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OXFORD MONOGRAPHS IN INTERNATIONAL LAW

Maritime Security and the Law of the Sea

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3 Law Enforcement Activities

A. Introduction

Law enforcement powers are essential to enable states to respond to maritime security threats. Although this point is simple enough in itself, the laws according to which states exercise jurisdiction are complex because of the different rights and obligations recognized in the various maritime zones. The regulation of activities at sea is dependent on what authority states have in any given maritime area or over any particular vessel or installation or structure located at sea. The ability of a state to undertake law enforcement not only varies because of the different rights and duties existing in the different maritime zones, but also according to what particular threat to maritime security is being addressed. While there is a general interest in upholding order at sea, the accepted responses to achieve order have been countered by other interests, especially the importance of territorial integrity and the corollary of maintaining exclusive rights over vessels that are flagged to the state. This balancing act is constantly at stake in seeking to prevent and respond to maritime security threats.

Under international law, states have prescriptive jurisdiction, which refers to the power to adopt legislation and other rules, as well as enforcement jurisdiction, which refers to the power to give effect to those rules through police and/or judicial action. States are entitled to exercise jurisdiction on the basis of different connections that a particular activity might have with them. The bases of criminal jurisdiction most commonly recognized are territorial; nationality; passive personality; universal; and protective. Territorial jurisdiction entitles a state to regulate persons and activities within its territory. Nationality jurisdiction allows states to regulate the activities of persons who have the nationality of that state. On the basis of passive personality, a state may exercise criminal jurisdiction over a person who has committed offences that are harmful to nationals of that state. Universal jurisdiction refers to jurisdiction over particular activities that are considered so heinous (notably, piracy and war crimes) that all states may exercise jurisdiction over the perpetrators of those crimes irrespective of any other link: a state may or may not have with the acts in question. Protective jurisdiction entitles states to exercise jurisdiction over activities considered prejudicial to the security of the state. As may be readily perceived, each of these bases of jurisdiction may be brought to bear in addressing maritime security threats, especially territorial, universal, and protective jurisdiction.

A state must lawfully exercise prescriptive jurisdiction in order for the possible exercise of enforcement jurisdiction to arise. Even once a state has adopted national law in accordance with its international law rights, full enforcement powers of those laws do not necessarily follow. This chapter focuses on the enforcement aspects of jurisdiction, although it seeks to acknowledge when difficulties associated with prescriptive jurisdiction arise. Both aspects of jurisdiction are critical to the protection of states from maritime security threats and this chapter explores the powers of states to take enforcement action against maritime security threats in relation to different ocean space and activities.

In the law of the sea context, Burke has well-summarized what enforcement jurisdiction involves:

Enforcement is the process of invoking and applying authoritative prescriptions. The range of operations includes surveillance, stopping and boarding vessels, search or inspection, reporting, arrest or seizure of persons and vessels, detention, and formal application of law by judicial or other process, including imposition of sanctions.

As mentioned, the precise contours of these enforcement powers may vary depending on what activity is occurring, where it takes place and which state with a connection to that area or activity wishes to exercise enforcement jurisdiction. This chapter therefore highlights the powers of states in relation to different maritime security threats (as being those outlined in the Introduction). In this regard, the discussion distinguishes between the different maritime zones: ports and internal jurisdiction that may be allied to the concept of universal jurisdiction. See Shaw, International Law 668.

An extension of the protective principle is the effects principle whereby states purport to exercise jurisdiction on the basis that the relevant activity has caused effects within the state. The US has particularly relied on this basis of jurisdiction but it has proven highly controversial. See Gillian D. Triggs, International Law: Contemporary Principles and Practices (LexisNexis Butterworths, Sydney 2006) 367–8.


Ibid.

There are instances where states have prescriptive jurisdiction, without explicit enforcement powers, or power is given to enforce certain rules without specifying that prescriptive jurisdiction also exists.


The threats identified by the UN Secretary-General were: piracy and armed robbery against ships; terrorism involving hijacking, offshore installations and other maritime interests; illicit trafficking in arms and WMD; illicit traffic in narcotics and psychotropic substances; smuggling and trafficking of persons by sea, illegal, unreported and unregulated fishing; and intentional and unlawful damage to the marine environment. See UNCA, 'Oceans and the Law of the Sea: Report of the Secretary-General' (10 March 2008) UN Doc A/63/63, para 39.


3 There is some controversy as to what acts universal jurisdiction attaches. Shaw considers piracy and war crimes to be the most widely accepted crimes, but notes there are a number of treaties creating
waters, the territorial sea, the contiguous zone, the EEZ, the continental shelf, and the high seas. Achieving an appropriate allocation of competences in each zone is critical to efforts to improve maritime security.

In assessing the allocation of enforcement powers, reference is made to port states, coastal states, and flag states. Following the distinction adopted by Molenaar, 'coastal states' refers to those states that may exercise jurisdiction with respect to maritime zones over which they have sovereignty, sovereign rights, or jurisdiction, whereas port states may be the same as coastal states, but the jurisdiction exercised by port states will refer to authority over activities occurring outside the maritime zones of the coastal state and enforced in port. Flag states' refers to those states with powers over vessels bearing their nationality or registered to them.

There are two complicating factors that must be acknowledged at the outset in dealing with law enforcement activities to enhance maritime security. The first is the phenomenon of 'flags of convenience' or 'open registries'. In order for companies to avoid being bound by the financial obligations, environmental standards, and legal requirements for operation of a particular state, their vessels are registered to a state with different, and usually lesser, standards. There is an obvious tension created because the flag state most commonly has exclusive jurisdiction over these vessels and attempts to ensure greater compliance with laws seeking to improve maritime security may well run against the interests of the flag state. Flag states need to take their responsibilities seriously if responses to maritime security threats are to be effective. The ascription of nationality to ships is one of the most important means by which public order is maintained at sea. The financial imperatives at stake have detracted from the willingness of flag states to embrace fully their duties in relation to their vessels. As will be discussed in this chapter, the failure of flag states to exercise sufficient authority over their vessels has led to efforts to grant other states powers over these vessels where possible.

A second complicating factor for law enforcement is the recognition of complete immunity accorded to warships, as well as ships owned or operated by a state and used only on government non-commercial service, from the jurisdiction of any state besides the flag state. This immunity does not necessarily allow for non-compliance with substantive rules, but does prevent the exercise of jurisdiction and measures of physical interference in the event of non-compliance. As a result, third state rights against foreign warships are virtually non-existent. The reciprocal advantages of this system are seen as indispensable for a state's security. Instead, an attempt to exercise law enforcement jurisdiction against a foreign warship could be tantamount to a threat or use of force against a sovereign instrumentality of a foreign state. Although law enforcement powers at sea have been increased, the immunity of warships and other government vessels has not been altered in any way. To the extent that any maritime security threats or breaches are state sponsored, law enforcement powers against sovereign immune vessels are not available. Instead, questions involving the threat or use of force may arise and diplomatic or other avenues for dispute settlement must be pursued.

This chapter proceeds by considering each maritime zone in turn, beginning with those closest to the state's land territory: ports and internal waters; the territorial sea; straits; the contiguous zone; the continental shelf; EEZ; and the high seas. For each zone addressed, particular issues for law enforcement in relation to maritime security threats are discussed, notably in relation to transnational crime, piracy, marine pollution, and IUU fishing. While there is some discussion of terrorism and the proliferation of weapons of mass destruction, the extent of recent legal development in this area has warranted that these maritime security threats are addressed separately in Chapter 4. In this chapter, it will be seen that there has been greater recognition of enforcement powers to respond to maritime security threats, and this recognition has usually come at the expense of sovereign interests in certain maritime areas and over vessels. These incremental changes may be viewed as necessary community responses for promoting and maintaining order at sea. While problems of a practical nature and of political will persist—and ideally must be overcome—the varied changes to the legal structures and principles are important contributions to the overall maritime security effort. Where legal ambiguities or gaps remain, interpretations that promote responses to maritime security should be viewed as in the broader interests of states and supported as such.

### B. Ports and Internal Waters

States exercise sovereignty over their ports and internal waters. Flowing from this sovereignty is the right of the coastal state to control what vessels enter its ports and

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16. Persons are described as those permanent harbour works which form an integral part of the *harbour system* and are regarded as forming part of the coast for the purposes of delimiting the territorial sea. UNCLOS art 11. Internal waters are those that lie landward of the baseline from which the territorial sea and other maritime zones are measured. UNCLOS art 9.
17. See UNCLOS arts 32, 42(5), 95, 96, and 236.
under what conditions. In many cases, access to port is governed by treaties between the states concerned, and states may have entered into agreements that permit free transit for trade purposes. In prescribing conditions for entry, states are entitled to regulate their ports consistent with the protection of various interests of the state. This regulatory power may provide an important means of responding to maritime security threats. The ISPS Code is an example of the actions that states may take to reduce the risk of terrorist attack against their port facilities and allows states to put in place notice requirements regarding the entry of a vessel into ports.

States may also regulate the access of vessels to their ports when the vessel poses environmental risks, which may be because of, inter alia, the general seaworthiness of the vessel or the nature of the cargo that the vessel is carrying. States nonetheless have an incentive to ensure that their security restrictions are consistent with international standards so that their ports are commercially viable and business is not re-directed to another, less demanding, port.

The right to close ports is a corollary of the principle of state sovereignty, and states are thereby entitled to regulate access to their ports as they wish. See Justin S.C. Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism' (2002) 18 American University International Law Review 541, 593; A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 SLQ 597, 607.

Drs discussed in more detail in Chapter 2, Part D(1).
(1) Enforcement of laws for actions occurring in ports and internal waters

Every vessel remains subject to the rules of its flag state throughout its voyage, including when it is in the ports and internal waters of other states. As a matter of practice, coastal states will not usually exercise jurisdiction over matters that are essentially internal to the ship and which do not affect the interests of the port state. 35 In this regard, various criminal matters occurring on vessels are referred to the flag state unless the criminal act is so serious as to warrant the intervention of the coastal state. 36 Nonetheless, coastal states retain rights to enforce the laws of their territory over vessels when those vessels are in its ports and internal waters. 35 As a general matter, it is universally acknowledged that once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory for events relating to such use and that all types of vessels, military and other, are in common expectation obliged to comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters. 36

The restrictions that are imposed on the state's application of its laws to vessels in ports only relate to the inapplicability of local labour laws and situations when a vessel has entered port as it is in distress. 37 The immunity of warships remains intact, however. 38

The ability of a state to exercise jurisdiction over acts of terrorism occurring in its ports is seen most clearly from the Rainbow Warrior incident, when French agents bombed and sank a Greenpeace vessel docked in Auckland, New Zealand. 39 New Zealand arrested and convicted the two agents responsible under its domestic law. 40 Although the vessel was registered in the United Kingdom and the crew member killed in the bombing was Dutch, New Zealand successfully pursued a claim for damages against France for what was essentially an act of state terrorism in its territory. 41

(2) Enforcement of laws for actions occurring outside ports and internal waters

Coastal states will seek to exercise jurisdiction over vessels that voluntarily enter their ports on the basis that in port enforcement is simpler than seeking to stop, inspect, and arrest a vessel at sea. 42 In these instances, this right of the coastal state is dependent on what actions the coastal state is seeking to regulate and where they occurred. 43 As a general matter, coastal states will only be able to exercise jurisdiction under international law where there is a sufficiently close or substantial connection between the person, fact, or event and the state exercising jurisdiction. 44

The most notable jurisdictional powers accorded to port states for activities occurring on foreign vessels beyond the port are in relation to vessel-source pollution. The scope of port state jurisdiction has been gradually increasing, partially as a response to the failure of flag states to control and regulate their vessels. Nonetheless, the recognition of port state authority to prevent and control pollution from vessels was not intended to impair the freedom of navigation. 45 As a result, the parameters for port state action were carefully defined in UNCLOS. The opportunity to encroach on the jurisdiction of flag states over their vessels is nonetheless notable for broader consideration of allocation of competences in responding to maritime security threats.

Under Article 218 of UNCLOS, port states may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from a vessel that has voluntarily entered the port when the discharge is in violation of international standards, 46 and has occurred outside the internal waters, territorial

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35 Molenaar, 'Port State Jurisdiction' 195.
36 McDougal and Burke, The Public Order of the Oceans 156. Churchill and Lowe similarly write: 'By entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State. Accordingly, that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules concerning sovereign and diplomatic immunities, which arise chiefly in the case of warships.' Churchill and Lowe, The Law of the Sea 65.
38 McDougal and Burke, The Public Order of the Oceans 133. See also Schooner Exchange v McFall 11 US 7 (Cranch) 116 (1812).
40 Ibid.
42 Molenaar, 'Port State Jurisdiction' 196. Molenaar relies on traditional bases of jurisdiction (universal, protective, effects) to argue that there are times when the port state may be able to exercise jurisdiction over conduct that has occurred outside the port, and in waters beyond the territorial sea of the port state. See ibid.
44 These situations are explored in more detail in the following sections of this Chapter.
45 Molenaar, 'Port State Jurisdiction' 196. Molenaar relies on traditional bases of jurisdiction (universal, protective, effects) to argue that there are times when the port state may be able to exercise jurisdiction over conduct that has occurred outside the port, and in waters beyond the territorial sea of the port state. See ibid.
The port state's authority to impose conditions for access, when compared to the more limited jurisdiction of coastal states. Typically, a state may not enforce laws against foreign vessels that take place outside of its waters as it would offend the principle of extra-territoriality, as well as defying flag state jurisdiction on the high sea. The seriousness of the problem of marine pollution, coupled with the deficiencies in enforcement engendered through the use of flags of convenience, has warranted changes to the previously existing legal structure.

This authority of the port state has been described as a 'radical development' when compared to the more limited jurisdiction of coastal states. Typically, a state may not enforce laws against foreign vessels that take place outside of its waters as it would offend the principle of extra-territoriality, as well as defying flag state jurisdiction on the high sea. The seriousness of the problem of marine pollution, coupled with the deficiencies in enforcement engendered through the use of flags of convenience, has warranted changes to the previously existing legal structure.

53 Mario Valenzuela, 'Enforcing Rules Against Vessel-Source Degradation of the Marine Environment and Management of Shipping Activities on the High Seas, Particularly in Relation to Straddling Stocks and Highly Migratory Species. Fishing Vessels have always been subject to more stringent rights of access to ports compared to merchant vessels. Under Article 23 of the 1995 Fish Stocks Agreement, the port state is to take measures to promote the effectiveness of conservation and management efforts, including inspecting documents, fishing gear, and catch on board fishing vessels, when they are voluntarily in port. Consistent with the port state's importation for purposes of Article 23 permit states to adopt regulations 'empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.'

61 Vignes Becker explains that this is because the power to prescribe is already accorded to the flag state under arts 94 and 211. See Michael A. Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46 Harvard JIL 131, 187. McDorman, however, argues that art 218 necessarily involves a prescriptive authority. McDorman, 'Port State Enforcement' 315.

59 UNCLOS art 226(1)(a). Port states are liable for any loss or damage attributable to them if the measures taken are unlawful or exceed those reasonably required in light of available information. UNCLOS art 233.
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Port state authority is being increasingly relied upon as a further means to address IUU fishing, and has recently been solidified through the adoption in 2009 of an Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. This Agreement is based on the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, and the 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing. Under the 2009 Port State Measures Agreement, port states may require, at a minimum, information from foreign flagged vessels seeking to enter their ports as to the identity and journey of the vessel, its fishing and transshipment authorizations, and the catch onboard and the catches offloaded. Based on this information, as well as any additional information required, the port state will decide whether a vessel is to be authorized or denied entry into port. Entry must be denied when there is sufficient proof that a vessel seeking entry has engaged in IUU fishing or fishing related activities in support of such fishing. However, entry may still be granted for the purpose of inspecting the vessel and taking other appropriate actions in conformity with international law which are at least as effective as denial of port entry in preventing, deterring and eliminating IUU fishing.

Port states are to inspect a minimum number of vessels annually, and carry out those inspections consistently with the Agreement. Where a foreign flagged vessel has entered a port, it will be denied a range of port services if the port state finds that the vessel lacks authorization as required by its flag state for fishing or as required by a coastal state for fishing in areas under its national jurisdiction. Port services must also be denied if the port state has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing related activities in support of such fishing unless the vessel can establish that it was acting consistently with relevant conservation and management measures. Denial of port entry and port

66 2009 Port State Measures Agreement art 8 and Annex A.
67 2009 Port State Measures Agreement art 9.
68 2009 Port State Measures Agreement art 9(4).
69 2009 Port State Measures Agreement art 9(5).
70 Port State Measures Agreement art 12(2). Agreement on the minimum levels of inspections is to be determined through RFMOs, the FAO or otherwise. 2009 Port State Measures Agreement art 12(2). Certain assistance is to be accorded to developing states in order to implement the Agreement. See 2009 Port State Measures Agreement art 21. The conduct of inspections is set out in art 13 and Annex B, with the form of the inspection report set out in Annex C.
71 2009 Port State Measures Agreement art 11(1)(a) and (b). As states have sovereignty over the territorial sea and sovereign rights over fishing in the EEZ, it may be presumed that national jurisdiction is included within both of these entitlements over these maritime areas.
72 2009 Port State Measures Agreement art 11(1)(e).

(3) Conclusion

There has undoubtedly been an increase in enforcement authority that may be exercised over vessels coming into port. This development is necessary in the face of reduced control exercised by flag states, particularly of convenience states. Increasing port state control has been viewed as preferable to allowing greater coastal state jurisdiction. Yet, as mentioned, one drawback to port states taking on a greater role in policing activities such as marine pollution from vessels and unlawful fishing, particularly when this is irrespective of where those activities occurred, is that there is potential for ‘open ports’ or ‘ports of convenience’ to
emerge in light of the economic advantages gained from increased port activity. Vessels that would be subject to inspections of enforcement action in some ports may well divert to others that do not threaten comparable responses and these ports will derive economic benefits through the payment of customs dues and the like, as well as increased employment. Widespread political will required to confront IUU fishing has been slow, but the possibility of utilizing port state authority at least stands as another example of states attempting to defeat the problems faced by the use of flags of convenience in addressing particular maritime security threats. Coastal state sovereignty over ports and internal waters thus provides critical legal and practical bases to undertake a range of measures to respond and prevent maritime security threats. Promoting port state enforcement powers, even with the 'open port' risk, is a logical step to enhance maritime security.

C. Territorial Sea

Coastal states have sovereignty over their territorial sea. This sovereignty extends to the bed, subsoil, and the airspace over the territorial sea. As a consequence of this sovereignty, the coastal state is generally said to have rights comparable to those enjoyed over its land territory, particularly with regard to rights to enact legislation and enforce that legislation in this maritime area. Yet the right of coastal states to prescribe legislation faces limitations as part of the effort to balance their interests with those of flag states with vessels traversing these waters. Article 21 of UNCLOS sets out a list of topics for which coastal states may adopt laws and regulations. Certain limitations on the coastal state's prescriptive jurisdiction include not discriminating against ships of any particular state or ships carrying cargo for any particular state, and not applying to the design, construction, manning, or equipment of foreign ships. The enforcement jurisdiction of the coastal state largely mirrors its rights to prescribe jurisdiction, and is considered in this section.

(1) Innocent passage and exercise of criminal jurisdiction

As discussed in Chapter 2, the coastal state's sovereignty over the territorial sea is subject to the right of all vessels to exercise innocent passage. Activities that may be considered as threats to the maritime security of the coastal state, such as various military-related activities, fishing, willful and serious pollution, and customs and immigration violations, are all considered as prejudicial to the peace, good order or security of the coastal state and thus render passage non-innocent. These activities are excluded from the scope of innocent passage with respect to vessels that are proceeding to or from the internal waters and ports or roadsteads of a state, as well as vessels that are traversing the territorial sea without entering these areas. The coastal state is then entitled to 'take the necessary steps in its territorial sea to prevent passage which is not innocent'.

Beyond these steps in response to non-innocent passage, coastal states also have recognized authority to exercise civil and criminal jurisdiction in particular cases. The exercise of criminal jurisdiction under Article 27 of UNCLOS is most likely to be relevant in dealing with threats to maritime security. This provision addresses the right of the coastal state to exercise criminal jurisdiction on board a foreign ship, and only permits arrest or investigation in the following circumstances:

(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;

Moreover, the 'sovereignty' accorded to coastal states to prescribe legislation faces limitations as part of the effort to balance their interests with those of flag states with vessels traversing these waters. Article 21 of UNCLOS sets out a list of topics for which coastal states may adopt laws and regulations. Certain limitations on the coastal state's prescriptive jurisdiction include not discriminating against ships of any particular state or ships carrying cargo for any particular state, and not applying to the design, construction, manning, or equipment of foreign ships. The enforcement jurisdiction of the coastal state largely mirrors its rights to prescribe jurisdiction, and is considered in this section.

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Unless the laws give effect to generally accepted international rules or standards. See UNCLOS art 21(2). See further Churchill and Lowe, The Law of the Sea 95.

Exceptions identified by Churchill and Lowe include the immunity of warships and governments vessels operated for non-commercial purposes; for crimes committed prior to entering the territorial sea when the vessel is just passing through the territorial sea; and for civil matters where the liability was not incurred in connection with the voyage in the territorial sea. Churchill and Lowe, The Law of the Sea 96.

These rights extend to aircraft flying over the territorial sea, as aircraft have no right of innocent passage comparable to the right accorded to vessels.

As listed in art 19(2). See further Chapter 2, Part B(2).

Which are relevant to drug trafficking and people smuggling and trafficking.

See UNCLOS art 18(1) (defining the meaning of passage).

