The arrest of ships in maritime zones beyond internal waters in Belgian maritime law

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Abstract

Opportunities may arise to arrest a ship in maritime zones beyond internal waters, e.g. in the territorial sea and the exclusive economic zone (EEZ). This paper examines the possibilities for arrest in those areas on the basis of jurisdiction ratione loci and ratione materiae. Under Belgian law the territorial sea is not part of the State’s territory; accordingly, the Belgian Judicial Code does not provide for an attachment judge nor a bailiff to have jurisdiction in this area and a fortiori in the EEZ. The law of April 22, 1999 solved the problem of territorial jurisdiction in this respect. As far as a ship’s arrest in the EEZ is concerned, it is not clear whether the United Nations Law of the Sea Convention (articles 73 and 220) combined with the requirement of a maritime claim, allows for an arrest at all. © 2001 Elsevier Science Ltd. All rights reserved.

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1. Introduction

Generally, the arrest of ships takes place in ports, which are part and parcel of the internal waters of the coastal state. Nevertheless, there remains a distinct possibility of arresting a ship beyond the internal waters, e.g. in the territorial sea. This article’s main objective is to examine some specific cases concerning the arrest of ships in Belgium with respect to the territorial jurisdiction of the judiciary. Of course, we do not intend to deal with all the aspects of the arrest of ships, neither do we intend to discuss the possibilities of an arrest in maritime zones related to, e.g. artificial islands.

The Belgian legal provisions on the arrest of ships can be found in the fifth part of the Judicial Code (the Code of Civil Procedure): the rules concerning the arrest of seagoing vessels and inland navigation vessels in articles 1467–1480; the rules concerning the executory arrest in articles 1545–1559; and the rules organising apportionment and ranking in case of an arrest in articles 1655–1675.

All claims related to the arrest of ships (prejudgment attachment) are taken to the attachment judge (article 1395 of the Judicial Code). Only he can authorise an arrest of ships provided they are within his territorial jurisdiction. With respect to a seagoing vessel, leave for the arrest of the vessel can only be authorised if a maritime claim is brought forward (article 1468 of the Judicial Code).\(^1\)

Article 1467 of the Judicial Code\(^2\) immediately introduces the problem of the judicial competence ratione loci. In my opinion, Delwaide gives a correct interpretation of the article as allowing the authorisation for an arrest even before the vessel in question has arrived within the

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\(^1\) In this context the term “seagoing vessel” (ship) will not be limited to the definition given in article 1 of the Maritime Law, which is only valid with a view to the application of that Law (“For the application of this Law seagoing vessel are vessels of at least 25 ton, normally used or designated for the carriage of persons or goods, for fishing, towing or any other profit seeking navigation activity at sea”). The Judicial Code does not shed any light on the terms “vessel” and “seagoing vessel” either. However, it has to be taken into consideration that the term “seagoing vessel” as used in article 1467 and following of the Judicial Code, refers to the Treaty of May 10, 1952, on the arrest of ships, in which a broader category of vessels than only commercial vessels was intended. The same goes for the International Convention on Arrest of Ships, 1999 which has however not entered into force yet. Generally see [1–2] contra: [3–4].

\(^2\) “The judge can allow the arrest of a seagoing vessel or an inland navigation vessel present within the jurisdiction of the tribunal.”
territorial jurisdiction of the attachment judge [2, p. 173]. This allows any creditor to act in an anticipatory way. Obviously, no arrest can be put on the vessel until it is effectively within the territorial jurisdiction of the judge authorising the arrest. Consequently a vessel cannot be seized when it is within the territorial jurisdiction of another attachment judge. Therefore, a vessel, steaming up to the port of Antwerp for instance and for which the attachment judge of Antwerp has given authorisation for an arrest, but which is diverted to Zeebrugge, cannot be put under arrest in the port of Zeebrugge until the attachment judge of Zeebrugge has given leave to do so.

Serving a writ for an arrest of ships is done by bailiff's notice. The bailiff also can act only within his territorial jurisdiction, i.e., within the judicial district as stipulated in his appointment decree (articles 513 and 516 of the Judicial Code). The master, or in his absence, the person responsible for guarding the vessel, is given a copy of the writ. The authorities of the federal police responsible for the maritime police, or in their absence, the harbour master are informed of the arrest in order to take the necessary actions to effectively put an arrest on the vessel. These imply that the vessel is prevented from sailing, or if she has already left berth, she is prevented from passing the locks. It is one of the legal tasks of the maritime police officers (who are responsible for the control of navigation) to supervise the execution of arrests on seagoing and inland navigation vessels (article 12, Law of May 3, 1999, organising the distribution of competences following the integration of the maritime police, the airport police and the railway police into the federal police).

