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Chapter 7. Sabotage of Critical Offshore Infrastructure: A Case Study of the Balticconnector Incident

Henrik Ringbom, Alexander Lott

Introduction

The Hong Kong-registered and Chinese-owned container ship *NewNew Polar Bear* is suspected of having been involved in damaging the Balticconnector gas pipeline and submarine cables in the exclusive economic zone (hereafter EEZ) and continental shelf of Estonia and Finland on her way to a port of the Russian Federation in the Gulf of Finland on 7-8 October 2023. During the voyage, the *NewNew Polar Bear* crossed the Balticconnector pipeline and the Estonian-Swedish, Russian, and Estonian-Finnish submarine cables all sustained damage during that night. The *NewNew Polar Bear* crossed the Balticconnector pipeline at the time of seismic activity near the pipeline while being accompanied by a Russian nuclear-powered container ship, the *Sevmorput*.[1] In addition, the Russian merchant ship *SGV Flot* was spotted spending three days, including the day when the cable and the pipeline were damaged, in the relevant maritime area.[2]

The main focus of the investigation into the damage caused to the submarine pipeline in Finland's waters is on the Hong Kong-flagged cargo ship *NewNew Polar Bear*. It is possible that this ship damaged the offshore infrastructure of Estonia and Finland with its anchor.[3] The *NewNew Polar Bear* left the Baltic Sea and reached China's port of Tianjin in December 2023 after crossing the Northern Sea Route. Upon its return from Russia, the ship first had to sail through the Finnish and Swedish EEZs. This chapter asks if Finland was entitled to board the *NewNew Polar Bear* while in its EEZ and arrest the ship?

Against this background, the broader aim of this chapter is to assess the legal situation of critical offshore infrastructure in the context of hybrid naval warfare (see *supra* Chapter 1) by identifying various means at the coastal State's disposal to take enforcement measures against a foreign ship suspected of having damaged a submarine pipeline. The focus of this chapter is accordingly on submarine pipelines, but it includes some discussion on submarine cables too, to the extent it is relevant for the overall discussion of the chapter. As illustrated below, the

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[1] Atle Staalesen, 'Runaway ship Newnew Polar Bear, suspected of sabotage in Baltic Sea, is sailing into Russian Arctic waters' The Barents Observer (26 October 2023), available at <https://thebarentsobserver.com/en/security/2023/10/runaway-ship-newnew-polar-bear-suspected-sabotage-baltic-sea-sailing-russian-arctic> accessed 27 October 2023; Andrius Sytas and Anne Kauranen, 'Three Baltic pipe and cable incidents 'are related', Estonia says' Reuters (27 October 2023), available at <https://www.reuters.com/world/europe/three-baltic-pipe-cable-incidents-are-related-estonia-says-2023-10-27> accessed 27 October 2023; See also Mirjam Mäekivi and Marcus Turovski, 'Chinese vessel even nearer to Balticconnector pipeline at time of leak' ERR News (17 October 2023), available at <https://news.err.ee/1609134998/chinese-vessel-even-nearer-to-Balticconnector-pipeline-at-time-of-leak> accessed 19 October 2023.

[2] Karl Kivil, Marcus Turovski, Helen Wright, 'Russian cargo ship spent weekend in vicinity of Balticconnector pipeline leak' ERR News (11 October 2023), available at <https://news.err.ee/1609128785/russian-cargo-ship-spent-weekend-in-vicinity-of-Balticconnector-pipeline-leak> accessed 11 October 2023.

[3] Staalesen (n 1).

coastal State's options for interdicting a ship outside the territorial sea differ significantly depending on whether the suspected ship damaged a cable or a pipeline.

The legal framework applicable to interdicting a ship suspected of injuring a submarine cable or pipeline outside the limits of the territorial sea is complicated and, arguably, includes legal gaps. The starting point of this chapter is that potential gaps and imperfections in the legal framework usually are more easily identified if departure is taken in a particular concrete case. Our point of departure and case study is the Balticconnector incident, and our assumption is that a coastal State's jurisdiction in that case was considerably more multi-faceted than the Finnish authorities have explained in their public statements.

1. The Context

The Finnish Border Guard made radio contact with the *NewNew Polar Bear* in the Gulf of Finland on its return journey westwards following a stay in St Petersburg. However, the vessel did not cooperate with the Finnish authorities. Finland's National Bureau of Investigation, investigating the damage to the Balticconnector pipeline, commented that Finland was constantly on alert in this situation and was ready to intervene if the ship had entered the Finnish territorial sea. However, it noted that Finland had no right to take any law enforcement measures against the *NewNew Polar Bear,* such as boarding, inspection, and arrest of the vessel.[4] Hence the Finnish coastal authorities eventually did not take any enforcement action against the vessel, reportedly since they lacked jurisdiction to do so, as the vessel did not enter Finland's territorial sea.

In general, the legal grounds for law enforcement measures against a foreign ship are broader in the territorial sea. However, this paper seeks to argue that Finland had legal arguments and remedies to take some enforcement measures even in its EEZ against the *NewNew Polar Bear* which was suspected of sabotaging pipelines on the Finnish continental shelf.

A contributing reason for the black-and-white response by the Finnish authorities is presumably that the relevant Finnish legislation (essentially the Penal Code (39/1889),[5] the Act on the EEZ (2004/1058)[6] and the Act on certain underwater cables and pipelines (1965/145)[7]

[4] Arni Alandi, 'Location of Balticconnector in exclusive economic zone limits investigation' ERR News (31 October 2023), available at <https://news.err.ee/1609150024/location-of-Balticconnector-in-exclusive-economic-zone-limits-investigation> accessed 3 November 2023.

[5] Under section 1 of the Finnish Penal Code the general scope of applicability is limited to crimes committed «in Finland». Its applicability with respect to crimes committed in the Finnish EEZ is to be addressed according to Act 2004/1058 on the EEZ and Act 1672/2009 on Environmental Protection in Maritime Transport.

[6] The Act on the EEZ lists in sections 10-16 several violations which, when committed in the EEZ, should be treated as crimes committed in Finland under the Penal Code. The list includes crimes on or against artificial islands, installations and structures, as well as environmental crimes, mining, hunting and fisheries violations, and general failures to meet applicable permit requirements, but includes no specific rules relating to cables and pipelines. For those, section 5(2) of the Act on the EEZ provides that the relevant legislation for the EEZ is Act 1965/145 on certain underwater cables and pipelines. (In Finnish and Swedish the terms used in this legislation (johto-ledning) cover both cables and pipelines and no distinction is accordingly made between the two types of infrastructure under the Finnish law).

[7] Along with the adoption of the Finnish EEZ in 2004, the geographical scope of Act 1965/145 on certain underwater cables and pipelines was extended to the EEZ (section 1). However, the same section of the amended act clarifies that it only applies to cables and pipelines beyond the limits of the territorial sea with respect to ships flying a Finnish flag, Finnish citizens or Finnish corporations. Finland has no separate act for the continental shelf.

make a stricter distinction between the territorial sea and the EEZ than international law does when it comes to jurisdiction over matters related to pipelines. However, the focus of this paper is on international law, which, as hypothesized here, provides greater prescriptive and enforcement jurisdiction in the present case.

The injuring of the pipeline and the Estonian, Finnish, Swedish, and Russian submarine cables on the night of 7/8 October 2023 did not lead to any significant disruptions in critical services in the relevant coastal States. Nonetheless, Finland, Sweden, and Estonia reacted to these incidents as a matter of grave concern. Finland's president Mr. Sauli Niinistö commented that: "It is likely that the damage to both the gas pipeline and the [Estonian-Finnish] communication cable is the result of external activity."[8] On 18 December 2023, the European Commission agreed to provide 800.000€ in emergency financial support to Finland from the European Union's (hereafter the EU's) Internal Security Fund for securing the incident area and investigating the disruption of the pipeline.[9]

Map 1. The Estonian, Finnish, Swedish, and Russian Submarine Cables and the Balticconnector Pipeline that All Sustained Damage in the Northern Baltic Sea on the Night of 7 to 8 October 2023

[8] Jon Henley and Jillian Ambrose, 'Undersea pipeline damage appears to be deliberate, says Finland' The Guardian (10 October 2023), available at <https://www.theguardian.com/world/2023/oct/10/undersea-pipeline-damage-appears-to-be-deliberate-says-finland> accessed 10 October 2023.

[9] See e.g. European Commission, 'The Commission provides emergency funding to Finland in relation to the damage of the Balticconnector pipeline' Press Announcement (18 December 2023), available at <https://energy.ec.europa.eu/news/commission-provides-emergency-funding-finland-relation-damage-Balticconnector-pipeline-2023-12-18_en> accessed 20 December 2023.

Source of the base map: Submarine Cable Map, TeleGeography, available at <https://www.submarinecablemap.com> accessed 27 September 2023. The dark grey lines in the Baltic Sea depict the submarine cables and the Balticconnector pipeline that all sustained damage in the northern Baltic Sea on the night of 7 to 8 October 2023. The original Submarine Cable Map has been converted to black and white, the approximate locations of the incidents (in red color) and the names of the cables, the pipeline, the Russian Federation and Kaliningrad have been inserted by the authors. The map serves an illustrative purpose only.