UNCLOS art 25(1). As discussed in Chapter 2, the steps that coastal states may take against warships are limited to requiring the warship to leave the territorial sea immediately.

Article 28 of UNCLOS deals with the exercise of civil jurisdiction. Under this provision, a coastal state should not stop or divert a foreign ship for the purpose of exercising civil jurisdiction over a person on board the ship. It is prohibited from exercising enforcement jurisdiction over a ship unless it is in relation to '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'. However, this prohibition does not prejudice the coastal state's right to levy execution against or arrest a ship for any civil proceedings when the ship is lying in the territorial sea or passing through it after leaving internal waters. See further Shearer, 'Problems of Jurisdiction' 329.
Questions may arise as to whether the activities rendering passage non-innocent are necessarily 'of a kind to disturb the peace of the country or the good order of the territorial sea' or whether the consequences of the activities extend to the coastal state, depending on the precise circumstances of the activities concerned. A coastal state could well be justified in taking the position that if an act is prejudicial to its peace, good order, or security then it should also be seen as disturbing the peace of the country. Such an approach is now warranted when the importance of responding to maritime security threats is taken into account. In that instance, the coastal state would need to have national legislation that reflects a variety of crimes associated with the activities viewed as prejudicial to its peace, good order, and security. The full range of enforcement actions would then be open to it. This approach enables a variety of maritime security threats to be addressed by the coastal state. This is not to suggest that it inevitably follows that the violation of any coastal state law renders passage non-innocent, always implicating what enforcement actions may be taken by the coastal state.

In each instance, consideration will be needed to determine if a coastal state may take steps to prevent passage that is not innocent and whether further enforcement actions are permissible and warranted. This approach not only protects the exclusive interests of the coastal state, but also supports the inclusive interest in maritime security when considering the repercussions that may flow to other states as a result of maritime security breaches.

The designated instances for exercising criminal jurisdiction on board foreign ships are only relevant for ships that are in lateral passage, that is, not entering or leaving internal waters of the coastal state, and do not affect the coastal state's right to exercise enforcement jurisdiction against a ship leaving its internal waters. Arrest and investigation are also permissible if the foreign ship is intending to enter the internal waters of the state in relation to crimes committed inside or outside the territorial sea.

For coastal states to be able to take the necessary steps to respond to maritime security threats, it is appropriate that coastal state's subjective assessment of the actions of vessels in relation to non-innocent passage or crimes 'of a kind to disturb the peace of the country' should prevail. Under the doctrine of sovereign immunity, the passage of warships and other government vessels will still be protected against any coastal state assertion of enforcement jurisdiction. Uncertainty about the extent of the coastal state's powers has sought to be removed through developments relating to coastal state action for unlawful fishing and marine pollution, as discussed in the following two sections.

(2) Increasing enforcement powers of the coastal state: marine pollution

The enforcement powers of the coastal state have been expanded under UNCLOS in order to address threats derived from marine pollution. The coastal state may determine that passage is not innocent if an act of willful and serious pollution occurs. Criminal jurisdiction may also exist if the act of pollution is such that the consequences of the crime extend to the coastal state. Certainly intentional acts of pollution are those that have triggered the most concern as a threat to maritime security.

Enforcement jurisdiction of the coastal state has been extended to address marine pollution that may have been accidental. Article 220(2) permits coastal state enforcement of its pollution laws where there are clear grounds for believing that a violation has occurred while navigating in the territorial sea. The enforcement actions permitted against vessels for violations occurring while navigating in the territorial sea include undertaking physical inspection, instituting proceedings and detaining the vessel. The coastal state may also take enforcement actions against vessels navigating in its territorial sea for pollution violations that occurred in its EEZ. These powers have thus gone beyond what has traditionally been accepted for coastal state action against foreign flagged vessels.

97 See UNCLOS art 27(1).
navigating in its territorial sea, and allows for more action than may have been possible if the pollution was considered as abrogating the right of innocent passage.

(3) Increasing enforcement powers of the coastal state: fisheries

Unlawful fishing within the territorial sea renders the passage of that fishing vessel to be non-innocent, and entitles the coastal state to take the necessary steps in its territorial sea to prevent passage which is not innocent. Criminal jurisdiction could also be exercised under Article 27 of UNCLOS on the basis that unlawful fishing disturbs the good order of the territorial sea, as well as potentially having consequences that extend to the state given the importance of a national fishing industry. In addition, under the 1995 Fish Stocks Agreement, a coastal state may also be able to board and inspect a foreign flagged fishing vessel for unlawful fishing on the high seas when that vessel has subsequently entered an area under the national jurisdiction of the inspecting state. To do so, the coastal state must be a member or participant in an RFMO and have clear grounds for believing that a fishing vessel flagged to another state party has engaged in unlawful activity in a high seas area subject to conservation and management measures by the RFMO.

Similarly, with marine pollution, what is notable about the increase in enforcement powers here is that a state has greater powers to take action against foreign flagged vessels for acts occurring outside its national jurisdiction. The expanded authority of the state in this regard, as with the expanded authority of the port state, may further be considered as a response both to poor or insufficient enforcement efforts by flag states and in relation to problems perceived of sufficient international importance to warrant such action.

(4) Encroachments on exclusive enforcement jurisdiction of coastal state

As coastal states exercise sovereignty over the territorial sea, it is generally accepted that other states are not permitted to exercise enforcement jurisdiction within these areas. This situation can cause difficulties as foreign vessels engaged in unlawful activities beyond the territorial sea may flee to this zone precisely because a third state is not entitled to enter the area to arrest the vessel and its crew. The problem is compounded when the coastal state in question lacks the resources, or does not consider it to be a priority, to police certain criminal activities within its territorial sea. These limitations have led to agreements between states where coastal states grant permission for other states to exercise enforcement jurisdiction within their territorial sea, subject to various conditions, in order to respond to particular maritime security threats. A notable example of this phenomenon is seen in the 2008 CARICOM Maritime and Airspace Security Co-operation Agreement, which allows for state parties to patrol and conduct law enforcement operations in the territorial sea of other states parties in response to a wide variety of maritime security threats.

More typically, states have concluded treaties expanding law enforcement powers in relation to particular maritime security concerns. Drug trafficking has been one of the primary activities that has led to coastal states showing greater flexibility in allowing other states to exercise enforcement jurisdiction within their territorial sea. Coastal states may exercise criminal jurisdiction in respect of offences committed on board foreign ships where ‘necessary for the suppression of illicit traffic in narcotic drugs’. This authority arguably applies even if a vessel is not traversing the internal waters or stopping at the port of the coastal state, because the very transport of these prohibited substances in the territorial sea would fall within the ‘illicit traffic in narcotic drugs’. In view of the adequacy of the coastal state’s authority in this regard, drug-trafficking treaties have usually only applied to activities occurring outside the territorial sea. The inadequacy of this strict division between coastal state authority and enforcement jurisdiction of other states against foreign vessels outside the territorial sea has resulted in change under bilateral and regional agreements.

The 2003 Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area includes innovative provisions allowing for the possibility of third states exercising law enforcement powers within the territorial seas of states parties to this agreement. Such authorization may be granted by the ‘competent national authorities’ designated under the Agreement. It was noted during the negotiations: ‘From a legal point of view, the most sensitive provisions of the regional agreement are the ones concerning operations in the territorial waters of a State.’ As a result, states parties...

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105 UNCLOS art 19(2)(b).
106 UNCLOS art 25(1).
107 1995 Fish Stocks Agreement art 21(14).
108 1995 Fish Stocks Agreement art 21(14).
109 As manifest in the restrictions on the right of hot pursuit. See UNCLOS art 111(3).
111 UNCLOS art 27(1)(d). This provision had been included in the Convention on the Territorial Sea and the Contiguous Zone (1958) 516 UNTS 205 [‘Territorial Sea Convention’] (without reference to psychotropic substances), though it was remarked that it was not based on state practice at the time, but reflects the move towards the universalisation of jurisdiction over drug trafficking. See William C. Gilmore, ‘Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ (991) 15 Maritime Policy 183; 184; Shearer, ‘Problems of Jurisdiction’ 237.
112 See Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (2003) <http://www.state.gov/s/ll/2005/87198.htm> [‘2003 Caribbean Agreement’] art 8(2). When doing so, the law enforcement officials are to respect the laws and naval and air customs and traditions of the other Party. See 2003 Caribbean Agreement art 8(1).
sought to strike a balance between the need for enforcement cooperation in addressing drug trafficking with sovereignty concerns.\textsuperscript{114} Article 11 sets out general principles to govern these operations, and reaffirms that law enforcement operations in the territorial sea are subject to the authority of the coastal state. Consent is therefore required for law enforcement to occur and that consent may be subject to any directions and conditions by the relevant coastal state.\textsuperscript{115} Moreover, the coastal state has priority in law enforcement operations as they are to be carried out by, or under the direction of, the coastal state’s own officials.\textsuperscript{116} Random patrols within or over the territorial sea by law enforcement officials of another state are not permitted.\textsuperscript{117} Another safeguard for the coastal state may be drawn from Article 40, which allows for the temporary suspension of obligations relating to the territorial sea if ‘required for imperative reasons of national security’.\textsuperscript{118} Further, any authorized and necessary use of force in law enforcement action must respect laws of the coastal state.\textsuperscript{119}

Article 12 of the 2003 Caribbean Agreement is then the critical provision for the procedure and scope of law enforcement operations in the territorial sea. The scenario addressed is where a suspect vessel has fled into the territorial sea of a state party when being pursued by the law enforcement officials of another state party. Under Article 12, the suspect vessel may be followed into the territorial sea and actions taken by the law enforcement officials of the other state to prevent its escape, and to board and secure the vessel and persons on board while waiting for a response from the coastal state if (a) authorization has been received from the national competent authority of the coastal state or if (b) notice is provided to the coastal state prior to entry into the territorial sea if operationally feasible or failing this as soon as possible.\textsuperscript{120} Notice will be sufficient in situations when there is no official from the coastal state embarked on the law enforcement vessel to grant consent, nor it is a law enforcement vessel of the coastal state in the vicinity ‘immediately available to investigate’.\textsuperscript{121} As another salve to any perceived forfeiture of sovereignty under the 2003 Caribbean Agreement, states parties may elect whether they prefer (a) or (b) and in the absence of election of either method, are deemed to have elected (a) whereby authorization from the coastal state is required for the suspect vessel to be followed into its territorial sea and secured by the other state’s law enforcement officials.\textsuperscript{122} A similar system is put in place in relation to aircraft.\textsuperscript{123} If a search reveals evidence of illicit drug trafficking, the coastal state is to be promptly informed and the suspect vessel, its cargo, and those on board are to be detained and taken to a port within the coastal state, unless otherwise directed by the coastal state.\textsuperscript{124}

The 2003 Caribbean Agreement is a significant advance in international cooperation to deal with illegal drug trafficking because of the potential law enforcement authority granted to third states within another state’s territorial sea. It should also be noted that this same Agreement admits of the possibility of such authority being extended to a coastal state’s internal waters (or parts thereof), which are otherwise excluded from the scope of the treaty.\textsuperscript{125} Excluding an option for such an extension was appropriate for those states that are concerned that areas immediately adjacent to the territorial sea would otherwise become safe havens for drug traffickers.\textsuperscript{126}

Encroachments on the coastal state’s exclusive enforcement jurisdiction in the territorial sea may also be seen in responses to acts of piracy and armed robbery.\textsuperscript{127} As the current definition of piracy is focused on acts on the high seas, and manypiratical acts occur within the territorial seas and internal waters of states (armed robbery), there have been calls to develop a broader approach encompassing all maritime zones.\textsuperscript{128} Further, it has been proposed that duties of cooperation related to combating piracy should be extended to maritime zones under the sovereignty of coastal states.\textsuperscript{129} Jesus has argued that there should be some modification to the geographical scope of the rules relating to piracy given that the ‘majority of coastal states do not have the means and the financial wherewithal to combat armed robbery against ships in their territorial sea or archipelagic waters, especially against the new and powerful international piracy syndicates’.\textsuperscript{130} He further asserts that piracy may deliberately choose to operate within the territorial seas of particular states precisely because they know foreign warships may not pursue them or enter these waters to stop them and that the enforcement authorities of the coastal state are otherwise unable to provide sufficient policing.\textsuperscript{131} In these circumstances, Jesus rightly questions whether it is legitimate to allow foreign ships, and those on board,

\textsuperscript{114} See ibid 23.
\textsuperscript{115} See 2003 Caribbean Agreement art 11(1) and (2).
\textsuperscript{116} See 2003 Caribbean Agreement art 11(3). See further Gilmore, Caribbean Area 23.
\textsuperscript{117} See 2003 Caribbean Agreement art 11(4).
\textsuperscript{118} See 2003 Caribbean Agreement art 40 reads in full: ‘Parties to this Agreement may temporarily suspend in specified areas under their sovereignty their obligations under this Agreement if such suspension is required for imperative reasons of national security. Such suspension shall take effect only after having been duly published.’
\textsuperscript{119} See 2003 Caribbean Agreement art 23(5).
\textsuperscript{120} See 2003 Caribbean Agreement art 12(1).
\textsuperscript{121} See 2003 Caribbean Agreement art 12(1)(b).
\textsuperscript{122} See 2003 Caribbean Agreement art 12(2).
\textsuperscript{123} See 2003 Caribbean Agreement art 12(4) and (5).
\textsuperscript{124} 2003 Caribbean Agreement art 12(3).
\textsuperscript{125} Art 12(1) defines the ‘waters of a Party’ to cover its territorial sea and archipelagic waters, but does not refer to internal waters.
\textsuperscript{126} See Gilmore, Caribbean Area 28.
\textsuperscript{127} The IMO distinguishes between piracy and ‘armed robbery against ships’, with the latter term referring to maritime zones under the sovereignty of the coastal state, ‘any unlawful act of violence or detention, or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State’s jurisdiction over such offences’. IMO Assembly, ‘Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships’ (29 November 2001) 212nd Session Agenda item 9 IMO Doc A 22/Rev 922.
\textsuperscript{128} See Robert C. Beckman, ‘Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward’ (2002) 33 ODIL 317; José Luis Jesús, ‘Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects’ (2003) 18 IJMCL 363, 368, and 382 (‘The first important change that would strengthen in a significant way the legal protection of shipping against modern piracy would be to extend the regime of piracy to territorial waters, in a way that would, at the same time, totally preserve respect for the coastal state’s sovereignty over its territorial waters’).
\textsuperscript{129} See Jesus, ‘Protection of Foreign Ships’ 380. See also Beckman, ‘Combating Piracy’ 333–4.
\textsuperscript{130} Jesús, ‘Protection of Foreign Ships’ 383.
\textsuperscript{131} Ibid.
mercilessly to fall prey to such attacks.\textsuperscript{132} Moreover, he argues that since no state takes responsibility for the actions of pirates in their territorial seas and pirates attack vessels of any state indiscriminately then the same reasons for according jurisdiction over pirates on the high seas apply equally to areas under the sovereignty of the coastal state.\textsuperscript{133} While it is arguable that a state could be held internationally responsible for a failure to protect foreign shipping adequately within its territorial waters,\textsuperscript{134} the more salient point rests with the exploitation of existing legal rules by the criminals. In these circumstances, there should be scope for reconsideration of these rules.

Third party involvement in improving coastal state responses to armed robbery against vessels may range from logistical and resource support to law enforcement activities. Efforts to respond to piracy off parts of the African coast include the United States' African Coastal Security Program, where the United States provides the region with additional naval vessels, radar and communications equipment, coastguard training and coordination to inter alia improve the capability of the navies and coastguard services of African governments and combat piracy.\textsuperscript{135} This programme clearly falls at one end of the spectrum in terms of not encroaching on territorial sea sovereignty.

By contrast, the prevalence of piratical acts off the coast of Somalia led to the adoption of Security Council resolutions authorizing certain enforcement action by foreign vessels within the territorial sea of Somalia.\textsuperscript{136} The resolutions do not purport to modify in any way the current situation under the law of the sea in addressing acts of armed robbery within the territorial sea of a coastal state and was predicated on the consent of the transitional government of Somalia (points reinforced by each of the delegates who spoke at the adoption of the first such resolution).\textsuperscript{137} Nonetheless, this step by the Security Council is at least an indication that there are means available for foreign warships to take action against armed robbery in the territorial sea of a coastal state on a collective and cooperative basis. While coastal state consent was underlined as an important element in Security Council authorizations to take action in Somalia's territorial sea, it is nonetheless notable that the United States and France had already pursued pirates in this sovereign area and not been censured by the United Nations for doing so.\textsuperscript{138}

A further response to piracy off Somalia has been an invitation from the Security Council that states enter into ship-rider agreements whereby law enforcement officials of countries willing to take custody of pirates would travel on the vessels of states and regional organizations fighting piracy off the coast of Somalia.\textsuperscript{139} Such agreements would still require the consent of Somalia's transitional government for any exercise of third state jurisdiction in Somalia's territorial waters.\textsuperscript{140} The use of embarked officers has been included in a non-binding Code of Conduct among states in the Western Indian Ocean and Gulf of Aden region.\textsuperscript{141}

Post-September 11, states have also considered what steps might be taken within the territorial sea in response to different terrorist threats. Questions may arise as to whether various terrorist activities—surveillance and other preparation for a terrorist act, shipment of supplies for the perpetration of an act, trading of goods intended to finance terrorist groups—violate the right of innocent passage.\textsuperscript{142} The coastal state is likely to have authority to prescribe acts of maritime terrorism as different crimes, on the basis that it may be conspiracy to commit a terrorist act and preparatory steps towards such an act may be criminal matters, the consequences of which might extend to the coastal State, or disturb its peace or good order.\textsuperscript{143} Each coastal state therefore has the legal authority to take necessary action, but third states may be concerned about the capacity or the willingness of the coastal state to do so.

Beckman has proposed that a new treaty should be adopted to address the obligations of coastal states to deal with terrorism against international shipping in territorial seas, straits, and archipelagic waters.\textsuperscript{144} In this regard, he favours an international agreement that would promote cooperative endeavours between the coastal state and other states for the purposes of suppressing terrorist attacks as opposed to powerful maritime states potentially undertaking unilateral action in the coastal waters under a broad, and possibly unlawful, definition of self-defence.\textsuperscript{145} This approach continues to show deference to the sovereignty of the coastal state while still seeking a means of responding to maritime security concerns.

Overall, it may be seen that extensive powers for enforcement action are accorded to coastal states in their territorial seas, including over activities that are threats to maritime security. Coastal states have strongly resisted the possibility of

\textsuperscript{132} Ibid 383-4.
\textsuperscript{133} Ibid 384 (Jesus refers to the exercise of "common jurisdiction").
\textsuperscript{134} See generally Tammy M. Sinnick, 'State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait' (2005) 14 Pacific Rim Law and Policy Journal 743.
\textsuperscript{137} See Security Council, 5902 nd meeting, 2 June 2008, UN Doc. S/PV.5902 (the interventions of Indonesia, Viet Nam, South Africa, China and Libya).
\textsuperscript{139} UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851, para 3.
\textsuperscript{140} Ibid.
\textsuperscript{142} With the advent of the Proliferation Security Initiative, commentators have questioned whether the transport of weapons of mass destruction would fall foul of innocent passage. See further discussion in Chapter 4.\textsuperscript{143} Kaye, 'The Proliferation Security Initiative' 215.
\textsuperscript{145} See ibid 115 (referring to the possible application of the Bush Doctrine on pre-emptive self-defence in waters under the territorial sovereignty of a coastal state).
third states exercising enforcement jurisdiction within their territorial seas, precisely because it is seen as a threat to the sovereignty of the coastal state. However, the inadequacies in policing, because of lack of resources or interest, have led to agreements between the states concerned to permit other states to exercise enforcement powers within another state's territorial sea. These agreements could be seen as recognition that the greater interest is in responding to the maritime security threat rather than the sovereign interests of the state being all important. The shift in this regard is slight, however.

D. Straits

When considering the enforcement powers of coastal states in straits subject to the transit passage regime,\(^{146}\) it may be noted at the outset that there is 'no direct prohibition of enforcement measures by the coastal State in straits, nor any direct recognition of them' in UNCLOS.\(^{147}\) Article 42 permits states bordering straits to adopt laws and regulations relating to transit passage in respect of a range of specific topics, including for navigation, pollution, fishing, customs, and immigration.\(^{148}\) These laws and regulations are not to 'discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage'.\(^{149}\) Despite the existence of these prescriptive powers, the absence of explicit enforcement powers within the text of UNCLOS has led some commentators to suggest that the coastal state has no enforcement jurisdiction in straits.\(^{150}\) Shearer has considered that there may be limitations on the enforcement powers of states bordering straits by reference to Article 233, which allows for enforcement measures in straits only where a violation of either certain navigation or pollution laws causes or threatens major damage to the marine environment of the strait.\(^{151}\) This absence of enforcement jurisdiction provides user states with 'unlimited and maximum freedom of passage'.\(^{152}\)

To deny the littoral states enforcement powers in straits is quite problematic in addressing maritime security concerns. The security of international shipping may be jeopardized if a state bordering a strait is unable to enforce requirements relating to, for example, navigational aids or criminal activity. Under Article 43 of UNCLOS, user states and states bordering a strait should cooperate in relation to necessary navigational and safety aids or other improvements in aid of international navigation and for the prevention, reduction and control of pollution from ships. To this end, separate agreements may be adopted to allow for explicit enforcement powers on the part of the littoral states. Such agreements could also be used to defray the expense of policing the straits to prevent acts of piracy or other attacks on ships.\(^{153}\) However, it would have to be anticipated that an increase of powers over straits would be resisted because of the possible imposition on the freedom of navigation.\(^{154}\) The freedom of navigation holds particularly high importance in the straits regime in view of the compromise that was reached in the creation of transit passage in response to greater claims of sovereignty in extending the breadth of the territorial sea.\(^{155}\)

While it could be validly argued that greater restrictions on the freedom of navigation may be warranted as a means of improving maritime security (in terms of the coastal state being permitted to exercise enforcement jurisdiction over actions that would threaten maritime security in the strait), an alternative perspective is to support the internationalization of the strait. Such internationalization refers to other states apart from the littoral state having authority to take steps to improve maritime security—in terms of preventive and defensive actions taken against pirates, increased monitoring and patrolling of the waters of the straits, and pursuit and arrest of vessels engaged in various unlawful activities (such as drug trafficking, illegal fishing, or people smuggling). This approach would of course cut into the sovereignty of the littoral state.

