

# 1

## Crimes at Sea: A Law of the Sea Perspective

Efthymios D. Papastavridis \*

### SECTION 1 INTRODUCTION

Back in 1982, when the contemporary “Constitution of the Oceans”, the UN Convention on the Law of the Sea<sup>1</sup>, was finally concluded, the problem of criminality at sea was not of primary concern. The division of jurisdictional competences between coastal and flag States seemed adequate to address the then maritime criminality: serious crimes within the internal or territorial waters as well as illicit fishing within the — then new — Exclusive Economic Zone (EEZ) were to be addressed by coastal States, whereas crimes committed on the high seas were to be addressed by flag States. International policing and assertion of jurisdiction by other States on the high seas were confined to a handful of crimes, such as piracy, the slave trade and unauthorized broadcasting.

More than 30 years later the picture is definitely not the same: there is an array of criminal activities at sea, including piracy and armed robbery at sea; maritime terrorism and proliferation of weapons of mass destruction (WMD); migrant smuggling and trafficking in persons; drug trafficking; organized crime within the fishing industry; oil bunkering — all of which challenge the public order of the oceans. These crimes occur in various maritime zones, but predominantly in areas beyond national jurisdiction. In response, States have entered in various multi-lateral and bilateral agreements and partnerships as well as have increased their policing activities, especially, on the high seas. Several partnerships in various forms have been established to this end, such as the Proliferation Security Initiative (PSI)<sup>2</sup> as well as numerous agree-

---

\*Director of Studies of the Centre, English-speaking Section. Lecturer, Democritus University of Thrace; Research Fellow, Academy of Athens.

1. See United Nations Convention on the Law of the Sea, 1833 *UNTS* 397; entered into force 16 November 1994; as at 30 January 2013, LOSC has 165 parties, including the European Community; see at [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The United Nations Convention on the Law of the Sea \(hereinafter, LOSC\)](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea (hereinafter, LOSC)).

2. PSI is described on the website of the US Department of State as “a global effort that aims to stop trafficking of weapons of mass destruction (WMD), their

ments concluded concerning the interdiction of suspect vessels in this regard, such as the 2005 SUA Protocol<sup>3</sup> or the 2000 Smuggling Protocol<sup>4</sup>.

All the above-mentioned illicit activities at sea are inextricably intertwined in the sense that not only do they involve activities of “organized criminal groups” within the meaning of the 2000 UN Convention against Transnational Organized Crime (UNTOC)<sup>5</sup>, but often the same organized criminal groups are associated with more than one illicit activity. This poses significant hurdles both in respect of the prevention of such crimes and in respect of the applicable legal framework. It is not surprising that a naval asset engaged, for example, in a counter-piracy operation may encounter a fishing trawler that, while suspected of being engaged in piracy, is actually engaged in smuggling of migrants or drug trafficking. This may necessitate the application of different Rules of Engagement and may jeopardize the effectiveness of the operation in question. Evidently, an area with heightened and multifaceted transnational organized criminal activity, including illegal fishing, human trafficking, piracy, is West Africa.

It is for this reason that an increasing number of multipurpose maritime interdiction operations have been recently launched with a view to patrolling waters and countering all potential threats to maritime security. Such operations are pursuant either to international agreements, such as the 2008 CARICOM Maritime Security Agreement<sup>6</sup> or to inter-

---

delivery systems, and related materials to and from states and non-state actors of proliferation concern”: see [www.state.gov/t/isn/c10390.htm](http://www.state.gov/t/isn/c10390.htm).

3. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (2005), available on the website of the US Department of State at [www.state.gov/t/isn/trty/81727.htm](http://www.state.gov/t/isn/trty/81727.htm) (hereinafter, 2005 SUA Protocol). The 2005 SUA Protocol entered into force on 28 July 2010 and as at 30 April 2013 it had 23 parties; see the list of States parties available at <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf>.

4. 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 *UNTS* 507 (entered into force 28 January 2004) (hereinafter, Smuggling Protocol). As at 10 May 2013, the Smuggling Protocol had 135 parties: see [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en).

5. “‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit” (UNTOC; Article 2 (a); reprinted in 40 *ILM* (2001), 335).

6. CARICOM Maritime and Airspace Security Cooperation Agreement, signed at Bolans, Antigua and Barbuda on 4 July 2008; available at [www.caricom.org/jsp/secretariat/legal\\_instruments/agreement\\_maritime\\_airspace\\_security\\_cooperation.pdf](http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_maritime_airspace_security_cooperation.pdf) (hereinafter, CARICOM Agreement).

agency co-operation agreements. The United States has been engaged in multipurpose operations in the Caribbean Sea as well as the Agency for the Management of Operational Cooperation at the External Borders of the European Union (FRONTEX) lately in the Mediterranean Sea<sup>7</sup>.

In addition, the effective repression of transnational organized crime at sea will never be possible without having adequate and precise legislation in place. It is a common observation that very often States sign and ratify treaties, yet they fail in taking the appropriate legislative measures to give teeth to these international instruments. As a consequence, many incidents involving transnational organized crime at sea never reach a trial phase, while it is observed that often national courts assume a divergent and controversial standing in relation to some issues, e.g. drug trafficking<sup>8</sup>.

These issues and many others were discussed extensively during the 2012 Centre for Research and Studies of the Hague Academy. This chapter serves as an introduction to the excellent research papers that are found in the present volume. It aims to set the scene for the analysis of the legal framework of “crimes at sea”, focusing in particular on questions relating to international law of the sea. Accordingly, it will, first, have regard to the LOSC and its provisions concerning crimes at sea, especially from the perspective of the jurisdictional competences that each State has in the various maritime zones under LOSC. Then, the focus will shift to “maritime criminality” as such: each category of crimes at sea will be presented and the relevant measures taken by the international community will be canvassed. It must be noted, from the outset, that the relevant analysis will be restricted to what occurs at sea and not on dry land, since these questions are brilliantly explored elsewhere<sup>9</sup>. Also, needless to say, it will not be exhaustive in view of the research papers to follow in the Volume at hand.

## SECTION 2 LOSC AND CRIMINALITY AT SEA

### Paragraph 1 Internal Waters

States enjoy exclusive sovereignty in their internal waters, including ports. This means that no State is obliged to allow

---

7. For further information regarding FRONTEX, see its website: [www.frontex.europa.eu](http://www.frontex.europa.eu). See also generally R. Weinzierl and U. Lissou, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea*, Berlin, German Institute for Human Rights, 2007, and E. Papastavridis, “Fortress Europe and FRONTEX: Within or Without International Law?”, 79 *Nordic Journal of International Law* (2010) 75.

8. See e.g. *United States v. Bellaizac-Hurtado and Others*, Case 11-14049 (11th Cir. 2012).

9. See K. Trapp, Chapter 2, *infra*.

foreign vessels into its internal waters and especially its ports, except in cases of distress<sup>10</sup>, or where this is provided for in a bilateral or multi-lateral treaty<sup>11</sup>.

With regard to jurisdiction over criminal acts, foreign ships entering a port are subject to the sovereignty of the coastal State; hence, the latter has criminal jurisdiction over them. This notwithstanding, the coastal State usually refrains from exercising criminal jurisdiction over matters involving solely the internal discipline of the ship<sup>12</sup>. Instead, it will exercise criminal jurisdiction in the following cases: (i) when an offence committed on board the ship is serious or it affects or is likely to affect the peace and the good order of the port; (ii) when the intervention of the coastal State is officially requested by the master of the vessel or the port consul of the flag State; (iii) when a non-crew member is involved; (iv) when matters which do not concern the “internal economy” of the foreign vessel, such as pollution, are involved<sup>13</sup>.

It is evident that the illicit activities under scrutiny, like drug trafficking or maritime terrorism, will be subject to the jurisdiction of the port State. The latter has also a very significant role to play in fighting illegal fishing and serious maritime pollution. Suffice to mention with regard to illegal fishing Article 23 (1) of the 1995 Fish Stocks Agreement, providing that the port State has not only the right, but also the duty, to adopt measures in accordance with international law, with the aim of promoting “the effectiveness of subregional, regional and global conservation and management measures”<sup>14</sup> as well as the 2009 Agreement

---

10. See *inter alia*, R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester, Manchester University Press, 1999, 63 (hereinafter: Churchill and Lowe), and R. Barnes, “Refugee Law at Sea”, 53 *ICLQ* (2004), 58. See also Coppens, Chapter 10, *infra*, on the delivery of persons rescued at sea to a port of a place of safety.

11. See, e.g., 1956 Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of America, Article XIX (2); 285 *UNTS* 232.

12. For long time, theory oscillated between the Anglo-American and the French positions on the reasons why coastal States refrained from exercising jurisdiction over these matters; see G. Gidel, *Le droit international public de la mer*, Vol. 2: *Les eaux intérieures* (reprint), Paris, Douchemin, 1981, 87, and pp. 204-205; A. Clapham, *Brierly's Law of Nations*, 7th ed., Oxford, Oxford University Press, 2012, 215.

13. See M. Hayashi, “Jurisdiction over Foreign Commercial Ships in Ports: A Gap in the Law of the Sea Codification”, 18 *Ocean Yearbook* (2004), 505.

14. See UN Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, 2167 *UNTS* 88 (hereinafter, 1995 Fish Stocks Agreement). For commentary see M. Hayashi, “The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention”, 29 *Ocean & Coastal Management* (1995), 51.

on Port State Measures<sup>15</sup>. On the marine pollution front<sup>16</sup>, reference should be made to Article 218 (1), LOSC, which sets out:

“When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.”

Thus, the port State jurisdiction is innovative in the sense that the port State is entitled to take enforcement action against a vessel even where a violation was committed on the high seas or marine spaces under that State’s jurisdiction. This port State control is enhanced by many global treaties in the field of pollution regulation and marine safety, such as the 1974 SOLAS Convention<sup>17</sup> and the MARPOL Convention<sup>18</sup>. In addition, port States have formulated regional institutions through Memoranda of Understanding (MoUs), which aim at the effective suppression of such illicit activities<sup>19</sup>.

## Paragraph 2      **Territorial Waters**

The coastal State exercises sovereignty over its territorial waters, subject, however, to certain restrictions, particularly the right of innocent passage, which ships of all States enjoy<sup>20</sup>. A vessel’s passage is considered “innocent” where it is not prejudicial to the peace, good order or security of the coastal State (Article 19 (1), LOSC). LOSC includes a long list of activities and circumstances whereby innocence is deemed as lost, such as fishing, serious pollution, research (Article 19 (2), LOSC). If a foreign vessel engages in such activities the coastal State is

---

15. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted in November 2009, Appendix V of the FAO Council, 137th Session, Rome, 28 September–2 October 2009. It has not yet entered into force. See further Oanta, Chapter 4, *infra*.

16. See further Gahlen, Chapter 3, *infra*.

17. International Convention for the Safety of Life at Sea, 1 November 1974, Annex, Chapter 1, Regulation 19, 1184 *UNTS* 2.

18. International Convention for the Prevention of Pollution from Ships of 1973, as modified by the 1978 Protocol, Regulation 11 of Annex I, 1340 *UNTS* 184.

19. See *inter alia* T. McDorman, “Regional Port State Control Agreements: Some Issues of International Law”, 5 *Ocean and Coastal Law Journal* (2000) 207.

20. See *Corfu Channel (United Kingdom v. Albania)*, Judgment (Merits), *ICJ Reports 1949*, p. 1, p. 28.

entitled to take the necessary steps in its territorial sea to prevent passage which is not innocent in accordance with Article 25 (1). Coastal States may enact legislation only for the range of matters stipulated in Article 21, LOSC. This includes, among others, the safety of navigation, conservation of living resources, and violations of customs or immigration laws.

As regards criminal jurisdiction in general, given that the territorial sea is under the sovereignty of the coastal State, the latter may, in principle, exercise criminal jurisdiction over foreign vessels passing through the territorial sea<sup>21</sup>. Nonetheless, in order to pay due regard to the interests of navigation, Article 27, LOSC, sets out that the criminal jurisdiction of the coastal State “should not” be exercised on board a foreign vessel passing through the territorial sea, save only in the following cases:

“(a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.”

The restriction of criminal jurisdiction does not apply to offences on board a foreign ship passing through the territorial sea after leaving internal waters pursuant to Article 27 (2), LOSC.

It follows that the majority of the criminal activities, which are of interest for the international community, would be subject to the coastal State’s jurisdiction if they are committed in the territorial waters: (i) *drug trafficking* is explicitly mentioned in Article 27 (1), LOSC; (ii) *smuggling migrants* to the coastal State<sup>22</sup>; and (iii) *illegal fishing* would be in contravention to the domestic laws of that State enacted in accordance with Article 21, LOSC; (iv) *acts of maritime terrorism* would undoubtedly disturb the peace and *ordre public* of the territorial sea (Article 27 (1) LOSC); (v) *piracy jure gentium* takes place on the high seas, albeit *armed robbery* would be criminalized under domestic legislation (Articles 21 and 27); and (vi) concerning the *pollution of marine environment*, Article 220 (2), LOSC provides that

“Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage

21. See, in general, I. Shearer, “Problems of Jurisdiction and Law Enforcement against Delinquent Vessels”, 35 *ICLQ* (1986), 320, at 325-329.

22. See further Guggisberg, Chapter 6, *infra*.

therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State . . . may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.”<sup>23</sup>

The only thorny question may arise in respect of foreign vessels carrying illicit material, such as WMD components, and traversing the territorial sea bound to another State. In such cases, LOSC does not seem to afford a clear legal basis for the coastal State to interdict that vessel; only pursuant to other legal bases such as the Security Council (SC) resolution 1540 (2004) or the consent of the flag State<sup>24</sup>. On the other hand, it has been argued, for example, that coastal States may declare the transport of WMD and relevant software as a crime under their national criminal law pursuant to the protective principle and take enforcement action on the basis of Article 27 of LOSC<sup>25</sup>.

### Paragraph 3      **International Straits**

Less power to exert authority and jurisdiction is granted to the coastal State with respect to straits used for international navigation. Under LOSC, the regime of “non-suspendable innocent passage” through straits is supplemented by another entitlement, i.e. the right of transit passage<sup>26</sup>. The right of transit passage applies only to straits connecting high seas or EEZs with other areas of high seas or EEZs and as long as these are used for international navigation. There are also straits covered by particular treaty regimes (e.g. the Dardanelles)<sup>27</sup>.

The LOSC grants the coastal State with the competence to adopt laws and regulations relating to transit passage. By virtue of Article 42 (1), those laws and regulations may be in respect of all or any of the following:

---

23. See further Gahlen, Chapter 3, *infra*.

24. See further discussion in Trapp, Chapter 2, *infra* and Cherief, Chapter 13, *infra*.

25. See, e.g., S. E. Logan, “The Proliferation Security Initiative Navigating the Legal Challenges”, (2005) 14 *Journal of Transnational Law and Policy*, 253, 263.

