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Report

The study on legal analysis of military activities hindering energy installations in the Exclusive Economic Zone or International water: Chornomornaftogaz rigs case in the Black Sea and the NordBalt cable case in the Baltic Sea

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Introduction

In its hybrid warfare strategy, Russia uses grey zone tools and techniques to achieve (geo)political objectives. Most commonly, these techniques generate a constant risk of military escalation by creating an atmosphere of contention and a sense of intimidation through the show of military force. They also tend to involve a long series of provocative, sometimes violent actions which could spark a larger dispute at any moment as it has been the case during Russia's occupation of Crimea and involvement in military activities in the East of Ukraine.

In the last couple of years, with growing tensions in the Eastern Flank of the Alliance, Russia has become more assertive in maritime disputes with its neighbours. These disputes could have significant energy security implications since maritime areas are hosts to critical energy infrastructure. In addition to security challenges, Russia's growing provocative behaviour in maritime domain raises important legal challenges for NATO and its concerned allies which has not been adequately addressed from the perspective of NATO and individual member states. In hybrid warfare, international law is often used as an instrument together with kinetic and non-kinetic actions. The use of grey zone techniques in hybrid warfare only exacerbates legal problems by manipulating international law and taking advantage of its loopholes and ambiguities.

Therefore, the **aim of this study is to address legal challenges and ambiguities of hybrid warfare by analysing the legality of Russia's military activities in maritime domain.**

This study is divided into four sections. The first chapter explains the use of hybrid warfare techniques by focusing on maritime dimensions and its security as well as legal implications in energy domain. The second chapter focuses on the legal analyses of two case studies of Russian activities in the Baltic Sea and Black Sea regions: the seizure of Chernomornaftogaz rigs and the divertion of civilian ships from the Nord Balt cable laying area.

1. Hybrid warfare and grey zone military operations

In this chapter we introduce the concept of hybrid warfare and grey zone operations. We assess Russia's grey zone strategy by looking how Russia uses kinetic and non-kinetic techniques to achieve its geopolitical objectives. Moreover, we focus on Russia's grey-zone activities in maritime domain and explain the security and legal implications that these activities have for the construction and exploitation of critical energy infrastructure in Baltic Sea and Black Sea regions.

1.1 Hybrid Warfare

Hybrid Warfare is a term NATO used in 2014 to describe Russia's actions in the occupation of Crimea and military activities in Eastern Ukraine (Stoltenberg, 2016). The term is particularly appropriate to characterize Russia's stealthy destabilising of Ukraine. Russia's annexation of Crimea and its ongoing aggression, direct and through proxies, in Eastern Ukraine constitutes a breach of international law (Baillat, 2016). Beyond the current Ukraine situation, the phrase may indeed apply to a range of actions that are being witnessed in most contemporary conflicts, where peace and crisis are no longer divided by clear-cut lines: "asymmetric warfare" was already blurring the lines between peace and war (ENSEC COE, 2017). Following the United Nations (U.N.) Charter's prohibition of the use of force as a means of settlement of international disputes, "war" had already become "conflict". Now "conflict" turns to "hybrid warfare" NATO's Wales Summit Declaration of September 2014 provides us with a reference to hybrid warfare and its components (NATO, 2014).

Commentators have used the term "hybrid warfare" to refer to combinations of conventional and unconventional means designed to produce or lay the groundwork for eventual decisive operations by military forces. Frank Hoffman, one leading proponent of this concept, defines hybrid threats as "Any adversary that simultaneously employs a tailored mix of conventional weapons, irregular tactics, terrorism, and criminal behaviour in the same time and battlespace to obtain their political objectives" (Hoffman, 2014). In addition, hybrid conflict involves the employment of a broad spectrum of tactics and weapons and methods including high-end military operations, cyberattacks, insurgency, terrorism, and more to target an opponent's vulnerabilities. Hoffman argues that hybrid war is characterized by "states or groups that select from the whole menu of tactics and technologies and blend them in innovative ways to meet their own strategic culture, geography, and aims" (Hoffman, 2009:35).

Hybrid warfare encompasses conventional military operations with other means largely built around psychological operations and information warfare. The concept refers to the usage of systems and techniques to achieve political ends. However, tools employed in hybrid warfare are rather distinct, ranging from higher-intensity military means to grey zone instruments. Therefore, hybrid warfare would seem to be a very broad and encompassing concept, more than expansive enough to include grey zone strategies (Mazarr, 2016).

1.2 Grey zone definition

The use of grey zone operations could be seen as strategies of states that might theoretically consider more direct military action but which are not confident of their ability to prevail. Escalation would bring them into a perilous domain, one with significant dangers of military failure (Mazarr, 2015). Grey zone strategies generate a constant risk of such escalation by creating the environment of rivalry of state trying to impose its will through provocation and/or force. They also tend to involve a long series of provocative, sometimes violent actions which could inflict a larger dispute at any moment. Grey zone strategies are forceful, destabilizing, and operate constantly on the edge of escalation to the sort of military conflict.

The "grey zone" could have different meaning to different people. One definition focuses on operations, primarily those that are more difficult to define as either peace or war, and possibly those undertaken intentionally to obfuscate and blur the lines between the two (Oliker, 2017). Carl von Clausewitz wrote that war is an extension of politics; he did not mean that politics ends when war begins. Rather, military, political, economic, and diplomatic instruments should all be expected to be used to attain national goals. Armed conflict could be characterized by the use armaments alongside other tools.

Grey-zone wars occur under NATO's Article 5 threshold, below the threshold of violence necessary to prompt a UN Security Council Resolution (Echevaria, 2016). The aggressive moves undertaken in recent years by Russia in Ukraine and by Beijing in the South China Sea are examples of grey zone operations. Russia and China have been able to exploit this zone of ambiguity to accomplish their objectives.

1.3 Russia's grey zone strategy

The main objective of Russia's grey zone actions is to dominate its near abroad and damage the unity of NATO (Mazarr, 2015). Russia's aggressive moves against Ukraine, Georgia and Estonia are examples of such actions. Even Russia's energy diplomacy with Eastern Europe reflects another variant of a grey zone strategy (Mazarr, 2015). These actions are designed to avoid the costs and risks of outright conflict.

According to Mazarr (2015: 89) "It is possible to view them as something more straightforward, and frankly aggressive, than gray zone strategies—a preemptive military fait accompli that relies heavily on conventional military forces, sometimes deployed in clandestine and deniable ways". Recent battles in Ukraine have certainly involved force-on-force fire- fights consistent with major combat operations, and have produced

casualties numbering in the thousands. But there is significant evidence as outlined in the five categories, that Moscow consciously has undertaken grey zone approaches.

Some of the Russian authors provide theoretical foundation for such campaigns. Vladislav Surkov, an aide to Russian President Vladimir Putin, has discussed the potential for "a future war, which involves everybody and everything, all aspects of life, while still remaining elusive in its main contours" (Ràcz, 2015: 37). Moreover, Sergei Chekanov and Sergey Bogdanov, writing about asymmetric war in 2010, argued that geopolitical competition is growing, and states will look for new means to wage competition and conflict (Chekinov and Bogdanov, 2010). The role of military force remains important, but the focus is on the indirect use of military power to achieve decisive ends in which the role of information and other nonkinetic components becomes more decisive. The Chief of the Russian General Staff Valery Gerasimov argued that "In the 21st century, we have seen a tendency toward blurring the lines between the states of war and peace. Wars are no longer declared and, having begun, proceed according to an unfamiliar template" (Gerasimov, 2013: 1, 2). Gerasimov describes a future in which a wide range of tools can bring a society to its knees in a matter of days or weeks "The very 'rules of war' have changed. The role of non-military means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness" (Gerasimov, 2013: 2).

