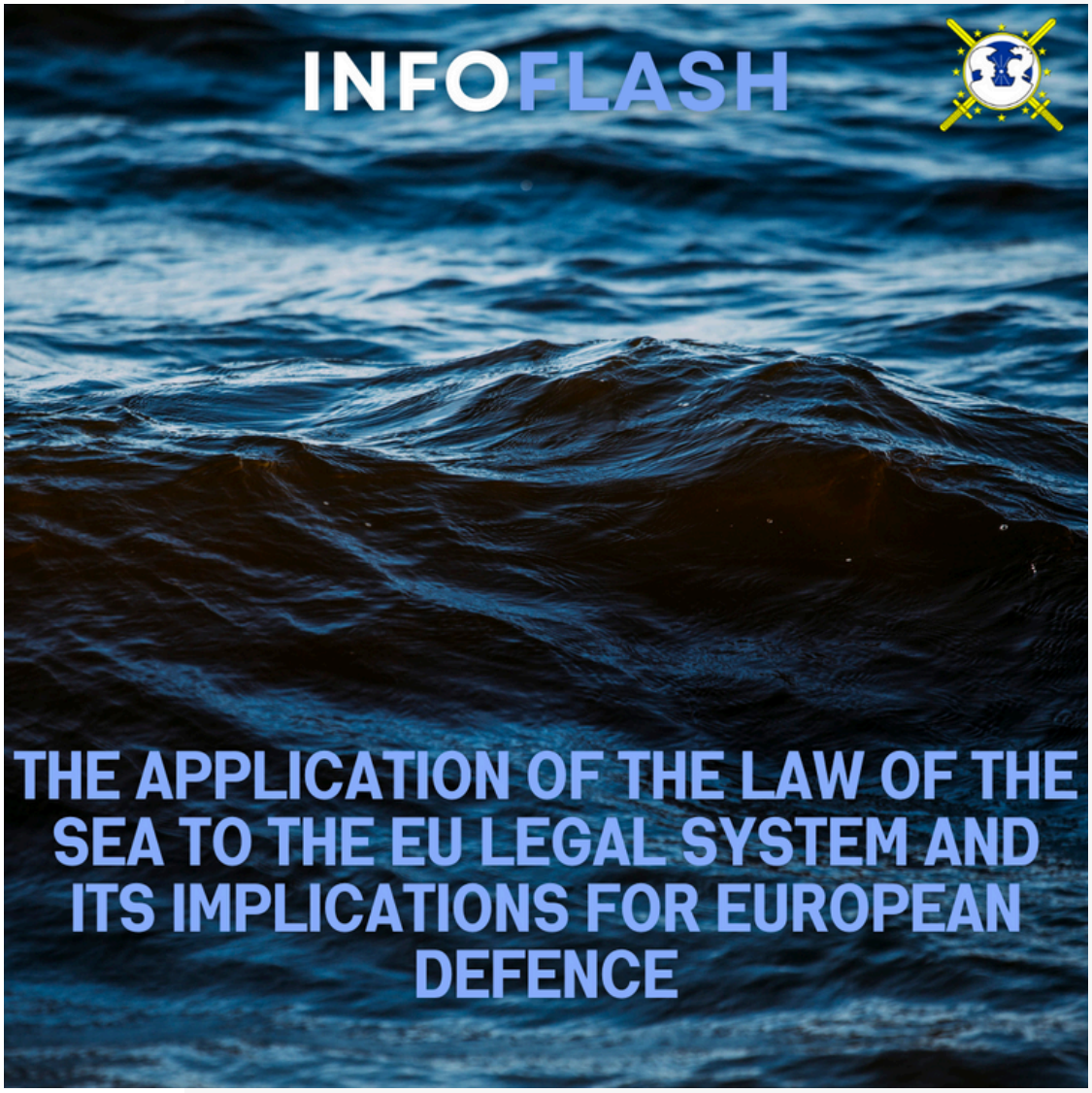
INFO FLASH
Finabel
The European Land Force Commanders Organisation

FINABEL - THE EUROPEAN LAND FORCE COMMANDERS ORGANISATION

JUNE 2024



WRITTEN BY
MARTA CERAFOGLI

EDITED BY
MANFRED SINTORN

SUPERVISED BY
RICCARDO ANGELO GRASSI

Introduction

States have long been considered the primary, but not only, subjects of International Law. To be considered a State, Article 1 of the Montevideo Convention (1933) sets out four criteria: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states (Montevideo Convention, 1933). A State's sovereignty is here limited to its territory, over which its legal system has complete jurisdiction. However, defined territory is not uncomplicated, as States control their airspace and have a border to outer space, and coastal State's territory encompasses maritime zones surrounding their land (Gioia, 2019).

