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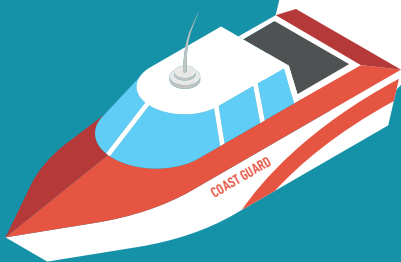
**SECOND
EDITION**

MARITIME CRIME:

A MANUAL FOR

CRIMINAL JUSTICE

PRACTITIONERS



GLOBAL MARITIME
CRIME PROGRAMME

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Maritime Crime: A Manual for Criminal Justice Practitioners

Global Maritime Crime Programme



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PREFACE

The Global Maritime Crime Programme (GMCP) of the United Nations Office on Drugs and Crime (UNODC) provides Member States with technical support to tackle the full range of transnational maritime crime. This Manual underpins that technical support. It is used both as a training tool in the capacity-building work carried out by the Programme, and as a guide for criminal justice practitioners working on maritime cases.

The second edition of the Manual contains an examination of a number of maritime crimes in detail for the first time, including the smuggling of migrants, terrorism, fuel theft and kidnap for ransom. The Manual also includes a new chapter on human rights at sea and new annexes, printed as separate publications, on the legal issues surrounding floating armouries and on the use of force by privately contracted security companies.

We hope you find the Manual of use in your work.

Alan Cole
Head, Global Maritime Crime Programme

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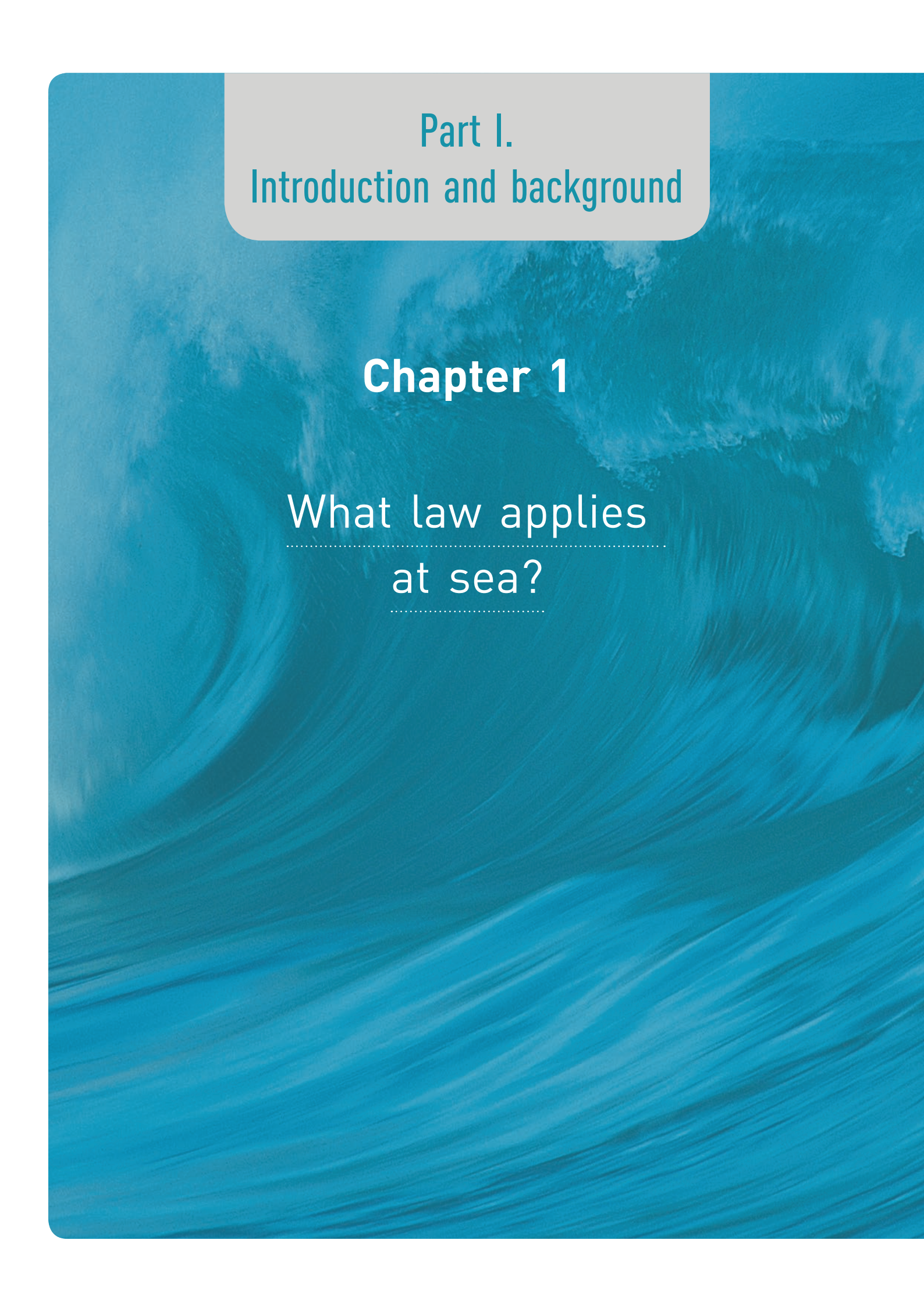
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The group effort was not only enjoyable but has produced a great, practical product.

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Part I.
Introduction and background

Chapter 1

What law applies
.....
at sea?
.....

KEY POINTS

1. There is an extensive legal regime that covers conduct upon the oceans.
2. There are many treaties and customary international law rules that apply to conduct at sea.
3. The centrepiece of this regime is the United Nations Convention on the Law of the Sea of 1982, which, along with customary international law, governs conduct at sea.
4. It is vital that maritime law enforcement agencies know what laws their State has passed in order to make international law applicable:
 - (a) Within their State's maritime zones,
 - (b) To people and vessels of their State, and
 - (c) In some circumstances, to vessels without nationality,so as to enable their State to engage in maritime law enforcement and prosecutions in relation to breaches of those laws.
5. A flag State generally has exclusive jurisdiction over a vessel flying its flag. However, there are exceptions to this rule, which in some circumstances allow another State to exercise jurisdiction over that vessel or people, things and conduct in that vessel.
6. This Manual examines legal considerations in maritime law enforcement. As such, it does not address the use of force in relation to contested claims at sea, the law of armed conflict or other national defence operations.

KEY TERMS

INTERNATIONAL LAW: The rules and other norms, both written and unwritten, that govern legal relations between States. International law includes many rules and other norms that relate to the rights and obligations that States have or may claim in relation to maritime law enforcement.

TREATY/CONVENTION: An international agreement concluded between two or more States which binds those States to act in a particular way, to relate with each other in a particular way and/or to manage competing claims and other issues between them through a particular process. These agreements are in written form and are governed by international law.

CUSTOMARY INTERNATIONAL LAW: International obligations arising from established State practice which bind States in their conduct and relations and are not reduced to a written instrument. States abide by these legal obligations because they consider themselves legally obliged to do so. Such customary rules can sometimes be difficult to identify, and States differ as to which rules meet the requirements of being customary international law.

IMPLEMENTATION IN NATIONAL LAW: For an international rule to be actionable within a State, or useable by that State's agents (such as navies, coastguards and marine police) as an authorization or source of power, it needs to be incorporated into that State's own national law. For some States, this is automatic; for example, a new treaty becomes part of the State's national legislation upon signature and ratification. For other States, a further act of "domestication" is required, such as passing a new law or regulation which incorporates that international rule into national law. These approaches are often called the "monist" and the "dualist" system, respectively.

MARITIME CRIME: Conduct which is perpetrated wholly or partly at sea and is prohibited under applicable national and international law.

INTRODUCTION

1.1 Why is it important for law to apply at sea?

There is an extensive regime of laws that applies in relation to activities which take place in, over and under the sea. Some of these rules are universal and therefore apply to all States; some are regional and apply to a limited number of States in a certain geographic region; some are bilateral and apply only to the two States which have agreed to the laws. It is important to have such rules governing conduct and relationships at sea for many reasons: First, the idea of a lawless space at sea (or in any other region) is against the interests of States, and thus a system of laws applicable at sea has emerged to ensure accountability for proscribed conduct regardless of where it occurs.

Another reason is that State interests often interact at sea, for example when ships of different States collide or a national from one State harms a national from another State aboard a ship, and it is important to have rules which describe how to manage these jurisdictional conflicts and crossovers.

A third reason is that the seas are divided into various zones in which States have different, and sometimes competing, sets of rights, powers and obligations. Rules are necessary in order to allocate and describe the rights, powers and obligations of States in these zones.

Yet another reason is that the use of the seas as a means of transport and the exploitation of some common resources are considered to be rights available to all States. Therefore, it is necessary to define rules which govern how these shared interests and rights are used and managed.

As a result, it is vital to have rules that govern how States manage resources, control crime and relate with one another at sea. However, these rules can still create jurisdictional difficulties for States because at sea, jurisdiction is not always as complete, and the hierarchy of jurisdiction is not always as clear, as is generally the case in land territory. On land there is, at least in theory, always a clearly superior jurisdiction—that of the sovereign territorial State.

Consequently, the way in which jurisdiction is delimited at sea is by designating certain maritime zones in which coastal States have certain rights and by retaining the concept of sovereign jurisdiction over vessels in the form of flag State jurisdiction.

1.2 International legal regimes that apply at sea

Treaties. Many treaties apply at sea and in relation to the sea. The United Nations Convention on the Law of the Sea of 1982 (UNCLOS) is considered to be the fundamental expression of the rules governing general relationships and jurisdictions at sea. In effect, it is a “constitution” for the sea.

Other treaties deal with issues that are not specifically “maritime” in nature, but which can apply both at sea and on land. For example, many of the provisions in the Rome Statute of the International Criminal Court apply equally to conduct perpetrated at sea and on land. Sometimes the way in which a general treaty rule is applied at sea requires some adjustment or a slightly different understanding, precisely because the sea is not the same as land territory. One example is the fundamental rule about when the right of a State to use force to defend itself is activated

(i.e. the inherent right of national self-defence as recognized in article 51 of the Charter of the United Nations). At times, international courts and tribunals have had to deal with questions about how this rule operates at sea, because conduct such as boarding a vessel at sea is not necessarily regarded in the same way as a small force crossing a land border. Another example is that some States adjust the time frames applicable to their human rights obligations or criminal procedure laws as to what “promptly” means when bringing a person detained at sea before a court for review of detention.

Customary international law. Similarly, a range of customary international law rules have been specifically designed to apply at sea. Piracy, for example, is a very old prohibition in international law, and the customary rule far predates the codified definition of piracy introduced in twentieth-century treaties on the law of the sea. Indeed, for some States which have not signed and ratified any of these modern treaties, their authority to take action against piracy under international law may only exist by virtue of customary rules.

As with treaties, there are also customary rules which are not necessarily specifically concerned with the sea, but which can apply equally, or with close approximation, at sea. One example is the law of armed conflict rule on the precautions that must be taken when attacking an enemy force. For many States, this is a treaty rule, but for some States it applies by virtue of customary international law rather than a treaty which they have not signed and ratified. This rule applies equally at sea and so applies regardless of whether an attack is aimed at an enemy tank park on land or an enemy warship far out at sea. Of course, however, it is important to remember that this Manual concerns maritime law enforcement and thus does not cover the law of armed conflict; this particular rule is cited only as an example of a customary rule applicable at sea.

A further source of rules of international law that apply at sea are the decisions of tribunals and courts. For example, the International Court of Justice has interpreted many rules of international law that apply at sea, particularly in respect of maritime claims and delimiting maritime zones. The International Tribunal for the Law of the Sea has also interpreted provisions in UNCLOS—for example, in relation to fisheries issues and disputes as well as the status of certain vessels as warships. The outcomes of certain international arbitrations have also been significant in clarifying or

providing detail on the application of rules at sea, such as providing specific detail on how to implement the right of hot pursuit correctly (see chapter 5). Finally, cases before national courts and tribunals are sometimes widely referred to because they have helped to clarify or explain an international rule in terms of how it applies at sea.

1.3 Implementing international law at sea

There are two levels of implementation of international law that concern the organs of a State—which, for the purposes of this Manual, generally refers to those people and agencies entrusted with the power and authority of their State, and acting under that State’s direction and control, to deal with matters of maritime crime and maritime law enforcement. The first is the “big picture” level where a State joins a treaty and thus indicates to other States that it intends to act in accordance with the rules in that treaty; in other words, it binds itself to those rules. This creates rights and responsibilities for that State in relation to other States bound by the same rules. The situation is essentially the same for customary rules: If a State has not persistently objected to a given rule, it is generally taken to mean that the State has agreed to be bound by that rule.

The second level of application is implementation in national law. This means that the State implements international law into its national legal system so that these rights and responsibilities are given force within the national law of the State. In turn, this implementation allows that State to give its organs—such as maritime law enforcement officials, prosecutors and judges—the power and jurisdiction to do the things the State has agreed (with other States) that it can or will do.

An example of this level of application is the regime of the exclusive economic zone (see chapter 4). The “big picture” level of application is that a State joins UNCLOS, which then entitles that State to claim up to 200 nautical miles (nm) of exclusive economic zone. This creates rights for that State to exploit the resources in this zone, and reciprocal obligations on other States to respect those rights. However, for the State to be able to actually enforce those rights—for example by arresting a foreign vessel which is fishing in the exclusive economic zone without a permit—it needs to have: (a) declared, in accordance with its national laws, where precisely

the zone ends; (b) created prohibitions in its national laws that make it an offence for foreign fishing vessels to fish there without a permit; and (c) given its maritime law enforcement agents

the power to apprehend people and investigate conduct, and its courts the jurisdiction to hear cases, in relation to unlawful fishing in that exclusive economic zone.

THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1982)

1.4 Background to the Convention

What law of the sea was there before UNCLOS? The need to have some agreed-upon rules that apply over the sea and in relation to conduct at sea was one of the earliest concerns of international law. There were Roman laws relating to the freedom and uses of the seas, and during the Middle Ages in Europe, the Catholic Pope, for example, issued a declaration (a papal bull) dividing the seas between Spain and Portugal. However, the modern law of the sea essentially began in the 1600s with legal analyses of the rules applicable over the sea, and at sea, by legal scholars such as Hugo Grotius, who wrote about the freedom of the seas, and John Selden, who wrote about the capacity of States to “own” or “close” parts of the sea.

The most significant advances in codifying the law of the sea—that is, setting down the rules in coherent, collective written instruments (mostly treaties)—were made during the twentieth century. The most significant codification prior to UNCLOS can be found in the Geneva Conventions on the Law of the Sea of 1958, which included four interlinked treaties: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf.

However, this set of conventions suffered from a number of deficiencies which ultimately rendered them inadequate in terms of managing tensions arising from States’ interactions at sea, particularly in relation to resources and fishing. One of these deficiencies was that States could pick and choose which of the four conventions they would sign and ratify, meaning that they could accept some rights and ignore some responsibilities. Another deficiency was that the States could not agree upon, and therefore the conventions did not set out, the limit up to which a State may claim a territorial sea and a fishery zone.

A further set of meetings in 1960 also failed to resolve these fundamental issues. Between 1958 and the start of negotiations for UNCLOS, many States unilaterally claimed territorial seas and fishery zones of widely varying sizes, in some cases out to 200 nm.

In this context, States agreed in the late 1960s that they needed to negotiate an enhanced, more complete set of rules governing the seas. This new process—undertaken as the Third United Nations Conference on the Law of the Sea—formally commenced in 1973 and continued until the text of UNCLOS was finally settled and opened for signature at Montego Bay in December 1982.

The negotiation of UNCLOS was underpinned by a number of factors which are clearly evident in the Convention itself. The first is that UNCLOS had to be a single treaty, so that States could not pick and choose which parts of a set of treaties they would agree to. Hence, UNCLOS is a large treaty, with 320 articles and nine annexes, some of which are themselves quite large (such as annex III, on the Basic Conditions of Prospecting, Exploration and Exploitation, which contains 22 articles).

The second underpinning factor was that UNCLOS was the first large multilateral treaty to be negotiated by consensus. This meant that some parts of the text were drafted and redrafted until they were sufficiently acceptable to all, so that individual parts did not need to be put to a vote. One consequence of this process is that some concepts in UNCLOS have been left undefined. Other concepts have been left “constructively ambiguous”, that is, the wording has been intentionally left ambiguous enough that each State is sufficiently satisfied that the concept or article has a meaning which satisfies that particular State, while other States may consider the concept or article to have a slightly different meaning. One example of this is article 30.

Article 30 does not describe the precise degree of force allowable in “requiring” a foreign warship which is not complying with the laws and regulations of the

coastal State concerning passage through the territorial sea (“innocent passage”) to leave the territorial sea. Getting States to agree on such a detail was simply impossible, so the language eventually agreed upon was ambiguous enough that one State might claim that this allows use of direct fire against an offending warship, while another State might claim that it only authorizes non-forcible measures.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 30

Non-compliance by warships with the laws and regulations of the coastal State

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

A third underpinning factor which characterized the negotiation of UNCLOS was that it was to be a “package deal”. On one level, as noted above, this meant that all the rules would be contained in a single text, so the States parties to the Convention were required to accept all operative provisions (i.e. the “complete package”). On a second, more detailed level, the package deal also required that the treaty reflect the agreement to balance flag State rights, coastal State rights and navigational freedoms.

One example was the need to balance the legitimate maritime security concerns of archipelagic States (such as their ability to assert some security control over conduct in the waters sandwiched between their islands) with the equally legitimate needs of other States to be able to sail their ships and fly their aircraft unhindered through and over these waters, because they are often the most efficient and economic route from one place to another. The resultant “package deal” is reflected in the balances achieved between the regime of archipelagic waters, which effectively give the archipelagic State the same control over the waters between its islands that it has in the territorial sea around its islands

(except for specific provisions which allow aircraft overflight in some circumstances) and the right of archipelagic sea-lanes passage for other States, which meant that their ships and aircraft could still use certain routes through archipelagos and remain secure in the knowledge that the archipelagic State was bound not to close or hamper those routes.

1.5 What types of issues are addressed in UNCLOS?

UNCLOS deals with many topics. It establishes the regime of maritime zones that characterize the delimitation of the seas: internal waters, territorial sea, archipelagic waters, contiguous zone, exclusive economic zone, continental shelf and extended continental shelf, high seas and the deep seabed. The Convention establishes the general rules for drawing the baselines from which most of these zones are measured. It also describes the rights and obligations—including resource rights, passage rights and other freedoms—that exist in each of these zones. Finally, it contains detailed provisions on piracy, boarding and pursuing vessels, and managing the exploitation of resources outside the management reach of individual coastal States, and sets up dispute resolution mechanisms.

1.6 What types of issues are not dealt with in UNCLOS?

There are, however, a number of issues which UNCLOS specifically does not address. One of these is the specific rules applicable to armed conflict at sea. However, many aspects of UNCLOS, such as the regime of maritime zones and certain passage and transit regimes, are considered to overlay the rules on armed conflicts at sea and are fundamental to where and how those rules are applied.

A second set of issues are those which are briefly noted in UNCLOS, but which have required further negotiations and agreements on implementation before they can be given detailed effect. One example is the special implementing arrangement that relates to straddling fish stocks.

OTHER INTERNATIONAL LAW SPECIFICALLY RELATED TO THE SEA

1.7 Suppression of unlawful acts at sea (SUA Convention and protocols)

UNCLOS is clearly the most significant piece of international law that is specifically aimed at governing the sea and regulating conduct at sea. However, there are many other treaties which are specifically designed to regulate or govern some aspect of State relationships at sea or conduct at sea. One example is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (SUA Convention) and its three protocols: one from 1988 dealing with fixed platforms and two from 2005 (one each on vessels and fixed platforms) which address certain types of criminal uses of the sea and conduct at sea in greater detail.

To know which specific set of obligations applies between any two States parties to the SUA Convention and its protocols, it is essential to know which treaties each of those States has ratified. For example, if State A has ratified only the 1988 Convention and Protocol, but State B has also ratified the 2005 protocols, it will generally be the 1988 set of legal obligations that applies between them. If both State A and State B have ratified the 2005 protocols, that set of obligations will apply.

The SUA Convention is concerned primarily with certain types of dangers to ships and navigation, and set in place an “extradite or prosecute” regime for offenders apprehended by those States which had ratified it. The 2005 protocols to the Convention went further, criminalizing the transport of terrorists and biological, chemical and nuclear weapons, among other things. The 2005 protocols also facilitate cooperation between States and provide a comprehensive framework for boarding suspect vessels. Consequently, the legal authorities and obligations of a State in relation to the Convention and its protocols will depend upon the particular combination of those instruments that the State has ratified. For example, article 3 of the Convention sets out a number of acts that those States which have signed and ratified the Convention have declared that they will criminalize

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION (1988)

ARTICLE 3

1. Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs *(a)* to *(f)*.

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs *(b)*, *(c)* and *(e)*, if that threat is likely to endanger the safe navigation of the ship in question.

This set of acts was broadened by the Protocol of 2005 to the SUA Convention.

PROTOCOL OF 2005 TO THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION (ARTICLE 3 *BIS* ADDED TO THE TEXT OF THE 1988 CONVENTION FOR THOSE STATES THAT RATIFIED THE 2005 PROTOCOL)

ARTICLE 3 *BIS*

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:

- (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
- (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
- (iii) uses a ship in a manner that causes death or serious injury or damage; or
- (iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii); or

(b) transports on board a ship:

- (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or
- (ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or
- (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or
- (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

...

1.8 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2000)

Although UNCLOS established and codified the basic set of fisheries arrangements applicable between States, it has nevertheless remained necessary for groups of States in particular regions to develop more precise rules and regulatory regimes to govern fish stocks that migrate between their exclusive economic zones and in areas between those zones. This has been necessary in order to ensure a reasonable economic outcome, for example by ensuring that one State does not generate massive income by allowing uncapped fishing of a migratory stock as it passes through its own exclusive economic zone, thus radically reducing the stock (and the potential income) by the time it reaches a neighbouring State's exclusive economic zone. These efforts have also been driven by other influences, such as the legal obligation and practical need to act cooperatively, and transnationally, in order to preserve the ecological and economic viability of overfished stocks for the future.

To this end, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 2000 was negotiated under the umbrella of the general provisions and regime established in UNCLOS and the additional, more detailed 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which was itself negotiated to add detail to this particular element of the UNCLOS fisheries regime. The purpose of the Convention is expressed in its article 2.

CONVENTION ON THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC OCEAN

ARTICLE 2

Objective

The objective of this Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 Convention and the Agreement.

1.9 Maritime search and rescue

For centuries, mariners have recognized a humanitarian duty to render assistance to persons in distress. Ship and aircraft commanders today have the same basic duty to assist those in distress; this is reflected in customary international law as well as more detailed search and rescue rules laid down in the International Convention for the Safety of Life at Sea of 1974, the International Convention on Maritime Search and Rescue of 1979, UNCLOS and the International Convention on Salvage of 1989.

The master of a ship has a duty to render assistance to persons in distress at sea. Ships and aircraft may be called upon in a variety of ways to support, conduct or coordinate search and rescue operations in the maritime environment, including conducting searches, towing vessels in distress, providing medical assistance, assisting in firefighting operations, providing food and supplies, and rescuing survivors.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 98

Duty to render assistance

1. 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:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. 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.

A rescue requires the commander of the warship or other authorized vessel to take into account immediate operational considerations, including the location of the distressed vessel, the nature of the distress, the training and expertise of crew on board, available

SEARCH AND RESCUE OBLIGATIONS, AND EXCERPTS FROM CONVENTIONS

Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants (IMO, UNHCR and ICS, 2015):

Just as Masters have an obligation to render assistance, Member States have a complementary obligation to coordinate and cooperate so that persons rescued at sea are disembarked in a place of safety as soon as possible.

UNCLOS, ARTICLE 98:

Every State shall require the master of a ship flying its flag ... (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to rescue persons in distress.

...

Comment: Under UNCLOS, the duty to render assistance exists throughout the ocean, be it in a territorial sea, in straits used for international navigation, in archipelagic waters, in an exclusive economic zone or on the high seas.

Safety of Life at Sea Convention, annex, chapter V, regulation 33:

1. The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance ...

Comment: The obligation to provide assistance applies to all ships except warships; however, it is common practice for governments to have warships act in a manner consistent with this obligation.

safety equipment, possible infectious diseases and security concerns. To support these operations, maritime law enforcement agencies must have a good understanding of the obligations under international law concerning assistance at sea and of how the global search and rescue system is implemented by coastal States.

The 1974 Safety of Life at Sea Convention was the first international legal instrument to call for the establishment of global maritime search and rescue services. The Convention is significant because it represented a system where the legal responsibility to rescue those in distress became government-based, rather than a system where the onus is placed solely upon the master of the vessel. States working together to save lives, in support of the ship's master and/or the assisting State vessel, enable the global search and rescue system to be effective.

International instruments that provide guidance on maritime search and rescue include:

(a) UNCLOS, which recognizes the duty to render assistance, requires States to “promote” maritime search and rescue services, and calls on States to develop regional arrangements to cooperate with neighbouring States;

(b) The Safety of Life at Sea Convention, which requires contracting States to “undertake” such services;

(c) The International Convention on Maritime Search and Rescue, which describes State obligations to undertake maritime search and rescue services; and

(d) The International Convention on Salvage, which stipulates that every master is bound, in so far as he can do so without serious danger to his vessel

and persons thereon, to render assistance to any person in danger of being lost at sea.

Key search and rescue terms include the following:

(a) *Search and rescue region*: A defined geographic area which is associated with a rescue coordination centre and within which search and rescue coordination services are provided;

(b) *Rescue coordination centre*: A unit responsible for promoting efficient search and rescue services and coordinating the conduct of search and rescue operations within a search and rescue region;

(c) *Search and rescue mission coordinator*: The official assigned to coordinate the response to an actual or apparent distress situation.

OTHER INTERNATIONAL LAW WHICH CAN APPLY TO MARITIME CRIMES

1.10 Bilateral agreements

When two States arrange to manage or cooperate on an issue of common concern in a coordinated way, they will usually formalize this arrangement through a written document (often a treaty). These agreements bind only the parties to them. For example, the United States of America has signed a bilateral agreement with the Marshall Islands on boarding arrangements (see chapter 5). However, this agreement only applies between the United States and the Marshall Islands; it does not bind States that are not parties to that agreement.

1.11 Regional initiatives

It is quite common for States within a particular region to formalize arrangements for dealing with maritime issues in a way that is particularly useful for, and sensitive to, the peculiarities of that region. Such special regional circumstances can include issues of geography, competing or overlapping claims and shared interests in cooperating in order to ensure effective maritime law enforcement. As noted above (section 1.8), one example is the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

Another example is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia.

REGIONAL COOPERATION AGREEMENT ON COMBATING PIRACY AND ARMED ROBBERY AGAINST SHIPS IN ASIA

ARTICLE 3

General Obligations

1. Each Contracting Party shall, in accordance with its national laws and regulations and applicable rules of international law, make every effort to take effective measures in respect of the following:

(a) to prevent and suppress piracy and armed robbery against ships;

(b) to arrest pirates or persons who have committed armed robbery against ships;

(c) to seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and

(d) to rescue victim ships and victims of piracy or armed robbery against ships.

2. Nothing in this article shall prevent each Contracting Party from taking additional measures in respect of subparagraphs (a) to (d) above in its land territory.

1.12 United Nations Convention against Transnational Organized Crime

In addition to the range of international rules that relate specifically to the sea, a large number of treaties apply more generally but also have implications for the regulation of conduct at sea. Many of these treaties do not contain any special subrules on the sea, but because they are intended for general application, they also apply to certain aspects of conduct

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

ARTICLE 7

Cooperation

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

ARTICLE 8

Measures against the smuggling of migrants by sea

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. 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 authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize 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.

...

at sea. Other treaties do have special built-in subrules which relate to the application of the main rules to conduct at sea.

One example of a set of treaty rules that applies equally at sea and on land, without any special mention of the sea, is the United Nations Convention against Transnational Organized Crime of 2000 and its protocols. This set of rules applies to mutual legal assistance in cases of piracy, to name one example. Additionally, the related Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime contains additional rules on the application of the Organized Crime Convention in relation to the specific crime of smuggling migrants by sea.

1.13 Wildlife and forestry trade regulation

Another set of treaty rules which are of general application and which, consequently, also apply to conduct at sea, is the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973, as amended in 1979. This treaty seeks to regulate trade in three categories of species and has implications for conduct at sea in at least two ways: First, some of the species it seeks to regulate are found in the sea. Second, given that much trade relies on maritime transport, it is vital that the rules also cover trade by sea.

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

ARTICLE I

Definitions

...

(c) "Trade" means export, re-export, import and introduction from the sea;

(d) "Re-export" means export of any specimen that has previously been imported;

(e) "Introduction from the sea" means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State;

...

1.14 Drugs

Another example of a treaty which addresses a matter of universal concern to States and which contains some special additional rules for application at sea is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention). UNCLOS also contains a general rule on this issue.

States have long recognized that the trafficking of drugs by sea is a major criminal enterprise and needs to be addressed in more detail than provided for in UNCLOS. As a consequence, when they came to negotiate the 1988 Convention, States took the opportunity to provide greater detail on how to implement the general authorization found in UNCLOS. The maritime crime of trafficking drugs by sea is dealt with in more detail in chapter 12.

UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

ARTICLE 17

Illicit Traffic by Sea

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.
2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
3. A Party which has reasonable grounds to suspect that a vessel exercising 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 authorization from the flag State to take appropriate measures in regard to that vessel.
4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia:
 - (a) Board the vessel;
 - (b) Search the vessel;
 - (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

...

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 108

Illicit traffic in narcotic drugs or psychotropic substances

1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

1.15 Arms trafficking

NAIROBI PROTOCOL FOR THE PREVENTION, CONTROL AND REDUCTION OF SMALL ARMS AND LIGHT WEAPONS IN THE GREAT LAKES REGION AND THE HORN OF AFRICA (2004)

ARTICLE 15

Law Enforcement

- (a) States Parties shall establish appropriate mechanisms for cooperation among law enforcement agencies to promote effective law enforcement including:
 - (i) strengthening regional and continental cooperation among police, customs and border control services to address the illicit proliferation, circulation and trafficking of small arms and light weapons. These efforts should include, but not be limited to, training, the exchange of information to support common action to contain and reduce illicit small arms and light weapons trafficking across borders, and the conclusion of necessary agreements in this regard;
 - (ii) establishing direct communication systems to facilitate free and fast flow of information among the law enforcement agencies in the sub-region;
 - (iii) establishing multi-disciplinary/specialized law enforcement units for combating the illicit manufacturing of and trafficking in, possession and use of small arms and light weapons;
 - (iv) promoting cooperation with international organisations such as the International Criminal Police Organization (INTERPOL) and the World Customs Organization (WCO) and to utilise existing data bases such as the Interpol Weapons and Explosives Tracing System (IWETS);
 - (v) introducing effective extradition arrangements.

In 2001, States adopted the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. This Programme of Action requires States to take steps to deal with trafficking in small arms, including by sea. One regional initiative to implement those obligations is the Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn Of Africa. As can be seen, for example, in article 15 on law enforcement, many of these cooperative measures can be applied at sea by maritime law enforcement agencies just as they can on land. However, applying such measures at sea—for example in relation to vessels flying the flag of States that have ratified the Nairobi Protocol or in their territorial seas—would require additional agreements between those States as well as implementation of those powers or arrangements in national law.

1.16 Human rights obligations at sea

Human rights standards, as well as humane and fair treatment considerations, also apply in the maritime environment. States have a wide range of views regarding which obligations are to be applied in what circumstances, and thus it is not possible to give a concise list of universally applicable human rights to be respected at sea. However, there are examples of human rights and criminal procedure issues that must be considered in all circumstances where the vessel and people are under the control of a maritime law enforcement agency: detention conditions; the right

to be promptly brought before a competent judicial authority; and transfer or surrender to another State. The International Tribunal for the Law of the Sea has reaffirmed on many occasions “that the considerations of humanity must apply in the law of the sea as they do in other areas of international law.” Accordingly, those conducting maritime law enforcement operations should identify the human rights instruments and domestic laws that apply to them and that they are obliged to implement, and they should understand how those obligations intersect with their maritime law enforcement authorizations.

1.17 Decisions of international tribunals and other international commissions

A range of judicial bodies as well as other inquiry and dispute resolution bodies have provided (and continue to provide) important decisions or opinions on matters related to the law of the sea. For example, the International Court of Justice plays a major role in resolving disputes relating to maritime boundary delimitation in accordance with UNCLOS and customary international law. The International Tribunal for the Law of the Sea plays a significant role in interpreting a wide range of provisions of UNCLOS, including on matters such as the prompt release of arrested or detained vessels. States also sometimes ask for expert panels of arbitrators or other commissioners to examine maritime law enforcement-related issues that have arisen between them, including in relation to the legal regime and requirements of hot pursuit (see chapter 5).



Chapter 2

How maritime zones
.....
are measured
.....

KEY POINTS

1. A legal regime of zones upon the oceans is set forth in the United Nations Convention on the Law of the Sea (UNCLOS).
2. This legal regime includes the rights and obligations of States in each of these zones and also sets out—sometimes in detail, but sometimes only very generally—the rights and obligations of different types of States in each of these zones.
3. The power of States to take maritime law enforcement action in these zones arises from those rights and obligations. Likewise, a State’s ability to prosecute persons in regard to their conduct at sea depends upon the jurisdiction the relevant State can claim over that particular conduct in the given maritime zone.
4. Some of those powers and jurisdictions are the same in the various zones in which they apply, while other powers and jurisdictions apply only to specific issues or in specific maritime zones.
5. The conduct of maritime law enforcement operations and of prosecutions for maritime crimes therefore requires knowledge about the zone in which a maritime law enforcement agency is operating and about the powers and jurisdictions available to the given State in that zone.

KEY TERMS

COASTAL STATE: A State which has a sea coast and which holds jurisdiction in those maritime zones over which it has sovereignty and which it has validly declared adjacent to its coast. The nature of sovereignty exercisable in each maritime zone of a coastal State differs in accordance with the type of zone and the specific issue in question. Additionally, in all maritime zones apart from internal waters, passage rights for vessels from other States exist as part of the legal regime covering that zone. These rights include innocent passage in territorial seas and archipelagic waters, a number of transit regimes for straits and archipelagos, and the freedom of navigation in other maritime zones.

FLAG STATE: The State of registration of a vessel. The jurisdiction of the flag State is the primary jurisdiction that operates on board any vessel lawfully flying that State's flag. Landlocked States may also be flag States.

MARITIME ZONE: An area of ocean that is subject to one or more of the regimes set out in UNCLOS or recognized in customary international law. The rights and obligations particular to, and as balanced between, the coastal State on one hand and flag States on the other can differ between maritime zones.

JURISDICTION: The power of a State to enact and enforce laws. In the context of maritime law enforcement, jurisdiction primarily refers to two things:

1. The authority of a State to enact and enforce laws that deal with prohibited conduct in places over which that State can legitimately exercise that particular power, as well as in relation to prohibited conduct which concerns interests or people over which that State can legitimately exercise that power.
2. The associated authority of a State to empower its maritime law enforcement agents to apprehend, investigate and arrest people and vessels, and its courts to hear cases, in relation to conduct:
 - (a) That occurs in areas over which that State can lawfully exercise jurisdiction; and/or
 - (b) That is perpetrated by or affects people over whom that State can legitimately exercise jurisdiction; and/or
 - (c) That affects an interest concerning which that State can legitimately exercise jurisdiction.

TERRITORIAL SEA: A belt of water which extends up to 12 nautical miles (nm) from the baseline of a State and which is regarded as sovereign waters of that State.

ARCHIPELAGIC WATERS: Waters inside the baselines of an archipelagic State. Archipelagic waters are sovereign waters.

INTERNATIONAL WATERS: Waters over which no State has sovereignty, although coastal States and flag States may hold certain enforcement rights depending upon the activity and location. International waters include the contiguous zone, the exclusive economic zone and the high seas.

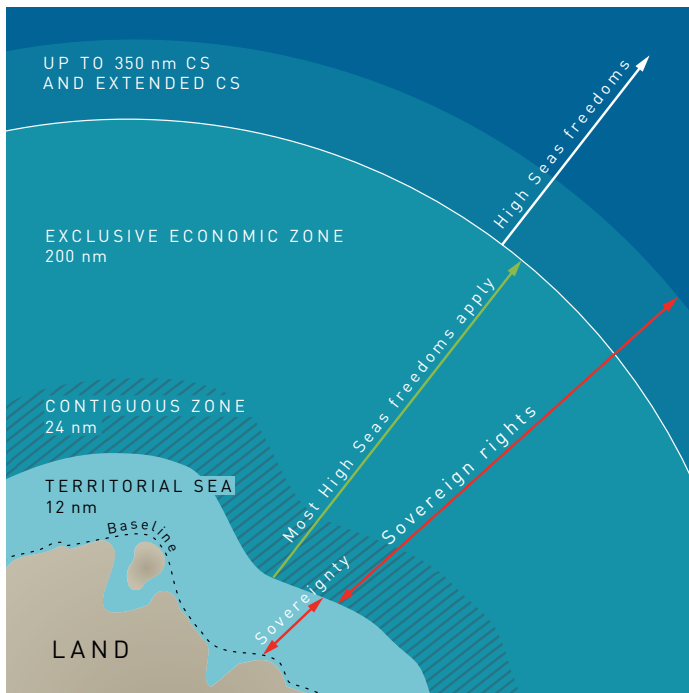


FIGURE 2.1
BASIC LAYOUT OF MARITIME
ZONES

INTRODUCTION

In general, baselines are the lines connecting all the points along a coastal State's shoreline or other accepted marker points such as bay closing lines. Where they enclose water on the landward side, these baselines also form the outer edge of a State's internal waters. Baselines are vital because they are the lines from which all maritime zones are measured. The area landward from the baselines is either land territory or internal waters, and all other maritime zones are then measured seaward from the baselines. In archipelagic States, in addition to internal baselines (e.g. across a river mouth on one of the islands), there are also archipelagic baselines connecting the outer edges of the outer islands of the archipelagic State. The areas inside those baselines are land territory, internal waters and archipelagic waters; all other maritime zones, including the territorial sea, are measured seaward from those baselines.

How are they drawn? Baselines are drawn in a variety of ways. The general rule from UNCLOS article 5 is that baselines follow the low-water mark of the shoreline of the coastal State.¹

¹Unless otherwise specified, all references to articles in this chapter are to UNCLOS.

ARTICLE 5

Normal baseline

Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Given that the tidal range can vary greatly throughout the year and at different places along a coastline, and based on the surveying and astronomical observations and calculations that can be required to establish baselines, the "low tide mark" used to set baselines can differ. Some of the most commonly used options are described below.

There are special rules that apply to the drawing of baselines in certain situations. The general effect of these rules is to push the baseline further out to sea due to some close connection between the land and the sea in a given context or to avoid an outcome that jeopardizes the coherence of the baselines with the legitimate claims of the coastal State (e.g. in the case of fjords; see below). A number of these special rules exist, but it will be sufficient to outline only a few indicative examples.

FIGURE 2.2
MEASUREMENT OF
MARITIME ZONES FROM
BASELINES



BASELINES: AN EXAMINATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION OF THE LAW OF THE SEA (UNITED NATIONS OFFICE FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, 1989)

ANNEX I

Standard Low-Water Levels

The following low-water levels are widely used as chart datums.

(a) *Lowest astronomical tide (LAT)*. The lowest level which can be predicted to occur under average meteorological conditions and under any combination of astronomical conditions; this level will not be reached every year. LAT is not the lowest level that can be reached, as storm surges may cause considerably lower levels to occur.

(b) *Mean low-water springs (MLWS)*. The height of mean low-water springs is the average, throughout a year when the average maximum declination of the moon is $23\frac{1}{2}$ degrees, of the heights of two successive low waters during those periods of 24 hours (approximately once a fortnight) when the range of the tide is greatest.

(c) *Mean lower low water (MLLW)*. The height of mean lower low water is the mean of the lower of the two daily low waters over a long period of time. When only one low water occurs on a day this is taken as the lower low water.

Where the range of the tide is negligible the level of chart datum may be based on:

(d) *Mean sea-level (MSL)*. Mean sea-level is the average level of the sea surface over a long period, preferably 18.6 years, or the average level which would exist in the absence of tides.

The above definitions have been adapted from the British Admiralty Tide tables.

The most important special rule is the one for drawing straight baselines, which can be used in a number of situations, such as:

(a) *Deeply indented coastlines*—such as fjords in Scandinavia or on the South Island of New Zealand—where a straight baseline can be drawn across the mouth of the fjord;

(b) *Fringing islands*—such as certain islands close to shore in the Great Barrier Reef off the north-eastern coast of Australia—where straight baselines can be drawn out from a point on the mainland low-water line used as a baseline to the outer points of the fringing islands and then back to the mainland to continue along the low-water line used as a baseline; and

(c) *River mouths*: “If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks” (article 9).



FIGURE 2.3
MEASUREMENT OF
MARITIME ZONES FROM
STRAIGHT BASELINES

ARTICLE 7

Straight baselines

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.
3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.
5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.

One important special rule is for islands that are on an atoll or that have a fringing reef.

ARTICLE 6

Reefs

In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

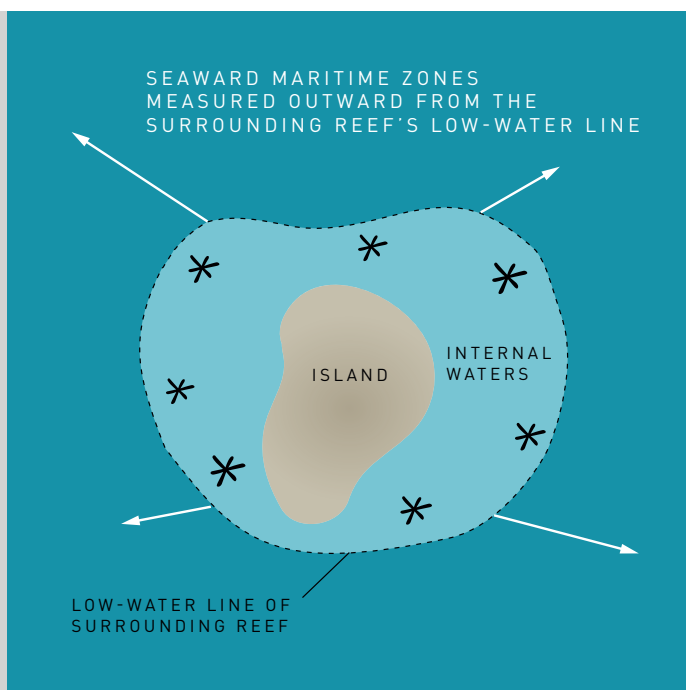
There is also a widely used special rule for bays (article 10).

ARTICLE 10

Bays

1. This article relates only to bays the coasts of which belong to a single State.
2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded

FIGURE 2.4
BASELINE AROUND
FRINGING REEF



as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

...

Another special rule concerns ports and roadsteads. Some features or structures of a port or roadstead can be used to form a baseline, while others cannot and are thus within the territorial sea outside the baseline, as opposed to within the internal waters inside the baseline.

ARTICLE 11

Ports

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.

ARTICLE 12

Roadsteads

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.

A final example of a set of special rules is for archipelagic States (see section 3.3). The special rules about baselines around the outside of the archipelago or archipelagos that make up an archipelagic State are defined in article 47. These rules can only apply when a number of criteria are met. These criteria include the following:

(a) The State must be an archipelagic State, that is, "a State [that is] constituted wholly by one or more archipelagos and may include other islands";

(b) The ratio of water area to land area must lie between 1 to 1 and 9 to 1;



FIGURE 2.5
BAY CLOSING LINES

(c) The main islands must be within the area enclosed by the archipelagic baselines; and

(d) The archipelagic baselines must not be more than 100 nm long, although up to 3 per cent of the total number of baselines enclosing the archipelago may be up to 125 nm long.

There are also some geographic and hydrographic features which cannot necessarily be used to create a territorial sea or which cannot be used as points supporting a baseline. The primary feature of this kind is a low-tide elevation.

UNCLOS article 13 describes two rules for using a low-tide elevation as a base point for measuring maritime zones:

(a) If the low-tide elevation—such as a rock that is only above the water at low tide—is no more than 12 nm off the land territory of the coastal State, it can be used as a point on which to anchor the baseline. This means that the territorial sea is then measured 12 nm seaward from that point. Such a low-tide

ARTICLE 13

Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

elevation can thus have a significant effect on the size of the territorial sea;

(b) If the low-tide elevation is further than 12 nm off the coast, it cannot be used to anchor a baseline. In such a situation, it is simply a low-tide elevation outside the territorial sea and has no effect on its size.

