

## Non-paper by Nauru on the Legal basis for the Council to Adopt Decision on Safety Zones

### 1. Introduction

- 1.1. This non-paper has been drafted to inform the discussion of the Council of the International Seabed Authority (the **Authority** or **ISA**) in regard to the legal basis for measures to be taken in response to the Greenpeace incidents in the NORI-D contract area in late 2023 (the **NORI-D Incidents**). This non-paper:
  - (a) Sets out the scope of the right to protest on the high seas and explains its limits, including under the United Nations Convention on the Law of the Sea (**UNCLOS**);
  - (b) Explains the Authority's rights and obligations to adopt measures to protect human life, safeguard States' sovereign rights, and uphold the rights of contractors; and
  - (c) Proposes ways in which the Council can act to fulfil those obligations, including to adopt a rule (or interim rule), establish a policy, request the Legal and Technical Commission to advise the Council on its options, or request the Authority's Legal Counsel to prepare an opinion paper with options for the Council to consider further.

### 2. The right to peaceful protest is limited by the law of the sea

- 2.1. It is undisputed that there exists a right to conduct peaceful protests at sea. As noted by the Tribunal in the *Arctic Sunrise* arbitration,<sup>1</sup> this right is related to the freedom of navigation and finds its foundation in the freedom of expression and freedom of assembly.<sup>2</sup> The existence of this right has also been recognised by international organisations.<sup>3</sup>
- 2.2. The right to conduct peaceful protests at sea, however, is not an unlimited license to conduct any actions or activities without regard to their impact on others. Instead, it is subject to limits defined by "*the law of the sea*".<sup>4</sup> This includes that the high seas are reserved for peaceful purposes, that the freedom of the high seas (including any freedom to conduct a peaceful protest) must be exercised with "*due regard to the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under [UNCLOS]...with respect to activities in the Area*" (UNCLOS, Article 88)(emphasis added), and that all "*activities in the marine environment shall be conducted with reasonable regard for activities in the Area*" (UNCLOS, Article 87(2)).
- 2.3. More specifically, States (and by extension the Authority on behalf of its member States under Article 157(1) of UNCLOS) are able to intervene to prevent or stop protests to pursue a "*legitimate aim*", such as the protection of a State's sovereign rights.<sup>5</sup> While States must tolerate a level of nuisance from protests at sea, where a protest impinges upon or threatens a sovereign right, reasonable, necessary, and proportionate measures may be taken to bring the protest to an end.<sup>6</sup>

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<sup>1</sup> *The Kingdom of the Netherlands v The Russian Federation*, PCA Case No. 2014-02, Award on the Merits (14 August 2015) (**Arctic Sunrise Award**), paras. 227-228.

<sup>2</sup> See, e.g., *International Covenant on Civil and Political Rights*, 999 UNTS 171, Articles 19 and 21; and the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), Articles 19 and 20.

<sup>3</sup> See, International Maritime Organization, *Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas*, Res. MSC303(87), 17 May 2010; and International Whaling Commission, *Safety at Sea*, Res. 2011-2.

<sup>4</sup> *Arctic Sunrise Award*, para. 228.

<sup>5</sup> *Arctic Sunrise Award*, paras. 325-6.

<sup>6</sup> *Arctic Sunrise Award*, paras. 326 and 328.

Such sovereign rights include the right to prevent the violation of laws, harm to persons or damage to equipment, and delays or interruptions to essential operations.<sup>7</sup>

- 2.4. As such, the right to peaceful protest does not prevent any State – nor the Authority – from adopting reasonable, necessary, and proportionate measures in accordance with UNCLOS to prevent or end actions that impinge upon sovereign rights or otherwise are in breach of the law of the sea, including as it is articulated in UNCLOS.

