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Maritime Security and the Law of the Sea

NATALIE KLEIN

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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 states 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.[1] 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.[2] 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)[3] that all states may exercise jurisdiction over the perpetrators of those crimes irrespective of any other link a state may or

[1] See Malcolm N. Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 649–51; Ian Brownlie, *Principles of Public International Law* (6th edn, OUP, Oxford 2003) 297.

[2] See Shaw, *International Law* 652–80; Brownlie, *Principles of Public International Law* 299–303.

[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

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.[4] 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.[5] 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.[6] This chapter focuses on the enforcement aspects of jurisdiction, although it seeks to acknowledge when difficulties associated with prescriptive jurisdiction arise.[7] 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.[8]

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).[9] 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.

[4] 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.

[5] Erik Jaap Molenaar, 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use' in David Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP, Oxford 2006) 192, 197.

[6] Ibid.

[7] 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.

[8] William T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Clarendon Press, Oxford 1994) 303.

[9] The threats identified by the UN Secretary-General were: piracy and armed robbery against ships; terrorist acts involving shipping, offshore installations and other maritime interests; illicit trafficking in arms and WMD; illicit traffic in narcotic drugs 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 UNGA, 'Oceans and the Law of the Sea: Report of the Secretary-General' (10 March 2008) UN Doc A/63/63, para 39.

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waters, the territorial sea, the contiguous zone, the EEZ, the continental shelf, and the high seas.[10] Achieving an appropriate allocation of competences in each zone is critical to efforts to improve maritime security.[11]

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.[12] '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/or 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.'[13] 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.[14] This immunity does not necessarily allow for non-compliance with substantive rules, but does prevent the exercise of jurisdiction and

[10] The deep seabed is excluded because the level of activity occurring in this area that relates to the identified maritime security threats is minimal.

[11] As noted by Higgins, 'there is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances'. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford 1994) 56.

[12] Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International, The Hague 1998) 92–3.

[13] R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, Manchester University Press, Manchester 1999) 179. See also Myres S. McDougal and William T. Burke, *The Public Order of the Oceans; A Contemporary International Law of the Sea* (New Haven Press, New Haven 1987) 1010 ('both the substantive and jurisdictional policies comprising the established system of public order of the oceans project, and are built upon, a fundamental distinction between national and non-national vessels').

[14] See UNCLOS arts 32, 42(5), 95, 96, and 236.

measures of physical interference in the event of non-compliance.[15] 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.[16] 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.[17] 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.[18] Flowing from this sovereignty is the right of the coastal state to control what vessels enter its ports and

[15] René-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea* (Martinus Nijhoff, The Hague 1991) 902.

[16] McDougal and Burke, *Public Order of the Oceans* 133.

[17] Bernard H. Oxman, 'The Regime of Warships Under the United Nations Convention on the Law of the Sea' (1984) 24 *Virginia JIL* 809, 815.

[18] Ports are described as 'the outermost 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 8.

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under what conditions.[19] In many cases, access to port is governed by treaties between the states concerned,[20] and states may have entered into agreements that permit free transit for trade purposes.[21] In prescribing conditions for entry, states are entitled to regulate their ports consistent with the protection of various interests of the state.[22] 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 port.[23] States may also regulate the access of vessels to their ports when the vessel poses environmental risks,[24] which may be because of, *inter alia*, the general seaworthiness of the vessel[25] or the nature of the cargo that the vessel is carrying.[26] 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.[27]

19 Whether there is a right of free access of foreign flagged vessels to ports is controversial. See Vasilos Tasikas, 'The Regime of Maritime Port Access: A Relook at Contemporary International and United States Law' (2007) 5 *Loyola Maritime Law Journal* 1. Given that the right of access is normally granted by treaty, the predominant view appears to be that there is no such separate customary right. Ibid 21–2, 25–7. See also Louise de La Fayette, 'Access to Ports in International Law' (1996) 11 *IJMCL* 1, 1–2. It is more broadly accepted that states are entitled to prescribe and enforce conditions for port entry. Ibid 30. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, 111 para 213 ('It is also by virtue of its sovereignty that the coastal State may regulate access to its ports'). This right to regulate access extends to establishing conditions of entry for warships, irrespective of their immunity. See McDougal and Burke, *The Public Order of the Oceans* 131–3.

20 Churchill and Lowe, *The Law of the Sea* 63–4.

21 See, eg, General Agreement on Tariffs and Trade (1947) 55 UNTS 194 art V ['GATT']. McDorman has noted that article V is 'silent on the issue of vessel access to ports, although the denial of a right of access may amount to a trade barrier inconsistent with GATT'. Ted L. McDorman, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention' (1997) 28 *JMLC* 305, 310–11.

22 See John T. Oliver, 'Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction Over Foreign-Flag Vessels in US Ports' (2009) 5 *South Carolina Journal of International Law and Business* 209, 246–315.

23 Discussed in more detail in Chapter 4, Part D(1).

24 UNCLOS art 211(3) anticipates that states will 'establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals'. Port access may also be denied for failure to comply with obligations set forth in the SOLAS Convention and MARPOL 73/78.

25 A series of regional memoranda of understanding on port state control have been adopted to prevent the operation of substandard ships. See Ted L. McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 *Ocean and Coastal Law Journal* 207. See also, eg, MARPOL 73/78 art 5(3); International Convention for the Prevention of Pollution of the Sea by Oil (1954) 327 UNTS 3 art VI.

26 See Convention on the Liability of Operators of Nuclear-Powered Ships (1962) reprinted in (1963) 57 *AJIL* 268, art 17. See also Joanna Mossop, 'Maritime Security in New Zealand' in Natalie Klein, Joanna Mossop and Donald R. Rothwell (eds), *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge, Oxford 2010) 54, 61–2 (discussing New Zealand legislation preventing nuclear vessels from entering its ports and the impact of this legislation on New Zealand's relationship with the US).

27 See McDorman, 'Regional Port State Control Agreements' 207–8, 218.

A particularly strong protective mechanism that may be available to states is the possibility of simply closing a port to foreign shipping.[28] Unlike the limitations regarding a coastal state's rights to suspend passage through the territorial sea or in straits,[29] ports may be closed to vessels flagged to particular states without concern that such closure is discriminatory in practice.[30] Ports may be closed to safeguard good order on shore, to signal political displeasure, or to defend 'vital interests'.[31] In practice, de La Fayette has observed that ports have been closed 'for various reasons related to the protection of public health and safety; to ships carrying explosives; to ships carrying passengers with contagious diseases; to ships carrying dangerous cargoes, such as hazardous wastes; for general coastal pollution protection; to substandard ships; and to ships presenting hazards to maritime navigation.[32] As the interface between a state's land and maritime territory, it stands to reason that broad port state control is a vital element in maritime security. This power has led to increasing responsibility being placed on port states to police activities that have been inadequately managed by some flag states, as will be discussed further below.

28 The right to close ports is a corollary of the principle of state sovereignty, and states are thereby entitled to regulate access 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* 341, 393; A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 *SDLR* 597, 607.

29 Discussed in Chapter 2, Part B(4).

30 eg, Canada closed its ports to vessels from Estonia and the Faroe Islands because of over-quota and other non-compliant fishing activities. See Rosemary Rayfuse et al, 'Australia and Canada in Regional Fisheries Organizations: Implementing the United Nations Fish Stocks Agreement' (2003) 26 *Dalhousie Law Journal* 47, 76. Churchill and Lowe have argued that patently unreasonable or discriminatory closures or conditions of access may constitute an *abus de droit*. See Churchill and Lowe, *The Law of the Sea* 63.