2. Competence ratione loci related to the arrest of ships in maritime zones

The territorial jurisdiction of courts extends over the state's territory. This territory not only comprises land territory, but also, in the case of coastal states, maritime territory that is subject to the sovereignty of the state. So it is important to identify to what extent the courts can exercise their competences related to the arrest of ships in maritime territory and also in those specific maritime zones over which states exercise sovereign rights, and to specify the modalities thereof. Both the attachment judge and the bailiff can exercise their competences related to the arrest of ships only within their territorial jurisdiction, i.e., the judicial district for which they are authorised. The crucial question therefore is whether within the Belgian maritime zones (subject to sovereignty or sovereign rights) an arrest of ships can be authorised in a legally valid way. Moreover, it has to be determined whether the attachment judge can give the necessary authorisation and which bailiff can serve the writ.

The sovereignty of the coastal state extends over its internal waters and territorial sea. Moreover, the state exercises sovereign rights and jurisdiction over some other maritime zones, such as the continental shelf, the contiguous zone and the exclusive economic zone (EEZ) or any other functionally contiguous zones (e.g. fishery zone). In principle, jurisdiction over the high seas is reserved for the Flag State. The principle of exclusive jurisdiction of the Flag State on the high seas is limited in a relatively exceptional way.\footnote{Policing rights such as the right of boarding, visit and search of a vessel flying a foreign flag on the high seas can only be exercised by a warship when there is reasonable ground for suspecting that the ship is engaged in piracy, slave trade, or unauthorised broadcasting; when the ship is without nationality; or though flying a foreign flag or refusing to show its flag, the ship is in reality, of the same nationality as the warship (article 110, UN Convention on the Law of the Sea, 1982). Generally see [5].}

We shall now examine the problems linked to the arrest of ships in some of these maritime zones. In doing so we shall limit ourselves to the internal waters and the territorial sea as areas over which the coastal state exercises its sovereignty, as well as to the EEZ. The arrest of ships on the continental shelf does not seem very obvious, and the legal status of the high seas requires separate and more in-depth consideration given the contemporary approach to the mare liberum principle.

2.1. Arrest of ships in internal waters

The internal waters are part of the state’s inland waterways, situated on the landward side of the baseline from which the territorial sea and other maritime zones are measured. The inland waters or interior waters comprise bays, estuaries, canals, rivers, lakes and inland seas. The internal waters senso strictu comprise the coastal waters on the landward side of the baseline (low-tide line or straight baseline), i.e. that part of the inland waterways that is not entirely surrounded by territory.

In principle, the unlimited sovereignty of the coastal state extends over its inland waterways, ergo also over its internal waters. Therefore, there is no doubt that exercising jurisdiction over vessels within internal waters or inland waterways is of the same nature as exercising jurisdiction over (legal) persons found on the state’s territory. Of course, limitations on sovereignty, if any, which the state has accepted by virtue of international law, conventional or customary, have to be taken into account.

Consequently, the applicable rules of the Convention on the Arrest of Ships (1952) and article 1467 (and following) of the Judicial Code concerning the arrest of ships will be in full force in the inland waterways and the internal waters.

So, arrest of ships can be allowed without any legal problem based on the applicable rules, in all the waters situated on the landward side of the baseline of the
territorial sea. A special situation arises when vessels seek refuge in the internal waters or inland waterways of a foreign state as a result of an emergency situation or force majeure. In this case, they will not be submitted to the local jurisdiction. Consequently, they enjoy a privileged position and are exempted from stipulations, which are normally applicable, when a vessel enters the internal waters voluntarily. Obviously, the emergency situation or force majeure must be of a bona fide nature [5, p. 146]. Vessels in this kind of situation cannot be sued for a violation of e.g. customs or excise tax regulations. Similarly, it will be difficult to accept arrest on a vessel that has entered the internal waters of a foreign state only because of a bona fide emergency situation or force majeure.4