The Secretary General of the North Atlantic Treaty Organization (hereafter the NATO), Mr. Jens Stoltenberg, made it clear that if the incidents were "proven to be an attack on NATO critical infrastructure … it will be met by a united and determined response from NATO".[10] A few days later, Prime Minister Rishi Sunak announced that, in 2024, the United Kingdom will deploy over 20,000 soldiers to northern Europe (16,000 soldiers to Norway and Estonia alone)

[10] Jon Henley, 'Finland says 'state actor' not ruled out in mystery of damaged Baltic gas pipeline' The Guardian (12 October 2023), available at <https://www.theguardian.com/world/2023/oct/12/finland-says-state-actor-not-ruled-out-in-mystery-of-damaged-baltic-gas-pipeline> accessed 12 October 2023.

complemented with eight Royal Navy ships, 25 fighter jets and an aviation task force to deter hybrid activities and protect critical infrastructure in the region.[11]

The Russian Federation has a long track record in mapping the vulnerabilities of the critical offshore infrastructure of the NATO member States in the Baltic Sea and North Sea. However, a Russian submarine cable Baltika was also injured on the night of 7 October 2023. The laying of the 1115-km-long communications cable Baltika on the seabed of the Gulf of Finland and the Baltic Sea was completed in 2021 to ensure the security and uninterrupted operation of Internet communications in Kaliningrad (see Map 1).[12]

In the EEZ corridor of the Gulf of Finland established by Finland and Estonia in 1994 by voluntarily limiting the outer limits of their territorial sea at the entrance to the Gulf of Finland,[13] the Baltika Cable runs through the Finnish EEZ and on its continental shelf.[14] The Baltika Cable is owned by the Russian company Rostelecom, which is, in turn, controlled by the Russian Federation. It serves as the only telecommunications cable linking the Kaliningrad exclave to mainland Russia that does not cross the territories of Russia's neighboring States (due to the existence of the EEZ corridor in the Gulf of Finland). The land communications cables between Kaliningrad exclave and Russia proper cross Lithuania and Poland that border Kaliningrad. In this context, the damaging of the Russian Baltika submarine cable demonstrates Russia's vulnerability to sabotage against (offshore) energy infrastructure in respect to its strategically important Baltic Sea exclave of Kaliningrad that is isolated from the rest of the Russian mainland territory.

In the growing body of legal literature on the peacetime protection of submarine cables and pipelines,[15] there appears to be a common understanding that this framework includes certain weaknesses (see also *supra* Chapter 5). The broader legal starting point of this paper is that coastal States' enforcement rights and duties with respect to activities by foreign ships impacting their cables and pipelines in the EEZ/continental shelf is not clearly regulated in the United Nations Convention on the Law of the Sea[16] (hereafter the LOSC or Convention). Yet, according to the preamble of the Convention, it is designed to settle 'all issues relating to the law of the sea' and address all usages of the oceans. Thus, regulatory voids need to be filled through interpretation.

[11] The UK Prime Minister's Office, 'PM accelerates military support to Northern Europe following visit to Sweden' Press Release (13 October 2023), available at <https://www.gov.uk/government/news/pm-accelerates-military-support-to-northern-europe-following-visit-to-sweden> accessed 15 October 2023.

[12] Anonymous, 'Rostelecom PVOLS Kingisepp – Kaliningrad', TAdviser, available at <https://tadviser.com/index.php/Product:Rostelecom_PVOLS_Kingisepp_-_Kaliningrad> accessed 27 August 2023; See also 'Kaliningrad Cable', Submarine Cable Map, available at <https://www.submarinecablemap.com/submarine-cable/kaliningrad-cable> accessed 27 August 2023.

[13] Exchange of Notes Constituting an Agreement on the Procedure to be followed in the Modification of the Limits of the Territorial Waters in the Gulf of Finland (adopted 4 May 1994, entered into force 31 July 1995) UNTS 1887.

[14] 'Gulf of Finland', Navionics Chart Viewer, available at <https://webapp.navionics.com/#boating@6&key=kdfkJsizvC> accessed 27 August 2023.

[15] On peacetime protection of submarine cables against non-State actors, see Douglas Guilfoyle, Tamsin Phillipa Paige and Rob McLaughlin, 'The Final Frontier of Cyberspace: The Seabed beyond National Jurisdiction and the Protection of Submarine Cables' (2022) 71 International & Comparative Law Quarterly 657, 662–675; Douglas Burnett, Tara Davenport, and Robert Beckman (eds.), *Submarine Cables – The Handbook of Law and Policy* (Brill 2013).

[16] United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

Two main approaches to coastal States' enforcement jurisdiction over suspected sabotage of pipelines in their EEZ and continental shelf may be identified: one may take the position that in the absence of specific enforcement provisions in the LOSC, there is no right for coastal States to take enforcement action in the EEZ; or one may take the view that the absence of such explicit jurisdiction means that such jurisdiction must be construed based on the Convention's provisions and international law more generally in light of the overall context.

Neither approach is self-evident, but since the matter here relates to a new type of threat that was not in the minds of the drafters of the LOSC, the latter approach, based on a dynamic and contextual interpretation of the LOSC, appears to be more appropriate. The apparently increasing targeting of pipelines and cables as a means of conducting hybrid warfare has shifted the safety concerns relating to cables and pipelines from a private concern (operator's essentially economic interest in preventing damage) towards a public (security) concern for States.

All States concerned with the Balticconnector incident are parties to the LOSC. Under Article 31(1) of the 1969 Vienna Convention[17] on the law of treaties, the general rule of interpretation is that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The context is to be established on the basis of the text and preamble of the treaty and other treaty relations (Article 31(2) of the 1969 Vienna Convention). Moreover, account shall be taken of, *inter alia*, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "any relevant rules of international law applicable in the relations between the parties" (Article 31(3) of the 1969 Vienna Convention). Supplementary means of interpretation, including assessing the preparatory works, may be resorted to under Article 32 of the 1969 Vienna Convention to determine the meaning, when interpretation under the main rule "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."

The LOSC seeks to establish a legal order for the oceans, covering according to its preamble, "all issues relating to the law of the sea". Like any treaty, it is based on the premise that the rights and obligations are undertaken in good faith, and it specifically provides that rights, jurisdictions and freedoms provided in the Convention shall be exercised "in a manner which would not constitute an abuse of right." (Article 300 of the LOSC). Under its preamble, the Convention is guided by "a spirit of mutual understanding and cooperation" and a desire to establish "with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans...."

Under this starting point, it seems clear that the overall interests underlying the LOSC heavily favour the interests of States who seek to have their undersea infrastructure intact; it is difficult to find anything in the text of the Convention or in its underlying object and purpose that would protect actors or States that seek to abuse the provisions of the LOSC for carrying out sabotage activities at sea, or to protect ships that may reasonably be suspected to be involved in such activities from further investigation.

More generally, the object and purpose of the LOSC regime was to establish a durable and all-encompassing legal regime for the oceans. This favours a dynamic interpretation of the Convention against the background of the arrival of new types of threats and activities that

[17] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

were not – directly, at least – conceived by the drafters of the Convention, such as State-supported sabotage activities by commercial ships. The increasing feature of such activities and threats in practice arguably justifies a flexible reading of the enforcement in favour of States seeking to counteract such activities whether undertaken by commercial or government-owned ships.

2. Law of the Sea Considerations on Prescriptive and Enforcement Jurisdiction

The EEZ is a functional 'compromise' zone. For some issues, the zone is subject to exclusive coastal State jurisdiction, for others, it resembles rather the high seas, where freedom of navigation applies, and jurisdiction mainly rests with the flag State. In other words, whether the coastal State has jurisdiction in the EEZ depends on the subject matter concerned. Furthermore, one may differentiate between the various categories of jurisdiction in the EEZ. In the words of Guilfoyle, '[t]he EEZ constitutes a patchwork of 'sovereign power' (including enforcement jurisdiction) over some subject matters and mere 'jurisdiction' (not necessarily extending to enforcement) over others.'[18]

Nonetheless, not even navigational freedoms imply the absence of rules or obligations. First, Article 88 of the LOSC provides that "[t]he high seas shall be reserved for peaceful purposes" and Article 58(2) makes that applicable to the EEZ. Second, flag States must ensure that ships, as a minimum, comply with generally accepted international rules on safety, environmental protection etc. (Article 94 of the LOSC). Third, there is a general duty for States to exercise navigational freedoms with 'due regard' for the interests of other States, including coastal States (Articles 87(2), 56(2) of the LOSC).[19]

2.1. Prescriptive Jurisdiction

The jurisdiction of Finland to lay pipelines in its EEZ and on its continental shelf is not in question. It follows from the general right of all States to lay cables and pipelines under LOSC Articles 58(1) and 79(1), and is further emphasized by coastal States' powers to place certain conditions on other States' pipelines in their continental shelf/EEZ under Article 79(2) and (3) of the LOSC. In addition, Article 79(4) safeguards the right of the coastal State to establish conditions for pipelines entering its territory or territorial sea, as well as its jurisdiction over cables and pipelines serving other lawful activities in the continental shelf, such as the exploration and exploitation of resources or the operation of artificial islands, installations or structures. Furthermore, any activity which involves drilling in the EEZ, e.g. for the laying of the Balticconnector pipeline, is subject to the *exclusive* jurisdiction of the coastal State under Article 81 of the LOSC. Article 246(5) of the LOSC on marine scientific research further

[18] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 19.

[19] The reciprocal duty of due regard does not as such involve a priority between different interests and must accordingly be analyzed on a case-by-case basis. See para 519 of Annex VII Arbitral Tribunal, Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Case 2011-03, Award of 18 March 2015 where it is found that, "the extent of the regard required by the Convention will depend on the nature of the rights held by [the other State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [coastal State], and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the right-holding State." See also the Annex VII Arbitral Tribunal, the "Enrica Lexie" Incident (Italy v. India), Case 2015-28, Award of 21 May 2020, paras. 973-975; Robin Churchill, Vaughan Lowe, and Amy Sander, *The law of the sea* (4th ed., Manchester University Press 2022) 287-291.

underlines this, by acknowledging a right for coastal States to withhold research permits in the EEZ, e.g. if the research involves explosives, drilling or marine pollution.

The jurisdiction of coastal States to establish safety zones in an EEZ close to such pipelines is less clear (Art 60(4) of the LOSC, see also *supra* section 6.1). The coastal State's jurisdiction in respect of such pipelines is obviously not as wide as the right governing installations, structures etc., where a safety zone of 500 metres can be established unilaterally, nor as wide as the jurisdiction over cables and pipelines that serve such installations (e.g., oil or gas platforms) and can be considered as integral parts of such installations of the coastal State under Article 79(4) of the LOSC.[20] But at least the International Maritime Organization (hereafter the IMO) could establish such zones, at the request of Finland and Estonia, through its routeing measures, based on the jurisdiction of those States over the cable in question.