This article analyses the International and European legal framework regulating States in their maritime areas. Then, it will focus on the interaction between those legal sources and their implications for European Defence.

Definition and evolution of the Law of the Sea

The necessity to regulate human actions at sea, particularly the right of navigation and exploitation of natural maritime resources, became clear after World War II. Until then, oceans were legally subject to the freedom of the seas doctrine, which reduced States' rights, claims and jurisdiction over the oceans, which legally belonged to no one. However, during the second half of the 20th century, in no small part due to technological advancement allowing gainful exploitation of the seabed, States began to claim sovereignty over their coastal waters (United Nations, 2024).

The International Law Commission (henceforth ILC), following recommendation 374 (IV) of 6 December 1949 of the United Nations General Assembly (henceforth UNGA), indicated the topic of territorial waters as a priority for the process of codification of international law (UNGA, 1949). In 1956, the ILC adopted its final report on the matter (ILC, 1956) and driven by the adoption of the UNGA resolution 1105 (XI) in the following year, the United Nations Conference on the Law of the Sea was held in Geneva from 24 February to 27 April 1958 (UNGA, 1957). Resolution 1105 (XI) gave the conference a mandate to examine the law of the sea, taking legal, technical, biological, economic and political aspects of the matter into consideration, resulting in one or more legal instruments (United Nations Conference on the Law of the Sea, 1958).

The Conference adopted four separate Conventions: the Convention on the Territorial Sea and the Contiguous Zone, which entered into force on 10 September 1964; the Convention on the High Seas, which entered into force on 30 September 1962; the Convention on Fishing and Conservation of the Living Resources of the High Seas, which entered into force on 20 March 1966; and the Convention on the Continental Shelf, which entered into force on 10 June 1964. In addition, an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes was adopted, which entered into force on 30 September 1962 (United Nations, 2010).

After less than a decade, in the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and Subsoil Thereof, beyond the Limits of National Jurisdiction, UNGA recognised that the existing legal framework was not sufficient to regulate the current use of the seabed and ocean floor (UNGA, 1970). The Assembly's attempt to address this was to convene another International Conference on the Law of the Sea with a mandate to create a comprehensive regulation (UNGA, 1973) and to instruct the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction to act as its preparatory body (United Nations, 2008).

On 10 December 1982, the second Conference adopted the United Nations Convention on the Law of the Sea (UNCLOS), which posits a comprehensive legal framework to regulate all foreseeably possible uses of the oceans. The Convention establishes what coastal States have the right to claim, their rights and duties, and a dispute resolution mechanism for parties at odds over the interpretation or application of its provisions (UNCLOS, 1982; Beckam, 2013). The Conference created UNCLOS through consensus (Treves, 2008a). Nearly all States are UNCLOS signatories, making it nigh universal and representative of a global consensus. For this reason, the Convention is widely applied and highly influential in the practical implementation of the law of the sea, which has led to legal scholars and practitioners often presuming that UNCLOS' non-institutional provisions amount to customary law unless proven to the contrary (Treves, 2008b). In favour of this argument, the International Court of Justice, the International Tribunal for the Law of the Sea, and other arbitral tribunals have often applied the Convention and sometimes done so as a reflection of customary law (Treves, 2008b).

The Convention's most significant accomplishment is establishing clear criteria delimiting a State's powers at sea. Articles 3 and 33 (Part 1) establish the maximum breadth of a territorial sea to be 12 nautical miles (NM) from a State's coast and specify a maximum contiguous zone width of 24 NM from shore. In these areas, States have the same rights as they do on land with the notable exception of a 'transit passage' regime for straits used for international navigation (art. 34). Moreover, coastal States can establish a 200NM exclusive economic zone (EEZ), in which they can exercise sovereign rights and jurisdiction on all activities conducted to explore and exploit natural resources, which includes the construction of artificial islands and installations, marine scientific research, and the protection of the maritime environment (art. 57). Beyond these areas, the only applicable regime is the High Seas, according to which States can only claim freedom of navigation, fish, or lay cables and pipelines (art.87). Lastly, article 136, amended by the 1994 Implementation Agreement, declares that, together with its resources, all seabed resources are the common heritage of mankind (UNCLOS, 1982).