26. See in general H. Caminos, “The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea”, 205 *Recueil des cours* (1987), 13-245.

27. See, e.g., the Convention Regarding the Regime of Straits (1936); 31 *AJIL Supplement* (1937), 1-17.

“(a) the safety of navigation and the regulation of maritime traffic, as provided in article 41; (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear; (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits”.

It is submitted that the majority of crimes under scrutiny would be subject to both the legislative and enforcement jurisdiction of the coastal State, especially in view of the provision of Article 42 (1) (d) above. A recurring question again would be what about a vessel carrying WMD components or smuggling migrants in transit passage to another State? The answer again would be that the legal basis for any assertion of jurisdiction would not be afforded by LOSC, albeit by the SC resolution 1540 (2004) or another treaty, such as the 2000 Smuggling of Migrants Protocol (Article 8).

#### Paragraph 4 **Contiguous Zone**

It has been long accepted that coastal States may exercise certain police powers outside their territorial waters in a zone known as the contiguous zone<sup>28</sup>, in relation to offences already committed, or in the process of being committed, there. Under Article 33, LOSC,

“1. . . . the coastal State may exercise the control necessary to:  
(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;  
(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”

As Shearer notes,

“the first limb [of para. 1] applies to inward-bound ships and is anticipatory or preventive in character; the second limb [of para. 1], applying to outward-bound ships, gives more extensive

---

28. See generally S. Oda, “The Concept of the Contiguous Zone”, 11 *ICLQ* (1962), 153.

power and is analogous to the doctrine of hot pursuit . . . Since laws on the substantive subjects of customs, fiscal, immigration or sanitary matters cannot be applied in the contiguous zone, it follows that an offence cannot be committed until the boundary of the territorial waters is crossed by inward-bound ships. ‘Control’ therefore must be limited to such measures as inspections and warnings and cannot include arrest or forcible taking into port.”<sup>29</sup>

Indeed, Article 33 literally means that the coastal State may exercise only enforcement, not legislative, jurisdiction within its contiguous zone; hence, action of the coastal State may only be taken concerning offences committed within the territory or territorial sea of the latter State and not in respect of anything done within the contiguous zone itself<sup>30</sup>. Moreover, it must be underscored that the contiguous zone would be either part of the high seas or part of the EEZ for States that have declared such zone.

As regards the crimes of our concern, the following comments are in order: coastal States may apprehend in the contiguous zone the outward ships that have committed the relevant offence within the territorial sea either pursuant to Article 33 (e.g. for crimes such as drug trafficking or smuggling of migrants) or pursuant to the doctrine of hot pursuit enshrined in Article 111 of LOSC and discussed later<sup>31</sup> (e.g. for crimes such illicit fishing or terrorism). Insofar as the inward ships are concerned, there seems to be a watershed difference, which, as stressed above, is that typically there has been no violation of the municipal laws of the coastal State. Thus, any assertion of jurisdiction, both prescriptive and enforcement, would have to be premised upon the relevant provisions of LOSC concerning the EEZ, if the coastal State has declared such a zone, or the high seas as well as upon other international agreements.

In more detail, as regards the crimes at sea addressed in this volume:

(i) *illegal fishing*: if the coastal State has declared an EEZ, it can exert jurisdiction under Article 73 (1), LOSC; if not, there has to be a multilateral or bilateral treaty to which both the coastal and the flag State of the delinquent vessel are parties<sup>32</sup>, or the consent of the flag State;

(ii) *smuggling of migrants*: save the rare instance of the application of Article 60 (2), LOSC, namely when the smuggling vessel is located

29. Shearer, *supra* footnote 21, at 330.

30. Sir Gerald Fitzmaurice is a leading supporter of this view; see G. Fitzmaurice, “Some Results of the Geneva Conference on the Law of the Sea”, 8 *ICLQ* (1959), 114.

31. See *infra* footnote 65 and accompanying text.

32. For example see Article 21 (1) of the 1995 Fish Stocks Agreement.

within the safety zone around an artificial island or an installation of the coastal State within its EEZ, all other cases of smuggling of migrants either in the EEZ or on the high seas are to be regulated by other treaties<sup>33</sup>;

(iii) *illegal pollution*: similar to illicit fishing, if the coastal State has declared an EEZ, it would suffice to exercise jurisdiction according to Article 56 (1) (b), LOSC, if not, there are few treaties granting such rights<sup>34</sup>;

(iv) *drug trafficking*: save again the rare instance of Article 60 (2), LOSC, there must be a bilateral or multilateral agreement granting such enforcement powers or the consent of the flag State;

(v) *maritime terrorism and proliferation of WMD*: there is no legal basis under LOSC for the seizure of an inward-bound ship suspected of being engaged in terrorist acts or carrying WMD material. The coastal State may enforce its jurisdiction pursuant to 2005 SUA Protocol or pursuant to the consent of the flag State.

(vi) *piracy*: beyond the limits of the territorial seas, all States, including the coastal State concerned, may intercept and seize the pirate vessel in accordance with Article 105, LOSC<sup>35</sup>.

#### Paragraph 5      **Exclusive Economic Zone (EEZ)**

By virtue of Article 57, LOSC, coastal States may claim an EEZ up to 200 miles<sup>36</sup>. There, first and foremost, coastal States exercise sovereign rights for the purposes of “exploring and exploiting, conserving and managing” both its living and non-living resources (Art 56). In addition, coastal States enjoy jurisdiction over the establishment and use of artificial islands and installations, marine scientific research, and the preservation of the marine environment in the EEZ, in addition to other (Art. 56 (b) and (c), LOSC). As to the juridical nature of the EEZ, it is described as a *sui generis* zone, i.e. a zone subject to a distinct jurisdictional framework and comprised of neither territorial seas nor high seas. Thus, Article 58, LOSC, provides that three of the freedoms of the high seas — i.e. navigation, over-flight, and the laying of cables and pipelines — are exercisable by all States within the EEZ in accordance with the general framework governing the high seas.

---

33. Arguably, certain cases of smuggling of migrants/human trafficking may be assimilated to slave trade.

34. A notable exception is the Protocol Relating to the Intervention on the High Seas in Cases of Pollution by Substances Other than Oil, 1313 UNTS 4.

35. See further Grymaneli, Chapter 5, *infra*.

36. On EEZ see generally D. Attard, *The Exclusive Economic Zone in International Law*, Oxford, Clarendon Press, 1987.

As far as the crimes in question are concerned,

(i) *illegal fishing*: it is evident that the coastal State may exercise jurisdiction by virtue of its sovereign rights in this regard. Article 73 (1), LOSC, sets forth that:

“The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.”

(ii) *marine pollution*: several provisions of Part XII of the Convention are relevant to enforcement in the EEZ. Article 210 (5), LOSC, allows the coastal State to “permit, regulate and control dumping in its EEZ”. Moreover, national laws and regulations shall be “no less effective” than “global rules and standards”, while specific power to enforce these laws and regulations in their EEZ is given to the coastal States by Article 216, LOSC, though that jurisdiction is concurrent with that of the flag State. Under Article 211 (5), LOSC, States may adopt laws and regulations on pollution from vessels conforming to “generally accepted international rules and standards established through the competent international organization” for the purpose of enforcement in their EEZ. Article 220 (3) allows the coastal State only to “require” the offending vessel to give information regarding its identity, route and details of the pollution incident. A series of enforcement measures, however, may be taken where the discharge causes or threatens “significant pollution of the marine environment”, including boarding and physical inspection (Article 220 (5), LOSC) and where a discharge causes ‘major damage or threat to major damage’, namely arrest of the vessel (Article 220 (6), LOSC)<sup>37</sup>.

(iii) *drug trafficking*: the coastal State may assert jurisdiction over foreign vessels suspected of being engaged in drug trafficking only with regard to such activities occurring on artificial islands or other installations pursuant to Article 60 (2), LOSC, which states that:

“[t]he coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations”<sup>38</sup>.

37. See Shearer, *supra* footnote 21, at 335, and Gahlen, Chapter 3, *infra*.

38. See also *M/V Saiga No. 2* case (Judgment) (1999), para. 1127, 38 *ILM* 1323, 1351. This provision is similar to that of Article 80, LOSC, which pertains to such installations or islands located on the continental shelf.

A prerequisite for the assertion of such jurisdiction is, of course, the extension by the coastal State of its customs legislation, including legislation concerning drug trafficking, to such islands and installations. In all other cases of drug-trafficking in the EEZ, the regime of the high seas is applicable.

(iv) *smuggling of migrants*: similar to drug trafficking, the coastal State has explicit jurisdiction over such activity only if it takes place in the artificial islands and installations, provided the existence of the necessary legislation<sup>39</sup>.

(v) *maritime terrorism and proliferation of WMD*: if the proliferation of WMD components happened to take place in an artificial island in the EEZ, it could be considered as a customs matter and the coastal State could exert jurisdiction. In all other cases, the jurisdictional authority for suppressing such acts could not to be found in LOSC, but in other agreements. Special reference should be made to 1988 SUA Protocol, which concerns directly the installations over the continental shelf<sup>40</sup>.

(vi) *piracy*: the regime of the high seas is fully applicable in this respect.

## Paragraph 6      **High Seas**

The premise of any discussion about the regime of the high seas is the fundamental principle of the freedom of the high seas, which is predominantly of a negative nature. According to the UN Memorandum on the Regime of the High Seas (1950):

“The freedom of the high seas, essentially negative, may nevertheless contain positive consequences . . . All maritime flag-States have equal right to put the high seas to legitimate use. But the idea of the equality of usage comes only in second place. The essential idea underlying the principle of freedom of the high seas is the concept of the prohibition of interference in peacetime by ships flying one national flag with ships flying the flag of other nationalities.”<sup>41</sup>

---

39. See further Guiggisberg, Chapter 6, *infra*.

40. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, reprinted in 27 *ILM* (1988), 680; see also the 2005 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; available at <http://www.dipublico.com.ar/english/treaties/protocol-for-the-suppression-of-unlawful-acts-against-the-safety-of-fixed-platforms-located-on-the-continental-shelf-2005-2005-sua-fixed-platforms-protocol/>.

41. Memorandum on the Regime of the High Seas, by the Secretariat (1950-II) (14 July 1950), UN doc. A/CN.4/32, reprinted in *Yearbook of the International Law Commission*, 67, 69 (translation). The Memorandum is believed to be the work of Gilbert Gidel.

From this prohibition of interference with non-national vessels flows the principle of exclusivity of flag-State jurisdiction, namely that ships on the high seas are, as a general rule, subject to the exclusive jurisdiction and authority of the State whose flag they lawfully fly<sup>42</sup>. This principle is firmly rooted in the axioms of State equality and of the freedom of the high seas<sup>43</sup>. Thus, it is generally accepted that no State can interfere with the shipping of another State unless the interfering State possesses an exceptional right clearly vested by customary law or pursuant to a particular treaty regime. Although the nature of this interference varies, justifiable acts of interference fall under two general rubrics: the right of approach (*droit de reconnaissance*) and the right of visit (*droit de visite*).

On the one hand,

“it is a universally recognised customary rule of international law that warships of all nations, in order to maintain the safety of the high seas, have the power to require suspicious private vessels on the high seas to show their flag”<sup>44</sup>.

The right to approach, or *reconnaissance*, is limited to the right to approach a ship to identify her<sup>45</sup>. An approaching warship may request an encountered vessel to show her colours, which are prima facie evidence of her nationality<sup>46</sup>. Without evidence to counter this showing of nationality or further suspicions, a warship may not board the encoun-

---

42. See generally D. P. O’Connell, *The International Law of the Sea*, Vol. II (ed. I. A. Shearer), Oxford, Clarendon Press, 1984, p. 796; R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th ed., London, Longman, 1992, p. 737.

43. It was famously given judicial imprimatur in the dictum of Lord Stowell in the *Le Louis* case:

“All nations being equal all have an equal right to the uninterrupted use of the unappropriated parts of the oceans for their navigation. In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another.” *Le Louis*, 2 Dods, 210, 243, 165 Eng. Rep. (1817), 1464, 1475.

See also “*Lotus*” case (*France v. Turkey*), Judgment, *PCIJ, Ser. A, No. 10* (1927), 25.

44. *Oppenheim’s International Law*, at p. 737.

45. The US Supreme Court has held:

“In respect to ships of war . . . there is no reason why they may not approach any vessels descried at sea, for ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority.” See *The Marianna Flora*, 24 US (11 Wheat.) (1826), 1, at 43.

46. See O. de Ferron, *Le droit international de la mer* (1958), pp. 108-109; Y. Van der Mensbrugge, “Le pouvoir de police des Etats en haute mer”, 11 *RBDI* (1975), 56, 61.

tered vessel and, *a fortiori*, may not proceed to examine her papers or perform a search<sup>47</sup>.

On the other hand, “under extreme circumstances, the public ships of a state are competent to visit and search the vessel of another State”<sup>48</sup>. The acceptance of the peacetime right of visit (*droit de visite*) has been gradual and controversial, since it was originally conceived as a belligerent right which did not apply in time of peace, unless provided for under a customary or conventional exception to the general rule of non-interference<sup>49</sup>. The traditional non-conventional exceptions were piracy and the right of self-defence, while the conventional exceptions in the nineteenth and early twentieth centuries pertained to fisheries, the protection of submarine cables, the slave trade and anti-smuggling measures<sup>50</sup>.

The right of visit is composed of two distinct operations: the *droit d’enquête du pavillon*, i.e. the right of boarding the vessel and of investigation of the flag, and the right of search (*perquisition*)<sup>51</sup>.

“A warship may employ the *droit d’enquête du pavillon* — the first element of the comprehensive *droit de visite* — to ascertain or verify the true nationality of a vessel she encounters upon the high seas. She may exercise her *droit d’enquête* against only those vessels she reasonably suspects of having engaged in some proscribed activity, which, under customary or conventional law, would permit the warship to proceed against the suspect vessel.”<sup>52</sup>

To effect a stoppage, of course, the warship will hail the suspect vessel or, if this is impossible or ineffectual, fire across its bow<sup>53</sup>. The actual verification of the flag takes place aboard the suspect vessel,

---

47. See G. Gidel, *Le droit de la mer*, p. 289; François, *Regime of the High Seas*, UN doc. A.CN.A/17, reprinted in ILC *Yearbook* (1950-II), 36, 41; R. Reuland, “Interference with Non-National Ships on the High Seas”, 22 *Vanderbilt Journal of Transnational Law* (1989), 1161, 1170.

48. Reuland, *supra* footnote 47, 1170.

49. Gidel wrote that “le droit de visite en temps de paix n’existe pas, sauf exceptions strictement limitées et résultant d’accords conventionnels”; G. Gidel, *Le droit de la mer*, Vol. I, Paris, Etablissements Mellottee Chateauroux, 1932, at p. 292.