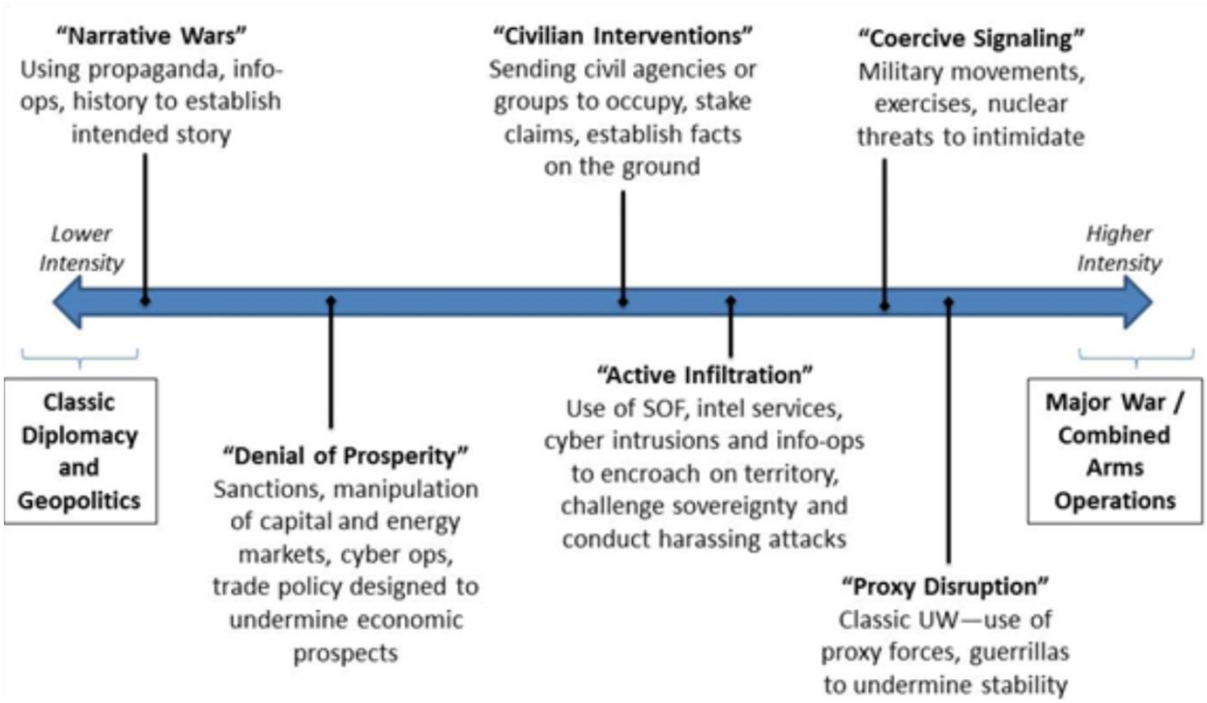
Russia's national interests or goals suggest the need for grey zone revisionism. Russian President Vladimir Putin seeks to renew Russian dominance of the near abroad, undermine the North Atlantic Treaty Organization (NATO), and reduce U.S. influence in the region (Mazarr, 2015). He has been trying to coerce the foreign policy decisions of neighbouring states by using political, energy, and economic, and maritime intimidation to deny their right to align more closely to the West.

1.4 Russia's grey zone instruments

Russia's grey zone strategy laid out by Gerasimov would employ a wide range of tools—economic, diplomatic, informational, military, and more. Direct military moves are vague or ambiguous; sometimes they are more apparent, but stop well short of large-scale conventional combined arms combat. Nevertheless, the most important actions of grey zone campaign are holistic in nature and its largely non-military character (Mazarr, 2015). Russia's behaviour implies the use of grey zone instruments. These include coercive diplomacy, economic assistance, threats of energy sanctions, propaganda and

information operations, cyberattacks, sponsorship of local militias and guerrilla organizations, support for pro-Moscow political movements, military manoeuvres, and implied nuclear threats (see Figure 1).

Figure 1: A spectrum of Grey Zone techniques



Source: Presentation to the Strategic Multilayer Assessment

Russia uses many techniques and instruments for hybrid war, including strategic communications techniques to shape political narratives in many countries. The aim of these information warfare operations is primarily to cast doubt upon objective truths. Moreover, as part of "Denial of Prosperity" techniques the Kremlin uses cyber operations to hack into Western information systems to spy and collect valuable information. The information is then used to influence elections and other political outcomes outside Russia's borders. In addition, Russia uses both direct and indirect economic influence to affect European politics. Russia also used energy as a foreign policy tool when it shut off the natural gas supplies to Ukraine in winter in 2006 and 2009 in an overt effort to coerce Ukraine into agreement on the price of its gas (Newnham, 2011). Furthermore, a part of "Active infiltration" campaigns Russia invests in strengthening its special operations forces. According to Chivvis (2007:4) "These forces have a range of roles, but one of their most dramatic has been in infiltrating other countries and directing hybrid warfare efforts there". For example, Russian special forces were used to seize Crimea and to support separatists in the Donbas and Luhansk regions.

1.5 Grey zone operations in maritime domain

In the last couple of years, with growing tensions in the Eastern Flank of the Alliance, Russia has become more assertive in maritime disputes with its neighbours. Moreover, since the annexation of Crimea, Russia's naval and air aggression has reached new levels. Russia's "grey zone" coercion threatens to destabilize the region by undermining the rules-based order and increasing the risk of conflict. As Murphy (2017) pointed out "Russia appears to have taken note of the success China has achieved with hybrid warfare tactics in the South China Sea, including its harassing behavior as multiple incidents have taken place on and over the Baltic and Black Seas". Moreover, Russia has executed aggressive surveillance and probing operations against NATO countries in breach of international law. (Frear et at., 2015).

The Baltic Sea region has re-emerged as an area of strategic importance for Allies and partners on the one hand, and more assertive Russia on the other. Since the beginning of Ukraine crisis in 2014, the Baltic Sea region has been a focus of major Russian military build-up (Meyer, 2016). In addition, new patterns of Russia's provocative behaviour have been seen in the Baltic Sea region in recent years. Russia's confrontational actions have included violations of national airspace and territorial waters, intimidation of planes and vessels in international airspace and waters, an increasing number of military exercises based on aggressive scenarios, including a nuclear attack on Warsaw (Zapad 2009) as well as mock bombing raids against Sweden (2013) and Denmark (2014) (Frear et at., 2015). Russian warships have also undertaken exercises in the exclusive economic zones of the Baltic states and harassed civilian and military vessels in national EEZ of other countries (Neumans and Bruns, 2015). For example, in 2016 a Russian jet flew 30ft of a US destroyer USS Donald Cook in the Baltic Sea in what the US navy described as a "simulated attack – one of the closest and riskiest encounters between the two countries' armed forces in recent years" (Borger, 2016). Moreover, flying with transponders turned off, Russian fighter jets have flown dangerously close to commercial airliners (Kramer and Nordenman, 2016). Sweden's Minister of Defence, Peter Hultqvist, described the situation in the Baltic Sea region "Russia is showing a more challenging behaviour and violations of territorial integrity are more frequent than before. The military-strategic situation has deteriorated and the region has become less secure" (Hultqvist, 2015).

Russia's hybrid warfare operations in Crimea and Eastern Ukraine has received considerable analytical coverage; hybrid warfare in maritime domain less so (Bartles and

McDermott, 2014). Since its occupation of Crimea, Russia's aggressive behaviour has been evident in the Black Sea region. For example, in 2017, a Russian fighter jet made aggressive passes over a USS Porter warship in the Black Sea (Fahey, 2017). Moreover, in 2017, Ukrainian unarmed military transport plane was hit by antiaircraft missile from a Russian naval vessel over a disputed area of the Black Sea (Rferl, 2017). In addition, Russia staged large-scale unannounced ("snap") land, air and sea drills in annexed Crimea involving thousands of troops (Sokolsky, 2017). According to the Russian military officials "the drill was prompted by an "increased terrorist threat" in the region" (Batchelor, 2017).

1.6 Maritime Energy installations

The Baltic Sea and Black Sea regions are hosts to critical energy infrastructure. For example, the Baltic States have made significant progress over the recent years by putting in place electricity interconnections and diversifying away from the only natural gas supplier through liquefied natural gas (LNG) import terminals. The Baltic Energy Market Interconnection Plan is advancing the efforts to increase energy security further through investment in new and improved cross-border and national grid capacities for electricity (European Commission, 2015). For instance, the electricity interconnections NordBalt, EstLink 1, 2 and Swe-Pol are all constructed underneath of the Baltic Sea. Moreover, Lithuania and Poland have constructed LNG terminals and Estonia is planning to build Tallinn LNG terminal.

Black Sea region's existing pipelines run near the region's existing or potential conflict zones. Moreover, Turkey plans to drill deep water oil well in Black Sea in 2018. Furthermore, Romania plans to construct two offshore drilling wells in Black Sea by the end of 2017 and a further two by mid-2018 (SeeNews, 2017). In addition, the country aims to start production at two gas fields by 2019, tapping the country's vast offshore resources. Bulgaria will also invest in exploration of oil and gas reserves in its Black Sea economic area.

