ENFORCEMENT ACTION IN CONTESTED WATERS: THE LEGAL REGIME

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Abstract
Law enforcement is undoubtedly expression of the sovereignty of the State within its territory and of its sovereign rights and jurisdiction within its contiguous zone, exclusive economic zone and continental shelf. In the case of undelimited maritime boundaries, however, there could be two states claiming exclusive powers of enforcement. How is this situation to be dealt with?
The presentation proposes to provide a set of criteria, drawn from the applicable rules of international law, primarily the 1982 United Nations Convention on the Law of the Sea, and from relevant decisions of international judges (ICJ, ITLOS, ECHR, Arbitral Tribunals) for assessing when a State may exercise enforcement action and determining how this action has to be conducted. The presentation will also provide indications as to the consequences of action not conforming to these rules, both at the level of State responsibility and of the admissibility of claims before international tribunals.

1. Introduction

The right of a coastal State to enforce its national legislation within its maritime zones flows from the sovereignty or sovereign rights and jurisdiction exercised by that State within them. The exclusivity attached to enforcement in marine waters, however, does not accord well with situations of contested maritime waters, wherein two or more States claim exclusive sovereignty or jurisdiction and they accordingly claim the exclusive right to exercise enforcement. Due to the specific conditions of the marine environment, instances of contested law enforcement at sea are much more frequent than on land. The impossibility to occupy permanently the sea and the possibility for vessels of all States to navigate through it make it materially feasible for both States to enforce their national legislation within the same contested area, as the proceedings to almost all delimitation cases submitted to international courts show[1].

While the number of contested areas is steadily diminishing as new agreed boundaries enter into force, the involvement of coastal States in enforcement activities in the remaining contested waters is however increasing. The process of gradual exhaustion of resources in many fields and the consequent need to explore and exploit new fields, the necessity to preserve the marine environment and to protect it against pollution, as well as the necessity to take action with respect to illegal activities such as drug trafficking, maritime terrorism and the plunder of the underwater cultural heritage, are all powerful inducements for States to abandon their traditional stance of non interference with contested areas.

It is with this background in mind that the present paper will try to address four main problems:

1. When can a State adopt enforcement action in a contested maritime area?
2. What are the limitations that international law poses on action thus adopted?

[1] Although delimitation disputes may involve more than one State, this paper will refer, for brevity to a bilateral dispute. The discussion and the conclusions reached apply nonetheless to disputes involving more than two coastal States.

3. What are the consequences of enforcement action that does not comply with those limitations?
4. Finally, what possibilities are there for bringing these cases before an international judge?

2. The Possibility to Adopt Enforcement Action and the Procedural Obligations Set by Arts. 74(3) and 83(3)

There is no rule of international law that prohibits *in principle* a coastal State from adopting enforcement action based on its sovereign rights or jurisdiction in a maritime zone it claims as its own, even though this zone is also claimed by another State. This absence of a positive prohibition does not mean however that there do not exist limits to the power of States, as the power of a coastal State to *actually* use enforcement is indeed constrained by the obligation to comply with a number of conditions posed by international law.

In the first place, enforcement in contested waters is possible only to the extent that such a right is attributed to a coastal State under general international law in the specific zone. Conversely, a State that does not have the right to exercise jurisdiction in a specific maritime zone or concerning a specific subject matter does also not have the right to exercise enforcement, nor can it acquire such right because of the uncertainty of boundaries. This issue will not be pursued further, since it is not the scope of this paper to address the exact extent and limits of the enforcement powers of a coastal State in its maritime areas, a topic that is currently undergoing much discussion, but rather to concentrate on the peculiarities of enforcement taking place in contested areas. Secondly, enforcement has to comply with the general rules concerning use of force and the protection of human rights, which will be briefly analysed in paragraph 3. Thirdly, and additionally, enforcement action has to comply with the special rules applicable as between parties to a delimitation dispute pending final settlement of the boundary. We will begin with the latter issue.