FIGURE 2.6
ARCHIPELAGIC BASELINES

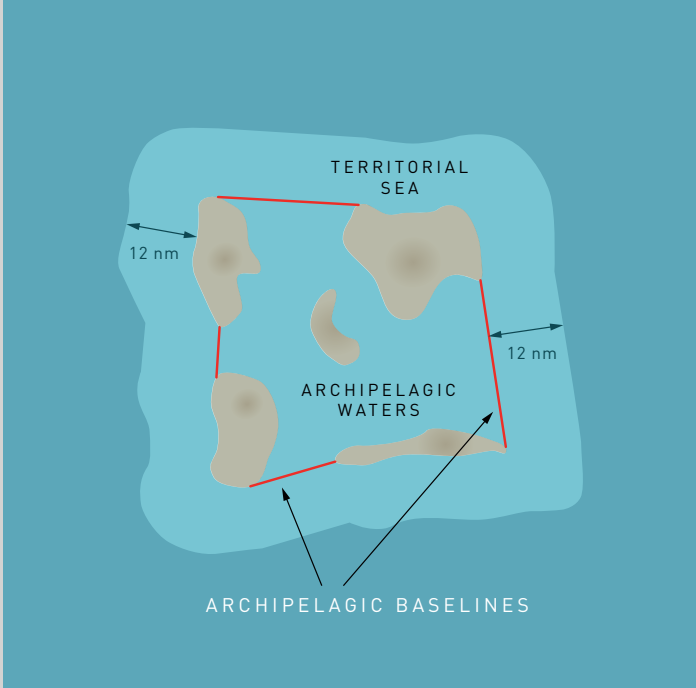
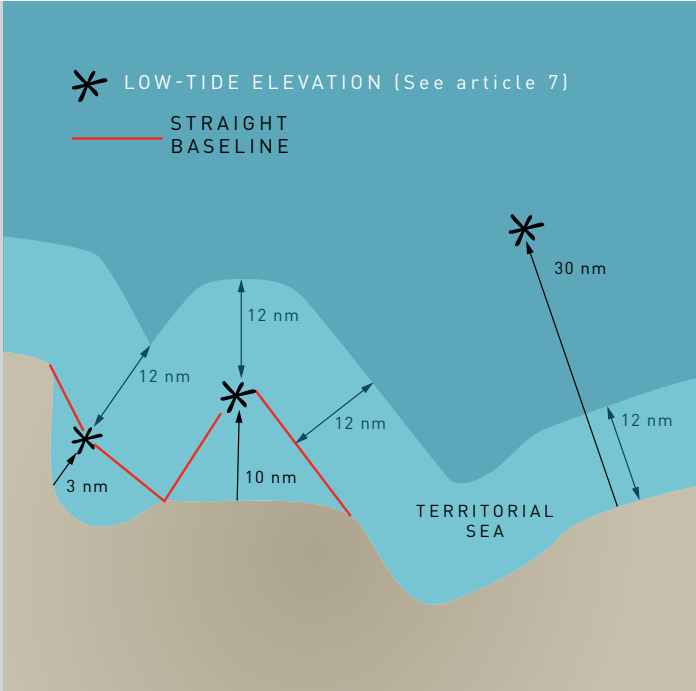


FIGURE 2.7
LOW-TIDE ELEVATIONS
AND BASELINES



Chapter 3

Maritime zones and
powers: internal waters,
territorial sea and
archipelagic waters

KEY POINTS

1. The United Nations Convention on the Law of the Sea (UNCLOS) outlines three maritime zones in which coastal States exercise full sovereignty. However, this sovereignty is subject to certain limitations which apply for the benefit of the international community as represented predominantly by the vessels of other flag States.
2. The enforcement jurisdiction (powers) available to coastal State maritime law enforcement agencies in these zones arises from those rights and responsibilities. Likewise, the coastal State's ability to prosecute persons in regard to their conduct at sea depends upon the jurisdiction it can claim over that particular conduct in a particular zone.
3. Some of these powers and jurisdictions are the same in the various zones in which they apply, while others apply only to specific issues or in specific maritime zones.
4. Successful prosecution of illegal conduct in the maritime domain can only take place when the prosecuting State can factually establish the location of such conduct within a given zone in order to ensure that the prosecuting State can legally exercise its domestic jurisdiction over the conduct in question.
5. Maritime law enforcement operations and the prosecution of maritime crimes therefore require knowledge about the zone in which the maritime law enforcement agency is operating and about the powers and jurisdiction that agency has at its disposal within that zone.

KEY TERMS

COASTAL STATE: A State which has a sea coast and which holds jurisdiction in those maritime zones over which it has sovereignty and which it has validly declared adjacent to its coast. The nature of sovereignty exercisable in each maritime zone of a coastal State differs in accordance with the type of zone and the specific issue in question. Additionally, in all maritime zones apart from internal waters, passage rights for vessels from other States exist as part of the legal regime covering that zone. These rights include innocent passage in territorial seas and archipelagic waters, a number of transit regimes for straits and archipelagos, and the freedom of navigation in other maritime zones.

FLAG STATE: The State of registration of a vessel. The jurisdiction of the flag State is the primary jurisdiction that operates on board any vessel lawfully flying that State's flag. Landlocked States may also be flag States.

INNOCENT PASSAGE: The right of vessels from flag States to enjoy unimpeded, continuous and expeditious passage, provided that passage is not prejudicial to the peace, good order or security of the coastal State, through the territorial sea of that coastal State.

MERCHANT VESSEL: For the purposes of this Manual, "merchant vessel" is a collective term used to cover all vessels not entitled to sovereign immunity, including those used in commercial cargo operations, passenger vessels, fishing vessels, private vessels, yachts and other such vessels used for private purposes.

JURISDICTION: The power of a State to enact and enforce laws. In the context of maritime law enforcement, jurisdiction primarily refers to two things:

1. The authority of a State to enact and enforce laws that deal with prohibited conduct in places over which that State can legitimately exercise that particular power, as well as in relation to prohibited conduct which concerns interests or people over which that State can legitimately exercise that power.
2. The associated authority of a State to empower its maritime law enforcement agents to apprehend, investigate and arrest people and vessels, and its courts to hear cases, in relation to conduct:
 - (a) That occurs in areas over which that State can lawfully exercise jurisdiction; and/or
 - (b) That is perpetrated by or affecting people over whom that State can legitimately exercise jurisdiction; and/or
 - (c) That affects an interest concerning which that State can legitimately exercise jurisdiction.

TERRITORIAL SEA: A belt of water which extends up to 12 nautical miles (nm) from the baseline of a State and which is regarded as sovereign waters of that State.

ARCHIPELAGIC WATERS: Waters inside the baselines of an archipelagic state. Archipelagic waters are sovereign waters.

INTERNAL WATERS: Waters on the landward side of a coastal State's baselines. Internal waters are part of the sovereign territory of the coastal State.

INTRODUCTION

There are a number of maritime zones in which a coastal State can have sovereignty and sovereign rights. This means that these waters belong to the coastal State, which is allowed (with some exceptions as the distance from the land territory increases) to make and enforce laws about many of the same things the State can govern in relation to its land territory. This sovereignty is different to the sovereign rights that the coastal State can claim in its other maritime zones (such as the exclusive economic zone). Such sovereign rights include rights to regulate activity in relation to certain resources, issues or conduct. However, sovereign rights differ from sovereignty over internal waters, territorial seas and archipelagic waters in that those rights do not confer absolute ownership of the waters themselves, nor do they include the right to regulate any activities that are not considered part of the coastal State's jurisdiction in that zone.

The maritime zones addressed in this chapter are as follows:

(a) *Internal waters*: All waters on the landward side of the coastal State's baselines, often including areas of ports or roadsteads;

(b) *Territorial seas*: All waters measured seaward from the baselines out to a maximum of 12 nm from those baselines;

(c) *Archipelagic waters*: All waters inside the special set of baselines drawn to connect the outer islands of an archipelagic State. There are still internal waters within the archipelagic waters, and there is a territorial sea up to 12 nm seaward of the archipelagic baselines.

3.1 Internal waters

UNCLOS defines "internal waters" as follows:

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 8

Internal waters

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

Internal waters commonly include areas such as river mouths, ports and roadsteads, bays enclosed by a closing line, waters inside a straight baseline drawn around the outer edge of fringing islands, and so on—that is, areas of water lawfully enclosed by and on the landward side of a baseline drawn in accordance with the rules discussed above.

Jurisdiction and powers of coastal States. A coastal State can exert almost the same full range of powers and jurisdictions over its internal waters as it can over its land territory.

(a) For a merchant vessel, the coastal State's powers and jurisdiction include being able to board the vessel, to search the vessel and to investigate the commission of crimes aboard the vessel or by people on the vessel. One exception to this rule is UNCLOS article 8(2): "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

(b) For a sovereign immune vessel, that is, a State vessel such as a warship, coastguard or police vessel, customs vessel or a government ship operated for non-commercial purposes (e.g. an oceanographic research vessel), the coastal State does not have an automatic right to board that vessel while it is inside internal waters, nor does the coastal State have an automatic right to investigate conduct on board that vessel.

ARTICLE 31

Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes

The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.

ARTICLE 32

Immunities of warships and other government ships operated for non-commercial purposes

With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

Jurisdiction and powers of flag States. When a vessel is in internal waters, the jurisdiction and powers of the flag State generally give way to the jurisdiction and powers of the coastal State. For example, except as discussed below, law enforcement officials (e.g. customs officials) from coastal State B cannot board a vessel of flag State A located in waters seaward of coastal State B's baseline without first gaining consent from flag State A. However, when the vessel is inside coastal State B's internal waters, then those State officials have a right to go aboard without first seeking permission from flag State A.

Another example is that the law in flag State A may allow the carriage of firearms (for defensive purposes) aboard commercial vessels flying State A's flag. However, coastal State B may have laws which prohibit commercial vessels from carrying any firearms aboard while inside State B's internal waters. In this case, primacy is given to the coastal State's jurisdiction and law, meaning that the commercial vessel should not carry

any firearms on board when it enters coastal State B's internal waters, such as a port.

The situation is different for a sovereign immune vessel. In this case, the law of flag State A retains primacy aboard the sovereign immune vessel, including when it is inside coastal State B's internal waters, for example on a port visit. In this case, coastal State B officials would need permission from flag State A (which could be provided by the commanding officer, for example) even to go aboard the sovereign immune vessel.

Additionally, the sovereign immune vessel would not be required to disarm itself entirely prior to entering the internal waters of coastal State B. However, in most cases, sovereign immune vessels require diplomatic clearance from the coastal State before they can enter that State's internal waters. Consequently, the coastal State may seek to impose conditions upon entry, and these matters will then require negotiation and resolution between the coastal State and the flag State prior to entry.

A RECENT CASE

The *ARA Libertad*, case no. 20 before the International Tribunal for the Law of the Sea (*Argentina v. Ghana*, 15 December 2012): In October 2012, the Argentine navy training ship *ARA Libertad* (a sailing vessel, but nevertheless a warship in accordance with UNCLOS article 29 and customary international law) visited the port of Tema, near Accra. At around the same time, a United States-based creditor of the Government of Argentina filed for an in rem attachment of the vessel in a Ghanaian court to satisfy a US\$370 million judgment in the United States. The Ghanaian court then ordered the arrest of the *ARA Libertad*.

The bond at the centre of the case contained an explicit waiver of sovereign immunity from suit by Argentina. When the *ARA Libertad* refused to allow Ghanaian officials to board under the court order, power and water supplies were cut off. Argentina and Ghana then submitted the matter to the International Tribunal for the Law of the Sea.

Ghana argued that sovereign immunity only applied in the territorial sea and outwards, not in internal waters, and that the *ARA Libertad* (and Argentina) could not therefore claim immunity from Ghanaian jurisdiction and execution of court orders. The Tribunal, however, affirmed that the *ARA Libertad* was entitled to sovereign immunity—even though the ship is a sailing vessel, it is still a vessel of the Argentine navy—and that sovereign immunity applies in internal waters.

3.2 Territorial sea

ARTICLE 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

ARTICLE 3

Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

ARTICLE 4

Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

The territorial sea is an area of ocean which extends up to 12 nm from a coastal State's lawfully drawn baselines and in which the coastal State enjoys sovereignty as opposed to mere sovereign rights. However, that sovereignty is subject to a number of limitations. The main such limitation is the right of innocent passage for the vessels of other States.

Innocent passage. The right of innocent passage is a limitation on the exercise of a coastal State's jurisdiction in its territorial sea. This right is available to all ships, including warships and other State vessels. Innocent passage represents a trade-off between the coastal State's interests in its territorial sea (including matters such as fishing, security, pollution and so on) and the need to facilitate efficient international maritime trade and navigation by ensuring that the coastal State does not hamper continuous and expeditious transit through its territorial sea by vessels from other States. There is, however, no right of overflight for aircraft in the territorial sea.

ARTICLE 17

Right of innocent passage

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Sovereign immune vessels also have a right of innocent passage through a coastal State's territorial sea. Some States claim that this right is more limited for sovereign immune vessels, particularly warships, than for vessels that are not entitled to sovereign immunity, such as merchant vessels. Other States sometimes inform coastal States about the passage of a warship as a courtesy; however, this does not prejudice the general rule that innocent passage applies to all vessels.

The concept of innocent passage has two closely interlinked elements. The first is "passage", which has to be "continuous and expeditious". For example, a vessel steaming in wide circles or back and forth along a line inside the territorial sea is not engaged in the requisite form of passage, as its passage is neither continuous in a general direction nor expeditious given that its movements are delaying its transit through the territorial sea from a point of entry to a point of exit.

ARTICLE 18

Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

The second element of innocent passage is "innocence", which is generally defined by the conduct of the vessel, as opposed to its character or contents. UNCLOS article 19 provides an exclusive list of the conduct that renders passage non-innocent.

ARTICLE 19

Meaning of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

UNCLOS article 20 defines an additional special rule for submarines and other underwater vehicles which requires that they must navigate on the surface and show their flag as a requirement for their innocent passage.

It is important to note that innocent passage does not apply to aircraft. Once an aircraft approaching land from over the sea reaches the outer edge of the territorial sea, it cannot go any further, as the airspace above the territorial sea is national airspace belonging to the coastal State. For aircraft, there is no right of innocent passage through this space. However, a range of existing schemes/procedures, such as request processes, standing commercial flight path arrangements and special emergency exceptions, have been established to allow aircraft to enter national airspace.

As long as a vessel is engaged in innocent passage, it is the duty of the coastal State not to hamper this passage. It must be noted, however, that the coastal State may, in some circumstances, temporarily suspend access to a part of its territorial sea as long as the restriction applies to vessels of all States equally. This temporary suspension will apply regardless of whether the vessels in question are otherwise engaged in innocent passage. For example, a State may be conducting weapons practice in a certain area, making it necessary to keep vessels away from that area.

What if the vessel is engaged in non-innocent passage? If a vessel inside a coastal State's territorial sea is engaged in non-innocent passage (e.g. because its passage is not continuous and expeditious or the vessel engages in prejudicial activity as identified in article 19), the coastal State may take action. For a non-sovereign immune vessel such as a merchant vessel or a private yacht, the coastal State can take "necessary steps in its territorial sea to prevent passage which is not innocent".

Although States differ as to what "necessary steps" might entail, most agree that such steps could include the conduct of initial maritime law enforcement responses such as approaching, hailing, boarding and so on. It is also generally accepted that, depending on the

ARTICLE 25

Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.
3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

scale of the breach, a vessel may be detained. For example, if a vessel that is sailing in circles is boarded and it is discovered that the master was merely testing the steering gear, the necessary steps may extend only to a warning to resume continuous and expeditious passage. If a vessel is stopped and boarded because it is engaged in commercial fishing in the territorial sea without permission, the necessary steps may include detaining the vessel and taking it into a port for further investigation and prosecution in accordance with national legislation. Another example is the power of the coastal State in UNCLOS article 219, on "Measures relating to seaworthiness of vessels to avoid pollution".

Jurisdiction and powers of coastal States. The duties of the coastal State in relation to its territorial sea are set out, in general form, in article 24.

ARTICLE 24

Duties of the coastal State

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:
 - (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
 - (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.
2. The coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.

The coastal State can regulate a wide range of matters in its territorial sea, such as the designation of sea lanes and traffic separation schemes (article 22) to assist in navigational safety, as well as special precautionary measures for nuclear-powered vessels and vessels carrying nuclear or other inherently dangerous or noxious substances (article 23). The coastal State may also enact laws and regulations that relate to the exercise of innocent passage. These laws and regulations can cover issues such as pollution, hydrographic surveying and fishing.

ARTICLE 21

Laws and regulations of the coastal State relating to innocent passage

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

The coastal State can also exercise some civil and criminal jurisdiction over the vessels of other States (but not sovereign immune vessels) when they are engaged in innocent passage through the coastal State's

ARTICLE 27

Criminal jurisdiction on board a foreign ship

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, 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.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.

5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

territorial sea. The criminal jurisdiction that a coastal State can exercise over or on another State's vessel located in the coastal State's territorial sea essentially depends upon whether the act has an effect on the coastal State, or whether a representative of the flag State or the master of the vessel requests assistance from the coastal State.

The authority of a coastal State to assert civil jurisdiction over a vessel that is transiting under another State's flag through that coastal State's territorial sea in innocent passage is also limited to situations that are directly related to the coastal State.

ARTICLE 28**Civil jurisdiction in relation to foreign ships**

1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.
2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.
3. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Jurisdiction of the flag State during innocent passage.
The jurisdiction of a coastal State over a vessel from another State which is transiting through that coastal State's territorial sea is basically limited to situations where:

- (a) The coastal State is authorized to make and enforce laws in relation to innocent passage;
- (b) Some conduct on board the vessel has an effect on the coastal State; and
- (c) The master of the vessel or an agent of the flag State of that vessel requests assistance from the coastal State.

Although a flag State may always exercise jurisdiction over its registered vessels, a coastal State may also exercise jurisdiction under the circumstances described in the previous paragraph above. For example, if one crew member were to assault another crew member on a flag State A vessel as it was transiting in innocent passage through coastal State B's territorial sea, the primary jurisdiction to investigate and deal with that assault would remain with flag State A. This is because the assault, which took place entirely aboard the vessel, has no consequence for or effect on the coastal State, nor has the vessel itself been engaged in a breach of innocent passage. Additionally, neither the master nor the flag State has asked for coastal State assistance. Similarly, while flag State A establishes the qualifications necessary for a person to be appointed as the engineer on board a vessel flying its flag, coastal State B may have a similar law on the qualifications of ships' engineers. However, the fact that vessel is transiting under State A's flag through coastal State B's territorial

sea does not alter the qualification requirements for engineers aboard the vessel. The applicable requirement remains the one set by flag State A. In contrast, if a vessel from flag State A were to transport cocaine destined for the territory of coastal State B, the latter State would be able to board and assert jurisdiction over that vessel without flag State A's consent in waters where coastal State B may exercise this specific power, as this action is specifically authorized under UNCLOS and customary international law.

Powers available to a coastal State if a warship from another State breaches innocent passage. UNCLOS does not precisely define the powers available to a coastal State to put an end to the non-innocent passage of a foreign warship in that coastal State's territorial sea. However, the words used in article 30—"may require it to leave the territorial sea immediately"—are considered by many States to permit the use of force, as a last resort, to compel the delinquent warship to depart.

ARTICLE 30**Non-compliance by warships with the laws and regulations of the coastal State**

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

Other forms of transit and passage rights that can apply in the territorial sea. There are further forms of passage through territorial seas, and even through internal waters, which place additional limitations on the powers of the coastal State and/or create additional rights for flag States. These forms of transit passage generally relate to straits, which are often navigable channels through areas of ocean close to land territory. The waters in which a strait is located are often within 12 nm of a coast, and therefore the strait falls within one or more States' territorial seas.

One such type of passage, which applies to one form of strait, is the same as innocent passage except that it cannot be suspended.

The second form of passage that places additional limitations on the coastal State and creates additional rights for the flag State is transit passage through "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone" (article 37).

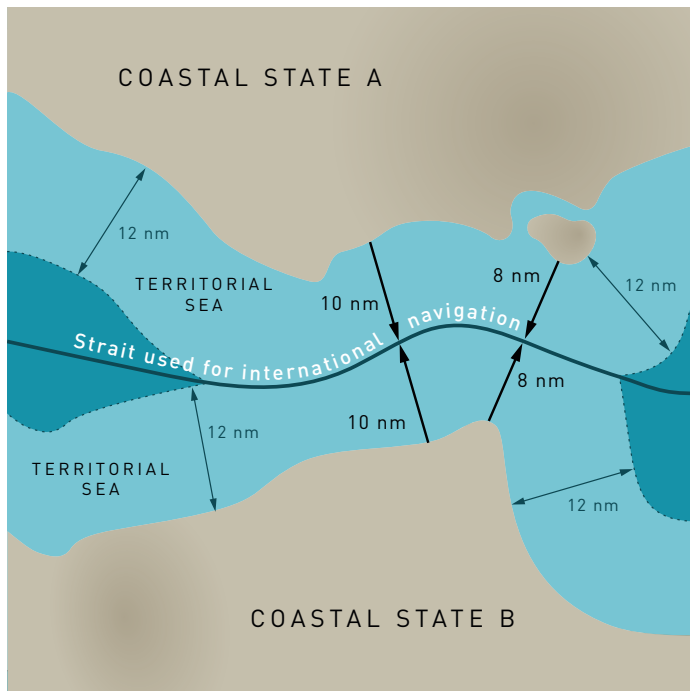


FIGURE 3.1
TERRITORIAL SEAS AND
STRAITS USED FOR
INTERNATIONAL NAVIGATION

ARTICLE 45

Innocent passage

1. The regime of innocent passage, in accordance with Part II, section 3 [Innocent Passage in the Territorial Sea], shall apply in straits used for international navigation:

(a) excluded from the application of the regime of transit passage under article 38, paragraph 1 [straits between an island and the mainland]; or

(b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State [e.g. the Strait of Tiran into the Gulf of Aqaba].

2. There shall be no suspension of innocent passage through such straits.

Transit passage through straits used for international navigation differs from innocent passage in three important ways:

(a) Like the form of transit passage through certain types of straits defined in article 45, it cannot be suspended—in contrast to innocent passage, which can be temporarily suspended in a part of the territorial sea;

(b) Unlike both innocent passage and transit passage under article 45, this form of passage can be conducted in “normal mode”. This additional right is particularly relevant to warships. For example, while launching helicopters is prohibited during innocent passage through the territorial sea (article 19(2)(e)), it

ARTICLE 38

Right of transit passage

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

is part of the “normal mode” of a helicopter-capable frigate that it will occasionally launch and recover its helicopter so as to gain a better picture of what is ahead. Similarly, a submarine can exercise its right of transit passage in its normal mode (i.e. submerged); and

ARTICLE 39**Duties of ships and aircraft during transit passage**

1. Ships and aircraft, while exercising the right of transit passage, shall:

(a) proceed without delay through or over the strait;

(b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;

(d) comply with other relevant provisions of this Part.

2. Ships in transit passage shall:

(a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;

(b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

3. Aircraft in transit passage shall:

(a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;

(b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

(c) Unlike innocent passage, this form of passage can also be exercised by aircraft. This means that an aircraft can fly through such a strait, exercising the right of transit passage, even though the strait is itself situated within one or more territorial seas or even in internal waters.

3.3 Archipelagic waters

What are they? Archipelagic waters are a special regime that applies only to archipelagic States. UNCLOS article 46 defines an “archipelagic State” as “a State [that is] constituted wholly by one or more archipelagos and may include other islands”. An archipelago is defined as “a group of islands, including parts of islands, interconnecting waters and other natural features which are

ARTICLE 49**Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil**

1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.

2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.

3. This sovereignty is exercised subject to this Part.

4. The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein.

so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.” Consequently, the United States, which has some archipelagos (such as the Hawaiian Islands) in addition to its mainland territory, cannot be an archipelagic State. Indonesia, however, which consists solely of islands and archipelagos, is an archipelagic State.

Jurisdiction and powers of archipelagic States. The jurisdiction and powers of an archipelagic State in its archipelagic waters are essentially the same as for territorial seas. Archipelagic waters do not constitute internal waters.

However, it is important to remember that there can still be internal waters within archipelagic waters (article 50). Examples might include a port or a bay on one of the islands where that bay is legitimately closed with a straight baseline. Similarly, archipelagic States can still claim a territorial sea around the outside of the archipelago. The archipelagic baselines form the baseline from which this territorial sea is measured up to 12 nm seawards.

Jurisdiction and powers of flag States. Similarly, the jurisdiction and powers of the flag State within archipelagic waters are essentially the same as in territorial seas.

Innocent passage in archipelagic waters. The right of innocent passage for foreign vessels exists in archipelagic waters and works in essentially the same way as in territorial seas.

ARTICLE 52**Right of innocent passage**

1. Subject to article 53 and without prejudice to article 50, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3 [Innocent Passage in the Territorial Sea].
2. The archipelagic State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

Archipelagic sea lanes passage. Given that many archipelagic States are criss-crossed by a number of long-used international sea routes (such as the north-south and east-west routes through the Indonesian archipelago), there is also an additional, non-suspendable rite of passage through these routes that is essentially the same as transit passage through straits used for international navigation.

The special form of transit available on these sea routes is known as archipelagic sea lanes passage, and it is available to both vessels and aircraft. UNCLOS articles 53 and 54 set out the rules regarding archipelagic sea lanes passage. One rule is that this form of transit is available only in archipelagic sea lanes or, if such sea lanes have not been fully declared, then in “all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters” (article 53(4)). These routes are generally depicted as running along an axis line.

UNCLOS also defines special requirements as to how far a vessel can be displaced from the axis line of the archipelagic sea lane before losing its right to archipelagic sea lanes passage and reverting to standard innocent passage in archipelagic waters. For example, article 53(5) allows archipelagic sea lanes passage to be used up to 25 nm to either side of the archipelagic sea lane’s axis line, but where there is less than 25 nm between the axis line and land, this form of passage is subject to the requirement that “ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane”.

ARTICLE 53**Right of archipelagic sea lanes passage**

1. An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.
2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.
3. Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.
4. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.
5. Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane.
6. An archipelagic State which designates sea lanes under this article may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes.
- ...
11. Ships in archipelagic sea lanes passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.
12. If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

Chapter 4

Maritime zones and
powers: contiguous zone,
exclusive economic zone
and high seas

KEY POINTS

1. The power of States to enforce their domestic laws in the various maritime zones arises from the rights and responsibilities they have in each maritime zone and from the national law that implements those rights and responsibilities and empowers a State's maritime law enforcement agencies.
2. National laws that criminalize or otherwise deal with conduct in the maritime domain are generally linked to a specific maritime zone. Therefore, documenting and proving the location of that conduct is critical.
3. Because multiple authorities may operate or overlap in international waters, the conduct of maritime law enforcement operations and the prosecution of illicit conduct perpetrated in international waters require a clear understanding of the relevant maritime zone and of the powers and authorizations available to a State within that zone.

KEY TERMS

COASTAL STATE: A State which has a sea coast and which holds jurisdiction in those maritime zones over which it has sovereignty and which it has validly declared adjacent to its coast. The nature of sovereignty exercisable in each maritime zone of a coastal State differs in accordance with the type of zone and the specific issue in question. Additionally, in all maritime zones apart from internal waters, passage rights for vessels from other States exist as part of the legal regime covering that zone. These rights include innocent passage in territorial seas and archipelagic waters, a number of transit regimes for straits and archipelagos, and the freedom of navigation in other maritime zones.

FLAG STATE: The State of registration of a vessel. The jurisdiction of the flag State is the primary jurisdiction that operates on board any vessel lawfully flying that State's flag. Landlocked States may also be flag States.

JURISDICTION: The power of a State to enact and enforce laws. In the context of maritime law enforcement, jurisdiction primarily refers to two things:

1. The authority of a State to enact and enforce laws that deal with prohibited conduct in places over which that State can legitimately exercise that particular power, as well as in relation to prohibited conduct which concerns interests or people over which that State can legitimately exercise that power.
2. The associated authority of a State to empower its maritime law enforcement agents to apprehend, investigate and arrest people and vessels, and its courts to hear cases, in relation to conduct:
 - (a) That occurs in areas over which that State can lawfully exercise jurisdiction; and/or
 - (b) That is perpetrated by or affecting people over whom that State can legitimately exercise jurisdiction; and/or
 - (c) That affects an interest concerning which that State can legitimately exercise jurisdiction.

4.1 Maritime zones beyond national jurisdiction, in which States have some rights, but not sovereignty

The term “international waters” does not refer to a recognized maritime zone in the United Nations Convention on the Law of the Sea (UNCLOS). However, this term has increasingly been used in bilateral agreements and in operations manuals to describe the maritime space outside of territorial seas for the purposes of maritime law enforcement and freedom of navigation, among others. Thus the activity, location and flag of a vessel are critical background questions which must be kept in mind when using the term “international waters”. In this Manual, the term is employed as a means of referring collectively to non-sovereign waters, that is, all maritime zones seaward of territorial seas. For the purposes of this Manual, therefore, international waters are zones in which no State enjoys full sovereignty, but in which States can claim some functionally limited sovereign rights, depending upon the nature of the maritime zone.

The maritime zones discussed in this chapter are:

(a) The contiguous zone, in which the coastal State can claim some additional law enforcement rights in relation to breaches of (or indications of an intention to breach) that coastal State’s fiscal, immigration, sanitary or customs (FISC) laws;

(b) The exclusive economic zone, in which the coastal State can claim sovereign rights over certain resources and resource-related activities in the water and on the seabed, including energy production;

(c) The continental shelf and extended continental shelf, on which the coastal State possesses resource rights, primarily in relation to exploiting oil, gas and mineral resources on or in the seabed and subsoil, and producing energy (e.g. from waves); and

(d) The high seas, which for some purposes (e.g. challenging excessive maritime claims and engaging in hot pursuit) are measured seaward from the territorial sea, and for other purposes (such as the freedom to fish) are measured seaward from the exclusive economic zone.

4.2 Contiguous zone

What is it? The contiguous zone, for those coastal States that have proclaimed one, is a zone which is adjacent to the territorial sea and extends no further

than 24 nautical miles (nm) from the coastal State’s baselines, and in which it has limited law enforcement authorities beyond those normally available in the exclusive economic zone. These additional powers relate to FISC matters. A contiguous zone does not constitute sovereign waters like the territorial sea; rather, it is a zone that otherwise effectively qualifies as the high seas, but where the coastal State has a set of additional rights to enforce aspects of its FISC laws. The origins of the contiguous zone lie in anti-smuggling maritime law enforcement. The contiguous zone does not relate to security interests.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 33

Contiguous zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, 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.

Overlaps between contiguous zone and territorial sea. UNCLOS describes the contiguous zone as extending up to 24 nm from a coastal State’s baselines. However, from a maritime law enforcement perspective, the first 12 nm of that 24 nm zone (i.e. the territorial sea) are already subject to a regime in which the coastal State has a much more robust set of powers and rights. Consequently, when talking about operations in the contiguous zone, maritime law enforcement agencies tend to focus on the zone beyond the territorial sea, that is, the zone between the outer limit of the territorial sea (usually 12 nm) and the outer limit of the contiguous zone. As such, contiguous zone operations are generally understood to relate to the coastal State’s functionally limited rights in relation to FISC matters.

There are two core aspects to the coastal State’s jurisdiction and powers in the contiguous zone. The first describes the enforcement actions they can undertake (i.e. “prevent” or “punish” actions). The second describes matters in relation to which the coastal State can use these enforcement powers.

FIGURE 4.1
TERRITORIAL SEA AND
CONTIGUOUS ZONE



First core aspect: Enforcement—“prevent” or “punish”. As article 33 makes clear, the contiguous zone regime can support two types of enforcement action.

The first enforcement power of the coastal State is to “prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea”. This power allows the coastal State to stop and board a vessel in that State’s contiguous zone where there are reasonable grounds to suspect that the vessel intends to breach the coastal State’s law. In other words, this power is available where there are reasonable grounds for suspecting that a vessel currently located in the 12 nm-24 nm contiguous zone intends to enter the territorial sea or internal waters of that coastal State, and that if it does so, it will have committed an offence against the coastal State’s FISC laws.

The second enforcement power of the coastal State is to “punish infringement of the above laws and regulations committed within its territory or territorial sea”. This power is aimed at pursuing and apprehending vessels that have already violated one or more of a coastal State’s FISC laws while inside the internal waters or territorial sea of that coastal State, but are attempting to flee. One example would be a commercial vessel that has departed from port after it has breached a customs law of the coastal State. Customs matters are among the FISC issues on which jurisdiction in the contiguous zone is based. This means that as long as the maritime law enforcement agents of the coastal State commence valid “hot pursuit” (see chapter 5) of that delinquent vessel before it leaves the contiguous zone (i.e. before it is more

EXAMPLE

A vessel currently in the contiguous zone is overloaded with people apparently intending to enter the territorial sea, internal waters and/or land territory of the coastal State without the required visas. If they then actually do enter the territorial sea, internal waters and/or land territory of the coastal State, then they are likely to have, at that point, actually committed an offence related to immigration matters, which are governed by the coastal State’s FISC laws. The “prevent” power allows maritime law enforcement agents of that coastal State (for example) to stop and board that suspect vessel if it is inside the contiguous zone. The maritime law enforcement agents might then warn the people on the vessel that they should not continue towards the territorial sea, as they are reasonably suspected of intending to violate the immigration laws of the coastal State and would actually commit that violation if they kept going and did enter the territorial sea, internal waters or land territory of that coastal State.

than 24 nm from the coastal State's baselines), then they can still carry out a valid arrest of the vessel, master and/or crew in relation to that breach. It

should be remembered, of course, that the right of hot pursuit does not only apply in the contiguous zone (see chapter 5).

In the example above, maritime law enforcement agents of the coastal State could still validly arrest the fleeing vessel prior to it sailing beyond the contiguous zone when the pursuit is continuous. It also means that, if the vessel refuses to stop (also known as "failing to heave to") and submit to boarding, the maritime law enforcement agents retain their right to arrest provided that they commence valid hot pursuit before the delinquent vessel sails beyond the contiguous zone (although the hot pursuit must cease when the delinquent vessel enters the territorial sea of another State). In either case, once the vessel is arrested, it can, for example, be taken back to a port in the coastal State for further action (such as investigation or prosecution) in relation to that breach of law.

Second core aspect: Issues over which the coastal State has powers in the contiguous zone. In the contiguous zone, the coastal State can regulate matters relating to FISC powers. The coastal State can therefore undertake some form of maritime law

enforcement activity in its contiguous zone (either under the power to "prevent" or to "punish") only if a foreign vessel breaches or apparently intends to breach a coastal State law in relation to FISC matters.

EXAMPLE

If a vessel in the contiguous zone is suspected of attempting to enter the territory (including the territorial sea) of the coastal State with a cargo of illicit pharmaceuticals, this is likely to violate the customs laws of the coastal State. In this case, the "prevent" powers available to the coastal State in the contiguous zone can be used.

On the other hand, if a vessel is in the contiguous zone and appears to intend to enter the territory of the coastal State to commit a non-FISC crime—for example, the crew of the vessel are suspected of intending to dock at a coastal State port and then engage in an unlicensed protest march through the town—then this is not a FISC matter and the law enforcement agents of the coastal State cannot take any "prevent" action against that vessel while it remains in the contiguous zone. Depending on the laws that relate to licensing of protest marches in that coastal State, the maritime law enforcement agents may need to wait until that vessel enters internal waters before they can take some form of "prevent" action.

The same analysis applies to the availability of the "punish" power. If, for example, a vessel flees from a coastal State port after having breached a fiscal law (such as one relating to port fees), then this is a FISC matter. This means that the coastal State can then use its "punish" power to stop and arrest that vessel, or commence hot pursuit, as long as that vessel is still within the contiguous zone.

On the other hand, if a vessel flees from a coastal State port after one of its crew has been involved in an unlicensed and illegal protest march, then this is not a FISC matter. This means that if the maritime police catch up to the vessel once it is already outside the territorial sea, but still within the contiguous zone, they have lost the opportunity to make an arrest. This is because breaching a law about protest marches is not a FISC matter, and so the contiguous zone has no relevance for this breach. As a result, the maritime law enforcement

agents of that coastal State cannot rely upon the extra powers conferred by the contiguous zone regime.

4.3 Exclusive economic zones

The exclusive economic zone is an area of ocean which lies beyond and adjacent to the territorial sea and in which the coastal State enjoys certain functionally limited rights once it has publicly asserted those rights. In order to have an exclusive economic zone, a State must carry out certain steps to enable this claim. In other words, an exclusive economic zone does not exist automatically; it must be properly claimed. According to article 57 of UNCLOS, the exclusive economic zone may extend up to 200 nm from the same baselines from which the territorial sea is measured. If a State has a contiguous zone and an exclusive economic zone, then it should be recalled that the contiguous

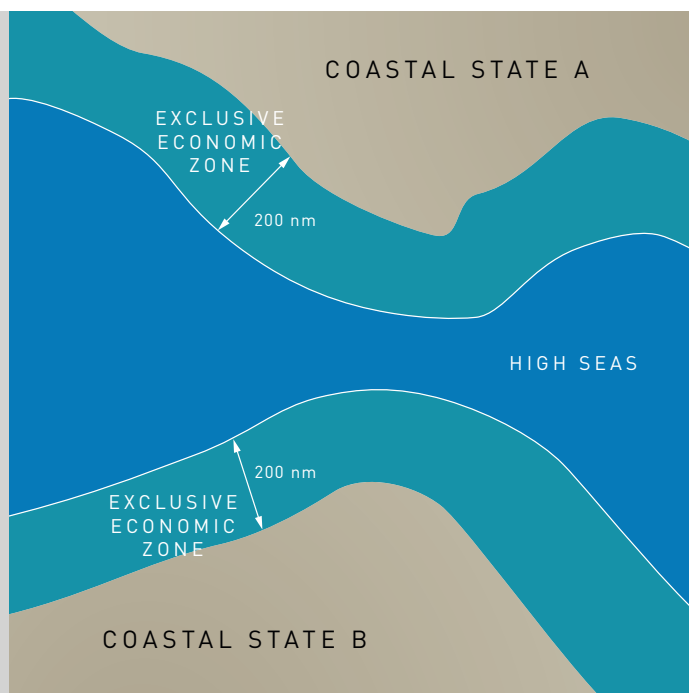


FIGURE 4.2
EXCLUSIVE ECONOMIC ZONE
AND HIGH SEAS

zone applies only to FISC matters; for other purposes, the same area of ocean is the exclusive economic zone. Similarly, as article 58 of UNCLOS provides, for matters not related to the exclusive economic zone (or for non-FISC matters in the contiguous zone), the exclusive economic zone is to be considered part of the high seas; this applies to freedom of navigation and over-flight, among other activities.

In situations where States have adjacent or opposite coasts and their exclusive economic zones adjoin each other, article 74 provides that they should negotiate a delimitation agreement. If they cannot reach agreement, they must submit the matter to a dispute resolution process in order to determine an appropriate delimitation. Dispute resolution mechanisms can range from arbitration or similar processes to taking the dispute to the International Tribunal for the Law of the Sea or the International Court of Justice.

Jurisdiction, powers and obligations of the coastal State. While the coastal State does not have sovereignty over its exclusive economic zone, it does have certain functionally limited rights and obligations in that zone. The coastal State can enforce those rights in relation to resources and act to implement those obligations. These general rights and obligations are set out in UNCLOS article 56. Additionally, the coastal State must exercise its rights and responsibilities in its exclusive economic zone with due regard to the rights and obligations of other States in that same area of ocean (article 56(2)).

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

- (i) the establishment and use of artificial islands, installations and structures;
- (ii) marine scientific research;
- (iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

In addition to this general scheme of sovereign rights and obligations, the coastal State also has specific rights and obligations in relation to:

- (a) Artificial islands, installations and structures in the exclusive economic zone (article 60);
- (b) Conservation and utilization of the living resources in the exclusive economic zone (articles 61-62);
- (c) Managing and sharing the utilization of living resources that straddle exclusive economic zones or that straddle an exclusive economic zone and areas of high seas (article 63);
- (d) Special additional rules on certain types of fish stocks and species (articles 64-68); and
- (e) A series of special rules designed to ensure that the rights of landlocked and other geographically disadvantaged States can be fairly accounted for (articles 69-71).

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 73

Enforcement of laws and regulations of the coastal State

1. 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.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

What can a coastal State do when a vessel does not comply? Article 73 of UNCLOS specifically authorizes coastal States to take enforcement action in relation to managing and protecting their sovereign rights, and implementing their obligations, in their exclusive economic zone. These authorizations extend to practical operational matters such as boarding suspect vessels to investigate whether there is a prima facie violation of a law or regulation

which the coastal State is entitled to make and enforce. The authorizations also extend to subjecting violators to judicial proceedings in the coastal State's courts or tribunals.

Does the existence of an exclusive economic zone change the general rule about obtaining flag State consent prior to boarding or asserting jurisdiction over a foreign-flagged vessel? When a coastal State engages in law enforcement actions in relation to its exclusive economic zone, it does not need to seek permission from the flag State of a suspect vessel before it boards and searches that vessel. This is because the coastal State has the sovereign right to make laws in relation to certain matters in its exclusive economic zone as well as the corresponding right to enforce those laws. The coastal State's rights in the exclusive economic zone are therefore not subject to the requirement of flag State consent before a boarding operation designed to confirm (or dispel) the coastal State's suspicion that a vessel is breaching a coastal State law applicable in the exclusive economic zone.

If the suspicions are confirmed upon boarding and further investigation, the coastal State can then take that vessel, its crew and cargo back to a coastal State port for further investigation. Again, the coastal State does not need to seek flag State permission to do so. If a breach is confirmed, then the vessel, crew and/or cargo (e.g. the illegal catch found on the vessel) can be subjected to further legal processes in the coastal State.

It is therefore critical that enforcement action in the exclusive economic zone be strictly limited to matters over which the coastal State is entitled to make and enforce laws and regulations, and thus to exercise jurisdiction. If enforcement action is not linked to a matter within the coastal State's exclusive economic zone powers and jurisdiction, then interference with that vessel without flag State consent (and not based on another exception such as universal jurisdiction) may be inconsistent with international law. This is likely to raise diplomatic and legal problems for the coastal State.

Jurisdiction and powers of the flag State. UNCLOS article 58 sets out the general rights and duties of foreign State vessels inside another State's exclusive economic zone. A core element of the exclusive economic zone regime is the existence of contemporaneous rights: Along with high seas navigational freedoms, vessels also have an obligation to operate with due regard for the rights and duties of the coastal State in its exclusive economic zone.

EXAMPLE

If a coastal State has a fisheries law applicable in its exclusive economic zone, then it has the power to enforce that fisheries law over other States' vessels that violate it. This is because the exclusive economic zone regime specifically grants fisheries management rights to the coastal State.

If, however, the coastal State purports to have laws that regulate the colour of vessels in its exclusive economic zone, then this is not a matter about which the coastal State has the authority to make laws which will apply in its exclusive economic zone. Consequently, any interference with a foreign vessel on this basis would not be permissible unless the coastal State first secured flag State consent for such action.

In the case of the *MV Saiga* (No. 2) before the International Tribunal on the Law of the Sea, a coastal State arrested a vessel in its exclusive economic zone, basing its authority to do so on a law that was effectively a customs law relating to taxes and tariffs on the sale of fuel. The coastal State maintained that the relevant law extended into the exclusive economic zone, i.e. well beyond the contiguous zone. The Tribunal determined that the arrest and subsequent convictions based on this law were not valid because UNCLOS does not grant the authority to apply such customs laws across the full exclusive economic zone; as noted above, customs laws do not apply beyond the contiguous zone.

ARTICLE 58**Rights and duties of other States in the exclusive economic zone**

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

The essence of this provision is that flag States continue to enjoy certain high seas freedoms and other rights under pertinent rules of international law (see section 4.5) in all exclusive economic zones, except to:

- (a) The extent that those rights are inconsistent with the exclusive economic zone regime; or
- (b) The extent that those rights are subject to the obligation to have "due regard" to the rights and obligations of the coastal State in its exclusive economic zone.

One example of a high seas right which is not compatible with the exclusive economic zone regime is the right to fish. This is because fisheries is a matter clearly within the right of the coastal State to regulate in its exclusive economic zone.

An example of a high seas right which remains a topic of contention is the right to conduct military exercises at sea. For example, consider a coastal State which has valid regulations in place to protect a particularly sensitive marine environment located within its exclusive economic zone. Many States believe that in this case the "due regard" obligation of other States would require that if they are carrying out weapons exercises at sea, then they must avoid (for example) firing rounds that will fall into that area. This would be paying due regard to the coastal State's obligation to manage that particularly sensitive marine area. Other States reject this interpretation, noting that the compromise language of article 58(1) of UNCLOS guarantees the right of all nations to exercise high seas freedoms in the exclusive economic zone to the extent that they are "internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and the submarine cables and pipelines, and compatible with other provisions of this Convention".

It is also important to note that there are other elements which are found in other parts of UNCLOS (i.e. those not related to the exclusive economic zone), but which also apply in the exclusive economic zone. Article 58(2), for example, very clearly brings into the exclusive economic zone regime almost all of the high seas rights and obligations, except to the extent that the exclusive economic zone regime directly contradicts a high seas right (e.g. in relation to fishing).

This means, for example, that the UNCLOS articles that define piracy and the right of visit apply in the exclusive economic zone beyond the territorial sea just as they do in the high seas beyond the exclusive economic zone.

4.4 Continental shelf and extended continental shelf

In addition to claiming an exclusive economic zone, a coastal State has rights to the continental shelf out to 200 nm, or to a lesser distance depending upon any existing delimitation arrangements. A coastal State may claim an extended continental shelf further than 200 nm if the physical continental shelf extends that far and data has been submitted and accepted by the Commission on the Limits of the Continental Shelf. The continental shelf regime concerns a coastal State's

sovereign rights over resources on, in and under the seabed of the continental shelf. These resources are primarily oil, gas and mineral resources, but can also include certain living resources on the seabed. In general, the continental shelf regime parallels the exclusive economic zone regime: The exclusive economic zone covers the water column and resources located therein, while the continental shelf regime covers the seabed and subsoil below the seabed, as well as the resources on, in or under it.