The functioning of existing and the construction of future critical energy infrastructure in the Baltic Sea and Black Sea regions could be disrupted by military activities. As Ruhle and Grubliauskas (2015:2) pointed out "Energy was and continuous to be a far more important element in hybrid warfare than commonly acknowledged". During its Crimean operation, Russia nationalized Ukraine's energy companies and seized energy infrastructure in the Black Sea. According to Ruhle and Grubliauskas (2015:2) "The move

allowed Russia not only to ensure a stable supply of energy to the region, but also to make it independent from mainland Ukraine, which is critical for effective control of the territory".

The Baltic Sea is home to a web of underwater communications cables which play an important role for the functioning of economy in general. As Robert Martinage pointed out "Today, roughly 95 percent of intercontinental communications traffic—e-mails, phone calls, money transfers, and so on—travels not by air or through space but underwater, as rays of light that traverse nearly 300 fiber-optic cables with a combined length of over 600,000 miles. For the most part, these critical lines of communication lack even basic defenses, both on the seabed and at a small number of poorly guarded landing points". Thus, the disruption of maritime installations could pose a serious challenge for the supply of energy in the region.

1.7 Challenges of International Law

Russia's growing provocative behaviour in maritime domain and its implications for the construction and exploitation of energy infrastructure raises important legal questions for NATO and its concerned allies. In modern conflicts, international law is often used as an instrument together with kinetic and non-kinetic actions. The hybridization of warfare only exacerbates legal ambiguities and uncertainties (Reeves and Barnsby, 2012).

Russia's grey zone operations could be viewed as "asymmetrical lawfare"[1] (Bachmann and Mosquera, 2015). According to Schmitt (2017:3) "…Russia has more reason to engage in legally ambiguous operations; it knows that its opponents may hesitate to react decisively, out of concern that their own response might be characterized as unlawful, opening the door to Russian claims of being the victim". In addition state's inability to respond to lawfare situations makes the attacker appear more powerful. In this asymmetrical dynamic, the State exploiting the grey zone accordingly tends to enjoy the advantage.

One could argue that Russia used international law as a weapon in Ukraine where it combined lawfare with kinetic and other non-kinetic means to achieve its objectives (Bartman, 2010). Growing Russia's maritime activities and operations in the Baltic Sea and the Black Sea regions, especially in relation to energy infrastructure, are yet another

[1] Lawfare is defined here as the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, using propaganda.

example of Russia's proficiency at exploiting the "grey zones" of international law. Russia exploits international law principles and rules that are poorly defined and are subject to competing interpretations. In addition, Russia often plays with an issue of evidence gathering in international law to avoid legal responsibility for its actions.

Under international law, actions by individuals are not attributable to the State, unless "the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct" (Crawford, 2002:110). In the case of the Crimea operation, the "Little green men"[2] were used by the Russian Federation in order to hide the involvement of its regular troops. These actions intended to avoid the automatic attribution of the actions of such persons to the Russian Federation since in such a case it is necessary to prove that these persons were acting on instructions of, or under the direction or control of, Russia. In doing so, Russia refocused attention on complex questions of State responsibility for the actions of non-State actors and the level of control under international humanitarian law that internationalises a non-international armed conflict. Moreover, with respect to naval activities in the Baltic Sea and Black Sea regions, Russia, one could argue, used ambiguities of the International Law of the Sea (UNCLOS) making it difficult for other states to definitively name and shame the country as having committed an internationally wrongful act.

In the next chapter of this study these legal challenges and ambiguities will be addressed by focusing on the Russia's military activities in the Baltic Sea and Black Sea regions. We will analyse the effectiveness of international law in tackling ambiguous military activities and operations at seas by looking at two case studies: the use of military activities against energy installations in the Baltic Sea and Black Sea regions.

1.8 Conclusion

Baltic Sea and Black Sea regions are hosts to critical energy infrastructure which could be disrupted by hybrid warfare's grey zone techniques, including naval activities to deny neighbouring states access to energy installations and resource extraction areas. Russia's growing provocative activities in maritime domain, including activities disrupting the access too, exploitation and construction of energy infrastructure, are important legal challenges for NATO and its concerned allies of the effectiveness of international law in countering the elements of hybrid warfare in international waters.

[2] http://www.bbc.com/news/world-europe-26532154

2. The Legal Analysis of Case Studies

Having analysed the security dimension of growing Russia's provocative behavior in maritime domain, in this chapter we will focus on the legal implications of this behavior by analysing 2 case studies which involved Russia's military activities against energy infrastructure in Ukraine's and Lithuanias EEZs. Firstly, we will explain the Chornomornaftogaz gas rigs case and its legal implications. Secondly, we will provide a legal analysis on the NordBalt power cable case in the Baltic Sea. At the end of the chapter, main legal conclusions of the 2 case studies will be provided.

2.1 Seizure of Chornomornaftogaz Gas Rigs in the Black Sea

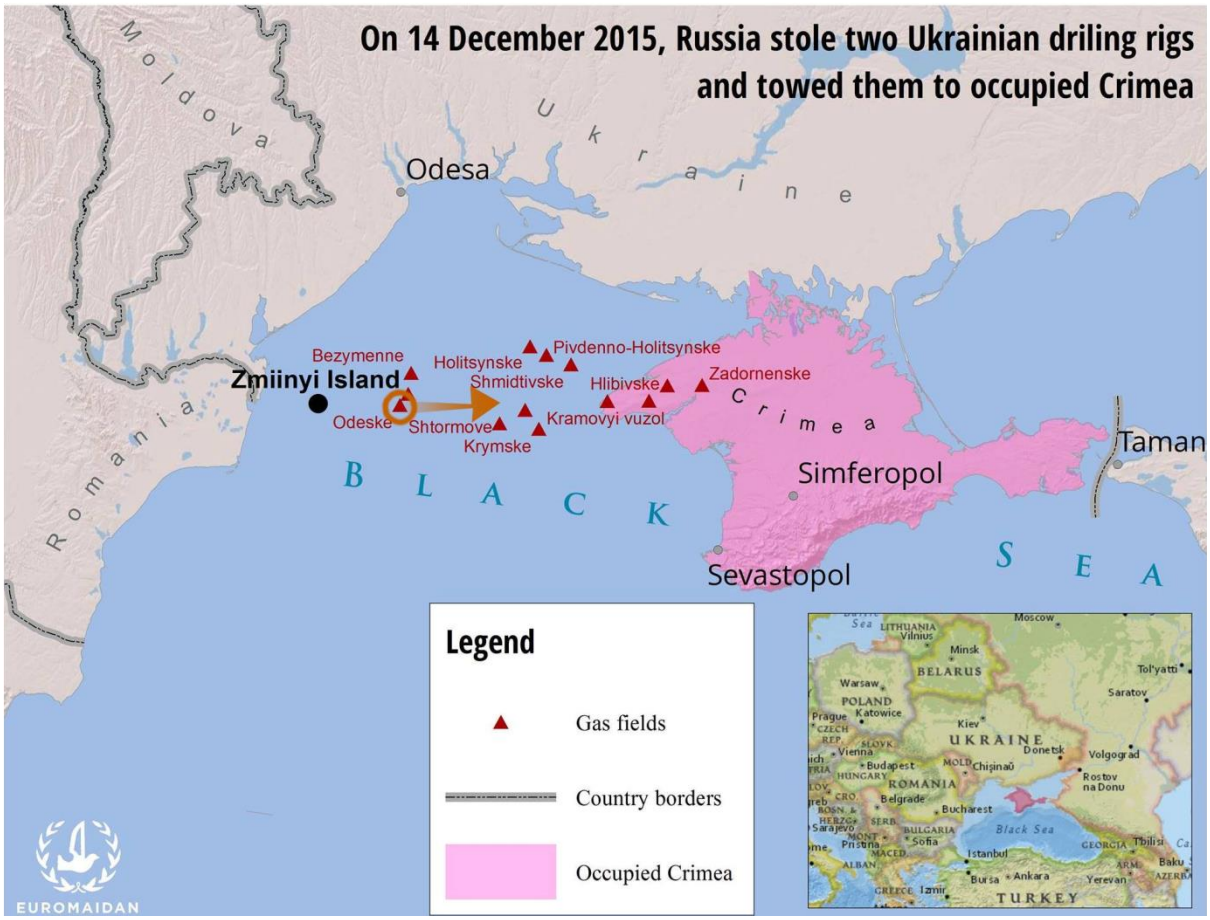
2.1.1 Factual Background

Simferopol-based oil and natural gas producer Chernomornaftogaz (hereinafter referred to as "Chernomorneftegaz"), which was owned by the Ukrainian oil and gas company Naftogaz, was operating two gas drilling rigs Peter Godunovets (B-312) and Independence (B-319) in the exclusive economic zone of Ukraine off the coast of Odessa (Черничкин, 2015).