Enforcement undertaken against third States, not parties to the dispute, does not usually raise problems. Even though the boundary is unclear and entitlement of rights is still uncertain, it is evident that the maritime area under dispute will finally be "assigned" to either one or the other party to the dispute or will be divided between them and that the exclusive rights of this State will be upheld. No other State can therefore exercise activities that would infringe upon the coastal States' sovereignty or exclusive rights and jurisdiction, nor can it claim exemption from the enforcement power of coastal States, on the basis of the fact that the area is contested. An issue could arise in case the two States apply different standards which are not compatible, for example in the field of protection of the marine environment or in the field of marine scientific research. The problem in this case relates indeed not only to compliance with the national legislation of the coastal State, but also and foremost with the granting of permits for conducting scientific research. However, most standards relating to navigation, including those for the protection of the marine environment, are usually agreed at the international level and are generally applicable. In case of standards having different intensity, the third State, acting in good faith, should comply with the highest standards in order to make sure that the legislation of both States is respected.

The core issue concerns enforcement action undertaken against the other party to the dispute or against its vessels, its licensees or its nationals. Forceful action by one State may cause retaliation by the other and the situation may escalate with negative consequences not only for the parties to the dispute and for third parties that may be directly involved in the dispute, but also for the international community at large. Since the beginning of the Third United Nations Conference on the Law of the Sea it had become clear that the extension seawards of the maritime areas subject to the exclusive rights of a coastal State would multiply maritime delimitation disputes and that

interim measures would be welcome[2]. It is probably having these negative consequences in mind that the drafters of UNCLOS agreed to include in the Convention primary rules specifically addressing situations of contested maritime zones.

Art. 74(3) and Art. 83(3), framed in identical terms, thus provide that

> "Pending agreement as provided for in paragraph 1 [on the basis of international law], the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation".

Arts. 74(3) and 83(3) UNCLOS echo the general principles of good faith and peaceful settlement of disputes. They do not limit *de iure* the powers of each State in a contested area that still has to be delimited, which thus remain those generally attributed to the coastal State by the relevant UNCLOS provisions and customary international law. Arts. 74(3) and 83(3), rather, pose a double condition for the exercise of such rights in the area of overlapping claims, provided that each claim is a reasonable one: the obligation to try and enter into provisional arrangements and the obligation not to hamper or jeopardise the final agreement on the maritime boundary. Despite the fact that they do not relate to the territorial sea, it may be considered that the general principles embodied in them are valid also for that zone.

The first obligation is a positive one: States involved in a dispute concerning maritime delimitation shall endeavour to enter into provisional arrangements to address the situation of competing claims. This provision imposes on the parties a duty to negotiate in good faith; according to the *Guyana/Suriname* Award, the text indicates "the drafters' intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement"[3]. As such, it does not impose on the parties the obligation to enter into any agreement or to adopt any specific solution, or any solution at all, but requires all the same some action by them and not merely a passive inaction. The second obligation is a negative one: States involved in a maritime delimitation dispute must refrain from acting in a way that would prejudge the final settlement of the dispute.

As to their scope, Arts. 74(3) and 83(3) apply in all cases where adjacent or opposite States have not yet delimited the maritime boundary of their exclusive economic zones and of their continental shelves, respectively, including cases in which they disagree on the qualification of features and their entitlement to a – full or partial – maritime zone and cases in which there is dispute over a portion of land territory that generates maritime areas. Furthermore, even though they do require that a dispute be in place, they apply independently from the previous initiation of negotiations for its settlement[4].

Enforcement action by itself does not automatically constitute a breach of Arts. 74(3) and 83(3), though in practice it is quite possible that this may be so, if one considers the obligations imposed by these two provisions. In assessing the legality of enforcement it is necessary to strike the right balance between two opposite considerations.

On one hand, there is the need not to paralyse all unilateral activities pending final settlement of the boundary, as well as the necessity to avoid creating a *de facto* legal vacuum in the area, that may conduce to the proliferation of illegal activities. The obligation to try to enter into provisional arrangements plays an important role here, as it promotes provisional arrangements permitting the exercise of rights, including enforcement powers, in a coordinated manner. In particular, the two States can agree on measures to coordinate the enforcement of legislation concerning, among others, preservation of marine resources, contrast to drug trafficking or the

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[2] R. Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements', 78 *American Journal of International Law* (1984), 345-368, at 349

[3] *Guyana/Suriname*, Final Award, para. 461. See also *North Sea Continental Shelf*, para. 85.