A number of highly technical rules govern continental shelf delimitation. There are also rules about other matters relating to the continental shelf, such as the laying of pipelines and cables, which other States are allowed to do as long as they pay due regard to the coastal State's rights and to the location and condition of existing pipelines and cables (article 79). The Convention also includes provisions dealing with the construction of artificial islands and installations on the continental shelf, which are exclusive rights of the coastal State (article 80); this is also the case in the exclusive economic zone (article 60).

UNCLOS also establishes a regime for claiming, delimiting and exploiting an extended continental shelf, which can extend out to 350 nm from the coastal State's baselines (article 76(2), (4-9)). Such claims must be submitted to the Commission on the Limits of the Continental Shelf and must generally be supported by significant scientific and hydrographic data. Other aspects of international law also apply to structures such as platforms that may be connected to the continental shelf (e.g. the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf). Similarly, security zones of 500 metres may also be placed around such structures and installations, as is also the case with such structures and installations in the exclusive economic zone.

4.5 The high seas

ARTICLE 76

Definition of the continental shelf

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

...

ARTICLE 77

Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

ARTICLE 86

Application of the provisions of this Part

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

In essence, UNCLOS defines “high seas” as all those sea areas that remain outside exclusive economic zones, territorial seas, archipelagic waters and internal waters of all States. The high seas are the “common heritage” of all States, and all humankind, and no State may assert sovereignty over the high seas. Article 89 is very explicit: “No State may validly purport to subject any part of the high seas to its sovereignty”.

On the high seas, and to the extent applicable in the exclusive economic zone, all States enjoy the freedoms of the high seas. The list of high seas freedoms set out in article 87 is inclusive rather than exclusive. For example, there is no specific mention of the high seas freedom to engage in military exercises or weapons practice, but such a freedom is generally accepted. Another such example of other rules of international law that apply at sea and must therefore also be taken into account when assessing conduct is the law of naval warfare (when applicable).

ARTICLE 87

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

In addition to (and separate from) the high seas freedom of navigation, the right of all States to sail ships flying their flag on the high seas is specifically recognized in article 90. However, this right is not limited to the high seas. For example, as noted in chapter 3, States also have the right for ships flying their flag to exercise innocent passage through another State’s territorial sea.

The high seas regime within UNCLOS also includes provisions regarding the nationality of ships (article 91), that is, the “flag” of a vessel; a general prohibition (with some very narrow exceptions) on sailing under more than one flag at any time (articles 92 and 93); the sovereign immunity of warships and vessels used only on government non-commercial service, which includes marine police vessels (articles 95 and 96); and a range of other matters.

The flag State. The high seas regime in UNCLOS also includes article 94, which provides a summary of the duties of a flag State, that is, a State which permits vessels to claim its nationality as long as they comply with that State’s regulatory requirements. The most significant maritime law enforcement consequence of a vessel having a nationality is that unless some recognized special circumstance is involved, it is the flag State that should assert exclusive jurisdiction over that vessel, its conduct, and conduct within that vessel (see chapter 5).

ARTICLE 94

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

- (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
- (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

- (a) the construction, equipment and seaworthiness of ships;
- (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
- (c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

- (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

...

However, as noted above, there are exceptions to this rule that allow a coastal State to take action in relation to a vessel without first obtaining flag State consent. One such exception is when the consequences of a criminal act on or by a vessel in innocent passage extend to the coastal State (article 27(1)(a)). Another exception applies when the coastal State has the authority to regulate matters such as fisheries and suspects that a foreign vessel inside its exclusive economic zone is breaching its fisheries laws.

The high seas regime is also the part of UNCLOS where many vital maritime law enforcement powers and definitions (discussed further in chapter 5) are set out. For example, the definitions of piracy (article 101) and pirate ship (article 103) as well as the right of visit (article 110) and that of hot pursuit (article 111) are all laid down in the high seas regime part of

UNCLOS. Similarly, the duty to render assistance at sea (article 98) is also set forth in this part of the Convention.

Importation of high seas rights, freedoms and obligations into the exclusive economic zone and contiguous zone. The fact that many general maritime law enforcement definitions and powers derive from the high seas provisions of UNCLOS raises the question as to how they apply elsewhere in international waters, that is, in the exclusive economic zone and contiguous zone. The Convention contains a set of cross-referrals that incorporate many aspects of the high seas regime back into the exclusive economic zone and contiguous zone:

(a) *Exclusive economic zone.* Articles 58 and 86 apply components of article 87 (i.e. the high seas freedoms that do not contradict the exclusive economic zone regime) and articles 88-115 (including provisions on matters such as piracy, the duty to render assistance, the right of visit and the right of hot pursuit) to the exclusive economic zone, albeit with the added requirement of “due regard” for the rights and obligations of coastal States in the exclusive economic zone; and

(b) *Contiguous zone.* There is no specific cross-referral of the high seas regime and its definitions, obligations and powers back into the contiguous zone, but this is because—for the purposes of high seas rights and obligations—the contiguous zone is simply a part of the exclusive economic zone, albeit one in which the additional FISC rights of the coastal State also apply.



Part II.
General principles

Chapter 5

Maritime law
.....
enforcement
.....

KEY POINTS

1. Maritime law enforcement is a routine peacetime policing operation similar to other such operations in that the determination of jurisdiction and authority is a necessary first inquiry.
2. According to best practice for valid maritime law enforcement, a State should have the following in place:
 - (a) Laws that validly assert its jurisdiction over specific activities or conduct in the specific maritime zone;
 - (b) Laws that give its maritime law enforcement agents the necessary powers to assert that jurisdiction, such as laws regarding boarding, detention, arrest, search and seizure at sea; and
 - (c) Laws that allow its courts and other actors in the criminal justice system to deal with such cases, even if they fall outside of the traditional limits of its territorial jurisdiction (which includes internal waters, territorial sea and archipelagic waters), by ensuring that a State's relevant domestic laws have extraterritorial application.

KEY TERMS

AUTHORIZED VESSELS: Those official State vessels, including warships, marine police vessels and other specifically identified State vessels on non-commercial service, which are authorized to engage in maritime law enforcement operations on behalf of their State.

RIGHT OF VISIT: The right of visit, contained in article 110 of the United Nations Convention on the Law of the Sea (UNCLOS), provides authority for certain vessels to board suspect vessels without flag State consent where they have reasonable grounds to suspect that the vessels are engaged in one of five specific types of conduct when they encounter those vessels in international waters.

HOT PURSUIT: Under UNCLOS article 111, the right of hot pursuit allows authorized vessels to continue pursuit of a suspect vessel into maritime zones beyond that maritime zone in which the suspect vessel is believed to have breached a relevant coastal State law. This right is only activated and only remains operative if all of the requirements are met, and it ceases as soon as the suspect vessel enters any territorial sea that does not belong to the coastal State or authorizing State.

USE OF FORCE: For the purposes of this Manual, this term refers to force employed in maritime law enforcement operations. When such force is used, it should be only to the extent that is reasonable and necessary in the circumstances of an attack or imminent attack upon law enforcement agents or upon others whom they have a right or obligation to protect from such harm, so as to stop or deter that attack or imminent attack:

(a) In situations where the threat posed by the attack or imminent attack is not at the level of a threat to life or of very serious injury, then the use of force in self-defence is generally limited to non-deadly force;

(b) The use of deadly force in self-defence is only available in situations where a person has a reasonably objective belief that the threat poses an imminent danger of death or serious bodily harm to himself/herself or others.

LAW ENFORCEMENT: Conduct, a purpose, or an outcome that is:

(a) Authorized under the relevant laws for maritime law enforcement agents to engage in or to seek to bring about; and

(b) Connected to the enforcement of a relevant substantive law or regulation that creates an offence or authorizes a power that the relevant State is entitled to create or authorize and to make laws about; and

(c) One for which the use of force to secure achievement is permitted in the relevant law or laws.

INTRODUCTION

5.1 The meaning of “maritime law enforcement” for the purposes of this Manual

For the purposes of this Manual, “maritime law enforcement” means actions taken to enforce all applicable laws on, under and over international waters, and in waters subject to the jurisdiction of the State carrying out such enforcement activities. Maritime law enforcement therefore includes authorizations for law enforcement agents and authorized vessels to deal with other vessels, including foreign vessels in some situations, by taking action at sea to enforce relevant laws. This includes actions such as:

- (a) Signalling and stopping suspect vessels;
- (b) Boarding suspect vessels;
- (c) Searching suspect vessels and the people and cargo in such vessels;
- (d) Detaining or arresting people in suspect vessels and/or the suspect vessels themselves;
- (e) Seizing items on suspect vessels;
- (f) Directing or steaming suspect vessels and the people and cargo in those vessels to a coastal State port or similar place for investigation;
- (g) Conducting such investigations; and
- (h) Subsequent prosecution or other forms of administrative action or sanctions.

Maritime law enforcement requires that a number of preconditions be fulfilled before operations are conducted. As this Manual focuses on interference with foreign vessels for maritime law enforcement purposes, these preconditions include the following:

(a) The coastal State must have enacted a law that applies to the conduct which the maritime law enforcement agents are using as the basis for their actions in relation to a particular suspect vessel;

(b) The coastal State must have the authority to regulate that conduct in the maritime zone where the suspect vessel is located;

(c) The maritime law enforcement agents must be authorized under the law of their coastal State to take maritime law enforcement action against that suspect vessel, in relation to that suspected breach and in that maritime zone; and

(d) There can be no legal limitation on the application of the coastal State’s law to the vessel and people targeted by the coastal State’s maritime law enforcement actions.

5.2 Potential legal bases for exercising maritime law enforcement authority

There are various authorities that allow maritime law enforcement agents to stop, board and search a suspect vessel. However, these authorities are strictly limited to their purpose and must be correctly executed, because they constitute a departure from the general rule that exclusive jurisdiction is vested in the flag State of a vessel legally entitled to fly the flag of that State.

Flag State consent. The primary jurisdiction over a vessel resides with its flag State. This means that the flag State can give permission to the maritime law enforcement agents of another State to board a vessel claiming that flag State’s nationality.

Where flag State consent is sought to board a vessel, the requesting State should be required to detail the reasons for the boarding request and any “follow-on” actions they may wish to take. If the flag State grants the request to board, it should ensure that understandings are in place with respect to issues such as responsibility or liability for damage to the vessel or cargo during any boarding or search, or for injuries suffered during the boarding operation.

Some States exercise the right to board a vessel flagged in another State based on consent given by the master of the vessel, who grants this authority on behalf of the flag State. However, not every flag State grants this authority to masters of vessels flying its flag. Where the ultimate goal of the boarding State is prosecution of the vessel and/or people on board, it is prudent to request permission to board from the flag State rather than the master.

Coastal State jurisdiction in relation to its own internal waters, archipelagic waters, territorial sea, contiguous zone, exclusive economic zone or continental shelf. As outlined in chapters 1 to 4, coastal States may assert and enforce their jurisdiction in those maritime zones in which they have either sovereignty or sovereign rights. A coastal State’s jurisdiction is generally at its greatest in areas closest to that State’s baselines.

Examples of such coastal State jurisdiction include:

- (a) In internal waters, a foreign vessel pumps oil into the water;
- (b) In archipelagic waters or the territorial sea, the consequences of a crime committed on a foreign vessel extend to the coastal/archipelagic State;
- (c) In the contiguous zone, the foreign vessel breaches a relevant fiscal, immigration, sanitary or customs (FISC) law of a coastal State;
- (d) In the exclusive economic zone, a foreign vessel fishes without a licence or other permission from the coastal State; and
- (e) On the continental shelf, a foreign vessel conducts exploratory oil drilling without the approval of the coastal State.

In most cases, the existence of coastal State jurisdiction in relation to a given maritime zone negates the normal requirement to obtain flag State consent prior to taking maritime law enforcement action in relation to that vessel. This is because the coastal State

has an independent jurisdiction related to its own territory, maritime zones and rights in such situations. This standard does not apply to warships or government vessels operating on government non-commercial service.

National self-defence. Many States assert that they have a right to board a foreign-flagged vessel without first gaining flag State consent if this is necessary in national self-defence. In practice, the same processes and procedures utilized in maritime law enforcement may be used in such situations. However, national self-defence is not a maritime law enforcement matter; it is subject to a range of other rules of international law and thus will not be discussed further in this Manual.

United Nations Security Council resolutions. Security Council resolutions provide legal authorities under international law to confront humanitarian and maritime security challenges, complementing land-based responses. Security Council resolutions addressing maritime interdictions are tethered to chapter VII of the Charter of the United Nations, and decisions taken by the Security Council in accordance with that chapter are binding on all United Nations Member States. Since 1966, the Security Council has approved more than 30 resolutions focusing on the maritime environment, including piracy, proliferation and migration.

When the Security Council implements a mandatory sanctions regime or authorizes some other form of interdiction regime, States may sometimes provide personnel trained in maritime law enforcement to work with the United Nations in order to implement those sanctions. In such situations, the existence of a sanctions regime which has been mandated at the required level (with well-settled phrases and words) will negate the requirement for assigned maritime law enforcement agents to seek flag State consent prior to halting, boarding, searching and potentially diverting a vessel suspected of breaching that sanctions regime. Similarly, if some other form of interdiction regime is in place, the Security Council will sometimes specifically set out the scope of additional authorizations.

Pre-existing boarding approvals based on treaties or agreements. Flag States may pre-authorize maritime law enforcement agents of another State to board a vessel claiming that flag State’s nationality without having to seek permission first. However, such approval is often limited to a specific set of situations, as opposed to being a blanket approval for all situations.

**EXAMPLE OF UNITED NATIONS SECURITY COUNCIL RESOLUTION:
RESOLUTION 665 (1990) ON THE SANCTIONS REGIME IN RELATION TO IRAQ/KUWAIT**

...

Having decided in resolution 661 (1990) to impose economic sanctions under Chapter VII of the Charter of the United Nations,

...

1. [The Security Council] *Calls upon* those Member States cooperating with [Kuwait] which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions relating to such shipping laid down in resolution 661 (1990);

...

**EXAMPLE OF OTHER INTERDICTION REGIMES IMPLEMENTED BY THE UNITED NATIONS SECURITY COUNCIL:
RESOLUTION 2240 (2015) ON MIGRANT FLOWS IN THE MEDITERRANEAN SEA**

...

Affirming the necessity to put an end to the recent proliferation of, and endangerment of lives by, the smuggling of migrants and trafficking of persons in the Mediterranean Sea off the coast of Libya, and, for these specific purposes, acting under Chapter VII of the Charter of the United Nations,

...

7. [The Security Council] *Decides*, with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels as mentioned above, to authorize, in these exceptional and specific circumstances, for a period of one year from the date of the adoption of this resolution, Member States, acting nationally or through regional organizations that are engaged in the fight against migrant smuggling and human trafficking, to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, provided that such Member States and regional organizations make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph;

8. *Decides* to authorize for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organizations to seize vessels inspected under the authority of paragraph 7 that are confirmed as being used for migrant smuggling or human trafficking from Libya, and underscores that further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith;

...

For example, State A and State B may agree with each other, through a treaty or other legal instrument, that they can each stop, board and search the other State's vessels in international waters where there is a reasonable suspicion that the vessel is involved in trafficking illicit drugs. The agreement may specify, for example, that this can be done without seeking flag State consent. Alternatively, the agreement may specify that a request for flag State consent must still be made, but that if no response is received after a set time limit (e.g. four hours), then flag State consent can be assumed to have been granted. States may also go even further and agree on more general authorizations, as is the case between the United States of America and Costa Rica.

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND COSTA RICA, SIGNED AT SAN JOSE DECEMBER 1, 1998, AND AMENDING PROTOCOL SIGNED AT SAN JOSE JULY 2, 1999

V. OPERATIONS SEAWARD OF THE TERRITORIAL SEA

1. Whenever U.S. law enforcement officials encounter a suspect vessel flying the Costa Rican flag or claiming to be registered in Costa Rica, located seaward of any State's territorial sea, this Agreement constitutes the authorization of the Government of the Republic of Costa Rica for the boarding and search of the suspect vessel and the persons found on board by such officials.

If evidence of illicit traffic is found, U.S. law enforcement officials may detain the vessel and persons on board pending expeditious disposition instructions from the Government of the Republic of Costa Rica.

The right of visit. UNCLOS article 110 is an important authorization for maritime law enforcement in international waters. This article is often called “the right of visit” and comprises the following key elements:

(a) Only warships and other duly authorized vessels may exercise this right;

(b) Maritime law enforcement agents are not required to seek flag State consent prior to conducting a “right of visit” boarding; however, the right of visit is only available in five specified circumstances and cannot be used outside those circumstances;

(c) The authority to engage in follow-on maritime law enforcement actions is separate from the authority to exercise the right of visit. Some of the circumstances specified below include a follow-on authority to prosecute, while others do not confer any authority for follow-on actions beyond confirming (or dispelling) the suspicion; and

(d) The right of visit does not apply to sovereign immune vessels (warships and State vessels used only on government non-commercial service; see articles 95 and 96). In other words, the right of visit cannot be used to justify the boarding of a sovereign immune vessel.

The right of visit is only available when a strict set of conditions is met:

(a) *Who?* The vessel intending to exercise the right of visit must be an authorized vessel, that is, an official State vessel that has the authority, under its own State’s laws, to exercise the right of visit. Such vessels include warships, maritime police vessels, coastguard cutters and the like. Merchant vessels such as commercial vessels and private yachts are not authorized to exercise the right of visit;

(b) *Where?* The right of visit under article 110 can only be exercised in international waters;

(c) *Why?* The right of visit under article 110 is available when the maritime law enforcement agent has reasonable grounds to suspect that the vessel is engaged in one of the five prohibited acts set out in that article (although it is, of course, possible for States to agree on other situations between themselves);

(d) *How?* The right of visit is generally exercised by sending a sea-boat with a boarding team (or in some situations by fast-roping down from a helicopter) to the suspect vessel so that maritime law enforcement agents can then board the vessel and carry out the necessary inquiries or inspections associated with the specific purpose under article 110.

Each of the five grounds for using the right of visit carries with it different requirements and permissions in terms of exercising follow-on jurisdiction.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 110

Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; 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.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

“*The ship is engaged in piracy.*” The UNCLOS rules on jurisdiction after a piracy boarding are more detailed than those governing other aspects of article 110. The crime of piracy is one of “universal jurisdiction”, which means that any State that apprehends a pirate may prosecute that pirate regardless of whether any of the apprehending State’s nationals, vessels or maritime zones were involved in the piracy, provided the State has the relevant national law in place to allow it to do so. Piracy will be covered in more detail in chapter 9.

“The ship is engaged in the slave trade.” The ability of maritime law enforcement agents to board and detain a vessel and its crew in international waters on suspicion that the vessel is engaged in the slave trade is based in article 110 of UNCLOS. The Convention also contains a separate provision (article 99) which prohibits the transport of slaves and establishes that any slave who takes “refuge on board any ship, whatever its flag, shall ipso facto be free”.

While boarding authority is clear in the case of vessels suspected of being engaged in the slave trade, the separate issue of jurisdiction to prosecute is not well settled. In many cases, the simplest approach would be that the flag State retains this jurisdiction. To some extent, this will depend upon the other obligations the relevant State has adopted and on the way in which it defines and distinguishes (or does not distinguish) between slavery, trafficking in people and other forms of compulsory labour, debt bondage and forced movement of people. While some consider that elements of the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) are now applicable to all States as customary international law (i.e. not only to those States which have signed those conventions), this is not universally agreed. Additionally, while the jurisdictional authorizations laid down in those conventions mandate close cooperation to ensure that the practice is eradicated and reflect an obligation to prevent and punish, not all States consider those authorizations to be necessarily the same as the universal jurisdiction which applies in relation to piracy.

“The ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109.” As in the case of slave trade, UNCLOS article 110 details the authority to board a vessel suspected of unauthorized broadcasting. The follow-on jurisdictions available on the basis of this authorization are set out clearly in UNCLOS. First, article 109(2) defines “unauthorized broadcasting”. Article 109(4) limits the right of visit to the authorized vessels of certain States, as opposed to all States generally, in relation to unauthorized broadcasting. It does so by limiting the right of visit to authorized vessels of a State which has the jurisdiction to prosecute the vessel. Article 109(3) sets out which States have the authority to prosecute. The effect, however, is that a State with a single national on board a vessel engaged in unauthorized broadcasting gains jurisdiction not only over their own national, but also over other people aboard the vessel and over the vessel itself.

ARTICLE 109

Unauthorized broadcasting from the high seas

1. All States shall cooperate in the suppression of unauthorized broadcasting from the high seas.
2. For the purposes of this Convention, “unauthorized broadcasting” means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.
3. Any person engaged in unauthorized broadcasting may be prosecuted before the court of:
 - (a) the flag State of the ship;
 - (b) the State of registry of the installation;
 - (c) the State of which the person is a national;
 - (d) any State where the transmissions can be received; or
 - (e) any State where authorized radio communication is suffering interference.
4. On the high seas, a State having jurisdiction in accordance with paragraph 3 may, in conformity with article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.

“The ship is without nationality.” States were traditionally opposed to the idea that a ship might have no nationality because this would imply that there is no jurisdiction applicable to that vessel. This would be against the desire of States to ensure that proscribed conduct is subject to some level of jurisdiction in all places. The modern view is that a vessel without nationality is subject to the jurisdiction of all States, although not all States agree as to the full extent of the jurisdiction that can be asserted. Of course, it should be remembered that persons found on board a vessel without nationality will nevertheless have access to a State of nationality based on their citizenship. Additionally, most States require domestic legislation to support enforcement action in relation to such vessels.

A vessel may be treated as one without nationality when:

- (a) The master or person in charge of the vessel fails, on the request of an authorized law enforcement official, to make a valid claim of registry;
- (b) The claim of registry made by the master or person in charge is denied by the State whose registry is claimed; or
- (c) The master or person in charge of the vessel makes a claim of registry that is not affirmatively or

unequivocally confirmed by that State, that is, the claimed flag State is unable to confirm or deny the verbal claim of registry by the master.

The right of visit includes the authority to board a vessel in international waters where that vessel is not flying a flag to indicate its claimed nationality. Often, the vessel's nationality may be readily and quickly confirmed by an inspection of vessel documents or by consultation with the claimed flag State. However, this is not always the case. Sometimes a vessel may only be able to produce an expired registration document; this is not sufficient on its own to prove that the vessel is without nationality. Small craft may not carry papers at all. Thus the most secure basis for determining that a vessel has no nationality is a refutation of any claimed nationality by the relevant flag State.

The interdicting State has very little follow-on jurisdiction or authority at its disposal once the flag State has confirmed nationality. If, however, suspicion or reasonable uncertainty as to nationality remains, the interdicting State may remain on board the vessel while inquiries continue. Some States also argue that if they find a cargo of illicit drugs in an unflagged vessel while conducting a boarding to verify its nationality, they may seize and dispose of those drugs (see chapter 12).

UNCLOS also permits one further type of vessel to be defined as a vessel without nationality. Article 92 states that where a vessel sails under two or more flags and swaps them according to convenience, it may be "assimilated to a ship without nationality".

"Though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the [authorized vessel]." These final grounds of authority for the right of visit are quite narrow. In essence, this authority to exercise the right of visit arises in the following situation:

ARTICLE 92

Status of ships

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

(a) An authorized vessel of State A encounters a vessel in international waters that is flying the flag of State B.

(b) However, based on information held by State A, the maritime law enforcement agents reasonably suspect that the vessel flying a State B flag is actually of State A nationality. They may suspect, for example, that the vessel is flying a State B flag precisely to make the State A authorized vessel believe that it has no jurisdiction over that vessel and therefore cannot stop and board the vessel.

(c) In this situation, the State A authorities may board the vessel to determine whether it is truly a State B vessel or in fact a State A vessel which is trying to hide its actual nationality.

If the vessel turns out to be a State A vessel which is trying to hide its true nationality, State A can then take appropriate law enforcement action against that vessel, as it is clearly within State A's jurisdiction. If, however, the vessel truly is a State B vessel, then article 110(3) permits State B to request compensation from State A on behalf of that vessel.

WHAT IS REQUIRED FOR MARITIME LAW ENFORCEMENT CONDUCT TO BE CONSIDERED LAWFUL?

5.3 A "checklist" for validity

Three sets of factors are necessary for a maritime law enforcement operation to be considered "valid" overall:

(a) A validly suspected breach, which requires that:

- (i) The subject matter of the breach is one over which the coastal State (or the flag State of the authorized vessel) may validly assert and enforce its jurisdiction; and
- (ii) The breach takes place in a valid location, that is, an area in which that

coastal State's law (or that authorized vessel's flag State law) can be applied in relation to that subject;

AND

(b) Permissible initial maritime law enforcement action, which requires that:

- (i) The signalling, halting, boarding and arrest process utilized by the maritime law enforcement agents is valid in accordance with international law and as incorporated into coastal State law; and
- (ii) Any use of force in the maritime law enforcement operation is valid in that it does not exceed the permitted levels established in law (see section 5.7);

AND

(c) A valid jurisdictional framework, which requires that all of these actions are carried out

in accordance with the framework of laws that support maritime law enforcement operations, most particularly:

- (i) That only properly conferred (i.e. valid) investigation powers are used; and
- (ii) That there is a valid general grant of jurisdiction and authority to the maritime law enforcement agent exercising those powers.

However, merely conforming with a checklist does not ensure prosecutorial success. This ultimately depends upon the quality of the investigation, the availability of sufficient admissible and relevant evidence to prove each element of the specific charge, and the absence of any justification, excuse or defence which can negate or diminish the legal responsibility of the accused person for the alleged breach. Unfounded actions may also raise issues of compensation.

A VALIDLY SUSPECTED BREACH

5.4 The subject matter of the breach is one over which the coastal State, or the flag State of the authorized vessel, may validly assert and enforce its jurisdiction

As noted earlier, maritime law enforcement action can only be lawful if it relates to subject matter or an issue which the coastal State is authorized under international law to regulate and enact laws about. Only if the conduct with which the maritime law enforcement agents concern themselves relates to one of the powers, obligations or rights that their State may validly regulate at sea is it possible to suspect a "breach" of that State's law.

Furthermore, a breach of a relevant law cannot be suspected if the coastal State, or the flag State of the authorized vessel, has not in some way regulated that matter in its own national legal system.

For example, if a coastal State has not claimed an exclusive economic zone and has no fisheries laws that extend beyond its territorial sea, then it would be difficult for that coastal State to proclaim that a foreign-flagged vessel was breaching a coastal State law by fishing 100 nautical miles (nm) off the coast.

However, the way in which rights, obligations and powers are manifested within the national system of laws is a matter for each State. For some States, the matter will need to be dealt with in a piece of statute law; for other States, the legal arrangements may already incorporate aspects of international law, including rights, powers and obligations under the law of the sea, without the need for additional specific laws or legislative or judicial action.

5.5 The (suspected) breach takes place in a valid location—that is, an area in which that coastal State's law, or the authorized vessel's flag State law, can be applied

A suspected breach can only authorize maritime law enforcement action if it takes place (or has taken place) in a maritime zone in which the coastal State, or the flag State of the authorized vessel, has the power to enact and enforce laws in relation to that conduct. For example, in the diagram below:

(a) A breach of innocent passage by a foreign-flagged vessel at the location of the red star would give rise to coastal State maritime law enforcement powers

because it is within the power of the coastal State to regulate that type of breach in its territorial sea. If, however, that same breach occurred at the location of the green oval, it would not give rise to maritime law enforcement authority for the coastal State because innocent passage does not apply outside the territorial sea and archipelagic waters, meaning that it cannot be used as a basis for maritime law enforcement authority in that zone;

(b) A breach in relation to a FISC matter at the location of the green oval or the red star would give rise to maritime law enforcement authority for the coastal State because the breach took place in the contiguous zone, in which the coastal State may utilize its “prevent” and “punish” powers in relation to FISC matters. If, however, the alleged FISC violation were to take place at the location of the brown triangle, then this would not support a maritime law enforcement operation because the coastal State would not have the authority to enforce its FISC laws beyond the contiguous zone unless it had properly commenced hot pursuit while the vessel was within the contiguous zone (see below);

(c) A breach of a coastal State fisheries law at the location of the brown triangle, the green oval or the red star would give rise to maritime law enforcement authority for the coastal State because fishing is a matter the coastal State can regulate in its exclusive economic zone (within which the brown triangle and green oval are located) as well as its territorial sea (within which the red star is located). However, the coastal State could not generally carry out fisheries enforcement at the location of the grey diamond (except in the case of “constructive presence”, which is described below) because the coastal State does not generally have the authority to enforce its exclusive economic zone fishing laws outside its own exclusive economic zone;

(d) Finally, in the case of piracy, both an authorized coastal State vessel and an authorized foreign flag State vessel would have the power to carry out a maritime law enforcement operation at the location of the grey diamond, the brown triangle or the green oval. This is because piracy constitutes grounds for the right of visit by any State’s authorized vessels, anywhere in the oceans, as long as it is outside any territorial sea (and archipelagic waters):

- (i) If the crew of one vessel boarded and seized control over another vessel at the location of the red star, only a coastal State authorized vessel could

carry out maritime law enforcement in relation to that incident. This is because it occurred within that coastal State’s territorial sea and therefore does not qualify as “piracy” as defined in UNCLOS. Rather, it is an offence over which the coastal State can assert its normal territorial criminal jurisdiction (e.g. armed robbery, hostage-taking or other such activities). In general, an authorized vessel from a foreign flag State would only be able to deal with that crime with some form of coastal State consent;

- (ii) Some States may also permit their authorized vessels to intervene if they encounter an act of armed robbery against a vessel in another State’s territorial sea when necessary to save lives; however, such action could result in a diplomatic protest by the coastal State;
- (iii) When a foreign-flagged vessel intervenes in another State’s territorial sea, the crime remains within the jurisdiction of the coastal State, and authorized vessels from other flag States must be aware of the potential risks of carrying out such an operation in the absence of coastal State consent or even in the face of a coastal State refusal of consent.

Constructive presence. In relation to maritime law enforcement in the exclusive economic zone, particularly with regard to fisheries, there is a widely held, but not universally accepted, doctrine that allows the coastal State to extend its maritime law enforcement jurisdiction just beyond its exclusive economic zone. This doctrine arose from domestic law and practices which involved the presence of a “mother ship” just outside the area over which the coastal State could assert jurisdiction (generally the territorial sea) and where that mother ship was unloading illicit or smuggled cargo onto smaller vessels, which then ferried the goods to shore. Clearly, the most effective law enforcement result was to apprehend the mother ship as opposed to the many smaller vessels. The two most common situations are as follows:

- (a) A fisheries “mother ship” operates just outside a coastal State’s exclusive economic zone, in the high seas, but serves as the storage and support ship for

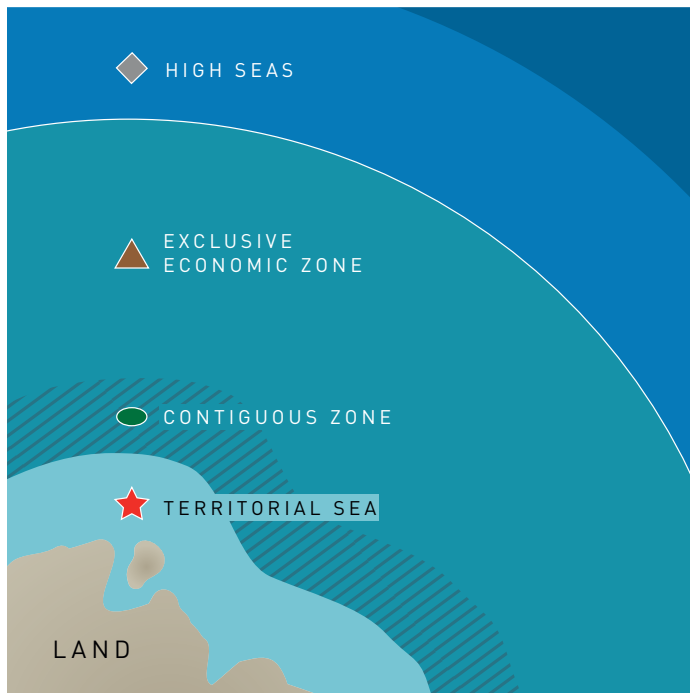


FIGURE 5.1
MARITIME LAW
ENFORCEMENT
AUTHORIZATIONS AND
MARITIME ZONES

associated fishing vessels which enter the exclusive economic zone to fish illegally and then return to the mothership to refuel, replenish supplies and unload their catch; or

(b) The fishing vessel, although it remains outside the exclusive economic zone, deploys fishing apparatus inside the coastal State's exclusive economic zone.

PERMISSIBLE INITIAL MARITIME LAW ENFORCEMENT ACTIONS

5.6 What actions are permissible if a vessel refuses to stop? The right of hot pursuit

Assume that an authorized vessel (or an aircraft or unmanned aerial vehicle; for the sake of simplicity, this Manual will focus on vessels) of a coastal State encounters suspicious conduct over which the coastal State can assert and enforce its jurisdiction, and that the suspicious conduct is taking place in a maritime zone where that coastal State has the right to assert and enforce that jurisdiction. If these two preconditions are fulfilled, the authorized vessel may seek to stop and board that suspicious vessel in order to carry out further investigations. What recourse does the coastal State have if the vessel refuses to stop and proceeds into the high seas?

In the situation described above, the right of hot pursuit gives the authorized vessel the power to commence and continue pursuit of the suspect vessel.

This right continues outside the relevant maritime zone (e.g. even after the suspect vessel has left the coastal State's exclusive economic zone) until the point where the suspect vessel enters another State's territorial sea. If the authorized vessel manages to halt and board the vessel before this point, it may then continue its investigation of the vessel and may, if the suspicions are confirmed, then take the vessel all the way back to a coastal State port for further investigation.

In order for hot pursuit to be valid, four preconditions must be met. It is important to keep in mind that if hot pursuit results in a stop-and-search operation that does not meet the requirements for valid hot pursuit, then the unwarranted delay may give rise to a duty to compensate the pursued vessel.

First, the hot pursuit must be validly commenced. In order for this to be the case, the pursuit must meet three requirements:

(a) First, as noted previously, the vessel must be engaged in, or suspected of, a breach of a valid coastal State law that applies in that maritime zone; and

(b) Second, the suspect vessel must be located within that particular maritime zone when hot pursuit is commenced, that is, when the initial signal for that suspect vessel to stop and be boarded is made by the authorized vessel. To satisfy this requirement, it is essential that the coastal State be able to show that the pursuing vessel made reasonable efforts to satisfy itself as to the position of the delinquent vessel. As noted above, the one exception to the requirement for the vessels to be within the relevant zone is “constructive presence”. The authorized vessel itself does not necessarily have to be in the relevant maritime zone; for example, it might be outside the exclusive economic zone but still close enough to the suspect vessel inside the exclusive economic zone that the required signals can be made; and

(c) Hot pursuit cannot commence unless and until “a visual or auditory signal to stop has been given [by the authorized vessel to the suspect vessel] at a distance which enables it to be seen or heard by the foreign [suspect] ship” (UNCLOS article 111(4)). This means that a loudhailer signal must be given at a range within which it will be heard. It is not required that the suspect vessel indicate that it has received or understood the signal; indeed, the suspect vessel may well ignore the signal or respond by turning away and heading for the high seas.

Second, the pursuit must be carried out by an authorized vessel. As noted previously, only properly authorized vessels of the coastal State can conduct maritime law enforcement and, therefore, commence and engage in hot pursuit. Thus a private fishing vessel flying the flag of the coastal State does not have the power or authority to engage in maritime law enforcement on behalf of that coastal State, so it cannot commence or continue hot pursuit of a foreign-flagged vessel which it finds illegally fishing in the coastal State’s exclusive economic zone. Maritime law enforcement authorizations can only be exercised by properly authorized vessels and maritime law enforcement agents. There is debate as to whether the pursuit may include tracking via satellite and similar systems that can also guarantee ongoing certainty as to identification and so on.

Third, the hot pursuit must be continuous once it is commenced. If it is broken (e.g. because the pursuing vessel has to respond to other orders from the

ARTICLE 111

Right of hot pursuit

1. 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 contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. 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.
3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.
4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.
5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.
- ...
8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

coastal State authorities or to a maritime search and rescue situation), then the hot pursuit is ended and cannot be recommenced.

However, the pursuing authorized vessel may hand over the pursuit to another authorized vessel (or

aircraft) of that same coastal State. For example, coastal State A's authorized vessel X, which commenced the hot pursuit but is running low on fuel, can hand over the pursuit to coastal State A's authorized vessel Y so that X can return to port. In this case, even though X has handed over the pursuit to Y, the hot pursuit remains unbroken and thus remains valid. Some States also assert that authorized vessel X could hand over the pursuit to another flag State's authorized vessel as long as there is a coastal State maritime law enforcement agent aboard the other flag State's authorized vessel.

Pursuit can still be continuous if the pursuing vessel loses sight of the suspect vessel, as long as close contact is maintained. For example, if the suspect vessel steams without lights at night in the hope of evading the pursuing vessel, but the pursuing vessel maintains radar contact with the suspect vessel, then the pursuit is still continuous and valid.

Fourth, the hot pursuit ends as soon as the suspect vessel enters the territorial sea of a State other than the pursuing coastal State. Hot pursuit is terminated when the suspect vessel enters the territorial sea of a State other than the coastal State pursuing the suspect vessel. This is because the suspect vessel has entered the national waters of another State, and as such the pursuing coastal State's enforcement authority can no longer be exercised.

The State whose national waters the suspect vessel has now entered (State B) may give the original pursuing State (State A) consent to enter State B's territorial sea to continue the pursuit. However, this right is based only on the consent of State B; it is not part of the right of hot pursuit. If the pursuing State is given permission to enter another State's territorial sea, it would need to confirm with that State whether it also has permission to board and arrest the suspect vessel and then to remove it from the other State's territorial sea for further investigation and prosecution. The pursuing State would also need to confirm that its own laws and courts would permit and accept an arrest carried out in another State's territory. Some bilateral agreements have included provisions that address pursuit and entry of this type.

5.7 Use of force

When carrying out maritime law enforcement operations, it may become necessary to use force in order to stop and board the suspect vessel, to search and detain the vessel and people on board the vessel, and

to seize items from the vessel. However, it must always be remembered that maritime law enforcement is a policing operation, not a "wartime" operation. This means that the rules applicable to the use of force in armed conflict are not relevant. Instead, the applicable rules on the use of force that apply more generally to all policing are used, which means that the level of force used must not exceed the minimum reasonably necessary in the circumstances. Excessive use of force can reduce or negate the ability to claim appropriate justifications such as self-defence or lawful authority. At this point, it is vital to reiterate that this form of self-defence is completely separate from and different to the concept of national self-defence in accordance with article 51 of the Charter of the United Nations.

In general, there are two related ways to think about the use of force in maritime law enforcement: permissible reasons for using force and the permissible level of force.

Permissible reasons for using force. There are two sets of reasons that may render the use of force by maritime law enforcement agents permissible:

(a) *Self-defence:* The use of force that is reasonable and necessary in the circumstances of an attack or imminent attack upon law enforcement officials or others whom they have a right or obligation to protect from such harm, so as to stop or deter that attack or imminent attack. This is sometimes referred to as individual self-defence and defence of others in order to distinguish it from the right of national self-defence, which is a very different and distinct legal concept.

(b) *Law enforcement purposes:* Those purposes which are authorized by a relevant law or regulation of the authorizing State of the maritime law enforcement agent and which permit the use of force in order to accomplish the specified law enforcement task or purpose. Examples of law enforcement purposes for which the use of force is authorized often include:

- (i) Stopping a suspect vessel;
- (ii) Boarding a suspect vessel;
- (iii) Searching a suspect vessel, its cargo and the people on board the vessel;
- (iv) Restraining or detaining people on board the vessel;
- (v) Seizing cargo or other items found on board the vessel (e.g. as evidence);
- (vi) Cutting or destroying certain items found on board or deployed from the

- vessel (e.g. nets which cannot be recovered for some reason);
- (vii) Detaining the vessel;
 - (viii) Controlling the vessel so as to steam or sail it to a port for further investigation.

Permissible level of force. The concepts central to assessing the permissible level of force are:

(a) *Attack.* Acts of violence in which there is a reasonable expectation that death or bodily harm may occur;

(b) *Non-deadly force.* Force not intended to or likely to cause death or serious injury. In situations where a person lacks a reasonably objective belief that a threat poses an imminent danger of death or serious bodily harm to that person or others, then the use of force in self-defence is generally limited to non-deadly force;

(c) *Deadly force.* Force intended to or likely to cause death or serious injury, regardless of whether death or serious injury results. The use of deadly force in self-defence is only available in situations where the person has a reasonably objective belief that a threat poses an imminent danger of death or serious bodily harm to that person or others.

In general, the use of deadly force in maritime law enforcement operations is limited only to situations of self-defence, because the acts of stopping, searching and detaining vessels and seizing cargo or items generally do not involve the threat of death or serious injury to the maritime law enforcement agent or others. Because this threat is not present, the use of deadly force is not permitted. However, non-deadly force may be used for:

- (a) A law enforcement purpose; or
- (b) A self-defence purpose where it is not necessary and permissible to use deadly force.

For maritime law enforcement purposes, unless self-defence situations apply, the use of force is generally limited to non-deadly force. Types of equipment and techniques that can be used in the employment of non-deadly force include pepper spray, propeller entrapment devices, fire hoses and so on. However, it is important to remember that even the use of non-lethal or less-than-lethal devices and techniques can create risk to life if used in certain situations. For example, using the stream of high-pressure water from

a fire hose to knock a person off a ship into the path of another vessel could easily be a situation that creates a clear risk to life.

Take the situation of a suspected illegal fishing vessel that has refused to stop after a maritime law enforcement vessel has signalled it to do so and has used warning shots ahead of the fleeing vessel's bow to further signal it to stop. Assume that the law applicable to the maritime law enforcement agents allows them to use direct fire as a further warning to the fleeing vessel to stop.

When a law enforcement vessel uses force to compel a suspect vessel to heave to for boarding, it must take care to avoid causing serious harm to, or the death of, people in the vessel. This is because generally it is only permissible to use non-deadly force to stop a fleeing suspect vessel; while using force to compel a vessel to stop is permissible, there is generally no justification for the use of deadly force in these instances. As a result, if direct fire is used, it should be aimed at places on the vessel where it is unlikely that people will be present. It would in almost any situation be too dangerous to aim at the bridge or steering area of the vessel, as this is one place where there will almost always be people present when the vessel is at sea.

The use of force would also need to be aimed and applied so that it did not directly create a life-threatening situation. For example, aiming to put a hole in the hull, which could lead to sinking, or aiming to ignite fuel drums on the deck would most likely be considered to exceed the use of non-deadly force. These uses of force would more probably be instances of deadly force, because they would almost certainly cause or be likely to cause death or serious injury.

Similarly, when a vessel is searched, the use of force is generally limited to non-deadly force. For example, if a maritime law enforcement agent is searching the suspect vessel and finds a compartment that is padlocked shut, it is reasonable to suspect that illegal cargo or evidence of other illegal activity (e.g. illegally caught fish) is hidden in the compartment behind that door. If the crew members then refuse to unlock the door, the maritime law enforcement agent may need to use force to open the door, for example by cutting the padlocks or even breaking the door down. This is non-deadly force. It would not be permissible to use deadly force to open the door because there is no threat to life.

However, it is important to remember that if a maritime law enforcement activity suddenly becomes a situation where there is a threat to life, then the rules

on the use of force in self-defence may apply. This is because the situation has become one of self-defence; it is not because deadly force has suddenly become permissible for the original maritime law enforcement purpose.

For example, assume that two members of a maritime law enforcement boarding team are searching a part of a suspect vessel. One maritime law enforcement agent is restraining a crew member who has tried to stop another maritime law enforcement agent from opening a door to search a compartment. Both activities—restraint and search—are for law enforcement purposes, meaning that only non-deadly force is permitted (e.g. using cutters to break the lock on the door

and using a wrist-lock or similar hold to restrain the uncooperative crew member).

However, if the restrained crew member suddenly breaks the restraint and pulls out a knife to attack the maritime law enforcement agent who is working on opening the door, then the use of force permissible against that crew member may suddenly escalate to deadly force if that is the only reasonable option available. This is not because the maritime law enforcement agents are now permitted, because of the changed circumstances, to use deadly force for a law enforcement purpose (such as restraint). Instead, it is because the situation has now changed to one of self-defence because there is now an imminent threat to life.