31 *Saudi Arabia v Arabian American Oil Company (Aramco)* (Arbitration Tribunal) (1958) 27 ILR 117 ('according to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require'). While the *Aramco* decision has been criticized for stating the ports must be open, the exception stated therein remains consistent with international practice. See Lowe, 'The Right of Entry into Maritime Ports' 600–6; Tasikas, 'The Regime of Maritime Port Access' 11–13 (both critiquing the decision). The exception for vital interests was included in the Geneva Convention and Statute on the International Regime of Maritime Ports (1923) 58 LNTS 285 (art 16 refers to permissible deviations 'in case of emergency affecting the safety of the State or the vital interests of the country'), and more recently in GATT art XXI (allowing for action when 'necessary for the protection of its essential security interest, taken in time of war [or] in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'). See further Churchill and Lowe, *The Law of the Sea* 62; Lowe, 'The Right of Entry into Maritime Ports' 607.

32 de la Fayette, 'Access to Ports' 6. Consistent with this view, states engaged in armed conflict may close their ports to the opposing belligerent during times of armed conflict. See Eritrea Ethiopia Claims Commission, Ports: Ethiopia's Claim 6, The Federal Democratic Republic of Ethiopia v The State of Eritrea (Final Award, 19 December 2005) para 20 <http://www.pca-cpa.org/upload/files/FINAL%20ET%20PORTS.pdf> (noting that 'it was lawful for Eritrea to terminate Ethiopia's access to the port of Assab and the movement of Ethiopian cargo from Assab to Ethiopia, notwithstanding any prior peacetime agreements or understandings between them regarding access to Eritrean ports').

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(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.[33] 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.[34]

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]

[33] Molenaar, 'Port State Jurisdiction' 195.

[34] See Churchill and Lowe, *The Law of the Sea* 66–7.

[35] UNCLOS art 25(2) provides: 'In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.'

[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.

[37] Stuart Kaye, 'The Proliferation Security Initiative in the Maritime Domain' (2005) 35 *Israel Yearbook of Human Rights* 205, 210–11.

[38] McDougal and Burke, *The Public Order of the Oceans* 133. See also *Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1812).

[39] See Mossop, 'Maritime Security in New Zealand' 62.

[40] Ibid.

[41] See Leslie C. Green, 'Terrorism and the Law of the Sea' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, Dordrecht 1989)

(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

249, 261–2. This dispute was formally settled through a conciliation conducted by the UN Secretary-General: *Rainbow Warrior (New Zealand v France)* (UN, ruling of the Secretary-General 1986) 74 ILR 241. See also J. Scott Davidson, 'The Rainbow Warrior Arbitration Concerning the Treatment of the French Agents Mafart and Prieur' (1991) 40 *ICLQ* 446.

[42] Molenaar, 'Port State Jurisdiction' 192. At sea enforcement is more likely if a vessel is not otherwise expected to enter the port of the state that has had its laws violated. Although vessels that enter a port in distress or because of *force majeure* are generally viewed as not subject to the jurisdiction of the coastal state, there are arguments that there should not be complete immunity for such vessels. See discussion in Churchill and Lowe, *The Law of the Sea* 68.

[43] These situations are explored in more detail in the following sections of this Chapter.

[44] 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.

[45] Tatjana Keselj, 'Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding' (1999) 30 *ODIL* 127, 127.

[46] The standards are generally agreed to be those set forth in MARPOL 73/78. See Christopher P. Mooradian, 'Protecting "Sovereign Rights": The Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone' (2002) 82 *Boston University Law Review* 767, 778; Daniel Bodansky, 'Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond' (1991) 18 *Ecology Law Quarterly* 719, 760.

sea, and EEZ of that port state.[47] The enforcement jurisdiction of the port state over vessels for unlawful discharges on the high seas is limited to undertaking investigations, unless the discharge has caused or is likely to cause pollution in one of the maritime zones of the port state.[48] When there has been an unlawful discharge in the maritime zone of another state, the port state may also undertake investigations and institute proceedings if warranted when that state, the flag state of the vessel, or a state damaged or threatened by the discharge violation so requests.[49] In addition to the authority set forth in Article 218, states have agreed to regional standards through the adoption of a series of Memoranda of Understanding (MOU).[50] These MOUs apply international treaties to which the states are parties.[51] For enforcement, the memoranda contemplate states investigating, inspecting, and detaining vessels in port where various deficiencies in the vessel could cause serious damage to the marine environment.[52]

This authority of the port state has been described as a 'radical development' when compared to the more limited jurisdiction of coastal states.[53] 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,[54] as well as defying flag state jurisdiction on the high seas. 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. While

[47] UNCLOS art 218(1). Keselj suggests that these powers may be derived from the universality principle of jurisdiction. See Keselj, 'Port State Jurisdiction' 136. However, McDorman argues more persuasively that vessel-source pollution does not have comparable recognition as an unlawful activity on par with piracy or torture that would permit universal prescription and enforcement. See McDorman, 'Port State Enforcement' 318–19. Instead, art 218 stands in its own right of providing a jurisdictional basis. Ibid, 320.

[48] UNCLOS art 218(2).

[49] UNCLOS art 218(2). The powers of the port state may be trumped by the coastal state that has been the victim of a violation in that the coastal state may request that the port state suspend proceedings and that evidence and records of the case, along with any bond or other financial security posted with the port state authorities be transmitted to the coastal state. UNCLOS art 218(4).

[50] See, eg, Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment (1982) 21 ILM 1; Memorandum of Understanding on Port State Control in the Asia-Pacific Region (1993) <http://www.tokyo-mou.org/> (which includes recent amendments); Memorandum of Understanding on Port State Control in the Caribbean Region (1996) 36 ILM 231; Memorandum of Understanding on Port State Control in the Mediterranean Region (1997) <http://www.medmou.org/>. See also *EC Council Directive on Port State Control* 05/21/EC (19 June 1995) 1995 OJ (L 157/1) and subsequent amendments.

[51] The conventions usually included are: the International Convention on Load Lines (1966) 18 UST 1857; the SOLAS Convention; MARPOL 73/78; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (1978) S Treaty Doc No 96–1, CTIA No 7624; Convention on the International Regulations for Preventing Collisions at Sea (1972) 28 UST 3459; International Convention on Tonnage Measurement of Ships (1969) TIAS No 10,490; Merchant Shipping (Minimum Standards) Convention (1976) (ILO Convention No 147) 15 ILM 1288; International Convention on the Control of Harmful Anti-fouling Systems on Ships (2001) RMC II.7.240.

[52] See Keselj, 'Port State Jurisdiction' 144–6.

[53] Mario Valenzuela, 'Enforcing Rules Against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction' in Davor Vidas and Willy Østreng (eds), *Order for the Oceans at the Turn of the Century* (Martinus Nijhoff, The Hague 1998) 496.

[54] See McDorman, 'Port State Enforcement' 313.

there was clearly pause over the extent of intrusion into flag state authority, the fact that any change was broadly accepted is remarkable. It shows that when a problem is widely considered serious enough, changes in state authority will be endorsed.

Although circumscription clearly exists, there has at least been 'indirect interference with the freedom of navigation'[55] through the allocation of these powers to the port state. Becker has noted that while powers to enforce have been extended to the port state, there has not been any extension of prescriptive jurisdiction.[56] The interference with the freedom of navigation is further minimized by requirements that only monetary penalties be imposed,[57] and that foreign vessels may not be delayed for longer than essential for the investigations,[58] and must be promptly released even when a violation has occurred, subject to reasonable procedures such as bonding or other appropriate financial security.[59] Further, port states are not obliged to take any action but may do so, which allows for the possibility that any state may decide as a matter of comity to defer to flag state control. Thus, while an adjustment in allocation of competences has occurred to respond to marine pollution, it is not a sizable one.

