

While legally binding upon States and individuals, the substance of customary international is mutable and, at times, nebulous.[29] As a result of unilateral State actions, collective responses to changing circumstances, ratification of new treaties, and the natural evolution of social norms, customary international law "is continuously evolving."[30] Furthermore, while the formation of customary international law generally requires widespread practice, the law of the sea is "readily susceptible to the influence of unilateral acts" by States, more so than in other areas of international law.[31] Indeed, unilateral State action has more than once been considered "influential before the [International Court of Justice]" when deciding issues of first impression.[32]

Treaties, notably international conventions, may purport to codify customary international law at a specific moment in time; however, the passage of time and the "ever-changing needs of the international community" can eventually place such treaties out of sync with modern day State practice and *opinio juris*.[33] Indeed, following a treaty's ratification, changes in customary international law may alter the present interpretation of the parties' treaty obligations.[34] Accordingly, just as a new treaty may

[28] O'CONNELL, *supra* note 1, at 30.

[29] *See* Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 25; Joshua A. Decker, *Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror*, 6 CHI. J. INT'L L. 803, 816 (2006) ("Customary international law, unlike treaties, is often hard to discern.").

[30] Lee, *supra* note 25, at 406.

[31] O'CONNELL, *supra* note 1, at 29.

[32] ROTHWELL & STEPHENS, *supra* note 23, at 24. *See, e.g.*, Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, 12 (July 25); North Sea Continental Shelf, 1969 I.C.J. at 32-33 (recognizing that the Truman Proclamation initiated the doctrine of the continental shelf); *but see* The Scotia, 81 U.S. 170, 187 (1871) ("Undoubtedly, no single nation can change the law of the sea . . . [and] it has become the law of the sea only by the concurrent sanction of those nations who . . . constitute the commercial world."). *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (noting "a systematic, unbroken, executive practice, long pursued . . . and never before questioned . . . making as it were such exercise of power part of the structure of our government, may be treated as a *gloss* on 'executive Power' vested in the President") (emphasis added).

[33] Lee, *supra* note 25, at 406. *See also* HELMUT TUERK, REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA 16 (Martinus Nijhoff Pub. 2012) (describing, for example, the right of "innocent passage" as a customary norm "which had long since formed part of international law, [and] was confirmed in Article 17 [of] UNCLOS").

[34] O'CONNELL, *supra* note 1, at 47. *See* Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 (("[T]ogether with the context . . . [a]ny subsequent practice in the application of the treaty" shall be taken into account for the purpose of its interpretation); Henrik Ringbom, *Introduction*, *in* JURISDICTION OVER SHIPS, *supra* note

amend an existing rule of customary international law, a new rule of customary international law can alter the common understanding and application of the existing rules of a long established treaty, such as UNCLOS.[35]

III. HISTORICAL ORIGINS OF THE MARITIME ZONES

Maritime commerce – an operational trade network of "two-way traffic in commodities" by sea – can trace its origins to the activities of Greek and Phoenician city States in the ninth century BCE.[36] As maritime trade steadily emerged as a vital part of their economies, States worked together in an effort to protect merchants against pirates and other threats.[37] During this era, the first set of unified rules of commercial maritime law – Rhodian Sea Law – was developed, which in turn formed the foundation of maritime law in the Roman, Byzantine, Islamic, and Northern European empires.[38] These laws, which continue to underpin modern international maritime law today, established rules regulating the relationships between ships' owners, sailors, and merchants, the carriage of goods by sea, general average, and liability for collisions between ships.[39]

While these early maritime laws sought to establish uniform rights and liabilities for individual actors operating in different parts of the world, States themselves largely focused on controlling and monopolizing the seas, rather than opening them for the benefit of all.[40] The general goal of these States

23, at 1, 2 ("[T]he adoption and widespread application of UNCLOS has not stopped [S]tate practice from developing in this field").

[35] *See, e.g.*, Fisheries Jurisdiction, 1974 I.C.J. at 22-23 (upholding Iceland's unilateral claim to a 12NM Exclusive Fisheries Zone, although in disagreement with the 1958 Geneva Convention on the High Seas, because such a claim "appears now to be generally accepted" as customary international law).

[36] LINCOLN PAINE, THE SEA AND CIVILIZATION: A MARITIME HISTORY OF THE WORLD 79 (2013).

[37] *Id.* at 114.

[38] *Id.* at 114, 224 (describing how these laws governed subjects such as "[rights between] ships' owners, the crew, and merchants; the carriage of goods; the laws of jettison and general average; the salvage of lost ships and cargoes; and commercial law and contracts").

[39] *See* Gordon W. Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065, 1068-70 (1983) (describing liability for cargo loss, collision, and seamen's personal injuries); William Tetley, *The General Maritime Law – The Lex Maritima*, 20 SYRACUSE J. INT'L L. & COM. 105, 109 (1994) (describing general average, maritime liens, and ship mortgages).

[40] *See* Christopher R. Rossi, *A Particular Kind of Dominium: The Grotian 'Tendency' and the Global Commons in a Time of High Arctic Change*, 11 J. INT'L L. & INT'L REL. 1, 16-17 (2015) (explaining how the Minoans, Athenians, and Venetians all made lasting and effective claims to control parts of the Mediterranean).

was to create a *Mare Clausum*, or "closed sea."[41] In effect, States operated under the assumption "that the sea [is] capable of enclosure" or of being territorialized.[42] Only Rome, however, succeeded in bringing the entire Mediterranean under its exclusive control beginning in the first century BCE.[43] The Romans established this period, known as *Mare Nostrum* ("our sea"), with the goal of increasing sea trade throughout the Mediterranean by subjecting all vessels to Roman rule and thwarting the ever-present threat of piracy.[44]

Several powerful seafaring nations in the seventeenth century CE also claimed sovereignty over different parts of the world's seas.[45] English monarchs of the seventeenth century, for instance, were "chief proponents of *[M]are [C]lausum*."[46] English scholar John Selden argued in the seventeenth century that customary international law actually supported the idea of legal dominion over the seas, then used this foundation as a basis to claim ownership over expansive areas of the world's seas for Britain.[47] Likewise, Norway and Denmark each claimed the North Sea as their own *Mare Clausum*, Sweden and Poland both claimed the Baltic Sea, and Portugal claimed the Strait of Singapore as its own exclusive domain, subject to its exclusive jurisdiction.[48]

Ultimately, these claims of ownership over wide swaths of ocean conflicted with the commercial activities of leading international trading companies. For clear financial reasons, global trading companies opposed any restrictions or prohibitions that interfered with the scope and reach of their own activities. In need of a philosophical foundation to support free trade and movement on the seas, the Dutch United East India Company (Verenigde Oostindische Compagnie, or "VOC")[49] turned to a young scholar named Hugo Grotius in 1603 to provide a convincing basis.[50]

Grotius, in turn, articulated a new concept: *Mare Liberum*, or "free seas,"

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[41] John A. Duff, *Assemblage-Oriented Ocean Resource Management: How the Marine Environment Washes Over Traditional Territorial Lines*, 30 MICH. J. INT'L L. 643, 647 (2009).

[42] *Id.*

[43] PAINE, *supra* note 36, at 130.

[44] *Id.* at 128-30.

[45] Paulsen, *supra* note 39, at 1073 (describing, for example, how "Spain claimed to control the West Atlantic, Portugal the East, and Britain the North").

[46] Rossi, *supra* note 40, at 17.

[47] PAINE, *supra* note 36, at 446-47; Paulsen, *supra* note 39, at 1073; Rossi, *supra* note 40, at 19; Scott J. Shackelford, *Was Selden Right?: The Expansion of Closed Seas and its Consequences*, 47 STAN. J. INT'L L. 1, 11 (2011).

[48] Rossi, *supra* note 40, at 17-18 & n.131.

[49] *See* Paine, *supra* note 36, at 442 ("The VOC was both a trading entity and an instrument of the [S]tate," empowered to use force and enter into trade agreements with other States).

[50] Rossi, *supra* note 40, at 33.

which holds that the high seas are a global commons incapable of exclusive and preclusive possession.[51] In its original form, the concept of *Mare Liberum* held that the high seas include all parts of the open ocean existing beyond a coastal State's control.[52] Grotius opined that such waters should be available for use by all nations, without restriction, in order to protect the "right to trade."[53]

In 1603, the Dutch used the concept of *Mare Liberum* to justify the VOC's capture and auction of a Portuguese vessel, the *Santa Catarina*, in the Portuguese-controlled Strait of Singapore, to avenge prior hindrance of Dutch trade in the region.[54] The Dutch also used *Mare Liberum* to maintain rights to fishing grounds in the North Sea, located sixty miles from the English coast.[55] Ironically, although the Dutch were among the first proponents of freedom of the seas, they soon changed course once it became economically advantageous to restrict trade in regions where the VOC began to enjoy its own monopolies.[56]

It is important to note that Grotius did not expand the concept of freedom of the seas to *all* navigable waters.[57] He recognized that coastal States were lawfully permitted to territorialize or possess waters which the coastal State could physically control, "in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land."[58] Over the following century, this vague notion settled into a rule of international law known as "the three-mile [canon-shot] rule": a coastal State's territorial dominion extended beyond dry land as far as projectiles could be fired from a canon resting on its shore.[59] Eventually, Europe and the United States came to widely accept the three-mile territorial sea rule.[60] In fact, twenty out of twenty-one coastal States claiming a territorial sea in the year 1900 claimed a three mile territorial sea, a limit then recognized as customary international

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[51] HUGO GROTIUS, MARE LIBERUM 79-85 (Robert Feenstra ed., Brill 2009) (1609) (concluding it to be "impossible that any right of property over the sea itself . . . should pertain to any nation or private individual, since occupation of the sea is impermissible both in the natural order and for reasons of public utility"). *See also* Rossi, *supra* note 40, at 18.

[52] Shackelford, *supra* note 47, at 11.

[53] GROTIUS, *supra* note 51, at 137. *See also* Paulsen, *supra* note 39, at 1073.

[54] PAINE, *supra* note 36, at 444-45.

[55] *Id.* at 446.

[56] *Id.* at 447 (describing how for example, the Dutch expelled Portugal from the Spice Islands in 1605).

[57] *See* Shackelford, *supra* note 47, at 11.

[58] PHILLIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 5 (1927) (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS, Book II, Ch. III, Sec. XIII).

[59] *Id.* at 6.