Guidance table: Zone, issue, State source of authority to board/carry out law enforcement action (but not against sovereign immune vessels)

Zone	Type of offence	Who can authorize law enforcement action?
Internal waters	<ol style="list-style-type: none"> 1. Criminal offences 2. Other regulatory offences 3. Some civil actions 4. Actions within warships or other authorized vessels 	<ol style="list-style-type: none"> 1. Coastal State 2. Coastal State 3. Coastal State 4. Flag State
Territorial sea/archipelagic waters (generally 0-12 nm and inside archipelagic baselines)	<ol style="list-style-type: none"> 1. Criminal offences confined to the vessel 2. Criminal offences where the consequences extend to the coastal State/affect the peace, good order or security of the coastal State 3. Matters governed by a mandatory United Nations Security Council regime under chapter VII of the Charter 	<ol style="list-style-type: none"> 1. Flag State 2. Coastal State 3. Authorized State (i.e. third State/boarding State)
Contiguous zone outside the territorial sea (generally an additional 12 nm outside the territorial sea: 12-24 nm)	<ol style="list-style-type: none"> 1. FISC matters 2. Other matters 	<ol style="list-style-type: none"> 1. Coastal State 2. Flag State
Exclusive economic zone outside the territorial sea (generally an additional 188 nm beyond the outer limit of the territorial sea)	<ol style="list-style-type: none"> 1. Resource issues 2. Other 	<ol style="list-style-type: none"> 1. Coastal State 2. Flag State
High seas/international waters (generally all waters beyond territorial seas; from 12 nm outwards)	<ol style="list-style-type: none"> 1. Article 110 situations 2. Matters governed by a mandatory United Nations Security Council regime under chapter VII of the Charter 3. Other matters 	<ol style="list-style-type: none"> 1. Authorized State 2. Authorized State 3. Flag State

5.8 Case studies on the use of force for maritime law enforcement

The *I'm Alone*. The *I'm Alone* was a wooden Canadian schooner. At the time of the incident, in 1929, it was subject to a 1924 treaty that had been concluded by the United States of America and the United Kingdom of Great Britain and Northern Ireland, and that covered Canadian vessels. The *I'm Alone* was involved in smuggling alcohol into the United States in breach of prohibition laws in place at the time. This treaty incorporated a 3 nm territorial sea for the United States and included provisions that meant Canadian vessels were also subject to United States jurisdiction in relation to customs issues out to “one hour’s sailing distance” from the coast, that is, out to about 12 nm.

United States maritime law enforcement agents aboard two authorized United States vessels suspected the *I'm Alone* of unloading alcohol onto smaller boats, which then ferried that alcohol ashore in Louisiana. United States maritime law enforcement agents asserted that the unloading had taken place within the customs enforcement zone within one hour’s sailing distance of the coast. As a consequence, authorized vessels pursued the *I'm Alone* to about 200 nm from the coast and then fired into her in a manner capable of causing the vessel to sink. The *I'm Alone* sank and one crew member died.

In accordance with the treaty, a joint United States–United Kingdom inquiry was held. In terms of maritime law enforcement operations, the inquiry found the following:

(a) The pursuit had been commenced in a valid manner. The fact that the *I'm Alone* was outside the 3 nm territorial sea was not relevant because the key fact was that the *I'm Alone* was within the customs zone of one hour’s sailing distance. This meant that the authorized vessels of the United States were lawfully permitted to commence hot pursuit because the *I'm Alone* was suspected of breaching a relevant law that applied in that particular zone. Therefore, the authorized vessels of the United States had the required jurisdiction to enforce that law, in that zone and against that vessel. To that end, the authorized vessels could indeed commence pursuit and continue it into the high seas.

(b) The use of force, including the firing of weapons into a fleeing suspect vessel, was a valid maritime law enforcement power. However, the use of force in

a way that was intended to sink the suspect vessel was not authorized for such law enforcement purposes.²

The *Red Crusader*. This incident, which occurred in 1961, involved the pursuit of a Scottish trawler (*Red Crusader*) suspected of fishing illegally inside a Faroe Islands fishing zone, which a treaty between the United Kingdom and Denmark (which had this authority in relation to the Faroe Islands) had reserved for Faroese fishing. In general, the zone from the Faroe Islands baselines out to around 6 nm was for Faroese fishing only, and a zone from that 6 nm limit out to a 12 nm limit was one in which both Faroese and British vessels could fish.

On this occasion, the Danish authorized vessel (*Niels Ebbesen*) had initially signalled to the trawler from a position outside the inner 6 nm zone. The trawler stopped, was boarded and was then ordered to follow the *Niels Ebbesen* back to port for further investigation. However, after a time, the *Red Crusader* (with two Danish sailors still on board as a steaming party) turned and headed for Scotland. The *Niels Ebbesen* pursued the vessel and, after warnings and warning shots, fired direct shots into the *Red Crusader*. Those direct shots were aimed at the radar, mast and stem (bow). Ultimately, some United Kingdom warships arrived on the scene and assisted the *Niels Ebbesen* in recovering her two sailors. However, the *Niels Ebbesen* was not able to place a new boarding party on the *Red Crusader*, and the trawler then steamed back to port in Scotland. The *Niels Ebbesen* followed, but did not enter the territorial sea of the United Kingdom and was eventually recalled.

As a consequence of the incident, a joint Danish–British commission was established to inquire into the matter. Not all of the findings of the commission have been universally endorsed. However, in terms of maritime law enforcement operations, the relevant findings and outcomes of that inquiry were as follows:

(a) The fact that the *Niels Ebbesen* had been outside the relevant zone when it first signalled the *Red Crusader* did not affect the validity of the signalling, stopping and boarding operation, nor did it affect the validity of the subsequent hot pursuit into the high seas when the *Red Crusader* turned and fled. The key jurisdictional question was whether the suspect vessel was inside the relevant zone. It did not matter whether

²For more detail on the *I'm Alone* incident, please refer to: “Claim of the British Ship ‘I’m Alone’ v. United States” (1935), *American Journal of International Law* 29:2, pp. 326–331.

the authorized vessel was inside or outside the relevant zone as long as the requirements for hot pursuit (such as signalling at a range where it could be seen/heard) were observed.

(b) The use of warning shots and the subsequent escalation to the use of direct fire were valid uses of force in maritime law enforcement.

(c) However, when direct fire into a suspect vessel is used, it must be preceded by express warnings to that effect.

(d) Additionally, the use of direct fire must be carefully managed so that there is no threat to life.³

The *MV Saiga*. This 1997 incident was brought before the International Tribunal for the Law of the Sea (ITLOS). It involved a tanker under the flag of St. Vincent and the Grenadines, and providing fuel to fishing vessels in the southern part of the Guinean exclusive economic zone, but well beyond 24 nm from the Guinean baselines (and therefore well outside any valid contiguous zone claim). Guinea, however, claimed a 200 nm “customs zone” in which it was an offence to provide fuel without paying the claimed Guinean taxes and fees. Guinean authorized vessels approached the *MV Saiga* and engaged in direct fire at the vessel, including at the bridge.

Upon boarding the vessel, maritime law enforcement agents used further force and caused significant damage. Two *MV Saiga* crew members were injured during the boarding. The *MV Saiga* was then taken back to a Guinean port, and the master and some of the crew were prosecuted, convicted of customs-related offences and imprisoned, and the vessel and cargo seized.

The matter was then brought before ITLOS, with the flag State seeking the prompt release of the vessel

and compensation. The Tribunal decided that the vessel must be released and some compensation paid. In terms of maritime law enforcement operations, the main relevant findings and outcomes of that case were as follows:

(a) The hot pursuit and boarding of *MV Saiga* was not valid from the outset because the law that was allegedly being enforced was not one that could be validly enforced in that area. This is because the enforcement of customs laws is only permitted if the suspect vessel is in the contiguous zone (out to 24 nm) or if it was in the contiguous zone when valid hot pursuit was commenced. There is nothing in the law of the sea that permits a coastal State to enforce its customs laws out to 200 nm from its baselines.

(b) The level of force used was not permissible. The permissible level of force for law enforcement purposes is non-deadly force. Furthermore, the use of force in maritime law enforcement is subject to the requirement of minimum levels of force and can only be escalated as circumstances require. This means that the use of force must be used only after other, less severe warning measures, such as warning shots, have been tried and have failed. Additionally, when the use of force becomes unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Finally, the use of force for law enforcement purposes must be carried out in such a way as to ensure that life is not endangered.

(c) The requirements for hot pursuit in UNCLOS article 111 are cumulative, meaning that all steps must be carried out and all the requirements met for the hot pursuit to be (and to remain) valid.⁴

³ For more detail on the *Red Crusader* incident, please refer to “Investigation of certain incidents affecting the British trawler *Red Crusader*: Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961”, *Reports of International Arbitral Awards* Vol. XXIX, pp. 521-539.

⁴ For more detail on the *MV Saiga* incident, please refer to: *The M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment (1 July 1999), International Tribunal for the Law of the Sea.

A VALID JURISDICTIONAL FRAMEWORK

5.9 Investigation powers

A valid jurisdictional framework requires that enforcement actions be carried out in accordance with the laws that support maritime law enforcement operations. A key aspect of ensuring a valid jurisdictional framework is that maritime law enforcement agents use only properly conferred investigation powers.

Maritime law enforcement is comparable to investigating a crime ashore in that law enforcement agents may use only those investigation powers, processes and procedures that are given to them by law. Where law enforcement agents comply with the required protocols and processes, the evidence obtained as a result is more likely to be admissible in the court that will ultimately assess the case.

Just as police ashore must have specific authority to collect evidence, interview witnesses or detain suspects, maritime law enforcement agents must have similar authorities for use at sea.

5.10 Valid jurisdiction and authority

It is not sufficient merely to have laws that allow and regulate the collection of evidence at sea, the detention of suspects at sea or the many other necessary elements and aspects of actually enforcing law at sea. It is also necessary to ensure that the particular maritime law enforcement agents who will be required to use those powers are specifically given the authority to do so. In other words, there must be a valid general grant of jurisdiction and authority to the maritime law enforcement agents exercising those powers.

For example, assume that a State has a police powers law that sets out all of the investigatory powers and processes to be used by the police. Assume that this law is stated to apply to the State police”, and that the law is stated to apply “within the territory of the State”.

If the maritime law enforcement agency for this State is actually an organization separate from the State police, such as the coastguard, then the fact that the police powers law is specifically limited to the State police may exclude the coastguard from access to those powers. This may also be the case in a State where maritime law enforcement is undertaken by the navy.

A State’s maritime law enforcement agency must be empowered to the same degree as its land-based counterparts. States must ensure that a specific law, regulation, decree or other legal process specifically grants the relevant maritime law enforcement agents (e.g. members of the coastguard) access to the powers and authorizations provided by the police powers law. If this is not done in a valid manner, any actions carried out by the maritime law enforcement agents might be unlawful or carry less weight in a prosecution, or any evidence they collect might be ruled inadmissible.

Similarly, a State should ensure that its laws on police powers permit the policing of conduct not just in the land territory and national waters of the State, but also over international waters where its substantive law applies (e.g. the exclusive economic zone in respect of fishing and the high seas in respect of piracy). Without this authority, the State’s law enforcement agents may be precluded from undertaking maritime law enforcement actions beyond the 12 nm territorial sea limit.

It is therefore important to confirm that maritime law enforcement agents are appropriately authorized to carry out the required policing tasks. However, it is also vital that the authorizations for those policing tasks are legally extended to cover maritime zones beyond the territorial sea for those offences and conduct over which the State may exercise jurisdiction in international waters.



Chapter 6

Human rights in the maritime domain

KEY POINTS

1. Human rights violations occur in the maritime domain. States are bound by their human rights obligations at sea, although the precise requirements may be different at sea than on land.
2. Flag States are under a duty to respect and protect human rights on board vessels that fly their flags and when they conduct law enforcement operations at sea. Coastal States are also bound to respect and protect human rights in their national waters and when exercising effective control over persons or vessels at sea.
3. The protection of human rights in the maritime domain requires that the law of the sea and international human rights law be applied concurrently.
4. Labour rights are often protected as human rights, but labour rights only apply to “workers”. Labour rights also apply at sea.

KEY TERMS

NEGATIVE HUMAN RIGHTS OBLIGATIONS: The duty of States to respect human rights and to refrain from interfering with the enjoyment of human rights.

POSITIVE HUMAN RIGHTS OBLIGATIONS: The duty of States to protect individuals and groups from abuses by other individuals.

JURISDICTION IN INTERNATIONAL HUMAN RIGHTS LAW: Jurisdiction in international human rights law is not clearly defined. Jurisdictional clauses are used in international human rights treaties to define the scope and application of each treaty.

OBLIGATIONS ERGA OMNES: Obligations erga omnes are those owed by a State towards the international community as a whole. Owing to the importance of the rights involved, all States have a legal interest in their protection. These obligations are distinguished from those arising vis-à-vis another State.

INTRODUCTION

Human rights violations occur regularly in the maritime domain. Different groups of people can be exposed to human rights violations in the maritime domain, including, but not limited to:

(a) Seafarers: seafarers may be subjected to abuse, discrimination, injury or death on board vessels;

(b) Fishers: fishers may be subjected to abuse on board fishing boats and in the wider context of fishing operations;

(c) Migrants and refugees: people try to flee their countries on board vessels, with the risk of drowning. Once interdicted, they may be illegally returned to States where they face torture, persecution or unlawful trials;

(d) Criminal suspects: persons suspected of involvement in illegal activities at sea, such as piracy, drug trafficking, human trafficking or illegal fishing, may themselves face human rights violations during maritime law enforcement operations. Use of force, arrest, detention and prosecution can all interfere with the human rights of people arrested at sea;

(e) Passengers: passengers may be the subjects of attacks or abuse on board vessels.

The human rights that may be infringed in the maritime domain include:

(a) The right to life;

(b) The right to freedom from torture, ill- or degrading treatment, including non-refoulement and collective expulsion;

(c) The right to be free from slavery;

(d) The right to liberty and security;

(e) The right to a fair trial;

(f) The right to be free from discrimination;

(g) The right to work and fair treatment at work;

(h) The right to freedom of expression.

States have negative and positive human rights obligations. Negative human rights obligations impose upon States an obligation to respect human rights and to refrain from violating them. Positive human rights obligations require States to protect human rights. This requires that States take reasonable measures to prevent human rights violations, to protect individuals from unlawful violence from other individuals and to investigate human rights violations. As they do ashore, States have human rights obligations at sea, although the precise details as to how these obligations bind States at sea may sometimes differ from the details as to how they bind that same State ashore. For example, the conception of a reasonable time in detention prior to bringing a suspect before an appropriate judicial authority may be different at sea than on land.

The development of positive human rights obligations is significant for the protection of human rights in the maritime domain. Many human rights violations at sea are perpetrated by non-State actors. Crimes such as piracy, human trafficking, maritime terrorism and illegal fishing are committed by non-State actors and pose significant threats to human rights. The complex nature of the maritime industry can also complicate the protection of human rights at sea. The conditions on board vessels and the treatment of seafarers and fishers, for example, may be opaque to flag States. One way to ensure that the human rights of individuals in the maritime domain are sufficiently protected is to rely on the positive obligations of flag States. Through regulation, enforcement and monitoring, States can

exercise their duty to prevent, end, investigate and, wherever appropriate, remedy human rights violations in the maritime domain.

All nine core human rights treaties and their protocols, as well as other relevant conventions, apply to States, although some are more relevant than others in the maritime domain. Examples include the following:

- Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- International Convention for the Protection of All Persons from Enforced Disappearance
- Convention on the Rights of Persons with Disabilities

Many regional human rights treaties are also applicable at sea, for example:

- American Convention on Human Rights
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
- African Charter on Human and Peoples' Rights
- Arab Charter on Human Rights

6.1 United Nations Convention on the Law of the Sea and human rights

The United Nations Convention on the Law of the Sea (UNCLOS) has no explicit references to human rights and does not provide for their protection. This is because UNCLOS was negotiated to provide a framework for promoting and facilitating the peaceful use of the oceans, mainly through maritime delimitation. Thus, human rights were not on the drafters' agenda. Further, the progressive development of human rights instruments and debates was still at an early stage when the preparatory work for the future UNCLOS was being completed.

However, UNCLOS does recognize the importance of protecting individuals at sea. Provisions for assistance to persons or ships in distress (article 98), the duty to release vessels and crews promptly (article 292) and the restrictions on imprisonment penalties for fishing and pollution violations (articles 73 and 230), are examples of how UNCLOS seeks to limit the enforcement powers of States at sea in order to protect individuals and flag States.

The International Tribunal for the Law of the Sea (ITLOS) has also affirmed "that the considerations of humanity must apply in the law of the sea as they do in other areas of international law" (*M/V Saiga* (No. 2) Case). ITLOS has also clarified that "if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of [a vessel] and the arrest and detention of those on board [is] reasonable and proportionate" (*The Arctic Sunrise* Case). These provisions and references, however, no longer provide sufficient detail and authority for addressing the many ways in which human rights can be violated at sea. UNCLOS cannot be interpreted in a vacuum, and the protection of human rights at sea requires that UNCLOS and international human rights law be applied concurrently.

6.2 Jurisdiction under the United Nations Convention on the Law of the Sea and international human rights law

In the maritime context, it is well established that States exercise jurisdiction on board vessels that fly their flags and when they conduct maritime law enforcement

operations. This approach is in line with UNCLOS article 94, which reiterates the duty of flag States to effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying their flag.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 94

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
 - (a) Maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
 - (b) Assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

Under international human rights law, States are obliged to safeguard the human rights of those within their jurisdiction. Although jurisdiction is not strictly defined in international human rights law, the jurisdictional clauses of human rights treaties are used to understand when States exercise jurisdiction for the purposes of each treaty. References to “territory” found in some international human rights law jurisdictional clauses affirm that States must protect the rights of those found within their territory. In addition, there are also international human rights law instruments and interpretations that indicate that States also remain bound by certain human rights obligations when they exercise extraterritorial jurisdiction. Below are some examples of the jurisdictional clauses of human rights instruments and their application at sea.

Slavery Convention of 1926 and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

Acts of slavery are defined in the Slavery Convention of 1926. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and

Children, supplementing the United Nations Convention against Transnational Organized Crime, also addresses modern forms of slavery. The prohibition of slavery is an erga omnes obligation and binds all States regardless of whether they have ratified the relevant Conventions. It requires States to prohibit and prevent slavery, including on vessels flying their flag. Under UNCLOS article 110, law enforcement agents can board a vessel on the high seas in order to verify its right to fly its flag, when they have reasonable grounds of suspecting that the vessel is engaged in slave trade. Further detail is in chapter 5, section 5.2.

SLAVERY CONVENTION OF 1926

ARTICLE 1

For the purpose of the present Convention, the following definitions are agreed upon:

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

...

ARTICLE 3

The High Contracting Parties undertake to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

ARTICLE 3 (a)

Use of terms

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

States are under the obligation to prohibit torture and punish all acts of torture on board a ship registered in those States and upon all vessels flying their flag. The prohibition of torture is also an erga omnes obligation and binds all States, and also – for many States – is considered to be a norm jus cogens from which no derogation is permitted.

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

ARTICLE 5 (1) (a)

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State.

International Covenant on Civil and Political Rights

The Human Rights Committee has interpreted article 2(1) of ICCPR to apply to everyone regardless of their nationality. The Committee has also concluded that States must respect and ensure that the rights enshrined in the Covenant apply “to all persons who may be within their territory and to all persons subject to their jurisdiction” (General Comment No. 31).

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

ARTICLE 2 (1)

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

European Convention on Human Rights

The European Court of Human Rights has interpreted the ECHR to apply on board vessels that fly the flags

of States of the Council of Europe. The Court has also clarified that the Convention rights can be “divided and tailored” in accordance with the particular circumstances of the extraterritorial act. This means that States are not under a duty to protect the whole spectrum of rights recognized by the Convention when they act extraterritorially, but that their human rights obligations depend on the control they exercise extraterritorially.

EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women applies to women at all times, including when on board vessels. According to the International Maritime Organization, women make up only an estimated 2 per cent of the world’s maritime workforce. The role of the Committee on the Elimination of All Forms of Discrimination against Women remains relevant in cases of human rights violations with a gender dimension, such as lack of maternity leave, maternal mortality, or violence between married couples on board vessels.

Reading UNCLOS and international human rights law instruments together indicates that coastal States have jurisdiction within their internal waters, archipelagic waters and territorial seas, and are obliged to protect the human rights of those aboard vessels located within these waters. However, the jurisdiction of coastal States is limited by the exclusive jurisdiction of flag States that are responsible for enforcing human rights standards on board vessels.

Flag States conducting enforcement operations outside the territorial sea must also comply with their human rights obligations when they exercise effective control. The case below explains when law enforcement agents exercise extraterritorial jurisdiction and are obliged to comply with human rights.

EXAMPLE: *J.H.A. V. SPAIN*, CAT/C/41/D/323/2007 (21 NOVEMBER 2008), COMMUNICATION NO. 323/2007 RELATING TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

A complaint was brought by one of the migrants who were rescued by the Spanish rescue tug *Luz de Mar* off the Canary Islands in response to a distress call following the capsizing of their boat, *Marine I*. The authorities of Spain engaged in diplomatic negotiations with Mauritania and Senegal regarding the fate of the migrants, who remained on board the vessel off the coast of Mauritania for eight days. The complainant, along with 22 others, refused to be repatriated and remained on board the vessel. He complained, inter alia, of violations of articles 1 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, owing to the poor conditions of detention on board the vessel.

Although it was concluded that the complaint was inadmissible because the complainant had no locus standi in the given circumstances, the Committee against Torture rejected the argument of Spain that it had no jurisdiction over the complainants because the violations took place outside its territory. The Committee stated that the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. Such jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention. In this case, Spain maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process, and as a result the alleged victims were within the jurisdiction of Spain.

6.3 Human rights at sea jurisprudence

Human rights courts and committees have broadly interpreted the jurisdictional clauses of human rights treaties. The questions dealt with by courts and treaty bodies relate to how these instruments apply at sea, rather than whether they apply at sea.

However, precisely because of the nature of international human rights law and the fact that it is subject to a wide range of interpretations by States, both generally and in terms of how it applies at sea, the remainder of the present chapter will provide a series of examples from cases that highlight approaches to the interpretation and implementation of human rights in relation to seafarers, fishers, migrants and criminal suspects at sea. These sets of examples are collated with

a focus on the following issues: torture; non-refoulement and collective expulsion; right to liberty; children's rights; and peaceful protest at sea. The excerpts of the cases are aimed at enabling law enforcement agents to understand when and how their exercise of jurisdiction over individuals and vessels at sea may engage the respect of their State and protect obligations in relation to human rights.

Torture

Various acts of ill-treatment and torture can take place on board a vessel against seafarers, fishers, refugees and passengers or during law enforcement operations. Law enforcement agents have a duty to prevent and protect individuals at sea against acts of torture.

EXAMPLE: *FATOU SONKO V. SPAIN* CAT/C/47/D/368/2008 (20 FEBRUARY 2012), COMMUNICATION NO. 368/2008 RELATING TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The complainant, Fatou Sonko, a Senegalese national residing in Spain, brought a complaint on behalf of her deceased brother, Lauding Sonko, for a violation of articles 1 and 16 of the Convention. Her brother, along with three more migrants from Africa, attempted to enter the autonomous city of Ceuta by swimming along the coast. Each migrant had a dinghy and a wetsuit. They were intercepted by a vessel of the Spanish Civil Guard and brought to the territorial waters of Morocco, where they were made to jump into the water. Beforehand, the Civil Guard officers had punctured the dinghies of the two male migrants, but not that of the woman. Mr. Sonko stated that he could not swim but was forced by the Civil Guard officers to jump into the water. Mr. Sonko struggled to stay afloat and one of the officers jumped into the water to assist him. However, when reaching the shore and despite the efforts of the officer to revive Mr. Sonko, he died.

The Committee reiterated that a State party's jurisdiction includes any territory where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. Accordingly, it found that the Civil Guard officers exercised control over the persons on board the vessel and were therefore responsible for their safety. The Committee concluded that the subjection of Mr. Sonko to physical and mental suffering prior to his death was in breach of article 16 of the Convention. Although the complaint was not raised by Ms. Sonko, the Committee also found that the lack of an investigation into the indications of ill-treatment by the authorities of Spain was a breach of article 12 of the Convention.

Non-refoulement and collective expulsion

Non-refoulement and the prohibition of collective expulsion of aliens are core principles of refugee and human rights law. States and law enforcement agents

have to carefully consider the principle of non-refoulement and the prohibition of collective expulsion when they intercept individuals at sea, as shown in the examples below.

EXAMPLE: *HIRSI JAMAA V. ITALY* – 27765/09 [2012] ECHR 1845

The navy of Italy intercepted a boat carrying nationals of Somalia and Eritrea and sent them back to Libya. The applicants complained that returning them to Libya without examining their case exposed them to a risk of ill-treatment and amounted to a collective expulsion. The European Court of Human Rights found that the applicants were within the jurisdiction of Italy for the purposes of article 1 of ECHR. The Court reiterated that States who exercise effective control over a vessel have to secure the rights and freedoms that are relevant to the situation of those individuals on board the vessel. Accordingly, Italy breached ECHR article 3 because there was a real risk that the applicants would be subjected to torture in Libya. The removal was also found to be of a collective nature and in breach of ECHR article 4 of Protocol No. 4 because the applicants had not been subjected to any identification procedure by the authorities of Italy. This also led to the violation of ECHR article 13 because the applicants had been deprived of any remedy to bring complaints under ECHR articles 3 and 4 of Protocol No. 4 and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.

EXAMPLE: *SHARIFI AND OTHERS V. ITALY AND GREECE* – 16643/09 – [2014] ECHR 1115

The coastguard of Italy intercepted vessels carrying the applicants just before reaching various ports in that country. The applicants were then immediately returned to Greece. The European Court of Human Rights reiterated that flag States could not collectively expel aliens intercepted on board vessels (article 4 of Protocol No. 4). Flag States might also be in breach of ECHR article 3 when they intercept individuals at sea and immediately return them to a country where they face a real risk of torture.

The case is of importance as the Court emphasized that States remain bound by their ECHR obligations when they operate at sea, even if these operations are in line with the obligations they have under the law of the European Union.

EXAMPLE: *THE HAITIAN CENTRE FOR HUMAN RIGHTS ET AL. V. UNITED STATES*, CASE 10.675, REPORT NO. 51/96, INTER-AM.C.H.R. OEA/SER.L/V/II.95 DOC. 7 REV. AT 550 (1997)

The petition was filed by non-governmental organizations challenging the interdiction of undocumented migrants from Haiti who tried to enter the United States. The interdiction on the high seas consisted of very short interviews, or no interviews at all, before the migrants were returned to Haiti. The Inter-American Commission on Human Rights found that the United States had jurisdiction over the migrants and concluded that by intercepting them at sea and returning them to Haiti without considering their asylum claims, the United States had violated their right to life, liberty, security and equality before the law, as well as their right to resort to the courts and to seek and receive asylum.

Right to liberty

The arrest, detention, transfer and prosecution of criminal suspects at sea interferes with their right to liberty. Given the practical challenges of ensuring effective judicial supervision for criminal suspects arrested at

sea, the right to liberty has attracted attention in human rights jurisprudence. While human rights bodies have acknowledged the challenges law enforcement agents face when they arrest and detain individuals at sea, it has been reiterated that the right to liberty continues to apply in the maritime domain.

EXAMPLE: THE ARCTIC SUNRISE ARBITRATION (NETHERLANDS V. RUSSIA) PCA CASE NO. 2014-02

On 18 September 2013, Greenpeace activists on board the *Arctic Sunrise*, flagged in the Netherlands, tried to access the Prirazlomnaya oil rig, which was operating within the exclusive economic zone of the Russian Federation, protesting against the activities of oil companies in Arctic waters. Following the efforts of the authorities of the Russian Federation to warn the vessel against entering the safety zone, they boarded the vessel, and arrested and detained its crew. The activists were brought to the port of Murmansk, where they were charged with serious offences. The Netherlands argued, inter alia, that the boarding, arrest and detention violated ICCPR article 9 (right to liberty and security) and article 12(2) (right to leave the country). The Tribunal acknowledged that it lacked jurisdiction to decide on the application of ICCPR but noted that it would consider international human rights law in order to determine whether the boarding, seizure and detention of the *Arctic Sunrise* and the arrest and detention of those on board was reasonable and proportionate. The Tribunal concluded that the authorities of the Russian Federation lacked a legal basis to board, investigate, inspect, and seize the vessel, and to arrest and detain those on board, without the consent of the flag State, and were in breach of UNCLOS articles 56(2), 58(1), 58(2), 87(1)(a) and 92(1).

EXAMPLE: MEDVEDYEV AND OTHERS V. FRANCE – 394/03 [2010] ECHR 384

Naval forces in France interdicted a suspected drug-smuggling vessel from Cambodia, the *Winner*, with the consent of Cambodia. Those on board remained confined on the *Winner* until they were brought to France to face prosecution 13 days later. The crew complained of a violation of ECHR article 5(1), which dictates that deprivation of liberty is allowed only in accordance with a procedure prescribed by law. They also claimed a violation of ECHR article 5(3), which requires that any person deprived of his or her liberty should be brought promptly before a judicial authority. The European Court of Human Rights found that the applicants were within the jurisdiction of France for the purposes of ECHR article 1, because the French agents exercised full and exclusive control over the *Winner* and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until the crew were tried in France. Accordingly, the Court found France in breach of ECHR article 5(1) because the arrest of the crew lacked a legal basis, given that Cambodia was not a party to either the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 or UNCLOS. However, the Court found no violation of ECHR article 5(3) as the “promptness” requirement should be examined under the wholly exceptional circumstances of transferring suspects from the high seas to a port.

EXAMPLE: HASSAN AND OTHERS V. FRANCE – 46695/10 AND 54588/10 [2014] ECHR 1355

The applicants were three nationals of Somalia who were arrested by the French navy in the territorial waters of Somalia. They were then placed under military guard on a French Naval frigate for less than 24 hours until their transfer to France to be prosecuted for acts of piracy was approved by the Government of Somalia. Upon arrival in France, the three applicants remained in custody for two more days before appearing in front of a judge. The applicants complained that there was no legal basis for the arrest (ECHR article 5(1)) and that they had not been brought promptly before a judge (ECHR article 5(3)). The European Court of Human Rights agreed with the applicants. It was found that the arrest of the nationals of Somalia was based on Security Council resolution 1816 (2008). However, the law applicable at the relevant time, to the situation of individuals arrested by French forces for acts of piracy on the high seas, did not include any rule defining the conditions of deprivation of liberty that would be subsequently imposed on them pending appearance before the competent legal authority. This was found to be a violation of ECHR article 5(1). The Court also found that although the transfer of pirate suspects from Somalia to France involved exceptional circumstances, the delay in bringing the suspected pirates before a judge in France breached ECHR article 5(3) as it was not designed to afford the authorities an opportunity to intensify their investigations for the purpose of bringing formal charges against the suspects.

Children’s rights

Children’s rights at sea have drawn attention in piracy trials because of the number of minors involved in

piracy, as well as the difficulties in establishing the age of those arrested. However, the vulnerability of children and young persons at sea requires special consideration in all law enforcement operations.

EXAMPLE: *SAYID V. R* (SCA 2 OF 2011) [2013] SCCA 24 (06 DECEMBER 2013)

The case was an appeal brought by a national of Somalia who was arrested and convicted of piracy. The only grounds for appeal concerned the length of the sentence. However, the judges in Seychelles quashed the conviction on the basis of the appellant's age, noting the following:

"[5] Before we consider this appeal we wish to place on record that we are somewhat dismayed by the fact that the Court of its own volition had to raise the issue of the provisions of the Children Act. Our intervention in this case is permitted under rr 31(1) and (3) of the Seychelles Court of Appeal Rules 2005. We cannot understand how charges were preferred against a number of children ranging from the ages of 13 to 16 without counsel for either party, nor for that matter the trial Judge bringing their attention to the provisions of the Children Act. These are grave criminal offences, but this serious lapse cannot be condoned by the highest court and court of last resort in Seychelles whose duty it is to see that the rights of accused persons as protected by the Constitution are upheld and that justice is done, especially so when the appellant in this case is a vulnerable young person."

Peaceful protest at sea

The right to protest derives from the right to freedom of expression and freedom of assembly and is an internationally lawful use of the sea related to the freedom of navigation. With the increase in environmental protests at sea, the protection of this right has drawn the

attention of national and international courts. The relevant case law shows that protest at sea is a protected right in international law but can be restricted for a number of reasons, such as when its exercise interferes with the safety of navigation or installations.

EXAMPLE: *WOMEN ON WAVES AND OTHERS V. PORTUGAL* [2011] ECHR 1693

In 2004, three associations sent the ship *Borndiep* to Portugal where abortion was illegal. They had intended to use the ship for various activities promoting the decriminalization of abortion in the Portuguese port of Figueira da Foz. The Government of Portugal became aware of the planned activities and blocked the entrance of the ship in the territorial waters. In assessing whether ECHR articles 10, on the right to freedom of expression, and 11, on the right to freedom of assembly and association, had been breached by the denial of entry to the territorial sea, the European Court of Human Rights found that the territorial sea was public and open space. While the Government of Portugal could consider limiting access to the territorial sea, in this case they had no reason to believe that the activities would violate the abortion legislation and, therefore, denying entry to the territorial waters was in breach of the Convention.

EXAMPLE: DISTRICT COURT OF AMSTERDAM, *CAPRICORN AND OTHERS V. GREENPEACE INTERNATIONAL AND OTHERS*, JUDGMENT OF 9 JUNE 2011, 491901 / KG ZA 11-870 PEE/PV

The case was brought by companies exploiting oil rigs in the exclusive economic zone of Greenland against Greenpeace for protesting near the oil rigs. While the Court paid attention to the right of Greenpeace to protest peacefully and draw the attention of the public to the risk of drilling activities, it ordered Greenpeace to refrain from entering the 500-metre safety zone of the two rigs. The reason was that *Capricorn* also had a legitimate interest in a safe working environment, in particular in this case, which involved high-risk and high-cost activities that could take place only in a limited period.

6.4 Labour rights

Labour rights can also apply at sea, and it is important that maritime law enforcement officials are aware of labour rights and, wherever necessary, monitor and report poor labour standards and breaches of labour conventions on board vessels.

Many labour rights are human rights and are also protected by human rights treaties. The International Covenant on Economic, Social and Cultural Rights, for example, protects rights such as the right to work and fair treatment at work (articles 6 and 7). However, labour rights are distinct in that they only apply to "workers". This means that labour rights at sea will be recognized and protected only to those employed at sea.

In 1998, the International Labour Organization (ILO) adopted the Declaration on *Fundamental Principles and Rights at Work*, committing all Member States to promote and protect principles and rights recognized in four categories regardless of the ratification of other labour conventions. These four core categories include:

- The freedom of association and the effective recognition of the right to collective bargaining
- The elimination of forced or compulsory labour
- The abolition of child labour
- The elimination of discrimination in respect of employment and occupation

There are also eight fundamental ILO conventions as well as specialized labour conventions for those working at sea. These are:

Fundamental conventions

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Seafarers conventions

General provisions

- Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)
- Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976
- Merchant Shipping (Improvement of Standards) Recommendation, 1976 (No. 155)

- Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)
- Maritime Labour Convention, 2006 (MLC, 2006)

Protection of children and young persons

- Protection of Young Seafarers Recommendation, 1976 (No. 153)

Vocational guidance and training

- Vocational Training (Seafarers) Recommendation, 1970 (No. 137)
- Vocational Training (Seafarers) Recommendation, 1946 (No. 77)

Access to employment

- Recruitment and Placement of Seafarers Convention, 1996 (No. 179)
- Recruitment and Placement of Seafarers Recommendation, 1996 (No. 186)
- Employment of Seafarers (Technical Developments) Recommendation, 1970 (No. 139)

General conditions of employment

- Seafarers' Annual Leave with Pay Convention, 1976 (No. 146)
- Repatriation of Seafarers Convention (Revised), 1987 (No. 166)
- Repatriation of Seafarers Recommendation, 1987 (No. 174)
- Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180)
- Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187)
- Repatriation (Ship Masters and Apprentices) Recommendation, 1926 (No. 27)
- Wages, Hours of Work and Manning (Sea) Recommendation, 1958 (No. 109)

Safety, health and welfare

- Seafarers' Welfare Convention, 1987 (No. 163)
- Seafarers' Welfare Recommendation, 1987 (No. 173)
- Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)

Security of employment

- Continuity of Employment (Seafarers) Convention, 1976 (No. 145)
- Continuity of Employment (Seafarers) Recommendation, 1976 (No. 154)

Social security

- Social Security (Seafarers) Convention (Revised), 1987 (No. 165)

Inspections

- Labour Inspection (Seafarers) Convention, 1996 (No. 178)
- Labour Inspection (Seafarers) Recommendation, 1996 (No. 185)
- Labour Inspection (Seamen) Recommendation, 1926 (No. 28)

Fishers conventions

- C188 – Work in Fishing Convention, 2007 (No. 188)
- Work in Fishing Recommendation, 2007 (No. 199)
- Accommodation of Crews (Fishermen) Convention, 1966 (No. 126)
- Work in Fishing Recommendation, 2005 (No. 196)

The main ILO convention for seafarers is the Maritime Labour Convention of 2006 that sets out seafarers' rights to decent conditions of work. Article II defines a seafarer as "any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies". The Maritime Labour Convention sets minimum requirements for nearly every aspect of working and living conditions for seafarers, including recruitment and placement practices, conditions of employment, hours of work and rest, repatriation, annual leave, payment of wages, accommodation, recreational facilities, food and catering, health protection, occupational safety and health, medical care, onshore welfare services and social protection. According to ILO, by mid-2018, 86 member States had ratified the Convention, which has resulted in 91 per cent of the world's shipping fleet being regulated.

In November 2017, the ILO Work in Fishing Convention No.188 of 2007, which sets the basic standards of decent work in the fishing industry, came into force.

This Convention sets out binding requirements in relation to work on board fishing vessels, including occupational safety, health and medical care at sea and ashore, rest periods, written work agreements, and social security.

Similar to their human rights obligations, flag States are under a duty to protect labour rights at sea by meeting the minimum requirements and conditions introduced by the labour conventions.

6.5 Challenges in protecting human rights at sea

Reporting

Human rights violations at sea often go unreported. Accessing reporting mechanisms and investigating complaints while at sea can be challenging and human rights abuses can go unnoticed and unpunished. This means that better reporting and monitoring mechanisms must be put in place so as to enable victims of human rights violations to report abuses and access compensation.

Flag States

While both State and non-State actors might interfere with the enjoyment and exercise of human rights at sea, only States can be held accountable for their protection or lack thereof. Flag States therefore have an important role in acting to protect human rights on board vessels. As a result, the protection of human rights at sea depends on the willingness of flag States, including States that operate open registries, to enforce and monitor human and labour standards on board their vessels. Failure to do so could significantly undermine the protection of human rights at sea.

Maritime operations

The exclusive jurisdiction of flag States on board their vessels does not permit the stop and search or interception of vessels for inspecting most human rights and labour standards, although existing authorizations in relation to article 110, and coastal State rights in the exclusive economic zone, for example, can enable boardings that may also serve such purposes indirectly. Nevertheless, it is incumbent upon States to consider new mechanisms that will further promote cooperation and communication in dealing with human rights abuses at sea.



Chapter 7

Conducting boarding,
search and seizure
operations

KEY POINTS

1. Boarding a foreign-flagged vessel constitutes interference with the normal freedom of navigation or other forms of lawful passage in accordance with the law of the sea and is an infringement of the flag State's sovereign prerogatives and jurisdiction. Consequently, boarding should only be undertaken with valid and lawful authority to do so.
2. Boarding operations should be planned in advance. Standard operating procedures that set out actions to be taken in the event of likely or possible incidents or occurrences (e.g. the need to restrain someone) should also be developed, approved and disseminated prior to operations, and refined as boarding experience evolves. Standard operating procedures may sometimes be described as, or accompanied by, tactics, techniques and procedures.
3. Safety and security are priorities during the boarding operation. Maritime law enforcement agents bear responsibility not only for the safety and security of their own team and unit, but also for the safety and security of those under their control, such as the crew and passengers on board a detained vessel.
4. Rules on the use of force must be developed, authorized and fully understood in advance.

KEY TERMS

BOARDING: An operation in which a law enforcement team boards a ship at sea, either in national or international waters. Boarding must be performed in compliance with the relevant authorization and in accordance with applicable domestic and international laws identifying the jurisdictional basis upon which the operation is based. Boarding must also take into account safety and security considerations, as well as its authorized purpose and jurisdictional basis.

RULES ON THE USE OF FORCE: Rules issued by a State authority to regulate the use of force in a law enforcement operation. In maritime law enforcement, rules on the use of force are an expression of how operations are regulated by national and international law, law enforcement policies and priorities, and maritime law enforcement capabilities.

STANDARD OPERATING PROCEDURES: Procedures described in written orders that regulate all aspects of an operation at sea, from preparation for boarding to evidence collection and delivery of the evidence seized or the persons in custody to the competent authorities.

INTRODUCTION

Law enforcement operations at sea routinely require maritime law enforcement agents to board, search and, if warranted, seize potential evidence on suspect vessels either of the agents' own nationality or flagged by other States. As indicated in chapters 3 and 4, only State vessels and officers acting in their official capacity can engage in maritime law enforcement operations. The boarding of foreign-flagged vessels must be conducted in accordance with the powers granted to law enforcement officers in each maritime zone.

Once a boarding operation begins, the authority to search depends on the basis of the boarding. If the boarding is being carried out under the authority of an agency of the boarding State, that State's law and procedures are followed. If the boarding is conducted with the consent of the flag State, the conditions of that consent will also govern the boarding operation.

The authority to seize evidence in accordance with national law is generally entrusted to designated law

enforcement officers. Although there is no international "standard" regarding how evidence is to be seized and handled, awareness of both the legal system of the boarding State and of the State where the evidence will be utilized in judicial proceedings (such as the flag State or a third State) is essential.

Boarding, search and seizure are part of the maritime law enforcement continuum. However, each has its own legal basis and requires the use of different authorities, capabilities, training and skills on the part of the personnel involved.

This chapter will focus on boarding procedures (with some reference to search and seizure) and on certain aspects of the use of force that may result from such operations. Legal considerations related to boarding will not be dealt with in this chapter, as they have already been addressed in chapter 5. Search and seizure will be analysed as part of the evidence collection procedure in chapter 9.

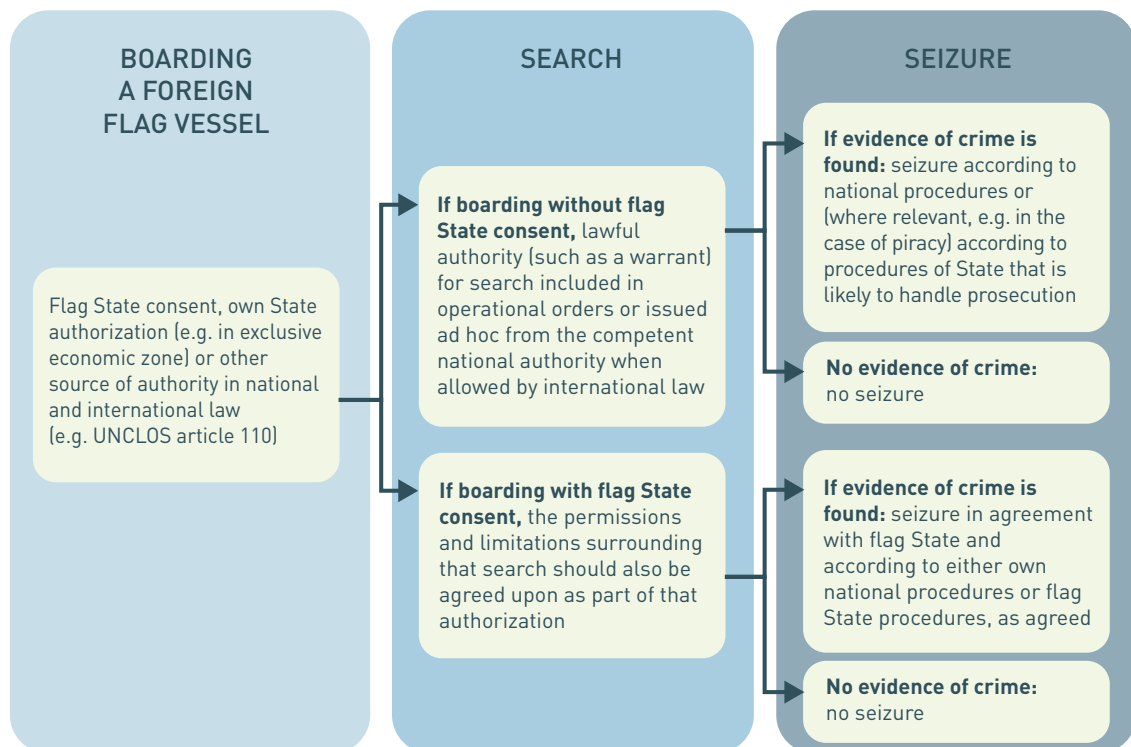


FIGURE 7.1
LOGICAL FRAMEWORK OF
BOARDING, SEARCH AND
SEIZURE

7.1 Boarding: operational aspects

Ensuring the safety of the people on board and the physical integrity of the vessel and its cargo is a priority during boarding operations. Therefore, such operations should be carefully planned and undertaken only by trained personnel on the basis of tried, tested and updated boarding procedures and standard operating procedures. Guidance should include a template for pre-boarding briefings as well as contingency plans for potential events during the operation.

Pre-planning, briefings and standard operating procedures should be geared towards ensuring the safety and the security of individuals on board the vessel and of the law enforcement personnel engaged in the operation, and toward preserving the necessary evidence. Planning for weather events during a boarding operation is a matter of safety, whereas planning for possible attacks on the boarding team by crew members of the boarded vessel is a matter of security.

Safety

The primary concern of every law enforcement official conducting a boarding should be the safety of every individual who is on board the vessel.

The maritime environment and weather conditions may therefore play a central role in determining the measures adopted. Boarding operations depend on the unique circumstances of the situation and may be conducted via rigid-hulled inflatable boat or helicopter. As a result, these operations require trained personnel and adequate equipment to be performed properly and safely. A boarding team should ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances. All boarding operations should take due account of the need to avoid endangering the safety of life at sea.

Circumstances may also require the adoption of additional safety measures in the event that a contagious disease is encountered. A boarding plan may therefore need to factor in quarantine or other medical precautions, among other measures (see section 7.2).