The United States considered this internationalized approach to strait security in relation to the Singapore and Malacca Straits. These straits are well-recognized as a hub of international shipping and, as a result, a terrorist attack in this area would have a devastating impact on international trade. Moreover, the Singapore and Malacca Straits have been ripe with piracy and other unlawful activity. Singapore, Indonesia and Malaysia had undertaken a range of initiatives to improve surveillance

\(^{146}\) See Chapter 2, Part B(1) for discussion of applicability of transit passage to various straits. Otherwise, enforcement powers of littoral states are determined by reference to the territorial seas or EEZ regimes, as appropriate.

\(^{147}\) Shearer, ‘Problems of Jurisdiction’ 331.

\(^{148}\) Article 41(2) refers to: (a) the safety of navigation and the regulation of maritime traffic, as provided in art 41; (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; (c) with respect to fishing vessels, the prevention of fishing, including the steering of fishing gear; (d) the loading or unloading of any commodity, currency, or person in contravention of the customs, fiscal, immigration, or sanitary laws and regulations of States bordering straits.

\(^{149}\) UNCLOS art 43(2).

\(^{150}\) See Jules Roberts and Martin Tsamenyi, 'The Regulation of Navigation under International Law: A Tool for Protecting Sensitive Marine Environments' in Tadis Malick Ndiaye and Rüdiger Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes (Martinus Nijhoff, Leiden 2007) 787, 798. See also Bing Bing Jia, The Regime of Straits in International Law (Clarendon Press, Oxford 1998) 161. By contrast, McDougall and Burke have noted (albeit in discussion of maritime areas adjacent to the territorial seal) 'if particular states are not to be accorded the competence to apply the authority necessary to implement their prescriptions, conferring upon them a competence to prescribe would appear but a superfluous verbal exercise'. McDougall and Burke, The Public Order of the Oceans 621. Arguably, this view could apply in relation to straits in the absence of explicit enforcement powers within UNCLOS.

\(^{151}\) Shearer, ‘Problems of Jurisdiction’ 332. See also Jia, The Regime of Straits 161–2.

\(^{152}\) Roberts and Tsamenyi, 'The Regulation of Navigation' 798.


\(^{154}\) The first agreement implementing art 43, the Cooperative Mechanism for the Straits of Malacca and Singapore, did not address enforcement powers, but user states instead insisted that passage should remain unimpeded and otherwise consistent with existing international law. See Joshua H. Ho, ‘Enhancing Safety, Security, and Environmental Protection of the Straits of Malacca and Singapore: The Cooperative Mechanism’ (2009) 40 ODIL 233, 238.

\(^{155}\) As discussed in Chapter 2, Part B(3).
and policing of the areas in the 1990s. However, the security of the area took on new importance following the September 11 terrorist attacks. In 2004, the United States proposed a Regional Maritime Security Initiative (RMSI) to address threats of piracy, as well as maritime terrorism, people smuggling, and drug trafficking, in the Straits of Malacca and surrounding areas. Although Singapore is reported to have favoured RMSI, Malaysia and Indonesia were more reticent given their views of security as a domestic issue to be resolved internally, or on a regional basis, and that involvement of the United States would be more likely to foment terrorist activity than deter or suppress it. Japan’s offer of its naval forces to help patrol the area was also rejected. Malaysia and Indonesia were further concerned that it might compromise their sovereignty and sovereign rights in the areas. Indonesia, Malaysia, and Singapore instead moved to coordinated patrols, and launched an ‘Eyes in the Sky’ programme with Thailand involving combined maritime air patrols to improve maritime domain awareness over the Straits of Malacca and Singapore.

In the absence of specific agreement, the ability of a strait state to respond to maritime security threats would be limited to instances where the conditions for transit passage or innocent passage have not been met. For strait subject to the regime of transit passage, if a vessel violates the right of transit passage then it will fall under the requirements of innocent passage. If the activity in question also violates the standards for innocent passage then the enforcement rights of the coastal state would then include taking steps to prevent passage that is not innocent. This approach may ultimately be sufficient given the generalities and scope of coastal state action in response to unlawful passage.

In view of the lack of specific enforcement powers otherwise accorded to states bordering international straits, opportunities to take steps to prevent or respond to maritime security threats could well be limited. This position may be lamented in view of the fact that international straits are of such fundamental importance to international shipping and hence are in greatest need of protection. The entrenched importance of the common interest in navigation is likely to prevent meaningful developments that would augment coastal state authority as a means to improve maritime security. It would seem that the balance of interests that had to be achieved to secure passage through international straits remains too delicate to risk any adjustment.

### E. Contiguous Zone

The contiguous zone is an area extending 24 miles from the baselines of a coastal state. The origins of the contiguous zone may be traced to the desire of the coastal state to provide greater protection to its interests, even if not going so far as to claim sovereignty over a wider expanse of ocean area. Although the contiguous zone is not recognized as a security zone, the protection currently afforded to the coastal state in the contiguous zone does accord with allowing for rights over certain activities that may be construed today as a threat to maritime security. In particular, Article 33 of UNCLOS refers to customs, fiscal, immigration, or sanitary laws, which may be relevant to address crimes associated with drug and people trafficking, or even potentially terrorism (if, for example, the activities concerned terrorist financing or smuggling contraband into a state for use in a terrorist offence). The contiguous zone is sometimes used by states (controversially) to assert a security jurisdiction that then requires notification of voyages by foreign warships, or foreign vessels generally.

Law enforcement may be undertaken by the coastal state in the contiguous zone. According to Article 33, states may exercise the control necessary to prevent and punish the infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territorial or territorial sea in a zone extending 24 miles from its baseline. In dissection of Article 33, Shearer notes that the first limb ‘applies to inward-bound ships and is anticipatory or preventive in character; the second limb, applying to outward-bound ships, gives more extensive power, and is analogous to the doctrine of hot pursuit.’

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156. See Sitrnick, ‘State Responsibility’ 753.
159. See Phil DeCaro, ‘Safety Among Dragons: East Asia and Maritime Security’ (2006) 33 Transportation Law Journal 227, 246. Approximately 80 per cent of Japan’s oil from the Middle East traverses these waters. Ibid.
161. See Sitrnick, ‘State Responsibility’ 753 (referring to the operation code named MALSINDO).
164. Ibid 16 (referring to UNCLOS art 25(1)).
165. See Chapter 2, Part B(4).
166. It may be the case that particular characteristics of a specific international strait warrant additional environmental protection, as may be seen in the steps taken by Australia and Papua New Guinea to have the Torres Strait declared a Particularly Sensitive Sea Area through the IMO. See Sam Bauman and Michael White, ‘Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risk to a Sensitive Marine Environment’ (2009) 40 ODIL 184.
Coastal states only have ‘control’ and not sovereignty, sovereign rights, or jurisdiction in the contiguous zone. Shearer considers that ‘control’ must therefore be limited to such measures as inspections and warnings, and cannot include arrest or forcible taking into port.173 However, it has also been argued that while the scope of the contiguous zone is limited in that it only refers to three specific categories of laws and regulations, it provides powers of prevention as well as repression. Dupuy and Vignes consider that ‘this power can be exercised by means of all forms of constraint, such as arresting the ship, escorting it to the ports of the coastal State, the carrying out of legal measures, seizure, etc.’172 In this regard, the primary limitation is the observance of proportionality.173 This latter interpretation is preferable in a more progressive approach to improving the ways states may address maritime security concerns. To this end, states could give greater attention to the scope of powers allowed in the contiguous zone to address maritime security threats.

F. Exclusive Economic Zone

In the EEZ, coastal states have sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of these waters and with regard to other activities for the economic exploitation and exploration of the zone.174 Coastal states also have jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.175 Within the EEZ, other states enjoy the freedoms 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.176

In view of the delicately balanced interests at stake in this area, UNCLOS sets up a carefully defined regime for the enforcement of laws relating to pollution,177 and fishing,178 so as to minimize the likelihood of coastal states interfering unnecessarily with navigation.179 Coastal states’ enforcement jurisdiction extends to authority to seize vessels violating coastal state laws and regulations related to these issues.180 A number of safeguards are included in UNCLOS to protect navigational rights in the face of this assertion of coastal state authority. As Becker notes, ‘the UNCLOS provisions place particular emphasis on system concerns: how coastal states must manage their living resources in the EEZ while keeping in mind the needs of the international system as a whole.’181

As UNCLOS is explicit about what enforcement powers a coastal state has, it could be argued that the enforcement of laws relating to maritime security more generally stand on less sure footing. The precise articulation of the enforcement rights accorded to coastal states in the EEZ may counter any argument that enforcement of security requirements is permissible under UNCLOS, as the coastal state only has economic-related rights in the EEZ. The ITLOS decision in MV ‘Saiga’ (No 2) provides some indication that states may not seek to enforce laws that are not specifically related to coastal state rights in the EEZ.182 In that case, the MV ‘Saiga’, an oil tanker sailing under the flag of Saint Vincent and the Grenadines, entered the EEZ of Guinea to supply fuel to three fishing vessels. Guinean customs patrol boats arrested the vessel outside of Guinea’s EEZ and subsequently detained the vessel and crew members. Guinea asserted that the arrest of the MV ‘Saiga’ had been executed following a hot pursuit motivated by a violation of its customs laws in the contiguous zone and ‘customs radius’ of Guinea.183 Under Guinea’s Customs Code, the ‘customs radius’ extended 250 kilometres from its coast. Saint Vincent and the Grenadines maintained that Guinea was not entitled to extend its customs laws to the EEZ and that the Guinean action had interfered with the right to exercise the freedom of navigation as the supply of fuel oil fell within ‘other internationally lawful uses of the sea related to the freedom of navigation’.184 The Tribunal determined that the application of customs laws to parts of the EEZ was contrary to UNCLOS.185 From this case, it seems that coastal states’ enforcement powers in the EEZ are therefore not likely to be recognized as lawful beyond those relating to the activities over which coastal states are specifically attributed jurisdiction or sovereign rights.

It should nonetheless be recalled that Article 58(2) of UNCLOS preserves the high seas regime, including certain law enforcement powers, to the extent that they are not incompatible with the EEZ regime.186 On this basis, law enforcement activities pursuant to the right of visit, as discussed below in relation to the high seas, are applicable within the EEZ. Certainly, the practice of states tends to indicate that coastal state powers in the EEZ have expanded, with Van Dyke going so far as to argue that, ‘[a] new norm of customary international law appears to have emerged that allows coastal states to regulate navigation through their EEZ.

171 Ibid 330. Although he notes that powers of arrest are greater under the second limb, since it refers to an offense that has already been committed within national territory.
172 Dupuy and Vignes, A Handbook on the New Law of the Sea 857 (acknowledging that there are more restrictive views on these powers than those they express).
173 UNCLOS art 56(1)(c).
174 UNCLOS art 56(1)(b).
175 UNCLOS art 58(1).
176 Articles 213, 214, 216, and 222 of UNCLOS address enforcement with respect to pollution from land-based sources, from seabed activities, by dumping and from or through the atmosphere respectively. UNCLOS art 73.
177 Ibid 857.
178 UNCLOS art 56(1)(c).
179 UNCLOS art 73.
180 Ibid para 142 (on hot pursuit).
182 MV ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea) ITLOS Case No 2; (1999) 38 ILM 1523.
183 See paras 116-17, 124-5 (referring to Guinea’s customs laws) and para 142 (on hot pursuit).
184 Ibid para 119 and 123.
Law Enforcement Activities

based on the nature of the ship and its cargo. This development has particularly been seen in the prohibition of transit of shipments of ultrahazardous nuclear cargoes through the EEZ. The status of any new customary principle allowing for coastal state law enforcement over activities beyond those specified in UNCLOS will usually be open to challenge given the generally accepted importance of protecting navigational rights within this maritime zone. It is therefore understandable that when it has been agreed that coastal states should have new law enforcement powers, these were carefully laid out in UNCLOS or other multilateral treaties. This section focuses on the two accepted activities over which coastal states have enforcement authority in the EEZ under UNCLOS: fishing and pollution.

1 Fishing

Article 73(1) of UNCLOS allows the coastal state to take various measures to ensure compliance with its laws and regulations for the exploration, exploitation, conservation, and management of the living resources in its EEZ. Expansive prescriptive powers are reinforced by broad enforcement powers that enable coastal states to board, inspect, arrest, and institute judicial proceedings against vessels found in violation of fishing laws and regulations. Additional measures that coastal states have taken, or may take, to enhance enforcement with fishing laws and regulations include prescribing sea lanes for transiting fishing vessels, requiring report of entry and exit together with route used; and stowage of fishing gear during passage. The penalties imposed by the coastal state may not include imprisonment, in the absence of agreements to the contrary by the states concerned, or any form of corporal punishment. In cases of arrest or detention of foreign vessels, the coastal state must promptly notify the flag state through appropriate channels of the action taken and of any penalties subsequently imposed.

While a coastal state has ample rights to regulate fishing in its EEZ and the legal authority to enforce those rules, the practical reality is that there is usually a large expanse of water involved and considerable resources are required to undertake adequate policing. Fishing vessels have become increasingly sophisticated both in terms of the techniques used, enabling large quantities of fish to be caught, and in the technology available to locate fish stocks and to avoid detection by coastal state authorities. These factors contribute to IUU fishing being perceived as a threat to the economic security of the coastal state.

The large incidence of IUU fishing indicates that the legal framework devised for prescribing and enforcing fisheries laws is inadequate. While there are of course practical limitations imposed on coastal states in terms of the capacity and resources that may be required to detect, arrest and prosecute unlawful fishing vessels, the current legal regime tends to underline these problems rather than provide any panacea. One such weakness relates to the right of hot pursuit, which is discussed in relation to the high seas below, and another is the procedure available under UNCLOS allowing flag states to challenge any failure by the coastal state to promptly release foreign flagged vessels upon payment of a reasonable bond.

The prompt release obligation is intended to protect the navigational rights of the vessels concerned, and is reinforced by the availability of a compulsory dispute settlement procedure before the International Tribunal for the Law of the Sea. Article 292 permits the institution of legal proceedings against the detaining state when it is alleged that the detaining state has not complied with the prompt release requirement of, inter alia, Article 73, paragraph 2. The prompt release proceedings under Article 292 can only deal with the question of release and the posting of a reasonable bond or other financial security, and not aspects relating to the merits of any alleged violations of a coastal state’s fisheries laws. Article 292(1) of UNCLOS provides that:

Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

The prompt release decisions of the Tribunal have so far only addressed vessels detained for unlawful fishing. One of the difficult issues faces by the Tribunal has been balancing the efforts of coastal states to address the serious problem of IUU fishing with the navigational rights of fishing vessels. This

188 Ibid 111.
189 See Natalie Klein, ‘Legal Implications of Australia’s Maritime Identification System’ (2006) 55 ICLQ 337 (discussing Australia’s plan to intercept vessels if they failed to provide particular identification information when entering Australia’s EEZ).
191 UNCLOS art 73(3).
192 UNCLOS art 73(4).
195 Article 73(1) of UNCLOS reads: ‘Arrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security.’
196 The prompt release procedure is also available for vessels detained for pollution offences. See Klein, Dispute Settlement 86.
197 For arrests of fishing vessels within the EEZ, the freedom of fishing is not at stake because coastal states have exclusive rights over the living resources within this area. It is a question of the
issue has been raised in the context of whether the bond set by the coastal state was reasonable or not.\textsuperscript{198} The approach of the Tribunal has tended to weight the need for prompt release over the conservation and management concerns of the coastal state.\textsuperscript{199} While it may be seen as appropriate for the rights of the flag state to be emphasized in view of the fact that Article 292 is available precisely to protect the freedom of navigation, this focus seems unwarranted in situations where evidence is presented of the excessive problems of over-fishing of a particular stock or species and the cooperative responses being pursued by coastal states.\textsuperscript{200} Greater appreciation of coastal state efforts to protect and manage fisheries is required when coastal states are engaged in collaborative endeavours; a different situation to one involving a coastal state over enthusiastically applying penalties to fishing vessels engaged in activities that violate national laws and regulations.\textsuperscript{201}

The enforcement powers of coastal states over unlawful fishing in their EEZ have been extended for parties to the 1995 Fish Stocks Agreement. If there are reasonable grounds to believe that a vessel located on the high seas has engaged in unlawful fishing in the EEZ, the coastal state may request the flag state to investigate immediately and fully, or that the flag state permit the coastal state to board and inspect the vessel on the high seas.\textsuperscript{202} The 1995 Fish Stocks Agreement thereby provides a coastal state with means to gain authorization to visit a foreign flagged vessel on the high seas to respond to offences within the EEZ of the coastal state. This right may be sought irrespective of the coastal state’s right of hot pursuit.\textsuperscript{203} This provision ultimately adds little to coastal freedom of navigation and the right of fishing vessels not to be unreasonably interfered with in traversing these waters.

\textsuperscript{198} See eg the Volga Case (Bullock v Australia) (Prompt Release) ITLOS Case No 11; (2003) 42 ILM 159, para 68; Monte Confurco Case (Seychelles v France) (Prompt Release) ITLOS Case No 6; (2000) ITLOS Reports 86, para 29. The factors considered in assessing the reasonableness of the bond include the gravity of the offence, the penalties imposed or imposable, the value of the vessel and its cargo, and the amount of the bond and its form. See Camouco Case (Panama v France) (Prompt Release) ITLOS Case No 5; (2000) 300, para 67. In the June Trader Case, ITLOS further stated that ‘[t]he assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties’. Juno Trader Case (Saint Vincent and the Grenadines v Greece/Rumania) (Prompt Release) ITLOS Case No 19; (2004) 44 ILM 498, para 85.

\textsuperscript{199} Judges in their separate opinions in the Volga did, however, refer to this aspect and suggest greater weight should have been accorded to this element. See, eg, Separate Opinion of Judge Cot, and Declaration of Judge Maritz. See further Tim Stephens and Donald R. Rothwell, ‘Case Note: The Volga (Russian Federation v Australia)’ (2004) 35 JMCL 283, 288 (‘The Tribunal therefore appears to have accorded little weight to the serious problem of IUU fishing or the uncontroverted evidence that the Volga was part of a fleet of vessels systematically violating Australian fisheries laws and CCAMLR conservation measures.’); Baird, ‘Illegal, Unreported and Unregulated Fishing’ 319-21.

\textsuperscript{200} In this regard, Judge Cot advocated that ‘The Tribunal has a duty to respect the implementation by the coastal State of its sovereign rights with regard to the conservation of living resources, particularly as these measures should be seen within the context of a concerted effort within the Food and Agriculture Organization) and CCAMLR’. Volga (Prompt Release) Separate Opinion of Judge Cot, para 12. See also ibid, Dissenting Opinion of Judge ad hoc Shearer, paras 19 (noting that the balance of interest between flag states and coastal states did not need to be ‘preserved exactly as it was conceived’).

\textsuperscript{201} See Klein, ‘Dispute Settlement’ 111-12.

\textsuperscript{202} 1995 Fish Stocks Agreement art 111.

\textsuperscript{203} Article 206 provides that the authorization to board the vessel on the high seas is without prejudice to art 111 of UNCLOS, which sets out the right of hot pursuit.

Exclusive Economic Zone

state authority over fishing in its EEZ as the 1995 Fish Stocks Agreement does not constitute the consent of the flag state for enforcement measures on the high seas for offences in the EEZ. Even without this treaty, the coastal state could have sought authorization of the flag state to board and inspect one of its vessels if there were reasonable grounds to believe that vessel had violated the coastal state’s laws.

The enforcement powers of the coastal states are therefore strongest within its EEZ in attempting to address the problem of IUU fishing. It is unfortunate that the efforts of coastal states to curb this practice have been undermined by the decisions of ITLOS in the prompt release cases and ITLOS should therefore reconsider the balance it applies between flag states and coastal states if it is to play any meaningful role in addressing this difficult issue.

(2) Marine pollution

Prior to the establishment of the EEZ, the permissible responses available to states to environmental emergencies outside their territorial seas were limited.\textsuperscript{204} Consistent with other attempted encroachments on the high seas, efforts to regulate shipping for better environmental protection encountered concerns about consequent limitations on the freedom of navigation.\textsuperscript{205} Through the IMO, states have increasingly adopted a range of standards to protect and preserve the marine environment. These have included treaties on vessel pollution,\textsuperscript{206} dumping at sea,\textsuperscript{207} and maritime casualties.\textsuperscript{208} The usual practice of the IMO is not to set out enforcement powers for coastal states within these treaties, as this matter is now largely regulated under UNCLOS instead.\textsuperscript{209} Under UNCLOS, coastal states are accorded increased powers to devise regulations over all sources of pollution in light of their recognized jurisdiction for the protection and preservation of the marine environment. However, while the prescriptive powers of coastal states have been

\textsuperscript{204} Boyle has noted that states were empowered to regulate pollution at sea, rather than being required to do so, prior to the adoption of UNCLOS. See Alan E. Boyle, ‘Marine Pollution under the Law of the Sea Convention’ (1983) 79 AJIL 347, 350-1.