50. See extensive discussion of these exceptions in Gidel, *supra* footnote 49, p. 301.

51. There is a certain discrepancy between the Anglo-Saxon and the French doctrines in the use of the relevant terms; for example, the former tend to speak only of a “right of visit and search” and they employ the terms “*reconnaissance*” and “*enquête du pavillon*” to designate what was called “the right of approach”; see *inter alia* Oppenheim’s *International Law*, p. 737; Ortolan, *Règles internationales et diplomatie de la mer*, tome II, Paris, 1864, p. 233.

52. Reuland, *supra* footnote 43, at 1172.

53. See Ortolan, *supra* footnote 47, at 252, and R.-J. Dupuy and D. Vignes, *Traité du nouveau droit de la mer*, Paris, Economica, 1985, p. 371.

which requires that the warship will send a party under the command of an officer to the suspect vessel, who will examine the papers and documentation of the suspect vessel<sup>54</sup>. Only circumstances of extreme suspicion, however, will justify the search of the vessel, which may include a detailed inspection of all parts of the ship and its cargo and the questioning of the crew<sup>55</sup>.

The 1958 High Seas Convention codified for the first time in a treaty the peacetime right of visit.<sup>56</sup> Article 22 of the High Seas Convention maintained the above distinction between the right of visit or “*droit d’enquête du pavillon*” and the right of search<sup>57</sup>, whereas it remained silent on the question of the customary right of approach. This did not entail, however, that the right of approach ceased to exist, as it was clear that the ILC intended only to codify the right of visit as such. As far as the right of visit (*droit de visite*) as such is concerned, Article 22 of High Seas Convention, and later Article 110 of LOSC, which was primarily based on the former provision<sup>58</sup>, set forth that it is accorded to warships against only those vessels reasonably suspected of having engaged in certain proscribed activities. These activities are: (a) piracy, (b) slave trading, (c) unauthorized broadcasting, (d) absence of nationality of the ship, or (e) though flying a foreign flag or refusing to show its flag, the ship is in reality of the same nationality as the warship<sup>59</sup>.

It is true that not all of the above circumstances are relevant in the contemporary era; for example, both the “unauthorised broadcasting”<sup>60</sup> and the “slave trade”<sup>61</sup> provisions have minimal application, whereas,

---

54. See ILC, *Regime of the High Seas*, Draft Articles, A/CN.4/79, Section II, reprinted in ILC *Yearbook* (1955-I), 27. See also L. B. Sohn, “International Law of the Sea and Human Rights Issues”, in Clingan (ed.), *The Law of the Sea: What Lies Ahead?*, 1988, p. 56.

55. See *Oppenheim’s International Law*, p. 738.

56. See Report of the ILC covering the work of its 8th session (A/3159), Art. 46, ILC *Yearbook* (1956-II), 283, and M. Nordquist (ed.), *UNCLOS 1982: A Commentary* (1993-II), p. 239 (hereinafter, Nordquist, *Commentary*).

57. See Article 22 of the 1958 Geneva Convention on the High Seas, 450 *UNTS* 52.

58. The only substantial changes were the inclusion in the grounds of interference of the “vessel without nationality” and unauthorized broadcasting. On the Third UN Conference on the Law of the Sea (UNCLOS III) in general see R. Platzöder, *Third United Nations Conference on the Law of the Sea*, London, Oceana Publications, 1982-1987 and on Article 110, in particular, see Nordquist, *Commentary*, 239-244.

59. See Churchill and Lowe, p. 203; Nordquist, *Commentary*, p. 237.

60. For a contemporary overview of the “unauthorized broadcasting” see D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge, Cambridge University Press, 2009, pp. 161-171.

61. Nevertheless, it is argued that the relevant provision should be reinvigorated to suppress certain forms of human trafficking; see *infra* footnote 150 and accompanying text.

“piracy”, once almost obsolete, has attained greater prominence lately, in view of the recent piratical activity off the coast of Somalia. As regards (d) “absence of nationality of the ship”, it denotes stateless vessels, i.e. vessels lacking any claim to nationality under Article 91 of LOSC on the basis either of State registration or some other right to fly a State’s flag. Under Article 92 (2), LOSC, vessels flying two or more flags according to convenience may also be assimilated to stateless vessels. It needs to be stressed here that in light of the wording of Article 91 (1)<sup>62</sup>, vessels may hold nationality independent of registration. For example, “national legal systems commonly only require vessels of certain size to register, and smaller vessels may be entitled to fly the flag of their owner state’s nationality without registration”<sup>63</sup>. This is important especially in relation to any exercise of enforcement jurisdiction over the vessel or the persons on board, in the sense that the lack of registration would not mean *ipso facto* that no State exercises jurisdiction over the vessel or the persons.

Furthermore, by virtue of Article 110 (1), other forms of interference can be conferred by treaty on a variety of subjects<sup>64</sup>. Accordingly, States have concluded numerous multilateral and bilateral agreements that provide for the right of visit on the high seas with a view to suppressing illegal activities, such as illegal fishing, drug trafficking, maritime terrorism and WMD. The above-mentioned illicit activities that have given rise to boarding agreements will be discussed in detail in the next Part.

Also, mention should be made to the doctrine of hot pursuit, which is another form of interference recognized by LOSC and customary law<sup>65</sup>. Under Article 111, LOSC,

“The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the

---

62. “Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.” Article 91 (1) LOSC.

63. Guilfoyle, *supra* footnote 60, at p. 95 with further references.

64. Both the High Seas Convention and LOSC contain the exception “where acts of interference derive from powers conferred by treaty”; see Articles 22 (1) and 110 (1) respectively.

65. On hot pursuit see *inter alia* N. Poulantzas, *The Right of Hot Pursuit in International Law*, 2nd ed., The Hague, Martinus Nijhoff, 2002.

contiguous zone if the pursuit has not been interrupted . . . If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.”

Finally, it is worth mentioning that although it is common ground that the LOSC does not directly bear on the law of naval warfare<sup>66</sup>, this does not mean that the law of the sea does not have any impact on the law regulating armed conflict at sea. As Natalie Klein reports:

“the arguments have varied from one extreme to the other — from considering that UNCLOS is not applicable during the armed conflict<sup>67</sup>, to UNCLOS being applicable because the laws of naval warfare are no longer relevant with the changes in laws relating to when States may lawfully resort to force<sup>68</sup>. As may be expected, a more moderate position whereby ‘the maritime rights and duties States enjoy in peacetime continue to exist, with minor exceptions, during armed conflict’ is the most tenable view.”<sup>69</sup>

Indeed, LOSC has an extensive impact on the rules defining the “regions” of naval operations, and especially the extent of these regions. Belligerent measures may be exercised on the high seas or in the territorial seas of belligerents, but not in areas under the sovereignty of neutral States<sup>70</sup>.

---

66. While none of the 1958 Geneva Conventions expressly so provide, it is true that the International Law Commission, which prepared draft articles on the subject, intended the articles to apply in time of peace; see ILC *Yearbook* (1956-II), 256. The LOSC is similarly silent, although here, too, it was understood that the Conference was concerned with the peacetime law of the sea; see A. V. Lowe, “The Commander’s Handbook on the Law of Naval Operations and the Contemporary Law of the Sea”, in H. Robertson (ed.), *The Law of Naval Operations*, Newport, Naval War College Press, 1991, pp. 109, 132.

67. See *inter alia* B. Wilson and J. Kraska, “American Security and the Law of the Sea”, 40 *Ocean Development and International Law* (2009), 268, 277.

68. See A. V. Lowe, *supra* footnote 66, at pp. 130-133.

69. N. Klein, *Maritime Security and the Law of the Sea*, Oxford, Oxford University Press, 2011, p. 259. See also G. K. Walker, “Self-defence, the Law of Armed Conflict and Port Security”, 5 *South Carolina Journal of International Law and Business* (2009), 347.

70. See W. Heinegg (ed.), *Regions of Operations of Naval Warfare*, Bochum, Brockmeyer, 1995, pp. 19–29.

Belligerent measures, such as naval blockade, the belligerent right of visit and search, perfidy had been discussed during the 2012 Centre with the emphasis placed upon whether they could give rise to war crimes at sea. Sergis's chapter provides an excellent overview of this issue<sup>71</sup>. Notwithstanding the paucity of the relevant incidents, the *MV Marmara* episode off the Gaza strip gave some food for thought in this regard<sup>72</sup>. And it may be destined to give more food for thought, should the ICC initiate criminal proceedings against Israeli officials pursuant to the recent (on 14 May 2013) referral of the case to the ICC by Comoros<sup>73</sup>.

### SECTION 3      **CRIMINAL ACTIVITIES CHALLENGING THE PUBLIC ORDER OF THE OCEANS**

#### Paragraph 1      **Maritime Terrorism and the Proliferation of Weapons of Mass Destruction (WMD)**

##### *A. Introduction*

It was after the unprecedented terrorist attacks on the United States on 11 September 2001 that States and the international community as a whole were forced to take into serious consideration the threats posed by maritime terrorism and by the proliferation of Weapons of Mass Destruction (WMD)<sup>74</sup>. These threats have been the object of much public and academic concern as well as of numerous unilateral or multilateral efforts by individual States and by international organizations. Suffice it to refer to the Proliferation Security Initiative (PSI), which was initially conceived as a “collection of interdiction partnerships” among eleven core members<sup>75</sup>, but it has subsequently expanded to a multifaceted international effort to combat the transfer of banned

71. See Sergis, Chapter 14, *infra*.

72. See *inter alia*, Report of the Secretary-General's Panel of Inquiry on 31 May 2010 (September 2011); D. Guilfoyle, “The *Mavi Marmara* Incident and Blockade in Armed Conflict”, 81 *BYIL* (2011), 171, and Sergis, *op. cit.*

73. See further information at <http://www.icc-cpi.int/icedocs/otp/Referral-from-Comoros.pdf>, and comments by D. Akande at <http://www.ejiltalk.org/court-between-a-rock-and-a-hard-place-comoros-refers-israels-raid-on-gaza-flotilla-to-the-icc/> (15 May 2013).

74. See, e.g., the 2004 UN High-Level Panel Report emphasized that preventing the proliferation of nuclear, chemical, and biological weapons materials and their potential use must remain an urgent priority for collective security; see Report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, (2004), p. 39. See further Cherief, Chapter 13, *infra*, examining the relationship between the regime applicable to the proliferation of weapons of areas destruction by non-State actors and the NPT.

75. See J. Garvey, “The International Institutional Imperative for Countering the Spread of WMD”, 10 *Journal of Conflict and Security Law* (2005), 125, 129.

weapons and weapons technology, receiving the support of another eighty States<sup>76</sup>. In addition, reference should be made to the UN Security Council resolutions 1373 (2001)<sup>77</sup> and 1540 (2004)<sup>78</sup>; the IMO SOLAS Amendments<sup>79</sup>, the 2005 SUA Protocol, and a plethora of other unilateral and bilateral measures in this regard<sup>80</sup>.

*B. The law of the sea and maritime terrorism/proliferation of WMD*

As regards the law of the sea, it is true that there is no reference to terrorism, let alone WMD, in the LOSC. Nonetheless, as discussed above, LOSC can be used to find out which jurisdictional powers States have to prescribe and enforce laws concerning terrorist activities at sea. Accordingly, a coastal State has the power to enact and enforce laws concerning maritime terrorism and the proliferation of WMD in its internal waters, usually in its ports, and in its territorial waters. Such laws are also required by the relevant UN Security Council resolutions (1373 (2001) and 1540 (2004) on terrorism and WMD respectively). The question whether the coastal State can intercept a vessel flying a foreign flag and engaged in such activities was addressed in the previous Section. On the high seas, the most pertinent provision is Article 110 of LOSC; it is readily apparent that neither international terrorism nor the proliferation of WMD is contemplated by the Convention as a specific ground for the right to visit of a foreign vessel. As a result, the requisite legal basis should be either extrapolated from the grounds for interference that are enshrined in the above provision, or be sought in another legal framework.

First, it is clear that the unauthorized broadcasting and the slave-trade grounds are completely irrelevant to the present survey. Moreover, the “same nationality” ground seems not to raise any particular problems, since in this case the vessel will be susceptible to the full jurisdiction of the flag State pursuant to Article 92 of LOSC. The grounds of “the absence of nationality” as well as “piracy”, however, merit scrutiny. As far as the former ground is concerned, it is very often the case that the

76. See US Department of State, Proliferation Security Initiative Participants (as of 10 September 2011), available at <http://www.state.gov/t/isn/c27732.htm>.

77. SC res. 1373 (28 September 2001) UN doc. S/RES/1373. See M. Hap-pold, “Security Council Resolution 1373 and the Constitution of the UN”, 16 *Leiden Journal of International Law* (2003) 93.

78. SC res. 1540 (27 April, 2004) UN doc. S/RES/1540. See also S. Sur, “La Resolution 1540 du Conseil de Sécurité (28 Avril 2004)”, 104 *RGDIP* (2004), 855.

79. See *inter alia* G. Hesse, “Maritime Security in a Multilateral Context”, 18 *International Journal of Marine and Coastal Law* (2003), 327.

80. See A. J. Roach, “Initiatives to Enhance Maritime Security at Sea”, 28 *Marine Policy* (2004), 41.

transportation of persons involved in terrorist actions or of WMD and related materials is carried out using non-registered vessels, without name or flag, i.e. stateless vessels. To exemplify this, suffice to mention the *M/V So San* incident.

On 10 December, 2002, Spanish naval forces patrolling the Arabian Sea were alerted by US intelligence to the presence of a suspicious cargo vessel in the Indian Ocean en route from North Korea. While the suspect vessel, which displayed no flag, had initially undertaken evasive manoeuvres, Spanish forces succeeded in intercepting and boarding the vessel 600 miles from the coast of Yemen. Upon searching the vessel, the inspecting team discovered a cache of 15 Scud missiles, although only the cement shipment was listed on the ship's manifest. Because the vessel which was later determined to be registered in Cambodia, as the *So San*, was not flying any flag, the Spanish authorities acted lawfully under the LOSC in boarding the ship. On the next day, however, the vessel was released with its cargo and was allowed to continue on to Yemen. Spain acknowledged the lack of authority for seizing the missiles since the sale between North Korea and Yemen as well as the transport of ballistic missiles by sea was not prohibited under any international instrument<sup>81</sup>.