### **3. The Authority is empowered and obliged to act to protect human life and rights under UNCLOS**

- 3.1. The Authority is both empowered and obliged to act to ensure that protests do not put at risk human life or safety, or interfere with States' rights under UNCLOS and contractors' rights and obligations under their contracts. These powers and obligations come from UNCLOS and are unique to the Authority given it is the only body authorised to exercise control over the Area.
- 3.2. First, Article 146 of UNCLOS mandates that the Authority take measures necessary "*to ensure effective protection of human life*" with respect to activities in the Area. This includes adopting rules to "*supplement existing international law*". Thus in the absence of specific and explicit measures in existing international legal regimes to prevent protests that threaten human life in the Area, it is the Authority that must put in place such measures informed by the relevant existing international law.
- 3.3. Second, Article 153(4) of UNCLOS mandates that the Authority exercises control over activities in the Area as is necessary for the purpose of securing compliance with Part XI of UNCLOS, the relevant Annexes of UNCLOS, the rules, regulations and procedures of the Authority, and approved plans of works; and Article 153(5) empowers the Authority to take measures provided for in Part XI to ensure compliance with Part XI and the exercise of the Authority's functions of control and regulation under contracts. Furthermore, the Authority has also undertaken certain commitments to contractors in their exploration contracts, including to "*fulfil in good faith its powers and functions under the Convention and the Agreement in accordance with article 157 of the Convention*".<sup>8</sup>
- 3.4. It follows from these provisions that the Authority is under a direct obligation to take measures to ensure that Part XI is complied with, including to protect sponsoring States' rights under Part XI and the rights of sponsored contractors. This includes measures to prevent and bring to end unlawful protests that impinge such rights.

### **4. The Council must act to ensure the Authority fulfils its obligations**

*No legal impediment to establishing safety zones around vessels undertaking activities in the Area*

- 4.1. To fulfil the Authority's obligations under UNCLOS, the clearest option available to the Council is to establish reasonable and proportional safety zones around vessels undertaking activities in the Area.
- 4.2. The establishment of safety zones is common around ocean installations and such safety zones are specifically contemplated in Articles 60, 147(2)(c) and 260 of UNCLOS. While UNCLOS does not explicitly refer to the use of safety zones around vessels, nowhere does it prohibit their creation as long as they are consistent with the relevant rights and obligations UNCLOS contains.

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<sup>7</sup> *Arctic Sunrise Award*, para. 327.

<sup>8</sup> *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, ISBA/19/C/17 (22 July 2013), Annex IV (Standard Clauses for Exploration Contract), Clause 13.4.

- 4.3. The Authority is not limited to only enacting measures that are explicitly referred to in UNCLOS. Indeed, the Authority has approved policy measures such as Regional Environmental Management Plans (**REMPs**), which while not explicitly referred to in UNCLOS are clearly supported by the Authority's powers and its obligation to take necessary measures to ensure effective protection of the marine environment under Article 145. This included referring to REMPs to adopt a subsequent decision to establish areas of particular environmental interest wherein certain exploration and exploitation activities are prohibited.<sup>9</sup> The protection of human life is equally important as to the protection of the marine environment and would similarly justify the adoption of an appropriate policy measure that shall include a decision to: (i) protect the right to protest; (ii) protect human life; and (iii) preserve the rights of sponsoring States and contractors by establishing a mechanism for the establishment of a proportional safety zone around vessels undertaking activities in the Area.
- 4.4. There are a number of precedents of member States establishing safety zones around vessels conducting exploration and exploitation of national resources within their domestic regimes, including in New Zealand, Australia, and Canada.<sup>10</sup> Thus, it cannot be right to say that safety zones can never be established around vessels either legally or practically.
- 4.5. Vessels undertaking activities in the Area are often connected to the seabed and thus have limited mobility. This makes such vessels closely akin to ocean installations for which the establishment of safety zones is routine. Further justifying the use of safety zones around such vessels.
- 4.6. It also would not be credible to suggest that establishing safety zones somehow interferes with any fundamental human right. As noted above, the international right to peaceful protest contains within itself certain limits and is not an unbound license to act in a way that threatens life or interferes with the rights of others. Further, the existence of safety zones under existing international and domestic legal regimes demonstrates that it cannot be the case that the mere institution of safety zones is a problematic interference with human rights. Peaceful protests can continue outside of the relevant safety zone and be conducted in a manner that respects human life and safety, and the rights of all States and contractors.
- 4.7. The Authority also has jurisdiction over what occurs on the ocean surface above the Area, not just on the seabed itself. The term "*activities in the Area*" is not limited to just the sea floor but instead includes a range of activities that extend to the surface. The International Tribunal for the Law of the Sea confirmed in its advisory opinion that the term "*activities in the Area*" encompass "*the recovery of minerals from the seabed and their lifting to the water surface*" as well as other "*directly connected*" activities such as preliminary separation of minerals, disposal of minerals at sea and certain types of transportation of minerals within the high seas.<sup>11</sup> To artificially limit the jurisdiction of the Authority solely to what occurs 4,000 to 5,000 meters below the surface of the sea would be a radical departure from member States' current understanding of the Authority's work, and result in a severe narrowing of its regulatory powers and ability to exercise control over contractors.