[60] Henry M. Arruda, *The Extension of the United States Territorial Sea: Reasons and Effects*, 4 CONN. J. INT'L L. 697, 699-700 (1989) (noting that the United States adopted a three-mile territorial sea in 1793).

law.[61] Thus, at the beginning of the twentieth century, customary international law explicitly recognized a restricted version of *Mare Clausum* where coastal States were entitled to retain their "rights and jurisdictions over the oceans to a narrow belt of sea adjacent to [their] coastline."[62]

Although in theory coastal States retained exclusive jurisdiction and sovereign rights over their territorial seas, in practice they asserted varying degrees of rights within these waters.[63] In large part, a coastal State's jurisdictional powers depended on the capacity of that State to enforce its claims.[64] Furthermore, with the advent of steamship technology, States began to recognize a limited right of passage of foreign vessels through their territorial sea, so long as that vessel's passage was innocent.[65] In fact, one international body, the Institute of International Law, advocated at the turn of the century that costal States maintain absolute sovereignty over their territorial seas, other than for innocent passage.[66]

Because most States depended upon maritime commerce for significant portions their trade, there was strong "interest in maintaining the maximum freedom of movement for shipping."[67] States had long exercised extraterritorial jurisdiction over vessels that are flying its flag when operating on the high seas, "where no [S]tate possesses territorial jurisdiction," in order to prevent a sort of jurisdictional void where no consequences exist for otherwise unlawful actions.[68] On the high seas, customary international law recognized that "flag State jurisdiction," or the "law of the flag," was exclusive with respect to criminal and civil infractions taking place on board a foreign vessel.[69] The exclusivity of flag State jurisdiction, however, remained hotly contested on the high seas and in sovereign waters, as both flag States and coastal States resisted any degradation of their respective territorial and jurisdictional integrity.[70]

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[61] *Id.* at 700.

[62] TUERK, *supra* note 33, at 8.

[63] ROTHWELL & STEPHENS, *supra* note 23, at 62. *See generally* O'CONNELL, *supra* note 1, at 259 (explaining that "[s]hips seek to keep within twelve miles of convenient coasts because position fixes are more easily obtained, the weather is likely to be better, adverse currents . . . can be avoided, and the voyage can be . . . shortened").

[64] ROTHWELL & STEPHENS, *supra* note 23, at 62.

[65] *Id.* at 223.

[66] *Id.* at 63. *See also* discussion *infra* pp. 24-27.

[67] O'CONNELL, *supra* note 1, at 259.

[68] ROTHWELL & STEPHENS, *supra* note 23, at 158-59.

[69] David Anderson, *Freedom of the High Seas in the Modern Law of the Sea, in* THE LAW OF THE SEA: PROGRESS AND PROSPECTS 327, 327 (David Freestone et al. eds., 2006); Eric Powell, *Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience*, 19 ANN. SURV. INT'L & COMP. L. 263, 268-69 (2013).

[70] *See* ROTHWELL & STEPHENS, *supra* note 23, at 159 (noting universal jurisdiction for the crimes of piracy and slavery); *see also* Ivan Shearer, *The Limits of Maritime Jurisdiction*,

The tension surrounding exclusive flag State jurisdiction reached its boiling point in 1926, following a high seas collision between a French vessel, the *Lotus*, and a Turkish vessel, the *Boz-Kourt*.[71] As a result of the collision, the *Boz-Kourt* was cut in half and eight Turkish nationals died.[72] Shortly afterwards, the *Lotus* docked in Constantinople and Turkish officials arrested a French watch officer, charging him with manslaughter.[73] France protested the Turkish government's actions, claiming that jurisdiction belonged exclusively to the French courts because the incident involved an alleged crime committed by a French citizen aboard a French vessel, which was operating on the high seas.[74] In the *Lotus* case, the Permanent Court of International Justice ("PCIJ") rejected the existence of any customary international law rule purporting to establish exclusive flag State jurisdiction on the high seas.[75] While the court agreed that vessels on the high seas are generally "subject to no authority except that of the State whose flag they fly," it held that this principle does not protect a vessel on the high seas whose culpable act "produces its effects on a vessel flying another flag or in foreign territory."[76]

This decision was widely criticized in international maritime circles out of concern for the risks and uncertainty non-flag State jurisdiction would cause ships, their crews, and international navigation as a whole.[77] Maritime companies and associations pressured their governments and international bodies to restrict non-Flag State jurisdiction, resulting in a series of treaties in the 1950's that effectively overruled the PCIJ's *Lotus* decision and made flag State jurisdiction on the high seas nearly exclusive. Moreover, for all practical purposes, these treaties prioritized the law of the flag by limiting coastal State jurisdiction in their own sovereign waters.[78] The first set of these treaties concluded in 1952, including the International Convention Relating to the Arrest of Seagoing Ships,[79] the International Convention on

in THE LIMITS OF MARITIME JURISDICTION 51, 52 (Clive Schofield et al. eds., 2014) (noting domestic courts have long exercised personal jurisdiction over their own seafarer nationals when aboard foreign vessels).

[71] S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 10 (Sept. 7).

[72] *Id.*

[73] *Id.* at 10-11.

[74] *Id.* at 6-7.

[75] *Id.* at 25-26.

[76] *Id.* at 25.

[77] *See* ROTHWELL & STEPHENS, *supra* note 23, at 170; Ademuni-Odeke, *Port State Control and UK Law*, 28 J. MAR. L. & COM. 657, 658 (1997).

[78] *See* Shearer, *supra* note 70, at 55 (explaining how the Territorial Sea Convention limited coastal State jurisdiction by requiring a right of innocent passage on a conditional basis). .

[79] International Convention Relating to the Arrest of Seagoing Ships, May 10, 1952, 439 U.N.T.S. 193.

Certain Rules Concerning Civil Jurisdiction in Matters of Collision,[80] and the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation.[81]

Shortly thereafter, States attempted to codify the balance of customary international maritime law with the 1958 Convention on the High Seas.[82] This Convention promoted the ideas of *Mare Liberum* and freedom of commerce and navigation, forbidding States from "assert[ing] jurisdiction on the high seas against foreign vessels except on suspicion of piracy or engag[ement] in the slave trade."[83] Although the 1958 Convention on the High Seas recognized a limited *Mare Clausum*, in the form of a coastal State's territorial sea, it failed to reach an agreement on its limits or to recognize the full scope of rights coastal States could legally assert.[84] Consequently, despite this wave of treaties in the 1950's, customary international law remained in murky waters.

In the mid-twentieth century, States regularly pushed the customary limits of their sovereign waters, in terms of both geographic scope and authority, in order to secure jurisdiction over oceanic resources. For example, in 1945, the United States unilaterally extended its jurisdiction over all natural resources on the Continental Shelf – i.e. the point at which waters reached a depth of 600 feet.[85] Several other States, from Latin America to the Middle East, quickly followed suit and, in some instances, made even greater claims.[86]

Similarly, in 1952, Iceland unilaterally extended its self-claimed Exclusive Fisheries Zone ("EFZ") to 4NM, and in 1971 to 50NM.[87] Iceland, with an economy largely dependent on fishing, prohibited fishing by any non-Icelandic vessels in this EFZ.[88] However, the United Kingdom refused to accept that its vessels should be banned from fishing in these waters.[89] This resulted in a number of incidents between British and Icelandic vessels,

[80] International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, May 10, 1952, 439 U.N.T.S. 217.

[81] International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, May 10, 1952, 439 U.N.T.S. 233.

[82] Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S 11.

[83] Shearer, *supra* note 70, at 56. *See generally* Convention on the High Seas, *supra* note 82; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.

[84] *See* Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, 12 (July 25).

[85] TUERK, *supra* note 33, at 9.

[86] ROTHWELL & STEPHENS, *supra* note 23, at 105 (asserting that several countries, including Chile, Costa Rica, El Salvador, and Honduras, made claims to 200NM territorial seas).

[87] *Id.* at 86.

[88] *See* Fisheries Jurisdiction Case, 1974 I.C.J. at 10.

[89] *Id.* at 12.

colloquially known as the "Cod Wars," wherein Icelandic government vessels began harassing and even arresting foreign fishing vessels operating in its EFZ.[90] Iceland's claims led to protests by both Germany and the United Kingdom, culminating in the Fisheries Jurisdiction Case.[91] In its opinion, the International Court of Justice ("ICJ") recognized that customary international law permitted a State to unilaterally expand its EFZ, and, subsequently, its territorial sea past 3NM (up to 12NM).[92] At the same time, the ICJ also recognized the existence of an area distinct from the territorial sea and the high seas, where a coastal State's rights – while not preclusive – could be considered preferential.[93]

The ICJ's recognition of a coastal State's authority to claim limited rights to a maritime zone beyond the territorial sea foreshadowed the concepts of the contiguous zone and the EEZ.[94] The Fisheries Jurisdiction decision also implicitly recognized a single State's ability to unilaterally change existing customary international maritime law. The emerging recognition of new maritime zones, as well as unilateral sovereign claims within such areas, raised several issues prior to the meetings for UNCLOS. Ultimately, this resulted in UNCLOS' sliding scale approach to jurisdiction, which seeks to balance the rights of coastal States and flag States, while simultaneously preserving traditional high seas freedoms, in each of the enumerated maritime zones.[95]

IV. JURISDICTION IN THE MARITIME ZONES

A. Jurisdiction Overview

Before proceeding further, it is necessary to explain what is meant, precisely, by "jurisdiction," and the various justifications that States put forth for exercising their authority over individuals, corporations, and vessels.[96] International law recognizes three distinct, yet interrelated, forms of jurisdiction: jurisdiction to prescribe ("prescriptive jurisdiction"), jurisdiction to adjudicate ("adjudicative jurisdiction"), and jurisdiction to

[90] *See id*. at 17; ROTHWELL & STEPHENS, *supra* note 23, at 320.

[91] *See* Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. at 6. *See generally* Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1974 I.C.J. 175 (July 25); ROTHWELL & STEPHENS, *supra* note 23, at 86.

[92] Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. at 23.

[93] *See id*.; ROTHWELL & STEPHENS, *supra* note 23, at 86.

[94] ROTHWELL & STEPHENS, *supra* note 23, at 86-87. *See also* O'CONNELL, *supra* note 1, at 542 (arguing that the Fisheries Jurisdiction Case and its recognition of a zone of preferential rights "affords a doctrinal infrastructure to the EEZ").

[95] ROTHWELL & STEPHENS, *supra* note 23, at 163.