\textsuperscript{205} Roberts and Tsamenyi describe this ‘historical debate’ as follows: ‘The historical debate over the regulation of shipping for environmental purposes is characterised by two dichotomous points of view—those that wish to see the adoption of ever-more stringent regulations for the protection of coastal States’ marine resources, and those that view coastal States’ environmental regulation as a threat to traditional rights of freedom of navigation and therefore with to limit the regulation of navigation for environmental purposes’. Roberts and Tsamenyi, ‘The Regulation of Navigation’ 787. See also Boyle, ‘Marine Pollution’ 352.

\textsuperscript{206} MARPOL 73/78.

\textsuperscript{207} Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972) 1046 UNTS 120.

\textsuperscript{208} International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969) 970 UNTS 211 [‘Marine Casualties Convention’].

\textsuperscript{209} Roberts and Tsamenyi, ‘The Regulation of Navigation’ 880 (UNCLOS provides the enforcement framework for IMO instruments by establishing the degree to which coastal States may legitimately interfere with foreign ships in order to ensure compliance with IMO rules and standards’).
augmented under UNCLOS, their enforcement powers have remained limited in deference to the rights of flag states.\footnote{See Boyle, 'Marine Pollution' 358.}

Responding to maritime casualties was one of the first major developments according greater power to coastal states to react to threats to their environmental security. The lack of recognized powers accorded to the coastal state had been highlighted by the 1967 grounding of the Torrey Canyon and spillage of over 100,000 tons of crude oil in the high seas near Cornwall in the United Kingdom. The British government ordered the bombing of the wrecked vessel as a means of igniting the oil to reduce the amount of damage to the marine environment and justified this action as self-defence.\footnote{See Marine Casualties Convention art V (1) and (2).} Given the questionable reliance on self-defence in these circumstances, states instead moved to adopt an international treaty in 1969 to deal with situations of marine casualty and to permit measures on the high seas in order 'to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil.'\footnote{See Boyle, 'Problems of Jurisdiction' 337 (characterizing art 221 as an 'extreme form of permission to intervene on the high seas'). Dupuy and Vignes consider that the breadth of art 221 and its reference to its basis in customary and conventional law are justified when regard is had to the doctrine of necessity in the international law of state responsibility. Dupuy and Vignes, A Handbook on the Law of the Sea 866.}

Although the 1969 Marine Casualties Convention was limited to oil pollution, a subsequent protocol removed the limitation to the right of intervention to pollution by oil, and now covers a range of substances that are drawn up by a body acting under the auspices of the IMO.\footnote{See MARPOL Convention 1973.} Unless the danger is imminent, states parties taking action are obliged to consult with experts and notify affected parties.\footnote{See Marine Casualties Convention art I.} Under this treaty, any intervention measure taken must be proportionate to the damage 'actual or threatened' and may not be more than was 'reasonably necessary'. The criteria for assessing proportionality of the measures are set out in Article V(3) and include the extent and probability of imminent damage if those measures are not taken; their likely effectiveness and the extent of damage they may cause. If the measures envisaged do not meet these criteria then the intervening party 'shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article 1.'\footnote{See Boyle comments, 'if properly adhered to, these provisions would greatly increase the effectiveness of flag state jurisdiction as the main means of control over shipping'. Boyle, 'Marine Pollution' 364.}

The key provision of the 1969 Convention was incorporated into UNCLOS, particularly as the UNCLOS negotiations were proceeding when the Amoco Cadiz split in two off the coast of Brittany, spilling 1.6 million barrels of oil into the ocean.\footnote{See Shearer, 'Problems of Jurisdiction' 797.} Article 221 of UNCLOS adopts the approach of the 1969 Convention with some modifications allowing for greater scope of action by the affected coastal state.\footnote{See ILA Committee, 'Final Report' 21.} Article 221 allows for measures to be taken, as well as enforced, and does not require there to be 'grave and imminent danger' but refers only to actual or threatened damage that may reasonably be expected to result in major harmful consequences.\footnote{Boyle considers that there has only been a partial diminution in the traditional primacy of flag state jurisdiction. See Boyle, 'Marine Pollution' 363.}

UNCLOS further accords states with powers to prescribe laws over different sources of marine pollution, so long as these laws are consistent with international standards.\footnote{Boyle considers that there has only been a partial diminution in the traditional primacy of flag state jurisdiction. See Boyle, 'Marine Pollution' 363.} Van Dyke has observed that coastal states have been adopting increasingly strict requirements against vessels in their EEZ for better protection of the marine environment.\footnote{See Boyle comments, 'if properly adhered to, these provisions would greatly increase the effectiveness of flag state jurisdiction as the main means of control over shipping'. Boyle, 'Marine Pollution' 364.} Flag states continue to have powers to enforce the applicable international rules and standards in relation to their vessels, and are to provide for effective enforcement irrespective of where a violation occurs.\footnote{Van Dyke observes that the EEZ has detracted from the typical deference accorded to flag state authority.}

The key provision for coastal state enforcement powers to deal with vessel pollution is Article 220, which has been described as a lex specialis to the enforcement powers set out in Article 73.\footnote{See UNCLOS arts 207–12.} While Article 220(3)–(6) of UNCLOS has been described as a 'potent provision' for coastal state enforcement,\footnote{See Boyle comments, 'if properly adhered to, these provisions would greatly increase the effectiveness of flag state jurisdiction as the main means of control over shipping'. Boyle, 'Marine Pollution' 364.} coastal states must meet a large number of requirements for various actions to be taken.\footnote{See MARPOL Convention 1973.} Coastal states have enforcement powers over foreign vessels in their EEZ when there are clear grounds for believing that the vessel has violated relevant rules and standards on marine pollution. These powers are limited in the first instance to
requiring information from the vessel as to 'its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred'. The coastal state may undertake a physical inspection if the violation results in a 'substantial' discharge that causes or threatens 'significant' pollution of the marine environment; the vessel either refuses to give evidence or gives information that is 'manifestly' at variance with the evident factual situation; and, if the circumstances of the case so justify. Proceedings may be instituted, and the vessel detained, if there is 'clear objective evidence' that a vessel in the EEZ committed a pollution violation 'resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State.' However, the vessel must be allowed to proceed, if there are procedures in place, upon compliance with requirements for bonding or other appropriate financial security has been assured. While there are clear limits to what a coastal state may be able to do to enforce its laws for the protection and preservation of the marine environment, whether the various standards are met in each instance will be a decision for the coastal state. It is therefore arguable that a considerable scope of power has been granted to the coastal state as a result. Nonetheless, if the requirements are not met, then enforcement powers remain with the flag state, or with a port state if the vessel enters the port voluntarily. Moreover, the flag state may require that any proceedings to impose penalties against one of its vessels for violations beyond the territorial sea be suspended while it instead takes action. This pre-emption of flag state authority is not disqualified, as no suspension is required in cases of major damage to the coastal state or where the flag state in question has repeatedly disregarded its obligations for effective enforcement. This latter aspect may be viewed as a blow against flag of convenience states that have failed to prevent substandard vessels from operating on a regular basis, particularly as it appears that the coastal state has the power to determine if suspension of its proceedings is required. Definite inroads into the exclusive authority of flag states may be seen in this regard.

(3) Conclusion

The enforcement powers granted to coastal states in the EEZ in respect of fishing and marine pollution are significant for their very existence given the possible impact of these powers on the rights of navigation of vessels in large expanses of the oceans. Moreover, the collective concerns regarding IUU fishing and marine pollution have warranted developments to allow for enforcement in the EEZ or in ports when these unlawful activities have happened in other maritime zones, including on the high seas. While the availability of resources may ultimately undermine coastal state efforts in this regard, at least the legal framework provides authority to work towards the key objectives in preventing these particular activities.

As an intrusion into the freedom of navigation, it is not surprising that the coastal state powers have been circumscribed to prevent possible abuse of navigational rights. The balance appears to be largely a realistic one. While the problem of IUU fishing is great, the difficulties countering this threat appear to be ones of practicalities in relation to physically policing the EEZ, rather than a lack of authority under international law for the coastal state to deal with this issue (except for the inadequate support to cooperative coastal state efforts proffered through the prompt release cases). Although the enforcement powers to deal with marine pollution have their limitations, it is remarkable that accidental pollution warrants this reaction, as opposed to limiting the responses to cases of willful and serious marine pollution, which is the more common environmental security threat identified. Overall, the enforcement powers granted to coastal states to protect their specific interests in fishing and the marine environment are, on the whole, appropriate to respond to these particular maritime security concerns.

Further enforcement powers for coastal states may be garnered through the right of hot pursuit and the right of visit in response to particular maritime security threats, such as piracy and drug trafficking. These issues are discussed in the section on high seas, below, and enforcement powers in relation to terrorism and proliferation of WMD are addressed in the following chapter. These responses to maritime security threats have been more hampered in their development than has been the case in relation to IUU fishing and marine pollution.

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230 UNCLOS art 220(3).
231 UNCLOS art 220(5).
232 UNCLOS art 220(6).
233 UNCLOS art 220(7). Detention is also permitted under art 226(1)(c) in relation to investigations of foreign vessels.
234 See Shearer, 'Problems of Jurisdiction' 335. See also ILA Committee, 'Final Report' 21 (the fact that they [the safeguards] are linked to a range of undefined criteria gives reason for concern as coastal states will have to interpret these in concrete situations. Objectivity and, consequently, uniformity, can therefore not be guaranteed).
235 See discussion above. See also Clarney, 'The Marine Environment' 892.
236 UNCLOS art 228(1).
237 UNCLOS art 228(1).
238 But see Boyle, 'Marine Pollution' 365 (arguing that the loss of exclusive jurisdiction is 'severely qualified').
239 Though there may be restrictions with national laws making prosecution more complicated. The key example here is to the difficulty in discovering beneficial ownership of vessels. See L. Griggs and G. Lutgen, 'Veil over the Nets: Unravelling Corporate Liability for IUU Fishing Offences' (2007) 31 Marine Policy 159.
G. Continental Shelf

Coastal states exercise sovereign rights over their continental shelves for the purposes of exploring and exploiting its natural resources. The particular law enforcement powers of the coastal state for activities related to the exploration and exploitation of the natural resources of the continental shelf must be drawn from the nature of sovereign rights, as well as from powers in relation to specific activities, such as the laying of submarine cables and pipelines and the presence of artificial islands, installations and structures. Some of these powers are drawn from the rights accruing to the coastal state within the legal regime of the EEZ in view of the fact that the EEZ incorporates sovereign rights over the seabed and its subsoil.

The ability of a state to exert control over activities occurring on the continental shelf may be of fundamental national importance to a state given the economic benefits to be derived from this maritime area. A coastal state's national security may therefore be at stake when a maritime boundary between two overlapping zones remains undelimited and provisional arrangements cannot be agreed. States have resorted to shows of force in contested maritime areas. This potential tension colours the exposition of coastal state law enforcement powers over the continental shelf.

Enforcement jurisdiction in relation to the continental shelf is of further importance for a state's maritime security because of the potential economic disruption that may be caused with any interference with or damage to submarine cables and pipelines, as well as against oil platforms and similar structures. For example, at the end of 2008, four cables between Europe, the Middle East, and Asia were severed, affecting telephone and internet services, and consequently an array of financial transactions. It has been estimated that 'over 95% of the world's international voice and data traffic, including almost 100% of transoceanic internet traffic, is carried by undersea cables'. The 2004 suicide attack on the Iraqi oil platforms was an example of such interference, which could be described as a form of law enforcement action. It has been estimated that the attack caused approximately $40 million and disrupting international trade in oil. Environmental damage may also occur if there are leaks from pipelines or installations or structures associated with the exploration of natural resources. These concerns arise irrespective of whether the damage has occurred accidentally or as a result of a terrorist act.

(1) Exploration and exploitation of the continental shelf

A coastal state is entitled to exercise enforcement jurisdiction against unlawful exploration and exploitation activities in relation to the natural resources of the continental shelf because of the sovereign rights it has over this maritime area. In utilizing the term 'sovereign rights', the International Law Commission indicated that these comprised 'all rights necessary for and connected with the exploitation of the continental shelf...[and] include jurisdiction in connexion with the prevention and punishment of violations of the law'. Ronzitti considers that the sovereign rights of coastal states would include measures that could be 'defined as police actions'. These statements indicate that the arrest, detention and prosecution of offending vessels may be expected for violations of the sovereign rights of a coastal state over its continental shelf.

In the maritime boundary dispute between Guyana and Suriname, the ad hoc arbitral tribunal considered whether acts of Surinamese gunboats seeking to prevent drilling activities in a disputed maritime area could be viewed as law enforcement activities. The tribunal implicitly accepted that a coastal state may be able to take law enforcement action in response to unauthorized drilling, but in this case, the force threatened by the Surinamese gunboats against the drilling rig amounted to 'a threat of military action rather than a mere law enforcement activity' and was hence unlawful as a result. The key restriction on enforcement activities would appear to be that the exercise of the coastal state's rights over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other states. This restriction may influence the enforcement steps taken by a coastal state, but the requirement that the interference be 'justified' tends to underline the need for ensuring force is only used as a last resort, and that the degree of force does not exceed what is reasonably required in the circumstances.

Unlawful exploration activities may be viewed as unauthorized marine scientific research. Under UNCLOS, marine scientific research on the continental shelf must be conducted with the consent of the coastal state. This consent may be

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241 UNCLOS art 77.
242 UNCLOS art 56(1)(a).
243 Most clearly seen, and as discussed further below, in the arbitration between Guyana and Suriname, Guyana v Suriname (2008) 47 ILM 164, paras 441-5. See also Patricia Jimenez Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Confrontation of Forcible Action at Sea in the Light of the Guyana/Suriname Award' (2008) 13 Journal of Conflict and Security Law 49, 69-70. The legality of these actions are discussed in Chapter 6, Part C1).
246 Louis Meléder, 'Iraq resumes petroleum exports after suicide boats strike oil terminals' Associated Press Newswire (Baghdad, 27 April 2004). It was further reported that '[i]n the weeks following the attack the world oil price rose 9.3 per cent, a clear sign that a successful attack could cripple Iraq's economy and seriously disrupt global energy markets'. Sean Hobbs, 'Guarding the Gulf' The Diplomat (March/April 2008) 23, 23.
248 Ronzitti, 'The Law of the Sea' 6(1) paras 441-5.
249 Ibid, para 455.
250 UNCLOS art 78(2).
251See M/V 'Saiga' (No 2) paras 155-6.
252 UNCLOS art 346(2).
withheld when the research is 'of direct significance for the exploration and exploitation of natural resources', if it involves drilling into the continental shelf or the 'construction, operation or use of artificial islands, installations and structures'. If consent is granted, then the coastal state retains the right to suspend marine scientific research activities if they are not conducted in accordance with the terms on which the consent was based or if the researcher fails to comply with various requirements laid down by the coastal state. This suspension may lead to a requirement of cessation of the activities, though responsibility and liability may accrue to states and competent international organizations for measures taken against scientific research in contravention of UNCLOS. In this scenario, enforcement powers are limited to the cessation of the research rather than taking steps to arrest and prosecute the offending vessel. These powers are most relevant in terms of maritime security to the extent a coastal state may wish to argue that its economic security is being undermined or in a scenario where exploration activities may not only be useful for scientific purposes but also have military significance.

(2) Submarine cables and pipelines

According to Article 79 of UNCLOS, all states are entitled to lay submarine cables and pipelines on the continental shelf. The right of third states to lay submarine cables and pipelines on the continental shelf is subject to the coastal state's 'right to take reasonable measures for the exploitation of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines'. With respect to the latter, coastal states are explicitly granted the power to prescribe and enforce laws and regulations to prevent, reduce and control pollution of the marine environment resulting from seabed activities, as well as from artificial islands, installations and structures within their jurisdiction. Enforcement activities in relation to pipelines will often fall within the scope of a coastal state's 'reasonable measures' to explore and exploit the resources of the continental shelf, although enforcement jurisdiction is not specifically stated in this regard. The same argument could not be made in relation to submarine cables, however.

More clear is that flag states and states with jurisdiction over persons who break or injure submarine cables and pipelines are entitled to exercise authority over these

254 UNCLOS art 246(3). Though under art 246(6), this discretion to withhold consent for the exploration and exploitation of natural resources does not apply in relation to the continental shelf beyond the 200-mile limit unless the coastal state has designated specific areas in which such activities may be undertaken.

255 UNCLOS art 253.

256 See UNCLOS art 253(2) and (3).

257 UNCLOS art 257.

258 In the absence of indication of the course of pipelines (but not cables) is subject to the consent of the coastal state: UNCLOS art 79(5).

259 UNCLOS art 208 and ar 214.


punishable offence(s)'. UNCLOS requires that every state must adopt laws and regulations to establish liability over flag vessels or 'persons subject to its jurisdiction responsible for breaking or injuring submarine cables or pipelines that are beneath the EEZ or the high seas, unless caused by persons seeking to save lives or their ships. This distribution of responsibility was first put in place with the adoption of an 1884 convention to establish rules relating to the protection of cables, following the laying of the first submarine cable between Calais and Dover in 1850. Article II of this Convention created offences for 'the breaking or injury of a submarine cable done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic communications in whole or in part'. Prosecution of these offences rested with the flag state of the offending vessel. Article X further anticipated that a warship could conduct a war of visit against a vessel when there was reasonable suspicion of a cable violation. Article 27 of the 1958 High Seas Convention then extended this protection to telephonic cables, high-voltage power cables, and submarine pipelines. Enforcement jurisdiction is therefore granted to flag states as well as to states with, most commonly, nationals on board vessels that break or injure a submarine cable or pipeline.

Ronzitti has gone slightly further, arguing that as the coastal state only exercises sovereign rights over this area, as opposed to sovereignty, a third state would be entitled to take action to prevent damage to its pipeline (or cable, presumably).

This approach is in line with the general position of the International Law Commission as to what sovereign rights entail. Any steps taken in this regard would at least need to be consistent with the requirements set forth in Article 58 of UNCLOS that states must have due regard for the rights and duties of the coastal state and comply with its laws and regulations. This approach may be preferable rather than relying on the flag state, which may have no interest in the particular cable or pipeline, to take the necessary action against the offending vessel or individuals.

254 Article 113 reads in full: 'Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship laying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offence. This provision shall apply also to conduct calculated or likely to result in such breaking or injury. However, it shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.'

265 UNCLOS art 113. While this provision is set forth in relation to the high seas, it applies to the EEZ by virtue of art 58.

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270 UNCLOS art 113. While this provision is set forth in relation to the high seas, it applies to the EEZ by virtue of art 58.
Artificial islands, installations, and structures

In addition to pipelines, offshore platforms are often constructed for the purposes of exploiting and exploiting the resources of the continental shelf. The establishment and use of artificial islands, installations and structures on the continental shelf, as with those in the EEZ, are subject to the jurisdiction of the coastal state. Article 60(2) of UNCLOS grants the coastal state exclusive jurisdiction, which includes jurisdiction with regard to customs, fiscal, health, safety, and immigration laws and regulations. While the prescriptive powers of the coastal state are quite clear, the enforcement powers of the coastal state are less so. Coastal states are entitled to establish safety zones of up to 500 metres around the artificial islands, installations, and structures, and within these zones, the coastal state may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures. The existence of enforcement powers within these safety zones is underlined by the provision that hot pursuit can be commenced in relation to offences that occur in safety zones around continental shelf installations. Kaye has argued that the practical application of these rules renders the grant of enforcement jurisdiction nugatory. He further notes that there has not been support for increasing the size of the safety zones because of concern that it would jeopardize the freedom of navigation.

Shortly after suicide attacks against Iraqi oil terminals, 'the United States announced warning zones around a number of oil terminals in the Persian Gulf' as well as 'exclusion zones around two oil terminals and the suspension of the right of innocent passage around those oil terminals within Iraq's territorial sea.' To enforce these safety zones, the United States, acting with the consent of the Iraqi government, would have been able to take action against vessels registered in Iraq. The IMO has adopted a resolution requiring flag states to take all necessary measures to ensure that ships flying their flag do not enter or pass through safety zones. Thus the coastal state may inform the flag state of any infringement and it is then incumbent on the flag state to take action against those responsible for the infringement. In any event, the coastal state would be able to take the necessary policing action to protect platforms consistent with its sovereign rights over the continental shelf. These rights have particular importance when considering the number of small fishing and other vessels (dhow) that traverse the Persian Gulf and thereby pass in the vicinity of the oil terminals.

Greater enforcement powers for the protection of platforms have been accorded under the 1988 Protocol to the SUA Convention. The 1988 SUA Protocol applies to 'fixed platforms' on the continental shelf. A 'fixed platform' is defined 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.' Among the exclusions from this definition are structures and installations used for marine scientific research or for military purposes.

Under this treaty, states may exercise jurisdiction over offences committed against fixed platforms on their continental shelf, or when the offender is a national of the state. The offences against fixed platforms include seizing or exercising control by force, acts of violence against a person on a fixed platform, destroying or damaging a fixed platform, placing a device or substance on the fixed platform that is likely to endanger its safety, and injuring or killing a person in connection with the commission of any such act.

However, gaps remain within this regime. One example is when a third state operates a fixed platform on the continental shelf of a coastal state. The third state would only be able to rely on claims of self-defence if it sought to rescue its nationals on the platform if they were being held hostage by terrorists. The 1988 SUA Protocol anticipates that existing rules of international law will continue to apply to situations not covered by its terms, and a third state would be unable to board a platform asserting jurisdiction that would run counter to the exclusive jurisdiction of the coastal state. While revisions to the 1988 SUA Protocol were undertaken in 2005 to expand the range of offences, third states were not given any authority to intervene to protect a fixed platform on the continental shelf of a coastal state.