After Russia's annexation of Crimea, on 17 March 2014 Crimean Parliament adopted a decree "On the Issue of Energy Security of the Republic of Crimea" under which it was decided to nationalize Chernomornaftogaz among other Ukrainian companies (Starodubov, 2016).

On March 19, 2014 Minister of Energy and Coal Industry of Ukraine Yuri Prodan announced that Ukrainian gas drilling rigs Peter Godunovets (B-312) and Independence (B-319) were seized by Russia during its annexation of the Crimea (Unian, 2014). It's been established that "the servicemen of the 104th paratrooper regiment of the 76th paratrooper division of Russia's airborne forces took part in the capturing the 'Chernomornaftogaz' company" (Kuznetsov (Klymenko), 2015). Navy Forces of Ukraine were at that time blocked in the bays of Sevastopol and Donuzlav (Gonchar, 2017). In December 2015, the rigs were towed from the Odessa shelf field to the territorial waters of the Russian Federation with the escort by FSB boats and the Black Sea Fleet missile boat (Gryganskyi, 2016) (see Figure 2).

Figure 2: Peter Godunovets (B-312) and Independence (B-319) stolen by Russia



Source: Euromaidan

Ukraine protested seizure of the gas rigs, accusing Russia of "large-scale looting" (MacKay. 2017). In Russia, a spokesman for the president of the Russian Federation, Dmitry Peskov, argued that there was "no connection" between the annexation and energy resources, adding that Russia did not even care about the oil and gas (Broad, 2014).

Seizure of the aforementioned gas drilling rigs ended all exploration in the affected maritime area. Ukraine suffered substantial financial injuries from the loss of foreign investment in offshore exploration for hydrocarbon resources, the related benefits of such capital inflow, as well as long-term benefits of the development of its resources in the Black Sea (Bugriy, 2017)

2.1.2 Legal Analysis

Majority of the western commentators agree that the actions taken by both Crimean and Russian public authorities for the purpose of making the Crimean Peninsula part of the territory of the Russian Federation amounted to annexation which was unlawful and therefore invalid (Bothe, 2014:99).

The General Assembly in its Resolution 68/262 adopted on 27 March 2014: "2. Calls upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means…; 5. Underscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol; 6. Calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status" (United Nations General Assembly Resolution 68/262, 2014).

Based on the principle ex iniuria ius non oritur the nationalization of Chernomornaftegaz by the Crimean Parliament and the consequent seizure and movement of the two gas drilling rigs Peter Godunovets (B-312) and Independence (B-319) could not either be considered lawful or valid (Bothe, 2014:101).

Assuming that the actions of "little green men" are attributable to the Russian Federation under the Articles on Responsibility of States for Internationally Wrongful Acts, seizure and movement of the two gas drilling rigs Peter Godunovets (B-312) and Independence (B-319) violates numerous provisions of the international law (United Nations, 2001).

Article 2(4) of the United Nations Charter (hereinafter referred to as the "UN Charter") states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (United Nations, 1945). This prohibition "constitutes one of the cornerstones of the modern international legal order" and "in addition to being a norm of customary international law,…is usually acknowledged in State practice and legal doctrine to have a peremptory character, and thus part of the international ius cogens" (Simma, et. al., 2012:203:231).

As it is stated in the Commentary to the Charter of the United Nations "In state practice forcible attacks against ships and aircraft of another State, either of a commercial or military character, [on the high seas] are also regarded as acts of force against that State and as falling under the prohibition of the use of force. Those attacks may be considered

to fall under Art. 2(4) because they are also "inconsistent with the purposes of the UN" (Simma, et. al., 2012:215).

Thus, following the same interpretation, the attacks by one State, i.e. Russia, on the gas drilling rigs in the exclusive economic zone of another State, i.e. Ukraine, should be qualified as impermissible use of force under Art. 2(4) of the UN Charter.

Even if the actions of "little green men" could not be attributed to the Russian Federation and, therefore, it could not be deemed responsible for direct (emphasis added) attack on the Ukrainian gas drilling rigs, it should be emphasized that Article 2(4) of the UN Charter prohibits the use not only of direct, but also of indirect armed force (Simma, et. al., 2012:211). As it is elaborated in Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State….Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force" (United Nations, 1970).

Proceeding further with the assumption that seizure and movement of the gas rigs are directly attributable to the Russian Federation, such activities should be also incompatible with the following provisions of the Convention:

1) Article 88 of the Convention which stipulates that "[t]he high seas shall be reserved for peaceful purposes" (United Nations, 1982). This rule is applicable in the exclusive economic zone since Article 58(2) of the Convention provides that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part" (United Nations, 1982);

2) Article 301 of the Convention which states that "[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations" (United Nations, 1982);

3) Article 56(1)(a) of the Convention which provides that "[i]n the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting,

conserving and managing the natural resources, whether living or non-living, of <…> the seabed and its subsoil…" (United Nations, 1982);

4) Article 77(1) of the Convention which establishes that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources" (United Nations, 1982);

5) Article 56(1)(b)(i) of the Convention which stipulates that "[i]n the exclusive economic zone, the coastal State has jurisdiction as provided for in the relevant provisions of this Convention with regard to the establishment and use of artificial islands, installations and structures" (United Nations, 1982).

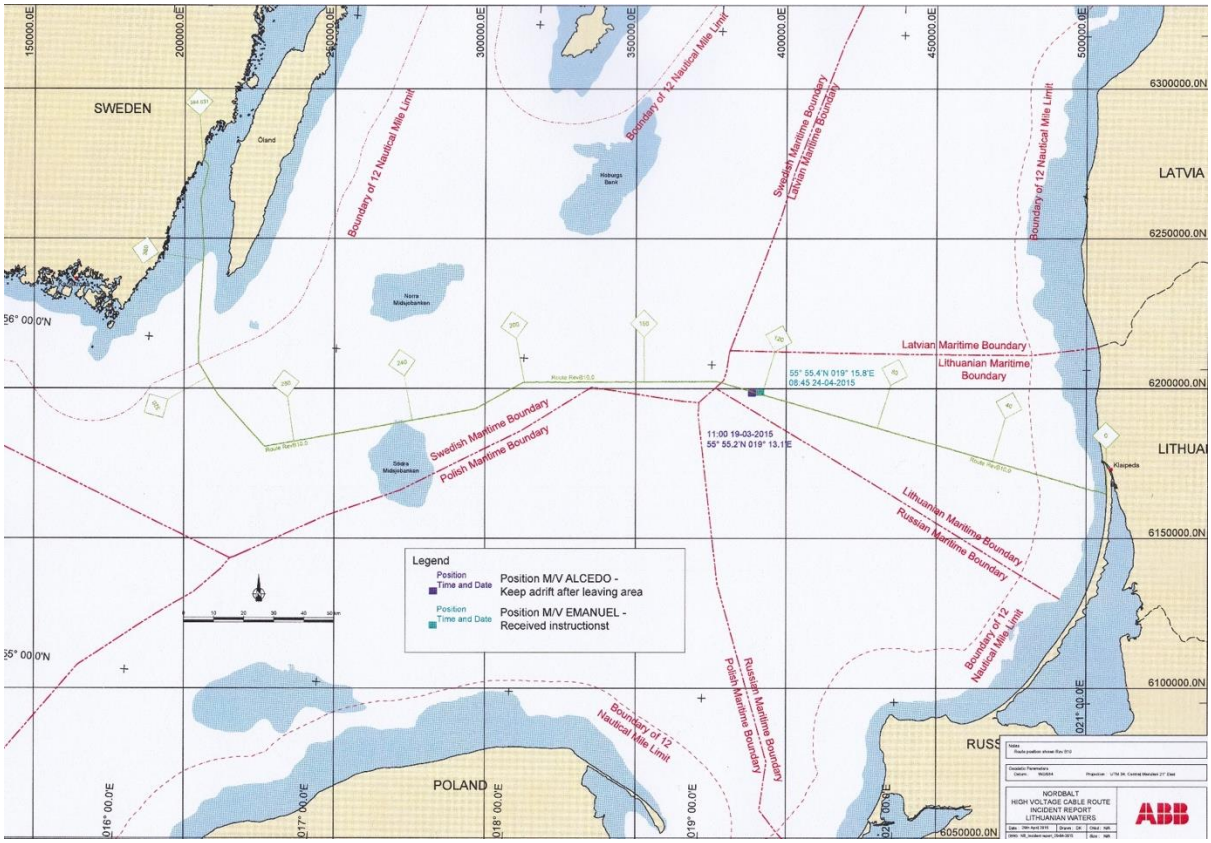
2.2. Interference with Laying of the NordBalt Submarine Power Cable