Port states have also been accorded greater responsibilities to deal with unlawful fishing 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.[60] Under Article 23 of the 1995 Fish Stocks Agreement,[61] 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 authority to impose conditions for access, Article 23 further permits 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'.

[55] Dupuy and Vignes, *A Handbook on the New Law of the Sea* 853.

[56] 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.

[57] UNCLOS art 230.

[58] 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 232.

[59] UNCLOS art 226(1)(b). See also Jonathan I. Charney, 'The Marine Environment and the 1982 United Nations Convention on the Law of the Sea' (1994) 28 *International Lawyer* 879, 893.

[60] See de la Fayette, 'Access to Ports' 4.

[61] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995) 2167 UNTS 88 ['1995 Fish Stocks Agreement'].

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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.[62] This Agreement is based on the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing,[63] and the 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing.[64] 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 catch to be offloaded.[65] 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.[66] 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'.[67] 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'.[68]

Port states are to inspect a minimum number of vessels annually, and carry out those inspections consistently with the Agreement.[69] 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'.[70] 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 it was acting consistently with relevant conservation and management measures.[71] Denial of port entry and port

[62] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009) FAO Doc C 2009/LIM/11-Rev. 1 ['2009 Port State Measures Agreement'].

[63] The Committee on Fisheries, FAO, 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2001) <http://www.fao.org/DOCREP/003/y1224e/y1224e00.htm>.

[64] The Committee on Fisheries, FAO, *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing* (2005) <http://ftp://ftp.fao.org/docrep/fao/010/a0985t/a0985t00.pdf>.

[65] 2009 Port State Measures Agreement art 8 and Annex A.

[66] 2009 Port State Measures Agreement art 9.

[67] 2009 Port State Measures Agreement art 9(4).

[68] 2009 Port State Measures Agreement art 9(5).

[69] 2009 Port State Measures Agreement art 12(1). 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.

[70] 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.

[71] 2009 Port State Measures Agreement art 11(1)(e).

use, as well as results of inspections, are to be communicated to the flag state as well as other relevant states (the coastal state where IUU fishing occurred, and the state of nationality of the vessel's master), regional fisheries management organizations (RFMOs), and the Food and Agriculture Organization (FAO).[72]

The enforcement powers of the port state are not augmented by the 2009 Port State Measures Agreement beyond the ability to undertake an inspection. The port state must otherwise show a sufficient jurisdictional nexus to warrant any enforcement action against the foreign flagged vessel, or be authorized by the flag state to take particular measures.[73] The flag state, following port state inspection, 'shall immediately and fully investigate the matter and shall, upon sufficient evidence, take enforcement action without delay in accordance with its laws and regulations'.[74] The onus therefore remains on the flag state and responsibility for law enforcement against IUU fishing also continues to rest with the flag state. Nonetheless, the internationally recognized powers of the port state to conduct inspections and to deny entry or port services may provide another tool to make IUU fishing a more difficult and perhaps less financially rewarding activity. When these powers (once the Agreement enters into force) are coupled with measures taken through RFMOs to address IUU fishing, including the implementation of catch documentation schemes, the disincentives for IUU fishing are strengthened. What remains important is ensuring that port states become parties to the 2009 Port State Measures Agreement and follow through on the commitments contained therein. Otherwise, vessels will divert to private ports or ports not operating under these regimes and the problem remains.

(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 flag of convenience states. Increasing port state control has been viewed as preferable to allowing greater coastal state jurisdiction.[75] 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'[76] to

[72] 2009 Port State Measures Agreement art 9(3), art 11(3), and art 15. Some RFMOs have already put comparable port state measures in place; eg, the South Indian Ocean Fisheries Agreement allows for port state inspection among state parties to verify compliance with regulations under that Agreement. See Judith Swan, 'Ocean and Fisheries Law: Port State Measures to Combat IUU Fishing: International and Regional Developments' (2006) 7 *Sustainable Development Law and Policy* 38, 39.

[73] See 2009 Port State Measures Agreement art 18.

[74] 2009 Port State Measures Agreement art 20.

[75] David Anderson, *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff, Leiden 2008) 265.

[76] See Keselj, 'Port State Jurisdiction' 131 (citing the views of the French delegate at the UNCLOS negotiations). See also Rachel Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence' (2004) 5 *Melbourne Journal of International Law* 299, 332.

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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.[77] This sovereignty extends to the bed, subsoil, and the airspace over the territorial sea.[78] 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.[79] 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.[80] Article 21 of UNCLOS sets out a list of topics for which coastal states may adopt laws and regulations.[81] 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,[82] and not applying to the design, construction,

[77] UNCLOS art 2.
[78] UNCLOS art 2.
[79] Shearer has noted that the debates over the attribution of sovereignty to coastal states over the territorial sea in the negotiations of the 1958 Territorial Sea Convention indicate that there was not conclusive resolution of this issue. Moreover, the 'sovereignty' accorded to coastal states 'is heavily qualified by what follows', namely the rules set forth in that treaty as well as other rules of international law. There was no clarification of this point in UNCLOS, and Shearer therefore suggests that it 'serves as a reminder that assertions of coastal state jurisdiction in the territorial sea, in cases of doubt, are not presumptively to be resolved in favour of the rights of the coastal State'. I.A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *ICLQ* 320, 323.
[80] Churchill and Lowe, *The Law of the Sea* 94.
[81] Art 21(1) refers to: (a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines; (d) the conservation of the living resources of the sea; (e) the prevention of infringement of the fisheries laws and regulations of the coastal State; (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; (g) marine scientific research and hydrographic surveys; (h) the prevention of infringement of the customs, fiscal, immigration, or sanitary laws and regulations of the coastal State.
[82] UNCLOS art 24(1)(b).

manning, or equipment of foreign ships.[83] The enforcement jurisdiction of the coastal state largely mirrors its rights to prescribe jurisdiction,[84] 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.[85] Activities that may be considered as threats to the maritime security of the coastal state, such as various military-related activities,[86] fishing, willful and serious pollution, and customs and immigration violations,[87] 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.[88] The coastal state is then entitled to 'take the necessary steps in its territorial sea to prevent passage which is not innocent'.[89]

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.[90] 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;

[83] 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.
[84] 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* 98.
[85] 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.
[86] As listed in art 19(2). See further Chapter 2, Part B(2).
[87] Which are relevant to drug trafficking and people smuggling and trafficking.
[88] See UNCLOS art 18(1) (defining the meaning of passage).
[89] 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.
[90] 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.

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(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state; or
(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.[91]

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.[92] Such an approach is now warranted when the importance of responding to maritime security threats is taken into account.[93] 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.[94] 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.[95] 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

[91] UNCLOS art 27(1).

[92] Against this position, it would need to be noted that there is a difference in the language and so the phrases should not necessarily be understood as carrying identical meanings. As enforcement actions by the coastal state interfere with the freedom of navigation, it could be argued that the permissible extension of coastal criminal procedures should be limited. This approach is consistent with the traditional construct of the law of the sea and would not promote maritime security.