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<sup>9</sup> See: ISBA/18/C/22.

<sup>10</sup> See *Crown Minerals Act 1991* (New Zealand), ss 101B (2), (6) and (7); *Collision Regulations* (Canada), CRC, c. 1416, Rule 43 (Safety Zones Around Exploration or Exploitation Vessels); and *Harbors and Navigation Regulations 2023* (South Australia, Australia), Regulation 140.

<sup>11</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, paras. 94-96.

- 4.8. Thus there is no legal impediment to establishing safety zones around vessels undertaking activities in the Area, nor is there any practical reason why an appropriate regime for their establishment cannot be instituted by the Authority.

*The Council has the power to implement a safety zone regime*

- 4.9. The Council has at least three options for instituting a safety zone regime around vessels undertaking activities in the Area:
- (a) Under Article 162(2)(o)(ii) of UNCLOS, the Council is empowered to *“adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority, and any amendments thereto, taking into account the recommendations of the Legal and Technical Commission or other subordinate organ concerned”*;
  - (b) Under Article 162(1) of UNCLOS, the Council is empowered to *“establish...specific policies to be pursued by the Authority”* on any matter within the competence of the Authority; and
  - (c) Under Article 162(2)(l) of UNCLOS, the Council is empowered to *“exercise control over activities in the Area”* in accordance with Article 153(4) and the Authority’s rules, regulations and procedures.
- 4.10. The Republic of Nauru is open to conferring on the best way for the Council to use these powers to ensure protests in the Area are conducted lawfully and peacefully, and to ensure the Authority complies with its duties under UNCLOS. Options available to the Council include:
- (a) Adopting a rule or interim rule, until the necessary amendments are made to the relevant parts of the Mining Code;
  - (b) Adopting a specific policy of the Authority on safety zones;
  - (c) Requesting the Legal and Technical Commission to consider these matter and provide advice to the Council on options; and
  - (d) Requesting the Authority’s Legal Counsel to prepare an opinion paper including options for the Authority to deal with these matters.
- 4.11. There is also no current legal proceeding that would be prejudiced by the Council considering these matters and adopting an appropriate measure. The current appeal proceedings in the Netherlands arising from the NORI-D Incidents does not involve the issues raised in this non-paper. Further, any measure adopted by the Council would be prospective in nature, and thus not attempt to change the legal regime that applies to the NORI-D Incidents. The Authority is therefore not restricted by those appeal proceedings from taking any action or implementing any rules or regulations that it may consider necessary to comply with its mandate under the Convention.

## **5. Conclusion**

- 5.1. The existence of a clear rule or policy in regard to safety zones around vessels undertaking activities in the Area will enable the Authority to fulfil its obligations to ensure that human life is protected, and that the rights of States and contractors are upheld. It would also facilitate peaceful protest in the Area, providing certainty for protestors to achieve their objectives.
- 5.2. There are no legal or practical restrictions on the establishment of safety zones around vessels undertaking activities in the Area. Indeed, such a regime would be consistent with the current precedent within UNCLOS for safety zones around installations, and a range of domestic regimes that establish safety zones around vessels.

- 5.3. As such, the Council should decide upon an appropriate measure to institute a safety zone regime, or find another method for ensuring the Authority fulfils the requirements of UNCLOS.