2.2.1 Factual Background

On 9 May 2014, during the construction of NordBalt power cable (see Figure 3), the Republic of Lithuania (hereinafter referred to as "Lithuania") issued Navigational Warning No. 034/14 which read as follows:

Laying power cable Lithuania-Sweden in progress by m/v Topaz Installer (call J8B2641) along line joining 55° 37.84'N 21° 06.57'E, 55° 45.00'N 20° 21.27'E, 55° 52.24'N 19° 34.54'E, 55° 56.81'N 18° 47.64'E till around mid-September 2014. Guard vessels placed along the route. Vessels are requested to keep well clear (500 meters or more). Safety zone of 200 meters width is established along power cable. Anchoring, trawling and any activities on seabed are prohibited (Lithuanian Maritime Safety Administration).

Figure 3: The NordBalt cable route (green line) in Lithuania's EEZ



Source: ABB

On 27 May 2014 the Russian Federation (hereinafter referred to as "Russia") issued two Navigational Warnings informing about its military exercises in the Baltic Sea (Swedish Maritime Administration, 2017):

SHIPS EXERCISES 28 THRU 30 MAY 0100 TO 1600

IN AREAS TEMPORARILY DANGEROUS TO SHIPPING

BR-65 CENTERED 55-10N 019-25E

BR-117 CENTERED 55-20N 019-45E

CANCEL THIS MESSAGE 301700 MAY

SHIPS EXERCISES 28 THRU 30 MAY 0100 TO 1600

IN AREA TEMPORARILY DANGEROUS TO SHIPPING

55-54N 019-03E 55-50N 019-20E 55-30N 020-15E

55-04N 020-15E 54-57N 020-06E 54-57N 019-50E

54-46N 019-50E 54-46N 019-34E 55-09N 019-00E

CANCEL THIS MESSAGE 301700 MAY

The danger zone in the last navigational warning included part of the exclusive economic zone of Lithuania as delimited by the Treaty between the Republic of Lithuania and the Russian Federation on the Delimitation of the Exclusive Economic Zone and the

Continental Shelf in the Baltic Sea of 24 October 1997 and the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Sweden on the Delimitation of the Exclusive Economic Zones and the Continental Shelf in the Baltic Sea of 10 April 2014.

Even though not separately mentioned in the aforementioned navigational warnings Russia's military exercises involved missile firing which was confirmed by the Polish Navy (Information from Polish Maritime Administration). Furthermore, Lithuanian authorities maintain that between the 26th and 30th of May 2014 Russian vessels conducting the exercises within the exclusive economic zone of Lithuania diverted civilian ships from the area and commanded cessation of laying of the Nord Balt cable for up to 7 hours with considerable financial costs (interview). It should be emphasized that the area of Russia's military exercises as indicated in its navigational warnings of 27 May 2014 was not overlapping with the zone where the cable was laid as notified by Lithuania in its Navigational Warning of 9 May 2014. Thus, the ships engaged in laying of the cable were not notified a priori that Russia's military exercises would be conducted in the vicinity of their works and that the area would become dangerous for shipping. Similar incidents were registered on the 10th and 17th of April as well as the 1st of June of 2014 (Information from Lithuanian Navy).

Lithuanian Ministry of Foreign Affairs protested such actions of the Russian Federation as violating the sovereign rights and freedoms of Lithuania and other countries under the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter referred to as "UNCLOS") (Sytas, 2014). Lithuania and Russia are both parties to UNCLOS: Lithuania since 12 December 2003, Russia – since 11 April 1997.

2.2.2. Legal Analysis

2.2.2.1 Sui Generis Status of the Exclusive Economic Zone

Before starting analysis of the maritime incidents themselves in the next chapter, sui generis status of the exclusive economic zone should be emphasized.

The Exclusive Economic Zone (EEZ) is one of the major achievements of UNCLOS III. The purpose for creating the EEZ regime was to balance the rights and duties of coastal states rights and other states. Moreover, UNCLOS III gave a legal basis to the EEZ concept. During the Third United Nations Conference on the Law of the Sea (1973-1982), hereinafter referred to as the "Third Conference", status of the exclusive economic zone was highly debated. A number of maritime states advocated that the exclusive economic

zone should have residual high seas character which would have resulted in the presumption that all uses of the sea which are not attributed under the convention to the coastal state in its exclusive economic zone would be secured for all the states under the regime of the high seas (Churchill and Lowe, 1999:165). The other alternative – residual territorial sea character – would have meant that any activity not included within the ambit of the rights of non-coastal states in the exclusive economic zone of another state as established in the convention would fall under the exclusive jurisdiction of the coastal state.

However, both of the aforementioned approaches have been rejected and a sui generis character of the exclusive economic zone as a spate functional zone has been established in the Convention (Pedrozo, 2014). This sui generis character encompasses three elements:

1) Convention clearly defines the rights and jurisdiction that the coastal state exercises in its exclusive economic zone;

2) Convention lists the rights of non-coastal states that they enjoy in the exclusive economic zone of the coastal state;

3) If certain activity in the exclusive economic zone is neither attributed under the Convention to the coastal state nor to the non-coastal states, then Article 59 of the Convention is applicable – "[i]n 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" (United Nations, 1982).

Having stated the aforementioned, it is necessary to analyze whether the Convention brings military exercises in the exclusive economic zone within the jurisdiction of the coastal state or whether it grants the right to conduct such exercises in the exclusive economic zone of a coastal state to all other states. If the right to conduct such exercises is neither attributed to the coastal state nor to other states, then Article 59 of the Convention would have to be applied.

2.2.2.2 Military Exercises in the Exclusive Economic Zone of Another State

Firstly, the rights and jurisdiction of the coastal state in its exclusive economic zone should be analyzed under the Convention.

Even though Article 47(2) of the Constitution of the Republic of Lithuania states that the Republic of Lithuania enjoys exclusive (emphasis added) rights over the continental shelf and the exclusive economic zone in the Baltic Sea, it should be emphasized that the exclusive economic zone is neither part of the territory of the coastal state nor the coastal state exercises sovereignty over its exclusive economic zone (The Constitution of the Republic of Lithuania, 1992). In the exclusive economic zone the coastal state only enjoys limited rights and jurisdiction as established in the Convention.

Those rights and jurisdiction are enshrined in Article 56 of the Convention which provides that "In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources [emphasis added], whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone [emphasis added], such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention [emphasis added] with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention [emphasis added]" (United Nations, 1982).

Having analyzed other provisions of the Convention, it should be concluded that it does not contain a clause which would establish that military exercises in the exclusive economic zone of a coastal state fall within the jurisdiction of that coastal state. Thus, further it is required to analyze the scope of the rights that the other states enjoy in the exclusive economic zone of a coastal state. Those are established in Article 58 of the Convention which states that "In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and

pipelines, and compatible with the other provisions of this Convention" (United Nations, 1982).

Even though Article 58 does not explicitly mention the right to conduct military exercises in the exclusive economic zone of a coastal state, it has been maintained by a number of the states that this right falls within the scope of "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines" (Pedroso, 2014:515).

When there is a need to confirm the meaning of a specific clause of an international treaty, Article 32 of the Vienna Convention on the Law of Treaties dated 23 May 1969 allows recourse to the supplementary means of interpretation, including the preparatory work of the treaty.

According to Vicuna, "many delegations preferred not to make any express statement about the problem of military uses in the exclusive economic zone, but it was implicitly present behind many of the provisions of the exclusive economic zone" (Vicuna, 1989:38). One of the negotiating texts of the current Article 58 of the Convention was formulated as follows "In the the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the present Convention, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication" (Galdorisi and Kaufman, 2001:271).

The US and other maritime states believed that the phrase "other internationally lawful uses of the sea related to the navigation and communication" was too restrictive (Beckman and Davenport, 2012:25). Therefore, the US proposed an alternative wording which became part of Article 58 of the Convention – "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of the Convention" (Galdorisi and Kaufman, 2001:271, 272). The intention behind this change was to secure for non-coastal states the high seas freedom to conduct military exercises in the exclusive economic zone of other states (Beckman and Davenport, 2012:25).