2.2. Enforcement Jurisdiction

However, in the case of the Balticconnector incident it is not the prescriptive right which is at issue, but the jurisdiction to take *enforcement* measures against ships suspected to be engaged in unlawful activities. Both types of jurisdiction are required for taking enforcement measures at sea. Coastal State enforcement jurisdiction linked to pipelines is not specifically regulated in the LOSC.

Article 113 of the LOSC makes it clear that the intentional or negligent damaging of pipelines or cables beneath *the high seas* is unlawful. The offence does not presuppose actual damage of the pipeline, as it extends to "conduct calculated or likely to result in such breaking or injury". However, the article places enforcement jurisdiction with the flag State. This may be natural in view of the origin of Article 113 of the LOSC pre-dating the EEZ,[21] but nevertheless creates an uncertainty in view of the extended prescriptive rights that coastal States have been granted with respect to pipelines in their EEZ and continental shelf (which clearly exceed their jurisdiction with respect to pipelines on the high seas).

As far as enforcement on the high seas is concerned, Guilfoyle has summarized that, '[a] state's public vessels may interdict a non-national vessel on the high seas in one of three cases: where the flag state consents; where a permissive rule of general international law allows the interdiction; or where the vessel is without nationality (i.e. stateless).'[22]

The *NewNew Polar Bear* was not stateless as she sails under the flag of Hong Kong. To the extent of the authors' knowledge, Finland had not sought the flag State's (Hong Kong/China) consent for boarding the ship in the Baltic Sea. It is possible, even though not necessarily likely, that the flag State might have given Finland the permission to board the vessel. Guilfoyle has explained that, '[c]ommonly, permission to search does not encompass permission to seize, and if evidence of prohibited conduct is found further disposition instructions must be sought from the flag state before further enforcement action is taken against the vessel, its cargo or persons aboard.'[23] Therefore, if Finland had sought to seize or arrest the ship, it would have had to file additional requests to the flag State.

[20] See also the Annex VII Arbitral Tribunal, Arctic Sunrise Arbitration (the Netherlands v. the Russian Federation), Award of 14 August 2015, paras. 211 and 244; Churchill, Lowe, and Sander (n 19) 269.
[21] See Douglas R Burnett, 'Submarine Cable Security and International Law' (2021) 97 International Law Studies 1660, 1671.
[22] Guilfoyle (n 18) 339.
[23] Ibid, 341.

Under Article 110(1) of the LOSC, officials can board a ship on the high seas in the event that this ship engages in piracy, slave trade, broadcasts illegal broadcasts or has no nationality. None of these grounds were relevant in relation to the *NewNew Polar Bear* incident. Furthermore, Guilfoyle notes that:

> [H]igh seas jurisdiction to enforce is only generally granted over piracy and unauthorized broadcasting, and the latter only in a qualified form. All UNCLOS parties are also obliged individually to 'prevent and punish' the use of their flag vessels in the slave trade, but there is no general duty of cooperation to this end, let alone universal high seas enforcement jurisdiction.[24]

As a starting point, the enforcement rules for the high seas apply to the EEZ as well, insofar as they are not incompatible with the rules for the EEZ (Article 58(2) of the LOSC). Guilfoyle accordingly concludes in relation to law enforcement measures on the high seas or in the EEZ that '[i]f there is not flag-State consent given in advance to interdicting a flag vessel in international waters, or a specific exception allowing the interdiction, it will be prohibited as a use of force.'[25] As regards pipelines incidents it was already noted that no specific enforcement jurisdiction is provided for coastal States with respect to pipelines in their EEZ and continental shelf, but that coastal States' prescriptive jurisdiction in these areas clearly exceeds their jurisdiction with respect to pipelines on the high seas. More generally, it is clear that enforcement jurisdiction in the EEZ offers more grounds for interfering with foreign ships than is the case on the high seas. The question is whether such considerations may be given any significance when seeking to establish coastal States' enforcement jurisdiction with respect to pipelines incidents in their EEZ or continental shelf.

The only two violations in the EEZ that are covered by specific coastal State enforcement jurisdiction are vessel-source pollution (Articles 220 and 221 of the LOSC) and enforcement linked to natural resources (in essence, fishing vessels) under Article 73(1) of the LOSC. Enforcement jurisdiction against ships suspected of polluting the marine environment is carefully differentiated, depending on the nature of the threat, the significance of the pollution and the strength of the evidence. By way of contrast, jurisdiction with respect to fishing vessels is very broad, including the right to board, detain and arrest the fishing vessel if it is necessary to ensure compliance with the national fisheries rules.

The enforcement jurisdiction over foreign (merchant) ships suspected of being involved in marine pollution is based on the jurisdiction of coastal States over environmental protection in their EEZ (Article 56(1)(b)(iii) of the LOSC), while the broader enforcement powers over foreign fishing vessels derive from the sovereign rights that coastal States have over living and non-living resources in the EEZ (Article 56(1)(a) of the LOSC). Pipelines are not specifically mentioned in the list of coastal State competences in the EEZ, but jurisdiction nevertheless follows from the reference in Article 56(1)(c) to "other rights and duties provided for in this Convention", in combination with some of the articles referred to in the next subchapter.

Based on this starting point, some potential jurisdictional bases for taking enforcement action against the *NewNew Polar Bear* are identified below, mainly to demonstrate that the Finnish authorities' argument that action could not be taken as the vessel stayed in the EEZ, was unduly cautious. The considerations below may be applied separately or cumulatively.

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[24] Ibid, 23.

[25] Ibid, 277.

3. Potential Jurisdictional Bases

3.1. Jurisdiction over Ships Polluting the Marine Environment

The only explicit enforcement jurisdiction against commercial ships on the EEZ which is specifically regulated in the LOSC relates to marine pollution. A first option is thus to base jurisdiction on the pollution caused by the damaged pipeline.

It is well-known that natural gas leakages may cause significant damage both to marine life and to the atmosphere.[26] The damaging of submarine oil or gas pipelines likely has an impact on the living resources in the EEZ at varying levels depending on the scale of oil or gas leaks as well as the location of the leaks and their vicinity to living resources. Still, the leaks may not have a notable effect on the living resources in the relevant EEZ. In particular, this might be the case for the leakage of natural gas into the marine environment, while the leakage of oil to the marine environment tends to have a greater impact on the living organisms.

The environmental risks of pipelines are acknowledged in the LOSC, e.g. in the distinction made between cables and pipelines on the continental shelf in Article 79(2) of the LOSC, permitting the coastal State to "take reasonable measures for … the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines". It is not further clarified what such reasonable measures might consist of, but arguably the word 'control' implies at least some jurisdiction to take enforcement measures against ships suspected of being involved in causing such pollution.

This type of pollution is clearly included in the definition of pollution of the marine environment in Article 1(4) and hence covered by Part XII of the LOSC, under which all States have an obligation to protect and preserve the marine environment (Article 192 of the LOSC) and "shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source" (Article 194(1) of the LOSC).

3.1.1. Article 220

In the case of pollution from ships, more specific rules are laid down in articles 211 and 217-221 of the LOSC, with Article 220(3-6) specifically dealing with enforcement jurisdiction over foreign ships on the EEZ. Article 220(3) of the LOSC stipulates that where there are clear grounds for believing that a vessel navigating in the EEZ or the territorial sea of a State has, in the EEZ, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred. Furthermore, where there are clear grounds for believing that a vessel navigating in the EEZ or the territorial sea of a State has, in the EEZ, committed such a violation resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation (Art 220(5) of the LOSC). The preconditions for such inspection are that the vessel has refused to give information or if the information supplied by the vessel is "manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection". Also, if the provisions of Article 220(3-6) of the LOSC had been applied, Finland could have

[26] DNV Recommended Practice, DNV-RP-F107 Risk Assessment of Pipeline Protection (2010), 32-34; Alexander Proelß, 'Pipelines and Protected Areas' in Richard Caddell and D Rhidian Thomas (eds.) *Shipping, Law and the Marine Environment in the 21st Century* (Lawtext 2013) 276.

required the vessel in question to give "other relevant information required to establish whether a violation has occurred" (220(3) of the LOSC).

James Kraska has found in relation to Article 220(5) that, 'the flag state, the vessel, and the coastal state are likely to disagree on the weight of the evidence, yet the objective test of the evidence in UNCLOS seems to tilt in practice toward the coastal state to make the determination.'[27] Kraska further comments that:

> Coastal states have jurisdiction in the EEZ with regard to "protection and preservation of the marine environment. /.../ In the territorial sea or EEZ, coastal states may undertake physical inspection in cases where there are "clear grounds" for believing that a violation of national laws that reflect international standards has occurred, and that are "resulting in a substantial discharge causing or threatening significant pollution of the marine environment." This test is as vague as the checklist that applies to ships "navigating" in the territorial sea. In particular, the temporal or chronological elements are unclear because of the "ing" verbs - may the coastal state act only if the violation is currently or actively resulting or causing or threatening pollution, or may it act much later, such as after the ship already has departed the EEZ and the threat is no longer unfolding? In either case, the authority of the coastal state to conduct a physical inspection is qualified in that it is done "if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection." This provision along introduces three more decision points for the coastal state: (1) has the ship refused to provide information?; (2) is the information inconsistent with evident facts?; and (3) do the circumstances justify an inspection? Given the subjective nature of the test, reasonable interpretations that are in conflict may be applied in good faith.[28]

In particularly severe cases of pollution impact (and clear evidence) the ship could be detained and subject to legal measures under Article 220(6) of the LOSC.

However, these enforcement rules have traditionally been applied with respect to pollution from the ship itself (as is indicated in the title of Article 211 of the LOSC), rather than to other forms of pollution caused by the vessel. The wording of Article 220(3) of the LOSC does not in itself clarify whether it may also extend to pollution caused by pipelines damaged by a ship. The underlined text below leaves open the possibility that national laws cover a wider spectrum of pollution sources, provided they have an international basis.

> Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone … has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels <u>or laws and regulations of that State conforming and giving effect to such rules and standards</u>, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

A duty to adopt such laws may be read into Article 214 of the LOSC, under which States "shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or

[27] James Kraska, 'Excessive Coastal State Jurisdiction', in Henrik Ringbom (ed.), *Jurisdiction over Ships – Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 188-189.
[28] Ibid, 189-190.

diplomatic conference to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction".