[93] 'If the crime is generally regarded as a serious one, such as homicide, or one for which, perhaps, any state might be competent to apply authority, the coastal state should be authorized to act despite the interference with navigation'. McDougal and Burke, *The Public Order of the Oceans* 294. Even after acknowledging the ongoing interest in supporting the freedom of navigation against coastal competence, McDougal and Burke note that coastal authority may be exercised for 'events which either have effects upon the coastal state or involve crimes of considerable importance'. McDougal and Burke, *The Public Order of the Oceans* 302.

[94] Subject to any immunity to which the vessel may be entitled. See further the discussion in International Law Association, Committee on Coastal State Jurisdiction, 'Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution' (ILA Conference, London 2000) [ILA Committee, 'Final Report'] 12–15, 51–4.

[95] See ibid 13. The ILA Committee notes that any enforcement action must still fall within the requirements of what is reasonable, which entails consideration of what is necessary and proportionate under the circumstances. Ibid 14.

leaving internal waters of the coastal state,[96] and do not affect the coastal state's right to exercise enforcement jurisdiction against a ship leaving its internal waters.[97] 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.[98]

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.[99] Criminal jurisdiction may also exist if the act of pollution is such that the 'consequences of the crime extend to the coastal State'.[100] Certainly intentional acts of pollution are those that have triggered the most concern as a threat to maritime security.[101] 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.[102] 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.[103] The coastal state may also take enforcement actions against vessels navigating in its territorial sea for pollution violations that occurred in its EEZ.[104] These powers have thus gone beyond what has traditionally been accepted for coastal state action against foreign flagged vessels

[96] Shearer, 'Problems of Jurisdiction' 326.

[97] See UNCLOS art 27(2).

[98] Shearer, 'Problems of Jurisdiction' 326.

[99] UNCLOS art 19(2)(h).

[100] UNCLOS art 27(1)(a).

[101] As discussed in Chapter 1, the UN Secretary-General identified intentional and unlawful damage to the marine environment as a maritime security threat.

[102] See further Becker, 'The Shifting Public Order' 196; Shearer, 'Problems of Jurisdiction' 328.

[103] UNCLOS art 220(2). However, if procedures exist, the vessel may be released from detention upon bonding or other financial security arrangements. UNCLOS art 220(7).

[104] UNCLOS art 220(3), 220(5), and 220(6). The limitations imposed on the coastal state in this instance are discussed further below. See below Part F(2).

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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,[105] and entitles the coastal state to take the necessary steps in its territorial sea to prevent passage which is not innocent.[106] 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.[107] 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.[108]

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.[109] 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

[105] UNCLOS art 19(2)(i).
[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).

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 seas of other states parties in response to a wide variety of maritime security threats.[110] 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'.[111] 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 recognized authority of the coastal state 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.[112] Such authorization may be granted by the 'competent national authority' 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.'[113] As a result, states parties

[110] CARICOM Maritime and Airspace Security Co-operation Agreement (2008) <http://www.caricomlaw.org/docs/CARICOM%20Maritime%20and%20Airspace%20Security%20Co-operation%20Agreement.pdf> ['2008 CARICOM Agreement'] art VII and art VIII. The maritime security threats cover drug, arms and people trafficking, terrorism, smuggling, illegal immigration, serious marine pollution, injury to off-shore installations, piracy, hijacking and other serious crimes, and 'a threat to national security': art I(2).
[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 universalization 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' (1991) 15 *Marine Policy* 183, 184; Shearer, 'Problems of Jurisdiction' 327.
[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/l/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).
[113] See William C. Gilmore, *Agreement Concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, 2003: Explanatory Report* (The Stationery Office, 2005) 22, citing the August 2001 Report of the Chair.

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sought to strike a balance between the need for enforcement cooperation in addressing drug trafficking with sovereignty concerns.[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 subjected to any directions and conditions by the relevant coastal state.[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.[116] Random patrols within or over the territorial sea by law enforcement officials of another state are not permitted.[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'.[118] Further, any authorized and necessary use of force in law enforcement action must respect laws of the coastal state.[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'.[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 is there a law enforcement vessel of the coastal state in the vicinity 'immediately able to investigate'.[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.[122] A similar system is put in place in relation to aircraft.[123] If a search reveals evidence of illicit drug trafficking, the coastal state

[114] See ibid 23.
[115] See 2003 Caribbean Agreement art 11(1) and (2).
[116] 2003 Caribbean Agreement art 11(3). See further Gilmore, *Caribbean Area* 23.
[117] 2003 Caribbean Agreement art 11(4).
[118] 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.'
[119] See 2003 Caribbean Agreement art 23(5).
[120] 2003 Caribbean Agreement art 12(1).
[121] 2003 Caribbean Agreement art 12(1)(b).
[122] 2003 Caribbean Agreement art 12(2).
[123] See 2003 Caribbean Agreement art 12(4) and (5).

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.[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.[125] Including 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.[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.[127] As the current definition of piracy is focused on acts on the high seas, and many piratical 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.[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.[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'.[130] He further asserts that pirates deliberately choose to operate within the territorial sea 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.[131] In these circumstances, Jesus rightly questions whether it is legitimate to allow foreign ships, and those on board,

[124] 2003 Caribbean Agreement art 12(3).
[125] Art 1(h) defines the 'waters of a Party' to cover its territorial sea and archipelagic waters, but does not refer to internal waters.
[126] See Gilmore, *Caribbean Area* 28.
[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 of 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) 22nd Session Agenda item 9 IMO Doc A 22/Res 922.
[128] See Robert C. Beckman, 'Combatting Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward' (2002) 33 *ODIL* 317; José Luis Jesus, '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').
[129] See Jesus, 'Protection of Foreign Ships' 380. See also Beckman, 'Combatting Piracy' 333–4.
[130] Jesus, 'Protection of Foreign Ships' 383.
[131] Ibid.

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mercilessly to fall prey to such attacks.[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.[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,[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.[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.[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).[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.[138]

[132] Ibid 383–4.
[133] Ibid 384 (Jesus refers to the exercise of 'common jurisdiction').
[134] See generally Tammy M. Sittnick, '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.
[135] See Global Security, African Coastal Security Program <http://www.globalsecurity.org/military/ops/acsp.htm>.
[136] UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816 and UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846. Discussed in more detail in Chapter 6, Part C(3)(b).
[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).
[138] See Matthew C. Houghton, 'Walking the Plank: How United Nations Security Council Resolution 1816, While Progressive, Fails to Provide a Comprehensive Solution to Somali Piracy' (2009) 16 *Tulsa Journal of Comparative and International Law* 253, 278.

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.[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.[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.[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.[142] The coastal state is likely to have authority to proscribe 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'.[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.[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 these waters under a broad, and possibly unlawful, definition of self-defence.[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

[139] UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851, para 3.
[140] Ibid.
[141] Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (29 January 2009), IMO Doc C 120/14 (3 April 2009) ['2009 Code of Conduct'] art 7. See also Douglas Guilfoyle, 'Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' (2008) 57 *ICLQ* 690, 698 (referring to a draft Memorandum of Understanding).
[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.
[143] Kaye, 'The Proliferation Security Initiative' 215.
[144] See Robert C. Beckman, 'Terrorism, Maritime Security and Law of the Sea: Challenges and Prospects' (2003) *Singapore Maritime and Port Journal* 109, 114.
[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).

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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

[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] Art 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 stowage of fishing gear; (d) the loading or unloading of any commodity, currency, or person in contravention of the customs, fiscal, immigration, or sanitary laws and regulations of States bordering straits.

[149] UNCLOS art 42(2).