[96] *See generally* United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996) ("'Jurisdiction' is a word of many, too many, meanings.").

enforce ("enforcement jurisdiction").[97] Prescriptive jurisdiction refers to the State's authority "to make its law applicable" to persons or things.[98] Adjudicative jurisdiction refers to a State's authority "to subject persons or things to the process of its courts."[99] Finally, enforcement jurisdiction refers to a State's authority to "compel compliance or to punish noncompliance with its laws or regulations."[100] The primary focus of this Note is prescriptive jurisdiction – "the geographical reach of a State's laws" – and is used interchangeably with jurisdiction herein.[101]

1. Territorial Principle

Jurisdiction and sovereignty are inextricably linked: the international legal structure is premised on the sovereign equality of all States, which restricts States from "assert[ing] jurisdiction over affairs which are the domain of other States."[102] This restriction finds its support in two principles. First, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," and is "incapable of conferring extra-territorial power."[103] As a result, it is widely accepted that States have the power to apply its laws to all individuals, and any property, within its borders[104] Second, the principle of non-intervention prohibits States from intervening in other State's domestic concerns."[105] This is known as the "territorial principle," which, when applied in a strict sense, empowers a State with "exclusive authority . . . to regulate events occurring within its borders."[106]

Until the twentieth century, States – mindful of interfering with the authority of other sovereign States – largely confined the scope of jurisdiction to their own territorial limits.[107] Over time, however, "governments

[97] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 9 (Oxford Univ. Press 2008).

[102] *Id.* at 6. *See generally* U.N. Charter art. 2, ¶ 1 (declaring that the U.N. "is based on the principle of the sovereign equality of all its Members").

[103] Schooner Exchange v. McFaddon, 11 U.S. 116, 136-37 (1812).

[104] DUNOFF, *supra* note 25, at 278.

[105] RYNGAERT, *supra* note 101, at 144. *See also* U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any [S]tate").

[106] Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 636 (2009).

[107] *See, e.g.*, The Apollon, 22 U.S. 362, 370 (1824) (declaring a State's extension of laws beyond its own territory to be "at variance with the independence and sovereignty of foreign nations"); American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (stating that "the general and almost universal rule is that the character of an act as lawful or unlawful must

increasingly viewed the territorial test as overly restrictive."[108] Accordingly, States began to recognize a basis for jurisdiction "over certain conduct that took place elsewhere but whose effects were felt within the regulating [S]tate."[109] This, in turn, "has led to an internationally sanctioned system of possibly harmful concurring jurisdiction."[110]

In fact, international law identifies several principles that support a State's exercise of extraterritorial jurisdiction, that is, the exercise of jurisdiction outside of its territorial borders.[111] These five principles are the Territorial Effects Principle, the Nationality Principle, the Protective Principle, the Passive Personality Principle, and the Universal Principle.[112]

2. Territorial Effects Principle

The Territorial Effects Principle permits a State to exercise "[j]urisdiction with respect to activity outside the [S]tate, [that has] or [is] intended to have substantial effect within the [S]tate's territory."[113] This principle developed in the *Lotus* Case,[114] which affirmed a State's authority "to prosecute and punish crimes commenced outside a [S]tate's territory but consummated within it."[115] Within twenty years, U.S. courts began to interpret the Effects Principle more broadly, establishing that a State can exercise jurisdiction when foreign conduct "has consequences within its borders which the [S]tate reprehends."[116] By the late twentieth century, European courts recognized jurisdiction over foreign conduct that has effects within their territories as well.[117] Wide recognition of Territorial Effects-based jurisdiction has, in

be determined wholly by the law of the country where the act is done"). *See also* Austen Parrish, T*he Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1463 (2008) ("Beginning around the 1600s with the Treaty of Westphalia, a nation's power was deemed to end at its border.").

[108] DUNOFF, *supra* note 25, at 280.

[109] Buxbaum, *supra* note 106, at 636.

[110] RYNGAERT, *supra* note 101, at 22.

[111] Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1304 (2014).

[112] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404; DUNOFF, *supra* note 25, at 280, 292-95.

[113] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d.

[114] S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7) (Turkey had jurisdiction over the acts of a French citizen, committed in French territory, because its effects were felt in Turkish territory).

[115] David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUS. J. INT'L L. 287, 293 (2004).

[116] United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

[117] *Compare* Joined Cases 89, 104, 114, 116, 117, 125, 126, 127, 128 & 129/85, A. Åhlström Osakeyhtiö v. Comm'n of the European Cmtys. (Wood Pulp Case), 1988 E.C.R.

turn, created "an increase in overlapping jurisdictional conflicts" due to the heightened possibility of concurrent jurisdiction over a given person or activity.[118]

3. Nationality Principle

The increased probability of concurrent jurisdiction exists because a person's conduct may implicate several distinct bases upon which a State is able to justify its exercise of jurisdiction over that individual.[119] One of the most prevalent justifications is the Nationality Principle, which "entitles a [S]tate to exercise jurisdiction over its [own] nationals and corporation[s], regardless of where their conduct occurs."[120]

Nationality jurisdiction is generally considered to be uncontroversial and has been recognized since at least the fourteenth century.[121] In addition, the Nationality Principle allows a State to extend its jurisdiction to any crime committed outside of its territory, thereby preventing its nationals "from enjoying scandalous impunity in the eyes of the domestic public."[122]

5193, 5243 (holding that "[t]he decisive factor is [ ] the place where [the foreign conduct] is implemented"), *with* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 rep. n.3 (stating that Germany and "[m]ost other [S]tates of Western Europe, including Austria, Denmark, Finland, France, Greece, Norway, Portugal, Spain, Sweden, and Switzerland, as well as Canada and Japan (but not the United Kingdom or the Netherlands) have accepted the effects doctrine . . ."); *and* RYNGAERT, *supra* note 101, at 42 (noting that while "only the territorial implementation doctrine has been sanctioned by the highest European court, [ ] the differences with the effects [principle] are in practice very small").

[118] Parrish, *supra* note 107, at 1478-79.

[119] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. b ("Territoriality and nationality are discrete and independent bases of jurisdiction; the same conduct or activity may provide a basis for exercise of jurisdiction both by the territorial [S]tate and by the [S]tate of nationality of the actor.").

[120] David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 190 (1984). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (defining the Nationality Principle as the authority of a State to exercise jurisdiction over "the activities, interests, status, or relations of its nationals outside as well as within its territory").

[121] RYNGAERT, *supra* note 101, at 88-90 ("[T]he [nationality] principle was already recognized at the time of Bartolus by the medieval city States of northern Italy."). *See also* The Apollon, 22 U.S. 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens*") (emphasis added); Blackmer v. United States, 284 U.S. 421, 436 (1932) (finding that the United States had jurisdiction over a U.S. citizen in a foreign country "[b]y virtue of the obligations of citizenship, the United States retained its authority over [the malefactor], and he was bound by its laws made applicable to him in a foreign country"); Edwin D. Dickinson, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 519 (1935) ("The competence of the State to prosecute and punish its nationals on the sole basis of their nationality is universally conceded.").

[122] RYNGAERT, *supra* note 101, at 88-90.

4. Protective Principle

The Protective Principle is "the right of a [S]tate to punish . . . offenses committed outside its territory by persons who are not its nationals," including those "directed against the security of the [S]tate or . . . threatening the integrity of governmental functions."[123] This principle can be traced to the French Napoleonic Code, which guided the development of similar prescriptive laws throughout nineteenth century Europe.[124] The Protective Principle is generally limited in its reach to crimes such espionage, counterfeiting, immigration violations, drug trafficking.[125] The Protective Principle, in contrast to the Effects Principle, does not require that the criminal activity had any "actual or intended effect inside the [State]."[126]

5. Passive Personality Principle

The Passive Personality Principle permits a State to "apply [its] law . . . where the victim of the act was its national,"[127] even when the act is committed by a non-national acting outside its territory.[128] As a basis for jurisdiction, the passive personality principle is considered both controversial and tenuous because it permits States to usurp jurisdiction from the State where the harm occurred.[129] In recent years, however, States have begun to make use of the Passive Personality principle in order to maintain jurisdiction where its nationals are the victims of "terrorist and other organized attacks . . . by reason of their nationality."[130] Thus, recent State practice appears to accept passive personality jurisdiction for certain crimes, or where otherwise reasonable.[131]

6. Universal Jurisdiction Principle

Finally, the Universal Jurisdiction Principle permits States "to define and prescribe punishment for certain offenses recognized by the community of

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[123] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. f.

[124] DUNOFF, *supra* note 25, at 293.

[125] Powell, *supra* note 69, at 285.

[126] United States v. Gonzalez, 776 F.2d 931, 939 (11th Cir. 1985). *See also* RYNGAERT, *supra* note 101, at 96 ("For the operation of the protective principle, actual harm need not have resulted from these acts.").

[127] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g.

[128] DUNOFF, *supra* note 25, at 294.

[129] *See* RYNGAERT, *supra* note 101, at 85; Powell, *supra* note 69, at 286.

[130] DUNOFF, *supra* note 25, at 294-95 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g).

[131] RYNGAERT, *supra* note 101, at 94.

nations as of universal concern."[132] Under this principle, "any [S]tate may exercise jurisdiction over an individual [of any nationality] who commits certain heinous and widely condemned offenses."[133] The list of acts condemned worldwide is necessarily narrow, and includes *jus cogens* offenses such as piracy, war crimes, genocide, and slavery.[134] In this sense, it is the nature of the act itself that confers jurisdiction on all States, "without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction."[135]

B. Flag State Jurisdiction

Historically, flag State jurisdiction was justified by the "floating territory" doctrine.[136] Under this doctrine, a vessel is essentially a piece of national territory floating on the ocean, thereby permitting a flag State, and prohibiting all others, to exercise jurisdiction pursuant to the territorial principle.[137] A State cannot exercise jurisdiction over a vessel that flies a different State's flag without somehow infringing on the sovereignty of the flag State.[138]

Recent scholarship, however, has discredited this theory as an outdated legal fiction.[139] Indeed, a floating territory concept "was always a stumbling block to the [competing] theory that the territorial sea is equivalent to national territory," because it would preclude any coastal State from exercising jurisdiction over a foreign ship sailing within its domain.[140] Today, flag State jurisdiction finds its strongest support in the nationality principle, meaning

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[132] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

[133] DUNOFF, *supra* note 25, at 295.