[4] M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, vol. II (Dordrecht/Boston/London, 1993), at 815 and 984.

protection of the marine environment over vessels flying the flag of third States. Usually, each State undertakes to enforce its legislation with respect to vessels flying its own flag (or vessels licensed by it) while both States can enforce legislation *vis-a-vis* vessels flying the flag of third States. The 1978 agreement on joint measures of fisheries and fisheries regulations in the Barents Sea between Norway and the Soviet Union (now Russia), and the 1999 agreement between France, Italy and Monaco for the creation of the Pelagos Sanctuary for Mediterranean marine mammals, provide examples of such arrangements.

On the other hand, there is the need to avoid, as far as possible, any unilateral action that could worsen the dispute and could threaten international peace and security[5]. The obligation not to hamper or jeopardise the final settlement of the boundary plays a fundamental role in this respect. Especially in tense situations, when every action could potentially trigger a forceful response by the other party, the consequences of each enforcement action must be carefully evaluated by the coastal States in the light of all the elements of the case.

The Arbitral Tribunal in the *Guyana/Suriname* case considered that action undertaken by Suriname against a company licensed by Guyana to conduct exploratory drilling in the contested area not only constituted "threat of the use of force" prohibited under Art. 2(4) un Charter, but also violated the obligation not to hamper or jeopardise the reaching of the final agreement[6]. The Tribunal's reasoning, however, could have been more refined by drawing a distinction between use of force against another State and use of limited force in the context of law enforcement activities, especially in the case of urgency to prevent infringement of a State's rights. The options enumerated by the Tribunal, which include entering into negotiations, bringing the case to a judge and requesting provisional measures, seem appropriate during the planning period, *before* any activity begins. One could cast some doubts, however, on their being sufficient to preserve the interests of the coastal State *after* activities have started and while they take place. Prohibiting in absolute terms a State from enforcing its legislation against a company that is undertaking exploratory drilling in the continental shelf without license by it does not seems to achieve a fair balance between the interests of the parties to the dispute.

States should therefore try to their outmost to show self-restraint and to avoid any action that could trigger a response by the other party and could aggravate the dispute. Enforcement action against the vessels or the licensees of the other party should be considered only as the very last option and should be authorised only in exceptional circumstances, when the balance between the need for the coastal State to safeguard its rights could be considered objectively as overwhelming. In particular, a State may incur into international responsibility for the violation of the obligations not to hamper or jeopardise the settlement of the dispute not so much for undertaking enforcement action in a situation of urgency, but rather for not having addressed the situation before, when lesser action could have safeguarded its rights. In acting thus, the State has in fact contributed to the situation reaching the point when the only possibility to protect its rights was to apply forcefully its legislation[7]. If, on the other hand, a State has in good faith tried to address the situation earlier by other means, and notwithstanding such action is obliged to put in place enforcement action, it may not be responsible for the breach of Arts. 74(3) and 83(3).

3. General Limits to Enforcement Action

In addition to the specific requirements set by Arts. 74(3) and 83(3), action in contested waters has to comply with the requirements set by general international law for the coast State to enforce its legislation in its maritime areas. Enforcement action will have to be specifically

[5] *Guyana/Suriname,* Final Award, para. 465.
[6] *Guyana/Suriname,* Final Award, para. 445.
[7] *Guyana/Suriname,* Final Award, para. 476.

permitted by international law and to be prescribed by national legislation, and must adhere strictly to the requisites set down both by national legislation and by international law[8].

The UNCLOS does not contain an organic sets of rules concerning enforcement by the coastal States, except for the field of protection of the marine environment (Part XII, Section 6). There are nonetheless a number of provisions providing some guidance, which include Art. 27 (criminal jurisdiction on board a foreign ship exercising the right of innocent passage through the territorial sea); Art. 73 (enforcement by the coastal State of laws and regulations concerning the conservation and exploitation of marine living resources in its exclusive economic zone); Arts. 224-227 (concerning the exercise and the limitations of enforcement with respect to pollution of the marine environment); Art. 232 (liability of States arising from enforcement measure in the field of protection of the marine environment).