[150] See Julian Roberts and Martin Tsamenyi, 'The Regulation of Navigation under International Law: A Tool for Protecting Sensitive Marine Environments' in Tafsir 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, McDougal and Burke have noted (albeit in discussion of maritime areas adjacent to the territorial sea), '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'. McDougal 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.

marine environment of the straits.[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 rife with piracy and other unlawful activity. Singapore, Indonesia and Malaysia had undertaken a range of initiatives to improve surveillance

[151] Shearer, 'Problems of Jurisdiction' 332. See also Jia, *The Regime of Straits* 161–2.

[152] Roberts and Tsamenyi, 'The Regulation of Navigation' 798.

[153] See Sam Bateman, 'Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zones' in David Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP, Oxford 2006) 365, 372.

[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).

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and policing of the areas in the 1990s.[156] 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.[157] 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.[158] Japan's offer of its naval forces to help patrol the area was also rejected.[159] Malaysia and Indonesia were further concerned that it might compromise their sovereignty and sovereign rights in the area.[160] Indonesia, Malaysia, and Singapore instead moved to coordinated patrols,[161] 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.[162]

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 straits 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.[163] 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.[164] This approach may ultimately be sufficient given the generalities and scope of coastal state action in response to unlawful passage.[165]

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

[156] See Sittnick, 'State Responsibility' 753.

[157] Regarding U.S. Pacific Command Posture: Hearing on the Fiscal Year 2005 National Defense Authorization budget request from the Department of Defense before the House Armed Services Committee, 108th Cong. 46 (2004) (statement of Admiral Thomas B. Fargo, US Navy Commander, US Pacific Command).

[158] See Paul Johnstone, 'Maritime Piracy: A 21st Century Problem' (November/December 2007) *Defence Today* 42, 43.

[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.

[160] Bateman, 'Security and the Law of the Sea' 373. See also Sittnick, 'State Responsibility' 755 (describing the negative reactions of Malaysia and Indonesia to RMSI).

[161] See Sittnick, 'State Responsibility' 753 (referring to the operation code named MALSINDO).

[162] See Singapore Ministry of Defence, 'Launch of Eyes in the Sky (EiS) Initiative' (13 September 2005) <http://www.mindef.gov.sg/imindef/news_and_events/nr/2005/sep/13sep05_nr.html>.

[163] ILA Committee, 'Final Report' 15–16.

[164] Ibid 16 (referring to UNCLOS art 25(1)).

[165] See Chapter 2, Part B(4).

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.[166]

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.[167] 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).[168] 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.[169]

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 territory or territorial sea in a zone extending 24 miles from its baselines. 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.'[170]

[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 Bateman and Michael White, 'Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment' (2009) 40 *ODIL* 184.

[167] See Frederick C. Leiner, 'Maritime Security Zones: Prohibited Yet Perpetuated' (1983–1984) 24 *Virginia JIL* 967, 976–7 and 980–1 (tracing the development of the contiguous zone as a zone of security).

[168] See Natalino Ronzitti, 'The Law of the Sea and the Use of Force Against Terrorist Activities' in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff, Dordrecht 1990) 1, 6.

[169] Stuart Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in David Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP, Oxford 2006) 347, 353. Kaye goes on to note that over 60 states have asserted extended rights limiting navigation. See ibid, 354–6.

[170] Shearer, 'Problems of Jurisdiction' 330.

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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'.[171] 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

[171] Ibid 330. Although he notes that powers of arrest are greater under the second limb, since it refers to an offence 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] Ibid 857. [174] UNCLOS art 56(1)(a).
[175] UNCLOS art 56(1)(b). [176] UNCLOS art 58(1).
[177] 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.
[178] UNCLOS art 73.
[179] Horace B. Robertson Jr, 'Navigation in the Exclusive Economic Zone' (1984) 24 *Virginia JIL* 865, 902.
[180] UNCLOS art 73, art 220(6), and art 226(1)(c). 'There appear to be no enforcement provisions relating to the jurisdiction enjoyed with respect to artificial structures and marine scientific research.' Shearer, 'Problems of Jurisdiction' 335.

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 *M/V '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 M/V '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 M/V '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

[181] Becker, 'The Shifting Public Order' 198.
[182] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* ITLOS Case No 2; (1999) 38 ILM 1323.
[183] See paras 116–17, 124–5 (referring to Guinea's customs laws) and para 142 (on hot pursuit).
[184] Paras 119 and 123.
[185] Ibid para 136.
[186] UNCLOS art 58(2). See Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP, Cambridge 2009) 44.

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based on the nature of the ship and its cargo.'[187] This development has particularly been seen in the prohibition of transit of shipments of ultrahazardous nuclear cargoes through the EEZ.[188] 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.[189] 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.[190] 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.[191] 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.[192]

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

[187] Jon M. Van Dyke, 'The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone' (2005) 29 *Marine Policy* 107, 121 (referring particularly to single-hull oil tankers and ships carrying dangerous cargos).

[188] Ibid 111.

[189] See Natalie Klein, 'Legal Implications of Australia's Maritime Identification System' (2006) 55 *ICLQ* 337 (discussing Australia's plan to interdict vessels if they failed to provide particular identification information when entering Australia's EEZ).

[190] Burke, *The New International Law of Fisheries* 315–35. See also David Joseph Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press, Oxford 1987) 180–1 (describing the enforcement measures exercised by various states and the validity of those measures under customary international law).

[191] UNCLOS art 73(3).

[192] UNCLOS art 73(4).

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.[193] 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.[194] 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.[195] 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.[196] One of the difficult issues faced 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.[197] This

[193] See Baird, 'Illegal, Unreported and Unregulated Fishing' 301.

[194] See Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP, Cambridge 2005) 85–119.

[195] Article 73(2) of UNCLOS reads: 'Arrested vessels and their crews shall be promptly released upon the posting of 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

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issue has been raised in the context of whether the bond set by the coastal state was reasonable or not.[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.[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 extensive problems of over-fishing of a particular stock or species and the cooperative responses being pursued by coastal states.[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.[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.[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.[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.

[198] See eg the *Volga Case* (*Russia 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 79. 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) 39 ILM 666, para 67. In the *Juno 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 Guinea-Bissau*) (Prompt Release) ITLOS Case No 13; (2005) 44 ILM 498, para 85.

[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 Marsit. 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 uncontested 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.

[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, para 19 (noting that the balance of interests between flag states and coastal states did not need to be 'preserved exactly as it was conceived').

[201] See Klein, *Dispute Settlement* 111–12.

[202] 1995 Fish Stocks Agreement art 20(6).

[203] Article 20(6) 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.

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.[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.[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,[206] dumping at sea,[207] and maritime casualties.[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.[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

[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' (1985) 79 *AJIL* 347, 350–1.

[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 wish to limit the regulation of navigation for environmental purposes.' Roberts and Tsamenyi, 'The Regulation of Navigation' 787. See also Boyle, 'Marine Pollution' 352.

[206] MARPOL 73/78.

[207] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972) 1046 UNTS 120.

[208] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969) 970 UNTS 211 ['Marine Casualties Convention'].

[209] Roberts and Tsamenyi, 'The Regulation of Navigation' 800 (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').