[134] *Id.*

[135] RYNGAERT, *supra* note 101, at 101. *See also* CrimA 336/61 Attorney General of Israel v. Adolf Eichmann, 16(3) P.D. 2033 (1962) (Isr.) (upholding Israeli jurisdiction over war crimes committed in Nazi Germany because "the universal character of the crimes in question [ ] vests in every [S]tate the power to try those who participated in the perpetration of such crimes").

[136] *See* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7) (stating that "a ship on the high seas is assimilated to the territory of the State the flag of which it flies"). *See also* United Sates v. Flores, 289 U.S. 137, 155-56 (1933) (extending the reach of U.S. jurisdiction to "offenses committed on an American vessel . . . [operating] in the territorial waters of a foreign sovereignty").

[137] *See* Robert Beckman, *Jurisdiction over Pirates and Maritime Terrorists*, *in* THE LIMITS OF MARITIME JURISDICTION, *supra* note 70, at 349, 351.

[138] Powell, *supra* note 69, at 269.

[139] ROTHWELL & STEPHENS, *supra* note 23, at 159; Péter D. Szigeti, *The Illusion of Territorial Jurisdiction*, 52 TEX. INT'L L.J. 369, 388 (2017).

[140] O'CONNELL, *supra* note 1, at 735.

"the right of a [S]tate to exercise jurisdiction on the basis of domicile or residence."[141] Just as with an individual or a corporation, "[e]ach [S]tate . . . may determine for itself the conditions on which it will grant its nationality to a [vessel], thereby accepting responsibility for it and acquiring authority over it."[142] It is "assumed that the nationality of the ship is that of the country whose flag it flies."[143]

This regime, however, trusts that flag States will in fact "exercise effective control over ships flying its flag on the high seas."[144] UNCLOS requires that there must exist "a genuine link between the State and the ship,"[145] but in reality, international law permits a feeble connection – simply registering the ship in that State is sufficient to enable a vessel its flag and operate under its exclusive jurisdiction on the high seas.[146]

As a result, ship owners are able to register their ships with States that have a minimal connection to any of its personnel or activities; such States, particularly those with "liberal domestic laws" are widely known as flags of convenience.[147] These States attract many ship owners for economic benefits, political reasons, or to conceal illegal activities, especially where the flag State lacks both the means and the desire to enforce their own domestic laws outside of their territory.[148] Ship owners that operate their vessels under a flag of convenience are subsequently incentivized to take unnecessary risks, thus placing seafarers, the marine environment, and other vessels at risk because there is little to no fear of repercussion from the flag State itself.[149]

To ensure that minimum standards are met, UNCLOS imposes positive duties on flag States to subject a vessel and its crew to that State's own domestic law and to take measures necessary to ensure safety at sea.[150] "This creates a requirement that the flag [S]tate apply particular shipping and

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[141] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. e ("The nationality principle is applicable to juridical [and] natural persons.").

[142] Lauritzen v. Larsen, 345 U.S. 571, 584-85 (1953) ("Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the [flag State], but apply the law of the flag on the pragmatic basis that there must be some law on shipboard . . . and no experience shows a better rule than that of the [S]tate that owns her.").

[143] O'CONNELL, *supra* note 1, at 752.

[144] *See* Anderson, *supra* note 69, at 339.

[145] UNCLOS, *supra* note 10, art. 91.

[146] *See* ROTHWELL & STEPHENS, *supra* note 23, at 168-69.

[147] *Id.* at 168.

[148] *See* H. Edwin Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 157-58 (1996); Manchuk, *supra* note 18, at 223 ("[F]lag of convenience states attract vessel owners to register with them because of their lenient enforcement measures.").

[149] Manchuk, *supra* note 18, at 223.

[150] UNCLOS, *supra* note 10, art. 94.

maritime laws to its flagged ships, and also relevant criminal and civil laws to the crew."[151] A flag State that repeatedly fails to enforce international obligations and regulations with respect to its vessels can forfeit recognition of its flag, as well as its right to exclusive jurisdiction over its vessels on the high seas.[152] In effect, such flag States have abandoned any claim to territorial or jurisdictional integrity with respect to its national vessels.

All non-flag States are limited in their capacity to prescribe and enforce law aboard foreign vessels in accordance with international law.[153] However, this does not mean that flag State jurisdiction is exclusive; rather it merely aims to connect all vessels (jurisdictionally) with *a* State.[154] Just as a foreign national becomes subject to a forum State's laws while traveling in its territory, a foreign vessel becomes subject to a forum State's laws while traveling in its territorial sea.[155] Likewise, when a vessel operates on the high seas – outside the territory of any State – it is generally subject to the exclusive jurisdiction of the flag State, just as a foreign national would still be subject to the laws of his or her home country while traveling beyond its borders.[156]

Accordingly, while flag States have been shown to possess "broad prescriptive and enforcement jurisdiction over their ships, coastal [S]tates are [still] afforded the right to exercise sovereignty, sovereign rights, [and] jurisdiction in the ocean adjacent to their coasts."[157] As a result, foreign vessels are generally subject to the concurrent jurisdiction of its flag State and the coastal State when sailing in sovereign waters. This regime necessarily creates friction where a foreign vessel violates a coastal State law or regulation in its sovereign waters, yet the coastal State lacks authority to regulate that particular foreign vessel activity.

C. Jurisdiction in the Maritime Zones

A coastal State's authority to regulate vessel traffic and activities in its waters varies greatly within each of the maritime zones prescribed by UNCLOS.[158] The closer a foreign vessel sails towards a coastal State's land, it becomes subject to a broader set of coastal State regulations; as a foreign vessel sails further from shore, coastal State regulations systematically

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[151] Rothwell & STEPHENS, *supra* note 23, at 169.

[152] UNCLOS, *supra* note 10, art. 228. *See* Anderson, *supra* note 69, at 336.

[153] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-404; Szigeti, *supra* note 139, at 388-89.

[154] *See* Anderson, *supra* note 69, at 333-34.

[155] *But see* UNCLOS, *supra* note 10, art. 17 (granting "ships of all States" the ability to "enjoy the right of innocent passage").

[156] *See* O'CONNELL, *supra* note 1, at 755.

[157] Kraska, *supra* note 23, at 168.

[158] ROTHWELL & STEPHENS, *supra* note 23, at 455.

evaporate until only flag State jurisdiction remains. The following sections describe UNCLOS' delineation of coastal State jurisdiction over foreign vessels in each of the principal maritime zones.

1. Territorial Sea

UNCLOS authorizes States to establish a territorial sea up to 12NM from their coastlines.[159] While coastal State sovereignty within the territorial sea is not absolute,[160] within this area the coastal State is "free to enforce any law, regulate any use and exploit any resource," as long as it does not interfere with the right of innocent passage for foreign vessels.[161] International law restricts coastal State sovereignty by authorizing freedom of passage through any territorial sea for foreign vessels either calling at a port facility or engaged in innocent passage.[162] The rights of innocent passage, however, are conditional: a coastal State may take necessary steps to prevent the non-innocent, or threatening, passage of any vessel.[163]

UNCLOS does not consider passage to be innocent where, among other things, such passage threatens the territorial integrity of a coastal State, where a vessel is collecting information to the prejudice of a coastal State, where it involves the launching of any military vessel, or where it involves research activities or any other activity not having a direct bearing on passage.[164] A coastal State can take any steps in order to prevent passage which is not innocent, including the arrest or detention of the vessel by State authorities,[165] as long as its response is both necessary and proportional.[166] Accordingly, depending on the particular facts and circumstances of the case, States may confiscate a vessel unlawfully operating in its territorial sea.[167] Besides confiscation, international law permits a State to detain a vessel, prevent further passage of a vessel, or forcibly remove a vessel that transgresses its laws while operating in its territorial sea.[168]

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[159] UNCLOS, *supra* note 10, art. 3.

[160] *See* ROTHWELL & STEPHENS, *supra* note 23, at 72.

[161] Tuerk, *supra* note 33, at 16.

[162] UNCLOS, *supra* note 10, arts. 18-19.

[163] *Id.* art. 25. *See also* James Kraska, *Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters*, 54 COLUM. J. TRANSNAT'L L. 164, 218-20 (2015).

[164] UNCLOS, *supra* note 10, art. 19.

[165] *Id.* arts. 25, 27-28; ROTHWELL & STEPHENS, *supra* note 23, at 233.

[166] M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 10, 61-62 ¶ 155.

[167] M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014, ITLOS Rep. 4, 78-81 ¶¶ 255-70 (holding that a coastal State has the right to arrest and confiscate a foreign vessel engaged in illegal activities in its sovereign waters when reasonable in light of particular circumstances).

[168] *See* ROTHWELL & STEPHENS, supra note 23, at 458.

International law further permits, indeed encourages, all coastal States to adopt laws and regulations in order to, among other things, protect the safety of navigation for all vessels in its territorial sea; to regulate maritime traffic; to prevent infringement of coastal State customs, immigrations; and to protect the coastal State's environment and living resources.[169] Foreign vessels, even those undertaking innocent passage in a coastal State's territorial sea, are required to comply with any such law that is made public to the global community.[170]

With the exception of the right of innocent passage, "[a] coastal State has the same sovereignty over its territorial sea . . . as it has in respect of its land territory."[171] Indeed, "as the sovereign rights of coastal [S]tates over the territorial sea gained greater recognition and acceptance, so too did the extent of the coastal [S]tate's prescriptive jurisdiction over ships within those waters."[172] Thus, "the law of the flag has less force when a foreign vessel sails within another [S]tate's territorial waters."[173] In many instances, the coastal State and flag State exercise concurrent jurisdiction: a coastal State may exercise its criminal jurisdiction over foreign vessels if the consequences of the crime extend to the coastal State; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances; or "where the assistance of the [coastal State] has been requested by the master of the ship or . . . [officials] of the flag State."[174]

"Stricter limitations exist with respect to civil jurisdiction against foreign ships within the territorial sea."[175] A coastal State should not stop a vessel "for the purpose of exercising civil jurisdiction in relation to a person on board the ship;" however, a coastal State can arrest a foreign vessel for civil liabilities incurred by the ship itself in the course of its voyage through the waters of the coastal State.[176] This includes civil proceedings based upon incidents arising while a foreign ship is transiting through any of the coastal State's sovereign waters, including the contiguous zone and the EEZ, while *en route* to the territorial sea.[177] In sum, foreign vessels enjoy the right of innocent passage through the territorial sea, but do not "enjoy any general

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169 UNCLOS, *supra* note 10, art. 21(1).

170 *Id.* art. 21(3)(4); ROTHWELL & STEPHENS, *supra* note 23, at 457.

171 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 512.