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267 Which applies mutatis mutandis to the continental shelf by virtue of art 80 of UNCLOS.
268 Kaye notes 'the extent of measures a state can implement to protect such platforms and their associated facilities is undefined'. Kaye, 'International Measures' 378.
269 UNCLOS art 60(4).
270 UNCLOS art 60(5).
273 Ibid 408.
While arguably the sovereign rights of the coastal state have been emphasized in relation to law enforcement powers over artificial islands, installations and structures, it is still notable that the freedom of navigation has been protected to the extent that only small safety zones are allowed. However, the powers of all states have been enhanced in relation to responding to certain acts of terrorism against fixed platforms under the 1988 SUA Protocol and the subsequent revisions in 2005. Gaps still remain in this regime but there has been a certain degree of consensus in addressing one of the key maritime security threats in relation to the exploration and exploitation of the continental shelf.

(4) Conclusion

Beyond the general assumption that the sovereign rights a coastal state exercises over the continental shelf extend to necessary policing powers in relation to the exploration and exploitation of the natural resources of the continental shelf, there is considerable ambiguity in the powers a coastal state or third state may exercise in relation to the protection of submarine cables, pipelines, artificial islands, installations, and structures. The flag state has authority to respond to damage to submarine cables and pipelines and also to take action against its vessels that unlawfully enter safety zones around artificial islands, installations, and structures. As with other maritime zones, relying on the flag state to exercise law enforcement powers is not especially desirable when states with open registries are less inclined to police their vessels.

Coastal states have various avenues available to respond to threats or actions taken in relation to the continental shelf. The coastal state's enforcement powers arguably exist in relation to pipelines because pipelines are most commonly used in association with the exploitation of the continental shelf. Further, the coastal state also has enforcement authority in relation to the safety zones around artificial islands, installations and structures (though the utility of hot pursuit has been questioned in this regard). Enforcement powers may also accrue to the coastal state to address marine pollution. Finally, coastal states may exercise jurisdiction over the range of terrorist offences against fixed platforms identified in the 1988 SUA Protocol and through the 2005 revisions. Other states may also exercise jurisdiction to the extent that their nationals commit or are injured by the offences or if the actions are directed against a state to compel it to do or refrain from doing some act.

Various scenarios expose the gaps that continue to exist in ascribing law enforcement powers for activities related to or on the continental shelf. Most notable in this regard is the continuing reliance on a legal regime created in 1884 to police offences against submarine cables. Protecting submarine cables is a vital element of a state's maritime security in view of the economic dependence of a state on telecommunications, particularly for conducting financial transactions internationally. The inadequacies of the existing regime could be seen when Vietnamese fishermen pulled up long lengths of submarine cables to recover the copper used.

seemingly with the authority of the Vietnamese government. As a result of their actions, Vietnam was reduced to one working submarine cable to meet its communication needs. Analysts examining the international law repercussions of the incident struggled to determine what legal actions could be pursued to prevent the injury. Kaye has proposed a more radical solution... of a system of registration of cables and pipelines, giving the State of registration a limited ability to enforce laws to protect pipelines and cables from interference. Alternatively, more authority may need to be accorded to the coastal state to intervene to protect submarine cables and to establish safety zones to prevent anchoring in their vicinity.

H. High Seas

As set forth in Chapter 1, for almost 400 years, the foundational concept for the law of the sea has been the principle of *mare liberum*, the freedom of the seas. The emphasis has thus been on retaining inclusive enjoyment of this ocean space, and only permitting exclusive claims to prevail if they serve the common interest where the impacts of use are especially critical for a particular state and the restrictions upon inclusive use are kept to the minimum.

Instead of claims of rights or control over this ocean space, a state has authority over the vessels that ply these areas under the flag of that state. Garvey has proclaimed that "[flag state jurisdiction is]... a highly significant embodiment of the general principle of freedom of the seas." It is the very fact that the high seas are open to all states that means that no one state is then able to exert control or authority over the vessels traversing the oceans unless the vessel has a tie to that particular state. The focus in the second part of this chapter is on the law enforcement powers granted to states on the high seas. In doing so, the exclusivity of flag state jurisdiction comes under further scrutiny. The pre-eminence of this position was articulated in the 1817 judgment of *Le Louis*:

In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another. No nation can exercise a right of

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288 Green and Burnett, 'Security of International Submarine Cable Infrastructure' 559-63.
289 Ibid 560-1.
290 See generally ibid (discussing the applicability of arts 87, 113, and the piracy provisions of UNCLOS to the incident).
291 Kaye, 'International Measures' 423.
292 Ibid, 422. Though these reforms would not have changed the responses for the incident in Viet Nam in view of the state's involvement in the acts.
293 McDougal and Burke, *The Public Order of the Oceans* 749.
visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim. 295

This position was reconfirmed over 100 years later by the Permanent Court of International Justice, which recognized the limited authority of states on the high seas in the SS Lotus case: 'It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly.' 296

A state may only exercise authority over those vessels bearing its flag because to do otherwise would be tantamount to an assertion of jurisdiction or sovereignty over the high seas, which is prohibited under international law. 297 A vessel is then subject to the exclusive jurisdiction of the state to which it is flagged, with any exception limited to those expressly provided for by treaty. 298 A ship is to sail under the flag of one state. 299 The importance of flag state control over a vessel is underlined by the requirement that the registration of a ship with a particular state may only be changed when the vessel is in port, thereby ensuring that the nationality of the vessel remains constant while the vessel is at sea. 300 States set the conditions for the grant of nationality to ships and for the right to fly their flag. 301 In bestowing the right to fly its flag, there must be a genuine link between the state and the ship. 302 While there has been considerable discussion and controversy over the genuine link requirement in relation to ships, 303 the minimal content is that if a vessel can meet a state's requirements for registration then there is a genuine link. 304 This weak

standard has allowed for flags of convenience to flourish and shipping companies have profited by registering their vessels with states that impose low or no taxes or costs on registration and that provide minimal surveillance in enforcing various international requirements in relation to the vessel itself as well as its activities.

The primary remedy for a state to take against a foreign vessel on the high seas that is not meeting international standards is to report the fact to the flag state and for the flag state to investigate and remedy the shortcomings. 305 The weakness of this mechanism is immediately apparent as a flag state may not be willing, or have the resources, to take action against a particular vessel; or if the flag state does take action, the owner of the vessel may opt to register the vessel elsewhere and avoid investigation or prosecution. Nonetheless, this remedy was the only acceptable formulation that could be devised without allowing for the non-recognition of a vessel's nationality, which was thought to have the potential to cause chaos on the seas. 306 As has been discussed in relation to ports, the territorial sea, and the EEZ, states have taken steps to allow for the exercise of jurisdiction by states other than the flag state precisely to counter the lack of enforcement effort by some flag states. This reallocation of competences has enhanced maritime security. Challenges to the exclusive authority of the flag state have been incremental, though, and have taken into account the entrenched position of the freedoms of the high seas and exclusive flag state control over vessels on the high seas.

Adherence to the exclusive authority of flag states over vessels has inevitable implications for vessels lacking nationality, or, in other words, not being registered with any state. The common view here is that vessels not registered in any state are termed vessels of convenience. 307 This result is that where a warship encounters a vessel and has a reasonable suspicion that the vessel lacks nationality, it may then board that vessel. 308 Also, when a warship has suspicions as to the nationality of a vessel, including whether a ship is of the same nationality as the warship, even though flying a foreign flag or refusing to show its flag, the warship is entitled to board the ship to verify its suspicions. 309

This latter authority offered a lawful basis for the boarding of a vessel, the MV So San, that departed North Korea and was headed to Yemen. Concerns about the nationality of the MV So San provided the justification for the Spanish Navy to board the (seemingly) Cambodian vessel wherein 15 Scud missiles were discovered on board. 310 Although the boarding was lawful in this context, there was no
prohibition on the delivery of the weapons to Yemen and the vessel was released in order to complete its journey. 311 Without the query as to nationality, the boarding would have been viewed as an illegal interference with high seas freedoms.

The United States has been quite aggressive in pursuing cases against stateless vessels involved in the drug trade, and has based its prosecution of those involved on the effects principle and the protective principle in order to exercise jurisdiction over arrests that happen up to 700 miles off the coast of the United States. 312 This extension of jurisdiction was possible because of the United States’ dominant position relative to the Central and South American states, which it was confronting in fighting the drug trade, and also because of the general desire among states to prevent illegal drug trafficking. 313 Ultimately, it is also the case that the very status of the vessel as stateless has posed no threat to the general principle of exclusive flag state control in this situation.

The instances where states may exercise enforcement powers against a foreign flagged vessel on the high seas are discussed in this part. One of the main avenues is through arrests that happen up to 700 miles off the coast of the United States. 312 This has long been accepted as part of the law of the sea. 316 This exception acknowledges the right of coastal states to protect their interests through the exercise of enforcement jurisdiction against vessels that have violated their laws. This entitlement arises within waters under the jurisdiction or sovereignty of the coastal state and is presumed to continue on to the high seas. The encroachment on the exclusive jurisdiction of the flag state is justified by the overall imperative to maintain order on the seas. 317 While the intrusion on to exclusive flag state authority in these circumstances is accepted, the requirements for the lawful exercise of the right of hot pursuit are detailed and as such reflect a desire to discourage interference with foreign flagged vessels. Greater scope should be accorded to coastal states in interpreting the requirements for hot pursuit if this right is to be an effective mechanism in addressing maritime security threats.

Article 111 of UNCLOS sets out the currently accepted international formulation of the right of hot pursuit. There are a range of procedural requirements, which are cumulative, 318 and so must all be satisfied for the lawful exercise of the right of hot pursuit. 319 Questions have been raised as to whether these requirements still meet current law enforcement needs, particularly in the face of IUU fishing. 320 The strict criteria may be viewed as useful to ensure that the freedom of navigation is not jeopardized, but there needs to be greater appreciation of evolving technology that may improve the efficiency of law enforcement operations, as well as the changing nature of the threats faced by coastal states.

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, including violations of laws and regulations of the EEZ and the continental shelf. 321 While there is no specific limitation on what laws or regulations a coastal state may seek to enforce through hot pursuit, the responding to maritime security threats warrants reconsideration of this entrenched position and anticipates that further challenges to exclusive flag state control should be pursued.

(1) Right of hot pursuit

The right of hot pursuit as an exception to the exclusive jurisdiction of flag states has long been accepted as part of the law of the sea. 316 This exception acknowledges the right of coastal states to protect their interests through the exercise of enforcement jurisdiction against vessels that have violated their laws. This entitlement arises within waters under the jurisdiction or sovereignty of the coastal state and is presumed to continue on to the high seas. The encroachment on the exclusive jurisdiction of the flag state is justified by the overall imperative to maintain order on the seas. 317 While the intrusion on to exclusive flag state authority in these circumstances is accepted, the requirements for the lawful exercise of the right of hot pursuit are detailed and as such reflect a desire to discourage interference with foreign flagged vessels. Greater scope should be accorded to coastal states in interpreting the requirements for hot pursuit if this right is to be an effective mechanism in addressing maritime security threats.

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resources involved tend to augur in favour of coastal states only exercising this right in response to more serious offences. Recent dramatic pursuits include Australia’s 14-day pursuit of the Viarsa in defence of Australia’s fisheries in the Southern Ocean.

Hot pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, archipelagic waters, territorial sea, or contiguous zone of the pursuing state, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. Hot pursuit may begin in the contiguous zone, the EEZ, and the continental shelf for offences against the law relating to those zones. It is deemed to have commenced when the pursuing military vessel is satisfied by such practicable means as may be available that the ship pursued is within the limits of the territorial sea, contiguous zone, EEZ or above the continental shelf. This formulation permits some level of subjectivity and may allow for the situation that a hot pursuit is still lawful even when subsequent calculations indicate that the pursued vessel was just outside a maritime zone under the jurisdiction of the coastal state. It is an appropriate acknowledgement of difficulties that may be faced at the practical level. The permissible margin of error should diminish, however, as the technology to locate target vessels becomes more accurate and the pursuing state has access to this technology.

One of the criteria to be met for a lawful hot pursuit is that a visual or auditory signal to stop must be given by the pursuing ship within a distance for that signal to be seen or heard by the foreign ship. It has been suggested that this formulation prevents the use of radio. However, recent state practice has indicated that radio broadcasts are used as a signal to stop, and this practice should be accepted as a reasonable development of the signalling requirements. The pursuing ship does not have to be in the territorial sea or contiguous zone itself at the time that it gives the order to stop.

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323 See Baird, ‘Illegal, Unreported and Unregulated Fishing’ 325-7 (commenting on the pursuits of the South Tomi, the Lena and Viarsa I). For a full account of the 21-day pursuit of the Viarsa, see G. Bruce Knecht, Hooked: Piracy, Poaching, and the Perfect Fish (Rodale: New York 2000).
324 UNCLOS art 111(1).
325 UNCLOS art 111(4).
326 This was the position taken by Australia in the Valga, as it was determined that the fishing vessel was just outside Australia’s EEZ as the time the pursuit commenced. The approaching vessel was of the view that the pursued vessel was within the EEZ at the time. Valga Case para 33. On the subjective approach, it could be argued that Australia’s pursuit was not unlawful for this reason. This point was not ultimately determined by ITLOS as it was a question outside the scope of the prompt release proceedings. Ibid para 83. See also Klein, Dispute Settlement 96-7.
327 UNCLOS art 111(4).
329 Baird, ‘Illegal, Unreported and Unregulated Fishing’ 328. Baird questions whether art 111(4) could be read so far as to allow communications via fax or email. Ibid 328.
330 UNCLOS art 111(1).

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331 UNCLOS art 111(3).
334 The commemoration of the 2003 and 2007 Australia-France treaties in their authorization of each state to maintain hot pursuits through each other’s maritime zones in the area of cooperation, including through each other’s territorial sea. Warwick Gullett and Clive Schofield, ‘Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean’ (2007) 22 UML 545, 566.
336 Ibid 190-1.
337 Ibid 189. A bilateral agreement between the US and Jamaica does not include this authorization, but instead allows for entry into the territorial sea when it is essential for speedy action to be taken to prevent the escape of suspect vessels or aircraft. Kenneth Rattray, ‘Caribbean Drug Challenges’ in Myron H. Nordquist and John Norton Moore (eds), Oceans Policy: New Institutions, Challenges and Opportunities (Martinus Nijhoff, The Hague 1999) 201, 216.
339 There is no difficulty in a coastal state granting consent to another state to maintain a pursuit through its territorial sea. However, the real question is whether the conduct of hot pursuit through the territorial sea of a third state is opposed to the flag state of the pursued vessel.' Gullett and Schofield, ‘Pushing the Limits’ 567.
argument is indeed a valid one, and should entitle the flag state successfully to challenge an assertion of jurisdiction in these circumstances.

Another criterion under Article 111 is that pursuit must be continuous. There has been some debate as to what circumstances will interrupt a pursuit and thereby negate its continued lawfulness. One question is whether maintaining radar surveillance of the offending vessel is sufficient even if audio or visual contact is lost. Moreover, Article 111 does not clearly anticipate a situation where the government authorities of one state take over or assist in a hot pursuit commenced by another state. The existence of an RFMO may also give rise to occasions where a pursuit may be continued by another vessel, particularly if the pursuing vessel is low on fuel or otherwise lacks the capability to bring the pursuit to an end. Commentators have favoured this form of pursuit provided that the pursuit is uninterrupted and other procedural steps are followed.

Gullett and Schofield have criticized bilateral agreements between France and Australia that allow for the takeover of hot pursuits. If there is a situation where one state takes over the pursuit of a vessel from another state, then under what law can the offending vessel be prosecuted if stopped and arrested by the second state? The vessel in question would have been in violation of the laws of the first pursuing state to warrant the lawful commencement of hot pursuit, but these same laws may not be applicable to the second pursuing state. Presumably the second pursuing state would have to make arrangements for custody of the offending vessel to be handed back to the first pursuing state, but this scenario raises the spectre of informal extraditions in relation to any crew members who were arrested with the vessel.

Another complicating scenario for the right of hot pursuit has been the use of 'mother ships', whereby a vessel is considered constructively present within the territorial sea of a third state. McDougal and Burke, The Right of Hot Pursuit 231; C. John Colombos, The International Law of the Sea (6th edn, D. McKay Co, New York 1967) 169-70; Reuland, 'The Customary Right' 581; Poulatzas qualifies his view, though, in suggesting that there is no interruption where the pursued vessel has entered the territorial sea with the obvious intention of evading the law. See Poulatzas, The Right of Hot Pursuit, 231.

The pursuers of the South Ton and the Varios I... were only brought to a close when vessels of other states rendered assistance to the Australian pursuit to effect the seizures. Gullett and Schofield, 'Pushing the Limits' 569.

The pursuers of the Sultana and the Varios I... were only brought to a close when vessels of other states rendered assistance to the Australian pursuit to effect the seizures. Gullett and Schofield, 'Pushing the Limits' 569.

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coastal state laws, the impingement on exclusive flag state authority is constrained and maritime security promoted.

(2) Right of visit

The 'right of visit' comprises a series of possible acts of interference against a foreign flagged vessel on the high seas moving along a spectrum from a request that a vessel show its flag (a right of reconnaisance, or also referred to as a right of approach), to a right of investigation of the flag (droit d'enquête du pavillon), to a right of search and of arresting the vessel and those on board. The right to approach a vessel on the high seas to ascertain its identity and nationality is generally recognized under customary international law. The more invasive right of visit (involving investigation of the flag and possible search and arrest) is usually viewed as permissible only by reference to specific instances under customary international law or under treaty. This constraint potentially limits the usefulness of the right of visit for the purposes of maritime security.

Article 110 of UNCLOS provides for a small number of circumstances where warships and certain government vessels may exercise a right of visit against a foreign flagged vessel. Warships and military aircraft are only justified in boarding another vessel on the high seas when there is reasonable ground for suspecting that the other ship is engaged in piracy; the slave trade; unauthorized broadcasting activities (where the flag state of the warship would have jurisdiction to prosecute); or when the other ship is without nationality or is in reality of the same nationality of the warship even though flying a foreign flag or refusing to show its flag. These exceptions to flag state authority and the freedom of the high seas have resulted from "globally-shared needs and troubles, especially in modern times." 361

355 See Reuland, 'Interference with Non-National Ships' 1169 (distinguishing between the right of reconnaisance and the droit de visite, which involves the droit d'enquête du pavillon and the right of search).
356 Ibid 1169.
357 See ibid 1170. Reuland further notes, "Much remains...of the historical distance for this right, which is regarded today as a necessary evil; while states indeed acknowledge the right, they do so grudgingly." Ibid 1170 n 22.
358 There are also limited instances where a state may prescribe and enforce certain measures against foreign vessels in the EEZ and on the high seas in order to protect and preserve the marine environment (as in UNCLOS art 221), or for the management and conservation of fisheries (as anticipated in UNCLOS art 72). See further Shiner, 'Problems of Jurisdiction' 333-41. Anderson has also suggested the right exists in relation to "mother" ships: A further application of the right is implied in Article 111(4) of UNCLOS in the case of a "mother ship" which remains outside the EEZ whilst its boats or other craft work as a "remotest" since the "mothership" could be the object of hot pursuit, it may be visited and searched, according to the doctrine of constructive presence, by a public vessel from the coastal State even before the commencement of pursuit." Anderson, 'Freedom of the High Seas' 441-2.
359 See UNCLOS art 109(3).
360 UNCLOS art 110(1).
361 Jesus, 'Protection of Foreign Ships' 373. Dupuy and Vignes have described the inclusion of unlawful broadcasting and slavery among the bases for the right of visit as "inconceivable". Dupuy and Vignes, A Handbook on the New Law of the Sea 421. They further consider, 'As a blow struck at the principle of the exclusivity of the flag State, the States have always been hostile to the recognition of the right of search, even in the framework of a convention.' Ibid 421.

362 Article 110 of UNCLOS anticipates additional 'powers conferred by treaty' in setting forth the right of visit. UNCLOS art 110(1).
363 Article (6) reads: 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction in case of a real transfer of ownership or change of registry.' Convention on the High Seas, 855-6.
368 Convention for Regulating the Police of the North Sea Fisheries (1882) cited in Hunnings, 'Pirate Broadcasting' 427.

Under Article 110, states anticipated that additional bases for conducting the right of visit could be agreed by states. Such an exception accounted for the fact that the right of visit had already been accorded for situations other than those listed in Article 110 prior to the adoption of UNCLOS. Article 6 of the 1958 High Seas Convention similarly permitted states to consent to interference with their vessels only 'in exceptional cases expressly provided for in international treaties'. States are thus entitled to enter into formal agreements to limit their sovereignty in relation to their authority over vessels flagged to them on the high seas. Therefore, despite the considerable emphasis placed on the pre-eminence of a flag state's exclusive jurisdiction, it is apparent that this principle is not immutable.