Similarly, in respect of pollution caused by dumping, coastal States shall enforce applicable international rules and standards "with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf" (Article 216(1)(a) of the LOSC). As far as is known, however, there are currently no international rules regulating gas releases into the marine environment.

3.1.2. Article 221

A more wide-reaching jurisdiction can be based on Article 221 of the LOSC, and the underlying Intervention Convention,[29] which offers coastal States a very broad enforcement jurisdiction to take measures against ships in cases of imminent 'maritime casualties'.[30] This article includes powers to arrest the ship, even beyond the territorial sea, if the environmental risks so require. As opposed to earlier proposals in the drafting of the LOSC, which covered marine incidents more generally, the wording of Article 221 of the LOSC limits the range of casualties covered to those involving ships, through its definition of 'maritime casualty'. However, since the Balticconnector pipeline incident is closely related to the nautical activities of the ship in question, it may still fall within the scope of the Article, as is indicated by the inclusion of 'other incident of navigation' to the definition of 'maritime casualty' and the underlined words below.

> 1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty <u>or acts relating to such a casualty</u>, which may reasonably be expected to result in major harmful consequences.
>
> 2. For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

The article, however, which is a maritime version of the doctrine of necessity, is usually considered to require a high threshold of damage to the coastline or its resources.

3.1.3. Natural resources

It may also be noted that Article 73(1) of the LOSC extends to measures for the purpose of preventing damage to any marine living resources in the EEZ.

> The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be

[29] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (adopted 29 November 1969, entered into force 6 May 1975) 970 UNTS 211.
[30] A protocol adopted in 1973, extended the main rules of the Intervention Convention, which were limited to pollution or threat of pollution by oil, to casualties involving other substances by oil.

> necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

Article 73(1) of the LOSC does not specifically link the damage to the living resources to the fishing vessel itself, which leaves open the prospect that the damage to the living resources could stem from oil and gas leaks from pipelines, provided there is a link to the ship in question. As demonstrated by the Balticconnector incident, the pipelines may be damaged by a ship's anchor, while the Nord Stream explosions of 2022 resulted from explosives attached to the pipelines by divers operating from a ship.

The use of the enforcement measures listed in Article 73(1) of the LOSC is subject to the criterion of necessity. Harrison notes that,

> This necessity standard is central to determining the balance between coastal state rights and the interests of other states. The inclusion of this phrase means that the enforcement actions of the coastal state are subject to some scrutiny by an international court or tribunal. /.../ At the outset, it must be remarked that the term 'necessary' is open-ended.[31]

Harrison concludes, with reference to case law, that 'coastal states should not be found in violation of Article 73(1) unless their actions can be shown to be arbitrary or patently unreasonable or exercised in bad faith.'[32] For avoiding this, the coastal State is required to provide at least some evidence of an offence that triggers the relevant enforcement actions under Article 73(1) of the LOSC.[33] Harrison illustrates this with the following example:

> [I]f a foreign fishing vessel is merely navigating through the EEZ, it is arguable that a coastal state should have to show some evidence that an offence has been committed before exercising any enforcement powers over that vessel. This would be the case even in the case of an inspection of the vessel, as inspection itself amounts to an interference with the freedom of navigation being exercised by the vessel. In this context, it is also appropriate to impose a minimum evidential threshold on the coastal state to prevent it from abusing its enforcement powers. Yet, in both situations, the evidential threshold should not be set too high. Doing so, would undermine the sovereign rights of the coastal state.[34]

The damaging of a submarine gas pipeline which is in operation may have an impact on marine living organisms, since a considerable amount of natural gas enters the marine environment leading to environmental damage.[35] Hence, to the extent the damage of the pipeline would affect living resources in the EEZ, it is possible to argue that the coastal State's sovereign rights over those resources could justify action based on Article 73(1) of the LOSC, including inspection, arrest, and starting judicial proceedings. In that situation, the coastal State would thus have an additional basis on which to enforce its laws in the EEZ in respect of a ship suspected of polluting the marine environment. It must be acknowledged, though, that Article

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[31] James Harrison, 'Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone—Law and Practice', in Ringbom (n 27) 220.
[32] Ibid, 221.
[33] Ibid.
[34] Ibid, 221-222.
[35] On the level of impact required for environmental damage, see Karen Hulme, *War Torn Environment: Interpreting The Legal Threshold* (Martinus Nijhoff 2004) 30-39.

73(1) of the LOSC is drafted with jurisdiction over fisheries in mind and that it is not intended to extend to damage to living resources caused by other marine activities.[36]

3.1.4. Summary

The LOSC does not provide an explicit jurisdiction to investigate ships involved in pollution caused by damaged pipelines on the EEZ. However, the pollution caused by a damaged pipeline is clearly covered under the general environmental jurisdiction of coastal states in their EEZ and by the general rights and obligations in the Convention relating to the protection of the marine environment. To the extent that this type of pollution is caused by ships, e.g. through anchoring manoeuvres, there are good grounds for treating the environmental damage as analogous to pollution emanating from the ship itself, which would imply that the enforcement jurisdiction against suspected ships is linked to the level of (potential) damage and the level of evidence linking the pollution to the ship. The latter consideration implies a right and duty of the coastal State to find out the facts relating to the ship and, hence, to undertake physical inspection of the ship, if other means of establishing basic facts are not helpful.

While not conclusive, this brief overview indicates that by focusing on the jurisdiction that coastal States have over the marine environment in their EEZ, Finland could have argued in favour of having some jurisdiction against the suspected ship based on the environmental impact of the damage to the Balticconnector pipeline. The potential measures include a physical inspection of the ship to find out more about its whereabouts, but even such enforcement measures as the arrest of the ship could be justified under international law. Causing damage to natural living resources could be subject to far-reaching enforcement jurisdiction of the coastal State, based on Article 221 of the LOSC and possibly – by analogy – Article 73(1) on marine living resources.

3.2. Enforcement Rules with Respect to Damaging a Submarine Pipeline

Another way to argue in favour of the coastal State jurisdiction over the *NewNew Polar Bear*-type of situation focuses on the (suspected) breach of the pipeline as such, rather than its incidental consequences.

3.2.1. Article 113

Article 113 of the LOSC requires every State to adopt the laws and regulations necessary to make the willful or negligent breaking or injury of a submarine cable or pipeline a punishable offense. This provision also applies to conduct calculated or likely to result in such breaking or injury. Thus, Article 113 of the LOSC sets the jurisdictional background in relation to the severing of a submarine cable or pipeline and makes it clear that the intentional cutting of submarine cables or injuring of submarine pipelines is illegal. It is subject to criminal liability if carried out both within and beyond the limits of the territorial sea of the coastal State.

In this context, the question arises as to whether Article 113 of the LOSC *per se* could be considered as an exception permitting the interdiction of a foreign ship on the high seas and in the EEZ? Currently, the dominant view appears to hold that Article 113 does not provide for

[36] In the M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, p. 4, the ITLOS accepted to include bunkering vessels serving fishing vessels in the EEZ under the scope of Article 73, but also established that "the principle of reasonableness applies generally to measures under Article 73" (para 270).

universal jurisdiction in the Balticconnector incident type of cases as it offers no explicit enforcement jurisdiction for States other than the flag State.

Heintschel von Heinegg has pointed out that Articles 113–115 of the LOSC neither require nor prohibit the exercise of universal jurisdiction in respect of attacks against submarine cables or pipelines and thus not only the flag State or State of nationality, but other States as well may exercise their jurisdiction in response to such attacks.[37] On that basis, in support of a position that a Baltic Sea coastal State could have boarded the *NewNew Polar Bear*, one might potentially refer to Article 113 of the LOSC arguing that it enables the exercise of universal jurisdiction in respect of attacks against submarine cables or pipelines.

In this context, a comparison can be made with Article 10 of the 1884 Paris Convention for the Protection of Submarine Cables Outside the Territorial Sea[38] that allows to board a ship outside the territorial sea and question the crew about the suspected breaking or damaging of a submarine cable. Beckman distils from Article 110 of the LOSC an explicit recognition that, 'additional reasons for exercising the right to board foreign flagged ships may be established by treaty.'[39] In this context, Article 10 of the 1884 Convention has special relevance as an additional permissive rule of general international law that would allow the interdiction of a ship suspected of damaging a submarine cable on the high seas.[40]

However, there are some limitations. Kraska and Pedrozo note that while the 1884 Convention prohibits the breaking or injury of submarine cable through willful or culpable negligence, this 'does not apply, however, to situation of accidental damage, such as by fishers.'[41] Yet it does not appear that the damage to the Balticconnector pipeline was caused by accident. In this connection, the Estonian Defense Minister Mr. Hanno Pevkur has commented that, 'if the ship's anchor hangs free for over 185 kilometers, it is hard to believe that it is an accident.'[42] This position is shared by experts who conducted simulations on the impact of the dragging of the anchor on the likely course divergences.[43]

It has been noted in literature that the focus on flag State enforcement for this type of crimes may be appropriate for accidental damage but is clearly unsatisfactory to deal with the type of

[37] Wolff Heintschel von Heinegg, 'Protecting Critical Submarine Cyber Infrastructure: Legal Status and Protection of Submarine Communications Cables under International Law', in Katharina Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace* (NATO CCD COE Publication 2013) 291, 311.

[38] Convention for the Protection of Submarine Telegraph Cables 1884 (adopted 14 March 1884, entered into force 1 May 1888) 1901 Australian Treaty Series 1.

[39] Robert Beckman, 'Protecting Submarine Cables from Intentional Damage', in Burnett, Davenport, and Beckman (n 15) 281, 286.

[40] Notably, while the 1884 Paris Convention applies to the protection of submarine cables, most of its provisions have been incorporated into the LOSC in a way that the provisions apply in parallel to submarine pipelines as well. Article 10 of the 1884 Convention could be seen as an exception in this context.