Significant conditions are set by human rights instruments, be they international treaties, such as the International Covenant on Civil and Political Rights and regional conventions, or national legislation. As the European Court of Human Rights has recently confirmed, obligations under these treaties, including the right to life, the right not to be subject to inhuman or degrading treatment and the right to personal liberty and its exceptions are applicable also to security operations carried out at sea[9]. Action will also have to comply with requirements set by treaties dealing with the enforcement of legislation concerning specific topics, such as the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The provisions of Art. 22 of the 1995 Straddling Fish Stocks Agreement, though dealing with the high seas, may also provide relevant guidance.

In the case (limited) use of force is necessary to conduct enforcement, States should also put great care in avoiding action violating the general prohibition to use force against another State, enshrined in Art. 2(4) of the UN Charter. The limited use of force envisaged here is conceptually different from the use of force in international relations prohibited by Art. 2(4). While in the latter case the use of force is the content and end of the action by the State, in the former case the use of force is instrumental to another activity, consisting in applying the legislation of the coastal State and preventing and sanctioning conduct that does not comply with it. In practice, it may be difficult to distinguish between these two situations. Certain criteria, such as the functional objective of the action, the status of the subjected vessel and the location of the incident, may be useful in distinguishing lawful enforcement from unlawful use of force[10].

The ITLOS has identified three general conditions for the use of force in the exercise of enforcement action[11], successively confirmed by the arbitral Tribunal in the *Guyana/Suriname* case[12]: unavoidability, reasonableness and necessity. Enforcement activities are permitted, in so far as force is used only as the last resort and is proportionate to the circumstances and the aim pursued. In the case of contested areas, however, the adherence to these criteria will be particularly strict, having regard to the obligations under Arts. 74(3) and 83(3) UNCLOS, discussed above.

4. Issues of Responsibility for Unlawful Acts

In the case of enforcement action violating one of the provisions mentioned in the preceding paragraphs, the State will incur into international responsibility for the violation of rules of international law. It is noteworthy that the applicability of these provisions does not depend on the final territorial settlement and a State may be held responsible for actions committed in areas that are finally awarded to it, as the *Guyana/Suriname* award has confirmed.

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[8] D. Guilfoyle, *Shipping interdiction and the Law of the Sea*, Cambridge, 2009, in particular 271-294.

[9] *Medvedyev and others v. France*, Grand Chamber decision of 29 March 2010.

[10] P J Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in Light of the *Guyana/Suriname* Award' (2008) 13 *Journal of Conflict and Security Law* 49.

[11] *M/V 'Saiga' (No.2)*, Judgement, paras. 155-156

[12] *Guyana/Suriname*, Final Award, para. 445.

The first consequence will be the obligation to cease the unlawful conduct and offer appropriate assurances and guarantees of non-repetition[13]. This obligation is especially important since in a situation of contested areas States could be liable to several violations of their obligations. The parties also remain under the continued duty to comply with the requirements of these provisions; a State therefore shall not withdraw permanently from negotiations even though it might pose as a condition for their continuation the compliance by the other States with their obligations and the cessation of the unlawful conduct. Finally, the responsible State will have to make full reparation for the injury caused[14]. This obligation includes all forms of reparation – thus not only satisfaction, but also restitution and compensation, though the latter may be difficult to prove.

An issue closely interwoven with State responsibility relates to enforcement undertaken as a countermeasure, in order to induce the other State to comply with its obligations under Arts. 74(3) and 83(3). Countermeasures are generally permissible as long as they are proportionate[15] and do not violate obligations provided by peremptory norms of international law, including the obligation to refrain from the threat or use of force[16]. They may be adopted also without having previous recourse to the dispute settlement mechanism of UNCLOS, since previous recourse to "all the amicable settlement procedures" before undertaking countermeasures has been expressly ruled out by the ILC while discussing State responsibility[17], but once the dispute settlement mechanism has been set to work, States are precluded from undertaking countermeasures in accordance with Art. 22 of the ILC draft articles.