This incident highlights also the jurisdictional deficit of the above provision, i.e. the right to visit stateless vessels does not *ipso facto* entail the full extension of the jurisdictional powers of the boarding States. This runs counter to a significant strand of legal doctrine, which supports that the boarding States may also completely subject stateless vessels to their laws<sup>82</sup>. Nevertheless, as was demonstrated in the *M/V So San* episode, Article 110, LOSC, does not accord any further jurisdictional powers vis-à-vis stateless vessels than the right of visit. In the present case, the transport of ballistic missiles by sea is not prohibited under any international instrument and thus there is not any legal justification for the confiscation of the cargo and the arrest of the crew members. Nonetheless, there will be cases involving international terrorism where the visit of a stateless vessel will be followed by the arrest of the suspects pursuant to principles, such as the passive nationality<sup>83</sup>.

---

81. See the detailed legal assessment in D. Guilfoyle, "The PSI: Interdicting Vessels in International Waters to Prevent the Spread of WMD?", 29 *Melbourne University Law Review* (2005), 733, 735.

82. This is in accord with the practice by the United Kingdom and the United States, that a stateless vessel may be seized by any State as it enjoys the protection of none; see: D. P. O'Connell, *The International Law of the Sea*, supra footnote 42, p. 756.

83. See *United States v. Yunis*, 681 F. Supp. 896, 902 (D.D.C. 1988), aff'd, 924 F. 2d 1086 (D.C. Cir. 1991); see also M. Halberstam, "Terrorism on the High Seas", 82 *AJIL* (1988), 269, at 297-298.

With regard to piracy, and whether it could be employed as justification for the visit of vessels involved in international terrorism, suffice to refer to the extended debate following the *Achille Lauro* incident<sup>84</sup>, where the rules of piracy were arguably considered as the best legal vehicle to address the problem of maritime terrorism<sup>85</sup>. Nevertheless, the question of maritime terrorism, especially in cases like the *Achille Lauro*, where the two-ship requirement is missing, falls beyond the scope of piracy *jure gentium*. Nevertheless, there will be situations that despite the political ends involved, the lack of “a due authority” and “legitimate targets” will be decisive for the designation of certain terrorist acts concerned as *acta pirata* under customary law. For example, any such act by a recognized belligerent or rebel group against vessels of third States and not of the State towards which they are in revolt, regardless of its motive, would not fall within the “political ends” exception and thus if the other requirements of Article 101 of LOSC exist, it could be considered as piracy<sup>86</sup>.

### *C. Other initiatives to counter maritime terrorism and the proliferation of WMD*

Firstly, reference should be made to resolutions 1373 (2001) and 1540 (2004) on terrorism and WMD respectively, which marked a significant departure from the traditional understanding of the Council’s role and powers under Chapter VII and the beginning of a new chapter of quasi-legislative action of the Council in these areas. In more detail and in chronological order, the Security Council passed resolution 1373 on 28 September 2001, only 17 days after the terrorist attacks on New York and Washington, DC. The resolution commences by “reconfirming that such acts, like any act of international terrorism, constitute a threat to international peace and security”. In its operative paragraphs, resolution 1373 decides that all States shall prevent and suppress the financing of terrorist acts, including by criminalizing terrorist fund-raising and donation activities, and by freezing assets of known terrorist individuals or entities. It goes on that all States shall take necessary steps to prevent the commission of terrorist acts, deny safe haven to those who finance, plan or support terrorist acts, and

---

84. On the *Achille Lauro* incident see *inter alia* A. Cassese, *Terrorism, Politics and the Law, the Achille Lauro Affair*, Polity Press, 1989.

85. See, e.g., Y. Dinstein, “Terrorism and War of Liberation”, in C. Bassiouni (ed.), *International Terrorism and Political Crimes*, 1975, p. 164.

86. See in this regard D. Guilfoyle, “Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts”, 57 *ICLQ* (2008) 690, 693. See also *Castle John and Nenderlandse Stichting Sirius v. Nv Marjlo and Nv Parfin* (1986), 77 *ILR* 537.

ensure that any person who participates in terrorist acts is brought to justice<sup>87</sup>.

On 28 April 2004 the Security Council passed resolution 1540. In this resolution, the Council undertook to address a number of fundamental loopholes in the existing non-proliferation treaties and regimes system. First, it centred its focus on non-State actors. Existing treaties and regimes assume that only States have the intention and capabilities to develop WMD<sup>88</sup>. The resolution addresses this non-State actor problem in paragraph 1, in which it provides that

“all States shall refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery”.

It is questioned whether these “generic” or legislative resolutions<sup>89</sup> may afford the requisite legal basis for interdiction operations in order to suppress non-State actors engaged in terrorist acts and/or in the proliferation of WMD. It is obvious that on the footing of the actual words used in the resolutions such a proposition finds no warrant. There is no explicit authorization for any interdiction operations on the high seas for the present purposes. Moreover, it is important to stress that in the drafting of what is now operative paragraph 10 of the SC resolution 1540, China was adamant in rejecting any reference to the word “interdiction”, included in the tabled drafts<sup>90</sup>. In its final version, paragraph 10 calls upon all States, in accordance with national and international law, to “take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials”. The exhortatory nature of the latter provision in conjunction with, on the one hand, the deletion of the word “interdiction” from the final draft and on the other, the explicit reference to international law, reflects the collective will of the Council in the resolution not to authorize any such operation<sup>91</sup>. It bears also reiterating that, in general, SC resolutions

---

87. See also S. Szurek, “La Lutte Internationale contre le Terrorisme”, 109 *RGDIP* (2005), 5. See also Cherief, Chapter 13, *infra*.

88. See P. van Ham and O. Bosch, “Global Non-Proliferation and Counter-Terrorism: The Role of Resolution 1540 and Its Implications”, in O. Bosch and P. Van Ham (eds.), *Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540* (2007), pp. 3, 9.

89. See S. Talmon, “The Security Council as World Legislature”, 99 *AJIL* (2005), 175, 190.

90. See UNSC Verbatim Record (22 April 2004), UN doc. S/PV.4950 (Resumption 1), at p. 6 and also comments in S. Logan, “The PSI Navigating the Legal Challenges”, 14 *Journal of Transnational Law and Policy* (2005), 253, 270.

91. See *per* this view N. Klein, *Maritime Security and the Law of the Sea*, OUP, 2011, p. 283. *Contra* W. Heinegg, “Maritime Interception/Interdiction

under Chapter VII should be construed *stricto sensu* and any unilateral action involving the use or threat of force should not lightly be presumed<sup>92</sup>.

Secondly, reference should be made to the role of the IMO and specifically to the revision of the SUA Convention and Protocol in 2005. While the original 1988 SUA Convention and Protocol provided for the arrest, detention, and extradition of alleged offenders with respect to certain categories of acts of violence committed on board or against unlawful shipping, it lacked an effective means to apprehend offenders<sup>93</sup>. “The inclusion of a procedure in the 2005 Protocol to allow states to board ships marks a shift from merely providing lawful bases to establish jurisdiction to creating the means to exercise jurisdiction.”<sup>94</sup> Indeed, the 2005 SUA Protocol sets out in Article 8*bis* procedures by which States parties may request flag States of suspect vessels to permit boarding outside the territorial sea of any State and thus it represents the latest exception to the traditional rules relating to the exclusive jurisdiction of the flag State over its vessels when those vessels are on the high seas. Noteworthy also is that the 2005 Protocol and the above SC resolutions complement each other, in the sense that while resolution 1540 proscribes the manufacture, possession, transport of WMD by non-State actors, the Protocol comes to criminalize the use of the latter weapons for terrorist purposes.

This comprehensive list of offences enshrined in the new Article 3 of the 2005 SUA Protocol would be ineffective without the reciprocal framework for interdiction of State parties’ vessels suspected of such offences on the high seas stipulated in Article 8*bis*. In substance, Article 8*bis* is premised on the scenario of a State party wishing to board a vessel that either flies the flag or displays marks of registry of another State party and is “located seaward of any State’s territorial sea”, i.e. on the high seas or in the EEZ<sup>95</sup>. According to Article 8*bis* (5), a State party wishing to board a ship flying the flag of another Party should proceed to the following two requests: the first is simply the confirmation of nationality; only upon confirmation of nationality will

---

Operations within the Framework of Operation Enduring Freedom”, in *Les nouvelles menaces contre la paix et la sécurité internationales*, Pedone, 2004, pp. 149, 158.

92. See E. Papastavridis, “Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis”, 56 *ICLQ* (2007), 83-117.

93. On SUA Convention and Protocol see also G. Plant, “The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation”, 39 *ICLQ* (1990), 27.

94. N. Klein, “The Right of Visit and the 2005 SUA Protocol”, 35 *Denver Journal of International Law and Policy* (2007), 287, 288.

95. See Article 8*bis* (5).

the requesting Party ask for authorization to board and take appropriate measures, including stopping, boarding, searching of the ship and the searching and questioning of persons on board.

The 2005 SUA Protocol follows an approach similar to the other relevant treaties, i.e. it fully adheres to the principle of preferential flag State jurisdiction, with the sole exception of the consensual conferment of the jurisdiction to the requesting or another Party<sup>96</sup>. This conferment, however, is contingent upon the establishment of jurisdiction by the requesting or the other Parties pursuant to Article 6 of the SUA Convention. In addition, if the boarding State takes the alleged offenders in its territory, then it is obliged either to establish the requisite jurisdiction or extradite them (*aut dedere aut judicare* principle)<sup>97</sup>.

Finally, we must have regard to the PSI and the relevant bilateral agreements. As regards the exact legal nature of the PSI, its authors have consistently characterized it as “an activity, not organization” and as “a collection of interdiction partnerships”<sup>98</sup>, while academic doctrine share the same view designating it as an “international partnership of countries”<sup>99</sup>, or a “loose alliance”. In respect of the interdiction of suspect vessels on the high seas, it is submitted that the PSI does not afford by itself any legal basis for such interdiction operations. Despite concerns and assertions to the contrary<sup>100</sup>, the PSI never purported to establish an autonomous legal authority for the interception of WMD shipments on the high seas and this was emphatically stated in the Statement of Interdiction Principles<sup>101</sup>.

In view of the fact that the PSI falls short of providing a sufficient legal basis for interdictions on the high seas, the United States shifted its attention to concluding bilateral agreements that put in place a framework for consensual boardings of vessels flying the flag of the respective parties on the high seas. Accordingly, the United States has signed agreements with 11 major-flag States, namely Liberia, Panama, the Mar-

---

96. See Article 8 *bis* (8).

97. See Article 6 (4) of the SUA Convention. See further discussion Cheah, Chapter 8, *infra*.

98. Bureau of Non-proliferation, US Department of State, *PSI (Continued) Frequently Asked Questions (FAQ)*, 11 January 2005; available at <http://www.state.gov/t/np/rls/fs/32725.htm>.

99. J. Garvey, “The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative”, 10 *Journal of Conflict and Security Law* (2005), 125, 129.

100. See in this respect A. Bergin, “The PSI: Implications for the Indian Ocean”, *International Journal for Marine and Coastal Law* (2005), 85, at 87.

101. See D. Rothwell, “The Proliferation Security Initiative: Amending the Convention on the Law of the Sea by Stealth?”, in D. Caron and H. N. Scheiber (eds.), *The Oceans in the Nuclear Age: Legacies and Risks*, Leiden, Martinus Nijhoff Pub., 2010, p. 285, at p. 287.

shall Islands, Croatia, Cyprus, Malta, Belize, Mongolia and Bahamas, St. Vincent and the Grenadines, and Antigua and Barbuda<sup>102</sup>.

In summary, all these ship-boarding agreements refer to suspect vessels, defined as ships “used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is engaged in proliferation by sea”, the latter being described as the “transportation by ship of WMD, their delivery systems and related materials to and from States or non-State actors of proliferation concern”. They all work within the framework of flag-State consent, upholding the requirement of flag-State permission to board a vessel on the high seas and the primacy of its jurisdiction to prosecute any offences discovered aboard.

## Paragraph 2 **Drug Trafficking**

### *A. Introductory remarks*

Although a wide variety of methods are utilized by drug traffickers in plying their trade, the use of private and commercial vessels has long been significant. This is particularly the case with drugs such as cocaine, opium and its derivatives, and cannabis, all regulated by the Single Convention on Narcotics Drugs, as amended<sup>103</sup>, where transportation from source to consumer country frequently involves passage over ocean areas<sup>104</sup>. For example, given its relative widespread availability and low cost, the vast majority of marijuana and cocaine entering the United States from abroad is said to be transported by private vessels<sup>105</sup>. As is reported by the UN Office on Drugs and Crime (UNODC),

“For the North American market, cocaine is typically transported from Colombia to Mexico or Central America by sea and then onwards by land to the United States and Canada. Cocaine is trafficked to Europe mostly by sea, often in container shipments. Colombia remains the main source of the cocaine found in Europe, but direct shipments from Peru and the Plurinational State of Bolivia are far more common than in the United States market.”<sup>106</sup>

102. The text of all these agreements is available at <http://www.state.gov/t/isn/c27733.htm>.

103. See Single Convention on Narcotic Drugs (1961), 520 *UNTS* 151; as amended by the 1972 Protocol, 976 *UNTS* 3.

104. See P. Van der Kruit, *Maritime Drug Interdiction in International Law*, Utrecht, Druk OBT/TDS, 2007, p. 21

105. See W. Gilmore, “Narcotics Interdiction at Sea, US-UK Cooperation”, *Marine Policy* (1989), 218.

106. See at [www.unodc.org/unodc/en/drug-trafficking/index.html](http://www.unodc.org/unodc/en/drug-trafficking/index.html). The 2011 World Drugs Report-Executive Summary issued by the UNODC recorded that “since 2006 seizures have shifted towards the source areas in South

Also, the means employed by the drug-traffickers in Central America have become highly sophisticated: apart from “go-fast” vessels<sup>107</sup>, they use semi-submersible vessels, which are almost impossible to be properly stopped and visited<sup>108</sup>. Such vessels are

“both difficult for the Coast Guard to detect and easy for crewmembers, who often prefer losing their cargo to being caught, to sink. At the first sign of the Coast Guard, drug traffickers can quickly sink the vessel and jump into the ocean, which destroys the evidence necessary to prosecute them for a drug offense . . .”<sup>109</sup>

This traffic by sea has led to various initiatives taken by those States most affected, such as the United States and European countries. Central to this has been the policy of interception of vessels not only in the territorial waters of the consumer States, but also on the high seas and even further in the territorial waters of the source or transit States. This policy has been effectuated either through informal means, i.e. *ad hoc* consent of the flag State or of the vessel’s master (consensual boarding), or through bilateral and multilateral treaties, such as the Caribbean ship rider agreements<sup>110</sup> and the 1988 UN Convention against

---

America and away from the consumer markets in North America and West and Central Europe. The role of West Africa in cocaine trafficking from South America to Europe might have decreased if judged from seizures only, but there are other indications that traffickers may have changed their tactics, and the area remains vulnerable to a resurgence in trafficking of cocaine”; see [www.unodc.org/documents/data-and-analysis/WDR2011/WDR2011-ExSum.pdf](http://www.unodc.org/documents/data-and-analysis/WDR2011/WDR2011-ExSum.pdf).