The Convention also fully applies to the maritime territories of the European Union's Member States. Every EU Member State signed the Convention, and the Council of the EU issued a 23 March 1998 decision formally approving UNCLOS and integrating it into the Union's legal framework (Decision 98/392/EC).

The relevance of UNCLOS' integration pertains to the division of competences between the EU as a supranational organisation with its own legal system juxtaposed over its Member States' legal systems, which are subject to European and International Law while largely retaining their sovereign jurisdiction. Whenever the EU gains competence over a matter, there is a need to determine whether said competence is exclusive or shared with its Member States. Should it be a wholly supranational competence, Member States are barred from entering into any international agreement on that matter, as that right is reserved to the EU, with the same holding in reverse should it be a wholly national competence.

If, on the other hand, the Union and its Member States have shared competency, both can be separate signing parties to an agreement (Chalmers et alt., 2019). As per articles 3 and 216 of the Treaty on the Functioning of the European Union (henceforth TFEU, 2012) and CJEU case law points out the fact that the EU has exclusive external competences only in matters pertaining to the customs union, establishing competition rules necessary for the functioning of the internal market, monetary policy for eurozone countries, conservation of marine biological resources under the common fisheries policy, and the common commercial policy (Chalmers et al., 2019).

The EU (then the European Economic Community) was initially granted observer status to UNCLOS, which lasted until the 1970s when it became a contracting party. However, the Union's competences in this role were not sufficiently clarified in the TFEU (Boelaert-Suominen, 2008). To overcome such ambiguity, Annex IX was added to the text of the Convention, which allowed international organisations like the EU - to which Member States had transferred powers regarding matters regulated by the Convention - to become UNCLOS signatories. In addition, such organisations were expected to declare the nature and extent of the competences transferred to them by the Member States (Annex IX, art.2, UNCLOS, 1982). In its final declaration, the EU clarified that UNCLOS applies to the same geographical extent as EU law and only on matters for which Member States have delegated authority to the Union (Gündüzler, 2013). The particularities of the EU's relationship with UNCLOS and the self-declared semi-jurisdiction over UNCLOS matters make it worthwhile to review EU-UNCLOS harmonisation.

Harmonisation of UNCLOS and EU law: the role of case law of the Court of Justice of the European Union

Since the (at the time) European Community's signature, the Court of Justice of the European Union (CJEU) has had to address the harmonisation of UNCLOS with the European Legal framework, particularly in the context of secondary sources. The consequences of UNCLOS inclusion in the EU's legal order were not merely legal debates but also affected contemporary issues such as the construction of Nord Stream II and marine environment research (Waverijn & Nieuwenhout, 2019).

EU primary law, notably the Treaty on European Union (henceforth TEU, 2012) and the TFEU, is the main link between International and European legal systems. As per article 3(5) of the TEU, the EU is bound to international law and must, inter alia, fully respect UNCLOS. UNCLOS raised legal issues around the definition and extent of the EU's jurisdiction over Member State territory as no EU treaty clarifies whether the EU has the mandate to regulate disputes on its Member States' continental shelves or EEZs. Article 52(2) TEU, which defines the territorial scope of the Union, does so by citing article 355 of the TFEU, which only refers to specific territories such as overseas islands and territories not connected to its Member States' mainland.

In a wide array of settled case law, the CJEU has established the influence of international law on EU secondary law and the extent of its application – namely, the same geographical area as the Treaties, unless the secondary law itself contains a provision explicitly providing otherwise (Case C-61/77; Case C-148/77; Case C-308/06).Nonetheless, secondary law may circumstantially not extend to a certain area on the basis of its object and purpose should the geographical scope be mentioned in the legislation itself. Secondary law, however, often fails to clarify its geographical scope or simply refers to the "territories to which the EC Treaty applies" (Waverijn & Nieuwenhout, 2019, p. 1631), which is the case in the declaration submitted by the European Community when ratifying UNCLOS. This is problematic because, as mentioned above, the treaties do not sufficiently specify their geographical application except in relation to overseas territories.