Tommy T. B. Koh, who served as the second and final president of the Third Conference, summarized the process of the negotiations and the outcome enshrined in the Convention as follows "The solution on the Convention text is very complicated. Nowhere it is clearly stated whether a third state may or may not conduct military activities in the

exclusive economic zone of a coastal state. But, it was the general understanding [emphasis added] that the text we negotiated and agreed upon would permit such activities to be conducted" (Van Dyke, 2004:31).

At the 192nd meeting of the Third Conference held on 9 December 1982 representative of the US delegation Mr. Clingan also emphasized that "The Convention has recognized the sovereign rights of the coastal State over the resources of the exclusive economic zone, jurisdiction over artificial islands, and jurisdiction over installations and structures used for economic purposes therein, while retaining the international status of the zone in which all States enjoy the freedom of navigation, overflight, the laying of submarine cables and pipelines and other internationally lawful uses of the sea, including military operations, exercises and activities [emphasis added]" (United Nations, 1973:117).

Despite those statements a small number of the states object such interpretation of the Convention:

1) Bangladesh, Brazil, Cabo Verde, Ecuador, India, Malaysia, Pakistan, Thailand and Uruguay in their declarations made either upon signature or ratification of the Convention have stated that the Convention does not authorize other states to carry out military exercises in the exclusive economic zone of the coastal state (United Nations, 2013);

2) China, Indonesia, Iran, Kenya, Maldives, Mauritius, Myanmar, North Korea, Philippines and Portugal have enacted domestic legislation regulating foreign military activities in their exclusive economic zone (Pedrozo, 2014:521);

3) Five additional states – Benin, El Salvador, Peru, Somalia and Togo – claim a territorial sea beyond the limit of 12 nautical miles where the military activities of the foreign ships are inevitably prohibited without their consent (United Nations, 2011);

4) Further four states claim security jurisdiction in their 24 nm contiguous zone – Cambodia, Sudan, Syria and Vietnam (Pedrozo, 2014:522).

Only three of the aforementioned countries – China, North Korea and Peru – have demonstrated their readiness to use force in pursuit of their claims (Pedrozo, 2014:522).

Some of the NATO states have fiercely objected the declarations made upon signature or ratification of the Convention which purported to limit the military exercises in the coastal state's exclusive economic zone:

1) USA denounced the Brazilian declaration as “frankly outrageous” and indicate “that they are not really very serious about the law that the Convention would seem to create” (Van Dyke, 2004:31);

2) Germany upon accession to the Convention made a declaration stating “According to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them” (United Nations, 2013:35).

3) France upon ratification of the Convention made a declaration stating that “France rejects declarations or reservations that are contrary to the provisions of the Convention. France also rejects unilateral measures or measures resulting from an agreement between States which would have effects contrary to the provisions of the Convention” (United Nations, 2013:35).

4) Italy upon signature and ratification of the Convention made declarations stating “According to the Convention, the Coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the Coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them” (United Nations, 2013:35).

5) Netherlands upon ratification of the Convention made a declaration stating that “The Convention does not authorize the coastal State to prohibit military exercises in its exclusive economic zone. The rights of the coastal State in its exclusive economic zone are listed in article 56 of the Convention, and no such authority is given to the coastal State. In the exclusive economic zone all States enjoy the freedoms of navigation and overflight, subject to the relevant provisions of the Convention” (United Nations, 2013:35).

6) United Kingdom of Great Britain and Northern Ireland upon accession to the Convention made a declaration stating that “The United Kingdom considers that declarations and statements not in conformity with articles 309 and 310 include, inter alia, the following those which are not in conformity with the provisions of the Convention relating to the exclusive economic zone or the continental shelf, including <….> those which purport to require consent for exercises or manoeuvres (including weapons exercises) in those areas” (United Nations, 2013:35).

It should be also mentioned that there are a number of bilateral treaties concluded between NATO states and the former USSR and the Russian Federation which "implicitly suggest there is an unfettered right to conduct weapons exercises and naval manoeuvres in the EEZ" (Rothwell and Stephens, 2010).

Summarizing it should be noted that one of the commentators has characterized the issue of military uses of the exclusive economic zone as *"one of the most controversial issues"* of the Convention itself (Scovazzi, 2001:31). **In the light of the preceding analysis it should nevertheless be concluded that the claim maintaining that Russia has violated the Convention by the mere fact that it was conducting military exercises in the exclusive economic zone of Lithuania without the latter's consent is highly contentious and would also contradict the position of major NATO states, including the USA, Germany, Italy, Netherlands, France and the UK.** Such stand would be reasonable only if Lithuania had a long-term policy in changing the interpretation of the Convention which might be theoretically possible having in mind that under Article 31(3) of the Vienna Convention on the Law of Treaties international treaty should be interpreted by taking into account, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Thus, if more and more states start objecting military exercises in their exclusive economic zones, then in the future interpretation of the Convention might change and it could be interpreted as prohibiting any military exercises in the exclusive economic zone of the coastal state without the latter's consent.

2.2.2.3 "Peaceful Purposes" Clauses of the Convention

Some of the states opposing the right to conduct military exercises in their exclusive economic zone further maintain that such exercises would be in violation with:

1) Article 88 of the Convention which establishes that "[t]he high seas shall be reserved for peaceful purposes". This rule is applicable in the exclusive economic zone since Article 58(2) of the Convention provides that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part" (United Nations, 1982);

2) Article 301 of the Convention which states that "[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or

in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations" (United Nations, 1982).

According to Pedrozo "most commentators that have addressed this issue agree that based on various provisions of the Convention … it is logical … to interpret the peaceful … purposes clauses as prohibiting only those activities which are not consistent with the UN Charter. It may be concluded accordingly that the peaceful purposes … clauses in Article 88 and 301 do not prohibit all military activities on the high seas and in EEZs, but only those that threaten or used force in a manner inconsistent with the UN Charter" (Pedrozo, 2014:534). Moreover, the Report of the Secretary – General of the United Nations (A/40/1985) of 17 September 1985 states "The Convention declares that "the high seas shall be reserved for peaceful purposes", but it does not contain a definition of peaceful purposes…Thus, military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51, are not prohibited by the convention on the Law of the Sea" (United Nations, 1985: para 188). Furthermore, San Remo Manual on the Law of Armed Conflicts at Sea which provides that hostile actions by naval forces may be conducted in the exclusive economic zone of neutral States[3] provided that these actions are compiled with "due regard" obligations[4] (San Remo Manual on the Law of Armed Conflicts at Sea, 1994).

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[3] San Remo Manual on the Law of Armed Conflicts at Sea available at https://ihl databases.icrc.org/ihl/INTRO/560?OpenDocument, para. 10 and 12:

> 10. Subject to other applicable rules of the law of armed conflict at sea contained in this document or elsewhere, hostile actions by naval forces may be conducted in, on or over:
> (a) the territorial sea and internal waters, the land territories, the exclusive economic zone and continental shelf and, where applicable, the archipelagic waters, of belligerent States;
> (b) the high seas; and
> (c) *subject to paragraphs 34 and 35, the exclusive economic zone and the continental shelf of neutral States* [emphasis added].
> <…>
> 12. In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.

[4] San Remo Manual on the Law of Armed Conflicts at Sea available at https://ihl-databases.icrc.org/ihl/INTRO/560?OpenDocument, para. 34 and 35:

> 34. If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, inter alia, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.

Based on the aforementioned it should be concluded that military exercises in the exclusive economic zone of another country are not deemed per se to be inconsistent with Articles 88 and 301 of the Convention. They would result in violation of those Articles only if they amounted to the "threat of force" under Article 2(4) of the United Nations Charter. Under normal circumstances naval exercises would not qualify as the "threat of force" within the context of UN Charter. This is evidenced by the Judgment of the International Court of Justice in the Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. United States of America) in which it concluded that even military manoeuvers carried by one state near the borders of another state amidst a hostile relationship between those two states do not necessarily constitute "threat of force". As it stated in the judgement "The Court has also found (paragraph 92) the existence of military manoeuvres held by the United States near the Nicaraguan borders [including those during which American warships were sent to patrol the waters off both Nicaragua's coasts and were deployed off the Atlantic coast of Nicaragua]; and Nicaragua has made some suggestion that this constituted a "threat of force", which is equally forbidden by the principle of non-use of force. The Court is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force" (International Court of Justice, 1986: para 227).