172 ROTHWELL, *supra* note 23, at 447.

173 Manchuk, *supra* note 18, at 226.

174 UNCLOS, *supra* note 10, art. 27; ROTHWELL & STEPHENS, *supra* note 23, at 457-58.

175 ROTHWELL & STEPHENS, *supra* note 23, at 458.

176 UNCLOS, *supra* note 10, art. 28.

177 ROTHWELL & STEPHENS, *supra* note 23, at 458-59.

exemption from laws and regulations enacted by the coastal [S]tate."[178]

2. Contiguous Zone

In addition to the territorial sea, coastal States are permitted limited rights with respect to the waters extending 24NM from its coastal baseline, or 12NM past the territorial sea, in an area named the "contiguous zone."[179] International law allows coastal States to exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration, and sanitary laws where those infringements would, or did, occur in its territory or territorial sea.[180] Prior to UNCLOS, State practice in the twentieth century revealed that many States extended their jurisdiction in order to prevent smuggling through territorial waters, and to prevent foreign vessels from hovering just beyond the territorial seas in order to establish an impervious base for illegal activities.[181] In effect, the contiguous zone "is a protective zone in which essentially defensive measures apply."[182]

Contiguous zone jurisdiction is valid only with respect to vessels that are moving inbound towards or outbound from a coastal State's territory or territorial sea; merely transiting through the contiguous zone does not create any obligations.[183] Accordingly, coastal States may only exercise jurisdiction over foreign vessels in the contiguous zone if: (1) a vessel is moving inbound towards the coastal State's territorial sea and is presently acting in contravention to that State's customs, fiscal, immigration, or sanitary laws; or (2) a vessel has departed from that State's territorial sea and, while in that State's territory, had acted in contravention to its customs, fiscal, immigration, or sanitary laws.[184] While jurisdiction is thus limited, coastal States may still intercept and remove vessels from their contiguous zone if the vessel is simply anchored in this area with no intent of ever entering its territorial sea.[185]

While coastal States have greater enforcement capacity in the contiguous zone compared to the EEZ or High Seas, "it is not a general security zone" and "does not confer upon the coastal [S]tate the extended operation of its laws."[186] Coastal States are not free to establish offenses that are "applicable

[178] *Id.* at 457.

[179] UNCLOS, *supra* note 10, art. 33.

[180] *Id.*

[181] ROTHWELL & STEPHENS, *supra* note 23, at 79.

[182] O'CONNELL, *supra* note 1, at 575.

[183] ROTHWELL & STEPHENS, *supra* note 23, at 83.

[184] *Id.*; James Carlson, *Presidential Proclamation 7219: Extending the United States' Contiguous Zone—Didn't Someone Say This Had Something to do with Pollution?*, 55 U. MIAMI L. REV. 487, 501 (2001).

[185] ROTHWELL & STEPHENS, *supra* note 23, at 83.

[186] *Id. See also* O'CONNELL, *supra* note 1, at 1034 ("The contiguous zone is the product

specifically to the contiguous zone."[187] Instead, within the contiguous zone, international law permits coastal States to enforce violations of domestic law committed in the territorial sea and to "prevent ships which enter the contiguous zone from committing such offences."[188]

3. Exclusive Economic Zone

The EEZ is an area beyond the territorial sea and contiguous zone, which extends up to 200NM from a coastal baseline.[189] Within the EEZ, international law seeks to balance coastal State sovereignty with the rights of foreign vessels and the international community.[190] Indeed, foreign vessels enjoy substantial rights in the EEZ which ordinarily cannot be suppressed by the coastal State.[191] UNCLOS established the EEZ, in part, as an effort to resolve the "tragedy of the oceanic commons" by assigning property rights to the States best placed, and best motivated, to manage coastal resources.[192] Within the EEZ, coastal States enjoy sovereign rights in exploring, exploiting, conserving, and managing living and non-living resources, and they possess jurisdiction over matters regarding artificial structures, marine scientific research, and the marine environment.[193] Following the conclusion of UNCLOS in 1982, the ICJ recognized the customary international law status of a 200NM EEZ in a 1984 dispute between the United States and Canada.[194]

Essentially, the EEZ combines characteristics of the high seas and the territorial sea – thereby restricting the freedoms of both foreign vessels and coastal States.[195] A coastal State is permitted to extend the reach of its resource rights, its ability to preserve the marine environment, and its power to protect itself from environmental threats out to 200NM.[196] At the same time, foreign vessels are entitled to the high seas freedoms of navigation,

of a nineteenth-century notion that a coastal State had jurisdiction beyond its territorial sea for the purpose of protecting its revenue against smuggling and its public health against disease.").

187 ROTHWELL & STEPHENS, *supra* note 23, at 460.

188 *Id.*; O'CONNELL, *supra* note 1, at 1058.

189 UNCLOS, *supra* note 10, arts. 55-57.

190 TUERK, *supra* note 33, at 161.

191 Damir Arnaut, *Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation Between Croatia and Slovenia*, 8 OCEAN & COASTAL L.J. 21, 65 (2002).

192 ROTHWELL & STEPHENS, *supra* note 23, at 85.

193 UNCLOS, *supra* note 10, art. 56; Asia N. Wright, *High Seas Ship Crimes*, 7 LOY. MAR. L.J. 1, 22 (2009).

194 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. Rep. 246, 294 ¶ 94 (Oct. 12).

195 ROTHWELL & STEPHENS, *supra* note 23, at 87-88.

196 *Id.* at 86.

laying of submarine cables and pipelines, scientific research, and other internationally lawful uses of the sea consistent with the aforementioned freedoms.[197] UNCLOS, however, prohibits a coastal State from implementing laws outside of these specific purposes, and from imposing either imprisonment or corporal punishment for the violation of its laws that concern artificial structures, marine scientific research, and the marine environment.[198]

Today, tension exists as coastal States seek to expand their rights in the EEZ, restricting the freedoms of foreign vessels operating in these waters "on account of national security concerns such as terrorism, weapons proliferation, piracy, and people trafficking."[199] Coastal States also restrict freedom of navigation in their EEZ by regulating the bunkering of vessels fishing in the EEZ, stopping and searching vessels to ensure compliance with fisheries regulations, enforcing pollution control measures, and prohibiting transit through sensitive marine environments.[200] In the EEZ, international law restricts a coastal State's prescriptive jurisdiction to matters regarding artificial installations, marine scientific research, and the protection of its marine environment and resources.[201] Globally, EEZ areas include nearly 90% of the world's fisheries and offshore hydrocarbon resources, and thus are fiercely sought after and protected by coastal States.[202] While coastal States retain strong economic rights to the resources in the EEZ, foreign vessels preserve their "non-resource related high seas freedoms within [the EEZ]."[203] In this sense, the EEZ is a zone of "functional sovereignty."[204]

Coastal States are permitted "extensive jurisdiction to regulate fishing in the EEZ,"[205] and may exercise jurisdiction by, for instance, stopping and searching foreign fishing vessels suspected of noncompliance with its fishing regulations.[206] In the event that a boarding reveals any violation of conservation laws aimed at protecting and managing marine resources, coastal States may arrest and "commence judicial proceedings against

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[197] UNCLOS, *supra* note 10, art. 58; Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830, 836 (2006).

[198] UNCLOS, *supra* note 10, art. 73; Arnaut, *supra* note 191, at 66.

[199] ROTHWELL & STEPHENS, *supra* note 23, at 86. *See also* TUERK, *supra* note 33, at 161 ("A tendency has manifested itself to extend coastal State legislation applicable to the territorial sea not only to the contiguous zone, but also across the entire EEZ.").

[200] ROTHWELL & STEPHENS, *supra* note 23, at 98.

[201] UNCLOS, *supra* note 10, art. 56.

[202] TUERK, *supra* note 33, at 27.

[203] *Id.*

[204] *Id.* at 19.

[205] ROTHWELL & STEPHENS, *supra* note 23, at 91.

[206] UNCLOS, *supra* note 10, art. 73.

delinquent ships, their masters and their crew."[207] Such permissive jurisdiction extends to closely related activities, including the bunkering operations, or re-fueling, of fishing vessels while in the EEZ.[208] Coastal States may not, however, apply its customs, fiscal, or immigration laws to foreign vessels operating exclusively in the EEZ.[209] Finally, in the EEZ, coastal States retain jurisdiction over incidents of intentional or incidental pollution by foreign vessels.[210] This authority derives from the coastal State's right to protect and preserve its marine environment.[211]

4. High Seas

"The high seas are open to all States,"[212] and include all parts of the sea that are not included in the internal waters of a coastal State, the territorial sea, or the EEZ of a coastal State.[213] UNCLOS recognizes six basic freedoms within the high seas: freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations like oil rigs, freedom to fish, and freedom of scientific research for vessels operating on the high seas.[214]

The freedoms associated with the high seas, however, are neither absolute, nor do they "amount to . . . [a] state of lawlessness."[215] This follows from the long-standing recognition that the high seas, and its resources, are the "common heritage of mankind."[216] The high seas are considered a globally managed commons, rather than an area where the above mentioned freedoms can be exercised with impunity.[217] Accordingly, freedoms of the high seas must be exercised "with due regard for the interests of other States in their exercise of the freedom of the high seas,"[218] and in compliance with other

[207] ROTHWELL & STEPHENS, *supra* note 23, at 463.

[208] *See, e.g.*, M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014, ITLOS Rep. 4, 67-69 ¶¶ 210-19.

[209] *See, e.g.*, M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 10, 54 ¶ 127.

[210] ROTHWELL & STEPHENS, *supra* note 23, at 97.

[211] *Id.* at 463-64 (describing UNCLOS articles 210 to 212 as "outlin[ing] the broad extent of coastal [S]tate jurisdiction to regulate aspects of marine pollution by foreign ships in the EEZ consistent with coastal [S]tate EEZ jurisdiction").

[212] UNCLOS, *supra* note 10, art. 87.

[213] *Id.* art. 86.

[214] *Id.* art. 87.

[215] Anderson, *supra* note 69, at 331.

[216] G.A. Res. 2749 (XXV), Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, ¶ 1 (Dec. 12, 1970); TUERK, *supra* note 33, at 13.

[217] *See* ROTHWELL & STEPHENS, *supra* note 23, at 155.