Security

Before the boarding operation, all security measures should be planned with a view to minimizing vulnerability, recognizing that maritime law enforcement operations inherently involve risk. Even if certain risks

cannot be avoided, minimizing them is an important element in the process of planning and conducting the boarding operation.

The boarding team, whether operating after a security team has first secured the vessel or on its own, should be trained in all security postures likely to be employed. Security remains the responsibility of all members of a boarding team regardless of their specific roles within the team.

Securing offenders, collecting evidence

A law enforcement operation may be performed in order to prevent or end a crime or unlawful act. Such an operation will also generally seek to collect evidence to allow subsequent further investigation and prosecutions in relation to the crime.

In situations where a criminal offence is suspected, the boarding team should secure offenders, collect all available evidence, gather information useful to prevent or punish other criminal actions, and communicate with competent authorities on shore regarding the ensuing steps.

7.2 The boarding team

With regard to law enforcement at sea, while States retain discretion as to how to organize their military and law enforcement structures, most States generally adopt one of two main approaches to the matter. One option is a dedicated law enforcement agency at sea, such as a coastguard or maritime police. The other common approach is to utilize the national navy (if it is legally authorized to engage in law enforcement operations at sea) either on an ad-hoc basis or as a permanent additional function.

The “whole of government” approach. Regardless of the approach adopted, however, many States recognize the imperative of ensuring coordination among the relevant agencies and departments, regardless of which is the primary maritime law enforcement agency. In France, for example, the *Préfecture maritime* is a military/civilian body that coordinates law enforcement operations at sea by various agencies, including the authorities responsible for customs and maritime affairs, the *Gendarmerie maritime* and the national navy. Similarly, in Australia, the Maritime Border Protection Command coordinates the requirements of “user” agencies and enforcement asset provider agencies such as the Royal Australian Navy and the Australian Border Force.

There is no single model for the integration of civil, military and law enforcement agencies within a government. States are increasingly seeking to create processes or frameworks aimed at aligning officials from ministries or agencies such as justice, foreign affairs, customs and the military in order to provide a coherent response to maritime crime. These processes recognize the complexity of maritime threats and the need to involve multiple agencies. Along with the provision of effective capabilities at sea, the challenge is to leverage all governmental resources (and others as appropriate) so as to provide a coherent spectrum of responses. It is vital to involve all relevant agencies because the expertise, authorities and responsibility for addressing maritime crime as well as safety and security events at sea are often distributed throughout a government. Whole-of-government frameworks have been particularly useful in aligning responses to piracy, armed robbery at sea, migrant smuggling, drug trafficking and illegal fishing.

Best practices in whole-of-government frameworks include direction by the Head of State, frequent use (including training and exercises), trust, transparency, inclusive processes, documentation of decisions and lessons learned, and agency support. To this end, appropriate whole-of-government frameworks could address the following, among other issues:

- Authority to board
- Evidence collection
- Disposal of prohibited weapons and materials

- Procedural rights to be afforded to potential defendants and witnesses
- Delivery of evidence
- Transportation of defendants and witnesses to another State exercising jurisdiction
- Disposition of legitimate cargo
- Environmental considerations (weather, difficulty in returning to port, distance from port)

The two components of the boarding team

Ideally, and particularly when it may be necessary to use force, boarding should be performed in two phases by appropriately trained elements of the boarding team. Additional personnel with medical and forensic functions may also accompany the team if required by the circumstances of the boarding. Initial boarding should be performed by trained personnel who are able to secure the boarded vessel and to deal with possible threats.

Those who are the first to board a vessel should be trained to deter, neutralize or minimize security threats before the follow-on team comes aboard. They should achieve this through their presence and, if necessary, the use of minimum force. This is sometimes referred to as the security element of the boarding team.

The presence of the security element on board may have an impact on subsequent evidence collection procedures. The security element should thus be trained in evidence procedures to the extent necessary in order to ensure that evidence is properly preserved.

EXAMPLE

While securing the ship, a security officer finds an AK-47 automatic firearm. The firearm must be secured, but attention must be paid to how this is done in order not to prejudice the evidential value of the weapon in any future trial. This may include, where possible: taking photographs of the position and location of the weapon; noting any important observations in a notebook for later inclusion in statements and affidavits; taking fingerprint evidence; tagging the weapon in an appropriate evidence container; and storing and delivering the weapon without interrupting the chain of custody.

A boarding team equipped and trained to carry out proper evidence collection and search and seizure tasks should begin those tasks as soon as possible after the vessel has been secured and the crew has been mustered. The

powers to detain, search and seize exercised by the boarding team (including the security elements of that team) should follow the applicable legal framework and be in accordance with any warrants that may have been issued.

EXAMPLE: UPON INSPECTING A VESSEL WHICH HAS BEEN BOARDED AS AN UNFLAGGED VESSEL IN ACCORDANCE WITH UNCLOS ARTICLE 110, THE BOARDING TEAM FINDS EVIDENCE OF DRUG SMUGGLING.

If the team trained for the task of initially securing the vessel and inspecting its registration documents lacks the skills necessary to appropriately secure and make an initial assessment of the sorts of evidence required in the prosecution of drug trafficking cases, the initial team must detain and hold the vessel for a period of time until more detailed instructions are received from an appropriate shore-based expert authority.

Where available, forensic experts should be part of the boarding team and should attend the pre-boarding briefing. The boarding team should ensure that their conduct conforms as closely as possible to the requirements specified by such forensic experts in order to ensure that evidence is preserved and exploited appropriately. However, it must be remembered that safety and security will generally remain the first priorities.

In most circumstances, a single, unified team is deployed to perform both tasks. The leaders and certain other members of the boarding team should therefore be trained in securing the boarded vessel, mustering the crew when necessary, and performing search, evidence collection and related tasks.

Medical assistance

Ideally, the master of the vessel to be boarded will report the existence of any disease threat and/or the need for medical assistance before the operation starts. It is good practice to establish such details during the initial communications between the authorized law enforcement vessel and the vessel to be boarded.

Requests for medical help received by the boarding authority should be addressed immediately to the available competent authority through emergency channels or fulfilled by the boarding authority if medical capacities are available on site.

Any need for a medical team to board the vessel should be assessed by the boarding team as part of pre-boarding and risk assessment procedures. The suspicion that individuals on board may be carrying contagious and transmittable diseases may call for the provision of a medical team to inspect the vessel in tandem with the security team. Quarantine of the vessel or of individuals on board may be required as a measure to prevent or minimize contact with diseases.

Where medical support is not requested or is not apparently required, medical personnel (where available) will perform a consensual medical examination only in cases of detention or where any crew or passengers from the boarded vessel are brought to the law enforcement vessel or another vessel.

Training the boarding team

Training is essential to any successful maritime law enforcement operation, both in order to ensure safety and security and to ensure that all searches and seizures of evidence are carried out in a lawful manner. The

boarding team, including its security, technical and forensic elements, should train together so that each member of the team understands her/his role, the roles of others and the challenges each of those roles can face, so as to develop the team's overall ability to respond to such challenges as they arise.

7.3 Prior to boarding: risk evaluation and assessment

Prior to boarding, known and potential risks should be identified so as to ensure that they are evaluated and that risk mitigation measures are developed as appropriate. Consideration should also be given to planning procedures in order to minimize possible but unforeseen risks; this is known as contingency planning.

The issues listed below are examples of possible risks to evaluate.

Number of people on board

The number of people on board may pose several risks. These will often include:

- (a) *Possible limitations on the use of force.* A large number of people on board a vessel may make it challenging to employ force should the necessity arise;
- (b) *Capsizing.* A large number of people on board a vessel should immediately prompt the boarding team to consider vessel stability, particularly if people are to be moved around the vessel.

Disembarking or cross-decking some people from an overcrowded vessel may reduce risks and allow better identification of passengers and crew. As this situation is not uncommon at sea, standard operating procedures that include security and medical arrangements adapted to such situations should be developed and employed. Such standard operating procedures should allocate specific tasks and roles within the law enforcement vessel for dealing with disembarked or cross-decked people. Roles and personnel dedicated to security, the provision of medical examinations/support when required, identification, logistics such as blankets and food, and the set-up of holding locations on the law enforcement vessel should all be identified and assigned in advance.

Damaged hull or ship clearly unseaworthy

Before a boarding operation, consideration should be given to the seaworthiness of the ship to be boarded. If the ship can be brought to a place of refuge, then

that course of action should be considered once authorization from the relevant national authorities of the maritime law enforcement agency as well as the intended port State authority (if different) is given.

Weather conditions: underway or still boarding

Weather has a considerable effect on boarding operations and may rule out the conduct of such operations entirely. Boarding in difficult weather conditions should be avoided when possible, as it represents a risk for both the boarding team and the crew and passengers of the vessel to be boarded. This is particularly true in cases where a vessel is rolling heavily in the prevailing seas and/or is on a poor sea-keeping course, or where the swell and seas are high, thus making it very dangerous to bring a rigid-hulled inflatable boat alongside and to disembark onto the vessel. In the interest of balancing security and safety with operational priorities, it may be a better option to maintain close surveillance of the ship until weather conditions are more permissive.

Boarding a moving vessel may represent an additional risk. Boarding when the vessel is stopped (and, where possible, not lying parallel to the swell) should be considered the preferable option where possible.

Hostile crew/intelligence of criminal activity

Boarding should not be undertaken unless actions to neutralize security threats on board the suspect vessel have been taken or are planned immediately upon boarding. However, the hostility of the crew, and thus the security threat level, may not be apparent when boarding is commenced but may arise during the boarding operation itself. This is why it is vital to ensure that the boarding team has well-understood and well-practiced procedures in place for dealing with unexpected, emerging or fast-developing security threats.

Offenders at sea are often physically present at the crime scene (i.e. the vessel) at the moment when the investigation begins. If there is reliable intelligence concerning a particular criminal activity on board the target vessel, the crew should be mustered in a centrally controlled and secured location before proceeding with the search in order to avoid hostile reactions.

7.4 The boarding plan

Boarding operations require detailed planning. As a minimum, the boarding plan should refer to or include:

(a) *Standard operating procedures.* These provide for the general conduct and disposition of the law enforcement vessel and the boarding team, together with routine and established procedures to be used in achieving the aim of the boarding (e.g. registration check, evidence collection, etc.) as well as procedures to be adopted or other actions to be taken in the event of certain common or potential incidents and occurrences (e.g. if a crew member draws a weapon or refuses to open a compartment);

(b) *Pre-boarding briefing.* This briefing should be carried out before each boarding operation and is designed to put into context the more general planning described above. A pre-boarding briefing makes it possible to conduct a last-minute verification of the situation, the threats identified and any necessary procedural changes the situation might require, and to give detailed instructions for the conduct of the boarding (e.g. the direction of approach);

(c) *Contingency planning.* These are measures designed to allow rapid, pre-planned reactions to events foreseen only as possibilities, not as probable occurrences, during the boarding operation. Effective standard operating procedures will provide standard procedures and responses for many contingencies. Personnel must be trained for and rehearse such contingency plans periodically. Further, it is probable that contingencies for which pre-planned responses have not been developed or which require amendments to existing pre-planned responses will arise. In this case, an ad-hoc situation-specific contingency plan should be put in place.

Standard operating procedures

Standard operating procedures should generally provide a description of planning considerations, actions to be taken in the event of common occurrences, and issues to be assessed and analysed when undertaking a particular operation (such as a boarding operation). Standard operating procedures should always be considered a “living” document subject to refinement, modification and improvement as a result of operational experience and practice.

Standard operating procedures should be in place prior to any boarding operation. All personnel involved



FIGURE 7.2
DIAGRAM ILLUSTRATING
CONTENTS AND ROLES DURING
THE PRE-BOARDING MEETING

should have a good knowledge of those procedures and should be trained in each element of their own roles and tasks within those procedures. This will help to ensure that the boarding is conducted effectively, efficiently and lawfully. Knowledge of standard operating procedures should be tested, personnel should be trained in the implementation of those procedures, and “lessons learned” evaluations should be carried out regularly in order to verify both the personnel’s understanding of those procedures and their adequacy. All of the personnel involved in boarding operations should be confident and competent not only in their own roles, but also more generally with the authorizations, limitations and general risk mitigation measures in the standard operating procedures which apply across boarding operations.

Pre-boarding briefing

Every pre-boarding briefing should involve all key members of the law enforcement vessel’s crew, as well as all members of the boarding team, so as to ensure the proper sharing of information and the development of an adequate plan of action.

Such briefings should deal with relevant situation-specific issues such as the seaworthiness of the target

vessel, the number of people on board, any indications as to their medical condition, the possible hostility of the crew and/or the presence of criminals on board, weather and environmental conditions, the particular legal framework in operations (e.g. hot pursuit of a delinquent fishing vessel; article 110 boarding to check flag, etc.) and any particular evidence collection instructions that may apply (e.g. the collection of forensic evidence, evidence relating to drugs, etc.).

It is common to expect that adjustments to the “standard” boarding plan may be required. Situational factors must be considered and evaluated during the pre-boarding briefing so that any alterations to routines are planned and understood in advance. Situations that may require such action include:

(a) Deteriorating weather conditions, which may reduce the time available for the boarding, thus requiring action to be adapted to the circumstances and the evidence collection procedure to be shortened accordingly;

(b) Any navigational constraints or requirements on the law enforcement vessel which may affect its proximity to the boarded vessel and boarding team; this may require adaptations such

as a larger security team to allow the rotation of sentries over a longer boarding period and the need to send additional equipment and supplies with the boarding team;

(c) Health and medical circumstances may be such that the medical officer may determine that it would be better to carry out medical checks on the boarded vessel rather than by cross-decking people to the law enforcement vessel, thus requiring additional medical specialists and security personnel on the boarding team.

Contingency planning

Every boarding operation carries with it the possible need to change or amend the plan at short notice in response to unanticipated incidents or occurrences. Such incidents or occurrences can include rapid deterioration in weather conditions, a sudden deterioration in security, the uncovering of important unexpected evidence or the presentation of an unexpected medical emergency (such as the discovery, or suspicion, of an infectious disease present on board).

A boarding plan should always include some level of contingency planning. Such contingencies might include:

(a) Considering what action is to be taken if the boarding team is not able to collect all required evidence or carry out sufficient medical checks in the case of rapidly deteriorating weather conditions which impede or shorten the time available for the operation after it has commenced;

(b) Adapting boarding procedures in order to adopt the safest and most secure approach possible in the changed conditions;

(c) Considering what actions the boarding team will take in terms of any search and seizure priorities if security or weather conditions change (see chapter 9).

The following is a non-exhaustive list of possible contingency planning questions to consider:

What is our course of action if:

- We find unaccounted/unexpected personnel on board?
- We find unexpected evidence of illegal activity?
- There is an assault on a member of the boarding team?

- We find weapons on board?
- Something happens to suddenly heighten the level of risk?

Communications

In the majority of cases, communications with the master of the suspect or target vessel will be possible on a locally allocated radio channel, on VHF channel 16 or simply with a combination of verbal communications and gestures if the ship to be boarded does not appear to have radio or similar communications.

It is important that as much information as possible be gained during such pre-boarding communications. This information will then feed into the pre-boarding briefing and the planning for the specific boarding operation. Pre-boarding questions asked of the master of the suspect/target vessel should generally include:

- Master's name, date of birth and nationality
- Number and nationality of crew
- Flag of the vessel
- IMO ship identification number
- Last port of call and next port of call, including dates
- Purpose of voyage and cargo, if carried
- Number of people on board
- Any weapons on board

This pre-boarding information may also serve other purposes, such as identifying inconsistencies between information provided by the master and any intelligence already in hand, thus pointing to issues to be further examined upon boarding. To this end, these questions and answers should be recorded as they may need to be used as evidence in later criminal proceedings.

In addition, it is often useful at this point to agree with the master as to the means and method of boarding, for example by rigid-hulled inflatable boat, port side, where there is easier access to the main deck via a gap in the guardrails or a jumping ladder. Even where the legal framework does not require the master's consent, it should always be sought if possible, with due attention to the need to balance the safety and security advantages of doing so with possible prejudice to evidence collection from such forewarnings.

7.5 Use of force

Chapter 5 dealt with legal issues related to the use of force; this section focuses on when a situation requires the use of non-deadly or deadly force.

Rules on the use of force

A military vessel or unit that operates in a law enforcement context should be provided with rules on the use of force which set out when and how force may be used in the law enforcement context. In some States, these rules on the use of force may be designated as “rules of engagement” because they are issued to a military force. However, even if they are called “rules of engagement” instead of “rules on the use of force”, the law governing their operations—and thus the actual content of the rules—will generally be equivalent to those contained in the rules on the use of force. Non-military personnel involved in law enforcement, that is, police and other law enforcement personnel, should also have rules on the use of force when performing law enforcement operations.

Training in and understanding such rules on the use of force generally enable law enforcement officers to operate more effectively. Knowledge of the laws and policies of one’s State in relation to use of force allows shorter reaction times, greater confidence and certainty as to the applicable limits on the use of force.

Rules on the use of force are often provided in the form of a numbered set of general rules. Some maritime law enforcement agencies may have a single set of rules on the use of force which covers most or all of their routine operations (e.g. fisheries enforcement, anti-smuggling, safety of life at sea and management of maritime movements of people). When confronted with a non-routine or particularly specialized or unusual operation (e.g. counter-piracy operations), agencies may be required to develop a tailored set of rules on the use of force for those operations.

Use of force before boarding

A suspect or target vessel may refuse to be boarded. Depending on the operational purposes and the applicable legal framework, force may be used to oblige a vessel’s crew to permit such boarding. To this end, rules on the use of force should always provide for procedures authorizing the progressive use of force in order to oblige a vessel to take a specific action, such as to heave to in order to facilitate boarding.

Rules for such escalations of force to compel compliance with an order to submit to boarding should generally provide for the following:

(a) Flares, sounds, lights or manoeuvring procedures available for use in order to gain the full attention of the master and crew of the vessel;

(b) Contact on a locally used channel or VHF channel 16:

In this situation, the maritime law enforcement authorized vessel will ask the master of the suspect/target vessel to comply with the maritime law enforcement vessel’s instructions in order to facilitate boarding operations. In situations where the suspect/target vessel does not respond, the message should be repeated.

The following is a possible communication template for this purpose:

(TYPE OF VESSEL) (NAME OF MERCHANT VESSEL): THIS IS (WARSHIP/SIDE NO.). CAPTAIN, IT DOES NOT APPEAR THAT YOU ARE RESPONDING TO MY DIRECTIONS. PLEASE COMPLY NOW. IF YOU DO NOT UNDERSTAND MY INSTRUCTIONS, PLEASE TELL ME NOW AND I SHALL REPEAT THEM.

(c) If the vessel still fails to comply, verbal and visual warnings should be issued to announce the intention to escalate and use force:

The following is an example of a verbal warning for this purpose:

(TYPE OF VESSEL), IF YOU REFUSE TO STOP AND PERMIT US TO APPROACH AND BOARD, WE SHALL FIRE ACROSS THE BOW OF YOUR SHIP. DO YOU UNDERSTAND, OVER?

Such verbal warnings should be repeated several times;

(d) If the vessel still fails to comply, it may now be permissible to employ warning shots in accordance with the authorized rules on the use of force, making sure to avoid creating any risk to the safety of navigation or any risk to life;

(e) Where the vessel still does not comply after warning shots, warnings should be escalated so as to indicate the intended use of disabling fire. Such fire is generally aimed at disabling the ship’s main engine:

The following is an example of a verbal warning for this purpose:

CAPTAIN, YOUR FAILURE TO COMPLY MEANS WE MUST DISABLE YOUR VESSEL. WE SHALL DISABLE YOUR VESSEL BY FIRING AT THE STERN. I AM NOW GIVING YOU AN OPPORTUNITY TO EVACUATE YOUR PEOPLE FROM THE STERN OF YOUR SHIP. YOU ARE PUTTING YOURSELF AND YOUR CREW IN GREAT DANGER. DO YOU UNDERSTAND, OVER?.

Such verbal warnings should be repeated several times. It is also prudent to deliver an obvious final warning. The following is an example of a final verbal warning:

(TYPE OF VESSEL), THAT WAS YOUR LAST WARNING. IF YOU DO NOT STOP YOUR VESSEL IMMEDIATELY, THE NEXT ROUND SHALL BE FIRED INTO YOUR STERN. DO YOU UNDERSTAND, OVER?

It is vital to remember that disabling fire is to be employed using the minimum force necessary for the relevant purpose and only as a last resort. Additionally, disabling fire must be employed so that it does not create collateral effects, such as sinking the vessel or injuring people on the vessel.

One example of taking action to reduce the potential for such collateral effects to the absolute minimum is to consider the calibre/type of round to be used, along with the direction of fire, taking into consideration the size of the suspect/target vessel and any seaworthiness difficulties it may already be displaying. Disabling fire that might reasonably and foreseeably cause sinking or capsizing, or physical harm to the crew, should be considered a use of deadly force and is thus only available in situations of self-defence.

Use of force during boarding

While mustering the crew during the early security stages of a boarding, it may become necessary to use force, as some or all members of the crew may not be cooperative. Rules on the use of force should also regulate the individual use of force in such situations.

In order to muster a reluctant crew or particular individuals, law enforcement officers should apply a continuum of force as follows:

(a) *Presence of the officer.* Body language, posture, display of official signs, and firm and respectful

behaviour can help to encourage the crew to be more cooperative. Excessive eye contact, even though it may occasionally be useful when mustering the crew, can be misinterpreted as aggressive among people from certain cultural backgrounds;

(b) *Verbal and visual warnings.* When facing non-compliant crew members, the officer should use verbal warnings and controlled gestures to indicate prohibited actions;

(c) *Carriage and display of weapons or other deterrent means.* As part of the delivery of verbal and visual warnings, the display of weapons—particularly when verbal communication is hampered by language or other circumstances—can be used to indicate a law enforcement officer's intention and capacity to respond to any serious threat. Weapons should not generally be pointed at people unless the situation has deteriorated to such an extent that their use is a near-term possibility;

(d) *Soft physical pressure.* Handcuffs and control techniques may be used;

(e) *Hard physical pressure.* Stun techniques may be used to control an individual who constitutes a more serious imminent threat;

(f) *Use of non-lethal means.* Such means can include batons, fire-hoses, acoustic devices and riot control agents;

(g) *Warning shots;*

(h) *Use of deadly weapons* (such as firearms). The use of deadly weapons is acceptable only where there is a direct threat to life, that is, in self-defence.

In all cases, it is important to remember that only the minimum force necessary should be used. However, when circumstances dictate rapid escalation to a higher and more harmful level of force, then this higher level of force should still represent the minimum force necessary to neutralize or deter the threat in those specific circumstances.

Human rights of apprehended suspects or detainees

Human rights standards as well as humane and fair treatment considerations apply in the maritime environment, including on boarded vessels where suspects are held in any form of custody. Maritime law enforcement officials must comply with their national law implementing such rights and obligations at all times, including during the boarding phase, while still seeking to assert control over the vessel.

Human rights law includes the Convention relating to the Status of Refugees (1951), the International Covenant on Civil and Political Rights (1966), particularly articles 9 and 10, and various regional agreements, such as the European Convention on Human Rights (1950). Provisions with general relevance to maritime law enforcement include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman, degrading treatment and punishments;
- (c) The right to liberty and security of the person, including the right not to be deprived of liberty and not to be subjected to arbitrary arrest or detention, and the right only to be deprived of liberty on such grounds and in accordance with such procedures as established by law;
- (d) The right of the person under arrest to be informed, at the time of arrest, of the reasons for his/her arrest and to be promptly informed of any charges against him/her;
- (e) The right of a person arrested or detained on a criminal charge to be brought before a judge or other officer authorized by law to exercise judicial power as soon as is reasonably practicable, having regard to the distance from the place of arrest or detention to the nearest judicial authority.

Where a detention or arrest at sea is foreseeable, advance planning and discussion are vital in order to ensure that appropriate detention facilities and arrangements are available and to hold suspects in adequate conditions until they are handed over to the competent State authority. In such cases, detainees should always be given access to:

- Adequate detention space with light and fresh air
- Adequate sleeping arrangements
- An adequate daily allowance of fresh water and food
- Medical assistance, with a consensual medical inspection
- Suitable arrangements to allow the practice of their religion

Compliance with human rights obligations will also generally require training, rehearsal and exercises in order to prove and test the system, for these arrangements can be operationally challenging at short notice and at sea.

Obligations to treat those detained at sea humanely extend beyond maritime law enforcement operations. For example, International Maritime Organization resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea (adopted on May 20, 2004), states that shipmasters should “do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs”.

It is always of the utmost importance that suspects or detainees be protected from all forms of violence, humiliating or degrading treatment while on board. Medical inspection at the moment of detention is often a sound procedure to adopt in order to allow a proper later evaluation of whether a suspect or detainee suffered some form of mistreatment during the detention on board. Such inspections should be consensual. In situations where consent is not given, a general and external set of observations should still be made, with due avoidance of any treatment which could be interpreted as humiliating.



Chapter 8

Searching for and collecting evidence at sea

KEY POINTS

1. Search and seizure of evidence at sea must comply with the applicable criminal procedure laws of the seizing State or of the jurisdiction where the evidence will be tendered to a court.
2. Consequently, boarding teams must conduct operational training and planning to ensure compliance with judicial requirements, statutory authorities and policy. The overarching objectives are adherence to the law, the admissibility of evidence and judicial consequences for those conducting illicit activities at sea.
3. Where evidence collection with a view to potential prosecution is the main aim of a maritime law enforcement operation, then evidence preservation should be a primary consideration for all personnel involved.

INTRODUCTION

8.1 Overview

The rule of law is enforced through the prevention of criminal activities and through the exercise of effective criminal prosecution. The boarding team plays a key role in ensuring that evidence is properly collected, preserved and presented to the prosecuting authority in accordance with the rules of criminal procedure applicable in the jurisdiction where suspected crimes are to be prosecuted.

Prosecuting crimes committed at sea requires evidence to be collected at sea. After ensuring the security of the vessel, cargo, crew and passengers

on board (and potentially the area of sea immediately surrounding the vessel(s) concerned), the main task of a boarding team is to search for and seize any items that may provide evidence of the crime. Evidence includes information and material that could either support prosecution or, alternatively, demonstrate that a crime has not been committed.

This chapter provides information and guidance in relation to evidence collection during the so-called “golden hour”, that is, searching for and seizing material as soon as is practicable after the suspected offence so that a prosecutor may introduce it in court.

SEARCHING FOR EVIDENCE OF A MARITIME CRIME: FUNDAMENTALS

8.2 Is there a proper warrant?

Law enforcement action that may involve search and seizure benefits tremendously from advance planning. Accordingly, consideration must be given to relevant national authorities, including the legal authorization for the search.

A warrant may be required prior to the seizure of evidence, though this is not universally the case. Where a warrant is required, this term refers to a written order issued by a competent judicial authority. When a standing military operation is in place, the legal basis for the action, including the presence of a warrant or identifying the legal authority to search, should be included in operational orders or guidance.

Depending upon the legal system of the State exercising jurisdiction, a warrant may have to be issued in order to authorize action in situations where a maritime law enforcement operation is not part of, or is not covered by, an existing grant of authority.

In some legal systems, legislation provides standing authorizations to search and seize where certain crimes are investigated under definite circumstances. Where a vessel boarding is planned, for example, in order to search for drugs, it is generally the case that either a warrant has been issued or some other authority is established in national legislation. This allows the search to be performed legally, which is necessary in order for the seized evidence to be admissible.

8.3 Adequate training

A formal training programme in maritime law enforcement, especially in relation to indicators of crimes at sea, is essential to effective maritime law enforcement. This should include training in identifying authorities, documenting proficiency, analysing experience gained from past operations and seeking out indicators of certain types of maritime crime. The paragraphs below provide some examples of situations that could be incorporated into training scenarios.

Vessels used for human trafficking or migrant smuggling generally have an unusually large number of people on board. Such vessels rarely fly a validly issued flag or any flag at all. Given the suspicions aroused by the nature and circumstances of such a vessel, a search is likely to focus on documents or any other material that identifies the nationality of the passengers on board, whether there is a master, the registration of the vessel, whether the passengers are being smuggled or trafficked, the traffickers, or whoever may be acting for the traffickers. Though not every vessel engaged in human trafficking or migrant smuggling is in distress, the United Nations Convention on the Law of the Sea (UNCLOS) recognizes the duty to render assistance when a vessel is in distress (see chapter 1).

Fast vessels that are not engaged in legitimate commercial or tourism operations are often fitted with multiple or high-output engines. Such vessels may be used to transport illegal drugs or other such contraband. In such situations, search activities may therefore need to focus on the presence of cargoes and hidden compartments.

Vessels that are used to commit acts of piracy may seek to disguise themselves as fishing vessels, for example. However, closer examination may reveal a lack of expected equipment or, alternatively, the addition of gear not relevant to fishing, such as outboard stairs or ladders of a size that have no reasonable use on that vessel, or large grappling-type hooks for illegal boarding. A large number of (fuel) “bunkers” could indicate that the vessel is designed to stay at sea longer awaiting the transit of potential victim vessels through their target area.

Law enforcement agents should have training and guidance that equips them to analyse such relevant indicators so as to prepare for the search before boarding the ship. Agents need to be ready to collect all evidence relevant to the suspected crime in accordance with the warrant or other legal authority. They must remain sceptical and questioning in relation to the

situation, as initial appearances, first reports and preliminary assessments may be misleading.

As a consequence, adequate training and professional curiosity as appropriate within the overall security context are important tools for law enforcement agents to ensure that they are equipped to conduct successful searches. However, this training must also encourage flexibility and the ability to alter focus as the situation evolves. In fluid or evolving maritime law enforcement situations, real-time access to advice and instructions, for example by communications with authorities ashore or with an embarked legal adviser, are essential in order to ensure that the evolving law enforcement response remains within the bounds of applicable procedural requirements and the law. These requirements may change along with the assessment of the situation or of the suspected offence.

8.4. Where to search: hidden compartments

While on a vessel, seafarers may live together in close proximity for weeks, often for months. This means that the crew can become very familiar with the structure of the ship. As a result, they may be well equipped to use this knowledge to their advantage when engaging in criminal activities. The most obvious example is the creation and use of hidden compartments to hide illicit substances or material. In such situations, searches can be carried out by focusing upon particular signs matching the usual modus operandi of the particular crime(s) for which the warrant or legal authorization was issued.

A hidden compartment is an enclosed area or space constructed and/or used to conceal contraband. Where a boarding team conducts a destructive search, special considerations, including authority, are generally necessary due to the excessive level of intrusiveness. A destructive search is any search activity that results or is likely to result in the permanent alteration, modification or destruction of any part of the vessel, including tanks, containers, bulkheads, hatches and other surfaces which cannot be reasonably repaired by the boarding team upon completion of the boarding activity at sea or at dock.

To detect hidden compartments, maritime law enforcement agents must:

(a) Carefully assess the physical surroundings and the layout of the vessel with a view to identifying areas worthy of closer examination that, individually or collectively:

- (i) Relate to current intelligence or previous examples of concealment;
- (ii) Indicate signs of recent activity, tool marks, repair or paintwork (see below);
- (iii) Indicate additional, superfluous or non-functional equipment (e.g. pipework);
- (iv) Offer opportunities for secure and/or covert access and recovery; or
- (v) Offer other specific conditions that might protect the integrity of the contraband;

(b) Picture the construction of the vessel beyond what is immediately visible and account for all spaces from bow to stern at each level. To do so, agents must utilize, where possible:

- (i) Original construction drawings and photographs of the vessel;
- (ii) Formal vessel records used to indicate repair work undertaken;
- (iii) Trusted members of crew (if possible);

(c) Be patient and persistent; it may take many hours to locate and forensically uncover hidden compartments while ensuring that evidence is gathered safely and without contamination.

The most common hidden compartments are the following:

(a) *Fluid tanks*: Fishing vessels and coastal freighters have fewer spaces and voids that can be used as hidden compartments. Fuel tanks and water tanks are the most likely areas of concealment. These compartments are usually constructed with a “tank within a tank” configuration;

(b) *Sealed spaces*: Sealed spaces are often present in fishing vessels, coastal freighters, bulk cargo vessels and sailing vessels. Voids and false bulkhead spaces also include ballast tanks, sea chests, shaft alleys, false flooring and fish holds;

(c) *Containers and parasitic attachments*: Maritime freight containers have been discovered with hidden compartments built into false internal bulkheads, decks, deckheads, corners and externally welded compartments. Parasitic attachments are attached to the hulls of larger cargo vessels and coastal freighters;

(d) *Miscellaneous*: All other locations, such as under ladders and bunks, in bulk cargo, in containerized freight products, in frozen fish, under galley areas, in machinery equipment and in overheads.

There are a number of tell-tale signs which every maritime law enforcement agent should be aware of:

(a) *Overt indicators*:

- (i) New construction (e.g. fibreglass or paint);
- (ii) Fuel tanks of unusual size or shape;
- (iii) Closed access areas;
- (iv) Decks covered by wooden planks to hide access plates;
- (v) Storage wells that have been altered/ repaired;
- (vi) Void spaces;
- (vii) Cracked, broken or new caulking;
- (viii) Excessive electronics equipment;
- (ix) Crew unfamiliar with the vessel;

(b) *Additional indicators*:

- (i) Positive intelligence;
- (ii) Altered documentation/numbering/ names;
- (iii) Conflicting stories from crew members;
- (iv) Changes to the original layout of the vessel;
- (v) Fuel transfer pumps and excessive lines;
- (vi) Excessive fuel drums;
- (vii) Vessel recently washed down with diesel fuel/bleach;
- (viii) Fenders rigged at sea;
- (ix) Excessive welding equipment;

(c) *Indicators of at-sea transfer capability*:

- (i) Rub marks/fenders visible;
- (ii) Excessive life rings;
- (iii) Polypropylene line;
- (iv) Chemical light sticks/smoke floats;
- (v) Inconsistent or excessive fuel;
- (vi) Crew too large for vessel;
- (vii) Pad eyes over closed decks.

“Rip-off” modality: A “rip-off” is a concealment methodology whereby a legitimate shipment, usually containerized, is exploited to smuggle contraband (particularly cocaine) from the country of origin, or the trans-shipment port, to the country of destination. In “rip-off” cases, usually neither the shipper nor the consignee is aware that their shipment is being used to smuggle illicit cargo.

“*Reefer*” modality: A “reefer” is a refrigerated container with an internal refrigeration unit. Reefers are often used to smuggle drugs, particularly cocaine. For this method to be successful, there will always be a local conspiracy in

the country of origin or the trans-shipment port as well as the destination country. The difference between “rip offs” and “reefers” is that the reefer mode usually requires the complicity of the legal owner of the cargo.

COLLECTING EVIDENCE IN RELATION TO MARITIME CRIME

8.5 General issues

Collecting evidence at sea presents operational, logistical and legal considerations that are unique to the maritime environment.

A boarding operation conducted at sea should not unnecessarily delay the commercial activities in which the vessel is engaged, unless detention of the vessel used for the criminal activity appears strictly unavoidable for investigation purposes. Wrongful detention exposes the flag State of the law enforcement agents to a claim from the commercial vessel. For example, the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation provides that a State party taking measures against a ship shall:

“take due account of the need not to prejudice the commercial or legal interests of the flag State” (8bis (10)(a)(v));

“take reasonable efforts to avoid a ship being unduly detained or delayed” (8bis (10)(a)(ix)); and

“States Parties shall be liable for any damage, harm or loss attributable to them arising from measures taken ... when: (i) the grounds for such measures prove to be unfounded, provided the ship has not committed any act justifying the measures taken; or (ii) such measures are unlawful or exceed those reasonably required in light of available information to implement the provisions of this article. States Parties shall provide effective recourse in respect of such damage, harm or loss.” (8bis (10)(b)).

Weather conditions can also significantly reduce the amount of time agents have at their disposal to collect evidence. For example, weather conditions can quickly deteriorate and force the officers to leave the suspected vessel for safety reasons (see chapter 8).

Similarly, as a boarding operation could be conducted underway, a particular route or a particular deviation may be required. This will affect the conduct and the time frame of the operation.

Materials collected as evidence are far more susceptible to loss or alteration on a vessel at sea than on land. Rough seas can imperil the integrity of evidence if waves wash away materials or evidence (e.g. fingerprints). Moreover, it is easy for people on board the vessel to dispose of incriminating evidence at sea by throwing it overboard.

8.6 Who is involved?

A number of key officials and agencies are involved in the collection, preservation and presentation of evidence. However, the team first called to intervene in a situation of criminal activity committed at sea will play an important role in preserving the scene until evidence can be collected.

In many legal systems, the use of boarding team witnesses in court has procedural advantages compared to written statements. A criminal case arising from conduct at sea benefits from the timely identification of witnesses and (as necessary) their appearance in court. Because of the transnational nature of maritime trade, witness presentation is particularly challenging. For instance, seamen who might be called as witnesses may have already returned to their homelands or be aboard a vessel at sea and thus not readily available to appear in court.

As a result of the difficulties inherent in ensuring the appearance of witnesses at trial, evidence should, where possible, minimize the number of people involved. Minimizing the number of witnesses therefore requires that those called to support a prosecution satisfy the necessary evidence requirements.

Preserving the chain of evidence is essential in all legal systems. Every person who has handled evidence should be considered a possible witness for the purposes of demonstrating in court that evidence has not been altered or exposed to potential alteration. It is thus recommended that the following roles be specifically assigned and performed within the boarding team:

(a) *Exhibits custodian(s)*. Responsible for seizure, recording, handling and transfer of exhibits. This role

should be performed only by adequately trained officers. The handling of exhibits by any other person should be strictly prohibited unless it is absolutely necessary under the circumstances. The exhibits custodian(s) is (are) the officer(s) called upon to prove the continuity of possession of the evidence. Because having a single officer serve as exhibits custodian involves a risk of losing the evidence if that officer is no longer available, two exhibits custodians are preferred for corroboration;

(b) *Photography and video manager.* One officer should be in charge of taking all video and photographic evidence. This officer's training should cover the basics of recording and photography. Photos and/or videos should capture evidence in situ before removal. The photography and video manager should be able to offer proof that the visual images taken to document evidence have not been altered. Date and time calibration is also an essential consideration. It will be necessary to use copies for ongoing investigation work so that the original remains unused prior to court proceedings. The equipment used may also have to be produced as evidence in court;

(c) *Operational witness.* Where possible, an officer should be designated to act as the key witness at the crime scene. This officer must personally witness all initial actions which lead to the boarding; this includes indicating the position of all ships, accounting for all decisions and outlining the basis upon which the boarding is carried out. The operational witness should also be able to describe security operations, boarding operations and the post-incident handover of seized items and persons (which may arise if the evidence is transferred to authorities of a State or jurisdiction different from those who originally collected the evidence). The operational witness should be the key witness with regard to what the maritime law enforcement authorities observed, heard and did. Care should be taken to ensure that this officer and other official witnesses do not undertake or become involved in any intelligence-related work so that a "firewall" exists between any "raw" intelligence received and the sanitized version that is subsequently released into the operational environment and that may ultimately be referred to in court;

(d) *Primary boarding witness.* Where possible, a single member of the boarding team should be appointed to act as the key witness to the boarding. To the extent reasonably practicable, the primary boarding witness should personally observe all key

actions undertaken as a result of the boarding. If security and boarding teams are separated, the primary boarding witness can testify only to what he or she witnessed. Consequently, it may be necessary to similarly prepare a separate security team witness who can recount the actions of that team.

8.7 The "golden hour" rule

The "golden hour" denotes the earliest possible stages of a criminal investigation in which evidence collection and boarding are carried out in order to maximize and uphold the validity, efficiency and admissibility of the most reliable evidence.

The "golden hour" rule is of particular importance during a maritime crime investigation. The investigation of the crime scene should always be anticipated prior to boarding, for example by taking photographs which may become useful evidence, such as when people in the suspect vessel are observed disposing of potential evidence. The officer serving as photographer and video manager should therefore commence his/her activity in collaboration with the primary boarding witness before the boarding itself and record the conduct of the personnel on board. This is a good practice and is vital in any case where there is suspicion of a crime committed or about to be committed (e.g. perverting the course of justice by disposing of evidence).

After boarding, the purpose of evidence collection is to compile as complete and accurate a picture/understanding as possible of the environment in which the suspected criminal activity took place. Clearly, with the passing of time, objects which may be used as evidence may be altered or may deteriorate. Statements can lose value through loss of memory as to detail or confusion due to witnesses comparing recollections. DNA samples and fingerprints can be lost or contaminated by the personnel on board or by external agents (wind, water, etc.). The primary boarding witness should be as strict as possible in managing each evidence collection operation.

With regard to the collection of evidence at sea, the following actions should be taken:

(a) Fingerprints and DNA samples, or any material which could be used as evidence, could be damaged by sea, wind or the movement of the ship or of the persons on board, should be collected immediately;

(b) Each space which could have relevance in the criminal investigation should be photographed by the boarding team as soon as possible;

(c) Similarly, statements from the witnesses and persons on board should be collected as soon as possible, before collusion opportunities arise among the crew. The crew should not be given opportunities to exchange information before being questioned; suspects should be under the surveillance of an officer during the boarding and evidence collection operation in order to avoid collusion in statements. The exact position of the ship (latitude/longitude) should also be recorded before and during the boarding.

8.8 How evidence is gathered

When two objects come into contact, there is an exchange of traceable material such as hairs, fibres, dirt, dust, blood, body fluids and skin cells.

As soon as the location of a crime scene is known, the area should be isolated to avoid contamination of any evidence, especially of the material listed above. Isolating the crime scene aboard a vessel at sea may require confining the crew and passengers to certain sterile yet safe areas of the vessel (e.g. on a deck) for the time necessary for investigation. If available, (paper) body protection suits may be used to help minimize cross-contamination.

Evidence must be first identified and then collected. The commission of an offence is not necessarily a static event that happens in a limited space and time. Therefore, a coordinated and comprehensive approach is the key to collecting all evidence related to the acts that led to the commission of the crime. This may include creating a “best guess” timeline of events from initial interviews so that evidence identification and capture, including video evidence capture, can reflect what is known or believed to have happened.

In searching for evidence, law enforcement agents should seek to identify evidence of any criminal act which may have been committed well before the time of actual boarding. For example, hidden cargoes may have been loaded and the hiding spaces constructed months prior to the boarding.

Immediately after the boarding operation is completed, law enforcement agents should follow a process that includes the following:

(a) Collect video recordings and still photographs in order to provide a reliable visual representation of the crime scene;

(b) Collect samples of illicit substances transported on the vessel. Such samples should be preserved as evidence immediately—and in compliance

with chain of custody requirements—for subsequent forensic analysis. Where available, drug-testing kits should be used to analyse substances, which should in any case be subjected to additional analysis in specialized forensic laboratories;

(c) Identify and isolate the suspects;

(d) Collect fingerprints and DNA samples, documents, small arms, mobile phones, laptops and any possibly relevant material as evidence. Careful attention must be paid to the preservation of fingerprints and DNA samples, which can deteriorate quickly;

(e) Identify and record identification information in relation to the vessel, engines, equipment (e.g. communications), cargo (to find registered owners, buyers and sellers), etc. This can be cross-referenced against law enforcement and commercial databases for the purpose of gathering further intelligence and evidence. If possible, this information should be collected during pre-boarding operations;

Consideration should be given to allowing a ship to continue its journey when there is no direct involvement of the owner/charterer or master and where continued detention of the ship is not necessary for prosecution. It may first be necessary to confirm the vessel’s legal ownership and to communicate with legal advisers or a prosecutor before releasing a vessel.

Additionally, law enforcement investigations at sea should be coordinated in real time with land-based investigations so as to increase the chances of effective prosecution. Examples might include:

(a) *In a piracy case, during hostage-taking, negotiation and payment of ransom.* In cooperation with the shipping industry, insurance companies and the banking sector, intermediaries and their telephone communications can and should be monitored in real time, and banknote serial numbers can and should be tracked. In some jurisdictions, ransom payments may be deemed contrary to “public policy” (albeit not necessarily illegal), which will require either prosecutor and/or governmental direction as to law enforcement actions in this regard. Some jurisdictions criminalize the payment of ransom where that payment is made to a designated terrorist group.

(b) *Monitoring of financial flows from criminal organizations connected to the crime.* In order to support criminal prosecution and to include all the financial components of the crime, a parallel financial investigation should also be undertaken. This will identify

banking supervision and facilitate the monitoring of electric funds transfers (e.g. by Internet and mobile telephone). Such investigations may require cooperation with (national) central banks (e.g. financial investigation units) and the wider banking system, including foreign exchange bureaux, funds transfer businesses and mobile telephone providers.

8.9 Evidence preservation

Evidence preservation should be one of the primary concerns of all personnel involved in a maritime law enforcement operation. The following steps represent best practice and are primarily addressed to the boarding team for the purposes of evidence collection:

(a) The primary boarding witness should account for all persons and their location on board the vessel before they are moved. Disposal of any evidence prior to the arrival of the collection team must be avoided. A system of marking the location of key evidence for early or immediate capture (due to the heightened potential for loss, contamination or deterioration at sea) should help to prioritize collection;

(b) Where illicit substances are transported, their location on board should be immediately documented in detail using visual images. Under the supervision of the primary boarding witness, samples of materials used for hiding the substances should be collected. In addition, samples of the same substances should be taken in such a way that their chemical characteristics are not altered (e.g. by ingress of water), thus enabling subsequent forensic analysis;

(c) Each person on board should be given a reference number, preferably in such a way as to prevent any switching of numbers, for example by attaching the number with a cable tag and using the number in photographs with a chalk board or other sign;

(d) If the suspects are on two or more vessels, their original locations should be recorded before they are moved to another vessel;

(e) Weapons or ammunition should not be handled. However, if there is a need to move them, records should be kept so as to identify unexpected DNA or fingerprints;

(f) Ammunition should be disposed of immediately if it poses a risk; however, evidence collection should be considered within security and safety limits. Photographic and written records should be collected, as should fingerprints (where possible);

(g) Any weapons or crime-related paraphernalia should be removed from suspects and considered evidence (as long as security or safety does not require immediate disposal). In either case, detailed records must be kept as to who was in possession of such items;

(h) Suspects should be prevented from communicating with one another.