In the case of contested maritime areas, however, it is quite difficult to consider law enforcement activities as lawful countermeasures. If they are carried out in conformity with the provisions mentioned in the above paragraphs, they will not be countermeasures since they will not violate any rule of international law. If they are conducted using more force than is legitimate, or are undertaken without due respect for human rights, or if they consist in reprisals contrary to humanitarian principles, they will be inadmissible in any case[18]. The only possibility of adopting enforcement action as countermeasures would be in the case such action is adopted in disregard of the procedural obligations provided under 74(3) and 83(3), in answer to the violation of a rule of law by the other State. This could be the case, for example, of countermeasures against a foreign company authorised by the other State to conduct drilling in the continental shelf, though this was ruled out in the *Guyana/Suriname* case.

5. Bringing a Case to A Judge

A final remark concerns the applicability of the disputes settlement mechanisms to cases of allegedly unlawful enforcement action in a contested area. There is an objective difficulty in substantiating claims of State responsibility evidenced, among others by the few instances in which these claims have reached the adjudicatory stage and by the fact that, even in the latter cases, the request of compensation has finally been put aside. Possible explanations include the fact that usually both parties to a dispute are involved, up to a certain degree, in enforcement activities with respect to vessels having the nationality of the other party or being licensed by it, and the fact that enforcement actions by either State are mainly invoked in order to prove the existence of a historic claim to a certain delimitation or a tacit agreement to a certain boundary. The *Guyana/Suriname* case is so far the only in which an international judge has addressed the merits of such a claim.

[13] Art. 30 of the Draft Articles on State Responsibility.
[14] Art. 31 of the Draft Articles on State Responsibility.
[15] Art. 51 of the Draft Articles on State Responsibility.
[16] Art. 50 of the Draft Articles on State Responsibility.
[17] See the Third and Fourth Reports of the Special Rapporteur Gaetano Arangio-Ruiz (UN doc. A/CN.4/440 and Add. 1 and UN doc. A/CN.4/444 and Adds. 1-3) and the debates at the ILC (ILC Reports for 1991, A/46/10, and for 1992, A/47/10).
[18] Art. 50(1) of the Draft Articles on State Responsibility.

As long as the claim is brought jointly by both parties to a dispute, there is no doubt that the judge will have jurisdiction to decide upon it. Is there, however, also the possibility for a State to unilaterally initiate proceedings? The general answer is yes. Since a dispute concerning enforcement action in contested waters undoubtedly concerns the interpretation or application of the Convention, under Art. 286 any State party to the UNCLOS may submit such dispute to the judge determined on the basis of Art. 287. A similar claim could form the content of an ad hoc application, of a request for provisional measures pending final settlement of a maritime boundary dispute, or be ancillary to an application for maritime delimitation. The second option may indeed be very useful, as shown by the *Land reclamation case* (provisional measures) decided by the ITLOS. The latter possibility was in fact expressly upheld by the Arbitral Tribunal in the *Guyana/Suriname* case, where the Tribunal considered the dispute as to responsibility for the breach of Arts. 74(3) and 83(3) as ancillary to the boundary dispute and thus not requiring separate exchanges of view in accordance with Art. 283(1)[19]. There is however the possibility for a State to exclude such disputes from binding settlement pursuant to Art. 298(1), letters (a) and (b).

Biography

Dr. Irini Papanicolopulu is presently Marie Curie Fellow at the University of Oxford, Faculty of Law, where is carrying out a research project on integrating the human element into law of the sea. She is also Senior Researcher in international law at the University of Milano-Bicocca, where she teaches international law of natural resources and international law of armed conflicts. She holds a Degree in Law from the same university and a Doctorate in International Law from the University of Milano and has attended the Rhodes Academy on Oceans Law and Policy in 1999 and 2001. She has published a volume on maritime delimitation (in Italian) and several articles covering a wide range of issues of international law and law of the sea, including entitlement and rights in maritime zones, the delimitation of maritime boundaries and State responsibility in contested maritime areas. She has acted as legal expert for the Italian Ministry of Foreign Affairs on law of the sea matters, at the EU and international level.

[19] *Guyana/Suriname*, Final Award, para. 457.