Taking into account the fact that the internal waters and the inland waterways are part of the Belgian national territory, no problems occur in identifying the competent attachment judge. It will be the judicial district in which the arrest is issued. Normally the arrest will be issued within the port, so it will be the attachment judge of the judicial district, in which the port is situated who will give the authorisation for the arrest. Consequently, for the Belgian coastal ports (Zeebrugge, Oostende, Nieuwpoort), the attachment judges of Furnes or Bruges will be responsible. Also the serving of the writ will have to be done by a bailiff with residence in the judicial district of Furnes or Bruges, depending on the port in which the arrest is issued. In the case of inland ports (Antwerp, Gent …) the attachment judges (and bailiffs) of the respective judicial districts have competence for allowing (and executing) a ship’s arrest. Principally, the judicial territorial competence will present no obstacle (for issuing an arrest) as far as the internal or inland waterways are concerned.

2.2. Arrest of ships in the territorial sea

There is a clear possibility of being confronted with problems of territorial competence whenever an arrest of ships must be issued on seagoing vessels in the territorial sea. In the Belgian territorial sea a number of anchor places are available where enterprising creditors could initiate proceedings, in the sense of an arrest if this were within the competence ratione loci of the judicial authorities. Information given by the maritime police indicates that no such actions have taken place in the Belgian territorial sea yet. The situation will be different with respect to vessels lying or hovering in the territorial sea as against those vessels that are in innocent passage. Indeed, the right of innocent passage will restrict the coastal state’s civil jurisdiction (infra). Ships merely in passage (as opposed to innocent passage) and those anchoring or hovering remain subject to the sovereignty of the coastal state and become liable for arrest.

2.2.1. Legal regime of the territorial sea

The territorial sea can be described as that part of the sea that is situated between the internal waters of a state and the high seas (or other functional maritime zones) and over which the coastal state enjoys sovereignty. It is a functional maritime zone, where the coastal State enjoys full sovereign competences. This sovereignty extends to the water, the air space above the water, as well as to the seabed and subsoil. In Belgium, opinions differ on the legal character of this maritime zone. The Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone (article 1) as well as the United Nations Convention on the Law of the Sea 1982 (article 2) say that the state exercises its sovereignty over the territorial sea subject to the rules of international law. Declaring that sovereignty must be exercised within the conditions of international law is in fact superfluous. Indeed, sovereignty implies exercising jurisdiction within the limits of international law in order to exercise government powers autonomously and independently from other states. So, exercising sovereignty means the use of all competences assigned to states by international law, precisely because they are sovereign. Having sovereignty over the territorial sea is therefore identical to fully exercising jurisdiction over this maritime zone, subject to possible limitations of international law. However, some Belgian authors consider these limitations stipulated by international law as a restriction of sovereignty, in the sense that the authority that a coastal state exercises over its territorial sea would not be the same as the sovereignty over its land territory. Thus, the territorial sea would not be part of the state’s territory [6–12].5

From an international law point of view, it is hard to refute that the territorial sea is part of the state’s territory and that consequently its sovereignty is of the same nature as on the land. A state’s territory not only comprises territory senso strictu, but also maritime territory (“land-maritime territory”).

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4 It is my opinion, however, that this argument is not applicable in the case of an executory attachment which should remain possible, as well as an arrest of a ship under article 1414 of the Judicial Code ("every judgment ... allows for an arrest for the convictions pronounced, on the condition that it has not been decided otherwise").

5 Also see the declaration of the Minister of Foreign Affairs and the Commission for External Relations of the Senate on the occasion of the bill fixing the width of the Belgian territorial sea, where the Minister maintained that the extension of the territorial sea could be seen as an extension of the national territory, Documents du Sénat, no. 451/2 (1986–1987). Also: Hoge Raad (Nl), February 7, 1986 (Attican Unity), especially the conclusion of the Solicitor-General Mr. Biegen-Hartogh, Schip en Schade 1986, no. 61. ("The territory of a coastal state also extends over that adjacent part of the sea, called territorial sea ..." — translation.) Also "In principle, the state of The Netherlands ... is given the competence to impose a prohibition by its sovereignty" — translation.
Under international law, it is generally accepted that the territorial sea is part of a coastal state's territory. The Paris Convention on Aerial Navigation 1919 and the Chicago Convention on International Civil Aviation 1944, consider the territorial sea to be part of the state's territory for the purpose of the application of the conventions. From an international law point of view, the problem can be reduced to an ancient and old-fashioned theory (dominium theory) according to which sovereignty rights were based on the rights of ownership. With the introduction of the doctrine of innocent passage and the separation of the concept "territory" from "jurisdiction" in the 19th century, it became possible to determine jurisdiction over the territorial sea without having to turn to the notion of ownership or territory. Territory was no longer considered as the property of a state, but as a spatial zone over which sovereignty rights could be exercised. Both in the Hague Codification Conference 1930, and in the draft convention of the International Law Commission of 1956 on the territorial sea, the following opinion is expressed: "the rights of the coastal state over the territorial sea do not differ in nature from the rights of sovereignty which the state exercises over the other parts of its territory" [13–16].