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augmented under UNCLOS, their enforcement powers have remained limited in deference to the rights of flag states.[210]

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.[211] 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'.[212]

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.[213] Unless the danger is imminent, states parties taking action are obliged to consult with experts and notify affected parties.[214] 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'.[215] 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 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 I'.[216]

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.[217] 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.[218] Article 221 allows for measures to be taken, as well as enforced, and does

[210] See Boyle, 'Marine Pollution' 358.
[211] Robert C.F. Reuland, 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction' (1989) 22 *Vanderbilt Journal of Transnational Law* 1161, 1220.
[212] See Marine Casualties Convention art I.
[213] MARPOL Convention 1973.
[214] See Marine Casualties Convention art III.
[215] See Marine Casualties Convention art V (1) and (2).
[216] Marine Casualties Convention art VI.
[217] See also Dupuy and Vignes, *A Handbook on the New Law of the Sea* 865.
[218] See Shearer, 'Problems of Jurisdiction' 337 (characterizing art 221 as an 'extreme form of permitted intervention 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

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.[219]

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.[220] 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.[221] 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.[222] These requirements indicate that flag states continue to have a critical role in addressing threats to the marine environment.[223] Enforcement powers are also accorded to coastal states, but are varied depending on the particular source of pollution.[224] It is clear that the recognition of these powers within the EEZ has detracted from the typical deference accorded to flag state authority.[225]

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.[226] While Article 220(3)–(6) of UNCLOS has been described as a 'potent provision' for coastal state enforcement,[227] coastal states must meet a large number of requirements for various actions to be taken.[228] 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.[229] These powers are limited in the first instance to

doctrine of necessity in the international law of state responsibility. Dupuy and Vignes, *A Handbook on the New Law of the Sea* 867.
[219] See Dupuy and Vignes, *A Handbook on the New Law of the Sea* 866.
[220] See UNCLOS arts 207–12.
[221] Following the breakup of the oil tanker *Prestige* off the coast of Spain in November 2002, several European states issued decrees regarding advance notice of passage, as well as restricting the passage of single-hulled oil tankers. See Van Dyke, 'The Disappearing Right' 109–10. Some states then requested that their EEZs be declared 'particularly sensitive sea areas' in their entirety in relation to single-hulled oil tankers and other vessels transporting dangerous cargoes, which further 'provides strong support for their view that it is legitimate to restrict maritime freedom in order to protect the resources of the EEZ.' Ibid 110.
[222] UNCLOS art 217.
[223] 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.
[224] See UNCLOS arts 213, 214, 215, 216, 221, and 222.
[225] Boyle considers that there has only been a partial diminution in the traditional primacy of flag state jurisdiction. See Boyle, 'Marine Pollution' 365.
[226] See ILA Committee, 'Final Report' 20 and 56.
[227] See Van Dyke, 'The Disappearing Right' 109.
[228] These have been described as a 'graded' enforcement scheme, whereby '[a]s the enforcement measures become more onerous, not only more evidence is required that a violation has taken place, but the consequences of the violation, or threat thereof, also have to be more serious'. ILA Committee, 'Final Report' 21.
[229] More specifically, art 220 refers to violations of 'applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards'. See UNCLOS art 220(3).

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'.[230] 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 information or gives information that is 'manifestly' at variance with the evident factual situation; and, if the circumstances of the case so justify.[231] 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'.[232] 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.[233]

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.[234] 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.[235] 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.[236] This pre-emption of flag state authority is not unqualified, 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.[237] 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. [238]

[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 Charney, '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').

(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).[239] 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.[240] 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.

[239] Though there may be restrictions with national laws making prosecution more complicated. The key example here is in 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.

[240] See Report of the Secretary-General, 'Oceans and the Law of the Sea' (10 March 2008) UN Doc A/63/63, para 107.

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G. Continental Shelf

Coastal states exercise sovereign rights over their continental shelves for the purposes of exploring and exploiting its natural resources.[241] 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.[242]

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.[243] 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.[244] 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'.[245] The 2004 suicide attack on the Iraqi oil platforms closed production in Iraq for two days, costing Iraq approximately $40 million and disrupting international trade in oil.[246] Environmental damage may also occur if

[241] UNCLOS art 77.

[242] UNCLOS art 56(1)(a). Though a distinction may be drawn for the laying of submarine cables and pipelines, which are recognized as a freedom of the high seas. UNCLOS art 87(1).

[243] Most clearly seen, and as discussed further below, in the arbitration between Guyana and Suriname. *Guyana v Suriname* (2008) 47 ILM 164. See also Patricia Jimenez Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation 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 C(1).

[244] See 'Severed Cable Disrupts Net Access' *BBC News* (19 December 2008) <http://news.bbc.co.uk/2/hi/technology/7792688.stm>.

[245] Mick P. Green and Douglas R. Burnett, 'Security of International Submarine Cable Infrastructure: Time to Rethink' in Myron H. Nordquist et al (eds), *Legal Challenges in Maritime Security* (Martinus Nijhoff, Leiden 2008) 557, 559.

[246] Louis Meixler, '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 9.9 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.

there are leaks from pipelines or installations or structures associated with the exploitation 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'.[247] Ronzitti considers that the sovereign rights of coastal states would include measures that could be 'defined as police actions'.[248] 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.[249] 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.[250] 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'.[251] 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.[252]

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.[253] This consent may be

[247] *Yearbook of the International Law Commission* (1956, Vol 2) 253, 297.

[248] Ronzitti, 'The Law of the Sea' 6.

[249] *Guyana v Suriname* (2008) 47 ILM 164, paras 441–5.

[250] Ibid, para 445.

[251] UNCLOS art 78(2).

[252] See *M/V 'Saiga' (No 2)* paras 155–6.

[253] UNCLOS art 246(2).

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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'.[254] 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.[255] This suspension may lead to a requirement of cessation of the activities,[256] though responsibility and liability may accrue to states and competent international organizations for measures taken against scientific research in contravention of UNCLOS.[257] 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 exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines'.[258] 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.[259] Enforcement activities in relation to pipelines may otherwise 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.[260]

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(5). 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 263(2).

[258] UNCLOS art 79(2). The delineation of the course of pipelines (but not cables) is subject to the consent of the coastal state: UNCLOS art 79(3).

[259] UNCLOS art 208 and art 214.

[260] Kaye identifies this as a 'jurisdictional lacuna'. See Stuart Kaye, 'International Measures to Protect Oil Platforms, Pipelines, and Submarine Cables from Attack' (2007) 31 *TMLJ* 377, 419.

'punishable offence[s]'.[261] 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.[262] 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,[263] following the laying of the first submarine cable between Calais and Dover in 1850.[264] Article II of this Convention created offences for 'the breaking or injury of a submarine cable done willfully 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.[265] Article X further anticipated that a warship could conduct a right 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).[266] 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 requirement 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.

[261] Article 113 reads in full: 'Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done willfully 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.'

[262] 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.

[263] Convention for the Protection of Submarine Telegraph Cables (1884) 163 CTS 241 ['1884 Paris Convention'].

[264] See Dupuy and Vignes, *A Handbook on the New Law of the Sea* 416.

[265] 1884 Paris Convention art IX.

[266] Ronzitti, 'The Law of the Sea' 7. See also Green and Burnett, 'Security of International Submarine Cable Infrastructure' 558.