107. These are typically 25-50-ft open boats, powered by twin outbound engines and capable of sustaining speed of 20-40 knots in 1-3-ft seas. Such boats present significant detection problems and their high speed enables them to escape into foreign territorial waters when confronted by the possibility of interdiction on the high seas; see W. Gilmore, *Agreement concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area*, London, The Stationery Office, 2005, p. 2 (hereinafter, Gilmore, *Caribbean Agreement*).

108. It is reported that “One self-propelled semi-submersible vessel intercepted by the Coast Guard, for example, contained seven tons of cocaine, worth 187 million”; see A. Bennett, “The Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel interdiction Act”, 37 *Yale Journal of International Law* (2012), 433, 434.

109. *Ibid.*, 434.

110. The problem of maritime illicit traffic of narcotic drugs is particularly acute in the Caribbean region, where there are a number of contiguous nations separated by relatively narrow bodies of water which serve, for the smugglers, as natural “stepping stones” between source and consumer States. These nations provide the “quintessential drug trafficking havens due to their sparse populations and limited enforcement capability”; see K. Rattray, “Caribbean Drug Challenges”, in M. Nordquist and J. N. Moore (eds.), *Ocean Policy: New Institutions, Challenges and Opportunities*, The Hague, Nijhoff, 1999, pp. 179, 185.

Illicit Traffic in Narcotic Drugs and Psychotropic Substances, respectively<sup>111</sup>.

*B. Drug trafficking and the law of the sea*

The point of departure for the following assessment is necessarily the LOSC. The various provisions concerning the assertion of both legislative and enforcement jurisdiction in the various maritime zones have discussed previously. In relation to the high seas, it is evident on the face of Article 110 that drug trafficking is not contemplated by the Convention as a specific ground for the right to visit of a foreign vessel. The LOSC only refers to illicit drug trafficking on the high seas in Article 108 and only asks that States co-operate in its suppression<sup>112</sup>.

In more detail, paragraph 1 sets out a general obligation for all States to co-operate, when the illicit traffic is “contrary to international conventions”. This obligation depends on the content of the above-mentioned Drug Conventions as well as that it is an obligation of conduct rather than result<sup>113</sup>. On the other hand, paragraph 2 addresses the issue of providing assistance to suppress the traffic in question. Nevertheless, only the State “which has reasonable grounds for believing that the ship flying *its* flag is engaged in illicit traffic” in such drugs or substances “may request the co-operation of other States to suppress such traffic”<sup>114</sup>. As Sohn observes, “The opposite case of a State asking for cooperation of a State whose ship is suspected of smuggling drugs to other countries is noticeably not mentioned.”<sup>115</sup> Consequently, Article 108 falls short of providing any enforcement mechanism to complement the obligation to co-operate enshrined in paragraph 1. This, in conjunction with the

---

111. See UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 19 December 1988), 21 *ILM* (1988) 1261 (hereinafter, 1988 Vienna Convention). As at 20 May 2013, the Convention had 188 States parties; see [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en). For commentary see inter alia UN Economic and Social Council, *Commentary on the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1998) (hereinafter, *Vienna Commentary*).

112. The provision in question was proposed for the first time by Malta at the 1971 session of the Sea-Bed Committee; see A/AC183/53, Art. 16, reproduced in SBC Report 1971, pp. 105, 123. See also Nordquist, *Commentary*, 224.

113. Cf. Bellayer-Roille writing that

“Une obligation de coopération est donc bien inscrite dans cet article, mais il ne s’agit en réalité que d’une obligation d’une ‘obligation théorique’, reposant sur la bonne volonté des Etats et, a fortiori, sur leur capacité réelle de réaction”; *idem*, “La lutte contre le narcotrafic en mer Caraïbe”, 111 *RGDIP* (2007), 355, 365.

114. Emphasis added; see Nordquist, *Commentary*, 224.

115. See Sohn, *supra* footnote 54, at p. 60.

absence of any explicit reference to drug trafficking in Article 110, LOSC, entails that in principle the LOSC and the respective customary law fail to furnish any basis for boarding drug smuggling vessels on the high seas<sup>116</sup>.

In consequence, the only relevant heading under Article 110 of LOSC is the “absence of nationality”, since none of the other grounds, i.e. piracy, slave trade, unauthorized broadcasting and the same nationality, would be applicable. Many drug traffickers operate in unregistered, stateless vessels, in which case Article 110 (1) (d) of LOSC applies. It is pursuant to this provision that warships or other duly authorised vessels of any State may exercise the right of visit on these vessels, but not to assert also jurisdiction, as explained above.

However, there is a case in which the statelessness of the vessel suffices not only for the boarding but also for the assertion of jurisdiction *per se*; this is the case of submersible or semi-submersible vessels according to the Drug Trafficking Vessel Interdiction Act (DTVIA), adopted by the US Congress in 2008<sup>117</sup>. The DTVIA purports to address the practical difficulties posed by the use of such vessels by criminalizing the operation of a submersible or semi-submersible vessel without nationality and with the intent to evade detection. Unlike other relevant laws, the DTVIA does not use a vessel’s statelessness solely as a jurisdictional hook, but makes the operation of a stateless vessel a key component of the substantive crime it proscribes<sup>118</sup>. In *United States v. Iburguen-Mosquera*, the Eleventh Circuit upheld the DTVIA without noting any significant difference between the jurisdictional requirements of the DTVIA and of previous laws: in the words of the Court, “international law permits any nation to subject stateless vessels on the high seas to its jurisdiction . . . Jurisdiction exists solely as a consequence of the vessel’s status as stateless.”<sup>119</sup>

### C. Other instruments to counter drug trafficking at sea

The most important multilateral instrument in this regard is the 1988 Vienna Convention, which contains provisions speci-

---

116. This was the reason that, for example, the boarding of the Honduran flagship *Fidelio*, loaded with several tones of hashish, by the Italian authorities on the high seas in 1986 was declared illegal by the Court of Appeal of Palermo in a Judgment of 30 June 1992; see further analysis in T. Scovazzi, “The Evolution of International Law of the Sea: New Issues and New Challenges”, 286 *Recueil des cours* (2000), 39, 225.

117. 18 USCA, § 2285 (West, 2011).

118. Bennett, *supra* footnote 108, p. 434.

119. 634 F. 3d 1370 (11th Cir. 2011), at 1379 (quoting *Marino-Garcia* 6, 79 F. 2d at 1382). The 11th Circuit also upheld the DTVIA in *United States v. Saac*, 632 F. 3d 1203, 1210-1211 (11th Cir. 2011).

fically directed to traffic at sea, including the right to board the vessels of other State parties engaged in illicit drug traffic. The Convention in question had been the outcome of protracted negotiations between States and various UN bodies since 1982<sup>120</sup>. In respect of the right to board the vessel, Article 17 (3) reads as follows:

“A Party which has reasonable grounds to suspect that a vessel exercising the freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.”

This provision should be scrutinized in relation both to Article 17 as a whole, entitled “illicit traffic by sea”, and to other key provisions of the Vienna Convention, with which it is inextricably linked. For example, while the focus of the article in question is on facilitating the exercise of enforcement jurisdiction in relation to suspect vessels, the overall effectiveness of the scheme is contingent upon the possession by States of appropriate prescriptive jurisdiction, which is accorded by Article 4<sup>121</sup>.

The most significant remark is that Article 17 (3) requires the explicit “authorisation” of the flag State, a word which was included after lengthy informal consultations. As it is pointed out in the *travaux préparatoires*, this word was deliberately used to

“stress the positive nature of the decision and of the action which the flag State in the exercise of its sovereignty was to take with regard to the vessel. It is entirely within the discretion of that State to decide whether to allow another party to act against its vessel.”<sup>122</sup>

Apart from the need for the explicit authorization, the requesting party has, first, to notify the flag State, then, request confirmation of the registry and, lastly, request the authorization. This provision should be read in conjunction with paragraph 4, which stipulates that

“the flag State *may* authorise the requesting State to *inter alia*:  
(a) board the vessel, (b) search the vessel and (c) if evidence

120. See in this respect W. Gilmore, “The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 15 *Marine Policy* (1991), 183, and F. Rouchereau, “La Convention des Nations Unies contre le trafic illicite de stupéfiants et de substances psychotropes”, 36 *AFDI* (1988), 601.

121. See *Vienna Commentary*, at p. 323.

122. See *Official Records of the Vienna Convention, Summary Records of Committee II*, 29th meeting, para. 7.

of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board”<sup>123</sup>.

In a regional context, reference should, first, be made to the 1995 Council of Europe Agreement<sup>124</sup>. This Agreement supplements and strengthens the relevant treaty framework in the European context, consisting, besides the Vienna Convention, of few bilateral treaties<sup>125</sup>. As a result, following Article 17, parties to the 1995 CoE Agreement undertake to co-operate to the fullest extent possible to interdict narcotics trafficking at sea. Action towards this end is envisaged in respect of private and commercial vessels located beyond the territorial sea of any State<sup>126</sup> and includes the right of visit of vessels flying the flag of another State party, which has given its explicit authorization to this end. It was agreed from the outset that, as with the Vienna Convention, action of this kind would be firmly based on the concept of authorization of the flag State, as well as that there is no obligation for a flag State to respond affirmatively to a request for authorization<sup>127</sup>.

Another regional arrangement to be regarded is the Agreement concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, concluded on 10 April 2003, at San José, Costa Rica, and entered into force on 18 September 2008<sup>128</sup>. This Agreement may be said to have emerged from the extensive practical experience of the States and territories of the region, which has also materialized in an extensive network of bilateral agreements in respect of drug trafficking. In addition, it has

---

123. See Article 17 (4) (emphasis added).

124. 1995 Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *European Treaty Series*, No. 156. The Agreement entered into force on 1 May 2000 and as of 20 May 2013 it had 15 States parties, <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=156&CM=8&DF=20/05/2013&CL=ENG>. For the associated official Explanatory Report see Council of Europe Document CDPC (94) 22, Addendum of 27 June 1995, <http://conventions.coe.int/Treaty/en/Reports/Html/156.htm> (hereinafter, Explanatory Report).

125. See for further information on the negotiation W. Gilmore, “Narcotics Interdiction at Sea: The 1995 CoE Agreement”, 20 *Marine Policy* (1995), 3.

126. As the Explanatory Report notes: “this would include the high seas, the contiguous zone and the EEZ within the meaning of the Montego Bay Convention and customary international law . . .”; at p. 25.

127. See also Article 17 of the 1995 Agreement.

128. See Gilmore, Caribbean Agreement. As of 19 April 2011, parties to the Agreement have been Belize, Costa Rica, Dominican Republic, France, Guatemala, Netherlands, Nicaragua, United States of America. Signatures subject to ratification: Haiti, Honduras, Jamaica, United Kingdom. See A. Roach and R. Smith, *Excessive Maritime Claims*, 3rd ed., Martinus Nijhoff, 2012, Appendix 16.

been significantly influenced by the special geographical circumstances of the Caribbean basin.

This Agreement, like the 1995 CoE Agreement in the European region, purports to enhance the effectiveness of Article 17 of the Vienna Convention in the Caribbean basin; however, it is far more innovative and ambitious than the latter, since it is based less on the Vienna Convention and more on the bilateral arrangements already in place in the region. Accordingly, this instrument contains detailed provisions concerning law enforcement operations of all State Parties in and over the territorial waters of the contracting States (Articles 11-15); a zone of coastal State sovereignty beyond the *ratione loci* reach both of the Vienna Convention and of the 1995 Agreement<sup>129</sup>. It directly addresses issues arising in illicit trafficking by air and regulates in some detail assistance by aircraft for the suppression of illicit traffic in zones of coastal State jurisdiction; issues on which the aforementioned treaties are largely silent. By virtue of Articles 11 and 13 (6), however, the previous authorization of the coastal State is a prerequisite for such operations, which, in any event, are subject to the authority of the coastal State and should be carried out by, or under the direction of, its law enforcement authorities<sup>130</sup>. Another innovative feature, which has been directly drawn from the bilateral treaties, is the already discussed “ship-rider” institution, i.e. each Party is required to designate law enforcement officials to embark on the vessels of other Parties in order to facilitate the timely provision of authorizations and the exercise of relevant national law enforcement powers within zones of jurisdiction of the former Party (Article 9)<sup>131</sup>.

Finally, as indicated above, there is an array of bilateral agreements, which include the right to visit foreign-flagged vessels suspected of illicit traffic in narcotic drugs on the high seas as well as in the territorial seas of the State Parties. The United States and many States in the Central and South American continent have concluded the majority of them. According to the latest International Narcotics Control Strategy Report (March 2012), “there are 44 maritime counterdrug bilateral agreements or operational procedures in place between the United States and partner nations”<sup>132</sup>. In general, they mirror the recent Caribbean

---

129. Article 1 (*h*) of the Agreement defines “waters of a Party” to mean the territorial sea and archipelagic waters of that Party. Importantly nonetheless, Article 15 provides a Party with the option of extending the application of the Agreement to some or all of its internal waters.

130. See Gilmore, *Caribbean Agreement*, at p. 23.

131. See further Tesfalidet, Chapter 16, *infra*.

132. See International Narcotics Control Strategy Report (Vol. I, 2012), at p. 52; available at <http://www.state.gov/documents/organization/187109.pdf>.

Agreement rather than the 1988 Vienna Convention or the 1995 CoE Agreement. They are noticeably flexible and practical, which, on the one hand, has considerable merits, while on the other, might create certain hazards for legal certainty and the rule of law in the oceans. This corresponds to their bilateral nature that enables the negotiating Parties to circumvent many of the procedural hurdles that unavoidably arise in a multilateral process when more than two jurisdictions are involved.

### Paragraph 3 **Smuggling of Migrants and Human Trafficking at Sea**

#### *A. Introductory remarks*

For centuries people have often undertake very perilous journeys, putting their lives into serious danger as a way to safety for persons in fear of their lives, or a gateway for others in search for a better life<sup>133</sup>. The sea can be the location of exploitation of victims of trafficking in persons or the means by which they are transported from one place to another. Smuggling of migrants by sea is the most dangerous type of smuggling for the migrants concerned<sup>134</sup>. Fishing boats, merchant vessels, cargo ships can be both the location where the exploitation takes place or where rights of migrants are violated, and the means used by smugglers and traffickers for transportation. The oceans have also facilitated the “commerce” of human beings, traded like commodities from one country or continent to another. Trafficking in persons and the smuggling of migrants are a very profitable business and source of income for criminals and these crimes have concomitantly engaged the concern of the international community.