The same opinion is found in article 1 of the Geneva Convention of 1958 and in article 2 of the United Nations Convention on the Law of the Sea of 1982: "the sovereignty of a coastal State extends, beyond its land territory and internal waters,... to an adjacent belt of sea, described as the territorial sea".

According to the Belgian constitutional lawyers before 1976, the territorial sea belonged to the national territory [17–19]. Consequently, it could be assumed that Belgian law extended ipso facto over the territorial sea [20]. As a result of a judgment of the Council of State of April 27, 1976, opinions in the Belgian legal doctrine became divided.

In the 1976 judgment, the Council of State detached sovereignty of the coastal state over its territorial sea from sovereignty over its land territory, in order to conclude that the Province of West Flanders could not levy taxes in the territorial sea. The motivation was based on restrictions, coastal states have to observe by international law when exercising their sovereignty, e.g. the right of innocent passage, the prohibition to levy any kind of taxes on foreign vessels and the restrictions concerning civil and criminal jurisdiction. Proposed amendments to the bill of the Special Law of August 8, 1980, with the objective of integrating the territorial sea and the continental shelf within the Flemish region, and more specifically in the Province of West Flanders, were advised on negatively by the Council of State based on its judgment of April 27, 1976, and on legal-technical considerations. Indeed, this Special Law for the Reformation of Institutions would have changed the provincial boundary. Moreover, these amendments would have had a major impact on the distribution code for the allocation of the budget to the regions for matters referred to in article 107 quarter of the (old) Constitution since one third of the total budget for the regions was dependent on the surface of each region (article 5, law of August 8, 1980). It may also be noted that other advice by the Council of State rejected the territorial claims of the Flemish region on the territorial sea (bill concerning the approval of the Convention of Oslo of February 15, 1972, on the prevention of maritime pollution by dumping; bill concerning the approval of the London Dumping Convention of December 29, 1972).

In his more recent works, Mast, the well-known constitutional scholar, mentions: "the national territory comprises the land territory and the inland waterways (rivers, lakes). It is now generally accepted that the territorial sea does not belong to the proper territory of the state, but that the state's sovereignty extends to the territorial sea" [21] contra: [22–23].

The consequence of this thesis is that: "... the territorial sea cannot be considered as belonging to the territory just like that, ... The national legislation does not extend ipso facto to the territorial sea" [24]. The Council of State has confirmed this opinion in its advice on article 3 of the bill for the law on the extension of the Belgian territorial sea up to 12 nautical miles.7

In its many advices concerning the bill of the law related to the reformation of the institutions, the Council of State has confirmed that the state's sovereignty over the territorial sea is not of the same nature as the sovereignty over the territory senso strictu, in the sense that Belgian law is not applicable ipso facto on the territorial sea.8 Consequently..."the State which has "authority" over the territorial sea cannot incorporate that territorial sea in the territory of one or several public services distinct from the State (...), nor can the State give the organs of these public services one or several competences on the basis of this authority". On the one hand, the Council of State concludes that, taking into account the fact that the territorial sea cannot be considered as territory, the Belgian State cannot hand over the territorial sea to a (federated) region because the Belgian State itself does not have disposal of that territory. On the other hand, in 1978 the Council of State concluded wrongly

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6 "The territory comprises the soil, the subsoil, the fluvial domain, the territorial sea and the aerial domain". "The national territory also comprises the inland waterways and the coastal sea...".