[218] UNCLOS, *supra* note 10, art. 87(2).

rules of international law.[219] For instance, international law has developed restrictions to navigational freedom in the form of rules designed to protect persons,[220] other vessels,[221] and the environment.[222] Likewise, international law restricts the freedom of fishing by imposing limitations on both the quantity and type of ocean dwelling organisms that may be harvested.[223]

In order to preserve a vessel's freedom to operate on the high seas, and to prevent the establishment of a jurisdictional black hole, UNCLOS maintains that vessels are, with few exceptions, "subject to the exclusive jurisdiction of the State whose flag they fly."[224] In this respect, "a flag [S]tate has the same exclusive right to exercise . . . jurisdiction over its vessels on the high seas as it does over its territory."[225] Unless the flag State, or the vessel's master, provides consent, a State may not interfere with a foreign vessel's freedom of navigation unless it reasonably suspects that vessel to be engaged in piracy, the slave trade, unauthorized broadcasting, or if it appears to be without nationality.[226] These exceptions align with a common heritage conceptualization of the high seas, as each exception can be considered one of the world's "common enemies."[227] This also leaves the door open for new

[219] ROTHWELL & STEPHENS, *supra* note 23, at 164. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 521 cmt. c ("Due consideration for interests of others requires that ships on the high seas observe rules relating to the safety of navigation, the protection of life at sea, and the prevention, reduction, and control of pollution of the marine environment.").

[220] *See, e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 6, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention]; International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278 [hereinafter SOLAS].

[221] *See, e.g.*, Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 [hereinafter COLREGS].

[222] *See, e.g.*, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120; International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 34 U.S.T. 3407, 1340 U.N.T.S. 184 [hereinafter MARPOL]. *See also* Tuerk, *supra* note 33, at 164 ("A [ ] most important area entailing limitations to the freedom of navigation is the growing body of international rules and standards governing vessel source pollution.").

[223] *See, e.g.*, International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 88 [hereinafter Fish Stocks Agreement].

[224] UNCLOS, *supra* note 10, art. 92(1); Beckman, *supra* note 137, at 350.

[225] Deirdre M. Warner-Kramer & Krista Canty, *Stateless Fishing Vessels: The Current International Regime and a New Approach*, 5 OCEAN & COASTAL L.J. 227, 229 (2000).

[226] UNCLOS, *supra* note 10, art. 110; Beckman, *supra* note 137, at 350-51.

[227] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 521 rep. n.1 ("Small deviations from [the exclusive flag State jurisdiction] rule have been

exceptions in the future, such as reasonable suspicion of illicit drug trafficking.[228]

"Within the high seas coastal [S]tates enjoy no specific rights of maritime regulation" and "the rights of the flag [S]tate are supreme."[229] With respect to "a collision or any other incident of navigation," only the flag State or an individual's nationality State may institute penal or disciplinary proceedings against the vessel or any person on board.[230] Non-flag States, however, do have the limited right to exercise Universal Jurisdiction over the common enemies of mankind, including vessels suspected of being engaged in piracy, the slave trade, and unauthorized broadcasting.[231] Thus, while international law recognizes the authority of non-flag States to enforce and adjudicate internationally prescribed crimes, non-flag States effectively lack jurisdiction over foreign vessels while sailing on the high seas.[232]

V. CHANGES IN THE CUSTOMARY LAW OF MARITIME JURISDICTION

Since the adoption of UNCLOS over thirty-five years ago, customary international law "has witnessed an ever expanding assertion of coastal [S]tate rights over adjacent waters."[233] These "developments in law and practice have already resulted in some important divergences between the jurisdictional scheme outlined in UNCLOS and how [S]tates in reality exercise jurisdiction over ships."[234] This is particularly true with respect to the EEZ, which was rightly predicted as the maritime zone "likely to provide the greatest source of conflicts and disputes over navigational rights and freedoms in the new century."[235]

Coastal States have expanded the scope of their jurisdiction regarding the activities of foreign vessels through a variety of means. Some coastal States

made in order to protect all [S]tates against common enemies such as pirates, slave traders, [etc.].").

[228] *Id.*

[229] ROTHWELL & STEPHENS, *supra* note 23, at 465.

[230] UNCLOS, *supra* note 10, art. 97. *See also* Wright, *supra* note 193, at 20 ("Although flag [S]tate jurisdiction over criminal matters is not explicitly recognized, it is recognized in practice").

[231] *See* UNCLOS, *supra* note 10, art. 110; ROTHWELL & STEPHENS, *supra* note 23, at 465.

[232] *See* Robin Geiß & Christian J. Tams, *Non-Flag States as Guardians of the Maritime Order: Creeping Jurisdiction of a Different Kind?*, *in* JURISDICTION OVER SHIPS, *supra* note 23, at 19, 25.

[233] ROTHWELL & STEPHENS, *supra* note 23, at 27.

[234] Ringbom, *supra* note 34, at 1.

[235] Sam Bateman, Donald R. Rothwell, & David VanderZwaag, *Navigational Rights and Freedoms in the New Millennium: Dealing with 20th Century Controversies and 21st Century Challenges*, *in* NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA 314, 323 (Donald R. Rothwell & Sam Bateman eds., 2000).

have created entirely new jurisdictional zones, such as environmental protection zones.[236] Other coastal States are simply subjecting existing maritime zones, such as the EEZ, to increasing "claims [of] sovereignty over the area itself and not just to the resources."[237] Not every expansion of coastal State jurisdiction is necessarily in violation of UNCLOS, and some may rightly be treated as a gloss on the treaty's text or interpretation.[238] Certain unilateral claims, however, directly contradict the meaning and purpose of UNCLOS. Benin, Ecuador, Liberia, Peru and Somalia, for instance, have all claimed territorial seas of 200NM, while UNCLOS explicitly limits such claims to a maximum distance of 12NM.[239]

Whether consistent with UNCLOS or not, coastal States are in fact thickening their jurisdictional authority within sovereign waters.[240] Indeed, the thickening jurisdiction of coastal States in the EEZ has evolved to the point where "it is no longer accurate to say that the freedom of navigation exists in that zone to the same extent as on the high seas."[241] Various treaties and unilateral State actions support an evolving scope of the jurisdiction that coastal States attempt to exercise within their sovereign waters. In turn, many of the customary international law norms enshrined in UNCLOS appear outdated, as coastal States now routinely regulate activities beyond the scope of the jurisdictional competence authorized by UNCLOS.

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[236] *See* Ringbom, *supra* note 34, at 2.

[237] TUERK, *supra* note 33, at 181.

[238] *Compare* UNCLOS, art. 59 ("In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States . . . conflict[s] should be resolved on the basis of equity and in the light of all the relevant circumstances . . ."), *and* Rothwell, *supra* note 23, at 90 ("Article 59 addresses the possibility that certain rights and jurisdiction will be asserted that are not specifically attributed by [UNCLOS] to coastal [S]tates or other [S]tates."), *with* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7) ("[T]he contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law . . .").

[239] *Maritime Claims*, CENTRAL INTELLIGENCE AGENCY: THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/283.html, [https://perma.cc/RB7B-KASH]. . *See also* Erik J. Molenaar, *New Maritime Zones and the Law of the Sea*, *in* JURISDICTION OVER SHIPS, *supra* note 23, at 249, 266.

[240] *See* Ball, *supra* note 19, at 103 ("'Thickening jurisdiction' is the process of regulating more and more activities within [a maritime zone]"); Bateman, *supra* note 235, at 324 ("'Thickening jurisdiction' refers [to] . . . either tightening regulations over activities within . . . [maritime zones] where the coastal State legitimately exercises jurisdiction, or extending regulations to activities that are usually regarded as not with the jurisdiction of the coastal State").

[241] TUERK, *supra* note 33, at 182.

A. Treaties

Since the adoption of UNCLOS, coastal and flag States have ratified several treaties enhancing the jurisdictional authority of coastal States over foreign vessels. Many flag States have entered into bilateral treaties with coastal States that permit jurisdiction to be exercised over foreign vessels for violations of coastal State domestic law with respect to fishing, drug trafficking, terrorism, and nuclear proliferation.[242] Several multilateral treaties have been ratified as well. These include the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), which "broaden[s] jurisdiction for maritime crimes in response to terrorism concerns;"[243] the Proliferation Security Initiative, designed to end trafficking of weapons of mass destruction;[244] and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (and subsequent bilateral treaties), which permits non-flag State vessels to board foreign vessels during counter-drug operations.[245]

In addition to the above treaties, two other international conventions expand the scope of coastal State jurisdiction within the EEZ: the Basel Convention[246] and the Convention on the Protection of Underwater Cultural Heritage.[247] In accordance with the Basel Convention, coastal States can block the shipment of hazardous cargoes from transiting through their EEZ.[248] The Convention on the Protection of Underwater Cultural Heritage, meanwhile, "grants the coastal State party the right to prohibit or authorize any activity on underwater cultural heritage located in its EEZ . . . so as to prevent interference with its sovereign rights."[249]

In accordance with these treaties, coastal States have expanded the reach of their own domestic law. For instance, on multiple occasions coastal States with established nuclear-free policies have denied foreign vessels carrying nuclear materials the right of innocent passage through their EEZ.[250] Indeed,

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[242] Geiß & Tams, *supra* note 232, at 28.

[243] Manchuk, *supra* note 18, at 224.

[244] Henning Jessen, *United States' Bilateral Shipboarding Agreements— Upholding Law of the Sea Principles while Updating State Practice*, *in* JURISDICTION OVER SHIPS, *supra* note 23, at 50, 52-53.

[245] *Id.* at 61.

[246] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126.

[247] United Nations Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 2562 U.N.T.S. 3.

[248] *See* Jon M. Van Dyke, *The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone*, 29 MARINE POL'Y 107, 112 (2005).

[249] TUERK, *supra* note 33, at 162.

[250] David B. Dixon, *Transnational Shipments of Nuclear Materials by Sea: Do Current Safeguards Provide Coastal States a Right to Deny Innocent Passage?*, 16 J. TRANSNAT'L L.

the Chilean Navy once threatened to destroy the propellers of a vessel carrying nuclear waste through its EEZ unless it immediately returned to the high seas, and relied upon recent development in customary international law (codified by the Basel Convention) to justify its denial of the foreign vessel's right to innocent passage required by UNCLOS.[251] Despite protests, foreign flag States have complied with these prohibitions, thereby implicitly accepting such extensions of domestic coastal State nuclear policy to the EEZ.[252]

B. Unilateral State Actions

States have also shown a tendency to expand their jurisdiction unilaterally, primarily in order to bolster national security or to protect their marine environment.[253] Recent practice reveals that many States, including the US, have asserted additional rights with respect to security jurisdiction.[254] Many coastal States have also enacted legislation with respect to presence of armed security guards in the EEZ,[255] and have prohibited vessels from their EEZ that are carrying ultra-hazardous nuclear cargoes.[256] In order to protect national security, coastal States have restricted military operations in their EEZs.[257] Finally, upon ratifying UNCLOS, many States explicitly reserved the right to prohibit certain activities within their EEZ, implicitly assuming jurisdiction over foreign vessels that transgress those regulations.[258]

& POL'Y 73, 76-77 (2006) (stating that Antigua, Argentina, Barbuda, Brazil, Chile, Colombia, Dominican Republic, Kiribati, Malaysia, Nauru, Portugal, Puerto Rico, South Africa, and Uruguay have prohibited ships carrying nuclear cargoes from passing through their sovereign waters).