[41] James Kraska and Raul Pedrozo, *Disruptive Technology and the Law of Naval Warfare* (Oxford University Press 2022) 182. Article 113 of the LOSC does not apply to such a situation either.

[42] Heini Pitkänen, 'Viron puolustus-ministeri: Kaasu-putki-vaurioihin yhdistetty kiinalais-alus veti ankkuriaan satoja kilometrejä pitkin meren-pohjaa' Helsingin Sanomat (24 November 2023), available at <https://www.hs.fi/ulkomaat/art-2000010015226.html> accessed 12 December 2023; See also Rebekka Salmela, 'Merikapteeni: On mahdollista, että kiinalaisalus veti ankkuriaan satoja kilometrejä merenpohjassa' Helsingin Sanomat (26 November 2023), available at <https://www.hs.fi/kotimaa/art-2000010017239.html> accessed 12 December 2023.

[43] Malte Humpert, 'Northern Sea Route Saw Seven Containership Voyages in 2023, Including Controversial Trip by Chinese Container Ship' High North News (21 December 2023), available at <https://www.highnorthnews.com/en/northern-sea-route-saw-seven-containership-voyages-2023-including-controversial-trip-chinese> accessed 22 December 2023.

intentional sabotage-like conduct that is suspected in the case of the *NewNew Polar Bear*.[44] In cases such as the Balticconnector incident where one of the States involved either as a flag State of a ship suspected of damaging a submarine cable or pipeline or as the interdicting State is a non-State party to the 1884 Convention, the boarding of the ship by a State non-party to the 1884 Convention (e.g., Estonia or Finland) might be possible provided that the above-discussed dynamic interpretation of Article 113 of the LOSC is adopted, thereby permitting universal jurisdiction in respect of such incidents.

Alternatively, in relation to submarine cables (though not necessarily pipelines), one might argue in support of Article 10 of the 1884 Convention forming part of customary international law. Kraska maintains that:

> While Article 10 of the 1884 treaty specifies that warships and other government vessels have a right to verify the nationality of a merchant vessel if it is suspected of having broken a submarine cable, this provision is a departure from the concept of exclusive flag state jurisdiction over ships, as embodied in Article 92 of the LOSC. Still, it is also possible to suggest that Article 10 persists even now by virtue of Article 30 of the 1958 [high seas] convention, which states that prior agreements already in force shall continue. Thus, the rule that states may approach and visit merchant vessels to investigate cut or damaged cables may still apply to states party to the 1884 convention and the 1958 convention, or perhaps more broadly under customary international law.[45]

Davenport has found that:

> [T]here is some merit in the argument that warships of all States should have the right to board vessels suspected of intentionally breaking a cable. For example, Article X of the 1884 Cable Convention allows warships to require the master of a vessel suspected of having broken a cable to provide documentation to show the ship's nationality and thereafter to make a report to the flag state. This provides an effective deterrent to prospective attacks.[46]

Still, it is unclear whether Article 10 of the 1884 Convention is part of customary international law, not least because the practice of States in boarding a foreign ship based on the said provision is limited and, arguably, because Article 10 was not included in the LOSC (unlike the other provisions of the 1884 Convention). McLaughlin, Paige, and Guilfoyle comment that:

> At least one such inspection occurred when in 1959 a US warship investigating a break in an Atlantic cable off Newfoundland 'boarded the Soviet trawler *Novorossiisk* and minuted its papers'. The Paris Convention, however, provided only for 'visitation on the high seas, not for arrest or even for search.' Its practical utility is further hampered by its low level of ratification having only 36 parties.[47]

Kraska and Pedrozo take the view that the 1884 Convention does not allow for the arrest of the ship and her crew.[48] However, they comment that in the above-referred 1959 incident where the United States Navy suspected the Soviet ship of cutting five submarine cables, since

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[44] Stuart Kaye, 'International Measures to Protect Oil Platforms, Pipelines and Submarine Cables from Attack' (2007) 31(2) Tulane Maritime Law Journal 377, 422.
[45] James Kraska, 'Submarine Cables in the Law of Naval Warfare' (10 July 2020) Lawfare, available at <https://www.lawfareblog.com/submarine-cables-law-naval-warfare> accessed 27 November 2023.
[46] Tara Davenport, 'Submarine Cables, Cybersecurity and International Law: An Intersectional Analysis' (2015) 24 Catholic University Journal of Law and Technology 57, 84-85.
[47] McLaughlin, Paige, and Guilfoyle (n 15) 663.
[48] Kraska and Pedrozo (n 41) 182.

Novorossiisk had been 'in the immediate vicinity of all five cable breaks at the time the lines were cut', the ship was subject to a 70-minutes-long 'investigation' by a United States Navy officer and four enlisted sailors.[49]

3.2.2. An Enforcement Gap in the EEZ?

The key question here is whether the presence of the pipeline in the Finnish EEZ and on its continental shelf, combined with other circumstances (including co-ownership of the pipeline and its role as a domestically important energy object) tying the cable to Finnish interests, could amount to establishing a jurisdictional link to Finland, strong enough to authorize enforcement measures in the EEZ.

The main rule of Article 113 of the LOSC extends to pipelines damaged in the EEZ of other States as well.[50] It follows *a fortiori* from the jurisdictional system set up by the Convention, and more explicitly from its Article 58(2), "insofar as [Article 113 and other high seas articles] are not incompatible with [Part V of the LOSC, on the EEZ]." The damaging of pipelines also breaches the duty of States to exercise the navigational rights in the EEZ with due regard for the interests of the coastal States.[51] It was already noted that coastal States have a clear prescriptive right to lay cables and pipelines in their EEZ/continental shelf and that some of the jurisdictional rights of the coastal State apply only in relation to the laying of pipelines, but not *vis-à-vis* cables. In particular, Article 79(2) of the LOSC acknowledges the right of the coastal State to "take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines". In addition, the delineation of the course of the pipeline, but not the cable, is subject to the consent of the coastal State (Art 79(3) of the LOSC). If anything, therefore, a systematic approach to the LOSC favours more enforcement jurisdiction for coastal States with respect to pipelines on its continental shelf than with respect to cables.

More generally, too, assuming that a ship was deliberately involved in sabotaging a submarine cable or pipeline and that the enforcement authorities were on the scene and caught the ship red-handed on the high seas or in the EEZ, it seems intuitively obvious that the suspected ship would have to submit itself to some enforcement jurisdiction. This follows also from more general collaboration provisions of the LOSC referred to in the introductory section above, and the prohibition of abuse of rights. It would simply defeat the purpose of the LOSC, and international law more generally, if a ship were free to engage in illegal activities that are blatantly against the interest of the majority of States in protecting submarine critical infrastructure and especially those of the coastal State in its own EEZ, without offering the State which suffers considerable damage from the act of sabotage any opportunity to intervene. If that assumption is correct, a certain jurisdiction to find out whether a violation of the international rules has actually taken place follows logically, even in the absence of a clear enforcement provision to that effect in the LOSC.

What also speaks in favour of the coastal State's jurisdiction in the case of the Balticconnector incident is the direct impact of the damaged pipeline to Finland, given that the damaged pipeline enters its own territory. This establishes several links in terms of the effects, including that the interruption of gas supplies due to the damage was directly felt by Finland, the economic damage affected Finnish companies owning and operating the pipeline, and the

[49] Ibid, 182-183.
[50] The origin of the article is to be found in Article 27 of the 1958 High Seas Convention, which in turn was inspired by Article 2 of the 1884 Convention.
[51] See *supra* n 19.

general security implications of a damaged (critical) marine infrastructure affected Finland. Article 79(4) of the LOSC acknowledges additional jurisdiction for coastal States "to establish conditions for cables and pipelines entering its territory or territorial sea", but it is not certain whether this provision can be read as strengthening coastal States' jurisdiction over such cables and pipelines *beyond* the territorial sea.[52]

3.2.3. Article 59

Alternatively, the regulatory gap with respect to the enforcement jurisdiction in respect of damaged pipelines in the EEZ may be approached by means of Article 59 of the LOSC, which is specifically designed to deal with this type of 'residual rights'-conflicts in the EEZ that are not specifically addressed in the LOSC. Article 59 stipulates that:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

While the wording of this article does not indicate a presumption in favour of coastal or other States, it seems obvious that wilfully damaging another State's gas pipeline would score very low on this balancing of interests, compared to the interest of the coastal State and the "international community as a whole". The flag State's only available counterargument, the freedom of navigation that applies in the EEZ, would seem to be of limited weight in the context of the Balticconnector incident, in view of the severe allegations against one or two individual ships in that particular case and, hence, the limited effects on navigation in the zone more generally.

The balance required to ensure that coastal States do not abuse enforcement jurisdiction on the EEZ suggests that enforcement jurisdiction should be linked to the level of evidence against the ship in question. That, in turn, speaks in favour of enabling a relatively light jurisdiction of the coastal State to search the suspected ship for the purpose of obtaining evidence. The exercise of the jurisdiction could further be limited to situations where the true circumstances cannot be established by flag State cooperation or direct communication with the ship, i.e. where the alternative means of finding out the facts were very limited.

However, it should be noted that Article 59 of the LOSC by its nature is more helpful in settling disputes *ex post*, e.g. in courts, than offering concrete guidance in a specific ongoing enforcement situation. To date, there seems to be very little, if any, practice on Article 59 in case law in general,[53] and none of relevance for the Balticconnector case at hand. On the other hand, clarification of the more precise meaning of the formula laid out in Article 59 of the LOSC will not be achieved if States do not test the boundaries of their enforcement jurisdiction in response to suspected acts of sabotage, possibly even when lacking an explicit legal basis for taking enforcement measures in response to a supposedly gray zone methods of aggression.

[52] See also Dorota Englender, 'Article 79', in Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS): A Commentary* (C.H. Beck/Hart/Nomos 2017) 627, referring to somewhat diverging views of Beckman and Burnett et al.

[53] The article was referred to by both parties, but not found applicable, in the 'Enrica Lexie' award (n 19) at paras 908-910.