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(3) Artificial islands, installations, and structures

In addition to pipelines, offshore platforms are often constructed for the purposes of exploring 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.[267] While the prescriptive powers of the coastal state are quite clear, the enforcement powers of the coastal state are less so.[268] Coastal states are entitled to establish safety zones of up to 500 metres around the artificial islands, installations, and structures,[269] 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'.[270] 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.[271] Kaye has argued that the practical application of these rules renders the grant of enforcement jurisdiction nugatory.[272] 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.[273]

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.'[274] 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.[275] 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.[276] 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

[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(5).
[270] UNCLOS art 60(4).
[271] Dupuy and Vignes, *A Handbook on the New Law of the Sea* 860.
[272] Kaye, 'International Measures' 406–8.
[273] Ibid 408.
[274] US Navy, US Marine Corps, US Coast Guard, *The Commander's Handbook on the Law of Naval Operations* (July 2007) para 7.9.
[275] IMO Assembly, 'Safety Zones and Safety of Navigation around Offshore Installations and Structures' (19 October 1989) Agenda item 10 IMO Doc A 16/Res 671.
[276] See Kaye, 'International Measures' 395.

continental shelf.[277] These rights have particular importance when considering the number of small fishing and other vessels (dhows) 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.[278] The 1988 SUA Protocol applies to 'fixed platforms' on the continental shelf.[279] 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'.[280] Among the exclusions from this definition are structures and installations used for marine scientific research or for military purposes.[281]

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.[282] 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 acts.[283]

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.[284] The 1988 SUA Protocol anticipates that existing rules of international law will continue to apply to situations not covered by its terms,[285] 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.[286] 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.[287]

[277] See above Part G(1).
[278] Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988) 1678 UNTS 304 ['1988 SUA Protocol'].
[279] 1988 SUA Protocol art 1(1). Hence oil platforms within the territorial sea or internal waters of a state are excluded, unless the offender is found within the territory of another state party. 1988 SUA Protocol art 1(2).
[280] 1988 SUA Protocol art 1(3).
[281] See Natalino Ronzitti, 'The Prevention and Suppression of Terrorism Against Fixed Platforms on the Continental Shelf' in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff, Dordrecht 1990) 91, 92.
[282] 1988 SUA Protocol art 3(1). A state may also exercise jurisdiction when the offence is committed by a stateless person, when one of its nationals is the victim of the offence or when it is an attempt to compel the state to do or refrain from any act. 1988 SUA Protocol art 3(2).
[283] See further 1988 SUA Protocol art 2(1). Attempts, aiding and abetting, as well as threatening the offences are also recognized as grounds for exercising jurisdiction. See 1988 SUA Protocol art 2(2).
[284] See Ronzitti, 'The Law of the Sea' 6–7.
[285] The Preamble affirms 'that matters not regulated by this Protocol continue to be governed by the rules and principles of general international law'.
[286] Kaye, 'International Measures' 393. [287] See ibid 394.

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 that 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.[288] As a result of their actions, Vietnam was reduced to one working submarine cable to meet its communication needs.[289] Analysts examining the international law repercussions of the incident struggled to determine what legal actions could be pursued to prevent the injury.[290] 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'.[291] 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.[292]

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'.[293]

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 '[f]lag state jurisdiction [is] . . . a highly significant embodiment of the general principle of freedom of the seas'.[294] 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 this part of the 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

[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.
[294] Jack Garvey, 'The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative' (2005) 10 *Journal of Conflict and Security Law* 125, 132.

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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

[295] *Le Louis* (1817) 2 Dods 210, 243 (per Lord Stowell, Sir W. Scott).

[296] *SS Lotus Case (France v Turkey)* [1927] PCIJ Ser A No 10 (7 September) 25.

[297] UNCLOS art 89 ('No State may validly purport to subject any part of the high seas to its sovereignty').

[298] UNCLOS art 92. Joyner emphatically denies that there is any existing right under customary international law to permit the interdiction of foreign flagged vessels on the high seas. Daniel H. Joyner, 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation and International Law' (2005) 30 *Yale JIL* 507, 536–7. 'Customary law has always regarded the jurisdiction of the flag State over its vessels as primary, and exclusive except in as far as another jurisdiction is conceded by a rule of law or by treaty.' Shearer, 'Problems of Jurisdiction' 339.

[299] UNCLOS art 92.

[300] UNCLOS arts 91 and 92; Kaye, 'The Proliferation Security Initiative' 210.

[301] UNCLOS art 91(1).

[302] UNCLOS art 91(1).

[303] The initial concerns from the time the 1958 High Seas Convention was drafted are thoroughly canvassed in Boleslaw A. Boczek, *Flags of Convenience: An International Legal Study* (Harvard University Press, Cambridge 1962). This issue was more recently examined by ITLOS in *M/V Saiga (No 2)* (1999) 38 ILM 1323, paras 63–83 and *Grand Prince (Belize v France)* (Prompt Release) ITLOS Case No 8; (2001) ITLOS Reports, paras 81–93. See also Alexander J. Marcopoulos, 'Flags of Terror: An Argument for Rethinking Maritime Security Policy Regarding Flags of Convenience' (2007) 32 *TMLJ* 27; Alex G. Oude Elferink, 'The Genuine Link Concept: Time for Post Mortem?' in I.F. Dekker and H.H.G. Post (eds), *On the Foundations and Sources of International Law* (TMC Asser Press, The Hague 2003) 41.

[304] In the *IMCO Advisory Opinion*, the ICJ stated: 'The criterion of registered tonnage is practical, certain and capable of easy application. Moreover, the test of registered tonnage is that which is most consonant with international practice and with maritime usage'. *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 169. On this basis, the Court accepted that registration *eo ipso* provided a sufficient link of nationality in relation to ships.

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 unregistered vessels have forfeited their right to freedom of navigation on the high seas.[307] One 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 *M/V So San,* that departed North Korea and was headed to Yemen. Concerns about the nationality of the *M/V 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

[305] UNCLOS art 94(6).

[306] See David Anderson, 'Freedoms of the High Seas in the Modern Law of the Sea' in David Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP, Oxford 2006) 327, 335–6.

[307] Reuland has noted that 'harsh treatment of stateless vessels is justified by the danger that stateless vessels pose to the international regime of the high seas'. Reuland, 'Interference with Non-National Ships' 1198. See also ibid 1199 (referring to the confiscation of the *Asya*, which flew a Palestinian flag and so was treated as stateless by the United Kingdom).

[308] UNCLOS art 110(1).

[309] UNCLOS art 110(1).

[310] J. Ashley Roach, 'Initiatives to Enhance Maritime Security at Sea' (2004) 28 *Marine Policy* 41, 53–4.

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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 the right of hot pursuit. Enforcement activities may also be undertaken on the high seas through the right of visit in relation to piracy, slave trading, drug trafficking, people smuggling, and unauthorized broadcasting. These enforcement activities may be undertaken by warships, as well as by vessels 'clearly marked and identifiable as being on government service and authorized to that effect'. As such, government vessels that are not accorded policing powers may not carry out enforcement measures at sea.

The limited ways that states may act against foreign vessels on the high seas reflect that the strength of the principle of exclusivity of flag state jurisdiction on the high seas is undeniable. Reuland has noted that '[t]he presumption is against the legitimacy of any exception and the burden of proof in contentious cases rests with the state asserting the exception.'[314] Establishing that various maritime security concerns legitimize interference with exclusive flag state control is therefore a difficult one.[315] Nonetheless, the common interest that exists in minimizing or

[311] See Frederic L. Kirgis, 'Boarding of North Korean Vessel on the High Seas' (12 December 2002) *ASIL Insights* <http://www.asil.org/insights/insigh94.htm>.

[312] See Patrick Sorek, 'Jurisdiction over Drug Smuggling on the High Seas: It's a Small World After All' (1983) 44 *University of Pittsburgh Law Review* 1095, 1096 (discussing the case of *US v Marino-Garcia* in which the court relied on the effects principle to exercise jurisdiction over crew members on board a stateless vessel involved in drug trafficking). See also William C. Gilmore, 'Narcotics Interdiction at Sea: UK–US Cooperation' (1989) 13 *Marine Policy* 218, 219 (referring to the use of the protective principle by the US to prosecute offenders involved in drug trafficking).