It is generally accepted that EU law is applicable whenever an action is carried out under the guise of a Member State's sovereignty, which, according to the CJEU's rulings, includes the sovereign rights enjoyed by coastal States in their EEZ and their continental shelf. This expanded upon in the Aktiebolaget case, the CJEU further ruled that the sovereignty of coastal States must be limited to the EEZ due to UNCLOS (Case C-111/05). In the subsequent Habitats case, the Court ruled on the application of the Habitats Directive (1992), which was aimed at protecting biodiversity in the Member States' EEZs (Directive 92/43/EEC). The Commission alleged that the UK limited the application of the provisions to land and territorial waters but not its EEZ and argued that Member States are obligated to apply EU law in their EEZs. The CJEU agreed that the UK exercised sovereign rights in its EEZ and that the Directive had to be applied there. In other words, the CJEU followed the reasoning that Member States must comply with EU law for the continental shelf and EEZ to the extent that they exercise their rights in these zones. The CJEU based its judgment on the recognition of sovereign rights and, in short, ruled that EU law applies in those areas (Case C-6/04).

Therefore, the application of UNCLOS to the EU legal system in maritime zones has resulted in a convoluted jurisdiction over States based on both ratione loci and ratione materiae. The EU's authority is limited ratione materiae because the application of EU law changes depending on the subject matter, as the EU cannot grant its Member States more power than they hold under UNCLOS.

Considering the criterium of ratione loci, instead, the geographical area to which the EU legal system applies is not uniform. Accounting for the extent of European territory indicated by Article 52(1) TEU and the TEU provisions on the conferral of powers, the EU's competence extends as far as the rule-making authority of its Member States. Therefore, EU law only applies if a Member State has a form of jurisdiction on a territory based on public international law and whether European law affects the specific action taken (Waverijn & Nieuwenhout, 2019).

In short, the specific EU-UNCLOS case still is somewhat unpredictable as a subject of an ongoing legal debate, as integrating international law into a supranational - or at least EU – structure is not without challenges. The unpredictability of applying international law through a combined EU-national jurisdiction is successively delineated as courts set precedents clarifying how and when the rules apply. In this context, EU initiatives in maritime security are surging due to the deterioration of the global security order and significant developments in areas around the EU's maritime territories, such as Russian hostility in the Baltic and North seas, the display of force – and increased tensions in – the South and East China Seas and the Taiwan Strait, along with challenges in the Gulf of Guinea (European Commission, 2023a).

The EU's Maritime Security Strategy

Considering the provisions of articles 3 and 4 TFEU, the EU's legal role in maritime is legally vague, as competency over maritime affairs is simultaneously exclusive to the Union, exclusive to the Member States, and shared between them. As an example of how this functions, a distinction is made where the Union is responsible for the conservation of marine biological resources under the common fisheries policy, whereas the common fisheries policy itself is a competency it shares with Member States (TFEU, 2012). The EU rightfully exercises wide-ranging maritime governance, which includes development initiatives and measures targeting any specific sector with a potential impact on the sea. As the TFEU makes no explicit provision for an EU legislative competency over maritime policy, secondary law provides the legal framework for the implementation of EU legislation on the matter (Regulation 508/2014). To clarify the framework, the EU launched the Integrated Maritime Policy (IMP) as a strategic public policy in which maritime governance is transposed into the operational and implemented through sectoral strategies and projects dedicated to specific policy groupings (European Parliament, 2012).

In 2014, covering the IMP policy field of Integrated maritime surveillance, the EU launched the regionally and nationally implemented EU Maritime Security Strategy (EUMSS) to comply with UNCLOS and wider international law. The EUMSS aims to make the EU take the lead in promoting international peace and security while ensuring maritime sustainability and biodiversity (Conclusions 14280/23). Maritime security is a crucial component of Europe's role in global security, as the Member States have the largest EEZ in the world when combined (European Commission, 2023b).

The Strategy sets several core objectives, such as protecting European citizens' interests, infrastructures, borders, and the marine environment, countering security threats, and organising ad hoc training and education (Note 11205/14). The EU Member States, the Commission, and the European External Action Service (EEAS) are implementing and updating the Strategy to improve their capacity to respond to emerging crises. In 2023, the Council approved a revised Strategy and Action Plan, which the Commission and High Representative of the Union for Foreign Affairs and Security Policy had proposed in a joint communication (European Commission, 2023a). The revision was deemed necessary due to substantial geopolitical and global developments involving climate change, the growth of new forms of illegal and unregulated fishing, threats to critical maritime infrastructures and the consequences of the Russian aggression against Ukraine (Conclusions 14280/23).