3.2.4. Safeguards

If Finland had taken measures to visit the *NewNew Polar Bear*, it would in any case have had to comply with a number of safeguards that are listed in section 7 of Part XII of the LOSC, including the duty to use clearly marked government ships for the purpose, to avoid adverse consequences, prompt release subject to reasonable security, liability for excessive measures (Articles 224-232 of the LOSC). For example, Article 225 of the LOSC stipulates that: "In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk."

The safeguards include rules on how to conduct investigations and various obligations to exercise caution in doing so. While the safeguards feature in the environmental part of the Convention, it is often considered that they apply to enforcement measures against commercial ships more generally. Moreover, the International Tribunal for the Law of the Sea (hereafter ITLOS) has held that:

> [A]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where use of force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.[54]

These so-called 'Saiga principles' are generally recognised as forming part of customary international law and have been reiterated in more recent case law.[55] In the M/V "SAIGA" (No. 2) Case, the ITLOS further stated that: 'It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act'.[56]

A potentially relevant detail among the enforcement safeguards is found in Article 228 of the LOSC, which secures the priority of flag States to take enforcement measures for its vessels for pollution violations committed beyond the territorial sea of other States. However, that priority does not apply if the proceedings relate to a case of major damage to the coastal State, or if "the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels." The same reasoning could be extended by analogy to other types of enforcement measures. In the present case this would mean that States that have a bad record of respecting the integrity of other States' marine infrastructure in international waters gradually would be less confident that the primacy of flag State jurisdiction protects them from legal action by other States.

3.2.5. Summary

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[54] M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p 10, para 155.

[55] See Annex VII Arbitral Tribunal, Matter of an Arbitration between Guyana and Suriname, Award of 17 September 2007, para 445; Arctic Sunrise award of 14 August 2015 (n 20) para 222.

[56] This is also reflected in Article 232 of the LOSC. See also M/V "SAIGA" (No. 2) Case (n 54) para 170; recalled also in M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, p 4, p. 116, para 428; M/V "Norstar" (Panama v. Italy), Judgment, ITLOS Reports 2018–2019, p 10, para 316.

Most activities for which LOSC provides for prescriptive coastal State jurisdiction in the EEZ are matched with specific enforcement jurisdiction over ships suspected of those activities. This applies to ship-source pollution and fisheries, but also to pollution resulting from dumping and other sources. With respect to damage to pipelines, this is not the case. The deliberate damaging of pipelines is only addressed in the high seas context and here jurisdiction is left with the flag State, though not necessarily exclusively. The undisputed right of the coastal State to lay pipelines and to monitor and control their integrity and safety on their continental shelf (Article 79 of the LOSC), combined with the equally clear legal condemnation of the damaging of such pipelines in Article 113 of the LOSC and in international law more generally, is not matched with a single explicit enforcement provision.

While this gap may not have been a major problem as long as incidents involving damage to pipelines were few and far between and mostly handled by means of civil claims by the party suffering the (economic) damage from the incident, the increasing tendency of State actors to target pipelines and cables as a means of hybrid attacks and sabotage emphasizes the importance and urgency of closing this gap that coastal States and 'pipeline States' increasingly face.

The significant interests of the coastal State over pipelines in its EEZ and continental shelf arguably justify a broader jurisdiction than what the explicit regulatory framework currently provides. Justifications may be found in the comprehensive nature of the LOSC itself, which invites to a systematic approach for interpreting regulatory gaps[57] but also in the specific balancing of interests which is inherent in the reciprocal due regard obligations in Articles 87(2), 56(2) of the LOSC and in the balancing formula of Article 59. The reasons underlying such 'gap-filling' may also be sought in its negotiation history. The Convention was not drafted with intentional government-supported sabotage actions in mind and its enforcement scheme does not consider the prospect that a flag State specifically abuses navigational rights granted in the Convention to damage lawfully established critical infrastructure in coastal States' maritime zones.

New types of hybrid activities inflict potentially severe damage at many levels for coastal States, which needs to be part of the balancing of interests. Those activities, moreover, specifically consist of abuses of opportunities offered by the current legal system and are based on the premise that other States constrain their responses by complying with that same legal framework. All these considerations justify a dynamic interpretation of the rules, in light of the altered circumstances and novel challenges.

It should be added, however, that the argument favouring increased enforcement powers of coastal States in this kind of situation is a cautious one, based on a variety of applicable principles relating to the avoidance of excessive force and safeguarding the navigational interests of the ship in question, as provided in the LOSC safeguards and elsewhere.

[57] See also Kristina Siig, Birgit Feldtmann, Fenella MW Billing, 'Introduction to UNCLOS 1982 as a System of Regulation', in Kristina Siig, Birgit Feldtmann, Fenella MW Billing (eds.), *The United Nations Convention on the Law of the Sea: A System of Regulation* (Routledge 2023).

4. Enforcement Options Based on Collaboration with Other States

If the above-referred opportunities were not considered to represent sufficient jurisdictional bases to act on ships passing through Finland's EEZ, there are other less intrusive mechanisms to secure enforcement. The examples below presume close collaboration between the Finnish authorities and other States. Press reports do not include information on whether any such collaboration initiatives have been taken on the part of Finland, and there is no reason to speculate on that issue here. Yet the mere availability of these options of collaboration between Finland's neighboring States adds to the overall impression that the Finnish authorities were not without remedies to take action against the *NewNew Polar Bear,* even if the ship did not enter Finnish territorial waters.

First, Finland could have requested permission by the flag State to board the ship for the necessary fact-finding exercises on the way back from St Petersburg. The ship's stay in St Petersburg for a couple of weeks before returning to the Finnish EEZ would have given Finnish authorities ample time to seek this type of agreement from the flag State.

Second, the practice of asking subsequent ports of assistance in investigations is widespread in the field of safety investigations and specifically foreseen in Article 218(2-4) of the LOSC in terms of pollution violations. Finland had the right to ask subsequent port States to examine the ship's log in detail and interview its crew. Finland made such a request to the Chinese authorities and when the *NewNew Polar Bear* arrived in China's port, the Chinese, Finnish, and Estonian authorities were reportedly supposed to jointly investigate the ship.[58] However, by that time, over two months had passed from the Balticconnector incident. On her return voyage to China, the ship appears to have made only stops in Russian ports.

Third, Finland could have requested other Baltic Sea coastal States, especially Sweden, to investigate the whereabouts of the *NewNew Polar Bear* and potential options for boarding and inspecting the ship at the time when she was leaving the Gulf of Finland and the Baltic Sea proper via the Danish Straits. The ship crossed the Danish Straits reportedly in the middle of October, approximately a week after the Balticconnector incident in the Gulf of Finland. It is unclear whether the ship crossed the Great Belt or the Øresund for exiting the Baltic Sea. If the *NewNew Polar Bear* left the Baltic Sea via the Øresund, she might have sailed through the Swedish part of the strait, i.e. in Swedish territorial waters. This chapter does not investigate this matter in any greater detail for length reasons, but it needs to be briefly clarified that even though the *NewNew Polar Bear* would have entered the Swedish territorial sea after the Swedish-owned cable had sustained damage, it might have been still possible for Sweden to board and inspect the ship in its territorial sea similar to Finland's right in its maritime area to board and inspect the same ship in relation to the suspected sabotage of the Balticconnector pipeline.

Presumably, the *NewNew Polar Bear* used the EEZ corridors established in the Kattegat and, if relevant, in the Bornholmsgat, and Fehmarnbelt prior to and after crossing the Danish Straits proper, i.e. the Great Belt, Little Belt, and Øresund.[59] This would have enabled her to avoid entering the territorial sea of the coastal State(s) in parts of the maritime area that are not subject to the special passage regime providing an exception from the applicability of the transit

[58] Claudia Chiappa and Pierre Emmanuel Ngendakumana, 'Finland: We 'trust' China will help probe Baltic Sea pipeline damage' Politico (8 December 2023), available at <https://www.politico.eu/article/finland-we-trust-china-help-probe-baltic-sea-pipeline-damage> accessed 22 December 2023.
[59] For the location of the EEZ corridors in the Danish Straits, see *supra* Map 1 of Chapter 6.

passage regime in the Danish Straits proper under the 1857 Copenhagen Convention in combination with Article 35I of the LOSC.[60] In any case, according to Article I(1) of the 1857 Copenhagen Treaty, no ship transiting the Great Belt, Little Belt, or Øresund cannot, 'under any pretext whatsoever, be subject, when crossing the Sound or the Belts, to detention or any hindrance'. This does not preclude Denmark exercising prescriptive jurisdiction, but means that enforcement might be possible only outside the Danish Straits proper.[61]

Hence, while Denmark and Sweden have prescriptive jurisdiction over the Great Belt, Little Belt, and Øresund, they appear to lack enforcement jurisdiction under the terms of the 1857 Convention over ships in passage (including the *NewNew Polar Bear*) either entering or leaving the Baltic Sea in these three straits. Nonetheless, the Kattegat includes a long EEZ corridor as the only route of exit or entry in respect of the Baltic Sea in which Denmark and Sweden can enforce their laws, but only to the limited extent permitted under the LOSC.

The role of Sweden is particularly interesting from the perspective of the potential interdiction of the *NewNew Polar Bear* in the Baltic Sea, given that Sweden is a party (whereas Estonia and Finland are not) to the 1884 Convention. It is submitted here that Sweden as a party to the 1884 Convention could have boarded the Hong Kong-flagged *NewNew Polar Bear* that is believed to have damaged the Balticconnector gas pipeline and submarine cables in the Baltic Sea, including the Swedish-owned cable EE-S1 linking Estonia and Sweden, based on Article 10 of the 1884 Convention discussed above (see section 3.2.1).

China (in relation to the flag State of Hong Kong) is not a State party to the 1884 Convention. Nonetheless, Sweden as a State party to the 1884 Convention appears to have had the right to board the Hong Kong-flagged *NewNew Polar Bear*. In this context, the central question is whether the right of visit, as stipulated in Article 10 of the 1884 Convention, is dependent on the nationality of the ship that is suspected of damaging a cable or whether that provision provides for an exception to the principle of treaty law according to which a treaty binds only its States parties. Article 10 provides that when boarding a vessel, the officers of one of the High Contracting Parties,

> [M]ay demand from the captain or master the production of the official documents proving the nationality of the said vessel. The fact of such document having been exhibited shall then be endorsed upon it immediately. Further, formal statements of the facts may be prepared by the said officers, whatever may be the nationality of the vessel incriminated.