The right of states to formulate specific agreements to permit the boarding and possible seizure of vessels has been accorded in response to efforts to suppress certain criminal acts. An early example was in 1924 when the United States entered into a treaty with the United Kingdom in its efforts to prevent the importation of liquor into its territory during the Prohibition era. In return for the United Kingdom consenting to boarding of its vessels for this purpose, the United States agreed that British vessels would be allowed in United States ports with liquor on board under seal when those vessels were en route to other destinations. Prior to that, the 1884 Convention on Submarine Cables provided for the possibility of submitting to inspection a foreign ship suspected of having committed a violation under the Convention. Powers conferred by other early treaties have also covered instances where states have entered into agreements to allow for enforcement in relation to the prevention of trade in arms and ammunition, the prohibition on sale of liquor to persons on board fishing vessels in the North Sea, and policing of North Sea fisheries.
Law Enforcement Activities

In conducting the right of visit pursuant to Article 110 of UNCLOS, the inclusion of reference to a 'reasonable ground for suspicion' is to provide a standard for action by a warship against a foreign flagged vessel and again to minimize the instances where interference may occur. While full knowledge of an unlawful act is not required, the standard of 'reasonable ground' at least indicates that there must be something more than a bare suspicion. Whether this standard is satisfied in any particular situation will of course depend on the facts. Under Article 110 of UNCLOS, a warship may send a boat under the command of an officer to the suspected ship and check its documents. If suspicion remains, the other ship may then be boarded for further examination. This examination must be carried out 'with all possible consideration'.

In the event that the suspicions prove unfounded and that no act was committed that justified such suspicions, the ship visited is entitled to compensation for any loss or damage that may have been sustained. Prior to the 1958 High Seas Convention, arguments had been made that there should be a standard of strict liability for unjustified searches, which again reinforces the reticence of states towards interference of their vessels on the high seas. In requiring that compensation be paid for an unlawful boarding, wrongful inspections could become a costly exercise, especially as the compensation is payable to the owner of the vessel, rather than the flag state, and it has been suggested that this requirement rules out the possibility of bilateral agreements where states could contract out of the compensation requirements.

One polemic aspect of the right of visit has been the permissible degree of force that may be used. Article 25 of UNCLOS is, according to Shearer, the 'sole reference to the degree of force to be used in enforcement measures'. In the I'm Alone arbitration, the incidental sinking of a vessel in the course of efforts to board, search, and seize a suspect vessel was considered acceptable, but the intentional sinking of such a vessel was not justified. However, Shearer has questioned this assessment in view of the circumstances involved and considers that the use of force was disproportionate as the gravity of the offence should be weighed against the gravity of the offence. Shearer has considered that firing without warning of solid (as opposed to blank) gun shot and creating danger to human life on board was in excess of what was necessary in pursuit of a fishing vessel fleeing arrest. The implication is that firing live ammunition is impermissible in arresting vessels. Gilmore has noted that the I'm Alone and Red Crusader decisions are both controversial and of questionable value in framing rules of engagement. More recently, this question was addressed in the M/V Saiga' (No 2). There, ITLOS considered that 'the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'. Efforts must first be made to hail the vessel or to fire across its bow before resorting to direct force against the vessel. Methods other than gun-fire are to be used wherever possible where the pursued vessel refuses to stop, for instance, outmanoeuvring, high pressure water hoses to short the electricity of the pursued vessel, harpooned sheets to foul propellers, etc.

Some of the multilateral and bilateral treaties setting out a right of visit have addressed the topic of the use of force. The 2003 Caribbean Agreement largely reflects the requirements set forth by ITLOS in the M/V Saiga' (No 2). Consistent with this position, a final savings clause provides that nothing in the treaty impairs the exercise of the inherent right of self-defence. Article 22 of this treaty also prohibits the use of force against civil aircraft in flight, in reprisal or as a punishment, and requires that the discharge of firearms against or on a suspect vessel is to be reported as soon as possible to the flag state. Generally, while there are limits on the degree of force that may be lawfully used, 'state practice continues to reflect the permissibility of resorting to forcible measures in law enforcement at sea'.

The procedure and criteria set out in Article 110 provide the basic framework for the right of visit, but the precise rights of the states involved (in terms of the warship or government vessel conducting the visit and the vessel being visited) tend to vary depending on what particular activity is at issue. The powers and parameters of interdictions on the high seas (and in the EEZ in accordance with Article 58(2) of UNCLOS) are set forth here in relation to piracy; slavery, people smuggling and trafficking; unauthorized broadcasting; drug trafficking; and IUU fishing. A common theme is the ongoing deference to exclusive flag state

370 See Reuland, 'Interference with Non-National Ships' 1161, n 26.
371 UNCLOS art 110(2).
372 UNCLOS art 110(3).
373 See Reuland, 'Interference with Non-National Ships' 1177.
374 See Müller, 'Missing the Boat' 381.
375 Shearer, 'Problems of Jurisdiction' 341, Article 25(1) simply provides: 'The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.'
376 I'm Alone Case (1955) 3 RIAA 1609.
378 The Red Crusader incident also considered the legitimate use of force to stop a vessel. There, a Commission of Inquiry considered that firing without warning of solid (as opposed to blank) gun shot and creating danger to human life on board was in excess of what was necessary in pursuit of a fishing vessel fleeing arrest. The implication is that firing live ammunition is impermissible in arresting vessels. Gilmore has noted that the I'm Alone and Red Crusader decisions are both controversial and of questionable value in framing rules of engagement. More recently, this question was addressed in the M/V Saiga' (No 2). There, ITLOS considered that 'the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'. Efforts must first be made to hail the vessel or to fire across its bow before resorting to direct force against the vessel. Methods other than gun-fire are to be used wherever possible where the pursued vessel refuses to stop, for instance, outmanoeuvring, high pressure water hoses to short the electricity of the pursued vessel, harpooned sheets to foul propellers, etc.

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authority over vessels on the high seas, despite the seriousness of the problems that need to be addressed.

(a) Piracy

The menace of piracy towards maritime commerce has been documented since the days of ancient Greece and the Roman Empire. An exception to flag state authority came to be recognized in respect of piracy because of the great importance to the European powers of securing their trade routes and transport lines to overseas colonies.

Universal jurisdiction exists over pirates, who are viewed as hostis humani generis. 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. This universal jurisdiction has been recognized due to the threat to commerce posed by acts of piracy.

Pirates are objects of international law inasmuch as their conduct is regarded as so heinous as to forfeit their right of protection of their state of nationality and an accusing state may therefore proceed directly against them. This is because the character of piracy is such that it would be impossible to hold any State responsible for their acts and, by pursuing such a lawless occupation on the high seas, they have shown themselves unwilling to keep the laws and regulations of States generally.

Application of universal jurisdiction to piracy could also be supported by the facts that it is largely reactive, rather than preventive, in nature, and that a party is liable under international law if a ship is seized without adequate grounds. However, at the point that the acts were not threatening to all states or the act was done under the authority of a state, universal jurisdiction would no longer be available.

Early definitions of piracy had sought to establish a broad basis for warranting the exercise of universal jurisdiction. Oppenheim, for example, defined piracy as 'every unauthorized act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.' A line used simply to be drawn between acts of piracy and acts of war when addressing acts of violence at sea. This division is reflected in the English case of In re Piracy Jure Gentium, where the court accepted that piracy is 'any armed violence at sea which is not a lawful act of war.' After surveying a range of commentators and codification efforts on piracy, Halberstam concluded that '[t]he customary law of piracy can be best understood as an attempt to balance the need for universal jurisdiction against the reluctance of states to permit encroachment on their exclusive jurisdiction.'

Under UNCLOS, piracy consists of '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 against another ship, or persons or property on that other ship, on the high seas.' Since the adoption of UNCLOS, the definition of piracy has come under scrutiny, particularly in relation to whether states may exercise universal jurisdiction over terrorists on the basis that they may be analogized to pirates. Certain features of the UNCLOS definition have served to exclude some terrorist attacks from this ground to exercise the right of visit. In particular, the requirement in the definition of piracy that two ships are involved precludes the characterization of hijacking (where passengers gain control of one ship) as piracy. Also, that the act is for private ends has also narrowed the range of acts that may be classed as piracy. Most typically, this restriction has excluded acts that have political motivations. For example, the hijacking of the Santa Maria, a Portuguese merchant vessel, in 1961 by passengers in the name of the Independent Junta of Liberation, which had been defeated in the Portuguese Presidential elections of 1958, was not considered to be for private ends.

While clearly inadequate to respond to acts of maritime terrorism, the narrow definition of piracy has provided an acceptable basis for states to exercise the right of

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393 Jesus, 'Protection of Foreign Ships' 364 (noting also the view that the 'very first time something valuable was known to be leaving a beach on a raft the first pirate was around to steal it'). See also Maximo Q. Mejia Jr, 'Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Law Enforcement Activities.'

394 Acts of Maritime Terrorism 153, 158 (noting the etymology of the word 'piracy' may be traced to Latin and Greek, denoting the existence of the act of as early as 140 AD).

395 Lassa Oppenheim, 'Terrorism on the High Sea' 207.

396 See generally Halberstam, 'Terrorism on the High Sea'; Garmon, 'International Law of the Sea' 269, 288. See also Becker, 'The Shifting Public Order' 207 (In simplest terms, the emphasis on suppression of piracy in the law of the sea reflects a long-shared view among states that the menace of piracy operates to the detriment of the community at large, and that the community benefits more from a shared capacity to police the seas against this threat than it is hurt by the limited exception to exclusive jurisdiction over vessels at sea.).

397 UNCOMS art 101.


399 This common understanding has been coherently challenged by Guillebeau, who argues that 'private ends' is not a question of subjective motivation of those involved but rather the lack of public sanction. See Guillebeau, 'Shipping Interdiction' 52–42.


401 It was due to the narrow definition of piracy included in UNCLOS, and now accepted as customary international law, that the 1988 AUA Convention was required. The acts of those responsible for the hijacking of the Achille Lauro and the murder of Mr Klinghoffer could not be
visit against foreign vessels on the high seas. Some effort has been undertaken to merge considerations of piracy and terrorism. The Joint International Working Group for Uniformity of the Law of Piracy and Acts of Maritime Violence, organized by the Maritime Law Association of the United States and the Comité Maritime International, devised a Model National Law on Acts of Piracy or Maritime Violence, which was intended to incorporate acts covered in the 1988 SUA Convention as well as the definition of piracy to allow for a more comprehensive coverage through reference to ‘maritime violence’. This approach would certainly expand the steps that states may take against terrorists on the high seas, but has not been the preferred option in view of the efforts undertaken to revise the 1988 SUA Convention through the 2005 SUA Protocol.

The treatment of piracy under UNCLOS has also come under stress because of the characteristics of modern piracy. Acts of piracy waned throughout the 19th and most of the 20th century to the point that it was questioned whether the topic was of sufficient import even to necessitate including it as part of the law of the High Seas. However, a resurgence occurred in the 1970s and 1980s when attacks on ships for private ends began to increase. Modern pirates are variously drawn from naval elements of some poor states where the individuals involved are looking to supplement their income, fishermen unable to make a living due to depleted fish stocks as well as some insurgent groups seeking to raise funds for their cause.

Roach has commented:

The increasing number and seriousness of attacks particularly against merchant shipping in transit and in port by hijacking, homicide, robbery and theft, and the consequential enhanced risk of collision and major environmental damage increasingly threaten peaceful maritime commerce in many areas of the world.

In addition to initiatives to address armed robbery in the territorial sea and in straits, states have sought greater cooperation to address piracy. At the proposal of Japan, Southeast Asian states instead adopted in 2004 a Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), which addresses piracy on the high seas and armed robbery within a state party’s jurisdiction. Although the scope of the agreement therefore encompasses the territorial seas, archipelagic waters, and internal waters of the state parties, it does not allow for the exercise of enforcement jurisdiction where that role is ‘exclusively reserved for the authorities of the state party by its national law’. The centrepiece of this agreement is the establishment of an Information Sharing Centre designed to improve operational cooperation in responding to acts of piracy and armed robbery, as well as enabling the development of more effective prevention measures.

The incidence of piracy remains of international concern, particularly in view of its surge off the coast of Somalia in recent years. States have responded by taking cooperative law enforcement action to protect international shipping, including the delivery of food aid to Somalia and the passage of recreational and fishing vessels.

A Code of Conduct has been negotiated among states in the region, which allows for the use of ship-riders, whereby a law enforcement official from one state would travel on the vessel of another state and exercise flag state authority against its vessels. The Security Council has also acted to enhance these law enforcement efforts when pirates have fled to the territorial sea, or back to land. These Security Council authorizations are discussed further in Chapter 6. Piracy clearly poses an ongoing challenge to states seeking to improve maritime security. While definitional ambiguities and limitations remain, key responses to piracy appear to lie more in cooperative efforts at a practical level and in adjustments to national law to ensure that universal jurisdiction for prosecutions exist.

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406 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (2004) 2383 UNTS 199 [‘ReCAAP’]. This Agreement is discussed in more detail in Chapter 5, Part D(1).
407 See ReCAAP art 1.
408 ReCAAP art 2(5). Article 2(2) also provides: ‘Nothing in this Agreement shall affect the rights and obligations of any Contracting party under the international agreements to which that Contracting party is a party, including the UNCLOS, and the relevant rules of international law.’
409 Fact Sheet on Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) paras 5-6 <http://app.mot.gov.sg/dara/ReCAAP%20facrsheet%20_030810.pdf>.
410 The European Union has undertaken Operation Atalanta, the United States has been involved in a multinational coalition of naval forces and individual states have further deployed naval vessels to the region in an effort to combat the incidence of piracy. See Kraska and Wilson, ‘The Pirates of the Gulf of Aden: Interference with Ships’ 799.
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412 2009 Code of Conduct at art 7. See also Guilfoyle, ‘Shipping Interdiction’ 72-3.
415 The deficiencies in national prosecution of pirates have resulted in the Security Council calling upon UN member states to criminalize piracy in their national laws, as well as asking the UN Secretary-General to examine ‘possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements’. UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918.

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(b) Slavery, people smuggling, and trafficking

Article 110 of UNCLOS recognizes that warships may visit and board a foreign vessel on the high seas when it is reasonably suspected that the foreign vessel is engaged in the slave trade. Britain led the campaign for the abolition of the slave trade and sought to conclude, with varying success, bilateral and multilateral treaties allowing for the 'right of visitation' with respect to any merchant vessel suspected of carrying slaves.426 Although Britain sought to establish this right as a matter of customary international law, there was long-resistance from states that preferred to minimize the instances where a right of visit against their vessels on the high seas would be allowed.427

However, unlike foreign vessels and persons engaged in piracy, the visiting vessel does not have the right to seize the vessel or arrest and prosecute those on board. A distinction is drawn in this regard between the right to board and the right to seize the vessel and arrest the crew.428 Both acts of enforcement jurisdiction are anticipated with respect to piracy, but not in relation to the slave trade. Instead, Article 99 of UNCLOS only requires states to suppress the slave trade in relation to their own vessels. Boarding is permitted if a vessel is reasonably suspected of being engaged in slave trading, but no enforcement measures may be taken against the vessel if it is found to be engaged in that unlawful activity. All that the boarding state may do is report the matter to the authorities of the flag state.

This regime reflects the 1817 decision of Le Louis where it was held that British warships had no right to visit and search vessels of other states for the purposes of suppressing the slave trade.429 Even though prohibitions on the slave trade have long been entrenched in international law,430 the enforcement of the prohibition, consistent with the traditional paradigm protecting the freedom of navigation, is conferred solely on the flag state. After tracing the evolution of the right, Reuland has concluded that 'the right to seize suspected slave traders likely exists today as a matter of customary right.431 While desirable, this position was not included in UNCLOS, and would seem to cut against the existence of an evolved customary right of visit that comprises powers of arrest and detention.

427 As explained by Guilfoyle: 'An interdiction has two potential steps. The first stage is stepping, boarding and searching the vessel for evidence of the prohibited conduct.... Where boarding reveals evidence of such conduct, the arrest of persons on board and/or seizure of the vessel or its cargo may follow.... The boarding and seizure stages of interdiction involve different exercises of enforcement jurisdiction.' Douglas Guilfoyle, 'Maritime Interdiction of Weapons of Mass Destruction' (2007) 12(1) Journal of Conflict and Security Law 1, 4.
428 See Reuland, 'Interference with Non-National Ships' 1190–4 (tracing the evolution of this right). See also Becker, 'The Shifting Public Order' 209.
429 Le Louis (1817) 2 Dods 210.
430 Convention to Suppress the Slave Trade and Slavery (1926) 60 LNTS 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) 226 UNTS 3.
431 Reuland, 'Interference with Non-National Ships' 1196.

There has instead been a move away from this position with what is often considered a modern version of slavery: people smuggling and trafficking.432 'Interlinked transnational gangs traffic by land and by sea an estimated four million people every year as “human cargo”.'433 It has been estimated that the annual earnings from this trafficking have reached US$7 billion.434 A distinction is drawn between individuals who are subject to people smuggling and those subject to people trafficking, whereby the former refers to individuals who are either asylum seekers or are seeking to enter a country through illegal immigration routes, and those involved in the latter are subject to coercion or deception in illegally entering a country and may be subjected to continued exploitation upon arrival in another country. While slavery, people (or more specifically, migrant) smuggling, and people (or human) trafficking are distinct legal categories, when sea transportation is involved, slavery and people trafficking commonly involve smuggling.435

Migrant smuggling is perceived as a threat by states because of concerns about the lack of identification of those arriving in a state (and particularly whether they have any criminal links), quarantine and health risks, logistical problems, and costs as well as the infringement of a state's sovereignty given the unlawful violation of its borders.436 The transport of unlawful migrants has also become particularly hazardous as the vessels are often grossly overloaded or are extremely unsafe.437 States have taken increasingly active measures to curb flows of illegal migrants and refugees seeking to enter a state's territory.438 Issues responding to persons in distress at sea as well as questions of refugee law, and particularly the non-refoulement obligation, 439 are relevant when addressing migrant smuggling at sea.440

432 See Ethnopoulos Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 Syracuse Journal of International Law and Commerce 145, 164–78 (arguing that references to 'slavery' in UNCLOS should be given a contemporary interpretation to cover migrant smuggling and human trafficking).
433 Roach, 'Initiatives' 43.
434 Ibid.
435 See Guilfoyle, 'Shopping Interdiction' 180–1. For a discussion on the difference in definition between human trafficking and slavery, see ibid 228–31.
437 Roach, 'Initiatives' 43.
438 One of the more notorious incidents being Australia's refusal to allow the MV Tampa to offload illegal migrants who had been rescued from a sailing vessel by the Norwegian cargo vessel. See Donald R. Redwell, 'The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 Public Law Review 118. See also Papastavridis, 'Interception of Human Beings' 149–50 (discussing recent European practice in the Atlantic and Mediterranean region).
run counter to obligations associated with refugee protection if the denial effectively results in a refugee being returned to the place of persecution. After reviewing state practice and the relevant legal obligations, Guilfoyle has commented:

Maritime interdiction of irregular migrants without providing some form of refugee screening process is strictly incompatible with the Refugee Convention and Protocol. However, as irregular migration by sea increases worldwide there appears a growing perception among ‘point of entry’ states that they are unable to cope with the numbers arriving and preventative maritime patrols are a legally permissible response.

The desire to address this particular maritime security threat has led to this practice irrespective of the rights of the flag state to prevent interference with one of its vessels. More formal enforcement powers have been recognized through the work of the IMO and by multilateral treaty.

An initial response to the increasing problem of migrant trafficking came from the IMO. In 1998, the IMO adopted interim, non-binding measures for combating unsafe practices associated with the trafficking or transport of migrants by sea. Among the recommendations set forth by the IMO was that states ensure compliance with the SOLAS Convention; that they collect and disseminate information on ships believed to be engaged in unsafe practices associated with trafficking or transporting migrants; appropriate action to be taken against those involved on the vessel; and preventing any such ship from engaging in unsafe practices and, if in port, from sailing. These measures must all be in conformity ‘with the international law of the sea and all generally accepted relevant international instruments’.

In addition to these prevention measures, the IMO recommendations also extended to possible measures and procedures for suppression. In this context, states could request, and those states requested should render assistance in dealing with a ship of that state’s nationality (or a stateless vessel) reasonably suspected for being engaged in unsafe practices associated with the trafficking or transport of migrants at sea. For foreign flagged vessels, the recommendations allow for states to request prior authorization from the flag state ‘to take appropriate measures in regard to that ship’. Given their non-binding nature, these IMO recommendations did not constitute a power conferred by treaty for exercising the right of visit on the

In 1998, the Migrant Smuggling Protocol was entered into force. The Protocol, entered into force in 2000, was adopted to combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

As a result, the Migrant Smuggling Protocol requires states parties to criminalize a range of activities relating to migrant smuggling, as well as migrant smuggling itself. In the scope of offences for migrant smuggling addressed by the Migrant Smuggling Protocol, it is important to note that the offences are to be transnational in nature and involve an organized criminal group. These characteristics may potentially limit the scope of the treaty. Under the Migrant Smuggling Protocol, smuggling of migrants means ‘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’.

Section II of the Migrant Smuggling Protocol addresses smuggling of migrants at sea specifically. Vessels potentially targeted in relation to migrant smuggling by sea may encompass ‘any type of water craft’, except for those subject to immunity.

The interpretive notes adopted at the time of the negotiations provide that in interpreting what vessels are engaged in migrant smuggling, there is to be a broad interpretation to address vessels directly and indirectly involved, particularly so ‘mother ships’ would be included. An initial obligation imposed on states parties is to 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.

An important aspect of the Migrant Smuggling Protocol is the inclusion of a boarding provision in Article 8, which follows to some extent the recommendations set forth by the IMO in its 1998 guidelines. In dealing with a stateless vessel or a vessel flagged to it, a state may request assistance of other states in suppressing the use of the vessel for the purposes of migrant smuggling. While it is optional for a state to make such a request, once made, it is obligatory for states parties so requested to render assistance, but only to the extent possible within their.
Law Enforcement Activities

A state party that has reasonable grounds to suspect that a foreign flagged ship is engaged in migrant smuggling may request authorization from the flag state to take appropriate measures, including boarding and searching the vessel and, if evidence of migrant smuggling is found, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag state. The flag state is to be promptly informed of results of any measure taken. These steps may be taken under Article 8 against a vessel 'exercising freedom of navigation' and hence in the EEZ or on the high seas. Interpretive notes adopted in the context of the negotiations of the Migrant Smuggling Protocol indicate that the measures set forth in relation to smuggling migrants at sea may only be taken in the territorial sea of another state with the permission or authorization of the coastal state concerned.