7 Article 3 of this bill was formulated as follows: "The Belgian legislation applies to the territorial sea". This article has not been retained in the law of October 7, 1987, fixing the width of the Belgian territorial sea (Belgisch Staatsblad, October 22, 1987).

that the state cannot delegate competences related to the territorial sea to a subordinate service or a region. In an advice of 1980 the Council took the correct view and admitted that this was possible. Indeed, from an international and constitutional law point of view, there are no obstacles to extending the material competence of the Flemish region to the territorial sea.9

A limited transfer of competences has already taken place anyhow by means of the allocation of material competences to the Flemish region for certain matters with specific reference to the territorial sea and the continental shelf (Article 6, Section 1, X, nos. 2–4, 9 of the Special Law of August 8, 1980). Until now, no political consensus has been reached for other matters, and moreover, the Flemish government has — for the time being — removed this issue from its political agenda.

Apparently, the Council of State has had a profound influence on the Belgian constitutional doctrine. The separation of the territorial sea from the Belgian national territory seems to be a part of the now generally accepted principles of Belgian constitutional law. However, attention should be drawn to the fact that the authorities have not always applied these principles in a consistent way. A good example is the extension, by law, of the territorial sea from 3 nautical miles (this boundary was fixed by a Royal Decree) to 12 nautical miles. This extension by law created the impression that there was an extension of territory [14, p. 252–53]. If, however, the reasoning of the Council of State was to be applied, article 68 (3) of the old constitution could not be invoked: “No renunciation, no exchange, no extension of territory can take place but by law.” So, it would have sufficed to use a Royal Decree instead of a law to effect this extension. The Belgian government, however, opted for a law instead of a Royal Decree for the extension of its territorial sea from 3 to 12 nautical miles. The Minister of Foreign Affairs declared: “... the extension of the territorial sea can be put on the same level as an extension of the national territory,” which is clearly in contradiction with the jurisprudence and the advice of the Council of State and with the old practice to regulate the boundary of the territorial sea by Royal Decree. In its explanatory statement of the bill for the extension of the Belgian territorial sea, the Government gave the following, hardly convincing, explanation: “The boundary of the territorial sea has been fixed at 3 nautical miles by several Royal Decrees ... Strictly speaking, it would have been sufficient to change the last Royal Decree accordingly. However, the Government found it appropriate to give its intention the guarantee of a law, not only to give it a more solemn character, but also to draw upon the example given by The Netherlands and France, countries to negotiate with on delimitation agreements as stipulated in article 2.”11 This is, to put it mildly, not really a flawless argument. It is clear that the government has not been able to shed a clear light on this matter. It is only on the basis of a — disputable — thesis from the Council of State that the principle “the territorial sea is not a part of the Belgian national territory” is pushed forward.

Evidently, it is actually correct to declare that the territorial sea is not a part of the Belgian territory. The constitution is very clear on that matter. Belgium comprises three regions: the Flemish region, the Walloon region and the Brussels region. The Flemish region consists of the provinces of Antwerp, Limburg, East Flanders, West Flanders and the Flemish speaking part of Brabant. This implies that in the direction of the sea the Flemish region is limited by the territory of the province of West Flanders, which is in its turn limited by the low water line.12

However, according to the law of the sea a coastal state’s territory comprises more than land territory. The maritime territory limited by the external boundary of the territorial sea is also submitted to the state’s sovereignty and is consequently part of the state’s territory: “Land territory” and “Maritime territory” together form “State territory”. The Belgian constitutional legislator and the ordinary legislator did not bother to take into consideration the existence of the territorial sea, being nevertheless a substantial part of the sea, all together with the seabed and the subsoil and the air space above the sea, and the opportunities it offers.

Since the territorial sea, within the limits of Belgian constitutional law, is not part of the state’s territory, Belgian law is only applicable on it when it is explicitly decided so.13 Nonetheless, in 1962 the Court of Cassation already stated that “the territorial waters” are submitted to the police and security laws of the coastal state.14 It seems indisputable that exercising police authority is a territorial application of the right of sovereignty. Moreover, the execution of police authority is

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9 Documents of the Chamber, no. 627/12, 3 (1979–1980).
14 Cassation, November 23, 1962, Pasiciries 1, 1963, 375–380. In a commentary, Mr. Ganshof Van der Meersch gives an overview of the existing doctrines on the question whether the territorial sea is part of the territory of the state. In general, the doctrine was convinced that this was the case. However, according to Mr. Ganshof Van der Meersch, the existence of the right of innocent passage must be considered as a restriction of sovereignty. That is why the Court of Cassation, in its judgment, has concluded that: “the territorial waters are a close dependence of the state’s territorial domain”. So, the territorial sea has not been incorporated into the state’s territory only because there is a restriction of international law on sovereignty. Nevertheless, it is evident that whoever has sovereignty, is allowed to accept restrictions to that sovereignty, whether on land or on the sea. See also [23–27].
specifically linked to the national territory, unless decided otherwise by international law (e.g. on high seas).