8.10 Standard procedures in relation to witnesses and suspects

It is important to obtain basic information from all persons on board by questioning them as either witnesses or suspects as soon as possible. This process must be carried out while ensuring full evidence capture and ensuring that individual rights are recognized and exercised.

Basic information to be acquired from each person on board the inspected ship should include the following:

(a) Copy of full identity document(s) (e.g. passport, national identification card, seaman's papers);

(b) Name (full names and names known by), including non-romanized characters (e.g. Chinese) which may be required for full confirmation of identity in their home country;

(c) Date and place of birth;

(d) Nationality;

(e) Full address(es);

(f) Contact details (e.g. telephone, mobile phone, e-mail address(es));

(g) Specific identifying features (e.g. tattoos) which may assist in description by other witnesses;

(h) Role(s) on board;

(i) Languages spoken;

(j) Next-of-kin information (including father's name); and

(k) Clan (where applicable).

When possible, statements should be taken in the witnesses' own language. Special care must be taken in the identification, selection and use of interpreters.

Where all or some of the people on board the inspected ship are suspected of having taken part in the commission of a crime, all suspects must first be informed of this suspicion, and it should be confirmed that they understand:

(a) That they need not say anything if they do not want to; and

(b) That anything they do say will be recorded and may be used in court.

If required, a legal caution should be used. Each suspect should be questioned separately. Attention should be paid to avoiding situations where suspects are able to communicate with one another.

Coercive or forcible means must not be used during the questioning of witnesses or suspects. Information must be provided on a voluntary basis. Unique reference numbers are to be used to record the sources of the information gathered.

If suspicion and evidence support the detention and transfer of suspects to the relevant competent authority (e.g. police), then transmittal material is likely to include:

(a) Original copies of all (signed) statements of witnesses and suspects, the signed (police) statements of the officers involved, and any video recordings taken;

(b) A copy of all detainee records (including photographs), preferably with unique reference

numbers and the names of the arresting officers, and where possible, the physical condition of the transferred person, medical treatment provided, the reason for detention, time at which detention commenced, meals provided and any decisions taken with regard to the suspect's detention;

(c) An original copy of the photograph log (description of what each image shows);

(d) Exhibits accompanied by:

(i) An original copy (copies) of statement(s) to ensure the continuity of exhibits from the moment of seizure until transfer to the police;

(ii) An original copy of the exhibits log; and

(iii) Any other relevant evidence.

Records should be kept of all evidence handed over to the authority in charge of prosecution. Copies are to be retained by the law enforcement agency that collected them.

ADDITIONAL GENERAL GUIDANCE

8.11 Adapting evidence searches, collection and preservation to the legal system where the trial could be held

Apprehended maritime criminal suspects may be liable to prosecution in several States (see chapters 5-7). The prosecution venue often depends on the jurisdictional link applicable, or available, under the circumstances. Because evidence collection is aimed at prosecution, it may be beneficial for a boarding team to be aware of legal requirements in more than one prosecution venue. Evidence should therefore be collected with consideration of the possible prosecution venue.

Historical influences and national legal cultures mean that differences between legal systems can affect the way in which evidence is understood and collected. For example, in a common-law system, prosecutors and/or courts may refuse evidence which has not been collected in full compliance with the rules of evidence, in particular where the chain of custody is not strictly observed. However, some Roman

law-based systems are more flexible than common-law systems in terms of the use of evidence and often rely on judicial police for certification powers which are not always recognized by common-law countries.

The consequence for maritime law enforcement agents is that they may need to place particular emphasis on certain elements if there is a chance that the trial may take place in a different legal system or jurisdiction. In particular, the maritime law enforcement agency which collects evidence should pay particular attention to issues such as the authority/position of a person to whom a witness can make an admissible statement and any specialized requirements for the evidential chain of custody.

Evidence should always be collected to the best possible standards of accuracy, notwithstanding the legal system to which the evidence could be transferred. Best practice in evidence collection and handling, in interviewing and recording statements, and in the treatment of suspects will maximize the chances that the fairness and transparency measures applied will be recognized by the trial court as having been adequate and acceptable.

Summary table: Crime—indicators—evidence—jurisdiction

Type of crime	Possible indicators	Possible evidence to collect	Jurisdiction (see chapters 1-7)
Human trafficking/ smuggling of migrants	Vessel overcrowded; passengers hidden/not declared; excessive fuel in relation to declared destination; intelligence reports; unflagged vessel; vessel in poor condition	Identification documents and fingerprints of suspects; position of the vessel based on GPS data; statements of witnesses, passengers and crew; logbook copies; relevant personal material, mobile phones and laptops of suspects; photographs and videos; tattoos or branding relating to slavery; dress style and labels of passengers' clothing; use of, or marking caused by, physical restraints	Territorial sea/contiguous zone. Flag State. Passive or active personal jurisdiction. Article 8 of UNTOC Smuggling of Migrants Protocol and Trafficking in Persons Protocol, where applicable.
Drug trafficking	Speedboat/fast vessel; indicators of hidden compartments; intelligence reports; additional or extra-powerful propulsion (e.g. outboard motors)	Fingerprints at the crime scene; samples of drugs for forensic analysis; identification documents and fingerprints of suspects; position of the vessel based on GPS data; statements of witnesses, passengers and crew; logbook copies; relevant personal material, mobile phones and laptops; photographs and videos; cash and/or valuables; weapons; marker buoys; detection by drug sniffer dogs; drug swabbing of vessel	Territorial sea/contiguous zone. Flag State. Passive or active personal jurisdiction. Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, where applicable.
Piracy/armed robbery at sea	Stairs; hooks; weapons; excessive fuel; high power engines; intelligence reports; lack of fishing or other equipment consistent with alleged "legal" use of vessel; size of vessel/"mother" vessel	Identification documents and fingerprints; position of the vessel based on GPS data; statements of witnesses; passengers and crew; logbook copies; relevant personal material, mobile/satellite phones and laptops; weapons; stairs; hooks; photographs and videos, particularly of all material which cannot be delivered to prosecutors (such as, possibly, the vessel itself)	Universal jurisdiction where national legislation allows (piracy). Flag State. Passive or active personal jurisdiction.



Part III.
Some specific activities of
maritime law enforcement

Chapter 9

The maritime crime
.....
of piracy
.....

KEY POINTS

1. The United Nations Convention on the Law of the Sea (UNCLOS) contains the internationally recognized scheme of definitions and authorizations in relation to piracy, codifies the authorities necessary to repress this crime and includes an obligation for all States to cooperate in this activity.
2. The maritime crime of piracy also exists independently in customary international law, meaning that it applies to and empowers all States regardless of whether they have ratified UNCLOS.
3. The ways in which States incorporate the offence of piracy into their national legislation vary widely. There is no single right way to incorporate this offence, and it must be done within the broader context of national criminal or penal law in order to be coherent with other aspects of that law. In States that require a further act of domestication of international obligations, UNCLOS provisions on piracy are generally incorporated by passing laws implementing articles 100 to 107 of UNCLOS with necessary modifications to suit the local situation. In States where this is not necessary, the ratification of or accession to UNCLOS in the international sphere automatically makes UNCLOS part of their domestic law.
4. In most situations, the key elements of the crime of piracy under international law are that it is:
 - (a) Any illegal act of violence or detention, or any act of depredation;
 - (b) For private ends;
 - (c) From a private ship against another ship (which could be a non-private ship such as a warship); and
 - (d) In international waters.

KEY TERMS

PIRATE SHIP (OR VESSEL): A ship intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101 of UNCLOS. For the purposes of this Manual, the broader term “vessel” will be used, as this term captures all types of craft navigating at sea (according to the Convention on the International Regulations for Preventing Collisions at Sea, 1972). However, each State may determine its own definition of “ship” or “vessel” and so on in its domestic legislation.

AUTHORIZED VESSELS: Those official State vessels, including warships, marine police vessels and other specifically identified State vessels on non-commercial service, which are authorized to engage in maritime law enforcement operations on behalf of their State.

INTERNATIONAL WATERS: Waters over which no State has sovereignty, although coastal States and flag States may hold certain enforcement rights depending upon the activity and location. In the context of piracy, international waters include the contiguous zone, the exclusive economic zone and the high seas.

INTRODUCTION

9.1 How is piracy addressed in UNCLOS?

Piracy is one of the few maritime crimes that are specifically addressed in UNCLOS. In almost all respects, the UNCLOS articles on piracy codify previously agreed-upon treaty provisions and reflect customary international law.

The UNCLOS piracy “scheme” is found primarily in articles 100-107 and article 110. Article 101, which is covered in more detail below, defines the maritime crime of piracy. Although maritime piracy also applies to aircraft, this Manual focuses primarily on vessels.

Article 100 reflects the high priority the international community places on cooperation in repressing piracy. The use of the phrase “shall cooperate to the fullest possible extent”, as opposed to a weaker wording such as “should” or “may”, indicates an obligation to cooperate and reflects the importance of counter-piracy action and coordination for the international rule of law and the security of the seas so that they are available for use by all States and vessels.

Along with article 110 (see chapter 5), articles 102-107 of UNCLOS set out the definitions, powers and

authorizations associated with the general obligation in article 100 and with the specific definition of the maritime crime of piracy set out in article 101.

The essence of article 102 is that a sovereign immune vessel, such as a warship or other authorized maritime law enforcement vessel, by definition cannot commit an act of piracy. This is important because many maritime law enforcement acts undertaken by such authorized vessels, such as warning shots, boarding, search and seizure, would, if carried out by a private vessel (and not for the purpose of self-defence), amount to piracy. However, because a State-authorized maritime law enforcement vessel is carrying out the will of its sovereign rather than taking action for private ends, it cannot be described as piratical, and its acts cannot be defined as piracy. The one exception to this rule is the situation codified in article 102, that is, where the crew of such an authorized vessel has mutinied and thereafter commits an act of piracy. If this is the case, the vessel is no longer a proper representative of its State and is then considered a “private” vessel and thus capable of committing piracy. Additionally, it must be remembered that if a private vessel may lawfully claim that it was acting in self-defence, its conduct is unlikely to amount to piracy.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 100

Duty to cooperate in the repression of piracy

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

ARTICLE 102

Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103 defines what is considered a pirate vessel. This definition is linked to, but separate from, article 101, which defines an act of “piracy”. The definition in article 103 describes the types of vessels that are subject to articles 104-106, which is a separate consideration from the conduct described in article 101.

The following may be considered a pirate vessel:

(a) A vessel in which pirates travel to a place to commit an act of piracy or in which pirates travel from a place where they have committed an act of piracy; and

(b) A vessel in which people are travelling, where it is believed, on reasonable grounds, that the people in that vessel intend to commit an act of piracy; and

(c) Any vessel which pirates have already taken through an act of piracy and which they still control, generally by still being aboard that vessel. However, once a pirated vessel is no longer under the control of pirates, it ceases to be a pirate-controlled vessel subject to the right of visit under article 110.

Some important issues for maritime law enforcement agents, prosecutors and judges to consider in applying this definition include:

(a) Who can be treated as a “person in dominant control” and what the indicators of this state of affairs are;

(b) How the relevant jurisdiction deals with the issue of “intent”/“intended”; and

(c) Factors that prove or disprove whether, at the time of seizure by maritime law enforcement agents, a pirated vessel was still under the dominant control of those guilty of its initial pirating.

ARTICLE 103

Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

ARTICLE 104

Retention or loss of the nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

ARTICLE 105

Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. 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 106

Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

Article 104 states that it is a matter for flag States to decide whether a pirate vessel bearing that State’s flag loses that State’s nationality (and thus, in the normal course of events, that State’s protection). However, in reality this provision neither assists nor hinders the maritime law enforcement agents of any State in their capacity to deal with the pirate vessel and the people on board.

This is because, as article 105 makes clear, any State may seize a pirate vessel and carry out legal processes with respect to that vessel in international waters, regardless of whether the law of the flag State of that pirate vessel indicates that such vessels retain that State’s nationality. Article 105 codifies the previously noted rule from customary international law regarding “universal jurisdiction” in relation to acts of piracy, pirates and pirate vessels. Customary State practice has also made it clear that third States, that is, States not involved in the actual seizure of a pirate vessel at sea, can be the prosecution venues for piracy.

However, article 106 states that where any seizure of a vessel on suspicion of it being a pirate vessel is ultimately found to have been “without adequate grounds”, the flag State of the seized vessel may be able to claim compensation from the State of nationality of the authorized vessel responsible for the seizure.

Articles 103-106 define what constitutes a pirate vessel and describe the actions which may be taken in relation to such vessels, in particular their liability to seizure. Article 107, on the other hand, defines the types of vessels that are permitted to take those seizure actions as laid down in article 105. As noted

ARTICLE 107**Ships and aircraft which are entitled to seize on account of piracy**

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

previously, only appropriately authorized State vessels—such as warships, coastguard cutters and marine police vessels—have the authority to seize pirate vessels. Authorized vessels are allowed to do so using the right of visit under article 110.

Article 107 does not, however, preclude the detention of a pirate vessel by its intended victim in the exercise of self-defence, provided that the pirate vessel and those in it are handed over to an appropriate governmental authority at the first available opportunity.

Along with article 110, articles 100-107 set out the specific powers and definitions related to piracy in UNCLOS. However, as noted previously, these provisions must be read alongside other, more general provisions of UNCLOS, such as the cross-referral of many “high seas” articles, including those addressing piracy, back into the exclusive economic zone by way of article 58(2).

Additionally, it must be remembered that UNCLOS is not the sole source of international law that “creates” the offence of piracy (e.g. piracy is also an offence under article 15 of the Geneva Convention on the High Seas, 1958), nor is UNCLOS the sole source of international law regarding universal jurisdiction over piracy; customary international law includes the same rule. Piracy as a criminal offence subject to universal jurisdiction, or concurrently to all national jurisdictions, also exists in other customary and treaty-based international law. However, it is generally accepted that the definition of piracy provided in article 101 reflects customary international law.

9.2 The elements of piracy as a maritime crime under UNCLOS

The maritime crime of piracy is defined in article 101.

There are several aspects of this definition which must be examined in detail in order to fully appreciate both the required elements of the crime and the scope of the offence. It is important to remember that in the process of incorporating the offence into domestic legislation, States may alter the scope or

ARTICLE 101**Definition of piracy**

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

elements of piracy as defined in their national law. Some examples can be found in the final section of this chapter.

9.3 The “primary” offence

The “primary” offence described in article 101 is contained in subparagraph (a). This offence has a series of key elements which must be met in order for an offence to be considered piracy of the article 101(a) type.

First, there must be an “illegal” act or acts “of violence or detention, or any act of depredation”:

(a) *Illegal*. This qualifier is important because it reinforces that where an act of violence or detention is for some reason lawful in accordance with the flag State’s applicable law on either the alleged pirate vessel or the alleged victim vessel, then it cannot be defined as piratical:

- (i) For example, assume two yachts meet at sea, and a person from one yacht (yacht A, of State A flag) approaches the other yacht to ask for some water;
- (ii) Assume that the master of yacht B (of State B flag) initially invites that person on board, but then threatens her/him with a knife;
- (iii) If the person from yacht A reacts with force in self-defence—for example, by hitting the knife wielder’s arm and breaking it—there has been an act of violence;

- (iv) However, this act of violence may not ultimately be found to be an illegal act of violence because it was lawful in self-defence;
- (v) In such circumstances, this act of violence would not necessarily amount to an act of piracy because it was not “illegal”.

(b) “*Violence or detention, or any act of depredation.*” This part of the first element indicates that an act of piracy may not necessarily involve violence. The term “violence” is broad enough to cover any illegal act of force, and thus it does not have to be of a particular severity or result in a particular level of physical injury or damage. The word “depredation” covers plunder, robbery and damage:

- (i) For example, in a situation where the crew do not resist and the pirates do not resort to physical violence, but the crew is nevertheless “detained” by being locked in a compartment, the first element of the article 101(a) offence is still met;
- (ii) Similarly, if there is no violence or detention, but the pirates simply come aboard and take items from the vessel (i.e. plunder as an act of depredation), the requirements for the first element of the article 101(a) offence may still have been met;
- (iii) However, this matter must of course be interpreted in line with the meaning which the relevant jurisdiction attributes to these concepts.

Second, these acts must be “committed for private ends by the crew or the passengers of a private ship or a private aircraft”. The key components of this element are:

- (a) “*Crew or the passengers of a private ship.*” The requirement set forth in this sub-element, in support of the “two ship” aspect (see below), is that the pirates must be people who are on board or who have come from a private ship. This means that:
 - (i) The crew/passengers from vessel A—the pirate vessel—are the people committing the piratical acts against or aboard the victim vessel B; and

- (ii) The pirate vessel—vessel A—is a private (non-State) vessel, confirming the article 102 rule that a State vessel cannot be defined as a pirate vessel unless its crew has mutinied and committed an act of piracy;
- (iii) It is also important to consider how the term “ship” is defined in the relevant domestic law or whether the term is replaced with a broader term such as “vessel”.

(b) “*Committed for private ends.*” This sub-element is quite contentious. There are two views on the issue of what constitutes “private ends”:

- (i) The most widely accepted view is that the term “private ends” means any ends that are not sanctioned or ordered by a State. That is, unless the act was ordered by a State for a sovereign purpose, it is considered to be for “private ends”. Thus, the simple theft or seizure of a ship for ransom by a rebel or political opposition group in order to pressure a particular State to take a particular course of action, for example, is for private ends and thus considered an act of piracy. Consequently, there can only be State ends and private ends under this approach; there are no non-State “political ends” which are not also private ends;
- (ii) A minority view defines “private ends” more narrowly as primarily motivated by financial gain. In this view, individuals or members of a non-State organization cannot commit piracy if their actions are politically motivated (e.g. environmental protest or overthrowing a government).

To a large extent, the definition of “private ends” utilized in assessing any particular act in terms of its liability to be charged as piracy will depend on the manner in which the relevant national jurisdiction where alleged pirates are prosecuted determines this issue. It should be noted, however, that even if “political” private ends pursued by a non-State actor are not considered “private ends” by a State for the purposes of prosecuting piracy, such actions are proscribed under the regime implemented in the Convention for

the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its protocols.

Third, the alleged piratical acts must take place “on the high seas” or in “a place outside the jurisdiction of any State”.

(a) “*High seas.*” For the purposes of the article 101(a) offence of piracy, the relevant acts must take place in international waters. Although this element requires that the conduct take place on the high seas—which might be incorrectly read, in this case, as outside the exclusive economic zones of all States—it must be remembered that article 58(2) specifically cross-refers articles 88-115 from the high seas provisions of UNCLOS (Part VII) into the exclusive economic zone regime (Part V) in so far as they do not contradict the resource-focused rights of coastal States:

- (i) This means that the offence of piracy under international law takes place in international waters, that is, in those waters outside of internal waters, territorial seas and archipelagic waters (national waters);
- (ii) It also means that acts of “piracy” that take place within territorial seas, archipelagic waters or internal waters are not acts of piracy in accordance with international law as encapsulated in article 101 of UNCLOS. Acts that would otherwise qualify as piracy but that take place within such waters are a matter for the coastal State and the flag State to judge according to their own legislation; they are not matters of universal jurisdiction. Such conduct would be characterized, for example, as armed robbery at sea, not as piracy;

(b) “*Outside the jurisdiction of any State.*” This provision could apply, for example, in the unlikely event that a new island was just created by an upheaval of earth in a massive earthquake and was not claimed by, and thus not under the jurisdiction of, any State. If a vessel attacked another vessel within 12 nautical miles (nm) of this new island, it would not be within any State’s territorial sea or other territorial jurisdiction. This is without prejudice to Antarctica, which is covered by a separate legal regime established through the Antarctic Treaty (1959).

Finally, the piratical act must be directed “against another ship or aircraft, or against persons or property on board such ship or aircraft” (article 101(a)(i) in relation to piracy on the “high seas”) or, as the case may be, “against a ship, aircraft, persons or property in a place outside the jurisdiction of any State” (article 101(a)(ii)). This is sometimes described as the “two ship rule”.

This element of the offence of piracy requires that two vessels be involved: the pirate vessel and a victim vessel. In situations that involve only one ship, for example where passengers or crew within a vessel illegally seize control of that vessel, the conduct is not considered an act of piracy under article 101(a) of UNCLOS. Such conduct is nevertheless likely to be an offence under other law, for example the regime established by the SUA Convention and its protocols. However, of course, that Convention and its protocols bind only those States that are parties to them.

At the same time, it is important to be very clear about whether any particular act is definable as piracy at international law in such a situation because, among other reasons, piracy is subject to universal jurisdiction as a matter of customary international law applicable between all States. However, most offences are subject only to “prosecute or extradite” jurisdiction and only between those States which have ratified the relevant treaties.

9.4 The “voluntary participation” or “operation” offence

Article 101(b) defines a second type of piracy offence, one that does not necessarily require the actual commission of an article 101(a) piracy offence. This offence focuses on presence in, and participation in the running of, a vessel definable as a “pirate vessel” under article 103.

People who are not directly involved in the commission of illegal acts of violence or detention, or acts of depredation may also be held liable. This is because the criminal act of piracy also includes those who are not actually directly involved in the illegal act of violence or detention, or in any act of depredation, but who support the capacity of others to do so, such as deckhands or cooks on board who have joined the ship knowing it is a pirate ship.

The article 101(b) offence involves “any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft”. Several of the key elements of this

offence can only be understood properly when read in conjunction with relevant national laws and jurisprudence defining related generic concepts in criminal law.

For example, UNCLOS does not provide a specific definition of “voluntary participation” in the context of piracy, nor does it detail what acts constitute “operation” of a vessel.

Similarly, any analysis of whether a person had “knowledge of facts making [the vessel] a pirate ship” will to a large extent depend upon the way in which the relevant national criminal or penal law defines the level of criminal responsibility most closely analogous to “knowledge”.

There are various ways to prove voluntary participation in the operation of a pirate ship. Demonstrating that the accused voluntarily participated in the operation of a pirate ship may include evidence that the suspect possessed knowledge:

(a) That it has been used to commit an act of piracy and remains under the control of the persons who committed those acts; or

(b) That it is intended by the person in dominant control of it to be used for the purpose of committing an act of piracy.

Thus, if the prosecution were to proceed on the basis of article 101(b), it would be necessary to prove not only that the ship had been used to commit any of the acts referred to in article 101(a), but also that the ship had remained under the control of the persons who had committed those acts when the accused voluntarily participated in the operation of the ship.

Similarly, a ship that has been used by one group of pirates for purposes of piracy and sold off to another group of pirates cannot be assimilated to a pirate ship for the purposes of prosecution based on article 101 (b). However, if it can be proved that when the accused voluntarily participated in the operation of the ship, they had the requisite knowledge that the person in dominant control of the ship intended to use it for the purpose of committing an act of piracy, they may be found liable.

Subject to national laws, policies and procedures, it is generally for the prosecution to prove that the accused participated in the operation of the ship voluntarily and with the requisite knowledge. It is possible, for example, that if a vessel has already been held to be a pirate ship, then it might only need to be proven that the accused had knowledge of those facts which made their vessel a pirate ship. The key is that

the accused were aware of the nature of what they were involved in and knew the purpose of their enterprise.

In order to convict a person of an offence on the basis of article 101(b), the elements referred to in article 103 need to be established, as that article contains the definition of a pirate ship. Thus the prosecution would generally be required to establish to the requisite standard that each of the accused was:

- (a) Involved in an act, severally or jointly, of;
- (b) Voluntary;
- (c) Participation;
- (d) In the operation of that ship; and
- (e) That ship;
 - (i) had been used to commit any illegal act of violence or detention, or any act of depredation, committed for private ends by its crew or its passengers and remained under the control of the persons who committed those acts; or
 - (ii) it was intended by the person in dominant control of that ship that it be used for the purpose of committing any illegal act of violence or detention, or any act of depredation, committed for private ends.

The words “act of voluntary participation” require the participatory presence of each of the pirates arrested on board a pirate ship. In some circumstances, it will not be justified to prosecute all persons found on board a pirate ship on the grounds that they are all pirates. However, any act of participation by each of the pirates, be it by way of firing or holding a gun, jettisoning goods, manoeuvring the ship, taking care of supplies or being on the lookout with binoculars, for example, would suffice.

Similarly, if a person voluntarily participated in the operation of the ship, but without knowledge that the ship was (or was intended to be) used for the purpose of committing acts of piracy, that person might not necessarily be held liable. This is because if the person voluntarily participated in the operation of a ship with the intention of committing another illegal act, such as smuggling arms, narcotics or contraband, then he or she could not be made liable for an offence created on the basis of article 101(b). Thus there is a necessary link between articles 101(b) and 103.

It is clear that if an authorized vessel encounters a suspected pirate vessel in international waters,

article 105 is still applicable. This means that the authorized vessel may still seize that vessel as a suspected pirate vessel even though it has not actually observed or found any other evidence of that vessel committing an act of piracy under article 101(a).

Similarly, the State of the authorized vessel may also still exercise universal jurisdiction to take the suspected pirates to the authorized vessel's own, or another, jurisdiction for prosecution for an article 101(b) type of offence. However, the success of the prosecution is likely to hinge, to a much greater extent, on specific national criminal law definitions of legal terms of art such as "voluntariness" and "knowledge" than is necessarily the case for article 101(a) offences.

However, should an authorized vessel of State A come across a vessel and people it reasonably suspects of the article 101(b) piracy offence, but the vessel and people are located in the territorial sea of State B, then the authorized vessel of State A cannot take action on the basis of an article 101(b) offence—nor, for that matter, on the basis of an article 101(a) offence committed just prior to fleeing into State B's territorial sea.

The authorized vessel's inability to take action is not because a potential article 101(a) or article 101(b) offence can no longer be made out because the suspect vessel is now inside State B's territorial sea and this in some way ends liability for any acts of piracy previously committed. This is not the case. Instead, the reason is that the authorized vessel of State A has no maritime law enforcement jurisdiction inside State B's territorial sea.

However, this situation would not, for example, prohibit the authorized vessel of State A, remaining outside State B's territorial sea so as not to offend the regime of innocent passage, from shadowing the suspected pirate vessel and then seizing it if it crossed back into international waters.

Nor would this situation prohibit State A from discussing the situation with State B with a view to some form of cooperative enforcement action against the suspect vessel as mandated in article 100. For example, State B may permit State A to enter State B's territorial sea in order to seize the suspect vessel and then to hand it over to State B authorities for prosecution. Provided that both States have the relevant jurisdiction and authorizations for these acts within their respective laws and State B has defined a relevant piracy offence with which it can charge the suspected pirates and their vessel, then universal jurisdiction would support such a solution.

9.5 The "facilitation" offence

The final type of piracy offence in article 101 is "any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)" (article 101(c)). In short, this offence relates to inciting or facilitating an actual pirate attack and/or inciting or facilitating a pirate vessel with pirates on board to go to sea with the intention of seeking an opportunity to commit an act of piracy.

As is the case in the article 101(b) offence, proof of the elements of this offence is to a great extent subject to the specific national law used to define or determine concepts such as "incite" or "facilitate". For example, in the relevant national jurisdiction, the term "facilitate" may be covered by other grounds of criminal responsibility such as "aid and abet", "conspire", "incite" or "procure".

However, the article 101(c) offence also differs significantly from the article 101(a) and (b) offences in that a person committing an article 101(c) offence may well be on shore rather than at sea with the pirate vessel. For example, a pirate group "kingpin", financier or organizer may incite and/or facilitate the act of getting a pirate vessel and pirates out to sea without actually going to sea herself/himself.

However, this does not mean that universal jurisdiction does not apply to article 101(c) offences. Certainly, the right to seize a person suspected of an article 101(c) piracy offence is still subject the same powers and authorizations as article 101(a) and (b) offences if that facilitator is physically located in international waters at the relevant time.

However, if the suspected pirate facilitator is physically on shore or within national waters, then standard rules on jurisdiction still apply.

This means that an authorized vessel of State A cannot use the piracy law regime and universal jurisdiction to enter the territory or national waters of State B without consent in order to seize a suspect. In this situation, State A must employ normally applicable law enforcement channels and extradition processes with State B in order to bring that suspect into State A's custody.

At the same time, this does not mean that universal jurisdiction has no role to play in relation to an article 101(c) offence where the suspect cannot be apprehended in international waters. In this situation, universal jurisdiction still attaches to the offence itself. This means that, should the suspect come into the hands of State A through some other process, for example if that suspect was seized while trying to enter

State A or seized by State C on the basis of a warrant from State A and then extradited to State A, then State A could still prosecute the suspect for the article 101(c) type offence.

Consequently, it is important to remember that where universal jurisdiction is available, it allows any State to prosecute an alleged perpetrator without the requirement of a separate jurisdictional nexus (based on territory, nationality, etc.). However, it is also necessary to note that universal jurisdiction does not allow one State to simply dispense with the territorial jurisdiction of other States for the purpose of seizing a suspect who is physically within the territorial jurisdiction of another State at the relevant time.

9.6 How can piracy offences be incorporated into national criminal or penal law?

There is no set format or manner in which the article 101 piracy offences must be incorporated into national law. It is vital that any such offence be coherent within the general criminal or penal law scheme of the relevant State so that the offence can be investigated, interpreted and applied readily by the law enforcement agents and within the courts of that State.

The following examples illustrate different ways in which piracy offences are (or were in the past) incorporated into national criminal or penal law. However, in considering these examples, two factors must be borne in mind.

The first is that the most appropriate method of incorporation, and any caveats or other conditions placed around the offence, are always a matter for the law-making and law-applying institutions of a particular State. In short, there is no single correct way to incorporate piracy offences into national law.

The second is that the incorporation of piracy offences into national law may also require some ancillary legislative reform. For example, legislation that specifically extends the jurisdiction of police and courts to the high seas (or more generally to international waters if no exclusive economic zone jurisdiction capable of covering piracy offences is in place) will permit them to deal with piracy.

Similarly, it may be necessary to add definitions or interpretive provisions to a State's criminal or penal law in order to facilitate the implementation of piracy offences in national law. One example might be to provide a definition of "pirate vessel". Another example

would be to allow for some interpretation around concepts such as "presentment before a court without undue delay". Again, there is no single or universally recognized template for these ancillary amendments; the requirements depend fundamentally upon the structure and philosophy of each State's own national criminal or penal law scheme.

Example 1. Kenya

Prior to its amendment by the Merchant Shipping Act of 2009, the Kenyan Penal Code incorporated the offence of piracy as follows:

KENYA: PENAL CODE

69(1) Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of Piracy.

(Now repealed and replaced by piracy provisions in the Merchant Shipping Act of 2009)

This form of incorporation of the piracy offence relies upon courts independently examining relevant international law ("piracy *jure gentium*", or "piracy under the law of nations", i.e. international law) in order to determine the applicability/availability of jurisdiction (in this case, universal jurisdiction), the elements of the offence and any definitions otherwise absent from Kenyan law that are required in order to interpret the law related to the offence.

In 2009, this provision in the Penal Code was repealed and replaced by a new set of provisions on piracy in the Merchant Shipping Act of 2009.

Kenya's revised approach to incorporating a piracy offence into national laws adopts a standard method whereby specific conduct is:

- (a) Identified and defined (in this case, piracy is defined in the same terms as in article 101 of UNCLOS); and then
- (b) Criminalized and attributed a penal sanction.

The concurrent criminalization of "armed robbery against ships", which is defined in section 369(1) of the Merchant Shipping Act of 2009 in terms similar—but not identical—to those used to define piracy, notes that it is applicable in the Kenyan territorial sea and other waters under Kenya's jurisdiction, and assigns the same penalty.

KENYA: MERCHANT SHIPPING ACT (2009)**369(1) ... “piracy” means—**

(a) any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed—

- (i) against another ship or aircraft, or against persons or property on board such ship or aircraft; or
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or

(c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b);

...

371. Any person who—

(a) commits any act of piracy;

(b) in territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life.

Example 2. Australia

The incorporation of piracy-related offences into Australian law exhibits a number of features. First, the conduct which is incorporated entirely within the definition of “piracy” in UNCLOS article 101 is broken down into two separate offences: piracy defined in terms reflective of, but not precisely the same as in, UNCLOS article 101, and a separate offence of operating a pirate-controlled ship.

A second aspect of this approach to incorporating piracy offences into national law—which can also be found in Canada’s legislation (see below)—is to define the piracy offence such that it also captures piracy-like conduct within national waters under that State’s jurisdiction. In this case, the offence in national waters is described as applicable in the Australian “coastal sea”, which is defined as follows:

AUSTRALIA: CRIMES ACT (1914)**51 Interpretation**

In this Part:

...

“coastal sea of Australia” means: (a) the territorial sea of Australia; and (b) the sea on the landward side of the territorial sea of Australia and not within the limits of a State or Territory; and includes airspace over those seas.

...

AUSTRALIA: CRIMES ACT (1914)**51 Interpretation**

In this Part:

“act of piracy” means an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft and directed:

(a) if the act is done on the high seas or in the coastal sea of Australia—against another ship or aircraft or against persons or property on board another ship or aircraft; or

(b) if the act is done in a place beyond the jurisdiction of any country—against a ship, aircraft, persons or property.

...

“pirate-controlled ship or aircraft” means a private ship or aircraft which is under the control of persons that:

(a) have used, are using or intend to use the ship or aircraft in the commission of acts of piracy; or

(b) have seized control of the ship or aircraft by an act of piracy.

...

52 Piracy

A person must not perform an act of piracy.

Penalty: Imprisonment for life.

53 Operating a pirate-controlled ship or aircraft

(1) A person must not voluntarily participate in the operation of a pirate-controlled ship or aircraft knowing that it is such a ship or aircraft.

Penalty: Imprisonment for 15 years.

(2) This section applies to acts performed on the high seas, in places beyond the jurisdiction of any country or in Australia.

...

55 Written consent of Attorney-General required

(1) A prosecution for an offence against this Part requires the consent of the Attorney-General.

(2) Despite subsection (1):

(a) a person may be arrested for an offence referred to in subsection (1), and a warrant for such an arrest may be issued and executed; and

(b) a person may be charged with such an offence; and

(c) a person so charged may be remanded in custody or on bail;

but no further step in the proceedings referred to in subsection (1) is to be taken until the Attorney-General’s consent has been given.

(3) Nothing in subsection (2) prevents the discharge of the accused if proceedings are not continued within a reasonable time.

A further element of the Australian approach to incorporating the offence of piracy into national law is the requirement of the Attorney-General's consent to proceed with a prosecution related to piracy or to operating a pirate-controlled vessel. This procedural caveat provides a "political" overlay in certain situations.

Example 3. Canada

Similar to the older approach used in the Kenyan Penal Code, the Canadian Criminal Code also uses a reference to "the law of nations" (i.e. international law) in order to define the offence of piracy and criminalizes such conduct in the same provision by stating that it is an offence.

The Canadian approach, set out in section 74 of the Criminal Code, provides that the offence of piracy as defined by the law of nations can be committed both inside and outside Canadian territorial jurisdiction.

This is one way of making piracy-like conduct perpetrated within Canadian national waters an offence without having to create a separate offence for national waters. This formulation is not inconsistent with international law, as it is within the prerogative of a coastal State to define and proscribe piracy-like conduct within its national waters in this way.

Nothing in this formulation implies that Canada could exercise jurisdiction over piracy in another State's national waters; it indicates only that Canada can exercise jurisdiction over piracy in international waters in line with "the law of nations" and thus universal jurisdiction, and in Canadian national waters in line with Canadian territorial jurisdiction.

CANADA: CRIMINAL CODE (1985)

Piracy

Piracy by law of nations

74 (1) Every one commits piracy who does any act that, by the law of nations, is piracy.

Punishment

(2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.

Piratical acts

75 Every one who, while in or out of Canada,

(a) steals a Canadian ship,

(b) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,

(c) does or attempts to do a mutinous act on a Canadian ship, or

(d) counsels a person to do anything mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Another notable aspect of the Canadian approach to criminalization is that it creates a separate set of offences ("piratical acts") which specifically relate to Canadian-flagged vessels. These acts are not definable as piracy under the law of nations. For example, the conduct in section 75(b)—"steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship"—would not necessarily meet the UNCLOS article 101(a) definition of piracy, as there may not necessarily be two ships involved and the location of the possible offence is not limited to Canadian ships in international waters.



Chapter 10

Kidnapping and hostage-taking at sea

KEY TERMS

KIDNAPPING FOR RANSOM: Kidnapping for ransom is the action of taking a person hostage for the purpose of achieving the payment of a ransom.

HOSTAGE-TAKING: The definition of hostage-taking can be found in article 1 of the 1979 International Convention Against the Taking of Hostages:

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group or persons, to do or abstain from doing any act and an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.

ARMED ROBBERY: Armed robbery against ships means any of the following acts:

(a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy”, committed for private ends and directed against a ship or against persons or property on board such ship, within a State’s internal waters, archipelagic waters and territorial sea;

(b) any act of inciting or of intentionally facilitating an act described above.

PIRACY: Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph *(a)* or *(b)*.

PRESCRIPTIVE JURISDICTION: The power of a State to make its law applicable to activities, relations or status of persons.

INTRODUCTION

Kidnapping by pirates, terrorists and other criminals occurs when people on board vessels are abducted for financial gain or political ends. The factual circumstances of kidnapping at sea might prompt its characterization as piracy as it may, for example, involve armed individuals attacking and seizing another vessel or individuals on another vessel for personal or organizational gain.

The table below briefly summarizes the key characteristics of the various acts of kidnapping at sea in order to highlight their similarities before discussing their key differences and the legal frameworks applicable to each of them.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 101

Definition of piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

FACTUAL CIRCUMSTANCES	PIRACY	ARMED ROBBERY	KIDNAP FOR RANSOM	KIDNAPPING FOR POLITICAL ENDS
Act of violence	✓	✓	✓	✓
Private ends	✓	✓	✓	x
Political ends	x	x	x	✓
Two vessels	✓	✓	✓	✓
Attack from within the vessel	x	x	✓	✓
Territorial waters	x	✓	✓	✓
Exclusive economic zone and high seas	✓	x	✓	✓

As illustrated in the table, not all acts of kidnapping meet the requirements of the United Nations Convention on the Law of the Sea (UNCLOS) definition of piracy. When UNCLOS does not apply, one of the 19 universal legal instruments and additional amendments dealing with terrorism may apply. These include the International Convention against the Taking of Hostages or the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. It is important to distinguish between the definitional and operational scope of these different criminal acts so that the correct legal framework is relied upon to address them.

The terms “kidnapping” and “hostage-taking” are often used interchangeably as they both refer to the same action of taking a person hostage for the purpose of achieving some form of personal or organizational gain. Hostage-taking is defined in the International Convention against the Taking of Hostages and as such it is considered an act of terrorism. Kidnapping is not defined in international law, but references to kidnapping are found in national anti-terrorism legislation, showing that it is also considered an act of terrorism.

INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES

ARTICLE 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

USA PATRIOT ACT

SECTION 802

Definition of domestic terrorism

5. The term "domestic terrorism" means activities that—“(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; “(B) appear to be intended—“(i) to intimidate or coerce a civilian population; “(ii) to influence the policy of a government by intimidation or coercion; or “(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and “(C) occur primarily within the territorial jurisdiction of the United States.”

10.1 Kidnapping for ransom

Kidnappers often take hostages in exchange for a ransom. This is known as kidnapping for ransom. Owing to the profits made through ransom, kidnapping has been employed both by pirate gangs and terrorist groups.

Pirates usually use pirate skiffs or mother vessels to attack commercial vessels, fishing vessels or leisure boats for the purpose of extorting a ransom in exchange for the vessel, cargo, and/or persons on board. While some of these attacks take place in international waters, not all will meet the definitional requirement of UNCLOS article 101. There are instances, for example, where kidnapping for ransom attacks take place within

national waters (territorial sea, archipelagic waters and internal waters). These attacks generally qualify as armed robbery under domestic criminal law.

Kidnapping for ransom is often employed by terrorist groups. It is a means of financing terrorist activities and is mainly employed in politically unstable areas with weak or corrupted central authorities. While terrorist groups have historically abducted hostages for ransom on land, attacks against vessels have increased. For example, following a call by Al-Qaeda in 2009 for attacks in maritime chokepoints, attacks against vessels in straits and ports have become more common, including the taking of hostages on board vessels, especially in the Sulu and Celebes seas.

USE OF KIDNAPPING FOR RANSOM MODEL IN MARITIME DOMAIN – 2005–2015

To date, kidnapping for ransom has been the main piracy model employed in East Africa. Somali pirates hijack vessels and take them back to shore where they keep the crew in captivity until a ransom is paid. It is estimated that between \$340 million and \$435 million was paid in ransom for ships and/or seafarers kidnapped by Somali pirates between 2005 and 2015. Owing to the large amounts of money made in ransom, kidnapping for ransom has turned into a successful business model and has begun being employed by pirates in West Africa and South-East Asia. Although fewer cases of kidnapping for ransom are reported in these regions, there has been an increase in incidents in which pirates seize vessels, take them to land and hold crew members captive until negotiations take place and a ransom is paid. A growing number of incidents of kidnapping for ransom have also been reported in South and Central America and the Caribbean, and are mostly aimed against recreational vessels.

EXAMPLE: MV BELUGA NOMINATION

On 22 January 2011, the *MV Beluga*, a German freighter flagged in Antigua and Barbuda, was attacked by a pirate skiff in the Indian Ocean, 390 nautical miles north of Seychelles. When the pirates boarded the vessel the crew hid in a citadel awaiting help. At the time of the attack, the nearest warship of the European Union Naval Force was over 1,000 nautical miles away. The pirates were able to break into the citadel and executed a crew member. Two others escaped in a lifeboat and spent two days at sea before being rescued by a warship. Two other crew members jumped overboard and went missing. The seven remaining seafarers were transferred to Somalia, where they were held captive until April 2011 when a ransom was paid for their release.

Although the seizure of vessels for ransom by terrorist groups appear to have similar characteristics to kidnapping for ransom by pirates, the UNCLOS definition of piracy does not always apply. As will be

discussed below, ransom payments to terrorists are banned under international law and States cannot exercise universal jurisdiction over the alleged offenders.

EXAMPLE: ROYAL 16

In November 2016, the Vietnamese bulk carrier *Royal 16* was approached by a fast skiff with armed men who opened fire before taking control of the vessel near the Philippine island of Basilan. The armed men were members of Abu Sayyaf, a violent armed group operating in the Philippines that has sworn allegiance to Islamic State. They took six crew members hostage, transferred them ashore and demanded a ransom for their release. The ransom was not paid and after almost a year in captivity, some crew members were rescued by the military of the Philippines, but the captain was executed by the kidnappers.

10.2 Kidnapping for political ends

Some armed groups seize vessels for political ends, such as political protest or propaganda. Such political aims do not always fall within the private ends requirement of the UNCLOS definition of piracy. For example, Greenpeace members have been involved in violent incidents against vessels and their crews, protesting against the dumping of toxic waste or whaling. These acts are sometimes called “eco-piracy”, but they are not necessarily considered by all States as constituting piracy within the UNCLOS definition. Abu Sayyaf has also kidnapped and executed sailors and fishermen in the Sulu archipelago in revenge for local

police operations targeting the group. The modus operandi of these attacks makes it difficult to decide whether these acts are acts of piracy, terrorism or other criminal acts.

The hijacking of the *Achille Lauro* highlighted the limitations of the UNCLOS definition of piracy and prompted the drafting the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Violent acts against vessels, their crews and passengers on board fall within article 3 of the Convention and its 2005 Protocol; State parties to the Convention can exercise jurisdiction to prosecute or extradite the offenders as discussed in chapter XX on maritime terrorism.

EXAMPLE: ACHILLE LAURO

On 7 October 1985, the *Achille Lauro*, an Italian cruise ship, was hijacked by four members of the Palestine Liberation Front who had been posing as passengers on board. The hijackers demanded Israel to release 50 Palestinian prisoners. After their failed attempts to reach Syria and then Cyprus, both of which refused them port rights, they anchored off Port Said in Egypt and started negotiating the release of the passengers in exchange for a safe passage and immunity from prosecution. In the meantime, they killed a disabled Jewish American passenger, named Leon Klinghoffer, and threw his body overboard. The hijacking ended two days later with the release of the passengers and the interception of the aircraft that was carrying the hostage-takers by United States fighter jets. Owing to the modus operandi and aim of the hijacking, the incident did not fit within the UNCLOS definition of piracy. The hijacking was committed for political rather than private ends; the vessel was not attacked by another vessel but by persons on board the vessel and the vessel was not on the high seas when it was hijacked.

EXAMPLE: MT LEON DIAS

In January 2016, the Greek-owned oil tanker *MT Leon Dias* was attacked by militants near the port of Cotonou. The attackers were suspected members of Niger Delta Avengers who claim that they fight for a fairer share of the oil production proceeds for the impoverished region. They warned that they would blow up the cargo unless the Government of Nigeria released pro-Biafran leader Nnamdi Kanu within 31 days. They then took five crew members hostage and left the vessel, after which the Navy of Benin regained control of it. Other pro-Biafran organizations that fight for the independence of the territories forcibly annexed to Nigeria during the British colonization refused any involvement in the attack. However, the political nature of the incident can create difficulties in terms of clearly classifying the attack as an act of piracy.