Given that the prime concern of most migrants is to flee from their country of origin, rather than to flee to any particular place, it is not surprising that they flee by whatever means possible, including overcrowded and unseaworthy vessels<sup>135</sup>. Such vessels will often be at risk of sinking and indeed many do sink, with the result that thousands of

---

133. Reports to IMO recount unimaginable means of transportation such as a small inflated raft for children of two metres length, carrying two migrants, a windsurfer with two migrants, an improvised raft (wooden door with plastic bottles tied to it) with two migrants etc.; see Second Biannual Report, IMO doc. MSC.3/Circ.2 (October 31, 2001); available at [www.imo.org](http://www.imo.org).

134. UNODC Issue Paper, “Smuggling of Migrants by Sea” (Vienna, 2011); available at [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_Smuggling\\_of\\_Migrants\\_by\\_Sea.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf). See also Guggisburg, Chapter 6, *infra*.

135. See IMO Report, *supra* footnote 133.

lives are lost every year<sup>136</sup>. This was particularly noticeable in the period of the Arab Spring (since January 2011), in which there was an increase in departures of migrant boats from North Africa and, allegedly, at least as many as 1,500 persons have lost their lives while trying to cross the Mediterranean<sup>137</sup>. Such problem may also arise soon in relation to the flow of people from Syria, due to the ongoing civil strife<sup>138</sup>. The migrants traversing the Mediterranean Sea or other seas of the world can be qualified under many legal categories, but it is very often the case that they are victims of human trafficking or are being smuggled by transnational organized groups.

It is evident that in the contemporary era the focus of most, especially developed, States has predominantly shifted to preventing asylum-seekers or illicit migrants from reaching their territory. Amongst the “non-arrival” policies employed to this end<sup>139</sup>, a primary role is attributed to interception, which has attained even more vigour recently in the light of the adoption of the Smuggling of Migrants Protocol, as well as of the relevant practice of States, like Australia<sup>140</sup>, the United States<sup>141</sup> and various European States<sup>142</sup>. The latest example is manifestly the 2009 “push-back” operations conducted by Italy in co-operation with Libya in the central Mediterranean Sea<sup>143</sup>.

---

136. See information and reports of dead or missing people up to 2011 in the UNHCR’s website on asylum and migration, entitled “All in the Same boat: The Challenges of Mixed Migratio”, available at <http://www.unhcr.org/pages/4a1d406060.html>.

137. See *inter alia* Report by T. Hammarberg, Commissioner for Human Rights of the Council of Europe (Strasbourg, 7 September 2011) — CommDH (2011)26, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1826921>. See also the allegations with respect to NATO vessels leaving people to die off the coast off Libya, at <http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants> (8 May 2011).

138. According to UNHCR, there are “more than 280,000 people registered or in need of humanitarian assistance and protection as of end of September [2012]”; see UN, Syrian Regional Response Plan, Second Revision (September 2012); available at <http://data.unhcr.org/syrianrefugees/uploads/SyriaRRP.pdf>.

139. See G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford, Oxford University Press, 2007, p. 374.

140. Following the *Tampa* incident in 2001, the then Howard Government passed a series of laws — commonly referred to as “Pacific Strategy” (previously, “Solution”) — “excising” various islands and coastal ports from the migration zone. See in this regard A. Schloenhardt (ed.), *Migrant Smuggling, Illegal Migration and Organized Crime in Australia and Asia Pacific Region*, Leiden, Martinus Nijhoff, 2003.

141. For interception operations recently launched in relation to Haiti, see B. Frelick, “Abundantly Clear: *Refoulement*”, 19 *Georgetown International Law Journal* (2005), 245.

142. See UNHCR, “Selected Reference Materials, Rescue at Sea, Maritime Interception and Stowaways” (November 2006), available at [www.unhcr.bg/other/law\\_of\\_the\\_sea.pdf](http://www.unhcr.bg/other/law_of_the_sea.pdf).

143. See *infra* footnote 174 and accompanying text.

A central role in the interception of asylum-seekers or illicit migrants has been ascribed to FRONTEX, which was established in 2004 to help EU Member States in implementing community legislation on the surveillance of the EU borders, including maritime borders, and to coordinate their operational co-operation<sup>144</sup>. As officially stated by FRONTEX, the Agency “plans, coordinates, implements and evaluates joint operations conducted using Member States’ staff and equipment at the external borders (sea, land and air)”<sup>145</sup>. Truly, many joint interception operations have been executed by EU Member States at sea<sup>146</sup>. Moreover, the operation capabilities of FRONTEX have been significantly enhanced by Regulation (EU) No. 1168/2011, which amended the Council Regulation (EC) No. 2007/2004 establishing FRONTEX. Under this Regulation, the Agency, *inter alia*, has the authority to plan, on its own, joint operations or pilot projects, while Member States should contribute with an appropriate number of skilled border guards and make them available for deployment on a semi-permanent basis<sup>147</sup>.

### *B. Smuggling of migrants and the law of the sea*

The LOSC refers to immigration matters in its provisions regarding innocent passage (Articles 19 (2) (g) and 21 (1) (h), LOSC), the police powers within the contiguous zone (Article 33 (1), LOSC), transit passage (Article 42 (1) (d), LOSC) and offshore installations and artificial islands within the EEZ or on the continental shelf (Articles 60 (2) and 80 (2), LOSC). On the high seas, the relevant provisions do not make any reference to smuggling of migrants or human trafficking and the latter are not contemplated by the Convention as a specific ground for the right to visit of a foreign vessel<sup>148</sup>.

With regard to interception of vessel suspected of being engaged in such illicit activities, it is apt to consider first whether Article 110 can provide any justification for the boarding in question. On the face of this article, only the grounds of “the absence of nationality” as well as the “slave trade” merit a closer scrutiny. As far as the former ground is concerned, it is very often the case that the transportation of the persons in

144. See *supra* footnote 7.

145. See at <http://frontex.europa.eu/about/mission-and-tasks>.

146. Examples of recently accomplished operations include *inter alia*: JO EPN Hera 2009 (extended in 2010), on tackling illegal immigration coming from West African countries disembarking in Canary Islands; JO Operation POSEIDON 2009 (extended in 2010) in the Eastern Mediterranean Sea; see <http://frontex.europa.eu/operations/archive-of-accomplished-operations>.

147. See *inter alia* 2011 FRONTEX Regulation, Article 1 (5) amending Article 3 of Regulation No. 2007/2004.

148. See further Guggisberg, Chapter 6, *infra*.

question is carried out using non-registered small vessels, without name or flag, i.e. stateless vessels<sup>149</sup>. In a Study of the European Commission, it was noted that

“Illegal immigration via [small craft aiming to reach the coast clandestinely] accounts for most of the illegal immigration by sea (over 70%–80% of detected illegal immigration by sea). These crossings involve small craft or dinghies which are not usually seaworthy and which are therefore jeopardising the lives of their occupants.”<sup>150</sup>

It goes without saying that such small craft or “dinghies” would not be flying any flag. By virtue of the provision of Article 110 (1) (d) of LOSC, warships or other duly authorized vessels of any State may exercise the right of visit on these vessels<sup>151</sup>. Furthermore, as already noted, according to one strand of legal doctrine, the boarding States may also subject stateless vessels to their laws. A number of judicial pronouncements concerning stateless vessels in general support this line of reasoning<sup>152</sup>. Similarly, in the only reported case of illicit migrants on board such vessels before a national court, the *Pamuk and Others* case in 2001, the “stateless vessel” ground was considered by an Italian court as sufficient for the arrest and trial of illegal migrants on the high seas bound for the coast of Italy<sup>153</sup>. Nevertheless, in the present author’s view, the right to visit such vessels does not *ipso facto* entail the full extension of the jurisdictional powers of the boarding States<sup>154</sup>.

---

149. See, e.g., cases like the ones reported to the IMO, *supra* footnote 133, and N. Ronzitti, “Coastal State Jurisdiction over Refugees and Migrants at Sea”, in N. Ando *et al.* (eds.), *Liber Amicorum Judge Shigeru Oda*, The Hague, Kluwer Law International, 2002, pp. 1271, 1274.

150. *Study on the International Law Instruments in Relation to Illegal Immigration by Sea*, SEC (2007) 691, 15 May 2007, Annex, para. 1.1.2.

151. The relevant provision was inserted for the first time in 1976 in the Revised Single Negotiating Text (A/CONF.62/WP.8/Part II, Art. 96, IV *Official Records*, p. 166), reprinted in IV Platzöder, p. 129. It should be noted that the insertion of the stateless vessels did not encounter any difficulties or objections; see also Nordquist, *Commentary*, 240.

152. See, e.g., the decision of the Privy Council in *Molvan v. Attorney-General for Palestine* [1948] AC 351. In that case the Council found that no breach of international law resulted when a British destroyer intercepted a ship carrying illegal immigrants bound for Palestine on the high seas and escorted into port, where the vessel was forfeited.

153. Italian customs officers had arrested on the high seas a flagless vessel transporting illegal immigrants who had been transferred, on the high seas, to another vessel directed to the Italian coast and had subsequently entered Italian territorial waters. See the decision of Tribunale di Crotone, 27 September 2001, *Pamuk et al.*, cited in *RDI* (2001), 1155, and for commentary, S. Trevisanut, “Droit de la mer”, 133 *Journal du droit international* (2006) 1035.

154. Similar arguments were put forward in relation to maritime terrorism and drug trafficking.

The other possible legal basis afforded by the LOSC for interception of human beings on the high seas is suppression of the slave trade. It is beyond the scope of this chapter to refer in detail to this argument<sup>155</sup>; suffice it to say for the present purposes that it constitutes a novel proposition premised upon an evolutionary interpretation of the relevant texts, especially the LOSC. While there is an evident tendency in international judicial practice and doctrine to broadly interpret the relevant slavery provisions in order to include contemporary manifestations of slavery, there is no actual State practice or any judicial decision to buttress a corresponding interpretation of the relevant provision of the LOSC. Nonetheless, it is worth pursuing it for several reasons: first, it purports to address the problem of contemporary “slave trade”, namely human trafficking, and secondly it does so without the need of new instruments. It also reflects the “positive” and humanitarian face of “interception”, which is completely different than the current state practice of external immigration controls. Finally, it aims to fulfil the normative content of Article 99 of LOSC, namely the suppression of slavery in the legal order of the oceans<sup>156</sup>.

Of relevance is obviously the duty to assist persons in distress at sea enshrined in Part VII of LOSC<sup>157</sup>. The duty to assist persons in distress at sea is a long-established rule of customary international law. It extends both to other vessels and coastal States in the vicinity. First, with regard to flag States, Article 98 (1) of UNCLOS provides that:

“Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers . . . to render assistance to any person found at sea in danger of being lost . . . and to proceed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may be reasonably be expected of him.”

Although the aforesaid provision is located in the part of UNCLOS concerning the high seas, it is submitted that the duty in question applies in all maritime zones. On the face of Article 98 (1), the responsibility to rescue and provide assistance rests initially with the master of the ship that comes to rescue and entails the duty to deliver the people on board

---

155. This argument has been put forward in E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Oxford, Hart Publishing, 2013, pp. 267-278.

156. *Ibid.*, at p. 267.

157. See detailed discussion in Coppens, Chapter 10, *infra*. For a discussion of the interaction between the duty to assist persons in distress at sea and criminal law enforcement against migrant smuggling, see Guggisberg, Chapter 6, *infra*.

to a place of safety. Every flag State must require the master of a ship flying its flag, both State and private vessels, to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance.

Secondly, with regard to coastal States, Article 98 (2) of UNCLOS stipulates:

“Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.”

On the face of this provision, it is evident that UNCLOS sets out a general obligation of conduct on the part of coastal States to maintain search and rescue services as well as a general obligation of co-operation with other States to this end.

These laws are supplemented by other treaty instruments, for example the 1974 Safety of Life at Sea Convention (SOLAS)<sup>158</sup>. The SOLAS covers a wide range of matters ranging from construction standards to operational rules to security measures. It sets forth specific provisions about the safety of navigation and rescue obligations. The other relevant IMO Convention is the 1979 International Convention on Maritime Search and Rescue (SAR Convention)<sup>159</sup>. In May 2004, in the wake of the *Tampa* incident<sup>160</sup> and the initiatives that it fuelled<sup>161</sup>, the SAR and SOLAS Conventions were amended to impose for the first time an obligation on States to “cooperate and coordinate” to ensure that ships’ masters are allowed to disembark rescued persons to a place safety. This obligation applies irrespective of the nationality or status of those upon the ship, and with minimal disruption to the ship’s planned itinerary<sup>162</sup>.

---

158. See International Convention for the Safety of Life at Sea, adopted 1 November 1974, entered into force 25 May 1980 (1184 *UNTS*, No. 278).

159. See International Convention on Maritime Search and Rescue, adopted 27 April 1979, entered into force 22 June 1985 (1405 *UNTS*, No. 23489).

160. See the relevant discussion in C. M. Bostock, “The International Legal Obligation Owed to the Asylum-Seekers on the M.V. *Tampa*”, 14 *International Journal of Refugee Law* (2002), 279.

161. See *inter alia* IMO Assembly Resolution on the Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, 22nd session, Agenda Item No. 8, IMO Assembly Res. A.920(22), November 2001, and UNHCR, “Note on International Protection”, 53rd session, UN doc.A/AC.96/965 (11 September 2002).

162. See IMO, MSC Res 153 (78), MSC Doc. 78/26.Add.1, Annex 5 (20 May 2004) with regard to the amendments to SOLAS and IMO, MSC Res. 155 (78) with regard to amendments to SAR Convention. Both amendments entered into force on 1 July 2006; see further information at <http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Pages/Default.aspx>.

This obligation of the State parties to SOLAS and the SAR Convention to provide “a place of safety” as soon as reasonably practicable does not necessarily mean that the State responsible for the SAR region is obliged to disembark the survivors in its own area. In other words, on the face of the provisions in question, there is no residual obligation of the coastal State to allow disembarkation on its own territory when it has not been possible to do so anywhere else<sup>163</sup>. This has rightly been criticized as the most notable shortcoming of the relevant treaty regime<sup>164</sup>.

*C. Other instruments countering the trafficking of human beings at sea*

Firstly, reference should be made to the Smuggling Protocol adopted in 2000. In general, the Smuggling Protocol is designed to fight cross-border crimes by obliging signatories to adopt national legislative measures, to open information channels and to promote co-operation in enforcement of international law. As far as the boarding provision of the Smuggling Protocol is concerned, it should be noted that it is modelled upon Article 17 of the Vienna Convention. *In casu*, the relevant measures are to be enforced against a vessel suspected of being engaged in the smuggling of migrants and may include measures against masters or crews involved in the smuggling. However, since measures are to be enforced against a vessel, measures under the Protocol may not be undertaken against stowaways, a situation in which the vessel as a unit is not engaged in the illicit activity. The right to visit as such of a foreign-flagged vessel is stipulated in Article 8 (2) as follows:

“A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures with regard to that vessel. The flag State may authorise the requesting State, *inter alia*: (a) To board the vessel; (b) To search the vessel; and (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.”