The action plan identifies six strategic objectives: setting up activities at sea, cooperation with partners, maritime domain awareness, risk and threat management, boosting capabilities, and education and training. To accomplish these goals, the EU has launched operative measures that build on an internal defence structure while enhancing close partnerships with other international organisations like NATO, the International Maritime Organization, and UN agencies such as the UN Office on Drugs and Crime. Examples of the EU's commitment are the planned annual naval exercises, the enhanced monitoring of maritime infrastructure and ships, and the reinforcement of offshore vessel surveillance (European Commission, 2023a).

To face challenges to the rule of law and the international order in seas encompassed by and surrounding the EU's borders, the EUMSS contributes to UNCLOS implementation by taking action against piracy, illegal fishing and other unlawful actions at sea, leading to a more stable and controlled environment. However, this implementation risks unevenness because of the current uncertainty in the distinction of competences between the EU and its Member States' jurisdiction. The CJEU's role in setting precedents is – and will continue to – be crucial in defining a clearer legal order, especially in lieu of action from the EU's co-legislators.

Conclusion

Incorporating UNCLOS into the European legal framework presents a pivotal moment in developing a common legal structure to protect and safeguard States' rights and duties at sea. Its impact on the regulation of maritime matters and the strengthening of international peace, security and cooperation are lauded and have recently been reaffirmed by the UNGA (UNGA, 2023). Regarding its integration with the European legal system, it is fundamental to consider UNCLOS's interaction with EU primary and secondary law due to a complicated division of competences. The CJEU, for instance, has determined that when coastal States act in accordance with UNCLOS, these matters, such as maritime research, environmental conservation, and the construction of artificial islands and structures, are outside EU jurisdiction (Waverijn & Nieuwenhout, 2019).

Given the legal and geopolitical context and under UNCLOS and its secondary law, the EU launched the EUMSS to promote international peace and security while ensuring oceanic sustainability and the protection of biodiversity. The EUMSS, in addition to its value for the EU's defence policy, contributes to cooperation with other international organisations like NATO and operates to ensure peaceful EU maritime governance. This analysis argues that the EU needs to clarify the divisions of authority between the institutions and the Member States in light of the CJEU's rulings on UNCLOS and attempts to harmonise International and European law. This can be done by either discerning and clarifying the territorial scope of EU law through amendments to the EU treaties, more consistent use of terminology when describing geographical scope in future regulations or regulation amendments or by ensuring that a single policy or geographical domain cannot be under several conflicting exclusive and joint competences.

Bibliography

Beckman, R. (2013). The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea. American Journal of International Law, 107(1), 142–163. doi:10.5305/amerjintelaw.107.1.0142.

Boelaert-Suominen, S. (2008). The European Community, the European Court of Justice and the Law of the Sea. The International Journal of Marine and Coastal Law, 23(4), 643-713. https://doi.org/10.1163/157180808X353894.

Case C-61/77. Judgement of the Court of 16 February 1978: Commission of the European Communities v Ireland. The Court of Justice of the European Union. https://curia.europa.eu/juris/showPdf.jsf?text=&docid=89526&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6858533.

Case C-148/77. Judgment of the Court of 10 October 1978: H. Hansen jun. & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg. The Court of Justice of the European Union. https://curia.europa.eu/juris/showPdf.jsf?text=&docid=89812&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10036375.

Case C-6/04. Judgment of the Court (Second Chamber) of 20 October 2005: Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. The Court of Justice of the European Union. https://curia.europa.eu/juris/showPdf.jsf;jsessionid=CA12111AC1F1DFE22F90B0C58BB259F2?text=&docid=60655&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7683778.

Case C-111/05. Judgement of the Court (Third Chamber) of 29 March 2007: Aktiebolaget NN v Skatteverket. The Court of Justice of the European Union https://curia.europa.eu/juris/showPdf.jsf?text=&docid=63004&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7569654.

Case C-308/06. Judgement of the Court (Grand Chamber) of 3 June 2008: The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport. The Court of Justice of the European Union. https://curia.europa.eu/juris/document/document.jsf?text=&docid=68315&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10034423.

Chalmers, D., Davies, G., & Monti, G. (2019). European Union Law: Text and Materials (4th ed.). Cambridge: Cambridge University Press. ISBN: 9781108654173.

Conclusions 14280/23. Council Conclusions on the Revised EU Maritime Security Strategy (EUMSS) and its Action Plan. Council of the European Union. https://www.consilium.europa.eu/media/67499/st14280-en23.pdf.

Decision 98/392/EC. Council Decision concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof. European Council. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998D0392.

Directive 92/43/EEC. Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. Council of the European Communities. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0043.