The opinion that the territorial sea is not a part of the state’s territory implies that its judicial organisation is not applicable there. Consequently, the territorial competences of the Belgian law courts as stipulated in the annex of the Judicial Code cannot be extended ipso facto to the territorial sea. Thus, this maritime zone does not belong to any judicial district.

Returning to our problem of arrest of ships, this means that neither an authorised attachment judge nor an authorised bailiff can be identified without the legislator’s specific intervention. This fundamental problem has fortunately been solved by the explicit attribution of competences on that matter in the law of April 22, 1999, introducing the EEZ.

2.2.2. Is it possible to issue an arrest of ships in the territorial sea?

Before going deeper into the problem of the competence ratione loci of the attachment judge and of the bailiff, the principal problem of the possibility of issuing an arrest of ships in the territorial sea must be given a definite answer.

As far as ships at anchor in the territorial sea are concerned, or hovering ships or even ships in mere passage, the sovereignty of the coastal state remains unrestricted, allowing for a possible arrest. Of course, the restriction of the coastal state’s sovereignty in its territorial sea because of the right of innocent passage is obviously of crucial importance. The coastal state must not hamper the innocent passage of foreign vessels in its territorial sea, except in accordance with the Law of the Sea Conventions. An arrest of ships in the territorial sea is a clear impediment on the right of innocent passage. As for foreign merchant vessels, both the Geneva Convention of 1958, and the United Nations Convention on the Law of the Sea of 1982, provide that the coastal state may not levy execution or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the vessel itself in the course or for the purpose of its voyage through the waters of the coastal State (Article 20, Section 2 Convention 1958, Article 28, Section 2 Convention 1982). The text of this article presupposes that it is only the coastal State itself that cannot take conservatory measures, such as the arrest of ships, in the territorial sea, while other creditors would have the possibility to do so. This reasoning is wrong. After all, this article deals with a restriction of the civil jurisdiction of the coastal state, and without the coastal state’s initial jurisdiction, the other creditors cannot issue an arrest of ships either [28].

Nevertheless, the text of the Conventions is without prejudice to the right of the coastal State to take executive or conservatory measures in civil matters as stipulated in its internal laws, when a foreign vessel is lying in the territorial sea or passing through the territorial sea after leaving the internal waters. It is clear that on account of the law of the sea the jurisdiction of the coastal State is in principle complete, except for the prohibition to issue an arrest on foreign vessels during innocent passage because of (contractual) obligations or liabilities undertaken by the vessel outside the territorial waters of the coastal State. Of course, the rules of the conventions on the law of the sea are no obstacle to the coastal state’s jurisdiction regarding vessels flying its own flag.

As for the (conservatory) arrest of ships, the Brussels Convention of 1952 should be taken into consideration. From an international law point of view, this Convention can be considered as a lex specialis in comparison with the Geneva Convention of 1958. There seems to exist a much more liberal regime for the conservatory arrest of a ship than for levying execution against it. Article 25 of the Geneva Convention on the Territorial Sea provides that the provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them. During the discussions at the Geneva Conference of 1958, several remarks were made on the fact that the matter of civil jurisdiction, in casu the arrest of ships, had already been dealt with in detail in the Brussels Convention of 1952. In order to avoid conflict situations between the two conventions, article 25 of the Geneva Convention of 1958 implicitly states that its articles do not affect the Convention of 1952. So, arrest is possible in the territorial sea on the basis of a maritime claim, regardless of the restrictions in article 20 of the Geneva Convention which stipulates that an arrest can only take place for reasons of obligations or liabilities assumed or incurred by the vessel itself in the course or for the purpose of its voyage through the waters of the coastal state.

Consequently, for as far as the provisions of the Convention on the Arrest of Ships of 1952 are in contradiction ("not compatible") with the arrest provisions in the territorial sea by virtue of article 28 of the United Nations Convention on the Law of the Sea of 1982, the Convention on the Arrest of Ships of 1952 must yield to the 1982 Convention. Thus, the United Nations Convention on the Law of the Sea of 1982 does not allow an arrest on a foreign vessel during innocent passage, unless a maritime claim is submitted which is linked to obligations or liabilities assumed or incurred by the vessel during or in view of its voyage through the coastal state's waters.