---

163. For a contrary opinion see S. Trevisanut, “Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?”, 25 *IJMCL* (2010), 523, 530.

164. See also Coppens, Chapter 10, *infra*.

Obviously, under this provision, any action against a foreign vessel on the high seas must be based on the express flag State authorization. Neither tacit consent, nor simply the consent of the master of the vessel, is sufficient to trigger Article 8 (2) of the Protocol.

There has recently been a number of bilateral agreements concerning the suppression of illegal migration, which provide for, among others, the right to board vessels on the high seas. It is a truism that the majority of these agreements have been concluded by the United States. What historically propelled the US action and led to the conclusion of the first agreement of this type was the Haitian exodus<sup>165</sup>. Following an Executive Order by President Reagan initiating the Haitian Migrant Interdiction Operation, the United States concluded a bilateral agreement with Haiti on 23 September 1981, in the form of an Exchange of Letters relating to the Establishment of a Cooperative Program of Interdiction and Selective Return of Certain Haitian Migrants and Vessels<sup>166</sup>. This agreement is not the only one which the United States has concluded in the broader Caribbean area. After a certain period of extended interdiction operations on unstable legal ground, it reached an agreement with Cuba, namely the United States-Cuba Joint Communiqué on Migration (9 September 1994). It enunciated *inter alia* that

“The two governments will take effective measures in every way they possibly can to oppose and prevent the use of violence by any persons seeking to reach, or who arrive in, the US from Cuba by forcible diversions of aircraft and vessels.”<sup>167</sup>

Besides Cuba, the United States has similar agreements with the Dominican Republic (May 2003)<sup>168</sup>, Bahamas (2004)<sup>169</sup> and Ecuador<sup>170</sup>.

---

165. From the abundant academic literature on the Haitian interception policy and its legal repercussions, see, *inter alia*, B Frelick, “Haitian Boat Interdiction and Return”, 26 *Cornell Journal of International Law* (1993), 675; D. Martin, “Interdiction, Intervention and the New Frontiers of Refugee Law”, 33 *Virginia Journal of International Law* (1993), 473.

166. See 33 UST (1981), 3559.

167. See also the Cuba-United States Joint Statement on the Normalization of Migration, Building on the Agreement of 9 September 1994, 2 May 1995, 35 *ILM* (1995), 327.

168. See Agreement between the Government of the United States of America and the Government of the Dominican Republic concerning Maritime Migration Law Enforcement, signed at Washington 20 May 2003; entered into force 20 May 2003. *TIAS* 03-520, 2003 *UST LEXIS* 32.

169. See Agreement between the Government of the United States of America and the Government of the Bahamas concerning cooperation in Maritime Law Enforcement, signed at Nassau 29 June 2004; entered into force 29 June 2004.

170. See Ecuador-United States operational procedures for boarding and inspecting vessels suspected of illicit traffic in narcotic drugs and psychotropic substances and of smuggling migrants by sea, signed at Quito, 30 August 2006.

However, such migration interdiction agreements are found also in the European milieu and more specifically in the Mediterranean Sea. For example, Italy has been very active in seeking co-operation with other neighbouring countries in order to tackle illicit immigration<sup>171</sup>. First, in the mid-1990s, when Italy was faced with a major influx of immigrants from Albania, it concluded an agreement with Albania with an Exchange of Notes of 25 March 1997 for the control and suppression of clandestine migration by sea<sup>172</sup>. The most notable partnership of Italy in this regard, however, was with Libya. First, on 29 December 2007, Italy and Libya signed a bilateral co-operation agreement in Tripoli on the fight against clandestine immigration. On the same date the two countries signed an additional Protocol setting out the operational and technical arrangements for implementation of the said Agreement. On 4 February 2009 Italy and Libya signed an Additional Protocol in Tripoli, intended to strengthen bilateral co-operation in the fight against clandestine immigration. That Protocol partially amended the agreement of 29 December 2007, in particular through the inclusion of a new article, which provided for joint patrols. On 30 August 2008 in Benghazi, Italy and Libya signed a Treaty on Friendship, Partnership and Cooperation<sup>173</sup>.

This series of agreements served as the legal background for Italy's controversial "push-back operations". In nine push-back operations between 6 May and 6 November 2009, a total of 834 migrants intercepted in international waters were collectively and indiscriminately shipped to Libya by Italian border authorities, while 23 people were returned to Algeria<sup>174</sup>. Some of those people were the applicants in the *Hirsi* case before the ECtHR (2012)<sup>175</sup>.

171. On the Italian practice vis-à-vis immigration in general see A. Di Pascale, "Migration Control at Sea: The Italian Case", in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Leiden, Martinus Nijhoff, 2010, pp. 281-310.

172. For academic commentary see T. Scovazzi, "Le Norme di Diritto Internazionale sull'Immigrazione Illegale via Mare con Particolare Riferimento ai Rapporti tra Albania e Italia", in A. de Guttry and F. Pagani, *La Crisi Albanese del 1997*, Milan, Angeli, 1999, p. 239.

173. On these agreements see ECHR, *Hirsi Jama a.o. v. Italy* (Appl. No. 27765/09), Grand Chamber Judgment of 23 February 2012 case, paras. 19-20.

174. *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Ital*, App. No. 27765/09 (ECtHR), 3. See also V. Moreno-Lax, "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", 23 *International Journal of Refugee Law* (2011), 174, 185, and M. Giuffrè, "State Responsibility beyond Borders: What Legal Basis for Italy's Push-backs to Libya? 24", *International Journal of Refugee Law* (2012), 692-734.

175. See *supra* footnote 173.

## Paragraph 4 **Piracy and Armed Robbery at Sea**

### *A. Introduction*

The crime of piracy remains at the centre of international concern, particularly in view of its surge off the coast of Somalia and more recently in the Gulf of Guinea<sup>176</sup>. According to the International Maritime Organization (IMO), in the first eight months of 2012 there were 84 attacks against ships in the waters off the coast of Somalia, resulting in the hijacking of 13 ships. The majority of attacks leading to vessels being hijacked during 2012 took place in the western Indian Ocean.

As of 31 August 2012, 224 people and 17 vessels (including three fishing vessels and eight dhows) were being held hostage. This compares with 378 people and 18 vessels (including 4 fishing vessels, 1 dhow and 1 yacht) held at the end of August 2011<sup>177</sup>.

This extraordinary growth in piracy in the region has attracted unprecedented media coverage which has subsequently led to a multipronged international response. The international community has responded with a series of initiatives, such as the deployment of naval operations (EUNAVFOR *Operation Atalanta*, NATO *Operation Ocean Shield* and CTF 151) or the adoption of Security Council resolutions, *inter alia*, authorizing, in accordance with Somalia's consent, the entry into territorial waters and territory to suppress piracy. Additionally in 2008, the Combined Task Force established a maritime security patrol area (MSPA) in international waters off the Somali coast, which was followed by a Shared Awareness and Deconfliction process (SHADE) among States with naval assets in the Gulf<sup>178</sup>. Finally, the IMO has adopted Recommendations for Flag States, who, in an increasing number of cases, employ private armed guards to augment shipboard security arrangements when transiting the area of the Gulf of Aden and West Indian Ocean<sup>179</sup>.

---

176. See the Report of the International Expert Group on Piracy off the Somali Coast commissioned by the Special Representative of the Secretary-General of the United Nations to Somalia, at p. 15; available at [http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf).

177. IMO source. For an updated list of cases of piracy and armed robbery, see at <http://gis.imo.org/Public/PAR/Default.aspx>.

178. See further information at D. Guilfoyle, "Combating Piracy: Executive Measures on the High Seas", 53 *Japanese Yearbook of International Law* (2011), 149, at 155.

179. See MSC 1/Circ 1406 (23 May 2011). On the use of private armed guards see C. Spearin, "Private Military and Security Companies v. International Naval Endeavours v. Somali Pirates", 10 *Journal of International Criminal Justice* (2012), 823-837, and Williams, Chapter 9, *infra*.

*B. The law of the sea and piracy*

Piracy *jure gentium* has traditionally been described as “every unauthorized act of violence by a private vessel on the open sea with the intent to plunder (*animo furandi*)”<sup>180</sup>. This broad definition was narrowed by the conventional definitions of the 1958 Geneva Convention on the High Seas and LOSC, which should be considered as declaratory of customary international law<sup>181</sup>. Article 101 of LOSC defines piracy as consisting of any of the following acts:

“[a]ny illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship . . . and directed: (a) on the high seas, against another ship . . . (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State . . .”.

It is true that the most controversial issue concerning the definition of piracy *jure gentium* is the requirement for “private ends”. It has been already discussed that the most convincing interpretation of this requirement is that it means piracy “without due authority”<sup>182</sup>.

As far as the suppression of piracy is concerned, it has customarily been recognized and codified that those on board a pirate vessel may be arrested by the seizing vessel. These individuals may be subsequently tried by any State and are subject to penalties imposed by that State’s laws (Article 105, LOSC)<sup>183</sup>. Throughout the past several hundred years, the legitimacy of universal jurisdiction over piracy has been recognized by jurists and scholars of every major nation<sup>184</sup>.

Nevertheless, it is evident that the most remarkable and controversial issue since the initiation of the counter-piracy campaign off the coast of Somalia in 2008, has been the assertion of jurisdiction over suspected pirates in the region. The prosecutions of suspected pirates still mark low in comparison with the number of attacks<sup>185</sup>.

180. L. Oppenheim, “Disputes, War and Neutrality”, in H. Lauterpacht (ed.), *International Law: A Treatise*, 8th ed., 1955, p. 608. The qualification *jure gentium* serves as the distinguishing trait between piracy under international law and piracy under national law.

181. On the provisions of LOSC concerning piracy see Nordquist, *Commentary*, 182. On piracy in general see H. Dubner, *The Law of International Sea Piracy*, 2nd ed., The Hague, Martinus Nijhoff, 1988; A. Rubin, *The Law of Piracy*, 2nd ed., New York, Transnational, 1998.

182. See *supra* footnote 82 and accompanying text.

183. “The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith”, Article 105, LOSC.

184. See, e.g., A. Van Zwanenberg, “Interference with Ships on the High Seas”, 10 *ICLQ* (1961), 785, at 805.

185. See also Grymaneli, Chapter 5, *infra*.

With regard to the assertion of the latter, suffice it to refer to an empirical study completed by E. Kontorovich and S. Art who state,

“of all clear cases of piracy punishable under universal jurisdiction, international prosecution occurred in no more than 1.47 per cent. This figure includes the unprecedented international response to the Somali piracy surge that began in 2008 and accounts for the majority of prosecutions. Prior to 2008, nations invoked universal jurisdiction, a doctrine that arose precisely to deal with piracy, in a negligible fraction of cases (just 0.53 percent, a total of four cases).”<sup>186</sup>

It is readily apparent that the dominant approach has been to avoid capturing pirates in the first instance, or, alternatively releasing them without charge or transferring them to a third State. The latter option has been the most common solution: States such as the United States<sup>187</sup> and the United Kingdom<sup>188</sup> and the European Union<sup>189</sup> have opted for entering into Memoranda of Understanding (MoU) with countries in the region (for example Kenya, Seychelles, Tanzania and Mauritius) to transfer the suspects to the latter States. Nonetheless, the transfer of

---

186. E. Kontorovich and S. Art, “An Empirical Examination of Universal Jurisdiction over Piracy”, 104 *AJIL* (2010), 436, 436. Also Professor Rubin has shown in his authoritative history of piracy law that very few criminal prosecutions for piracy can be found that depended on universal jurisdiction. He enumerates fewer than five cases in the past 300 years; see A. Rubin, *The Law of Piracy*, 2nd ed., NY, Transnational Publishers Inc., 1998, at pp. 302, 348.

187. See, e.g., Memorandum of Understanding between the United States of America and the Republic of the Seychelles concerning the conditions of transfer of suspected pirates and armed robbers and seized property in the western Indian Ocean, the Gulf of Aden, and the Red Sea, signed at Victoria 14 July 2010.

188. Reportedly, the United Kingdom has signed relevant agreements with Kenya, Seychelles, Tanzania and more recently with Mauritius. See, e.g., “Republic of Kenya and the United Kingdom Sign A Memorandum of Understanding on Piracy along the Coast of Somalia”, available at [http://www.mfa.go.ke/mfacms/index.php?option=com\\_content&task=view&id=305&Itemid=62](http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=305&Itemid=62), and “Signing of Piracy Agreement with Mauritius” (8 June 2012); available at <http://www.number10.gov.uk/news/piracy-agreement-mauritius/>.

189. See Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy (6 March 2009); Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers (2 December 2009) and Agreement between the European Union and the Republic of Mauritius on the Conditions and Modalities for the Transfer of Suspected Pirates and Associate Seized Property from the European-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer (14 July 2011). The text of the agreements and all relevant information are available at <http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eunavfor-somalia/legal-basis.aspx?lang=en>.

piracy suspects to regional States remains complicated largely due to the lack of requisite capacity in the region, which, rightly, has been at the centre of the focus of the international community lately<sup>190</sup>.

In close interplay with the problems in asserting jurisdiction over the suspected pirates in the region are human rights considerations. Both in the relevant Security Council resolutions and in academic literature<sup>191</sup>, it is stressed that prosecutions must be “in accordance with international human rights law”. For example, in the resolution 2020 (2011), the Council

“[c]alls upon all States to criminalize piracy under their domestic law and to favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, and their facilitators and financiers ashore, consistent with applicable international law including *international human rights law*”<sup>192</sup>.

### C. Armed robbery at sea

From the definition of piracy as outlined above, it is evident that acts of violence that occur in the territorial or in the internal waters of the coastal State fall beyond the ambit of the international regulation of piracy *jure gentium*. This raises significant problems, since the majority of relevant incidents in the beginning of the twenty-first century occurred in territorial waters or ports of States, while the ships were at anchor or berthed. Therefore acts of piracy committed, for example, in the territorial waters of States littoral to Malacca Straits<sup>193</sup>, as well as in the territorial sea of Somalia, cannot be designated as piracy *jure gentium*. In view of this, the international community, and in particular, the IMO referred to the crime of “armed robbery against ships” as:

190. On the exercise of domestic criminal jurisdiction over piracy, see Grymaneli, Chapter 5, *infra*. See further information, UNODC Counter-Piracy Programme Brochure, Issue 8 (February 2012); available at [http://www.unodc.org/documents/easternafrica//piracy/20120206-UNODC\\_Brochure\\_Issue\\_8.1.pdf](http://www.unodc.org/documents/easternafrica//piracy/20120206-UNODC_Brochure_Issue_8.1.pdf).