Requirements imposed on the flag state to facilitate these measures include responding expeditiously to requests regarding information for claims of registration of a vessel and to requests for authorization to board. For this purpose, flag states are to designate the necessary authorities and notify the Secretary-General of this designation. Consistent with traditional law of the sea principles, another state would not be able to act against the suspect vessel in the absence of receiving this information or authorization from the flag state. The flag state and the requesting state are to agree to conditions for the authorization to board the suspect vessel, including conditions as to responsibility and the extent of effective measures to be taken.

A series of safeguards in the Migrant Smuggling Protocol are to apply in relation to measures taken in boarding a suspect vessel to exercise the freedom of navigation. These include ensuring the safety and humane treatment of people on board and that any measure taken with regard to the vessel is environmentally sound, as well as taking due account of the need not to endanger the security of the vessel or its cargo and not to prejudice the commercial or legal interests of the flag state or any other interested state. The safeguards extend to rights under international law generally, in terms of not undermining the authority of the flag state in the exercise of its jurisdiction and control in administrative, technical and social matters as well as seeking to protect the rights of coastal states in their EEZs. Consistent with Article 110(3) of UNCLOS, if suspicions prove to be unfounded following the boarding of a vessel, then the vessel is to be compensated for any loss or damage that may have been sustained in situations where the vessel did not commit any act justifying the measures taken.

Regional efforts have also been pursued to respond to migrant smuggling, through bilateral treaties, as well as cooperative, political arrangements. One example of the latter was the creation of the Bali Process in 2002 among 38 source, transit, and destination states from throughout the Asia-Pacific region. The objectives of the Bali Process include developing more effective information and intelligence sharing; improving cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks; and the enactment of national legislation to criminalize people smuggling and trafficking in persons.

The Bali Process does not create a further legal framework, but is instead driven towards activities that are practical, targeted and focused on capacity building of operational level officials representing justice, law enforcement, foreign affairs and other key agencies involved in combating people smuggling, trafficking in persons and related transnational crime. To this end, a number of operational workshops and seminars have been held, and have addressed topics such as model return agreements, as well as legislation workshops. States that are particularly affected by migrant smuggling have sought to enter into bilateral agreements with the states from which the migrants are travelling to enhance law enforcement efforts.

The right of visit has provided one tool to address the modern problem of people smuggling and trafficking. Although responses to slavery showed considerable deference to the rights of the flag state, the 2000 Migrant Smuggling Protocol has gone some way to redress this situation. While there are limitations in the definition of what is covered by the 2000 Migrant Smuggling Protocol, the treaty still stands as testament to the recognition that allowing for the right of visit to address this problem is a needed solution. It has, however, still been accepted within the confines of an existing agreement and therefore also reinforces the long-standing deference to exclusive flag state authority and the freedom of navigation. The community interest that may well exist in resolving this problem did not warrant any drastic reconsideration of these tenets, and arguably the legal response has been sufficient—or at least as progressive as possible—in this regard.

(c) Unauthorized broadcasting

The right of visit is also permissible in relation to the transmission of radio or television broadcasts from a ship or installation on the high seas intended for law enforcement activities.
reception by the general public contrary to international regulations. The problem of unauthorized broadcasting grew at the end of the 1950s and into the 1960s, particularly in the Baltic, Irish, and North Seas. At the 'height' of unauthorized broadcasting, there were 11 stations transmitting from ships and installations on the high seas. Coastal states were unable to enforce their laws against unlawful broadcasting, as the vessels on which the stations operated were installing on the high seas. 475 Coastal states were unable to enforce their laws against unlawful broadcasting, as the vessels on which the stations operated were usually registered with flag of convenience states by companies incorporated outside the relevant jurisdiction in order to conceal the true owners and financial interests involved. Unauthorized broadcasting does not currently constitute a major maritime security concern. Its interest rests in demonstrating the steps states are prepared to take to improve law enforcement powers when confronted with activity perceived as a shared threat.

In devising responses to unauthorized broadcasting, there was resistance among the affected states at the time to utilize 'strong arm action' that would run 'counter to the traditional British concept of the freedom of the seas'. The motives for coastal states in claiming jurisdiction included the desire to prevent certain stations operating on wavelengths that had been allocated to other states under international agreement; or to prevent stations operating on wavelengths so close to those allocated that electrical interference was caused. States were also motivated by the desire to protect their own broadcasting monopolies or to prevent the development of commercial broadcasting. Further, the pirate radio stations broadcast music without the appropriate royalty payments being made to those holding copyright and performing rights. Finally, coastal states were concerned that the pirate broadcasters would avoid paying proper income and other taxes. Robertson summarizes these concerns as follows:

The basic problem presented by pirate radio stations was that they struck at the very heart of the comprehensive and sophisticated national and international regulatory schemes adopted by the international community to ensure order and noninterference between uses and users of the radio spectrum. Since the spectrum of radio frequencies allocated to radio broadcasting is limited and a large number of broadcasting states were competing for places on the spectrum, the intrusion of broadcasting stations free to pick their own frequencies and radiated-power levels was bound to create interference with other states. As it was primarily European states that were afflicted by this crime, they sought to adopt an agreement within the Council of Europe. Britain urged the position that there should be 'concerted action taken within a framework of clearly established jurisdictional rules rather than by resort to innovatory extensions of criminal jurisdiction'. Some delegations wished to take a bold new initiative to curb what all delegations agreed were abuses in the region, but the majority were cautious about extending the scope of maritime jurisdiction. The affected states within the Council of Europe proceeded to adopt a treaty that established jurisdictional rules in connection with the establishment, operation and facilitation of unlawful offshore broadcasting stations, rather than extending the reach of their criminal jurisdiction into the high seas. The 1965 European Agreement did not, therefore, allow states parties to proceed against each other's vessels on the high seas.

To overcome the strictures of the traditional law of the sea principles, states devised alternative, lawful, measures to counter this activity. The United Kingdom chartered a vessel to conduct a surveillance operation whereby those vessels transporting supplies to the vessels with the broadcasting stations were duly noted for the possibility of pursuing prosecution within the United Kingdom. States also were able to exercise jurisdiction when extraneous circumstances assisted and the unlawful broadcasting vessels were damaged due to inclement weather and had to put into port for repairs. Although flag states were reminded of their international obligations, these communications proved unpersuasive with the states involved in terms of acting against vessels registered to them. Ultimately, an important factor in the general demise of unlawful broadcasting was the introduction of commercial radio in the states concerned (including the United Kingdom).

The 1965 European Agreement formed the basis of a proposal for the negotiations of UNCLOS, which resulted in the adoption of Article 109. Under the latter provision, vessels entitled to exercise the right of visit must have jurisdiction over the unauthorized broadcasting based on the offending vessel or installation being of the same flag or registry, the nationality of the offenders, or the vessel or installation is flagged to the state where the transmissions can be received or where authorized radio communication is suffering interference. States are accorded
both legislative and enforcement jurisdiction in this regard. If a military vessel does not have jurisdiction on these grounds, it may not conduct a boarding or seize the suspected vessel or installation, or arrest and prosecute those on board. Note that along with the right of visit, there is a right (for certain categories of states) to seize the offending vessel as well. The inclusion of this provision [right of visit for unlawful broadcasting] in the Convention and the willingness of states to commit themselves to it is puzzling. Nonetheless, the importance of the freedom of the high seas demanded that one of these acknowledged bases of jurisdiction exist in order to subject a foreign vessel to the right of visit.

(d) Drug trafficking

Illegal drug trafficking by sea became an increasing problem, especially for the United States, throughout the 1970s. By 1999, one US Coast Guard official wrote: 'The problems associated with the manufacture, distribution and consumption of illicit narcotics must now be numbered among the most invidious and persistent threats to national security and economic vitality in the post-Cold War era.' The situation has only worsened post-September 11, as drug trafficking at sea has evolved into a major transnational organized criminal endeavour and terrorist groups are reported to use drug trafficking as a source of revenue. As one aspect in the growth of this global trade, the United States recognized that there was an increasing use of foreign flag vessels bringing in narcotic substances and it initially developed a procedure for informal, case-by-case agreements to allow for boarding, search, and seizure of these vessels. Seeking consent in such an ad hoc manner made law enforcement efforts difficult, particularly when an operation could become more complicated (because of weather, time of day, or dumping of drugs overboard) while the US Coast Guard waited for permission to board. One practice followed by the United States was to undertake what it termed as 'consensual boarding' where consent was obtained from the master of the vessel in the first instance and the flag state would then be contacted if law enforcement measures such as arrest or seizure were warranted. The controversy surrounding this practice led to alternative methods to be sought that paid full respect to flag state authority.

As a starting point to the international legal framework, all that UNCLOS requires is that states parties cooperate in their efforts to suppress the illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas. The inclusion of this provision was still an advance on the 1958 High Seas Convention, which lacks a comparable provision. There is no specific right granted to warships in UNCLOS to visit, board, and seize a vessel if there is a reasonable suspicion that a vessel is engaged in this illicit trade. Instead, all that is anticipated is that the flag state may request the assistance of other states, rather than another state initiating action or undertaking more precise measures against foreign flagged vessels involved in drug trafficking on the high seas. It is therefore notable that drug trafficking stands in contrast to the rights granted to states to enforce laws related to slavery, piracy and unauthorized broadcasting.

The 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances built on the general requirement under UNCLOS to cooperate in the suppression of illicit drug trafficking on the high seas. Article 3 of the 1988 Vienna Convention specifies the most serious international drug trafficking offences and Article 4 requires states to establish jurisdiction over those offences, including when they are committed 'on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed'. In relation to these offences as relevant for maritime security, the 1988 Vienna Convention refers to states cooperating 'to the fullest extent possible', which is intended to augment the requirement of cooperation included in Article 108 of UNCLOS. Further, this treaty improves on the situation set forth in UNCLOS by allowing the interception of a ship suspected of illicit trafficking by a state other than the flag state. Suggestions that there should be consideration of arrangements for law enforcement authorities to board vessels flying foreign flags were initially considered 'inappropriate' and best left to bilateral and regional arrangements. The 1988 Vienna Convention did not ultimately provide a general grant of authority for the right to visit foreign vessels suspected of involvement in drug trafficking. Instead, Article 17 sets up a procedure whereby a state party may request permission to board a vessel of another state party when the ship is outside the territorial sea of any state. Authorization may be afforded on an ad hoc basis, but it is not the right of visit.

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503 UNCLOS art 108(1).
505 UNCLOS art 108(2).
506 Gilmore, Drug Trafficking by Sea' 185.
508 See Gilmore, 'Drug Trafficking by Sea' 187 (referring to paras 1 and 2 of art 17). See also Williams, 'Bilateral Maritime Agreements' 179.
509 Prescriptive jurisdiction is established under art 4 of the 1988 Vienna Convention.
510 See Gilmore, Drug Trafficking by Sea' 185 (referring to the response of the relevant expert group involved in drafting the Vienna Convention to a Canadian proposal).
511 1988 Vienna Convention art 17(3).
or by means of separate agreements or arrangements otherwise reached between the states parties. 511

Certain protections are also accorded to the flag state within the 1988 Vienna Convention in recognition of its preeminent position on the high seas. A flag state is permitted to subject its authorization to conditions to be mutually agreed upon between it and the requesting party. 512 It is also within the discretion of the flag state not to authorize the boarding at all. 513 Moreover, Article 17 does not set any precise timeframe for the authorization by the flag state, but simply requires a party to ‘respond expeditiously to a request from another party’ regarding the nationality of a vessel and authority to board. 514 Protections are also included in relation to the coastal state’s exercise of sovereign rights and jurisdiction over the EEZ, as there is a requirement to ‘take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States’. 515

Article 17 is not intended to be the definitive statement on interdictions to suppress drug trafficking, as the 1988 Vienna Convention expressly accounts for earlier agreements concluded between states addressing the problem, as well as providing a framework for subsequent bilateral and multilateral agreements. One such earlier agreement was an Exchange of Notes between the United States and the United Kingdom from 1981. 516 This Agreement permitted the interdiction of British-flagged vessels in designated areas of the Caribbean, Gulf of Mexico, and Atlantic Ocean when those vessels were suspected of trafficking in drugs. Reciprocal rights were not accorded to the United Kingdom in relation to any United States vessel. Its provisions are designed solely to facilitate the effective enforcement of US law subject to a number of safeguards for the UK. 517 United States law addressed a range of offences relating to the possession of drugs on vessels, as well as the forfeiture of drugs and vessels involved in smuggling. 518

The Exchange of Notes facilitated efforts at enforcing these laws at sea. At the time of its adoption, the Exchange of Notes was described as a ‘significant departure from the customary rule that on the high seas jurisdiction follows the flag’. 519 The United Kingdom further emphasized that the agreement was not to be regarded as a precedent for the conclusion of any further agreement affecting British vessels on the high seas. 520

Through this treaty, consent to the visit, search and seizure of the vessel was given in advance and so no further authorization was needed at the point that a vessel wished to conduct a boarding. 521 A boarding by the US Coast Guard would only be justified if there was a reasonable belief that the vessel had on board a cargo of drugs for importation into the United States. 522 Setting such a standard prevents random boardings from being conducted. Upon boarding, the US Coast Guard was required to take necessary steps to establish the place of registration of the vessel, and if these steps suggested that a drug trafficking offense under United States law was being committed, could proceed to search the vessel and then seize it and take it to a US port. 523 The United States could seize a vessel if it appears that a breach of the laws of the United States is being or has been committed. 524 This broader standard facilitates the operations of the US Coast Guard. 525 In this situation, the United Kingdom did reserve its right to object to the continued exercise of US jurisdiction and could thereby forestall forfeiture proceedings. 526 Furthermore, the United Kingdom reserved the right to object to the exercise of jurisdiction over any of its nationals who may have been arrested at the time of the seizure of the vessel, and in which case the United States would be required to release those nationals. 527

In response to illicit drug trafficking into its territory, the United States has pursued a range of legal strategies, both within its domestic law, 278 and in cooperation with other states. For the latter, the United States has sought to overcome the shortcomings of UNCLOS and the 1988 Vienna Convention, most notably the requirement of consent for boarding from flag states on a case-by-case basis. In doing so, the United States did not seek to alter the exclusive flag state jurisdiction.

538 See, eg, Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea (Spain–Italy) (1990) 1776 UNTS 229. Article 5 of this treaty allows for each party to ‘intervene as its agent, in waters outside its own territorial limits, in respect of ships or any other board or surface vessel displaying the flag of or having the nationality of the other Party’, cited in Gilmore, ‘Narcotics: Europe Agreement’ 7, n 57. See further Guillot, ‘Shipping Interdiction’ 85–6.

539 1995 European Agreement art 7. The ability to respond promptly is to be enhanced by states making arrangements for its availability at all times. See 1995 European Agreement art 17(1).

540 Gilmore does note that some of the negotiating parties were willing to permit a more liberal approach to boarding than was enshrined in art 6 and so predicted the possibility of further bilateral agreements. Ibid.

541 Art 6 of the 1995 European Agreement reads: ‘Where the intervening State has reasonable grounds to suspect that a vessel, which is flying the flag or displaying the marks of registry of another Party or bears any other indications of nationality of the vessel, is engaged in or being used for the commission of a relevant offence, the intervening State may request the authorisation of the flag State to stop and board the vessel in waters beyond the territorial sea of any Party, and to take some or all of the other actions specified in this Agreement. No such actions may be taken without the authorisation of the flag State.’

542 See, eg, Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea (Spain–Italy) (1990) 1776 UNTS 229. Article 5 of this treaty allows for each party to ‘intervene as its agent, in waters outside its own territorial limits, in respect of ships or any other board or surface vessel displaying the flag of or having the nationality of the other Party’, cited in Gilmore, ‘Narcotics: Europe Agreement’ 7, n 57. See further Guillot, ‘Shipping Interdiction’ 85–6.

543 One such improvement was additional detail on the payment of compensation for loss, damage or injury following an intervention. See 1995 European Agreement art 26. See further Gilmore, ‘Narcotics: Europe Agreement’ 9–10.

544 See, eg, Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea (Spain–Italy) (1990) 1776 UNTS 229. Article 5 of this treaty allows for each party to ‘intervene as its agent, in waters outside its own territorial limits, in respect of ships or any other board or surface vessel displaying the flag of or having the nationality of the other Party’, cited in Gilmore, ‘Narcotics: Europe Agreement’ 7, n 57. See further Guillot, ‘Shipping Interdiction’ 85–6.


546 See, eg, Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea (Spain–Italy) (1990) 1776 UNTS 229. Article 5 of this treaty allows for each party to ‘intervene as its agent, in waters outside its own territorial limits, in respect of ships or any other board or surface vessel displaying the flag of or having the nationality of the other Party’, cited in Gilmore, ‘Narcotics: Europe Agreement’ 7, n 57. See further Guillot, ‘Shipping Interdiction’ 85–6.

547 William C. Gilmore, ‘Narcotics Interdiction at Sea The 1995 Council of Europe Agreement’ (1996) 20 Marine Policy 3, 4. The link between the agreements is reinforced by the fact that only states party to the Vienna Convention could also become parties to the 1995 European Agreement. See 1995 European Agreement art 27(1).

548 See, eg, Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea (Spain–Italy) (1990) 1776 UNTS 229. Article 5 of this treaty allows for each party to ‘intervene as its agent, in waters outside its own territorial limits, in respect of ships or any other board or surface vessel displaying the flag of or having the nationality of the other Party’, cited in Gilmore, ‘Narcotics: Europe Agreement’ 7, n 57. See further Guillot, ‘Shipping Interdiction’ 85–6. Under the 1995 European Agreement, the flag state must consider a request for boarding in a timely and effective manner and provide a response, ‘whenever practicable’ within four hours. The flag state retains the authority to determine if any conditions are to be imposed prior to permitting one of its vessels to be boarded, including the possibility to deny permission for the boarding. The boarding state would normally be authorized to stop and board the vessel, establish effective control over it and search for evidence of an offence, as well as requiring the vessel and those on board to be taken to that state’s port for further investigations. Further, arrest and detention of the persons concerned is permissible if evidence is found of an offence. The flag state is to be informed without delay, and either the state letter or spirit of the 1988 Vienna Convention were not acceptable. There are several aspects of the 1995 European Agreement that elaborate and improve on the requirements set forth in the 1988 Vienna Convention. However, Article 6 of the 1995 European Agreement retained the need for flag state authorization prior to the boarding of a ship by another state party. Proposals relating to the treaty itself afford a basis of consent to a boarding by states parties, or that tacit consent could be established when a flag state failed to respond to a request were rejected. It appears that this requirement is more easily dispensed with when states are negotiating treaties on a bilateral basis, rather than a multilateral basis. Under the 1995 European Agreement, the flag state must consider a request for boarding in a timely and effective manner and provide a response, ‘whenever practicable’ within four hours. The flag state retains the authority to determine if any conditions are to be imposed prior to permitting one of its vessels to be boarded, including the possibility to deny permission for the boarding. The boarding state would normally be authorized to stop and board the vessel, establish effective control over it and search for evidence of an offence, as well as requiring the vessel and those on board to be taken to that state’s port for further investigations. Further, arrest and detention of the persons concerned is permissible if evidence is found of an offence. The flag state is to be informed without delay, and either the state
conducting the boarding or the flag state then prosecute any offenders, with the flag state being accorded preference in such a situation of concurrent jurisdiction.\textsuperscript{547}

The 2003 Caribbean Agreement brought together many of the features of the bilateral agreements between the United States and Caribbean states,\textsuperscript{548} as well as seeking to supplement Article 17 of the 1988 Vienna Convention. Article 17 had been viewed as overly restrictive in this region due to the use of 'go-fast' vessels that could escape boarding proceedings when outside the territorial sea of a state by fleeing to such an area while the law enforcement officials waited for consent of the flag state to board.\textsuperscript{549} The 2003 Caribbean Agreement is intended to enhance the effectiveness of Article 17 of the 1988 Vienna Convention, as acknowledged in its preamble as well as through the inclusion of Article 35, which restricts access to the 2003 Caribbean Agreement to states that are already parties to the 1988 Vienna Convention.\textsuperscript{550} The new agreement is described by Gilmore as 'more ambitious, innovative and comprehensive'.\textsuperscript{551} Among the key changes is the inclusion of detailed provisions for law enforcement operations in and over the territorial seas of participating states and territories, as well as considering issues pertaining to illegal drug trafficking by air.\textsuperscript{552} The 2003 Caribbean Agreement incorporates the use of 'ship-riders' to provide authority for entry into that official's waters and air space.\textsuperscript{553} Each state party is required to designate personnel to act as 'embarked law enforcement officials', but not required, just encouraged, to have such designated personnel embark on their law enforcement vessels.\textsuperscript{554}

As one of the initial steps in law enforcement operations on the high seas, verification of nationality of a suspect vessel has particular importance in the drug trafficking context given that stateless vessels have frequently been used in these operations. Article 6 of the 2003 Caribbean Agreement addresses this issue and requires that requests for verification of nationality 'be answered expeditiously and all efforts shall be made to provide such answer as soon as possible, but in any event within four (4) hours'.\textsuperscript{555} During negotiations, states had considered including a provision where there was deemed authorization to board to inspect the vessel's documents, question persons on board and search the vessel and cargo if a response was not forthcoming within the set timeframe.\textsuperscript{556} This provision was not ultimately included and it must be presumed that if such verification is not received then the situation is governed by customary international law so that the law enforcement vessel may approach and check nationality to determine what other steps may be permissible once nationality is verified.