Thus, one of the aims of the right of visit is enabling the verification of the nationality of the ship in question. Papastavridis explains with reference to Gilbert Gidel's 1932 book *Le droit international public de la mer* that since Article 10 of the 1884 Convention 'stipulated that

[60] Treaty between Great Britain, Austria, Belgium, France, Hanover, Mecklenburg-Schwerin, Oldenburg, Netherlands, Prussia, Russia, Sweden and Norway, and the Hanse Towns, on the one part, and Denmark, on the other part, for the Redemption of the Sound Dues (adopted 14 March 1857, entered into force 31 March 1857). United Nations Treaty Collection, United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter, Denmark's declaration upon the ratification of the LOSC on 16 November 2004; Sweden's declaration upon signing the LOSC on 10 December 1982 and ratifying it on 25 June 1996. Both available at <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 10 December 2023.

[61] Alex G Oude Elferink, 'The Regime of Passage through the Danish Straits' (2000) 15(4) The International Journal of Marine and Coastal Law 555, 562.

warships of all signatory powers have a right to stop and verify the nationality of **merchant ships of all nations**' and thus '[a]s **it was drafted to apply to also *vis-à-vis* third states**, the interference on the high seas was limited to the right of approach and *d'enquête de pavillon*, which, however, involved the right to board, but not to search the vessel.'[62] (emphasis added) Hence, the right of visit (short of enforcement measures) under Article 10 of the 1884 Convention is independent of the nationality of the ship as (non-)party flag State vessel that is suspected of damaging a cable.

The 1884 Convention criminalizes damaging of cables "wilfully or through culpable negligence" on the high seas, without barring additional civil actions (Article 2). Legal actions shall be taken by courts "of the country to which the vessel on board of which the infraction has been committed belongs", i.e. the flag State or, if that cannot be carried out, a State that has penal jurisdiction under other applicable national or international law (Article 8).

Any enforcement measures against the *NewNew Polar Bear* under the 1884 Convention would have required, on Sweden's part, a will and interest in asserting her coastal State's rights by means of a somewhat progressive development of the law of the sea through the creation of new State practice, since the Balticconnector incident demonstrates that States parties to the 1884 Convention appear to be oblivious in respect of the right of visit as stipulated in Article 10.

The next subchapter debates the validity of a potential dynamic interpretation of international law, based on which one could potentially argue that Estonia, Finland, and Sweden were entitled to board and inspect the *NewNew Polar Bear* based on a claim of necessity.

5. General International Law Considerations

Assuming that it was established that the *NewNew Polar Bear* had been engaged in wilfully sabotaging the Balticconnector pipeline, at the order of a State,[63] it is clear that a whole new set of additional rules would come into play, also affecting the rights of coastal States to take measures against the ship in question. For example, the right of States to exercise self-defence under Article 51 of the United Nations (hereafter UN) Charter raises questions with respect to how concepts such as 'armed' attack' and necessity and proportionality could play out in this context. Hybrid attacks may also raise issues belonging to the law of naval warfare, providing for a different enforcement regime altogether. An analysis of those rules was undertaken in *supra* Chapter 6 and will not be repeated here, in view of the many uncertainties relating to the facts of the Balticconnector incident.

An analysis of the rules of State responsibility also brings the discussion well beyond the law of the sea, but as was already noted, the LOSC accepts in its preamble that it does not operate in a vacuum and that issues not regulated in it continue to be governed by the rules and

[62] Efthymios Papastavridis, *The Interception of Vessels on the High Seas, Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013) 34. According to Art 2(1)(h) of the Vienna Convention on the Law of Treaties, "third State" means a State not a party to the treaty.

[63] The fact that the damage was undertaken by non-State actors, such as a commercial ship in this case is not necessarily ruling out an armed attack, see *supra* Chapter 6. On other difficulties linked to proving that an armed attack against a particular State, and the different tests involved, relating to scale and effect, see *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, p 161, paras 51-64.

principles of general international law. Under the 2001 Draft Articles on State Responsibility,[64] a conduct which may otherwise be wrongful in a variety of situations, including if the matter relates to countermeasures to another wrongful act, may be justified under the doctrine of necessity. The doctrine of necessity in international law is outlined in Article 25 of the 2001 Draft Articles on State Responsibility, which expresses its scope in negative terms:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
> (a) the international obligation in question excludes the possibility of invoking necessity; or
> (b) the State has contributed to the situation of necessity.

The formulation clearly leaves scope for applying the doctrine of necessity in the *NewNew Polar Bear*-type of incident, given that the focus is on a particular ship, rather than the right of navigation more generally and that other forms of enforcement measures based on direct collaboration with the ship and other States may leave immediate enforcement measures as the only remaining way to "safeguard an essential interest against a grave and imminent peril". A similar argument may thus be raised in respect of the coastal State's right to take enforcement measures in response to a suspected act of sabotage against submarine cables outside the limits of the territorial sea. When a foreign-flagged ship abuses rights or freedoms in the coastal State's maritime area and threatens to cause significant harm to the coastal State, then the coastal State should have the right to intervene, even in the absence of an explicit right to do so in any of the applicable legal rules.

6. On the Role of Civil Liability Rules

Complementing the rules of State responsibility discussed above, there is a series of rules relating to the civil liability for damage caused, which may also have a bearing on the enforcement opportunities against suspected ships in a *NewNew Polar Bear*-type of situation.[65] These rules can also usefully be divided between environmental liability rules and other liability rules.

The main international civil liability convention for dealing with damage by hazardous and noxious substances, including gases, caused by ships, the so-called HNS Convention,[66] is not applicable to this type of incidents, as it only covers hazardous and noxious substances carried

[64] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (United Nations 2008).
[65] See also Peter Wetterstein, 'Subsea Gas Pipelines in the Baltic Sea Area – Civil Liability Issues', in Henrik Ringbom (ed.), *Regulatory Gaps in Baltic Sea Governance: Selected Issues* (Springer 2018).
[66] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (adopted 3 May 1996, not yet in force) 35 ILM 1406, as amended by the Protocol of 2010 (adopted 30 April 2010, not yet in force).

on board the ship.[67] Instead, the civil liability of the owner and operator of the ship will be based on the regular tort liability regime for shipowners, which is not internationally harmonized and thus mainly based on national rules.

In Finland, the starting point is the Tort Act (Act 412/1974), which establishes a fault-based liability system, which covers personal injury, property damage and, in certain conditions, pure economic losses.[68] However, the Tort Act does not apply if liability is subject to special rules adopted in law or contract.[69] As regards ship operations, the starting point for liability rules in Finland - and in all Nordic States applying a virtually identical legislation on this point -, Chapter 7, section 1 of the Maritime Code (Act 1994/674). Under this main rule the shipowner ('laivanisäntä', 'redare', could also be translated to 'ship operator') is vicariously liable for loss or damage that the master, crew member or pilot causes through fault or neglect in the performance of their duties, but also for errors committed by other persons performing work in the service of the ship. In the Water Act (Act 587/2011), a fault-based liability is placed with ships owners causing economic losses to third parties.[70] There is little doubt, therefore, that the owner of the *NewNew Polar Bear* would be liable to compensate for the damage caused to the Balticconnector pipeline if the incident could be linked to the activities of the ship. The scope of the compensable damage would be regulated by the Tort Act (or Water Act), but the owner would still be entitled to limit the liability according to Chapter 9 of the Maritime Code, based on the size of the ship, unless the claimant can prove that damage resulted from the liable person's "personal act or omission, committed with the intent to cause such damage, or recklessly with knowledge that such damage was likely to occur".[71]

In addition, certain Finnish laws relating to environmental impairment liability, which provide a strict liability regime for damage caused by ships to fixed installations (as opposed to movable ships) in the EEZ/continental shelf would apply to this event. Notably, under section 1 of the Environmental Damage Act (Act 737/1994), environmental damage caused by pollution of water and air, but also other disturbances, such as heating or smell, is to be compensated. Compensation extends beyond injury and property damage, to pure economic losses, if they are not insignificant, up to a "reasonable amount"[72] and to reasonable restoration costs.[73] Damage caused by a criminal act is always compensated.[74] The liability rests with the operator, i.e. the person who carries out the activity that causes the environmental damage.[75] At the EU level, Directive 2004/35 on environmental liability, obliges operators of identified activities to bear the costs for preventive and remedial actions in cases of environmental damage, including damage to species and habitats in the EEZ.[76] It could be applicable for this type of cases, and,

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[67] HNS Convention, Article 1(5).

[68] One of the requisites for compensating economic losses in Chapter 5 section 1 of the Tort Act is that the loss was caused by a criminal act.

[69] Tort Act, Chapter 1, section 1.

[70] Water Act, Chapter 13, section 4.

[71] The wording of Maritime Code, Chapter 9, section 4 matches that of Article 4 of the 1976 International Convention for the Limitation of Maritime Claims (adopted 19 November 1976, entry into force 1 December 1986) 1456 UNTS 261, as subsequently amended.

[72] Environmental Damage Act, section 5(2).

[73] Ibid. section 6

[74] Ibid., section 5(1).

[75] Ibid. section 7.

[76] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Official Journal of the European Union 2004 L 143/56, Article 2(1).

if so, the standard of care required would depend on the nature of the activity that caused the damage.[77]

Both economic losses and environmental damage emanating from the damage could, in other words, justify the institution of civil proceedings against the suspected ship, by the State as well as by private actors, notably the owner or operator of the Balticconnector pipeline (such as Gasgrid Finland and Estonia's Elering). Civil claims offer the opportunity to arrest the ship (or even one of its sister ships) in a suitable jurisdiction, under the applicable arrest rules, in order to ensure sufficient financial security to cover the claims.[78]

Such actions are normally undertaken with respect to ships in ports, but the port State jurisdiction for the purpose of exercising civil liability over ships in the EEZ is not regulated in the LOSC. With respect to pollution, Article 229 of the LOSC only provides that:

> Nothing in this Convention affects the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment.