191. See in general S. Piedimonte Bodini, “Fighting Maritime Piracy under the European Convention on Human Rights”, 22 *European Journal of International Law* (2011), 829, D. Guilfoyle, “Counter-piracy Law Enforcement and Human Rights”, 59 *International & Comparative Law Quarterly* (2010), 141, C. Laly-Chevalier, “Lutte contre le piraterie maritime et droits de l’homme”, 42 *Revue belge de droit international* (2009), 5.

192. SC res. 2020 (2011); para. 16 (emphasis added). See also Batsalas, Chapter 11, *infra*.

193. On the attacks in the Malacca Straits see *inter alia* J. S. Burnett, *Dangerous Waters: Modern Piracy and Terror on the High Seas*, NY, Plume, 2003, p. 9.

“any unlawful act of violence or detention or any act of depredation or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a state’s jurisdiction over such offences”<sup>194</sup>.

This crime reflects what has been acknowledged as piracy in many national jurisdictions (i.e. acts of piracy within territorial waters)<sup>195</sup>. Despite this, it is highly unlikely that this expansive notion of piracy within territorial jurisdiction has entered the corpus of international customary law. Moreover, this provision does not fall under the scope of Article 105 of LOSC (i.e. attracting universal jurisdiction). Hence, each coastal State must enact relevant legislation with regard to armed robbery within its waters<sup>196</sup>. In regard to cases of armed robbery at sea within Somali territorial waters, third States would have prescriptive jurisdiction only if the vessel attacked had their flag (principle of vessel registration) or had its nationals involved in the offence (principle of active or passive personality).

## Paragraph 5     **Illegal Fishing**

### *A. Introduction*

One of the most long-standing and recurrent illicit activity at sea is indubitably illegal fishing, which is currently considered as part of the called “illegal, unreported, unregulated (IUU) fishing”<sup>197</sup>. In more detail, “illegal fishing” includes all fishing activities conducted in contravention of national and international laws, as well as agreed regional fisheries management and conservation measures<sup>198</sup>. Such fishing may include fishing beyond allowable catch limits, the

---

194. IMO, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, adopted 29 November 2001, Res A.922(22), Art. 2 (2), [http://www.pmaesa.org/Maritime/Res%20A.922\(22\).doc](http://www.pmaesa.org/Maritime/Res%20A.922(22).doc). Cf. also Article 1 of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (28 April 2005), *ILM* (2005), 829.

195. See also Abdoul, Chapter 7, *infra*.

196. See further *ibid*.

197. See 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing adopted by the FAO Ministerial Meeting on Fisheries, Rome, 12 March 2005, available at <ftp://ftp.fao.org/fi/document/ministerial/2005/iuu/declaration.pdf>. See also Closing the Net: Stopping Illegal Fishing on the High Seas, Final Report of the Ministerially-led Task Force on IUU Fishing on the High Seas, 2006, available at [www.high-seas.org](http://www.high-seas.org), and M. Palma *et al.*, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing*, Leiden, Martinus Nijhoff, 2010, p. 245 (hereinafter, Palma, *Fisheries*).

198. See para. 3.1 of the IPOA-IUU.

taking of juvenile fish, the taking of prohibited fish species, fishing during closed seasons or fishing in closed areas<sup>199</sup>.

Combating illegal fishing has been one of the main issues on the international fisheries agenda for the past decade, as it has been recognized as a major threat to fisheries conservation and marine biodiversity<sup>200</sup>. It is reported that “in case of fisheries, more than 75 per cent of the world’s fish stocks are reported as already fully exploited or overexploited and increasing numbers of marine species are considered threatened or endangered”<sup>201</sup>.

Numbers regarding IUU fishing, including illegal fishing, are telling: “the 2008 estimates for the total value of IUU losses worldwide are between USD10 and 23 billion annually”<sup>202</sup>.

The international community has endeavoured to address this particular problem either globally by adopting multilateral instruments, such as the UN Fish Stocks Agreement (1995) and the FAO Compliance Agreement (1993)<sup>203</sup>, or regionally by the action of an array of regional fisheries management organisations (RFMOs)<sup>204</sup>. To this end, joint enforcement operations and inspection schemes have been extensively employed both in areas under national jurisdiction and on the high seas<sup>205</sup>.

---

199. Cf. Article 62 of LOSC and FAO Code of Conduct for Responsible Fisheries, adopted at the 28th session of the FAO Conference, Rome, Italy, 31 October 1995, para. 8.2.2 (hereinafter, FAO Code of Conduct).

200. See T. Lobach, “Combating IUU Fishing: Interaction of Global and Regional Initiatives”, in D. Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf*, Leiden, Martinus Nijhoff, 2010, pp. 109, 109.

201. R. Rayfuse, “Moving beyond the Tragedy of Global Commons: The Grotian Legacy and the Future of Sustainable Management of the Biodiversity of the High Seas”, in D. Leary and B. Pisupati (eds.), *The Future of International Environmental Law*, Tokyo, United Nations University Press, 2010, pp. 201, 204.

202. K. Gjerde, “High Seas Fisheries Governance: Prospects and Challenges in the 21st Century”, in D. Vidas and J. Schei (eds.), *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues*, Leiden, Martinus Nijhoff, 2011, pp. 221, 224.

203. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1994), 2221 *UNTS* 91. The FAO Compliance Agreement was approved on 24 November 1993 by Resolution 15/93 of the Twenty-Seventh Session of the FAO Conference and entered in force on 24 April 2003.

204. See, e.g., M Lodge, “Developing a Model for Improved Governance by Regional Fisheries Management Organizations”, in D. Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf*, Leiden, Martinus Nijhoff, 2010, pp. 157-174.

205. See *inter alia* R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden, Brill Academic Publishers, 2004.

*B. Illegal fishing and the law of the sea*

The regulation of illegal fishing in zones of national sovereignty and jurisdiction has already been discussed previously. As far as the high seas is concerned, LOSC devotes Articles 116-120 to the regulation of high seas fisheries<sup>206</sup>. Flag States have the primary responsibility to exercise enforcement jurisdiction over their vessels for unlawful fishing activities wherever they occur. In addition, Article 117 refers to States taking measures for their “respective nationals as may be necessary for the conservation of the living resources of the high seas”. This provision affords the legal basis for States to take action against their nationals who engage in IUU fishing even if the national is on a vessel flagged to another State<sup>207</sup>.

As regards enforcement on the high seas, LOSC falls short of providing for interception powers against foreign-flagged vessels on the high seas. The only ground under LOSC that may be invoked in order to board and inspect a fishing vessel on the high seas is the statelessness of vessels (Article 110 (1) (d) of LOSC)<sup>208</sup>. Besides this, there must be a treaty granting such powers to contracting States, such as the Straddling Stocks Agreement. This lacuna under the LOSC became evident in the famous *Estai* case, that is, the dispute between Canada and Spain before the ICJ concerning fishing immediately outside Canada’s EEZ. Canada sought to extend its enforcement powers to these vessels on the basis, *inter alia*, of an ecological emergency, whereas Spain argued that Canada had to respect the principle of exclusive flag State jurisdiction on the high seas. At the end, the Court held that it lacked jurisdiction to resolve the dispute and thus the merits of the case were never discussed<sup>209</sup>.

The global treaty that allows for enforcement action against foreign vessels on the high seas is the 1995 Straddling Stocks Agreement<sup>210</sup>. In general, the Agreement establishes a general framework and principles

---

206. See in general E. Hey, “The Fisheries Provisions of the LOS Convention”, in E. Hey (ed.), *Developments in International Fisheries Law*, The Hague, Kluwer Law International, 1999, p. 20.

207. See Guilfoyle, *supra* footnote 60, at 101.

208. See *inter alia* T. McDorman, “Stateless Fishing Vessels, International Law and the UN High Seas Fisheries Conference”, 25 *Journal of Maritime Law and Commerce* (1994), 531.

209. *Fisheries Jurisdiction case (Spain v. Canada)*, Preliminary Objections, *ICJ Reports 1998*, p. 432. For commentary see R. Churchill, in 12 *LJIL* (1999), 597-611.

210. See also M. Hayashi, “The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention”, 29 *Ocean & Coastal Management* (1995), 51-69.

and rules within which particular straddling and highly migratory fish stocks may be better managed at the regional level. One of the most significant aspects is the emphasis on co-operation among States to conserve and manage these stocks through appropriate regional or sub-regional fisheries management organizations and arrangements<sup>211</sup>. Co-operation in the conservation and management of resources on the high seas is not only an obligation of RFMO members but it is also extended to non-members or non-participants in such organizations. Article 8 (3) stipulates that States fishing for these stocks on the high seas may choose not to join in the respective RFMO, yet they are obliged not to undermine the conservation and management measures adopted by the latter organization. In addition, under Article 17 (1), non-member States of RFMOs are not discharged from the obligation to co-operate in the conservation and management of such fish stocks.

### *C. Regional fisheries management organizations*

The most advanced and efficient initiative to manage fisheries on the high seas has been the establishment of regional fisheries management organizations (RFMOs)<sup>212</sup>. Such organizations have the competence to prescribe fishery conservation and management measures, including total allowable catches (TACs) for some fish stocks, as well as to take various steps to promote compliance with these measures<sup>213</sup>. These enforcement mechanisms applicable between the contracting States include what may be characterized as more traditional maritime enforcement measures, such as intercepting, boarding, inspecting and potentially arresting a vessel.

To provide an example, the North Pacific Anadromous Fish Commission, which was established in 1993 with a treaty between Japan, the United States, Canada and Russia<sup>214</sup>, aims to prevent directed fishing for certain salmon species within the management area. The said Convention sets forth a reciprocal boarding and inspection scheme: duly authorized officials of any State party may board any other party's fishing vessel upon reasonable suspicion that it is in violation of the Convention

---

211. Article 8 of Fish Stocks Agreement.

212. On RFMOs in general see *inter alia* R. Barston, "The Law of the Sea and Regional Fisheries Organisations", 14 *IJMC*L (1999), 333; T. Henriksen *et al.*, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*, Leiden, Martinus Nijhoff, 2006.

213. For a list of the principal RFMOs, see A. Sydnes, "Regional Fishery Organizations: How and Why Organizational Diversity Matters", 32 *Ocean Development & International Law* (2001), 349, 353.

214. See Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, *TIAS* 11465.

and inspect the vessel and question persons aboard. The inspecting State may arrest a person or the vessel should it reasonably believe that it has breached the Convention, and conduct further investigations if necessary. However, only the flag State may try violations and impose penalties upon the delinquent vessel<sup>215</sup>.

## Paragraph 6 **Pollution of Maritime Environment**

### *A. Introduction*

“Each year, up to 810,000 tons of oily waste is intentionally and illegally dumped into the world’s oceans by commercial vessels. As a consequence, seabird populations are reduced, the habitats for slow-moving shellfish such as clams, oysters, and mussels are poisoned, and fish — if not killed by the harmful toxins of the oil — lose the ability to reproduce, reproduce deformed offspring, or upon ingestion of the oil, create even more toxic substances. Separately, mammals, reptiles, and amphibians whose natural habitats are either in or close to coastal waters either suffocate to death from oil ingestion or die from eating wildlife previously poisoned by oily waste.”<sup>216</sup>

This short paragraph aptly describes the threat to the marine environment and to the biodiversity of the global ecosystem posed by the illegal dumping of oil. Vessel-source pollution is responsible for some 12 per cent of marine pollution. Thus it is subject to strict international regulation. A significant amount of this pollution is due to oil bunkering. It is reported that

“to reduce the chances of getting caught, vessels most often illegally discharge their oily waste outside of any port, flag, or coastal state’s territorial seas, along regular shipping routes or in an area of recent oil accidents at nighttime”<sup>217</sup>.

### *B. Maritime pollution and the law of the sea*

The legal regime for preventing vessel-source pollution is aptly described in Part XII on the “Protection and Preservation of the

215. See *op. cit. supra* footnote 214, Article 5 (2).

216. B. S. Gullo, “The Illegal Discharge of Oil on the High Seas: The US Coast Guard’s Ongoing Battle against Vessel Polluters and a New Approach toward Establishing Environmental Compliance”, 209 *Military Review* (2011), 122.

217. See OECD Report, “Cost Savings Stemming from Non-Compliance with International Environmental Regulations in the Maritime Sector” (2003), at p. 47.

Marine Environment” of LOSC<sup>218</sup>. Besides the LOSC, vessel-source pollution is mainly governed by conventions concluded under the auspices of the International Maritime Organization (IMO). First and the most relevant is obviously MARPOL 1973/78, which mainly addresses the prevention of pollution<sup>219</sup>. Another relevant IMO Convention is the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, which covers the response in case of pollution from ships<sup>220</sup>.

#### SECTION 4 CONCLUDING REMARKS

As aptly demonstrated in the above analysis, combating crimes at sea poses numerous challenges, both to States and international organizations. This is because organized crime at sea is a multifaceted problem, involving many criminal activities and many practical difficulties both on the international plane as well as in the domestic setting. Challenges may arise when conducting enforcement operations at sea. Such operations may involve multinational forces with no specific mandate or knowledge of how to tackle sensitive issues relevant to evidence collection, witnesses’ testimonies or human rights. In addition, the problem of the necessary legal basis for the interdiction operation looms large in many occasions.

Also, challenges are observed firstly in relation to the establishment of jurisdiction over transnational organized crimes at sea and secondly in ensuring efficient co-operation amongst various State authorities. This may be addressed by co-ordination between competent international organizations and by the development of more Mutual Legal Assistance (MLA) and extradition agreements. The ratification of existing multilateral treaties concerning criminal activities at sea and the harmonization of domestic legislation is imperative in the fight against crime at sea.

All these issues were addressed during the 2012 Centre for Studies and Research of the Hague Academy of International Law and the products of the meticulous research of the participants are to be found in the following chapters.

---

218. See also Gahlen, Chapter 3, *infra*.

219. International Convention for the Prevention of Pollution from Ships, 2 November 1973, 1983 *UNTS* 184 (entered into force 2 October 1983) and Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 17 February 1978, 1983 *UNTS* 62 (entered into force 2 October 1983).

220. International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC): Adoption: 30 November 1990; entry into force: 13 May 1995.

E Papastavridis, "Crimes at Sea: A Law of the Sea Perspective"™, in E Papastavridis & K Trapp (eds.), *La Criminalit  en Mer/Crimes at Sea*, Hague Academy of International Law (Leiden: Martinus Nijhoff Pub. 2014), pp. 3-52. E Papastavridis, "We Saved them. Now What?" E Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, (Oxford: Hart Publishing, 2013) [reprinted in paperback in 2014 with a new Preface]. Bantekas & E. Papastavridis, *International Law Concentrate* (Oxford: Oxford University Press, 2013).