Consent for ship-boarding is accorded under the terms of the agreement, and so consent does not need to be sought on a case-by-case basis similar to Article 17 of the 1988 Vienna Convention.\textsuperscript{557} However, states do have the option of requiring such express consent at the time they sign, ratify, approve or accept the 2003 Caribbean Agreement,\textsuperscript{558} or of creating a system where there is deemed consent for boarding if no response is forthcoming within a four-hour period.\textsuperscript{559} In the latter two instances, a state party may authorize the requesting state to take all necessary actions to prevent the escape of the vessel pending verification of nationality and decision on authorization for boarding.\textsuperscript{560} Allowing for these alternative options to consent by virtue of the treaty itself reflected that states were 'mindful of the fact that such a radical departure from past multilateral treaty practice might pose policy, legal or other difficulties for some jurisdictions'.\textsuperscript{561} Further deference to the flag state is seen in its retention of primary jurisdiction over detained vessels and persons, although this right may be waived.\textsuperscript{562}

With each of these agreements, the efforts to establish ship-boarding procedures have been faced with the entrenched construct of the freedom of the high seas and the paramouncy of flag state control over its vessels on the high seas. The derogations from the traditional adherence to exclusive flag state authority to deal with the illicit trade in drugs have involved precise strictures as to when the right of visit may occur, and what safeguards are to be afforded to the foreign flagged vessel in these instances. What might have been considered a common interest in reducing unlawful trafficking in narcotic drugs and psychotropic substances, was superseded by what was perceived as a greater common interest in adhering to the principle of mare liberum. It is interesting to note that where states had adhered strictly to the preeminence of exclusive flag state jurisdiction, the shortcomings of this approach resulted in the need to negotiate and conclude further agreements, usually on a bilateral or regional basis (as seen particularly in the practice of the United States in this regard).

(e) IUU fishing

The freedom of fishing on the high seas has been recognized in UNCLOS but is now subject to obligations of conservation and management, as set forth in UNCLOS,\textsuperscript{563} as well as under other treaties.\textsuperscript{564} Flag states have the primary responsibility to exercise enforcement jurisdiction over their vessels for unlawful fishing activities wherever they occur. In addition, Article 117 refers to states taking measures for their 'respective nationals as may be necessary for the conservation of

\begin{itemize}
\item \textsuperscript{547} 1995 European Agreement arts 3, 10, and 14.
\item \textsuperscript{548} These agreements continue in effect under art 31 of the 2003 Caribbean Agreement.
\item \textsuperscript{549} See Gilmore, \textit{Caribbean Area} 4.
\item \textsuperscript{550} See 2003 Caribbean Agreement Pmb, art 35. See further Gilmore, \textit{Caribbean Area} 8.
\item \textsuperscript{551} Gilmore, \textit{Caribbean Area} 8.
\item \textsuperscript{552} Ibid 8. The reference to 'territories' takes into account those areas for which their foreign affairs are conducted by other states.
\item \textsuperscript{553} See 2003 Caribbean Agreement art 9.
\item \textsuperscript{554} See 2003 Caribbean Agreement art 9(1). See further Gilmore, \textit{Caribbean Area} 20.
\item \textsuperscript{555} 2003 Caribbean Agreement art 6(4).
\item \textsuperscript{556} See Gilmore, \textit{Caribbean Area} 18.
\item \textsuperscript{557} See 2003 Caribbean Agreement art 16(1).
\item \textsuperscript{558} 2003 Caribbean Agreement art 16(2)
\item \textsuperscript{559} 2003 Caribbean Agreement art 16(3).
\item \textsuperscript{560} 2003 Caribbean Agreement art 16(4).
\item \textsuperscript{561} Gilmore, \textit{Caribbean Area} 29.
\item \textsuperscript{562} 2003 Caribbean Agreement art 24. See also Gilmore, \textit{Caribbean Area} 20.
\item \textsuperscript{563} See UNCLOS arts 117-20.
\item \textsuperscript{564} As acknowledged in UNCLOS art 87 and art 116.
\end{itemize}
the living resources of the high seas’. This provision allows for states to take action against their nationals who engage in IUU fishing even if the national is on a vessel flagged to another state. 565

Rights of enforcement against foreign flagged vessels on the high seas are only available where states have specifically agreed to such powers under treaty. This point was evident in the dispute between Canada and Spain (and by extension, the European Union) regarding fishing immediately outside Canada’s EEZ. Canada sought to extend its enforcement powers to these vessels on the basis of an ecological emergency. 566 Spain instead argued that Canada had to respect its exclusive flag state jurisdiction on the high seas, and sought to challenge Canada’s position before the ICJ. 567 As a result of this problem, Canada sought multilateral support to recognize enforcement powers against unlawful fishing on the high seas. 568

The key global treaty that now allows for enforcement rights against foreign flagged vessels on the high seas is the 1995 Fish Stocks Agreement. This treaty does not directly threaten the principle of exclusive flag state jurisdiction on the high seas. 569 Considerable deference is accorded to the flag state’s authority, and the emphasis is instead on detailing the duties of the flag state in relation to vessels registered to it and fishing on the high seas. In this regard, Article 18 of the 1995 Fish Stocks Agreement provides that states parties are only to authorize its vessels to fish on the high seas where those states are able to exercise effectively their responsibilities. 570 These responsibilities include controlling fishing through licences, authorizations, or permits, establishing regulations to address the conduct of fishing, and undertaking monitoring, control and surveillance of their fishing vessels. 571 Flag states are to enforce conservation and management measures irrespective of where violations occur, and the treaty sets out requirements for investigation, instituting proceedings, detaining vessels and applying appropriate sanctions. 572

While the rights of the flag state are thereby recognized and affirmed in the 1995 Fish Stocks Agreement, this treaty also anticipates a greater role for third states in enforcing conservation and management requirements through the possibility of

565 Guilfoyle, Shipping Interdiction 101.
568 See Byers, ‘Policing the High Seas’ 537–8.
570 1995 Fish Stocks Agreement art 18(2). Presumably, though, this provision is self-judging in the first instance and it may only be in the context of dispute settlement proceedings that another state party may challenge a state’s decision on its capability under this article.
571 1995 Fish Stocks Agreement art 19.
572 1995 Fish Stocks Agreement art 18(3).
573 1995 Fish Stocks Agreement art 18(3)(g)(i).
574 1995 Fish Stocks Agreement art 21(3).
575 1995 Fish Stocks Agreement art 21(1). Of course the flag state must at least be a party to the 1995 Fish Stocks Agreement for the vessel to be subjected to this regime.
576 1995 Fish Stocks Agreement art 22(1)(a).
577 1995 Fish Stocks Agreement art 22(1)(b). The inspectors may not interfere with the master’s ability to communicate with the authorities of the flag state either. 1995 Fish Stocks Agreement art 22(1)(c).
578 1995 Fish Stocks Agreement art 22(1)(d).
579 1995 Fish Stocks Agreement art 22(1)(e).
580 1995 Fish Stocks Agreement art 22(1)(f).
581 1995 Fish Stocks Agreement art 21(3). What constitutes a ‘serious violation’ is defined in art 21(1) and includes fishing without a valid license, failure to maintain accurate records, using prohibited fishing gear, multiple violations which together constitute a serious disregard of conservation and management measures, and such other violations as may be specified by the particular RFMO.
582 See 1995 Fish Stocks Agreement arts 21(6), (7), and (12).
the fact that it is only available in relation to vessels registered to states parties to the treaty. The ability of vessels to re-flag to avoid such obligations will thereby reduce the effectiveness of enforcement measures designed to improve the conservation and management of fish resources. Alternative mechanisms for non-flag state enforcement are thus critical if goals of fisheries conservation and management are to be achieved.

To this end, it may be observed that various RFMOs have established ways to enforce and manage fish resources. Alternative mechanisms for non-flag state documentation schemes, which track landings of fish and the trade flow of particular species, are to be achieved. Management in the 21st Century: Institutional Frameworks and Responses will be developed through RFMOs in respect of particular fisheries or fish stocks. 583 As part of the responses to the threat of IUU fishing, RFMO have established catch documentation schemes, which track landings of fish and the trade flow of particular species. 585 Vessel monitoring systems have also been required as a means of tracking the location of vessels. 586 This practice was undermined to a certain extent by the Volga case where ITLOS determined that the use of a vessel monitoring system could not be required as a condition of bond following the arrest of a vessel under Article 73 of UNCLOS. 587 RFMOs have also relied on reputational challenges through the listing of vessels and flag states that have violated conservation and management measures. 588 The adoption of the 2009 Port State Measures Agreement may provide another avenue for states to respond to unlawful fishing on the high seas. A variety of legal techniques have therefore been put in place to boost law enforcement efforts against unlawful fishing.

(f) Conclusion

Law enforcement on the high seas has been enhanced in various ways in response to state concerns over a range of unlawful activities. To this end, improved understandings of the right of hot pursuit are developing to account for the use of modern technologies by policing vessels as well as those vessels being pursued. Further, states have devised bilateral, regional, and multilateral agreements to recognize procedures that may be followed against their vessels when there are reasonable suspicions of certain activities that threaten maritime security. These agreements have commonly acknowledged the pre-eminent position of the flag state and arguably the procedures put in place are weaker as a result. Improvements to the agreed procedures, especially the need to gain consent even with the existence of a separate treaty, could have been achieved if there had been less emphasis on flag state authority. While it could be argued that the increased instances allowing for the right of visit account for open registries and the failure of flag states to properly monitor their own vessels, this very phenomenon could have warranted stronger roles for other states as alternatives to flag state action.

The endurance of the law enforcement regime on the high seas may also be questioned in light of recent efforts by environmental protestors to disrupt certain activities. These groups may not typically be regarded as pirates, as their goals are not for ‘private ends’ but are related to the quest for marine environment protection. 589 States have nonetheless sought to take action against environmental protestors when they have interfered with particular maritime activities; most notably, in relation to protests against nuclear and other weapons testing. 590 and the recent clashes between Japanese whaling vessels and members of the Sea Shepherd Conservation Fund in waters off Antarctica. Options for law enforcement on the high seas have been limited, despite the risks posed to navigation and other activities in this area. The encounters between the Japanese whalers and the Sea Shepherd protestors, which intensified in the 2008–2009 and 2009–2010 seasons, particularly highlight this point. In attempting to thwart Japan’s whaling, Sea Shepherd has launched...
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butyric acid (or rotten butter) onto Japanese vessels and the whales have used water cannons to keep the protestors at bay.591 Sea Shepherd protestors boarded a Japanese vessel in 2008 to deliver a letter of protest.592 In early 2010, the Japanese vessel Shonan Maru 2 collided with the Ady Gil, which was flagged to New Zealand, causing the Ady Gil to sink after those on board were rescued.593 The captain of the Ady Gil subsequently boarded the Shonan Maru 2 to deliver a demand for compensation for the destroyed vessel.594 While the Sea Shepherd protestors lacked authority to board Japanese vessels,595 Japan was similarly limited in the steps that it could lawfully take in pursuing what Japan has considered a legal activity on the high seas.596 Japan had to appeal to the relevant flag states,597 and reportedly issued an international arrest warrant against Captain Paul Watson, the leader of Sea Shepherd.598 While Japan released the protestors who boarded in 2008,599 the captain of the Ady Gil was returned to Japan where he was subsequently charged with trespass and other offences.600 States not only need to resolve the source of the dispute prompting these altercations at sea, but should also consider whether the existing legal frameworks are sufficient if order is to be maintained on the oceans.

592 Ibid.
596 However, as a General Assembly resolution, the World Charter for Nature is not binding. At most, its terms could be viewed as soft law. Lynon Keith Caldwell, International Environmental Policy: From the Twentieth to the Twenty-First Century (2nd edn, Duke University Press, Durham 1996) 100.
604 ‘Japanese vessel in 2008 to deliver a letter of protest. 592 In early 2010, the Japanese vessel Shonan Maru 2 collided with the Ady Gil, which was flagged to New Zealand, causing the Ady Gil to sink after those on board were rescued.593 The captain of the Ady Gil subsequently boarded the Shonan Maru 2 to deliver a demand for compensation for the destroyed vessel.594 While the Sea Shepherd protestors lacked authority to board Japanese vessels,595 Japan was similarly limited in the steps that it could lawfully take in pursuing what Japan has considered a legal activity on the high seas.596 Japan had to appeal to the relevant flag states,597 and reportedly issued an international arrest warrant against Captain Paul Watson, the leader of Sea Shepherd.598 While Japan released the protestors who boarded in 2008,599 the captain of the Ady Gil was returned to Japan where he was subsequently charged with trespass and other offences.600 States not only need to resolve the source of the dispute prompting these altercations at sea, but should also consider whether the existing legal frameworks are sufficient if order is to be maintained on the oceans.

I. Conclusion

The law enforcement powers of states should be assessed against the inclusive need to improve responses to maritime security threats. To this end, Becker has rightly observed:

Balancing new claims of jurisdiction to prescribe and enforce against the principle of navigational freedom will be an uneasy exercise in lawmaking, but there is room for a more aggressive interdiction regime to the extent that its proponents keep in mind the needs and claims of the system as a whole. The non-interference principle merits respect, but only to the extent that it remains a valuable and effective tool for promoting the general welfare of the international system and all its participants.605

For each of the maritime zones assessed here, there are a variety of ways that states have sought to move away from the entrenched position of exclusive flag state authority as well as coastal state sovereignty in order to promote maritime security. These may be summarized as follows.

In ports and internal waters, coastal state sovereignty allows for the exercise of law enforcement powers over a range of activities occurring in these maritime areas. In the face of these powers, it is by dint of international comity that certain matters, usually those internal to the vessel, are deferred to flag state authority. Extensions of port state authority have involved granting new powers to the state over foreign flagged vessels in port for activities that have occurred outside the maritime zones of that state. These extensions have occurred in response to vessel-source pollution as well as IUU fishing on the high seas. The latter efforts have been confirmed with the adoption of the 2009 Port State Measures Agreement at the FAO. These developments demonstrate that there has been a shift away from the deference typically accorded to flag states, partially, if not primarily, as a response to the unreliable enforcement efforts by flag of convenience states. The shift has not been
huge, as a range of protections and preferences are still accorded to flag states in addressing these issues. Nonetheless, such multilateral endeavours may be seen as reflecting the inclusive interest in responding to particular maritime security threats. The balance of interests has been altered and refined.

The law enforcement regime in the territorial sea has not been altered significantly in recent times as states have sought to improve responses to maritime security threats. Coastal state sovereignty over the territorial sea is subject to the right of innocent passage of foreign flagged vessels. If a foreign vessel violates this right, the coastal state may only take steps to prevent that passage. Whatever these steps may precisely require in each instance, enforcement jurisdiction on board a foreign vessel in lateral passage through the territorial sea is only permissible in particular circumstances, including when the consequences of the crime extend to the coastal state and the crime is of a kind to disturb the peace of the country or the good order of the territorial sea.605 If breaches of the right of innocent passage are considered to fall within these circumstances then the enforcement powers of the coastal state to respond to maritime security issues are enhanced. While preferable for maritime security purposes, such authority will not always be recognized by other states. As with port state authority, additional rights have been granted to respond within the territorial sea to vessel-source pollution and to unlawful fishing on the high seas. Again, protections for the rights of the flag state are part and parcel of these regimes.

The primary development in relation to improving law enforcement powers in the territorial sea has been through encroachments on the sovereignty of the coastal state and thereby allowing other states enforcement powers within this maritime zone. This modification has been considered necessary to respond to the practical reality that not all coastal states have sufficient resources available to address certain maritime security threats, most notably drug-trafficking as well as piracy off Somalia. While this approach has been mooted in other situations, such as responding to terrorism and piracy in other locations, there has been insufficient political will to allow for further encroachments on coastal state sovereignty.

Ambiguity as to enforcement powers arises in relation to straits subject to the transit passage regime. While no explicit enforcement powers are accorded in UNCLOS, such authority could be implied to provide some meaning to the prescriptive powers granted to the littoral states. The importance of freedom of navigation in straits subject to transit passage may augur against such an interpretation, however. The limited responses permissible for violations of transit passage or innocent passage will be the alternative avenues for enforcement action. Such reticence, while expected, may be regretted since a maritime security breach in a strait may have severe repercussions for international shipping. The small trend seen with respect to the territorial sea to allow other states enforcement powers has been considered for straits, and rejected by certain littoral states given the encroachment on sovereignty that would occur.

605 UNCLOS art 27(1).

The authority accorded to the coastal state in its contiguous zone is laid out in Article 33 of UNCLOS, and is potentially relevant for responding to maritime security threats associated with transnational crime as well as terrorism. Although there has been some debate as to the precise limits of the ‘control’ that a coastal state may exercise in this maritime zone, it is argued here that the approach to be preferred is one that allows for the full panoply of enforcement activities and not merely inspections and warnings. The latter, more limited, perspective will curtail the ways that states may respond to maritime security threats. Given that the heads of authority in the contiguous zone are already limited to customs, fiscal, immigration, or sanitary laws and that such delineation preserves navigational rights, further restriction is unnecessary when allowing for responses to transnational crime or terrorism.

In the EEZ, a careful balance has been sought between the coastal state’s economic security and environmental security and the interests of all states in the freedom of navigation. Enforcement powers of all states in the EEZ include those for the right of visit and the right of hot pursuit, but coastal states have specific enforcement powers to address unlawful fishing as well as for the protection and preservation of the marine environment. The permissible enforcement activities are then to be balanced against the inclusive interests in the freedom of navigation. This latter interest has been over-emphasized by ITLOS in prompt release proceedings and should be reconsidered in the face of cooperative coastal state efforts to curb IUU fishing. The coastal state also has enforcement jurisdiction to respond to incidents of marine pollution, including maritime casualties. This authority, on the one hand, is quite limited because of the many criteria to be met for its exercise and because of the deference that is normally accorded to the flag state. On the other hand, the scope for coastal state interpretation and discretion may warrant views that coastal state powers have demonstrably increased in responding to this issue. The law enforcement powers available to coastal states in the EEZ to respond to unlawful fishing and marine pollution are largely appropriate, and improvements in maritime security may be best drawn from increased and improved resources for policing, including enhanced monitoring arrangements.

Sovereign rights to explore and exploit the natural resources of the continental shelf have been viewed as incorporating jurisdiction to prevent and punish violations of the coastal state’s laws concerning these activities. This position remains true for coastal state authority over pipelines that are part of such exploitation. Flag states of vessels and states with jurisdiction over persons who break or injure either cables or pipelines have authority to address this punishable offence. Law enforcement authority may also be derived in relation to safety zones around artificial islands, installations, and structures, as well as from the 1988 SUA Protocol. Efforts to improve or to articulate enforcement powers have been resisted because of concerns relating to the freedom of navigation and concomitantly, not wishing to extend the powers of the coastal state over the continental shelf. Further consideration and clarity should be accorded to this area of law enforcement, particularly for the protection of submarine cables, if states are to be adequately equipped to respond to maritime security threats associated with activities on the continental shelf.
Law Enforcement Activities

On the high seas, the starting position is that this area is open to all users and that the flag state has exclusive enforcement powers over its vessels. There are only limited exceptions to this position, which are based on the right of hot pursuit and the right of visit. Each entails the satisfaction of a range of requirements for their lawful exercise and these conditions reflect the preeminent importance accorded to flag state authority. There has, however, been sufficient concern relating to particular activities that impinge on global maritime security that these rights have evolved and expanded. A flexible interpretation of the right of hot pursuit has been advocated and tolerated to account, to some extent, for improved technologies in monitoring and communication between vessels and for cooperative efforts at enforcing regional or multilateral standards (especially in the fishing context). States have sought to recognize greater powers of interdiction over foreign flagged vessels to prevent and respond to maritime security threats such as migrant smuggling, drug trafficking, and IUU fishing. In each instance, any expansion of powers away from the flag state has been tightly constrained to reaffirm the dominant legal position of the flag state. The use of flags of convenience provides some motivation to move away from this entrenched view. More particularly, the nature of the maritime security threats being addressed and the wide concern in establishing the means to address these threats warrant responses that account for the common interest in promoting maritime security. The assortment of agreements concluded allowing for increased powers of interdiction reflect this shared concern but arguably the response to the concern could have been stronger if less deference was accorded to the exclusivity of flag state jurisdiction.

Overall, law enforcement efforts to enhance maritime security have been beleaguered by the emphasis on flag state authority. This focus is problematic in the first instance because of the endemic use of flags of convenience and the accompanying failures of some flag states to enforce international standards designed to enhance maritime security. Further, while flag state authority must be acknowledged in multilateral efforts to develop the law of the sea as it pertains to maritime security (as much as a matter of form as a matter of reality), the result has been inadequate or non-existent alternatives for other states seeking to promote maritime security. Nonetheless, there have been a number of shifts against flag state authority, as seen in increased use of port state authority and in building up the instances for rights of visit on the high seas and in the EEZ. There have also been changes in that proposals have been asserted, and sometimes accepted, that would intrude upon coastal state sovereignty as a means of enhancing law enforcement efforts. These changes may have been small but they are important for acknowledging the shared interest in maritime security. It may well be the case that these improvements in law enforcement powers are as much as could realistically be expected in the current law of the sea paradigm. While further legal developments may be desirable, it must be acknowledged that operational or other implementation issues may require greater focus at the present time.