10.3 Jurisdiction

The classification of kidnapping at sea as either piracy or terrorism also defines the legal basis for the exercise of prescriptive jurisdiction over the alleged offenders.

If an act of kidnapping is piracy, every State can establish and exercise jurisdiction over the pirate vessel and suspected pirates.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 105

Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. 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.

If an act of kidnapping at sea is committed by a terrorist group, but for some reason that act is not definable as piracy in accordance with UNCLOS, a number of other jurisdictional bases may be relevant for establishing jurisdiction over the alleged offenders. State parties to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the International Convention against the Taking of Hostages and the United Nations Convention against Transnational Organized Crime can establish and exercise jurisdiction when:

- (a) The offence is committed within their territory (territorial principle);
- (b) The offence is committed by a national of that State Party (nationality principle);
- (c) The offence is committed against their nationals (passive personality principle);

States can also exercise jurisdiction for the purpose of protecting the human rights of hostages. Article 94 of UNCLOS requires flag States to exercise effective jurisdiction and control in administrative, technical and social matters over ships flying its flag. As explained in chapter 6 of the present Manual, human rights treaties apply on board vessels and flag States therefore remain bound by their human rights obligations. This means that flag States have certain duties towards the

persons taken hostage on board vessels registered to their flag, which include a duty to:

- (a) Take reasonable measures to prevent the taking of hostages;
- (b) Take steps to release hostages;
- (c) Investigate killings and injuries of hostages;
- (d) Compensate the victims.

Although the maritime industry provides for compensation to seafarers taken hostage, persons abducted at sea by terrorists should be given access to State compensation mechanisms in place for victims of terrorism.

It is common for kidnappers to transfer crews to stateless vessels or to take vessels and/or crews ashore, or closer to shore or ports, where they are held until a ransom is paid. In this case, the hostages are within the jurisdiction of the State within whose waters or territory they are held captive. In these instances, the coastal State will have obligations in relation to safeguarding the human rights of those kidnapped.

10.4 Impact of kidnapping at sea on human rights

During a kidnapping attempt and following the seizure of a vessel, persons on board vessels will in most circumstances be exposed to lethal force, and to other forms of physical and psychological abuse. These hostages may also remain in captivity for prolonged periods of time. Several human rights can therefore be affected, in particular the right to life; the right to freedom from torture, ill-treatment or degrading treatment; the right to liberty and security; and the right to privacy.

Owing to its pervasive nature, kidnapping for ransom has an adverse impact on victims. Kidnappers do whatever it takes to secure a ransom without any regard for the hostages. Testimonies and accounts of released seafarers have shown that they suffer severe human rights abuses in captivity:

- (a) Seafarers suffer physical abuses, including slaps, punches, beatings and cigarette burns. Reported abuses also include seafarers being tied up in the sun for hours, being locked in freezers, having fingernails pulled out with pliers and being electrocuted;
- (b) Seafarers are often malnourished and have no clean water;

(c) Both systematic isolation and lack of privacy have been reported. Hostages are often escorted in the toilet and are not allowed to shower;

(d) Psychological abuse is also common. Hostages are made to call their families and beg for help at gunpoint or are threatened that they will be murdered if a ransom is not paid.

(e) Mock executions also regularly take place;

(f) Captivity might last from a few hours to a few years;

(g) Murders and beheadings have been recorded both during an attack and following the expiration of a ransom deadline;

(h) Released hostages suffer from different forms of post-traumatic stress disorder, such as sleep problems, memory loss, increased use of alcohol, irritability, aggression, deterioration of family and social relationships and suicidal thoughts. Some seafarers are so traumatized by their experience that they do not return to sea and consequently lose their livelihood.

EXAMPLE: *MV ICEBERG I*

The *MV Iceberg I* was a Panama-flagged Ro-Ro ship attacked and overrun by pirates 10 miles off the port of Aden on 29 March 2010. The Dubai-based ship owner had no insurance and refused to pay the \$10 million ransom, thereby effectively abandoning the crew. When the *MV Iceberg I* was hijacked, she had a crew of 24, made up of nationals of Yemen (8), India (6), Ghana (4), Pakistan and the Sudan (2 each) and the Philippines (1). The seafarers' countries of nationality could not agree on a rescue operation and the crew was released by Somali forces three years later. In the meantime, one crew member committed suicide and another jumped overboard but was rescued and locked in a room for five months. The testimonies of the released hostages verified the reports of the abuses seafarers suffer at the hands of pirates.

"We were treated very badly. We were treated below humans [...]. In fact, I don't know which other word to use because the pirates, they are almost inhuman. They don't have hearts. They behave like they were not created by God. Really, we went through a lot of torture and suffering at different stages and different times depending on what happened we suffered for it." Jewel Ahiable, *MV Iceberg I*.

"Once a day rice, cooked rice, once in the morning, they pushed it. I myself was isolated for almost six months without talking to no one so when they opened the door they pushed it for me [...]. [The pirates] contaminated the water with diesel or petrol, in fact when they contaminated the water, when you sip small, you don't feel thirsty again." Francis Koomson, *MV Iceberg I*.

EXAMPLE: ABU SAYYAF KIDNAPPINGS AND BEHEADINGS

Abu Sayyaf is known in particular for its brutality and for posing serious threats to trade routes in South-East Asia. It has used kidnapping as a source of funding for its activities; although most Governments refuse to pay ransom, the group's kidnapping activities have been on the rise. In 2017 alone, the armed group kidnapped and killed more than 13 persons. All hostages, who were either seafarers or tourists, were abducted while on board vessels. When the ransom deadline had passed, they were beheaded, and their bodies were found in different locations in the southern Philippines.

10.5 Responses to kidnapping at sea

Different responses are employed by States, depending on whether the kidnapping at sea is committed by pirates or terrorists.

The maritime industry plays a key role in protecting and securing the release of persons abducted at sea. While many seafarers abducted by pirates have been released through the payment of a ransom by ship owners, there have also been instances where ransoms have not been offered for a range of reasons, and the hostages have endured long periods of captivity.

Ransom payments to terrorists are generally prohibited in international law. The International Convention for the Suppression of the Financing of Terrorism criminalizes the direct or indirect financing of terrorist activities. In its resolutions 2133 (2014), on ransom payments, and 2199 (2015), on threats to international peace and security caused by terrorist acts by Al-Qaida, the United Nations Security Council explicitly called upon States to prevent terrorist groups from directly or indirectly benefiting from ransom payments.

Regardless of whether a ransom payment is being considered, another alternative may be a rescue

operation. The increased naval presence in regions prone to illegal activities, the alarm and communication systems on board vessels and the creation of regional reporting centres have allowed crews to alert nearby warships and State vessels engaged in law enforcement operations. States, naval forces and law enforcement agencies often exchange information in an effort to locate the seized vessels and facilitate the rescue of hostages.

Conducting a rescue operation at sea is different to other maritime law enforcement operations in that the aim is not only to arrest the suspected criminals, but also to release the victims. This means that, in addition to safeguarding the human rights of suspected criminals, discussed in chapters 7 and 8 of the present Manual, due consideration must also be given to those kidnapped. There have been reported incidents of deaths and injuries during rescue operations. States that conduct maritime law enforcement operations for the release of hostages should consider the following:

- (a) The primary aim of a rescue operation should always be the safe release of seafarers;
- (b) Rescue operations must be accurately planned in advance;
- (c) The use of force in all maritime law enforcement situations must be reasonable and necessary in order to be lawful. Warning shots, other signals and

negotiations should take place, wherever possible, to explore the possibility of kidnappers handing over the hostages. More-detailed guidance on the use of force in maritime law enforcement operations, including in maritime situations involving kidnapping for ransom, is contained in chapter 5, section 5.7;

(d) Given that injuries are mostly unavoidable during a rescue operation, warships should have the right medical support in place to treat those injured;

(e) Following a rescue operation, an independent and effective investigation should take place to establish the cause of injuries and deaths;

(f) Effective and independent investigations should lead to effective compensation for the victims and their families.

Regardless of whether kidnapping is committed by pirates, terrorists or other criminals, its transnational nature means that securing the release of hostages and establishing jurisdiction over kidnappers require transnational cooperation. Kidnappers often move their victims from flagged vessels to stateless vessels, through different maritime zones and ashore. This means that various States might have an interest in securing the release of their nationals and establishing jurisdiction over their kidnappers. Sharing information and coordinating rescue operations and effective prosecutions are important to achieve this end.



Chapter 11

Maritime terrorism offences

KEY POINTS

1. The United Nations Convention on the Law of the Sea of 1982 (UNCLOS) offence of piracy overlaps with, but is not in all circumstances the same as, the concept of “maritime terrorism”.
2. Maritime terrorism is not a single specific legal offence, but rather is often used as an umbrella term for a range of criminal activity at sea or from the sea. Often the concept of maritime terrorism is conflated with offences involving violence at sea, but this is not accurate in all situations. Some maritime terrorism offences, such as transporting materials by sea for terrorist purposes, do not necessarily involve violence, but rather involve a terrorist purpose context. Similarly, there are acts of violence at sea that do not involve any terrorist purpose or context.
3. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (SUA Convention) and its three protocols (one from 1988 and two from 2005) are important instruments – although not the only instruments – that deal with maritime terrorism.
4. Offences that deal specifically with maritime terrorism, as opposed to offences dealing with general violence at sea and general transport offences, typically include certain key following. Those elements are as follows:
 - (a) Offence includes acts of violence, or the facilitation of violence, or the transport of terrorists or associated materials;
 - (b) Offence is committed by private actors;
 - (c) Offence is committed at sea or using ships;
 - (d) Intent to create fear in the minds of a group of people forms an explicit or overarching component (“chapeau”) of the offence.

KEY TERMS

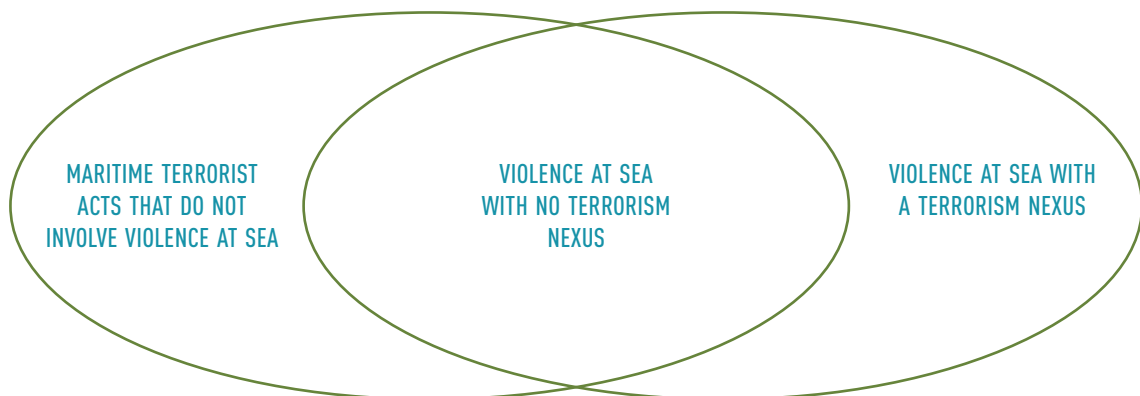
PROSECUTE OR EXTRADITE: The prosecute or extradite obligation is a treaty-based arrangement between the States that are party to a particular instrument that includes the obligation. The prosecute or extradite arrangement applies only in relation to matters and conduct as detailed in that instrument. The obligation covers situations where a State has an alleged offender (under the terms of the relevant instrument) in its custody, in circumstances where the alleged conduct is within the jurisdiction of another State that is party to the same instrument – generally, in maritime situations, the flag State. In the normal course of events, if the State with the alleged offender in custody chooses not to prosecute, it will extradite to the other State with jurisdiction.

11.1 How is maritime terrorism dealt with in international law?

When considering the overlapping issues of maritime terrorism on the one hand, and violence at sea on the other, it is important to note that while they are often interrelated, they are nevertheless legally and conceptually distinct. While many acts of violence at sea may also constitute acts of maritime terrorism, this is not always the case. For example, a violent robbery at sea may be committed purely for personal gain, just as a violent assault on a fellow crew member at sea may be motivated solely by a personal hatred. There may not be any terrorist purpose, context or motivation (i.e., a

terrorism nexus) to such violence. Similarly, some acts of maritime terrorism may not involve any immediate use of violence. For example, transporting certain materials by ship, with the intention that those materials be used by a terrorist group to produce a weapon, does not involve any immediate act of violence. However, it is clearly an act committed with a terrorism nexus and thus falls within the umbrella concept of maritime terrorism.

This chapter does not deal with acts of violence at sea in general, except where such acts also constitute maritime terrorism, and as may be required for the purposes of distinguishing between violence at sea and certain maritime terrorist offences.



INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM OF 1999

ARTICLE 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Terrorism: There is no single universally recognized definition of “terrorism” under international law. Some examples of definitions found in international instruments are as follows:

UNITED NATIONS SECURITY COUNCIL RESOLUTION 1566 (2004) ON THREATS TO INTERNATIONAL PEACE AND SECURITY CAUSED BY TERRORIST ACTS

PARAGRAPH 3

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature ...

In addition, some international instruments that deal with crimes committed in particular contexts – for example, on board an aircraft – can encompass and apply to terrorist acts, but their offences are not limited to terrorist acts.

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT OF 1970

ARTICLE 1

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act, commits an offence.

Terrorism and the maritime domain: Some international instruments dealing with terrorism in general do make specific reference to the maritime domain. For example, article 3(1)(a) of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents of 1973, requires States to establish jurisdiction over offences, as set out in article 3 of the Convention, when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State.

Further, some international instruments dealing with the security of materials that can be used by terrorists similarly refer to maritime aspects – most often in terms of the security of such material during transport by sea. For example, article 3 of the Convention on the Physical Protection of Nuclear Material of 1979 requires States to protect nuclear material on board a ship or aircraft under its jurisdiction insofar as such ship or aircraft is engaged in the transport to or from that State of such materials.

Maritime terrorism: As with the general concept of terrorism, there is no single or universally accepted definition of the concept of maritime terrorism. The SUA Convention and its Protocols, for example, deal with offences in, from, against or using vessels. While many of these offences do not constitute maritime terrorism, they can, depending on the context of the acts and how each particular offence is incorporated into national law. The SUA Convention and its Protocols will be dealt with in more detail below.

11.2 Differences between piracy and maritime terrorism

It is important to note that while the concepts of piracy and maritime terrorism overlap, they are not interchangeable. Furthermore, some acts of maritime terrorism cannot – by definition – amount to piracy. Maritime terrorism refers, therefore, to a category of offences that is broader than piracy. Some factors that may differentiate an act of piracy from an act of maritime terrorism include:

(a) A State's approach to the question of whether the element of piracy requiring that an act be for "private ends" includes or excludes political motivations expressed through violent means;

(b) There is no "two-ship rule" applicable to all conduct incorporated within the concept of maritime terrorism, whereas the two-ship rule is a fundamental element of piracy as defined in UNCLOS article 101;

(i) Indeed, many of the offences classifiable as maritime terrorism when considering the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, for example, can be perpetrated in, by or from a single vessel;

(ii) For example, the *Achille Lauro* was hijacked in international waters in 1985 by terrorists who had embarked on the ship while it was in port. Because piracy in accordance with UNCLOS requires the involvement of two or more ships, this act could not be properly labelled as piracy. It was nevertheless an act of maritime terrorism;

(c) Piracy, in terms of UNCLOS, can only occur in international waters (that is, in maritime zones beyond territorial seas), whereas many maritime terrorism offences, as defined by the SUA Convention, can also occur in national waters. For example, article 6(1)(b) of the SUA Convention requires that States establish their jurisdiction over article 3 offences committed "in the territory of that State, including its territorial sea...";

(d) The powerful concept of universal jurisdiction applies to piracy but does not apply to acts of maritime terrorism that do not meet the definition of piracy;

- (i) However, many maritime terrorism offences that are not also definable as piracy are subject to “prosecute or extradite” jurisdiction;
- (ii) This is a vital distinction for States and maritime law enforcement officials when considering the jurisdictional options available when dealing with criminal conduct at sea.
- (iii) Article 6 of the Convention requires each signatory State to establish its jurisdiction over these offences, including when committed “against or on board a ship flying the flag of the State at the time the offence is committed”;
- (iv) The Convention also contains articles that deal with cooperation, reporting, and information sharing (e.g., articles 7, 12 and 13), and the obligation of State parties to prosecute or extradite alleged offenders present in their territory (e.g., article 6(4) and article 10);

11.3 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation and Protocols

The SUA Convention and its Protocols were negotiated under the auspices of the International Maritime Organization and form the central element of a package of instruments that deal with violence in, by, from, and against vessels and fixed platforms. This package of instruments also, since 2005, deals explicitly with certain maritime terrorism-related offences, and with certain transport offences (such as transporting terrorists or materials for terrorist use), that involve vessels and fixed platforms at sea.

The main components of the SUA Convention package of instruments are as follows:

(a) The SUA Convention, applies to ships, defined in article 1 as “a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft”;

- (i) However, the Convention does not apply to warships and ships “owned or operated by a State when being used as a naval auxiliary or for customs or police purposes” (as is also the case with piracy per UNCLOS article 102), or ships “withdrawn from navigation or laid up” (article 2(1));
- (ii) The main offences covered by the Convention are found in article 3. These offences are generally characterized as offences dealing with violence at sea. For example, article 3(1)(3) provides for an offence of destroying a ship or causing damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;

(b) In parallel with the SUA Convention, the accompanying Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of 1988 was also negotiated. The Protocol applies many of the Convention provisions to fixed platforms, which are defined in article 1 as “an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes”.

(c) In 2005, after negotiations at the International Maritime Organization, two additional Protocols were opened for signature. The first concerns shipping, and the second is designed to extend the 2005 SUA Protocol provisions to fixed platforms;

- (i) The 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation offers an important elaboration of a range of maritime terrorism offences;
- (ii) When combined with the original text of the Convention – noting that the combined text is relevant only for those States which have ratified both instruments – the distinct maritime terrorism offences are primarily found in articles 3, 3bis, 3ter and 3quater of the Protocol;
- (iii) For example, article 3bis(1)(a) contains the following “terrorist purposes” chapeau for a range of offences: “when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to

abstain from doing any act ...”. In contrast, article 3ter is primarily concerned with the transporting of “another person on board a ship knowing that the person has committed an act that constitutes an offence” under the SUA Convention package of instruments, while article 3quater covers facilitation, organization, attempt and other associated offences and extensions of criminal responsibility.

For those States that ratify the 2005 Protocol, this instrument also contains provisions on a number of operational and enforcement issues which both clarify and extend certain of the authorizations and provisions contained within the Convention (see section 11.7).

11.4 Types of maritime terrorism offences

As noted previously, maritime terrorism offences can include conduct that is recognizable as a normal subject of criminalization (such as violence at sea), as well as conduct that requires specific linkage to a terrorism nexus. Maritime terrorism offences also generally includes ancillary offences (such as attempt or aiding/abetting the primary offence), as well as associated offences that involve conduct at or from the sea that is peripheral to or enables terrorist acts. The following examples are drawn from the SUA Convention and 2005 Protocol.

An example of an offence involving violence at sea that is incorporated within the Convention, but which does not necessarily involve a clear terrorism nexus, is article 3(1)(d). This provision creates an offence covering the situation where a person unlawfully and intentionally “places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship...”

An example of an offence that is recognized (or can be recognized) as a terrorist offence is contained within the 2005 Protocol in article 4(5), which adds article 3bis to the Convention. This provision includes the following offence in article 3bis (1)(a)(i): “Any person commits an offence ... if that person unlawfully and intentionally: (a) when the purpose of the act, by its nature or context, is to intimidate a

population, or to compel a government or an international organization to do or to abstain from doing any act: (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN [biological, chemical or nuclear] weapon in a manner that causes or is likely to cause death or serious injury or damage ...”.

An example of a traditionally ancillary or inchoate offence, drawn from the Convention, is contained in article 3(2)(b). This offence provides that: “Any person also commits an offence if that person: ... abets the commission of any of the offences set forth in [article 3(1) – violence at sea offences] perpetrated by any person or is otherwise an accomplice of a person who commits such an offence...”

An example of a maritime offence that does not necessarily involve violence at sea, but which is nevertheless explicitly associated with a terrorism nexus, is provided by article 4(6) of the 2005 Protocol, which introduces new article 3ter into the Convention. This offence concerns any person who “unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, 3bis or 3quater or an offence set forth in any treaty listed in the annex, and intending to assist that person to evade criminal prosecution”. Such treaties include the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 (the Montreal Convention), and the International Convention for the Suppression of the Financing of Terrorism of 1999. Another example of such an associated offence is indicated in article 4(7) of the 2005 Protocol, which introduces new article 3quater into the Convention. The offence in article 3quater(d) deals with any person who “organizes or directs others to commit an offence set forth in article 3, article 3bis, article 3ter, or subparagraph (a) or (b) of this article...”

The legal contours of offences that reflect violence at sea (such as destruction of property), and routine concepts of ancillary or inchoate offences (such as attempt or aiding/abetting) are well known to law enforcement officials. To that end, the remainder of this section on offences will deal only with the primary attributes of the two sets of offences that focus on maritime and terrorism found in international law as expressed via the SUA Convention and its Protocols. These may be described as the “terrorism offences” and the “transport offences”.

11.5 The “terrorism” offences

Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation and Protocols

One form of reference to a terrorism nexus is explicit reference to this nexus as an element in certain relevant offences in the 2005 Protocol. This approach emphasizes the compulsion element of terrorist acts. In the SUA Convention, the covered offences only exceptionally include a compulsion element or terrorism nexus, although it is clearly capable of including such terrorist acts within its scope. Such an element is found in article 3(2)(c), which provides that “[a]ny person also commits an offence if that person:... threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in [article 3(1)], subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.” The offences are as follows:

(a) Article 3(1)(b): if a person unlawfully and intentionally “performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship”;

(b) Article 3(1)(c): if a person unlawfully and intentionally “destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship”; and

(c) Article 3(1)(e): if a person unlawfully and intentionally “destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship.”

Article 6(2)(c) of the SUA Convention also provides that States parties to the Convention may also assert “jurisdiction over any such offence when: ... it is committed in an attempt to compel that State to do or abstain from doing any act”.

The 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

The 2005 Protocol makes the terrorism nexus of certain acts of violence and transport at sea explicit in two ways.

First, the 2005 Protocol adds additional offences that reflect the offences dealing with violence at seas that are contained in article 3 of the SUA Convention—such as committing violent acts in or from a ship, or using a ship to commit violent acts – but which expressly include a terrorism nexus chapeau. Article 5 of the 2005 Protocol, which for ratifying States introduces a new article 3bis(1) into the SUA Convention, provides that “[a]ny person commits an offence within the meaning of this Convention if that person unlawfully and intentionally: (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”, engages in any of the four sets of conduct which follow. These sets of conduct relate to discharging explosive, radioactive, or biological, chemical or nuclear material in or from a ship in a manner likely to cause death or serious injury, discharging hazardous or noxious cargoes (such as oil or toxic waste) in such quantities as to be likely to cause death or serious injury, using a ship to cause death or serious injury, or threatening to do any of these acts.

The second type of terrorism offence present in the 2005 Protocol is a limited number of specific offences that exist outside the coverage of the terrorism purposes chapeau. One example is the article 4(5) introduction of the article 3bis(1)(b)(i) offence of transporting on board a ship “any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act...”. Another example is the article 4(6) introduction of the new article 3ter offence of “unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, 3bis or 3quater or an offence set forth in any treaty listed in the annex [which lists nine terrorism related conventions], and intending to assist that person to evade criminal prosecution.”

11.6 The “transport” offences

The 2005 Protocol introduced a series of new maritime terrorism-related offences, which are often labelled as the “transport” offences. These offences are of two types. The first type comprises transport

offences in which the terrorism nexus is explicit and forms an element of the offence. The second type comprises transport offences that are of broader application, for which a terrorism nexus is often implicit, but is not necessarily required.

The transport offences in which the terrorism nexus forms an explicit component of the proscribed conduct generally incorporate this nexus via the terrorist purposes chapeau. For example, the transport offence in article 4(5) of the 2005 Protocol, which introduces new article 3bis(b)(i), reads as follows: “transports on board a ship:... any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act...”.

Most of the transport offences in the 2005 Protocol, however, do not explicitly require that they be committed with a terrorism nexus, and do not necessarily require knowledge of a terrorist context. One example is the offence in article 4(5), which is incorporated as new articles 3bis(b)(ii)–(iv). These offences relate to transport of biological, chemical or nuclear weapons, and – with the intention that these items will be used for the purpose of designing, manufacturing or delivering a weapon – any source material, special fissionable material or equipment, or any other equipment, materials, software or related technology that significantly contributes to the design, manufacture or delivery of a such a weapon. It is of course possible that these offences could take place in the context of an underlying terrorist purpose or intent. For example, the master of the ship, or the organizer of the transport, may indeed be engaged in that transport activity in order to provide the materials to a terrorist group, with the intent that they be used as a weapon by that group. However, it is not required that this be the case.

A second example of a transport offence in which a terrorism nexus is not a necessary element of the proscribed conduct is that set out in article 4(6) of the 2005 Protocol. This establishes the new article 3ter offence of “unlawfully and intentionally transport[ing] another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, 3bis or 3quater or an offence set forth in any treaty listed in the annex, and intending to assist that person to evade criminal prosecution”. This offence does not necessarily require that the

person being transported must have committed a terrorism offence, as none of the pre-existing offences contained in article 3 of the SUA Convention, for example, require a terrorism nexus as a definitional element. However, it may be the case that the person being transported has indeed committed an offence for which a terrorism nexus or purpose is a definitional element, such as some of the offences elaborated in the annexed conventions.

11.7 The boarding provisions

The 2005 Protocol contains a well described and comprehensive boarding regime, which is primarily found in article 8bis. Maritime law enforcement officials are defined in article 8bis(10) as follows: “law enforcement or other authorized officials’ means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities duly authorized by their government. For the specific purpose of law enforcement under this Convention, law enforcement or other authorized officials shall provide appropriate government-issued identification documents for examination by the master of the ship upon boarding”.

There are five features of this boarding regime that are of particular relevance for maritime law enforcement operations at sea:

(a) Article 8bis(1): a restatement of the obligation to cooperate for the purposes of good order at sea;

(b) Article 8bis(3): recognition of the difficulties inherent in boarding operations at sea, and that States should therefore “give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere”;

(c) Article 8bis(5): a detailed system of request and response expected under the regime, which is an “opt in” system;

(d) Article 8bis(9): a clear expression of the principles governing the use of force in maritime law enforcement operations carried out in conjunction with the regime, article 8bis(9) states: “[w]hen carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of

force which is necessary and reasonable in the circumstances”;

(e) Article 8bis(10): a detailed set of “safeguards” which are designed to regulate boarding operations carried out under the auspices of the 2005 Protocol and SUA Convention, for those States which have ratified the 2005 Protocol;

- (i) The safeguards regime provides a useful checklist for boarding operations more generally;
- (ii) Some of the specifically listed safeguards include:
 - a. To take due account of the need not to endanger the safety of life at sea;
 - b. To ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law;
 - c. To take due account of the safety and security of the ship and its cargo;
 - d. To take due account of the need not to prejudice the commercial or legal interests of the flag State;
 - e. To ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;
 - f. To ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship’s owner and the flag State at the earliest opportunity;
 - g. To take reasonable efforts to avoid a ship being unduly detained or delayed;
 - h. That any measure taken pursuant to this article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect; and
 - i. The specific definition of “law enforcement or other authorized officials” as noted above.

11.8 “Prosecute or extradite” jurisdiction

As noted previously, it is essential to remember that universal jurisdiction does not apply to acts of maritime terrorism unless they are also acts of piracy. However, for acts of maritime terrorism (and indeed for other acts of violence at sea) that are within the ambit of the SUA Convention and its Protocols—to the extent that the relevant State has ratified these instruments—a “prosecute or extradite” jurisdiction exists. A description of the concept of prosecute or extradite jurisdiction is provided in the key terms section at the beginning of this chapter.

The fundamental elements of prosecute or extradite jurisdictional arrangements, as applicable to the SUA Convention and its Protocols, are summarized below:

(a) The prosecute or extradite jurisdiction is available as a function of, and is thus limited by, the Convention and its Protocols;

(b) The prosecute or extradite jurisdiction applies only between those States that have ratified these instruments. It also depends upon their municipal legal arrangements, which have also taken any necessary implementing actions within their national jurisdiction. See article 6 of the SUA Convention;

(c) The prosecute or extradite jurisdiction applies only to offences within the ambit of the Convention and its Protocols;

(d) The prosecute or extradite jurisdiction does not require that a State with custody of an alleged offender needs to have any other nexus to the alleged offence, other than the fact that they have the alleged offender in their custody;

(e) The main obligation imposed by the prosecute or extradite provisions upon a State which has custody of an alleged offender, but which otherwise has no other jurisdictional nexus to the case, is to communicate with the Flag State of the vessel upon which the alleged offence was committed;

- (i) The purpose of this communication is to agree, as between the flag State and the State with custody of the alleged offender, which of the two options for subsequent proceedings available at this point will be utilized;

- (ii) These options are that the alleged offender be extradited into that flag State's jurisdiction for subsequent proceedings, or alternatively that the State with custody of the alleged offender will prosecute the offender for the relevant SUA offence as incorporated into its national law. See articles 7, 8 and 10 of the SUA Convention.

EXAMPLE: UNITED STATES V. SHI (525 F.3D 709 (2008))

An example of the operation of the SUA Convention prosecute or extradite arrangements is offered by the case of *United States v. Shi*. Shi Lei, a Chinese national, was serving on the fishing vessel Full Means 2, registered in Seychelles. In 2002, at the time of his offences, Full Means 2 was operating in international waters off the coast of Hawaii. Both Seychelles and the United States were signatories to the SUA Convention at the time of the offences – and continue to be.

After being demoted from cook to deckhand, Shi Lei killed the Master and First Mate, took over the ship, and directed that it sail to China. He was subsequently overpowered and detained by the crew. The United States Coast Guard ultimately intercepted the ship in international waters off the coast of Hawaii and took Shi Lei into custody. The United States informed Seychelles, as the flag State of the vessel, of the circumstances of the case in order to determine, among other matters, whether authorities in Seychelles wished for Shi Lei to be extradited into their jurisdiction. Seychelles waived its jurisdiction, which meant that the United States could then exercise its prosecution authority in accordance with the arrangements set out in the SUA Convention, as incorporated into United States law. The United States did so, and Shi Lei was subsequently convicted and sentenced to a period of imprisonment.

Chapter 12

The maritime crime of
illicit traffic
in narcotic drugs and
psychotropic substances
by sea

KEY POINTS

1. The United Nations Convention of the Law of the Sea (UNCLOS) places an obligation upon all States to cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea (article 108). A number of other multilateral treaties, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention), also contain provisions relating to illicit traffic in drugs by sea.
2. No existing treaty expressly grants the authority to board a foreign-flagged vessel suspected of illicit trafficking of narcotic drugs and psychotropic substances on waters seaward of the territorial sea of any State without flag State consent.
3. Parties to the 1988 Convention are required to:
 - (a) Criminalize drug trafficking (article 3);
 - (b) Take measures to ensure that they have jurisdiction over their flag vessels in drug trafficking (article 4); and
 - (c) Cooperate with other parties to suppress illicit traffic by sea (article 17).
4. Coastal States take different views as to their authority to stop and board, and take enforcement action against, a suspected drug trafficking vessel flagged by another State without that State's consent while that vessel claims to be exercising the right of innocent passage.
5. There is also no consensus regarding the extent to which a coastal State may "prevent" a breach of its FISC laws in its contiguous zone. Some coastal States may permit action by their maritime law enforcement agents to seize such drugs where it is reasonably suspected that the vessel's next port of call is within that coastal State.

KEY TERMS

AUTHORIZED VESSELS: Those official State vessels, including warships, marine police vessels and other specifically identified State vessels on non-commercial service, which are authorized to engage in maritime law enforcement operations on behalf of their State.

TERRITORIAL SEA: A belt of water which extends up to 12 nautical miles (nm) from the baseline of a State and which is regarded as sovereign waters of that State.

ARCHIPELAGIC WATERS: Waters inside the baselines of an archipelagic State. Archipelagic waters are sovereign waters.

INTERNATIONAL WATERS: Waters over which no State has sovereignty, although coastal States and flag States may hold certain enforcement rights depending upon the activity and location. International waters include the contiguous zone, the exclusive economic zone and the high seas.

COMPETENT NATIONAL AUTHORITY: The position, agency or person designated under a mechanism (e.g. the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 or the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its protocols) as the point of contact for facilitating communication and cooperation between States parties with a view to effective implementation of treaty obligations.

12.1 How is illicit traffic in narcotic drugs and psychotropic substances by sea dealt with in UNCLOS?

UNCLOS requires cooperation in suppressing illicit traffic in narcotic drugs and psychotropic substances. For the purposes of this Manual, this will be referred to in short form as “illicit traffic in drugs by sea”.

The requirement of cooperation laid down in article 108, when combined with the near-universal acceptance of the 1988 Convention, signals that States consider countering illicit traffic in drugs by sea to be a matter of significant concern.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 108

Illicit traffic in narcotic drugs or psychotropic substances

1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

12.2 The 1988 Convention and the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea

Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provides States with express guidance regarding the implementation of article 108 of UNCLOS. The preambular language to the 1988 Convention has continued resonance today:

“Recognizing that eradication of illicit traffic is a collective responsibility of all States and that, to that end, coordinated action within the framework of international cooperation is necessary,
 ...

Recognizing also the importance of strengthening and enhancing effective legal means for international cooperation in criminal matters for suppressing the international criminal activities of illicit traffic,
 ...”

UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES OF 1988

ARTICLE 17

Illicit Traffic by Sea

1. The Parties shall cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.
2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
3. A Party which has reasonable grounds to suspect that a vessel exercising 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 authorization from the flag State to take appropriate measures in regard to that vessel.
4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia:
 - (a) Board the vessel;
 - (b) Search the vessel;
 - (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.
5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.
- ...
6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.
7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

The combined effect of article 108 of UNCLOS and article 17 of the 1988 Convention is that in the absence of flag State consent, a pre-existing flag State authority or a chapter VII mandate from the United Nations Security Council (see chapter 5), the situation is as follows:

- (a) An authorized vessel of a coastal State,
- (b) Which approaches,
- (c) In international waters,
- (d) A vessel flagged to a different State,
- (e) On the suspicion that this vessel is involved in trafficking illicit drugs by sea,
- (f) Must first ask that flag State for permission to board before undertaking further enforcement action,
- (g) Or await the suspect vessel's entry into national waters of the coastal State (or, if such authority is claimed by the coastal State, the contiguous zone) prior to taking enforcement action on the basis of that coastal State's own territorial jurisdiction.

The 1988 Convention also contains more generally applicable provisions on drug trafficking matters, such as provisions on conduct to be criminalized (article 3), mutual legal assistance (article 7) and international cooperation and assistance for transit States (article 10). These provisions do not refer directly to illicit traffic in drugs by sea, but they do apply to such conduct as a subset of the general subject matter covered by the scope of the Convention.

Article 4, which describes the jurisdiction that States parties are to establish over the offences set out in the 1988 Convention, is a key component of the regime established by the Convention.

UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES OF 1988

ARTICLE 4

Jurisdiction

1. Each Party:
 - (a) Shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:
 - (i) The offence is committed in its territory;
 - (ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;
 - (b) May take such measures as maybe necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:
 - (i) The offence is committed by one of its nationals or by a person who has his habitual residence in its territory;
 - (ii) The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article;
 - (iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c) (iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.
2. Each Party:
 - (a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:
 - (i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or
 - (ii) That the offence has been committed by one of its nationals;
 - (b) May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.
3. This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

The 1988 Convention contains a number of important definitions which define its scope and which are also useful to national jurisdictions in defining the scope of narcotic substance prohibitions in their own national laws.

UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES OF 1988

ARTICLE 1

Definitions

...

(n) "Narcotic drug" means any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

...

(p) "Proceeds" means any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1;

...

(r) "Psychotropic substance" means any substance, natural or synthetic, or any natural material in Schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971...

Finally, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 requires each State party to designate a competent national authority, which is a key element in the effective implementation of treaty obligations and handles any issues that may arise, including:

- (a) Extradition;
- (b) Mutual legal assistance;
- (c) Confirmation of registry;
- (d) Authorization for stop, board and search operations; and
- (e) Requests for waivers of jurisdiction or responses to waiver requests.

Best practices for competent national authorities include:

- (a) 24/7 availability, including back-up support where necessary;

UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES OF 1988

ARTICLE 7

Mutual Legal Assistance

...

8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General. ...

(b) Awareness of contact information for government officials who may need to be involved in processing or responding to requests;

(c) Ability to notify government officials of a request expeditiously;

(d) Ability to communicate decisions on behalf of the government expeditiously, including the ability to confirm vessel registry expeditiously; and

(e) Ensuring the existence of a framework that supports national-level decision-making, where necessary, including the conduct of regular exercises to prove and test the system.

12.3 Other multilateral instruments with a direct bearing on cooperation in suppressing illicit traffic in drugs by sea

Another important multilateral treaty relevant to illicit traffic in drugs by sea is the United Nations Convention against Transnational Organized Crime and the Protocols thereto (2000).

The Organized Crime Convention contains provisions on a number of vital international criminal cooperation matters, including law enforcement cooperation, extradition, mutual legal assistance, money-laundering and dealing with the proceeds of crime.

This Convention is relevant to suppressing illicit traffic in drugs by sea because the scope of its subject matter specifically includes drug smuggling offences, provisions dealing with proceeds and assets of crime that may be drug-related, and involvement in criminal structures that are engaged in illicit drug trafficking.

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO (2000)

ARTICLE 2

Use of terms

For the purposes of this Convention:

(a) “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;

(b) “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

...

(e) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

...

Additionally, a number of regional or bilateral treaties—either specifically or more generally—address cooperation to suppress the illicit traffic in drugs by sea. These arrangements can be categorized as follows:

(a) Regional treaties addressing illicit traffic in drugs by sea;

(b) Regional treaties that deal with more general or associated issues but contain obligations, processes or mechanisms that can be utilized in suppressing illicit traffic in drugs by sea;

(c) Bilateral treaties specifically dealing with the implementation of obligations in relation to illicit traffic in drugs by sea between two States; and

(d) Bilateral treaties that address more general or associated issues but contain obligations, processes or mechanisms that can be utilized in cooperation for the purpose of suppressing illicit traffic in drugs by sea.

Specifically focused regional treaties: One example of a regional treaty that specifically addresses illicit traffic in drugs by sea is the Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted by the Council of Europe in 1995. This regional treaty deals with matters such as jurisdiction, authorization processes, enforcement measures and damages. Of particular interest is the specific provision relating to regional

COUNCIL OF EUROPE: AGREEMENT ON ILLICIT TRAFFIC BY SEA, IMPLEMENTING ARTICLE 17 OF THE UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (1995)

ARTICLE 5

Vessels without nationality

1. A Party which has reasonable grounds to suspect that a vessel without nationality, or assimilated to a vessel without nationality under international law, is engaged in or being used for the commission of a relevant offence, shall inform such other Parties as appear most closely affected and may request the assistance of any such Party in suppressing its use for that purpose. The Party so requested shall render such assistance within the means available to it.

2. Where a Party, having received information in accordance with paragraph 1, takes action it shall be for that Party to determine what actions are appropriate and to exercise its jurisdiction over any relevant offences which may have been committed by any persons on board the vessel.

3. Any Party which has taken action under this article shall communicate as soon as possible to the Party which has provided information, or made a request for assistance, the results of any action taken in respect of the vessel and any persons on board.

and national arrangements for dealing with a vessel that is suspected of being engaged in illicit traffic in drugs by sea and is also without nationality.

This article contemplates that a State party to the Agreement may assert jurisdiction over a vessel without nationality that is suspected of involvement in illicit drug trafficking by sea if such action is authorized in that State party’s national law. That State may do so where the suspect vessel is apprehended within either:

(a) International waters; or

(b) The national waters of the State party to the treaty asserting this jurisdiction; or

(c) The national waters of another State party to the treaty, where that State has asked the prosecuting State to assist by apprehending the suspect vessel with a view to the apprehending State then exercising its own jurisdiction over the vessel and crew.

More general regional treaties with implications for the suppression of illicit traffic in drugs by sea: An example of a more general regional treaty that does not specifically address illicit traffic in drugs by sea but can nevertheless be utilized in that particular context is the African Union Convention on Preventing and Combating Corruption (2003).

AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION (2003)

ARTICLE 4

Scope of Application

1. This Convention is applicable to the following acts of corruption and related offences:

...

(c) any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;

...

ARTICLE 13

Jurisdiction

1. Each State Party has jurisdiction over acts of corruption and related offences when:

(a) the breach is committed wholly or partially inside its territory;

(b) the offence is committed by one of its nationals outside its territory or by a person who resides in its territory; and

(c) the alleged criminal is present in its territory and it does not extradite such person to another country;

(d) when the offence, although committed outside its jurisdiction, affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party.

...

This regional treaty does not deal specifically with illicit traffic in drugs by sea. However, in a situation where no specific offence in relation to illicit traffic in drugs by sea exists within a particular State jurisdiction, an offence under this treaty may nevertheless still be chargeable.

For example, conduct involving an official of the shipping registry of a State that is party to this corruption-focused Convention (and that has incorporated these corruption offences into its national law) might still be subject to prosecution for an offence related to accepting a private benefit for the registration of a vessel involved in illicit traffic in drugs by sea.

Bilateral treaties specifically dealing with the implementation of obligations in relation to illicit traffic in drugs by sea: An example of a bilateral instrument which specifically deals with cooperation and coordination in suppressing illicit traffic in drugs by sea is the Agreement between the Government of the United States of America and the Government of

Barbados Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking (1997).

This instrument defines terms and addresses coordination, training arrangements, registration verification procedures and jurisdiction over detained vessels. The Agreement also addresses operational issues in maritime law enforcement, such as the pursuit of a suspect vessel into the other party's national waters and the use of force.

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF BARBADOS CONCERNING COOPERATION IN SUPPRESSING ILLICIT MARITIME DRUG TRAFFICKING (1997)

ARTICLE 6

Pursuit and Entry

1. Subject to paragraph 3, where a suspect vessel or aircraft located seaward of the territorial sea of any State is pursued by a law enforcement vessel, the suspect vessel or aircraft may be followed by that law enforcement vessel into the territorial sea of either Party.

2. Subject to paragraph 3, where a suspect vessel or aircraft is located within or over the territorial sea of one Party, and no law enforcement official of that Party is embarked on a law enforcement vessel, and having ascertained from the law enforcement authorities of that Party that no law enforcement vessel of that Party is immediately available to investigate, a law enforcement vessel of the other Party may enter the territorial sea of the first Party in order to maintain contact with the suspect vessel or aircraft and to keep it under surveillance until the law enforcement officials of the first Party take control of the situation.

3. The Party conducting the pursuit or entry shall inform the law enforcement authorities of the other Party of the circumstances of the situation and request appropriate instructions. Pending the receipt of instructions or the arrival of the law enforcement officials of the other Party, the law enforcement vessel may order or signal the suspect vessel to stop in the territorial sea of the other Party. The Party conducting the pursuit or entry shall keep the other Party continuously informed of the situation and the law enforcement vessel shall render only such further assistance as is directed by the law enforcement officials of the other Party.

4. If directed by the law enforcement officials of the other Party, the law enforcement vessel may escort the suspect vessel to a specified location for delivery to the law enforcement officials of the other Party.

5. The provisions of Article 13, and in particular paragraph 6 thereof, apply to any use of force under this Article, mutatis mutandis, including enforcement of any order or signal under paragraph 3 of this Article.

...

ARTICLE 13**Use of Force**

1. Any use of force by a Party pursuant to this Agreement shall be in strict accordance with applicable laws and procedures of the Parties and shall in all cases be the minimum reasonably necessary under the circumstances.
2. Any use of force by a Party within Barbados or United States waters pursuant to this Agreement shall be in strict accordance with the laws and procedures of the Party within whose waters the force is used.
3. Authorisations to stop, board, search and detain vessels and persons on board include the authority to use force in accordance with this Article.
4. When conducting boarding and searches in accordance with this Agreement, law enforcement officials shall avoid the use of force in any way, including the use of firearms, except in the exercise of the right of self-defence, and in the following cases:
 - (a) to compel the suspect vessel to stop when the vessel has ignored the respective Party's standard warnings to stop; and
 - (b) to maintain order on board the suspect vessel during the boarding and search or the period of detention, when the crew or persons on board resist, impede the boarding and search or try to destroy the vessel or evidence of the illicit traffic, or when the vessel attempts to flee during the boarding and search or the period of detention.
5. Authorised law enforcement officials shall discharge their firearms only when it is not possible to apply less extreme measures.
6. In all cases when the discharge of firearms is required, it shall be necessary to have the previous authorisation of the flag or coastal State except when warning shots are required as a signal for a vessel to stop, or in the exercise of the right of self-defence.
7. Nothing in this Agreement shall impair the exercise of the inherent right of self-defence by the law enforcement or other officials of the Parties.