2.2.3. Judicial competences

Trying to identify the attachment judge authorised to issue an arrest in the territorial sea, Delwaide mentions in a rather lapidary way that "the attachment judges of Bruges or Furnes will be authorised to allow an arrest of a ship in the territorial sea" [2, p. 175]. Van Aerde, however, takes the view that the attachment judges (and the bailiffs) of the judicial district of Antwerp have territorial competence to permit (or to issue) an arrest of a ship in the territorial sea.\(^{15}\) It cannot be denied that legislation did not provide for an attribution of competences until the law of April 22, 1999. This implies that the proposals in the doctrine are speculative, taking into account the fact that the territorial sea does not belong to any judicial district. Fortunately, the law of April 22, 1999 (Belgisch Staatsblad, July 10, 1999), provides that the attachment judges of the judicial districts of Antwerp, Bruges and Furnes are equally competent if the request for an arrest is related to an arrest in the territorial sea (article 54). At the same time, the bailiffs of the judicial districts of Antwerp, Bruges and Furnes, have the competence to act in the territorial sea (article 51). In this way, the problem of identifying an attachment judge and a bailiff having competence beyond the baseline is taken care of. I would be greatly surprised, however, if this attribution of competence led to a massive number of demands for arrest of ships in the territorial sea anyway.

2.3. Arrest of ships in the exclusive economic zone

The judicial competences ratione materiae and ratione loci are a problem not only in the territorial sea, but also in the EEZ.

The law of April 22, 1999 establishes the Belgian EEZ in the North Sea. The EEZ, as described in Part V of the United Nations Convention on the Law of the Sea of 1982, is an area that does not extend beyond 200 nautical miles from the territorial sea baselines. Its particular, legal regime is of major importance to the regulations concerning fishing in the 200 nautical miles zone. The coastal state can only exercise specific sovereign rights and a specified jurisdiction in the EEZ (article 56 UNCLLOS).

Thus, the coastal state has sovereign rights for the exploration, the exploitation, the conservation and the management of living and non-living natural resources of the waters and the seabed and subsoil. Consequently, the coastal state enjoys exclusiveness in the EEZ, which allows it to take conservatory and protective measures related to fishing, and to control and impose sanctions on violations of the applicable legislation. The Belgian courts will consequently deal with violations of the Belgian law concerning fishing in the EEZ, even when foreign vessels are involved. The Law of the Sea Convention of 1982 provides the possibility for the coastal state to take the necessary actions in order to require respect for the applicable law. Exercising its sovereign rights, the coastal state can take all necessary measures, including boarding, inspection, arrest and judicial proceedings (article 73). In this way, it becomes possible to arrest a vessel for reasons of civil litigation resulting from violations against the fishing regulations in the EEZ. The question can however be raised whether a maritime claim could be produced as listed in article 1468 of the Judicial Code. Moreover, the text of article 73 of the Law of the Sea Convention seems to indicate that boarding and judicial proceedings should rather be considered as actions by the government in order to safeguard their sovereign rights in the domain of fishing. The term "arrest" in the English text of the Convention (article 73, paragraph 1) must be understood in the sense of a claim in rem independent of the nature of that claim (civil, penal or administrative). It seems that the measures mentioned in article 73 of the Law of the Sea Convention give the coastal state the necessary means to safeguard its own interests in the EEZ.\(^{16}\) Does this imply at the same time

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\(^{15}\) [1, p. 128] comes to this conclusion (or rather proposal?) by analogy to article 627, no. 10 of the Judicial Code, which stipulates that the claims presented in the frame of the limitation of the liability of the shipowner, and with the objective of identifying a judge and a liquidator, must be taken to the president of the tribunal of commerce of Antwerp, when the damage has occurred in the territorial sea.