In the light of the aforementioned it should be concluded that the **military exercises which were conducted by Russia in the exclusive economic zone of Lithuania in May 2014 do not either constitute threat of force under Article 2(4) of the UN Charter. As it is indicated by one of the commentators "a prohibited threat of force is a clear act of or an ambiguous statement that communicates an intention to use armed force unless a specific demand that is impermissible under international law is met" (Helal, 2017). There are no evidences that would suggest that Russia communicated any such demand to Lithuania or made it clear that it would use force if such demand was not met.**

35. If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, inter alia, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment.

2.2.2.4 “Due Regard” Obligations of the Convention

If it is presumed that a state is not prohibited under the Convention to conduct military exercises in the exclusive economic zone of another state, this does not mean that there are no associated obligations which have to be respected while carrying such exercises. For example, under Article 58(3) of the Convention “[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part” (United Nations, 1982). Moreover, in Article 87(2) of the Convention it is pointed out “[t]hese freedoms [of the high seas] shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas…” (United Nations, 1982).

Thus, assuming that other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines do include the right to engage in military exercises in the exclusive economic zone of another state, the state conducting those exercises shall have due regard not only to the sovereign rights of the coastal state to explore and exploit, conserve and manage the natural resources of the exclusive economic zone as well as to engage in other activities for the economic exploitation and exploration of the zone but also to the freedoms that all states enjoy in the exclusive economic zone of another state, namely freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the Convention.

Consequently, Russia while carrying the military exercises in question was bound by the Articles 58 and 87 of the Convention to have due regard to at least:

1) the sovereign rights of Lithuania to explore and exploit, conserve and manage the natural resources of its exclusive economic zone which have been transferred within the exclusive competence of the European Community (United Nations, 2013);

2) the sovereign rights of Lithuania to engage in other activities for the economic exploitation and exploration of the zone;

3) the freedom of navigation enjoyed by all states in the exclusive economic zone of Lithuania;

4) the freedom of overflight enjoyed by all states in the exclusive economic zone of Lithuania;

5) the freedom of the laying of submarine cables and pipelines enjoyed by all states in the exclusive economic zone of Lithuania.

The scope of the "due regard" obligations has not been elaborated in the Convention itself. However, it was considered by the tribunal in the Chagos Marine Protected Area Arbitration in the context Article 56(2) of the Convention that "The ordinary meaning of "due regard" calls for the [first State] to have such regard for the rights of [the second State] as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of [the second State's] rights; nor does it uniformly permit the [first State] to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by [the second State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [first State], and the availability of alternative approaches" (Permanent Court of Arbitration, 2015: para 519).

The same interpretation of the "due regard" obligation was also applied by the tribunal in the South China Sea Arbitration in the context of Article 58(3) of the Convention (Permanent Court of Arbitration, 2016: para 741-744). Consequently, it should be assumed that the same interpretation should applied while interpreting Article 87 of the Convention.

Based on this conclusion it should be noted that in case of military exercises the Convention does not impose a uniform obligation to avoid any impairment of Lithuania's rights and other states' freedoms in the exclusive economic zone of Lithuania; nor does it uniformly permit Russia to proceed as it wishes, merely noting such rights. As it is stated in the aforementioned arbitral awards, the extent of the regard required by the Convention will depend upon the nature of the rights held by Lithuania and other states in the former's exclusive economic zone, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by Russia, and the availability of alternative approaches.

There is no information available which would imply that due to Russia's military exercises the sovereign rights to explore and exploit, conserve and manage the natural resources of Lithuania's exclusive economic zone or the sovereign rights of Lithuania to engage in other activities for the economic exploitation and exploration of the zone have been impaired. Thus, the analysis will be further focus on the freedom of navigation and freedom of the laying of submarine cables and pipelines enjoyed by all states in the exclusive economic zone of Lithuania.

As it has been indicated, due to Russia's military exercises which involved missile firing civilian ships were diverted from the area and laying of submarine cable had to be seized for 7 hours with financial costs. However, such information is not sufficient in itself to be able to opine whether Russia has breached its "due regard" obligation under Article 87 of the Convention. The following would be important when weighing the interests of Russia and other states, including Lithuania and Sweden:

1) how large was the area of Lithuania's exclusive economic zone which was declared as dangerous for shipping due to Russia's military exercises;

2) how many ships had to change the course of their navigation due to Russia's military exercises and how substantial was the diversion as compared to the original route;

3) whether the other routes that the ships had to use due to Russia's military exercises were equally safe and secure;

4) did the area of Lithuania's exclusive economic zone which was declared dangerous for shipping included any shipping lanes which are usually used by ships in the Baltic Sea;

5) there were any other negative consequences on unrestricted navigation in the Baltic Sea, e.g. failure to deliver cargos on time, extra costs incurred to change of course, disruption of the operations of Klaipeda Sea Port and etc.;

6) what areas are chosen by Lithuania itself for its military exercises in the exclusive economic zone and whether impairment over freedom of navigation in those cases are of a lesser extent as compared to the impairment due to Russia's military exercises in question;

7) how much in advance were the ships engaged in laying of Nord Balt power cable notified by Russian navy that they would have to seize the works and leave the area and was there any communication issued by Lithuania after such notification and before the

actual start of the military exercises claiming that such activities of Russia would unlawfully hinder its freedom to lay submarine cables;

8) what were the financial damages incurred due to the suspension of the laying of submarine cable, was it safe to seize the works and leave them as they were, could the ships during the period in question be engaged in performance of other works in waters beyond area of Russia's military exercises;

9) since the works had to be abandoned within a short time period and without being able to prepare for that, could the ships of Russian navy damage the works and impede further progress on such works by merely navigating over the works;

10) what kind of military exercises Russia was conducting, what weapons were involved and was it possible to carry them out without entering the exclusive economic zone of Lithuania or any other state, i.e. was there enough space in their own exclusive economic zone to carry out such exercises, or could it at least avoid the area where the submarine cable was being laid;

11) how often before 26 May 2014 Russia conducted military exercises which were restricting legitimate uses of Lithuania's exclusive economic zone by Lithuania itself or by other states and what was the scope of the impairment in each of those cases;

12) was Lithuania consistently objecting those exercises effecting its exclusive economic zone, what were the official statements by Lithuania's authorities as well as the ships in the incidents and what letters of protest were sent by Lithuania and other states (if any) to Russia.

Only after having all of the aforementioned and other relevant information (if any) it would be possible objectively and comprehensively to weigh the actual interests of all the states and to conclude whether Russia did breach its obligation under Article 87 of the Convention.

However, at the same time it should be emphasized that military exercises of Russia involved missile firing which was not separately mentioned in the navigational warnings of the Russian Federation. Weapons testing naturally results in establishment of the warning zones which are declared dangerous for navigation. Establishment of such zones has been controversial even on the high seas. By now legality of such zones has been largely accepted on the high seas provided that the conditions of reasonable or due regard to the other users have been satisfied (Klein, 2011). This has led some of the commentators to conclude that in the exclusive economic zone of the coastal state only

"naval exercises of reasonable scale without the use of weapons are permitted" since "once weapons are involved, the interference with the coastal state rights is inevitable" (Hayashi, 2005:129) (Klein, 2011:49). However, in the author's opinion, there mere use of the weapons does not necessarily deem the military exercises impermissible. Everything ultimately depends on the case-by-case assessment of the interests involved, as described earlier. Nevertheless, it has to be admitted that use of the weapons during the military exercises has a greater potential of impairing the rights of other states, ultimately resulting in a higher obligation of "due regard" on behalf of the state conducting military exercises.

Having in mind that Russia's military exercises involved missile firing in the exclusive economic zone of Lithuania, that there was no indication in Russia's Navigational Warnings of 27 May 2014 that the area of its military exercise would affect the works of laying of Nord Balt power cable and, therefore, this has precluded any possibility of inter-state consultations, that the ships engaged in cable laying works were not notified and were not prepared in advance that they would have to abandon the works, that interference by Russian navy with the works of laying of Nord Balt power cable was recurrent and that Nord Balt power cable was of strategic importance not only to Lithuania and Sweden but to the entire European Union, it might be possible to claim that Russia has violated Article 87 of the Convention obliging it to have due regard for the interests of other States in their exercise of the freedoms of the high seas on Lithuania's exclusive economic zone. As it has been already mentioned, further study of the relevant circumstances is required in order to reach a more decisive conclusion.