European Commission. (2023a, March 10). Joint Communication to the European Parliament and the Council of 10 March 2023 on the update of the EU Maritime Security Strategy and its Action Plan "An enhanced EU Maritime Security Strategy for evolving maritime threats". European Commission and High Representative of the Union for Foreign Affairs and Security Policy. https://eur-lex.europa.eu/resource.html?uri=cellar:9e3d4557-bf39-11ed-8912-01aa75ed71a1.0001.02/DOC_1&format=PDF.

European Commission. (2023b, March 10). Maritime Security: EU updates Strategy to safeguard maritime domain against new threats. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1483.

European Parliament. (2012). European Parliament resolution of 21 October 2010 on Integrated Maritime Policy (IMP) - Evaluation of progress made and new challenges (2010/2040(INI)). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010IP0386&from=GA.

Gioia A. (2019). Diritto Internazionale. Giuffrè Francis Lefebvre. ISBN: 978-88-28-80659-2.

Gündüzler U. (2013, December). United Nations Convention on Law of Sea As a Mixed Treaty of EU: A Headache for Turkey?. Ankara Avrupa Çalışmaları Dergisi, 12(2), 61-80 https://dergipark.org.tr/en/download/article-file/847550.

International Law Commission (ILC). (1956, July 4). Report of the International Law Commission on the Work of its Eighth Session, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159). Yearbook of the International Law Commission, vol. II. Doc A/CN.4/104. https://legal.un.org/ilc/documentation/english/reports/a_cn4_104.pdf.

Montevideo Convention on the Rights and Duties of States. (1933, December 26). https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf.

Note 11205/14. European Union Maritime Security Strategy. Council of the European Union. https://data.consilium.europa.eu/doc/document/ST%2011205%202014%20INIT/EN/pdf.

Regulation 508/2014. Regulation of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council. European Union. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0508.

Treaty on European Union. (2012). Consolidated version. https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506 fd71826e6da6.0023.02/DOC_1&format=PDF.

Treaty on the Functioning of the European Union. (2012). Consolidated version retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT.

Treves T. (2008a). 1958 Geneva Conventions on the Law of the Sea. United Nations Audiovisual Library of International Law. https://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf.

Treves T. (2008b). United Nations Convention on the Law of the Sea. United Nations Audiovisual Library of International Law. https://legal.un.org/avl/pdf/ha/uncls/uncls_e.pdf.

United Nations. (2008). United Nations Convention on the Law of the Sea. United Nations Audiovisual Library of International Law. https://legal.un.org/avl/pdf/ha/uncls/uncls_ph_e.pdf.

United Nations. (2010). 1958 Geneva Conventions on the Law of the Sea. United Nations Audiovisual Library of International Law. https://legal.un.org/avl/pdf/ha/gclos/gclos_ph_e.pdf.

United Nations. (2024). Ocean and the Law of the Sea. https://www.un.org/en/global-issues/oceans-and-the-law-of-the-sea.

United Nations Conference on the Law of the Sea. (1958). Final Act of the Conference. UN Doc. A/CONF.13/L.58, Off. Rec. vol. 2, 146. https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_2/a_conf_13_l_57_58.pdf.

United Nations Convention on the Law of the Sea. (1982). https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

United Nations General Assembly. (1949, December 6). UN Doc. A/RES/374 (IV). file:///C:/Users/Utente/Downloads/A_RES_375(IV)-EN.pdf.

United Nations General Assembly. (1957, February 21). UN Doc. A/RES/1105 (XI). https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_2/resolutions.pdf.

United Nations General Assembly. (1970, December 17). UN Doc. A/RES/ 2749 (XXV). https://legal.un.org/diplomaticconferences/1973_los/docs/english/res/a_res_2749_xxv.pdf.

United Nations General Assembly. (1973, November 13). UN Doc. A/RES/3067 (XXVIII). https://treaties.un.org/doc/source/docs/A_RES_28_3067-E.pdf.

United Nations General Assembly. (2023, November 28). UN Doc. A/78/L.15. https://documents.un.org/doc/undoc/ltd/n23/369/28/pdf/n2336928.pdf?token=ArRvPsn80zQoff2VhD&fe=true.

Waverijn J., & Nieuwenhout C. (2019). Swimming in ECJ case law: the rocky journey to EU Law applicability in the continental shelf and exclusive economic zone. Common Market Law Review, 56(6). https://www.stibbe.com/sites/default/files/2022-07/Swimming_in_ECJ_case_law_2019__Waverijn_10533.pdf.