\(^{16}\) In its judgment of July 1, 1999 in the M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines vs. Guinea), the International Tribunal for the Law of the Sea (ITLOS) clearly considered the arrest of the ship by Guinea in this context. It concluded that the arrest and detention of the Saiga, the prosecution and the conviction of its master as well as the confiscation of the cargo and the seizure of the ship in the application of its customs laws in the EEZ, were contrary to the UN Law of the Sea Convention of 1982 (paragraph 136). Again in a judgment of February 7, 2000 in the "Camouco" case (Panama vs. France) ITLOS dealt with the arrest of a ship. According to the facts of the case it is even more clear here that the arrest of the Panamanian vessel "Camouco" by French naval forces was made to protect French fishing interests in its EEZ against alleged poaching activities. Basically the Tribunal decided on the form and amount of the financial security and its reasonable character and the prompt release of the ship and crew (article 73, Section 2 UNCLLOS). Also see: Revue générale de droit international public 2000, 514–530; on the prompt release procedures: 11 International Journal of Marine and Coastal Law 2 (1996).
the interests of its subjects? Whenever personal interests of the coastal state’s subjects can be reduced to the public interest, the state can without any doubt use those means mentioned in article 73. But most of the time, the personal interests of private subjects are not necessarily identical to the interests of the state. Consequently, the question can be raised whether the interest of the state and the public interest in the domain of fishing can be safeguarded by private civil actions. It is clear that a private action by a fisherman to stop the fishing activities of another fisherman in the EEZ because the assigned quota is transgressed is in the interest of the public. Indeed, such particular action serves to protect the biological resources.

Nevertheless, it is initially the task of the authorities to take necessary measures in order to avoid violations of the regulations on fishing. When, however, the authorities fail to do so, the citizens can always go to court. In this case, no arrest of the ship is needed. It is sufficient to seize the fishing equipment for which no maritime claim is required. Consequently, there is no clear basis for allowing an arrest of a ship in the EEZ based on article 73 of the Law of the Sea Convention.

The problem of arrest of ships in the EEZ becomes even more complicated in the framework of article 220 of the Convention of 1982. This article stipulates that in case of a violation of the legal regulations concerning pollution in the EEZ, i.e. discharges that have caused or that risk causing major damage to the coastline or related interests of the coastal state in the EEZ or in the territorial sea, the coastal state has the right to take action, including detention of the vessel (article 220, Section 6). On the basis of this text it can be presumed that an arrest would not be justified. Detention of a vessel is not necessarily the result of a judicial action but rather more an administrative, preventive and public measure for which no judicial intervention is required. Nor is this measure taken for the safeguarding of private rights. The English text, however, created some confusion stating that “... State may... institute proceedings, including detention of the vessel, ...” (article 220, Section 6). So it is not clear whether other measures, such as arrest of ships, would not be acceptable. On the other hand, it is quite remarkable that in the text the word “arrest” is not used and is replaced by “detention”. Although the text as well as the preparatory works is not very clear, it seems that there has been an attempt to avoid the practice of arrest of ships in the EEZ.

The law introducing the EEZ in the North Sea in Belgium, also regulates the problem of territorial competence of the attachment judges (and the bailiffs) in the EEZ. It is stipulated that the attachment judges of the judicial districts of Furnes, Bruges and Antwerp are equally competent. An analogous regulation has been stipulated for the bailiffs. Rationale materiae is however disputable whether these judges have competence for authorising a ship’s arrest in the EEZ. And it is not certain at all whether an arrest or even a detention is practically feasible in the EEZ.

3. Conclusion

Implicitly because of the specific view of Belgian legal authorities with respect to the legal character of the territorial sea, the territorial judicial organisation as provided in the Judicial Code, cannot be applied to this maritime zone. Therefore, it became obvious that without specific legislative initiative it would not be possible to identify a competent attachment judge or bailiff. It took until 1999 before such a specific law was passed in Parliament, leaving no doubt at last on this matter.

Finally, it can be concluded that from a maritime law point of view, it still is disputable whether in principle an arrest is feasible in the EEZ. The competence of a coastal state to issue an arrest in the EEZ is limited by the application of article 73 (fishing) and article 220 (pollution) of the Convention on the Law of the Sea of 1982. It is even more doubtful whether article 220 allows for an arrest of ships. For the application of article 73 it will not be easy to introduce an appropriate maritime claim. As for other applications of arrests in the EEZ, they do not seem realistic, and are not really feasible because of practical and pecuniary considerations. This remark also applies to the arrest itself. The identification of the attachment judges competent for the EEZ as foreseen in the law introducing the EEZ in Belgium will certainly be appreciated by law practitioners. Nevertheless, this regulation is in danger of turning into empty packing. Just as for the territorial sea, it would be amazing if the attachment judges in future were to be flooded with demands for the arrest of ships in the EEZ.

References

[27] Franckx E. Belgium extends its territorial sea up to 12 nautical miles, RBDI 1987, pp. 61–3.