[251] *Id.* at 77-78, 82.

[252] *See id.* at 76-77.

[253] Kraska, *supra* note 23, at 187 ("Coastal [S]tates have been particularly active in asserting and enforcing regulatory jurisdiction over vessel-source pollution as well as military and security activities in a manner that exceeds the scope of their competence in UNCLOS."); Oxman, *supra* note 197, at 840. *See also* Sam Bateman, *Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zones*, *in* THE LAW OF THE SEA, *supra* note 69, at 365, 383 ("In December 2002, China announced that it had enacted a new law explicitly requiring Chinese approval of all survey and mapping activities in China's EEZ and stating that unapproved ocean-survey activity will be subject to fines and confiscation of equipment and data.").

[254] TUERK, *supra* note 33, at 17.

[255] Kraska, *supra* note 23, at 167-68.

[256] TUERK, *supra* note 33, at 175.

[257] Bateman, *supra* note 235, at 524.

[258] *See, e.g.*, *United Nations Convention on the Law of the Sea: Declarations and Statements*, U.N. DIV. FOR OCEAN AFF. AND THE LAW OF THE SEA (last updated Oct. 29, 2013), http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm [https://perma.cc/JKG9-QCX9] (citing Thailand as declaring that "in the [EEZ], enjoyment

In recent years, the International Tribunal for the Law of the Sea ("ITLOS") and the PCA have heard a number of disputes that involve coastal States unilaterally expanding the scope of their jurisdiction to foreign vessel activity within their sovereign waters. Two of these cases are highlighted below.[259]

1. Arctic Sunrise Case

The *Arctic Sunrise* is one such case, involving a Dutch vessel that had been chartered and operated by Greenpeace International since 1995.[260] In September 2013, the *Arctic Sunrise* sailed towards an offshore oil platform, the *Prirazlomnaya*, in the Pechora Sea to protest offshore oil drilling in Arctic waters.[261] A subsidiary of a Russian State-controlled oil company operated the *Prirazlomnaya*, which is fixed well within Russia's EEZ.[262]

Prior to taking any action, the *Arctic Sunrise* notified the *Prirazlomnaya* that it planned to dispatch activists from the vessel to scale the platform and establish a camp on it.[263] Russian Coast Guard officials warned the *Arctic Sunrise* that its actions violated various articles of UNCLOS and that navigation was prohibited near the platform for safety reasons.[264] Ignoring these orders, the *Arctic Sunrise* dispatched smaller vessels, and several of its crewmembers began to climb the platform, using grappling hooks and rope in order to stage their protests.[265] After being repelled by water cannons, the Greenpeace activists started to retreat towards the *Arctic Sunrise* and Russian authorities issued a warning that the vessel was suspected of terrorist activity and needed to submit to a security boarding.[266] The following day, Russian authorities boarded the vessel and detained all crew members on board under suspicion of hooliganism.[267]

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of the freedom of navigation . . . excludes any non-peaceful use without the consent of the coastal State, in particular, military exercises or other activities which may affect the rights or interests of the coastal State;" Malaysia declaring that "the provisions of [UNCLOS] do not authorize other States to carry out military exercises . . . in the [EEZ] without the consent of the coastal State;" and China as declaring that "the People's Republic of China shall enjoy sovereign rights and jurisdiction over [the EEZ]").

[259] *See generally* TUERK, *supra* note 33, at 126 (describing ITLOS as "the specialized international judicial body established for the settlement of disputes concerning the interpretation or application of UNCLOS, and for rendering advisory opinions").

[260] Arctic Sunrise Arbitration (Neth. v. Rus.), PCA Case No. 2014-02, Award, Aug. 14, 2015, ¶¶ 74-75.

[261] *Id.* ¶¶ 77-78, 81.

[262] *Id.* ¶ 79.

[263] *Id.* ¶ 84.

[264] *Id.* ¶ 82.

[265] *Id.* ¶¶ 87-91.

[266] *Id.* ¶¶ 93-94.

[267] The initial charge was piracy, but was changed to hooliganism because, by definition,

Following the arrest of the *Arctic Sunrise* and its crew, the Netherlands, as the flag State, commenced proceedings against Russia at the PCA for violating UNCLOS.[268] In addition, the Netherlands also applied to ITLOS for the prompt release of both the vessel and its crew.[269] The dispute centered on the inherent conflict between the rights of a coastal State in its EEZ and the rights of the flag State *vis-à-vis* vessels flying its flag while navigating in another coastal State's EEZ.[270] Specifically, the Netherlands claimed that Russia's seizure of the *Arctic Sunrise* had interfered with its UNCLOS-guaranteed freedom of navigation within Russia's EEZ.[271] As a result, Russia "breached its obligations owed to the Kingdom of the Netherlands in regard to the freedom of navigation and its right to exercise jurisdiction over the *Arctic Sunrise*" as the flag State.[272]

Russia refused to participate in either the PCA or the ITLOS proceedings, claiming, in a *note verbale* addressed to ITLOS that it did not recognize the jurisdiction of ITLOS or the PCA with respect to disputes "concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."[273] Russia also maintained that it had jurisdiction within its own EEZ over the criminal activities of the *Arctic Sunrise* and its crew pursuant to UNCLOS articles 56 and 60.[274] According to Russia, these articles confer exclusive jurisdiction upon the coastal State with respect to any vessel engaged in an illegal action against its offshore installations within sovereign waters.[275] This is because the sovereign rights conferred upon a coastal State within its EEZ "cover all rights necessary for the exploration and exploitation of the natural resources . . . includ[ing] jurisdiction in [connection] with the

piracy must involve at least two vessels. *Id.* ¶¶ 101-02.

[268] Alex G. Oude Elferink, *The Russian Federation and the Arctic Sunrise Case: Hot Pursuit and Other Issues Under the LOSC*, 92 INT'L L. STUD. 381, 382 (2016).

[269] *See generally* Arctic Sunrise (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, ITLOS Rep. 230.

[270] Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, Request for the Prescription of Provisional Measures, Oct. 21, 2013, ¶ 38.

[271] *Id. See also* UNCLOS, *supra* note 10, art. 58; Rothwell, *supra* note 23, at 95.

[272] Arctic Sunrise, Request for the Prescription of Provisional Measures, ¶ 20.

[273] Arctic Sunrise Arbitration (Neth. v. Rus.), PCA Case No. 2014-02, Award, Aug. 14, 2015, ¶ 23.

[274] *Id. See generally* UNCLOS, *supra* note 10, art. 56(1)(b) (declaring that in the EEZ, coastal States have exclusive jurisdiction over the "use of artificial islands, installations and structures," including "jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations").

[275] The Ministry of Foreign Affairs of the Russian Federation, *On Certain Legal Issues Highlighted by the Action of the Arctic Sunrise Against Prirazlomnaya Platform*, ¶ 7.2 (last visited Mar. 16, 2018), http://www.mid.ru/documents/10180/1641061/Arctic+Sunrise.pdf/bc7b321e-e692-46eb-bef2-12589a86b8a6 [https://perma.cc/9NGZ-6SV8].

preventing and punishment of violations of law."[276] Accordingly, Russia argued it had jurisdiction over the *Arctic Sunrise* because the vessel was deliberately violating Russian laws that were designed "to protect [Russia's] sovereign right to safely exploit mineral resources of its . . . EEZ."[277] In this sense, Russia attempted to extend the reach of its arguably legitimate jurisdiction over offshore installations throughout its EEZ.[278]

Ultimately, ITLOS required Russia to release the vessel and its crew, without judging the merits of the Netherlands' claim and requiring the Netherlands to post a €3.6 million bond with Russia.[279] However, there was sharp disagreement between the judges "over the rights and obligations of a coastal [S]tate and a flag [S]tate within the EEZ," where a foreign vessel intentionally violates legitimate regulations.[280] These legitimate regulations included the establishment of safety zones around offshore installations in sovereign waters, wherein coastal States may prescribe laws and regulations "aimed at ensuring the safety of both navigation and the artificial islands, installations, or structures."[281] The PCA, in its decision on the merits, clearly stated that the rights of the coastal State within these safety zones exceeds "its rights in the EEZ at large."[282]

However, despite this recognition, the PCA ruled against Russia based on its finding that Russia failed to arrest the *Arctic Sunrise* while it was actually in the safety zone surrounding the *Prirazlomnaya*, as well as failed to satisfy the continuity requirement of hot pursuit.[283] Additionally, the PCA stated that Russia would have lawfully exercised jurisdiction over the *Arctic Sunrise* if it had "reasonable grounds to suspect the vessel [was] engaged in terrorist offences against [the *Prirazlomnaya*],"[284] or if the vessels activities reasonably "could have resulted in major harmful [environmental] consequences."[285] Finally, the PCA recognized that coastal States may exercise jurisdiction over foreign vessels in the EEZ where their activities represent "dangerous situations that can result in injuries to persons and damage to equipment and installations" or could "delay or interruption in

[276] *Id.* ¶ 7.1.

[277] *Id.* ¶ 11.6.

[278] *See* Elferink, *supra* note 268, at 398-99.

[279] Arctic Sunrise (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, ITLOS Rep. 230, ¶ 105.

[280] ROTHWELL & STEPHENS, *supra* note 23, at 95-96.

[281] Arctic Sunrise Arbitration ¶ 211. *See generally* UNCLOS, *supra* note 10, art. 60(4).

[282] Arctic Sunrise Arbitration ¶ 211.

[283] *Id.* ¶ 275. *See also* UNCLOS, *supra* note 10, art. 111 (authorizing hot pursuit when "undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State").

[284] Arctic Sunrise Arbitration¶¶ 278, 314.