Agreements designed to implement specific arrangements between two States can often be more detailed and precise than is generally the case with broad multilateral treaties such as UNCLOS and the 1988 Convention. As a result, such bilateral agreements often set in place specific, tailored arrangements in relation to how two States will coordinate their suppression of illicit trafficking of drugs by sea.

Bilateral treaties that deal with more general or associated issues but contain obligations, processes or mechanisms that can be utilized in suppressing illicit traffic in drugs by sea: An example of a more general bilateral instrument which can be employed by its parties in

cooperating in the suppression of illicit traffic in drugs by sea is the Extradition Treaty between the Republic of the Philippines and the Republic of Indonesia (1976).

This bilateral instrument deals with the general mechanisms and processes of extradition between Indonesia and the Philippines. However, the Treaty is also relevant to cooperative action between the two States in relation to suppressing illicit traffic in drugs by sea because the categories of crimes listed as extraditable include "smuggling" and "crimes against the laws relating to narcotics, dangerous or prohibited drugs or prohibited chemicals".

Should the Philippines arrest an Indonesian-flagged vessel which is engaged in illicit traffic in drugs by sea and its investigations determine that the "kingpin" behind the shipment was an Indonesian national (who was not on board the arrested vessel), this treaty could form the basis for cooperation between the two States in prosecuting the kingpin.

12.4 Can Security Council action affect this situation?

Unless there is a special arrangement between States regarding authorities for boarding a suspected drug trafficking vessel in international waters, the "default rule" applies. In other words, jurisdiction generally remains with the flag State in international waters. As discussed above, there are circumstances where a coastal State vessel may board and assert jurisdiction over a foreign-flagged vessel suspected of illicit drug trafficking, but no consensus exists on this issue. The options are generally limited to:

- (a) Informing the flag State of the details of the vessel and grounds for suspicion, with a view to the flag State exercising its own jurisdiction over the vessel and people in the vessel as appropriate; or
- (b) Informing the flag State of the details of the vessel and grounds for suspicion, with a view to the flag State confirming registry, authorizing a boarding operation and waiving jurisdiction over the vessel, as appropriate;
- (c) Informing the coastal State of the suspect vessel's apparent next port of call, with a view to that coastal State exercising its jurisdiction of the vessel once it enters that coastal State's national waters.

As noted in chapter 5, an exception to the general rule of flag State jurisdiction exists where the United

Nations Security Council passes an appropriately worded chapter VII resolution that explicitly authorizes boarding and/or applies alternative jurisdictional options in relation to the vessel. To date, this has not occurred specifically in relation to illicit traffic in drugs by sea. Nevertheless, it is entirely foreseeable that the illicit traffic in drugs by sea could in some situations amount to a threat to international peace and security or—as with Somali piracy—constitute a factor exacerbating a more general threat to international peace and security.

12.5 How can maritime drug trafficking offences be incorporated into national criminal or penal law?

There is no set format or manner in which offences in relation to illicit traffic in drugs by sea must be incorporated into national law. As with all such offences, it is vital that any such incorporation be coherent within the general criminal or penal law scheme of the relevant State so that the offences can be investigated, interpreted and applied readily by the law enforcement agents and within the courts of that State.

Additionally, and in contrast to the offence of piracy, for example, a specifically tailored offence of

illicit traffic in drugs by sea may not be required in all circumstances. For example, if a State can prosecute a general offence of “transporting drugs” but also has a separate jurisdictional reach that includes vessels flying its flag, and/or its nationals wherever they may be physically located at a given time, then it may still be able to prosecute conduct arising from the seizure, in international waters, of a vessel engaged in illicit traffic in drugs.

Similarly, a fact nexus specifically related to illicit traffic in drugs by sea could be prosecuted under laws which do not specifically target drug crime. For example, the arrest and seizure of a vessel suspected of illicit drug trafficking by authorized maritime law enforcement agents in international waters may also support prosecution under more general organized crime laws, e.g. for corruption or money-laundering. It is vital that the international waters venue of the actual conduct should not always be perceived as a jurisdictional bar. In many cases involving illicit traffic in drugs by sea, there are other jurisdictional bases available apart from the flag State nationality of the vessel. These alternative bases may include the nationality of the perpetrators or some other direct effect of the criminal conduct upon the State seeking to take action, such as being a destination for the illicit drugs.



CHAPTER 13

Smuggling of migrants by sea

KEY POINTS

1. The United Nations Convention against Transnational Organized Crime is supplemented by the Protocol against the Smuggling of Migrants by Land, Sea and Air. The Protocol is the primary international treaty applicable to the smuggling of migrants.
2. The United Nations Convention on the Law of the Sea (UNCLOS) provides the general framework for the application of the Organized Crime Convention and its Smuggling of Migrants Protocol at sea, establishing jurisdictional foundations for law enforcement action.
3. Migrants smuggled by sea face particular dangers due to the nature of smuggling by sea. Law enforcement operations and rescue operations often overlap in responding to smuggling of migrants cases. Rescue operations, governed by UNCLOS, the International Convention on Maritime Search and Rescue of 1979 (SAR Convention) and the International Convention for the Safety of Life at Sea of 1974 (SOLAS Convention), must take precedence over law enforcement actions.
4. The international legal framework applicable to migrant smuggling does not target migrants but, rather, the perpetrators of the crime: the migrant smugglers.
5. No existing multilateral treaty allows, without the consent of the flag State, the boarding of a foreign-flagged vessel suspected of being engaged in migrant smuggling.
6. The United Nations Security Council has adopted resolutions which in particular situations authorize an interdiction regime in addition to the international legal framework applicable to migrant smuggling.

KEY TERMS

MIGRANT SMUGGLING/SMUGGLING OF MIGRANTS: The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident.

ILLEGAL ENTRY: Crossing borders without complying with the necessary requirements for legal entry into the receiving State.

REFUGEES: Those persons unable or unwilling to return to their country of origin, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

FINANCIAL BENEFIT: Payments, bribes, rewards, advantages, privileges and services, including sexual services.

INTRODUCTION

The issue of the smuggling of migrants by sea is a complex area of law and law enforcement. Law enforcement actions may turn into rescue operations and vice versa, and human rights and refugee law often play a role in assessing and responding to each situation. Different laws and obligations will apply depending

upon the specific situation. Moreover, the vulnerability of smuggled migrants often means that other forms of criminal activity, including violence, rape, theft, kidnapping, extortion and human trafficking, are also relevant to any response to smuggling of migrants by sea.

The UNODC *Global Study on Smuggling of Migrants*, published in June 2018, found evidence that, in 2016, there was a minimum of 2.5 million migrants smuggled for an estimated economic return of \$5.5 billion–7 billion. While smuggling by sea accounts for a small portion of overall migrant smuggling, the particular dangers it entails make it a priority for response. In 2017, it was estimated that 3,597 fatalities were due to drowning at sea. This represents 58 per cent of the overall reported migrant fatalities that year.

“SMUGGLING OF MIGRANTS” IS DISTINCT FROM “TRAFFICKING OF PERSONS”

There is an important legal difference between smuggled persons and trafficked persons. Trafficking in persons falls outside the scope of the present chapter. However, for clarity it is important to note the difference between the two. “Human trafficking” applies to a number of different forms of trafficking that include, among others, sexual exploitation, forced labour, forced begging and trafficking in human organs. Human trafficking is a criminal activity that brings high profits to traffickers through the acquisition and exploitation of human beings by improper means such as force, fraud or deception. The smuggling of migrants, in contrast, involves facilitating of the illegal entry of a person into a State of which that person is not a national or permanent resident, for financial or other material benefit. A key difference is that victims of trafficking are considered victims of a crime under international law, while smuggled migrants are not: they pay smugglers to facilitate their movement.

13.1 The United Nations Convention on the Law of the Sea and the smuggling of migrants

UNCLOS does not directly address the crime of migrant smuggling. This is different from crimes such as piracy and drug trafficking. Nevertheless, through its expression of the rules governing relationships and jurisdiction at sea, UNCLOS provides the essential legal background for the application of the primary

legal instrument related to the smuggling of migrants by sea: the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (the Smuggling of Migrants Protocol).

UNCLOS does this by prescribing which actions can be taken by States in which maritime zone and therefore lays the jurisdictional foundation for the maritime interdiction of migrant smuggling activities at sea.

For a detailed discussion of the different maritime zones, see chapters 3 and 4 of the present Manual. A brief review of the coastal State's powers in the relevant maritime zones in relation to the smuggling of migrants is as follows:

Internal waters: A coastal State has full authority to exercise jurisdiction over a vessel suspected of migrant smuggling in its internal waters.

Territorial sea: A coastal State has full authority to exercise law enforcement jurisdiction over a vessel suspected of migrant smuggling in its territorial sea. Article 19(2)(g) of UNCLOS stipulates that passage is not deemed innocent if “the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State” occurs. However, where a vessel involved in smuggling migrants (destined for another State) is merely transiting through the territorial sea of a different State, with no intention of disembarking those migrants in that territorial sea or in the territory of that State, this conduct may not necessarily be a violation of the innocent passage regime. Article 21 of UNCLOS covers the laws and regulations of the coastal State relating to innocent passage through the territorial sea.

Contiguous zone: A coastal State can claim additional law enforcement rights and may act to punish or prevent infringements of its fiscal, immigration, sanitary or customs laws and regulations. For example, in the case of the smuggling of migrants at sea, it is possible that a coastal State could prevent the entry of a smuggling vessel into its territorial sea to preclude a violation of its immigration law.

Exclusive economic zone: A coastal State has no particular power to act against migrant smuggling in its exclusive economic zone as the crime is not related to its resources.

International waters: Unless one of the authorizations under article 110 (Right of visit) of UNCLOS is applicable, or another exception is relevant (for example, a United Nations Security Council resolution—see section 13.6; or a bilateral agreement), the default rule is that an authorized vessel may board a vessel suspected of migrant smuggling in international waters only with the flag State's consent. This is specifically reaffirmed in article 8 of the Smuggling of Migrants Protocol (see section 13.3). For the purposes of this paragraph, international waters include all maritime zones beyond the territorial sea, unless a contiguous zone is claimed and contiguous zone rights are engaged.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 98

Duty to render assistance

1. 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:

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him...

UNCLOS also establishes a duty to render assistance to any person in distress. This includes, for example, suspected perpetrators of migrant smuggling and smuggled persons on an unseaworthy or capsized vessel. Masters of civilian vessels, as well as commanding officers of government vessels, must prioritize rescue operations over considerations related to law enforcement.

This obligation is also contained in the International Convention for the Safety of Life at Sea of 1974 (SOLAS Convention) and the International Convention on Maritime Search and Rescue of 1979 (SAR Convention) (see sections 13.4 and 13.5), which set minimum standards related to rescue operations.

The duty to render assistance exists in all maritime zones.

13.2 The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (Smuggling of Migrants Protocol)

The United Nations Convention against Transnational Organized Crime is the primary international legal instrument applicable to transnational organized crime, including the offences established in accordance with the Smuggling of Migrants Protocol. The Organized Crime Convention obliges State parties to:

(a) Criminalize the laundering of proceeds of migrant smuggling (article 6);

(b) Adopt measures to establish the liability of legal persons for migrant smuggling (article 10);

(c) Adopt measures to establish the broad jurisdictional application of migrant smuggling provisions (article 15);

(d) Cooperate in investigation, prosecution, and judicial proceedings for migrant smuggling and related conduct through joint investigations (article 19), mutual legal assistance (article 18) and extradition (article 16);

(e) Provide channels of communications and other means for law enforcement cooperation in investigating migrant smuggling offences (article 27).

Pursuant to article 15 of Organized Crime Convention, States parties are to establish jurisdiction over the offences prescribed by the Convention or its supplementing Protocols. This includes the smuggling of migrants.

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 15

Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party;

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is:

(i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;

(ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.

[...]

The Smuggling of Migrants Protocol is the primary international instrument applicable to migrant smuggling. Its aim is to prevent and combat the smuggling of migrants while also protecting the rights of the persons being smuggled. As the Protocol supplements the Organized Crime Convention, the provisions of the Convention apply to all the offences to be established in accordance with the Protocol, provided certain conditions are met: that the offence is transnational and that it is committed by an organized criminal group. By ratifying the Protocol, States acknowledge the need to foster and enhance close international cooperation to tackle the smuggling of migrants.

Part II of the Protocol deals specifically with smuggling of migrants by sea and is addressed in more detail in section 13.3.

Definitions

Smuggling of migrants and illegal entry: Article 3 of the Protocol defines smuggling of migrants and illegal entry:

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 3

Use of terms

For the purposes of this Protocol:

(a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

In general, the elements of migrant smuggling under the Protocol are:

(a) The procurement of the illegal entry of a person

(b) Into or in a country of which that person is not a national or permanent resident

(c) For financial or other material benefit.

It is important to note that this definition, by including the financial or other material benefit element, does not extend liability to the actions of persons who assist migrants to gain illegal entry on purely altruistic grounds or based on close family ties. A financial or other material benefit is to be interpreted broadly to include payments, bribes, rewards, advantages, privileges and services, including sexual services.

Vessel: Article 3 of the Smuggling of Migrants Protocol also defines “vessel”.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 3

Use of terms

For the purposes of this Protocol:

(d) “Vessel” shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

A vessel “engaged” in the smuggling of migrants should be understood to include both direct engagement (carrying the migrant) as well as indirect engagement (motherships or support vessels). This was confirmed in the interpretative notes to the Organized Crime Convention and its Protocols (A/55/383/Add.1, para. 102).

Offences in terms of the Protocol

Article 4 of the Protocol calls on States parties to prevent, investigate and prosecute migrant smuggling while protecting the rights of persons who have been the object of such offences.

Article 6 criminalizes migrant smuggling and related offences, such as enabling a person by illegal means to remain in a State in which he/she is not a national or producing or procuring a fraudulent travel or identity document in order to obtain a financial or material benefit. Criminalizing the smuggling of migrants is the central obligation for States parties to the Protocol. The Protocol also requires States to

criminalize attempt and complicity, and provides for aggravating circumstances in certain cases.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 6

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document;

(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article;

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

Several provisions of the Protocol reflect international human rights standards and norms, particularly the fundamental rights to life and freedom from torture and inhumane treatment. In this respect, article 6(3) stipulates that the infringement of such rights has to be considered in national legislation at least as an aggravating circumstance. The importance of protecting the rights of migrants is also reflected in articles 4, 5, 9, 16 and 19, as is discussed below.

The Protocol does not use the term “victims” with reference to migrants, but rather “persons that have been the object of such offences”. Article 5 of the Protocol provides that migrants shall not become liable to criminal prosecution for the mere fact of being the objects of the conduct set forth in article 6.

The Protocol, however, does not prevent States from holding migrants liable for other offences, such as document fraud (see article 6(4) of the Protocol).

13.3 Part II of the Protocol against the Smuggling of Migrants by Land, Sea and Air: smuggling of migrants by sea

Part II of the Protocol deals specifically with the smuggling of migrants by sea. Article 7 calls for cooperation

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 5

Criminal liability of migrants

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 7

Cooperation

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

between States parties and reinforces the connection between the Protocol and UNCLOS, as it underscores the requirement for States parties to cooperate in accordance with the international law of the sea.

Measures to be taken by intercepting States

Article 8 sets out measures available to States when responding to the smuggling of migrants at sea. It is designed to facilitate cooperation between States parties in maritime law enforcement by clearly defining law enforcement actions that may be taken in relation to smuggling of migrants involving the vessels of another State party. As described in article 8, the flag State may authorize a requesting State party to board, search and “take appropriate measures” with respect to a suspected migrant smuggling vessel flying its flag.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 8

Measures against the smuggling of migrants by sea [...]

2. 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 authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize 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.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

[...]

Article 9 subjects the measures prescribed by article 8 to a detailed set of safeguards, recognizing the unalienable nature of fundamental human rights. Article 9(1) requires States parties to ensure the safety and humane treatment of the persons on board. It also requires States to take due account of additional rights and interests, such as the security of the vessel and its cargo, the commercial and legal interests of the flag State or any other interested State, as well as the environment. Article 9(2) further establishes an obligation to compensate a vessel if the grounds for boarding, searching or other measures proved to be unfounded.

The Protocol does not limit the exercise of maritime search powers to only warships and military aircraft. It is open to legislatures to extend such powers to any official or agency with appropriate law enforcement powers. However, article 9(4) requires that any boats, ships or aircraft used for such a purpose must be clearly marked and identifiable as being on government service and authorized to that effect.

Article 16 of the Protocol stipulates further duties of States intercepting migrants at sea. Such provisions apply during both maritime law enforcement operations and rescue operations.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 9

Safeguard clauses

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

(a) Ensure the safety and humane treatment of the persons on board;

(b) Take due account of the need not to endanger the security of the vessel or its cargo;

(c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

(d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken. [Note: This also appears in UNCLOS, article 110 (3).]

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 16

Protection and assistance measures

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

Persons rescued are entitled to be disembarked in a “place of safety”. To comply with human rights obligations and article 16 of the Protocol, an analysis of

the most appropriate place of disembarkation must be conducted on a case-by-case basis. The International Maritime Organization has issued guidelines in this regard.

INTERNATIONAL MARITIME ORGANIZATION RESOLUTION MSC.167(78): GUIDELINES ON THE TREATMENT OF PERSONS RESCUED AT SEA (NON-BINDING)

Place of safety

6.12 A place of safety [...] is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.

[...]

6.14 A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.

6.15 The Conventions, as amended, indicate that delivery to a place of safety should take into account the particular circumstances of the case. These circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units. Each case is unique, and selection of a place of safety may need to account for a variety of important factors.

Where migrants are not intercepted within the framework of a rescue operation, their disembarkation must still comply with article 16 of the Smuggling of Migrants Protocol. Returning migrants to a place where they could be subjected to torture or other cruel, inhuman or degrading treatment or punishment would amount to a violation of their human rights and the Protocol

Human rights and saving clause

Protecting the human rights of migrants is an important aspect of the Protocol, and maritime law enforcement and rescue operations must adhere to applicable international human rights standards and international and regional human rights instruments.

Article 19 reiterates obligations that exist independently of the Protocol, such as non-refoulement and non-discrimination.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME OF 2000

ARTICLE 19

Saving clause

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

The concept of non-refoulement is an obligation under customary international law, and is described in article 33 of the Convention relating to the Status of Refugees of 1951, which prohibits States parties from “expel[ing] or return[ing] (“refouler”) a refugee [...] to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”

Article 1 of the Convention relating to the Status of Refugees defines “refugees”, in short, as those persons unable or unwilling to return to their country of origin, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. (See article 1 of the Convention for the full definition.)

Assessments of refugee status of the person seeking that status (known as the asylum seeker) have to be conducted by competent authorities. The conduct of such assessments should not impede or delay the asylum seeker from reaching a place of safety.

13.4 International Convention on Maritime Search and Rescue of 1979 (SAR Convention)

States are obliged to provide basic assistance to those who are in distress at sea. This takes priority over the

investigation of crimes and procedures for evaluating refugee status. Basic assistance means ensuring migrants are safe and that medical assistance, food, water, clothing, accommodation or any other immediate need is met. This is applicable during both maritime law enforcement operations and rescue operations and is reflected in chapters 1 and 2 of the annex to the SAR Convention, and article 16 of the Smuggling of Migrants Protocol.

EXAMPLE: COURT OF CATANIA (ITALY)

PROC. NR 675/2016 R.I.M.C.

[Excerpt of summary as published in the United Nations Office on Drugs and Crime Sharing Electronic Resources and Laws and Crime (SHERLOC) portal]

The intervention of national authorities [in the form of a search and rescue operation at sea] occurs as part of the criminal plan designed by the organized criminal group. Once authorities are aware of the precarious conditions migrants are travelling in, they are under the national [...] and international obligation to take action and attempt to rescue the endangered migrants. In this sense, authorities act under a state of necessity (in order to prevent a greater harm, i.e., the death of migrants). They are used by the organized criminal group so as to ensure the production of the ultimate goal of the criminal plan in Italian soil. Accordingly, the Italian jurisdiction is triggered, preventing an impunity gap and giving, inter alia, effect to article 5 of the Organized Crime Convention.

13.5 International Convention for the Safety of Life at Sea of 1974 (SOLAS Convention)

The SOLAS Convention will apply to migrant smuggling in the case of rescue operations. Regulation 33 of chapter V of the SOLAS Convention reflects UNCLOS article 98 regarding the obligation of vessel masters to conduct rescue operations when safety at sea is endangered, regardless of migrants possibly being undocumented.

INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA OF 1974

CHAPTER V, REGULATION 33 (1)

Distress messages: obligations and procedures

1. The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so.

13.6 Security Council resolutions

In addition to the international legal framework applicable to migrant smuggling, the United Nations Security Council may establish special interdiction regimes

Some migrant smugglers have exploited the obligation by States parties to conduct rescue operations and rely on such rescue operations for the final leg of the smuggling operation, i.e., reaching the territory of the destination State. In some jurisdictions, the exploitation of the rescue operation by the criminal organization is considered part of the commission of the crime.

in international waters when faced with crises. For example, Security Council resolution 2240 (2015), further extended by resolutions 2312 (2016) and 2380 (2017), was adopted in response to the massive loss of life of migrants and trafficked persons suffered due to smuggling operations in the Mediterranean Sea.

This series of Security Council resolutions act as supplementary international legal instruments designed to respond to the smuggling of migrants and related conduct in the Mediterranean Sea. These resolutions authorize Member States to inspect vessels on the high seas off the coast of Libya in cases where States had reasonable grounds to suspect that such vessels were being used for migrant smuggling or human trafficking from Libya. This could be done without the flag State's consent, although Member States were invited to make good faith efforts to obtain the flag State's consent prior to using the authority to inspect the vessel as set out in Security Council resolution 2240 (2015). Member States were further authorized to seize and dispose of vessels and other maritime assets that were confirmed, through inspection, as being used for migrant smuggling or human trafficking. The authorizations provided in Security Council resolution 2240 (2015) are generally understood to relate to law enforcement actions. The resolution does not provide specific guidance on the establishment of jurisdiction for criminal prosecution.

Paragraph 9 of the Security Council resolution 2240 (2015) calls upon all flag States that undertake inspections and interdictions under the terms of the resolution to cooperate with and keep flag States informed of actions taken with respect to their vessels. In turn, flag States that receive such requests should review and respond to them in a rapid and timely manner.

SECURITY COUNCIL RESOLUTION 2240 (2015)

[...]

7. Decides, with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels as mentioned above, to authorize, in these exceptional and specific circumstances, for a period of one year from the date of the adoption of this resolution, Member States, acting nationally or through regional organizations that are engaged in the fight against migrant smuggling and human trafficking, to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, provided that such Member States and regional organizations make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph;

8. Decides to authorize for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organisations to seize vessels inspected under the authority of paragraph 7 that are confirmed as being used for migrant smuggling or human trafficking from Libya, and underscores that further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith;

[...]

10. Decides to authorize Member States acting nationally or through regional organizations to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers in carrying out activities under paragraphs 7 and 8 and in full compliance with international human rights law, as applicable, underscores that the authorizations in paragraph 7 and 8 do not apply with respect to vessels entitled to sovereign immunity under international law, and calls upon Member States and regional organizations carrying out activities under paragraphs 7, 8 and this paragraph to provide for the safety of persons on board as an utmost priority and to avoid causing harm to the marine environment or to the safety of navigation.



Chapter 14

Illicit oil and fuel
.....
activities in the
.....
maritime domain
.....

KEY POINTS

1. Illicit oil and fuel activities are used to fund transnational organized crime, terrorism, insurgency and militancy, largely because they tend to be low-risk and high-reward and not a high priority for law enforcement agencies.
2. Given the global demand for fuel and the universal desire for discounted prices, organized criminal groups often resort to illicit activities involving hydrocarbons to buy the loyalty of local communities by providing fuel at prices well below the market rate. Fuel smuggling therefore leads to substantial losses for Governments, in particular through diminished fuel purchases, lost subsidy payments and lost tax revenue.
3. Any difference in the price of fuel across borders, even a small difference across a closed border, creates an incentive for smuggling. Further, some drug cartels take particular interest in controlling the illicit fuel market in order both to fuel transport for trafficking operations and have easy access to gasoline which is used in the manufacture of cocaine.
4. Adulterated fuel, mixed in order to defraud the purchaser into paying a higher price or to “stretch” the volume of fuel, poses a risk to machinery, human health and the environment.

KEY TERMS

ARBITRAGE: The purchase of a commodity in one jurisdiction for sale in another jurisdiction, in order to take economic advantage of a price differential.

BUNKER FUEL: Fuel used by vessels, often also called “marine fuel”.

BUNKERING: The process of fuelling a ship.

ILLEGAL BUNKERING: The illegal sale of crude or refined oil, without paying any tax, levies or duties, particularly when that product has been stolen or smuggled.

DOWNSTREAM: For the purposes of this chapter, “downstream” refers to refined oil products.

UPSTREAM: For the purposes of this chapter, “upstream” refers to crude oil prior to refining.

INTRODUCTION

The theft, smuggling and adulteration of, and fraud relating to oil and fuel, is estimated globally to account for at least \$130 billion in criminal profits annually. Much of that illicit activity occurs in the maritime domain, and maritime illicit oil and fuel activities are often evident in key areas of instability. Fuel is fundamental to modern life for everything from transportation to cooking, heating and cooling. Because generally, fuel is a daily necessity, fuel sold at a discount is an attractive proposition. In order to secure that discount, some people are willing to breach or circumvent the law. There are several motivating factors for engaging in such activities:

1. Meeting basic energy needs when unable to afford the market price
2. Profit for personal gain
3. Profit for the gain of a criminal enterprise or terrorist group
4. Control of fuel for use as a precursor chemical for drug production (coca leaves are soaked in gasoline)
5. Control of fuel as a means of buying the loyalty of communities

These motivations can be seen in a wide range of actions. Criminal innovation will continue to be applied to steal and control oil and fuel as long as the world remains dependent on fuel for daily life. New modalities of such crime will continue to evolve, and the following list of modalities is thus meant to be indicative rather than exhaustive:

1. Piracy involving theft of cargo or fuel from vessels' fuel tanks
2. Armed robbery at sea involving theft of cargo or fuel from vessel fuel tanks
3. Theft from shoreside or offshore storage facilities
4. Theft from abandoned vessels
5. Theft of "remaining on board" fuel on tankers after cargo discharge
6. Theft by tapping underwater pipelines
7. Smuggling in barrels, drums, jerry cans or other containers on the decks of canoes, fishing boats, pleasure craft and yachts

8. Smuggling in the holds (which are often modified) of fishing vessels, pleasure craft and yachts

9. Smuggling in the fuel tanks (which are often modified) of fishing vessels, pleasure craft and yachts

10. Laundering through offshore facilities to obtain legitimate export certificates for stolen oil

11. Fraudulent transfers using forged or modified documents

12. Fraudulent sale of fuel that has actually been recovered from the tanks of vessels planned to be scrapped

13. Technical fraud involving reporting and billing for a higher quality of fuel than what it actually is

14. Adulteration involving mixing with lower grade fuels, other fuels or other substances including water to "stretch" the fuel

15. Adulteration involving disposal of refinery by-products, chemical and industry waste and other contaminants

Millions of litres of stolen or smuggled fuel are transported daily by vessels – ranging from canoes to fishing boats, yachts, passenger vessels and tankers – causing significant losses for governments in terms of purchase and/or subsidy expenses, or lost revenues from evaded taxes. While some of this activity is perpetrated by the desperate or energy poor seeking to meet needs or earn subsistence wages, over the past decade there has been a dramatic increase in illicit hydrocarbons activities being used to fund transnational organized criminal groups and terrorist organizations. In addition, environmental and public health consequences, as well as the use of fuel as a way to mask other illicit activity or as a currency for purchasing other illicit goods, are growing concerns. It is vital that maritime law enforcement agencies recognize that illicit hydrocarbon activities provide an easily transferable source of funds for individuals or entities with broader illicit intentions.

Given the range of possible criminal activity involving oil and fuel in the maritime domain, this chapter is designed to sensitize law enforcement officials to the importance of addressing illicit hydrocarbon activities and to offer some guidance on the development of mechanisms for taking effective action to counter illicit fuel activities in the maritime domain.

Ultimately, there are numerous ways in which law enforcement officials can exercise jurisdiction over oil and fuel matters. Just as criminals have been creative in their execution of these crimes, law enforcement agencies must be creative in their pursuit of these criminals.

14.1 Theft

The most overt type of illicit hydrocarbon activity is theft of oil or fuel. Theft takes a number of different forms, from pipeline tapping to outright hijacking of vessels and siphoning fuel from storage facilities.

National laws against theft

The most direct legal approach to addressing oil and fuel theft is through national laws prohibiting theft. Every legal system prohibits theft of property, and stealing oil or fuel is illegal regardless of how it is done. Law enforcement officials should generally treat the theft of oil and fuel as they would the theft of any other property or item of value.

Piracy

Piracy is addressed in detail in chapter 9. A major driver of both piracy and armed robbery at sea has been the theft of oil or fuel. Legally, there is no difference between the crime of piracy that targets oil and the crime of piracy without the involvement of oil, but other laws may be applicable in this context.

Annex I, chapter 8, of the International Convention for the Prevention of Pollution from Ships

In 2009, the International Maritime Organization amended annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL), adding an eighth chapter on the prevention of pollution during ship-to-ship (STS) transfers. As many oil-focused piracy attacks, both upstream and downstream, involve STS transfers, violation of this chapter of annex I of MARPOL offers additional grounds for prosecution. This provision requires the production and maintenance of a STS transfer plan, and at least 48 hours' notice to the coastal State if the STS transfer is conducted in the territorial sea or exclusive economic zone of that State. In any piracy or armed robbery incident involving a STS transfer, these provisions would almost certainly be violated.

INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS (MARPOL), ANNEX I, CHAPTER 8

REGULATION 41

General rules on safety and environmental protection

1. Any oil tanker involved in STS operations shall carry on board a Plan prescribing how to conduct STS operations (STS operations Plan) not later than the date of the first annual, intermediate or renewal survey of the ship to be carried out on or after 1 January 2011. Each oil tanker's STS operations Plan shall be approved by the Administration. The STS operations Plan shall be written in the working language of the ship.
2. The STS operations Plan shall be developed taking into account the information contained in the best practice guidelines for STS operations identified by the Organization. The STS operations Plan may be incorporated into an existing Safety Management System required by chapter IX of the International Convention for the Safety of Life at Sea, 1974, as amended, if that requirement is applicable to the oil tanker in question.
3. Any oil tanker subject to this chapter and engaged in STS operations shall comply with its STS operations Plan.
4. The person in overall advisory control of STS operations shall be qualified to perform all relevant duties, taking into account the qualifications contained in the best practice guidelines for STS operations identified by the Organization.
5. Records of STS operations shall be retained on board for three years and be readily available for inspection by a Party to the present Convention.

REGULATION 42

Notification

1. Each oil tanker subject to this chapter that plans STS operations within the territorial sea, or the exclusive economic zone of a Party to the present Convention shall notify that Party not less than 48 hours in advance of the scheduled STS operations. Where, in an exceptional case, all of the information specified in paragraph 2 is not available not less than 48 hours in advance, the oil tanker discharging the oil cargo shall notify the Party to the present Convention, not less than 48 hours in advance that an STS operation will occur and the information specified in paragraph 2 shall be provided to the Party at the earliest opportunity.
2. The notification specified in paragraph of this regulation shall include at least the following:
 - 1) name, flag, call sign, IMO Number and estimated time of arrival of the oil tankers involved in the STS operations;
 - 2) date, time and geographical location at the commencement of the planned STS operations;

- 3) whether STS operations are to be conducted at anchor or underway;
- 4) oil type and quantity;
- 5) planned duration of the STS operations;

- 6) identification of STS operations service provider or person in overall advisory control and contact information; and
- 7) confirmation that the oil tanker has on board an STS operations Plan meeting the requirements of regulation 41.

EXAMPLE: DUZGIT INTEGRITY ARBITRATION

The *M/T DUZGIT INTEGRITY*, a Maltese-flagged tanker, was carrying crude oil in the archipelagic waters of Sao Tome and Principe in March 2013 when she attempted to initiate an STS transfer with the *M/T MARIDA MELISSA* without permission from Sao Tome and Principe. The country's coastguard arrested both vessels on 15 March 2013, imprisoned the masters, confiscated the cargo and imposed several fines. Malta instituted proceedings against Sao Tome and Principe in the Permanent Court of Arbitration. In the *Duzgit Integrity Arbitration*, the Court found that, while the penalties imposed by Sao Tome and Principe were excessive and disproportionate, the *DUZGIT INTEGRITY* did not have the necessary permissions under the laws of Sao Tome and Principe to engage in the STS transfer. The arrest of the vessel was therefore within the country's enforcement jurisdiction.

Other national laws

In addition to piracy and environmental laws, other national laws may also be applicable to oil and fuel theft and associated crimes. In particular, laws concerning the handling of or trading in petroleum resources, as well as arms control laws (including the implementing legislation for the Arms Trade Treaty and the Firearms Protocol to the United Nations Convention against Transnational Organized Crime) may be applicable. As theft by force often involves the use

of weapons, those weapons may be obtained in contravention of legislation based on the Arms Trade Treaty or the Organized Crime Convention, but such weapons may also have been taken out of the State's jurisdiction in violation of related export controls. Given that some forms of theft, such as pipeline tapping, involve damage to property, laws against vandalism or property damage may also apply. In cases where the laws are silent or are weak in terms of addressing fuel theft directly, other such laws can offer an alternative pathway for curtailing this criminal enterprise.

EXAMPLE: *M/T MAXIMUS*

The case of the *M/T MAXIMUS*, frequently cited as a successful case of maritime security cooperation, shows the potential for cooperation in the Gulf of Guinea to address oil and fuel theft. After the *MAXIMUS* was taken by pirates in the exclusive economic zone of Côte d'Ivoire on 11 February 2016, Côte d'Ivoire, Ghana, Togo, Benin, Nigeria and Sao Tome and Principe cooperated to track the vessel. Ultimately, the Nigerian Navy interdicted the *MAXIMUS* in the exclusive economic zone of Sao Tome and Principe, conducted an opposed boarding, killed one pirate, arrested the remaining pirates and freed the hostages. As Nigeria had not at that time completed an update to its piracy legislation, trying the pirates for piracy was not possible. Instead, the pirates were charged with offences relating to conspiracy, dealing in petroleum products without authority and transferring it to another vessel according to articles 1(17) and 3(6) of the Miscellaneous Offences Act of 2004, article 15 of the Money-Laundering (Prohibition) Act of 2011, as well as the unlawful possession of firearms under articles 3 and 8 of the Firearms Act of 2004.

14.2 Smuggling

Fuel smuggling is a form of arbitrage aimed at bringing lower priced fuel from one jurisdiction into a higher priced jurisdiction in order to obtain a profit through the price differential. Any time there is a price differential across a border, there is an incentive for

smuggling. Even slight differences can be sufficient incentive, so long as the smuggling operation can rely on volume in order to make a profit. Smugglers routinely use maritime routes in order to accomplish this end, carrying the fuel in barrels or cans on the decks of vessels, creating tanks in the holds or even expanding the capacity of their vessel's own fuel tanks so that the

excess is available for siphoning and sale on arrival at a port. Some smuggling operations even use purpose-built tankers.

Customs, duties and tax laws

Smuggling is most prominently a form of customs violation, avoidance of duties and tax fraud. Governments

that pay subsidies lose billions each year when fuel that they have subsidized is smuggled out of the country. Similarly, Governments lose billions of dollars in income from not being able to collect tax and duties on smuggled fuel entering their territory. While communities receive some benefit in being able to buy fuel at slightly reduced prices, the main benefit accrues to the smuggling enterprise.

EXAMPLE

Roughly 3 million litres of fuel are smuggled every day from Malaysia, where the price of fuel is low, into Thailand, where the price is relatively high. Much of this fuel is transported in fishing boats modified to carry fuel in their holds instead of fish. Throughout Thailand, the unregulated sale of smuggled fuel is visible as roadside fuel vendors offer customers fuel from repurposed drinks bottles. This enterprise costs the Government of Thailand hundreds of millions of dollars in tax revenue and has been linked to funding for the southern Thailand insurgency, profits for organized criminal groups including Klang Valley syndicates, high-level corruption, and both human trafficking and human slavery.

Countering money-laundering, terrorist financing and threat financing

Global trends indicate that terrorist groups and criminal cartels are using illicit oil and fuel trading to fund their operations. One mechanism for addressing fuel smuggling is therefore to use laws relating to money-laundering, threat financing and the financing of terrorism in order to take law enforcement action against cartels that engage in illicit hydrocarbon activities. At the same time, following fuel smuggling routes may be a useful approach to uncovering illicit networks and illicit financial flows. The Financial Action Task Force,

an intergovernmental policymaking body focused on combating money-laundering and terrorist financing, issued its Forty Recommendations for States relating to implementing relevant international conventions and norms into national laws. A key international instrument relevant to the use of illicit oil and fuel proceeds in support of terrorist activity is the International Convention for the Suppression of the Financing of Terrorism of 1999.

This obligation provides a useful mechanism for pursuing networks that use illicit oil and fuel activities to fund terrorist organizations. It can also be used to combat organized criminal groups that, while not normally considered to be terrorists, nevertheless use tactics that fall within the parameters of the Convention.

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM OF 1999

ARTICLE 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

[...]

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Organized crime offences

Given the nexus between fuel smuggling and transnational organized crime, maritime law enforcement personnel may also employ the authorizations and powers as set forth in the Organized Crime Convention in responding to illicit fuel activities. In particular, article 5 of the Convention mandates that States develop laws to criminalize participation in an organized criminal group. For example, smugglers of artisanal fuel, depending on the provisions of national implementing legislation, may be deemed to be participating in a criminal enterprise as governed by the Convention if the proceeds of their smuggling are in any way attached to an organized criminal group.

EXAMPLE: GULF OF GUINEA CODE OF CONDUCT CONCERNING THE REPRESSION OF PIRACY, ARMED ROBBERY AGAINST SHIPS, AND ILLICIT MARITIME ACTIVITY IN WEST AND CENTRAL AFRICA

One significant instrument reflecting interregional cooperation against illicit fuel theft activities is the Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa (the Yaoundé Code of Conduct). This instrument was signed by 25 Heads of State in June 2013 and now has 26 States parties. Article 1(5)(d) of the Yaoundé Code of Conduct specifically defines “transnational organized crime in the maritime domain” as including “illegal oil bunkering.” Although it is a non-binding instrument, the Yaoundé Code of Conduct provides maritime law enforcement officials in West and Central Africa with a mandate at the level of Heads of State to address the theft of oil in the maritime domain at the national, zonal, regional and interregional levels.

The use of fuel smuggling to support other illegal operations at sea is a major criminal enterprise. Trafficking and illegal fishing, as well as piracy operations, require fuel for the vessels involved in perpetrating the

offences. Law enforcement officials should therefore consider options for addressing fuel smuggling through the prosecution of smugglers by means of laws against aiding and abetting other criminal activities.

EXAMPLE: FU YUAN YU LENG 999

The FU YUAN YU LENG 999, a large Chinese refrigerated vessel, was arrested in Ecuador in August 2017 with significant quantities of illegally caught fish on board, including sharks and endangered species, mostly caught in the Galapagos Marine Protected Area. While the illicit fishing operation was conducted by foreign vessels, fuel smugglers brought fuel to the fishing vessels that were perpetrating these crimes, thereby assisting them in destroying the marine environment in that world heritage site. Those local fuel smugglers were therefore aiding and abetting illegal fishing offences and committing environmental infringements, violations of the World Heritage Convention of 1972 and violations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES).

Sanctions evasion

Sanction regimes often target oil and fuel. The oceans are an attractive venue for sanctions evasion, as oil and fuel trading can be carried out at sea, often beyond the view of State law enforcement agencies. Law enforcement officials in proximity to sanctions regimes should be aware of and monitor such activities. In addition to being illegal under annex I, chapter 8, of MARPOL (as outlined above), STS transfers for the purpose of evading sanctions may constitute a serious offence under the relevant sanctions regime. Furthermore, sanctioned States or entities may actually precipitate large-scale smuggling operations, which can, in turn, fund other activities.

Environmental and safety concerns

The movement of fuel by sea always poses a degree of risk, but it is particularly problematic when such movement is illegal and unregulated. A spill may result in costly environmental damage. And as well, there are dangers to safety. For example, one means of smuggling fuel is to enlarge the vessel’s fuel tanks in order to carry extra fuel. Vessels modified for such purposes have been known to explode, killing those on board, spilling the fuel and creating hazards to navigation. Furthermore, illegal STS transfers in violation of annex I of MARPOL can also cause environmental damage, as illicit operations are often conducted with no regard for environmental consequences and protections.

EXAMPLE

Several different fishing vessels with modified fuel tanks that were being used to smuggle extremely low-priced Venezuelan fuel into the Dutch Caribbean island of Aruba exploded in Aruba’s harbour in the autumn of 2017 on account of the poor workmanship of the fuel tank modification process. This created a threat to human life, environmental spillage and hazards to navigation.

Related smuggling activities

Since the smuggling of fuel is often co-located with other illicit smuggling operations, a further legal approach is to bundle oil and fuel smuggling with other smuggling offences. Smuggling of weapons, narcotics, antiquities, wildlife and human beings, for example, are all well regulated by most States. It is often therefore a relatively simple legislative step to broaden the range of smuggling activities monitored by maritime law enforcement agencies to include illicit hydrocarbons activities, authorizing these agencies to carry out interdictions in conjunction with other activities that are likely to be prosecuted.

14.3 Adulteration

Adulterating, “cocktailing” or “stretching” fuel are terms used to describe mixing a fuel product with a different, less expensive product (even water) in order to increase its volume. Adulterated fuel damages machinery, pollutes the air and can be toxic to human health. When sold, adulterated bunker fuel can have devastating effects on vessel engines and can leave ships without power. In addition to violations of national laws concerning fuel regulations and fraud, it is also a violation of environmental regulations.

Annex VI of the International Convention for the Prevention of Pollution from Ships

Unlike most of International Maritime Organization regulations, annex VI of MARPOL sets out regulations for not only vessels and vessel owners but also the fuel suppliers to vessels. It seeks to set parameters on the quality of fuel used to power vessels. A major focus of the shipping industry is the transition by 2020 to fuel with a capped sulphur content. Given the change from the current 3.5 per cent cap to a 0.5 per cent cap, there are likely to be various forms of fraud and adulteration during the transition period. Violations of annex VI of MARPOL can leave vessels without power, causing major and costly maritime safety and search and rescue incidents, and could lead to catastrophic environmental spills or the loss of life.

14.4 Fraud

Falsified documents

Large-scale and sophisticated smuggling operations often require falsified documents, and even small-scale operations may involve forgeries or modified documents. Falsified customs documents, export certificates, bills of lading and cargo manifests are often employed in moving oil and fuel. Standardization of documents and electronic documents can help counter that. Law enforcement agencies should be familiar with accurate documents in order to more readily recognize fraudulent ones.

Subsidies fraud

In some jurisdictions, nefarious shippers engage in “round tripping” – coming into port, collecting a subsidy on an oil cargo, leaving without unloading and returning to collect the subsidy again. Real-time electronic records can help combat this problem, but law enforcement agencies should monitor such movements to avoid systematic defrauding of the State.

In-kind trading and masking

A growing challenge in dealing with illicit oil and fuel crime is the swapping of oil or fuel for other illicit goods, including drugs and weapons. This form of trading is difficult to counter because it does not involve financial transactions. Furthermore, the benign perception of fuel means that smugglers of other goods, such as drugs or weapons, will sometimes smuggle fuel on the same vessel in plain sight, as it can mask the higher-end smuggling operation.

14.5 Other legal responses

Marking

A number of States and regions have implemented fuel marking laws requiring that fuel be marked – either with a dye or, more effectively, a molecular marker – to distinguish legitimate from illegitimate fuel. These markers can help with mapping smuggling routes and

illicit networks, and such marking laws, if properly enforced, can dramatically change the calculation of risk versus reward for smugglers and thieves. Shutting down distribution facilities and other vendors of fuel that is illicit or adulterated can quickly reduce black market trading. In most countries where molecular marking has been implemented, the government has been able to reclaim significant tax revenues.

Tracking

Mechanisms for monitoring the movement of vessels carrying oil and fuel are important for countering illicit activity, including illegal STS transfers. States can require that automatic identification systems remain activated within their maritime zones, and law enforcement agencies should enforce that requirement on a regular basis. For vessels not legally required to use an automatic identification system under existing regulations on account of their tonnage, States may consider an alternative means of tracking. Furthermore, States should anticipate likely efforts by criminals to avoid being monitored. Any loopholes or gaps in tracking-related requirements or regulations may create new forms of criminal opportunity.

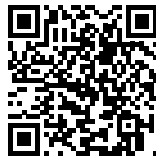
Port State control

Port States have substantial powers to address illicit oil and fuel activities. Oily water separator regulations, for example, have long offered port States the ability to enforce environmental obligations. Falsified log books have also anchored prosecutions addressing illicit oil operations, and large civil penalties have had a deterrent effect. Port State control measures could be further expanded to address the growing catalogue of illicit oil and fuel activities in the maritime domain, in particular as they are connected to organized crime and terrorism.

Bunkering regulations

In the case of the *M/V VIRGINIA G*, the International Tribunal for the Law of the Sea found that coastal States have regulatory authority governing refuelling at within their EEZ when that bunkering is linked to illegal fishing operations. While the coastal State has enforcement jurisdiction, the extent of the enforcement action must be limited to what is necessary to sanction non-compliance and deter future activity.

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