The only article in the LOSC that specifically addresses civil enforcement jurisdiction with respect to foreign ships is Article 28, which is limited to the territorial sea.

While civil law actions on behalf of the State or those who have suffered economic losses from the incident does not in itself generate independent enforcement rights over ships in the EEZ, a pending civil law claim on environmental liability would add to the relevance and reasonableness claim for further enquiries of the suspected ship's earlier whereabouts.

Conclusion

It is suggested here that the significant interests of the coastal State over pipelines in its EEZ/continental shelf justify a broader jurisdiction than what the explicit regulatory framework currently provides. Part of the reasons for that proposition originate in the text of the Convention itself, such as the due regard obligations, the prohibition of abuse of rights and the written indication of certain control rights of coastal States over pipelines in their EEZ/continental shelf and in Article 59 of the LOSC.

Other reasons may be found by closely analyzing the architecture of the Convention. On the one hand, the Convention firmly establishes the criminality of damaging cables and pipelines on the high seas. On the other hand, the Convention suggests that enforcement rights in the EEZ are broader than those on the high seas and that enforcement with respect to pipelines in the EEZ are broader than the corresponding jurisdiction with respect to cables. The

[77] Ibid, Article 3(1) and Annex III.

[78] Ship arrest is a well-known method of securing maritime claims, which requires a decision by a local court. None of the parties involved in the Balticconnector incident have ratified the International Convention Relating to the Arrest of Seagoing Ships (adopted 10 May 1952, entered into force 24 February 1956) 439 UNTS 193. Estonia has ratified the 1999 International Convention on Arrest of Ships (adopted 12 March 1999, entered into force 14 September 2011) 2797 UNTS 3. Finland signed it subject to ratification in 2000 but has not ratified it. Russia and China are not parties to either convention. The maritime claims that can be secured by arrest by courts under Article 1 of the 1999 Convention include: «loss or damage caused by the operation of the ship» and environmental damage and threat thereof.

environmental risks linked to damaged pipelines also justify drawing analogies to pollution and environmental damage caused by the ship itself.

Historic considerations also support a flexible interpretation, as the Convention was not drafted with the scenario of intentional government-supported sabotage actions in mind. Its enforcement scheme does not consider the prospect that a flag State specifically abuses navigational rights granted in the Convention with the purpose of damaging lawfully established critical infrastructure in the coastal State's maritime area.

The most important reason for the openness towards a dynamic interpretation of the enforcement jurisdiction of coastal States in incidents similar to the one discussed in this chapter relates to the change of State practice in recent years. The tendency of State actors to deliberately target pipelines and cables as a means of hybrid warfare against other States significantly changes the nature of the balance between the coastal State and the ship and its flag State, as drafted in the Convention. Such attacks against subsea infrastructure deliberately target legal grey zones and their success specifically depends on the caution exercised by victim States in not taking actions which are not specifically authorized in the relevant international conventions.

Therefore, a cautious response may even promote hybrid warfare of this nature in the future. Conversely, the contention that coastal States remain without a remedy to take measures against a ship that is (reasonably suspected of being) engaged in sabotaging its critical energy infrastructure seems difficult to defend, both in view of the object and purpose of the Convention and in light of a number of general rules of international law, such as the doctrine of necessity, the duty to act in good faith and the general observance of an international legal order in the first place. In the specific case of the Balticconnector incident, emphasizing the coastal States' interest is further justified by the importance of the coastal State interests at stake and the very direct impact of the damage to Estonia and Finland, both to the States as such and to the companies co-owning and co-operating the Balticconnector pipeline.

It would clearly have been easier for the Finnish authorities to identify enforcement jurisdiction, had the *NewNew Polar Bear* entered the Finnish territorial sea on its way back from St Petersburg. Yet, this chapter has sought to show that even a more active enforcement role could have been justifiable under international law. The main alternatives include:

- prior agreement with the ship's flag State to authorize a fact-finding visit and potential further measures as discussed in section 4;
- basing the jurisdiction on the environmental impact of the suspected event as discussed in section 3.1 with one or more of the relevant sub-options discussed therein;
- basing the jurisdiction on a progressive interpretation of States' jurisdiction for this type of situations, as explored in section 3.2, possibly in combination with other rules of general international law, as discussed in sections 5-6; or
- a collaboration with port States along the ship's route or with other coastal States, such as Sweden, whose jurisdiction over the *NewNew Polar Bear* could have been established based on, for example, the 1884 Convention (section 4).

For commercial parties suffering damage, the existing maritime law regime offers opportunities to secure financial claims by means of arrest if the suspected ship (or its sister ship) is targeted for the purpose. However, the shipowner's liability will normally be limited to relatively modest amounts linked to the size of the ship, unless wilful misconduct can be proven. And even if the intent or required recklessness on behalf of the owner could be proven, it may well be that the ship's third party insurance is capped at the maximum under the global limitation regime.

In the longer term, the coastal States which seek to avoid finding themselves in a similar situation to that of the Finnish authorities in the case of the Balticconnector incident should consider adopting precautionary measures, reflecting some of the jurisdictional opportunities identified above. The list of potential measures below is not exhaustive and is provided in no particular order of priority.

- The coastal State's domestic legislation could be amended to reflect the flexibility of international law in this area. As was noted, Finnish national enforcement laws make a sharp distinction between maritime areas within and beyond its territorial sea, which reduces the opportunity to make use of jurisdictional grey zones as identified in this chapter under international law.
- Pipelines could be better monitored and surveyed, both at the surface and through technology on or near the pipeline. The jurisdiction of the coastal State to install monitoring equipment on its own pipelines on the continental shelf is not controversial under the law of the sea and could potentially be a valuable source of information (and proof) in future instances of pipeline damages. In the context of sabotage against critical undersea infrastructure, this could increase the coastal State's maritime domain awareness and preparedness for rapid enforcement against suspected acts of sabotage.
- Each coastal State confronted with hybrid warfare should consider, as a first step, making the fullest use of the zonal approach of the LOSC, first and foremost by way of establishing the maritime zones that enable to broaden the jurisdictional reach of the coastal State and thereby narrowing down the room of manoeuvre for grey zone activities at sea. It is possible to establish further navigational restrictions near pipelines, as discussed in the previous chapter of this book. The jurisdiction of Estonia and Finland to impose such restrictions unilaterally or bilaterally beyond their territorial seas is limited by the reference to international rules as a maximum ceiling in Article 211(5) and (6) of the LOSC, though with a theoretical jurisdictional opportunity offered by Article 211(6)(c). However, routeing measures of various severity, e.g. ranging from non-anchoring zones to full scale mandatory areas to be avoided, can be adopted internationally through the 'competent international organization', i.e. the IMO. Such international endorsement of the measures would also have the consequence that the measures would qualify as 'applicable' international rules and standards, within the meaning of the limited enforcement provisions in, *inter alia*, Articles 220, 226 and 228 of the LOSC.
- Continued development of regional and global soft and hard law instruments to make sure response capabilities match the threats of today, and hence to reduce the advantage currently offered to States that specifically seek to abuse gaps in the legal system while expecting that others will follow them. For example, the development of new treaty law could grant universal enforcement jurisdiction in respect of ships suspected of damaging submarine pipelines or cables outside the limits of the territorial sea similar to the universal jurisdiction granted over piracy and unauthorized broadcasting under the LOSC.
- Based on the analysis above, it is clear that the interdiction of foreign-flagged ships suspected of having inflicted damage to a pipeline outside the limits of the territorial sea is an area of law which includes many legal gaps that need to be overcome, either

by way of a dynamic interpretation of the relevant LOSC provisions or by way of developing new treaty law. The more coastal States manage to close such grey areas, the less room there is for hybrid attacks and warfare on undersea infrastructure that is of critical importance for all States from the perspective of electricity, gas and oil, and telecommunications networks.

- In the hope of increasing the legal resilience of offshore critical infrastructure in the Gulf of Finland, there have been proposals to abolish the EEZ corridor which is established in the middle of the Gulf mainly in the interests of the east-west navigation. The Balticconnector incident occurred in the EEZ corridor. The more such presumed acts of sabotage take place in the EEZ corridor, the more Finland and Estonia will be tempted to extend the outer limits of their territorial sea to the maximum limit under Article 3 of the LOSC (12 nautical miles), so that the central part of the Gulf of Finland would be completely covered by the territorial sea, with the effect that the international corridor would disappear. However, while this measure could somewhat strengthen jurisdiction over the pipelines (see *supra* Chapter 6), it would not help to establish jurisdiction over ships navigating in the Gulf and would not provide additional enforcement jurisdiction with respect to ships suspected of damaging pipelines in the area. In view of the presence of the EEZ (previously high seas) area north of Gogland Island (Suursaari) in the eastern part of the Gulf of Finland, the measure would have the effect that much of the Gulf of Finland could qualify as a strait subject to the rules of transit passage under Article 37 of the LOSC. This, in turn, would grant freedoms of navigation and overflight not only within the limits of the EEZ corridor in the middle of the Gulf of Finland where these freedoms currently apply, but in the entire maritime area of the Gulf of Finland (as measured either from the baselines or coasts of the two coastal States). Such a broadening of the freedom of navigation and overflight in the Gulf of Finland would hardly serve the interests of Estonia and Finland.
- The rapidly changing frequency and means of State-sponsored interference with offshore infrastructure may also require a policy shift in the approach by authorities to enforcement actions. Expecting a specific legal basis for any enforcement action is unlikely to be a useful strategy against hybrid warfare, which by definition targets grey zones in the legal system. A more daring and less formalistic approach to enforcement jurisdiction provides a useful means of testing the legal limits and may even prove to be a way to develop international law in this field, while awaiting further treaty developments. Proportionate enforcement measures against a few individual suspected offenders are not likely to challenge the regulatory regime as a whole, and if the legality of the enforcement action were to end up being assessed by an international court or tribunal, it would provide an even better opportunity to clarify the boundaries of international law faced with rapidly changing threats and challenges.