[285] *Id.* ¶ 311.

essential operations."[286]

On its surface, the *Arctic Sunrise* Case stands for the proposition that Russia impermissibly extended its jurisdiction to protest activities of a foreign vessel operating in the EEZ. At a deeper level, however, the case demonstrates that coastal States are expanding the reach of purely domestic laws, in this case hooliganism, to its sovereign waters beyond the territorial sea with the conviction that such practices are legally acceptable. The PCA recognized, however, that a slight variation in the facts, such as a finding that the protests amounted to terrorism or that Russia had arrested the vessel inside the safety zone, could have readily caused the tribunal to recognize the validity of Russia's jurisdiction over the *Arctic Sunrise*. This would represent an overt shift in favor of coastal State jurisdictional authority in the EEZ over foreign vessel activities that have negative consequences or effects in the coastal State.

2. Enrica Lexie Incident

On February 15, 2012, two unarmed fishermen aboard the Indian vessel *St. Antony* were shot and killed while the vessel operated approximately 20.5NM from India's coast.[287] Based on the distance from shore, this incident occurred outside of India's territorial sea, but within its EEZ.[288] Indian authorities soon discovered that the Italian oil tanker M/V *Enrica Lexie*, with several armed Marines on board to protect the vessel in the event of a pirate attack, had passed near the *St. Antony* at the same time.[289] Indian authorities suspected that these Italian Marines were responsible for the killings, and arrested two Italian Marines when the oil tanker docked at Kochi, India on February 19, 2012. Indian officials charged the Marines with murder, relying on the SUA Convention,[290] as a basis for jurisdiction.[291]

In response, Italy accused India of breaching international maritime law for extending its jurisdiction to an incident involving the actions of Italian citizens on board an Italian vessel operating on the high seas.[292] Italy claimed its jurisdiction over any criminal proceedings in such a setting was exclusive,[293] simply because Italy was the flag State, and therefore possessed

[286] *Id.* ¶ 327.

[287] Enrica Lexie (It. v. India), Case No. 24, Order of Aug. 24, 2015, ITLOS Rep. 182, 191 ¶ 43.

[288] *See* UNCLOS, *supra* note 10, arts. 3, 33.

[289] Enrica Lexie ¶¶ 42, 44.

[290] *See* SUA Convention, *supra* note 220.

[291] Duncan Hollis, *The Case of Enrica Lexie: Lotus Redux?*, OPINIO JURIS (Jun. 17, 2012), http://opiniojuris.org/2012/06/17/the-case-of-enrica-lexie-lotus-redux/ [https://perma.cc/X5AU-XVA6].

[292] Enrica Lexie ¶ 28.

[293] *Id.* ¶ 40.

exclusive jurisdiction over the *Enrica Lexie* and its crew despite the vessel operating outside the territorial sea of any State.[294] As a result, Italy maintained that India's exercise of criminal jurisdiction over the *Enrica Lexie* and the Marines was unlawful because the incident took place in India's EEZ, where flag State jurisdiction is exclusive "over vessels flying its flag 'save in exceptional cases expressly provided for in international treaties or in [UNCLOS].'"[295]

India, meanwhile, maintained that UNCLOS did not even govern over the incident because it did not involve an incident between vessels, such as a collision, "but rather is about [the] double murder at sea" of two of its nationals.[296] Furthermore, India claimed that these murders were committed "in a maritime area under the jurisdiction of India."[297] As a result, India itself "possesse[d] fundamental rights that would be prejudiced" if it were not allowed to exercise jurisdiction over the murder of "two unarmed Indian fishermen plying their trade legitimately in India's [EEZ]."[298] At no point, however, did India claim that its own jurisdiction was exclusive. Instead, its submission appeared to operate on the presumption that both States had a legitimate interest in exercising jurisdiction – India because the incident resulted in the death of two Indian nationals in its sovereign waters, and Italy because the accused were two Italian nationals aboard a vessel flying the Italian flag.

Italy officially commenced proceedings against India in 2015, and the case is still ongoing. ITLOS has ordered both India and Italy to suspend all court proceedings until the issue of jurisdiction is resolved.[299] Both Italian Marines have been allowed to return to Italy, while remaining subject to India's authority, until the PCA determines which country has jurisdiction over them with respect to the *Enrica Lexie* incident.[300] The PCA has not yet issued any holdings, and, as of March 2018, both parties have only submitted their initial memorials.[301]

The PCA will be required to resolve critical issues surrounding the competing rights and jurisdiction of coastal States and flag States with

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[294] *Id.* ¶ 77.

[295] Enrica Lexie (It. v. India), ITLOS Case No. 24, Request for the Prescription of Provisional Measures, July 21, 2015, ¶ 35 (quoting UNCLOS article 92(1)).

[296] Enrica Lexie (It. v. India), ITLOS Case No. 24, Written Observations of the Republic of India, Aug. 6, 2015, ¶¶ 1.11, 3.5.

[297] *Id.* at ¶ 3.5.

[298] *Id.* at ¶ 3.77.

[299] Enrica Lexie ¶ 141.

[300] *See* The Enrica Lexie Incident (It. v. India), PCA Case Repository 1, 7 ¶¶ 29, 125, 132 (2016).

[301] *See generally* Enrica Lexie Incident (It. V. India), PCA Case No. 2015-28, Procedural Order No. 4 (Feb. 12, 2018).

regards to foreign vessels operating in an EEZ. UNCLOS does not provide for coastal State jurisdiction over the homicide of nationals that occur outside the territorial sea.[302] At the same time, UNCLOS only explicitly provides for exclusive flag State jurisdiction "[i]n the event of a collision or any other incident of navigation concerning a ship on the high seas."[303] Accordingly, unless murder is to be understood as a mere incident of navigation, there is a considerable gap in UNCLOS with respect to the proper delegation of jurisdictional authority in such a case. In one sense, India has acted unilaterally to expand the reach of its domestic criminal law to the EEZ, and is acting with the conviction that it has the legal authority to exercise jurisdiction over a foreign vessel's crewmembers accused of murdering Indian nationals in Indian sovereign waters.

These two cases demonstrate that_coastal State jurisdiction is actively thickening, particularly in the contiguous zone and EEZ, beyond the limits imposed by UNCLOS. This shift in customary international law is evidenced by the expanding extraterritorial reach of coastal State laws to cover violations of domestic laws anywhere within its sovereign waters, when such conduct imposes negative consequences upon the coastal State. Coastal States may already lawfully hold foreign flag vessels criminally and civilly liable for acts of terrorism, human and drug trafficking, and pollution.[304] As the *Arctic Sunrise* and *Enrica Lexie* cases indicate, States are now attempting to hold vessels and their crew liable for serious crimes committed in their sovereign waters as well.[305]

This trend, however, is strongly opposed by many maritime powers and scholars who fear that any expanse of a coastal State's jurisdictional authority in the contiguous zone and EEZ will "lead to a gradual assimilation of [these zones] with the territorial sea."[306] Such territorialization, it is claimed, will diminish the current freedoms of the seas that all States enjoy.[307] In reality, what appears to be feared is a return to the type of *Mare Clausum* regime that John Selden envisioned,[308] whereby States maintain absolute sovereign rights and jurisdiction over expansive areas of the world's seas, which in turn might restrict the freedom of international trade.

Thickening jurisdiction, however, need not result in restraints on trade nor in a free pass to regulate all activities taking place within a coastal State's sovereign waters.[309] To date, jurisdiction has only thickened with respect to

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302 *See* UNCLOS, *supra* note 10, art. 58.

303 *Id.* art. 97(1).

304 *See* discussion *supra* Part V.A.

305 *See* discussion *supra* Part V.B.i-ii.

306 TUERK, *supra* note 33, at 28.

307 ROTHWELL & STEPHENS, *supra* note 23, at 27.

308 *See* discussion *supra* p. 8.

309 *See, e.g.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED

a reasonable range of activities, namely those that have reprehensible consequences within the coastal State, such as pollution, nuclear proliferation, unsanctioned interference with State-owned property, and the murder of coastal State nationals. Thickening coastal State jurisdiction may also result in important benefits to the global community, the very reason why the EEZ was recognized in the first place.[310] One significant benefit of expanding the degree of coastal State jurisdiction with its own waters is that it will hold vessels, and their crew members, more accountable for transgressions that impact the global community. While this may result in an increase in the number of concurrent jurisdictions instances, such a regime will do "greater justice than the jurisdiction of a flag of convenience," which often permits violations to go unpunished where the flag State itself experiences no harm.[311]

Second, freedom of the seas has never been absolute, especially with respect to the "like freedom of others to use."[312] Where States are actively polluting the environment, killing innocent fisherman, and exploiting natural resources, they necessarily prevent others from using the world's oceans. Thus, as long as freedom of movement "can be preserved in its integrity, diminution of [navigational freedoms] can be tolerated, and can even be seen to be of advantage to the community of nations, even if . . . disadvantageous to particular maritime Powers . . ."[313]

VI. CONCLUSION

The aforementioned treaties and cases are, on their own, insufficient to definitively declare the existence of a new rule of customary international law or to predict the outcome of the pending *Enrica Lexie* arbitration. Nonetheless, this Note shows that coastal States are now consistently exercising jurisdiction over foreign vessels and crewmembers far beyond the limits imposed by UNCLOS. In particular, coastal State jurisdiction is thickening with respect to foreign vessel activities that have negative consequences felt within its borders; in other words, consequences that impact the coastal State's environment and that directly harm the members of its population.

This widespread practice of thickening jurisdiction, both through treaties and unilateral acts, necessarily impacts the scope of jurisdictional authority

STATES § 403(1) (AM. LAW INST. 1987) (indicating that a State with a valid basis for jurisdiction should still refrain its exercise "with respect to a person or activity having connections with another [S]tate when the exercise of such jurisdiction is *unreasonable*") (italics added).

310 *See* discussion *supra* p. 29.

311 Manchuk, *supra* note 18, at 247.

312 O'CONNELL, *supra* note 1, at 985.

313 *Id.* at 168.

that coastal States are lawfully permitted to exercise.[314] In this way, the jurisdictional limits that UNCLOS imposes have been tempered by new, and increasing, customary international standards. Furthermore, the application of coastal State domestic laws to an increased range of foreign vessel activities within sovereign waters will likely continue to expand as technological advances enable coastal States to more capably control larger areas of ocean, to gather evidence of criminal transgressions, and to effectively monitor a wider range of activities taking place at sea.

[314] *See* Vienna Convention on the Law of Treaties, *supra* note 34, art. 31(3)(b).