2.2.2.5 Warning Zones and Threat of Force

It is necessary to draw attention to several other contentious aspects of Russia's behavior during the military exercises in question. It's been noted that Russian military "diverted civilian ship from the area". It is not clarified what means were employed for the aforementioned purposes. Depending on the methods used, such diversion could be deemed unlawful under international law due to the following circumstances.

As it has been mentioned, weapons testing naturally results in establishment of the warning zones which are declared dangerous for navigation. However, it is usually agreed that such zones are voluntary and force may not be used to keep the ships outside such zone. According to Klein "The United States has maintained the legality of these danger or warning zones as they have been predicated on comity and voluntary compliance

[emphasis added] (rather than explicitly closing off the area) and were limited in terms of the size of the zone, as well as the duration and the isolated location…This view was also supported by the former Soviet Union. The practice has led other states to adopt similar approaches to testing their weapons" (Klein, 2011:57). Moreover, Van Dyke argues "If a vessel chooses to enter an exclusionary or warning zone…, the nation seeking to test its missiles or conduct other military operations in that vicinity cannot lawfully seize or remove that vessel without the permission of the nation whose flag the vessel flies" (Van Dyke, 1991:57)

This position is further elaborated by the USA in the Commander's Handbook on the Law of Naval Operations. As it is stated in the handbook "Specifically…commanders may assert notice (via NOTAMs and NOTMARs) that within a certain geographic area, for a certain period of time, dangerous military activities will be taking place. Commanders may request that entities traversing the area communicate with them and state their intentions…Ships and aircraft are not required to remain outside such zones and force may not be used against such entities merely because they entered the zone. Commanders may use force against such entities only to defend against a hostile act or demonstrated hostile intent, including interference with declared military activities" (Department of Navy, 2007:4-9).

Thus, if the military vessels of Russian Federation imperatively demanded that the civilian ships would leave the warning area, this would amount to the breach of applicable international law, namely, the freedom of navigation. If they merely warned them of the danger and advised to stay clear, this would not be considered as incompatible with the provisions of the Convention. Thus, everything depends on the actual message communicated by Russian military.

Finally, if that message involved direct or implied threat to use force if the ships did not change their course, Russia could be reminded of the award in the Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname Award of 17 September 2007. The dispute between the parties concerned inter alia delimitation of the continental shelf. In 1998 Guyana granted a concession for oil exploration in the disputed area of the continental shelf to CGX Resources Inc. (hereinafter referred to as "CGX"), a Canadian company (Permanent Court of Arbitration, 2007). In 1999 CGX started seismic testing of the concession area. In May 2000 Suriname demanded through diplomatic channels that Guyana would terminate all activities in the disputed area

(Permanent Court of Arbitration, 2007). Shortly after midnight on 4 June 2000 upon Guyana's failure to comply with such demand two patrol boats from the Surinamese navy approached CGX's oil rig and drill ship, the C. E. Thornton, and shined their search lights on the rig (Permanent Court of Arbitration, 2007). As Edward Netterville, the Rig Supervisor on the C. E. Thornton, argued "The gunboats established radio contact with the C.E. Thornton and its service vessels, and ordered us to "leave the area in 12 hours," warning that if we did not comply "the consequences will be yours." The Surinamese Navy repeated this order several times. I understood this to mean that if the C.E. Thornton and its support vessels did not leave the area within twelve hours, the gunboats would be unconstrained to use armed force against the rig and its service vessels" (Permanent Court of Arbitration, 2007:433).

When qualifying this incident, the tribunal was of the view that "the order given by Major Jones to the rig constituted an explicit threat that force might be used if the order was not complied with" (Permanent Court of Arbitration, 2007:439). As it is stated in the tribunal's verdict "The Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary. However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity…Suriname's action therefore constituted a *threat of the use of force in contravention of the Convention, the UN Charter and general international law [emphasis added]*" (Permanent Court of Arbitration, 2007:445).

Even though the facts of the case under this analysis are different from the circumstances in the aforementioned arbitration between Guyana and Suriname, nevertheless, this award could be used in the discussions with Russia as evidence of the tendency on behalf of international tribunals to expand the scope of prohibited threat of force under Article 2(4) of the UN Charter.

2.2.2.6 Military Exercises and the Dispute Settlement under the Convention

As it has been already mentioned, if Lithuania seeks to pursue protection of its interests that are adversely affected by Russia's military exercises in its exclusive economic zone, it should advance the argumentation based on Articles 58 and 87 of the Convention

rather than claiming that such military exercises are non-permissible per se in the exclusive economic zone of Lithuania.

However, it should be emphasized that dispute over Russia's military exercises in the exclusive economic zone of Lithuanian could not be submitted to the compulsory dispute settlement procedure under the Convention due to the fact that Russia upon ratification of the Convention has made a declaration indicating that "The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes…concerning military activities, including military activities by government vessels and aircraft…" (United Nations, 2013). According to Galdorisi and Kaufman "The dispute resolution mechanisms of the 1982 United Nations Convention on the Law of the Sea are insufficient to successfully litigate such disputes. Therefore, the international community is left to make peaceful resolution of the contentious issues regarding military activities in the EEZ a matter of priority" (Galdorisi and Kaufman, 2001:300).

Thus, the dispute regarding legitimacy of Russia's military exercises in the exclusive economic zone of Lithuania could only be settled by diplomatic means of dispute settlement.

2.3 Conclusion

Russia's military activities in the Black Sea and the Baltic Sea EEZs exemplifies two very different legal cases.

Russia's actions in the Black Sea with a seizure of Ukraine's gas rigs in its EEZ should be regarded as impermissible use of force under Art. 2(4) of the UN Charter. Russia violated Article 2(4) of UN Charter and therefore breached UNCLOS 301 and 88 "peaceful purposes" or "peaceful use" provision. There was no official explanation from the Russian side regarding the conduct of military activities in the Black Sea area.

On the other hand, Russia's military exercises in the Baltic Sea and disruption of the construction of NordBalt cable should be regarded as being within the "grey zone", a classic example of non-kinetic lawfare activity. There is little support in state practise that consent of a coastal state is required for military exercises of another state in the former's exclusive economic zone. Thus, it could be only claimed that Russia has breached its "due regard" obligation established in Article 87 of UNCLOS when planning and conducting those exercises. However, the "due regard" obligation is not defined in UNCLOS and the

outcome of its application is not that easily predictable. Everything ultimately depends on the assessment of all the relevant circumstances and interests involved. Furthermore, any differences in opinions while assessing those circumstances and interests cannot be referred to compulsory dispute settlement procedures under UNCLOS since Russia has refused to accept such procedures with respect to disputes concerning military activities.

3. Conclusions

Critical energy infrastructure in Baltic Sea and Black Sea regions could be targeted by gray zone techniques, including naval activities to deny neighbouring states access to energy installations and resource extraction areas. Russia's growing provocative behaviour in maritime domain raises important legal challenges for NATO and its concerned allies of the effectiveness of international law in countering the elements of hybrid warfare in international waters.

Although UNCLOS is the most comprehensive legal framework for all matters concerning the maritime issues, it remains unclear on some issues such as the ones pertaining to the military activities in the EEZ. Despite its ambiquity, it is agreed that UNCLOS allows military activities to be conducted within the EEZ.

The disruption of NordBalt cable laying activities in the Baltic Sea and the seizure of Chornomornaftogaz rigs case in the Black Sea constitute two different legal cases. The former should be regarded as impermissible use of force under Art. 2(4) of the UN Charter and therefore breach UNCLOS 301 and 88 "peaceful purposes" or "peaceful use" provision. The latter case is more complex if analysed from international law's point of view. First of all, military exercises in Lithuania's EEZ in the Baltic Sea conducted by Russia in May 2014 do not constitute threat of force under Article 2(4) of the UN Charter. Moreover, it could be only claimed that Russia has breached its "due regard" obligation established in Article 87 of UNCLOS when planning and conducting those exercises. However, the "due regard" obligation is not clearly defined under UNCLOS framework and the outcome of its application is not that easily predictable. Everything ultimately depends on the assessment of all the relevant circumstances and interests involved. From available information it is difficult to suggest that Russia's military exercises impaired the sovereign rights of Lithuania to explore and exploit, conserve and manage the natural resources and to engage in other activities for the economic exploitation and exploration. In addition, in defending its position, Lithuania cannot refer to compulsory dispute settlement procedures under UNCLOS since Russia has refused to accept such procedures with respect to disputes concerning military activities.

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