[313] See Jeffery D. Stieb, 'Survey of United States Jurisdiction over High Seas Narcotics Trafficking' (1989) 19 *Georgia Journal of International and Comparative Law* 119, 146.

[314] Reuland, 'Interference with Non-National Ships' 1167.

[315] Though to this end, McDougal and Burke comment as follows: 'To purport to confer upon states a limited measure of occasional, exclusive competence to prescribe with respect to activities in contiguous zones, and in some instances even in noncontiguous areas, for securing common interests, and yet at the same time to deny to states the necessary means to make their prescriptions effective, could only be to make a mockery of processes of authoritative decision. Any adequate formulation of the doctrine of the freedom of the seas must, accordingly, be made flexible enough to accommodate this necessary measure of occasional, exclusive competence to apply.' McDougal and Burke, *The Public Order of the Oceans* 869.

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.

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

[316] See D.P. O'Connell (ed I.A. Shearer), *The International Law of the Sea*, 2 Vols (Clarendon Press, Oxford 1984) 1078–9 (describing the entrenched position of the right and consequent lack of controversy over the right during the progressive codification of the law of the sea). See also Robert C. Reuland, 'The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention' (1993) 33 *Virginia JIL* 557.

[317] See Reuland, 'The Customary Right' 559; Craig H. Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20 *ODIL* 309, 311.

[318] See *M/V 'Saiga' (No 2)* para 146.

[319] O'Connell notes that these qualifications, which were included in the drafting of the High Seas Convention, were more detailed than customary doctrine but could be viewed as reasonable corollaries of it. O'Connell, *The International Law of the Sea* 1079.

[320] See Baird, 'Illegal, Unreported and Unregulated Fishing' 324–30.

[321] UNCLOS art 111(1) and (2). Article 111 follows art 23 of the High Seas Convention.

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resources involved tend to augur in favour of coastal states only exercising this right in response to more serious offences.[322] Recent dramatic pursuits include Australia's 14-day pursuit of the *South Tomi* and the 21-day pursuit of the *Viarsa* in defence of Australia's fisheries in the Southern Ocean.[323]

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.[324] 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.[325] 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.[326] 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.[327] It has been suggested that this formulation prevents the use of radio.[328] However, recent state practice has indicated that radio broadcasts are used as a signal to stop,[329] 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.[330]

[322] See Reuland, 'The Customary Right' 566–8; Allen, 'Doctrine of Hot Pursuit' 315.

[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: Pirates, Poaching, and the Perfect Fish* (Rodale, New York 2006).

[324] UNCLOS art 111(1).

[325] UNCLOS art 111(4).

[326] This was the position taken by Australia in the *Volga*, as it was determined that the fishing vessel was just outside Australia's EEZ at the time the pursuit commenced. The arresting vessel was of the view that the pursued vessel was within the EEZ at the time. *Volga 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).

[328] See Reuland, 'The Customary Right' 583; McDougal and Burke, *The Public Order of the Oceans* 917–18; O'Connell, *The International Law of the Sea* 1091.

[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).

The right of hot pursuit is no longer available under UNCLOS once the ship pursued enters the territorial sea of its own state or of a third state.[331] Reuland has posited that this limitation marks the balance between the coastal state's interest in the enforcement of its laws, the community interest in the freedom of the seas, and the ongoing importance of territorial integrity.[332] The requirement has been adjusted within the regional context of the Committee for Eastern Central Atlantic Fisheries whereby a contracting state, in whose territorial waters a pursued ship takes refuge, 'has a duty to arrest the vessel and escort it to the pursuing patrol boat'.[333] Other international agreements have similarly sought to deviate from this position by a state allowing for hot pursuit by third states to continue into their territorial sea. An example is the bilateral treaties between Australia and France.[334]

The bilateral drug trafficking agreements between the United States and its neighbours also allow for law enforcement officials to pursue a fleeing vessel into the territorial sea of a party and then stop, board, search, and, if evidence warrants, detain the vessel and its crew pending instructions from the coastal state.[335] Similar rules have been created in relation to aircraft.[336] These bilateral agreements have also granted permission for the law enforcement officials of one state to enter the territorial sea of the other to investigate, board and search a specific suspect vessel or aircraft when no law enforcement vessel of that other party is available to respond immediately.[337] In these circumstances, the coastal state would need to have an independent basis of jurisdiction over the pursued vessel.[338] Gullett and Schofield have raised the question as to whether a third state is bound by any bilateral agreement that waives the obligation for hot pursuit to cease in the parties' territorial sea.[339] This

[331] UNCLOS art 111(3).

[332] Reuland, 'The Customary Right' 560.

[333] Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law* (2nd edn, Martinus Nijhoff, The Hague 2002) xiv, citing United Nations, 'The Law of the Sea: Annual Review of Ocean Affairs, Law and Policy' *Law of the Sea Overview* (New York, 1993) 21–2.

[334] 'The cornerstone of the 2003 and 2007 Australia–France treaties is 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 *IJMCL* 545, 566.

[335] Malcolm J. Williams, 'Bilateral Maritime Agreements Enhancing International Cooperation in the Suppression of Illicit Maritime Narcotics Trafficking' in Myron H. Nordquist and John Norton Moore (eds), *Oceans Policy: New Institutions, Challenges and Opportunities* (Martinus Nijhoff, The Hague 1999) 179, 188–9.

[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.

[338] Reuland, 'The Customary Right' 577.

[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 opposable to the flag state of the pursued vessel.' Gullett and Schofield, 'Pushing the Limits' 567.

argument is indeed a valid one,[340] 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.[341] One question is whether maintaining radar surveillance of the offending vessel is sufficient even if audio or visual contact is lost.[342] 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.[343] 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.[344]

Gullet and Schofield have criticized bilateral agreements between France and Australia that allow for the takeover of hot pursuit. 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.[345] 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 coastal state's waters because it supports smaller vessels that so enter. There is reliance on the notion of constructive presence in this regard.[346] UNCLOS refers to the foreign ship 'or one of its boats' being within the waters of the pursuing

[340] Article 311 of UNCLOS does allow states to enter into separate agreements that modify or suspend the operation of UNCLOS, but these agreements may not affect the rights enjoyed by other states parties under UNCLOS.

[341] McDougal and Burke have argued that the pursuit may be resumed when a pursued vessel re-emerges from the territorial sea of a third state. McDougal and Burke, *The Public Order of the Oceans* 898. See also Allen, 'Doctrine of Hot Pursuit' 320. Colombos, Poulantzas and Reuland have disagreed with this position. Poulantzas, *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. Poulantzas 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 Poulantzas, *The Right of Hot Pursuit*, 231.

[342] See Baird, 'Illegal, Unreported and Unregulated Fishing' 328.

[343] 'The pursuits of the *South Tomi* and the *Viarsa 1* ... were only brought to a close when vessels of other states rendered assistance to the Australian pursuit vessel to effect the seizures.' Gullett and Schofield, 'Pushing the Limits' 569.

[344] See Baird, 'Illegal, Unreported and Unregulated Fishing' 329–30; Erik J. Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa I* and the *South Tomi*' (2004) 19 *IJMCL* 19, 32.

[345] See Gullett and Schofield, 'Pushing the Limits' 568.

[346] See Churchill and Lowe, *The Law of the Sea* 214–16; Allen, 'Doctrine of Hot Pursuit' 314.

state.[347] Anticipating this type of operation is important given its increasing use for unlawful fishing operations, as well as modern piracy.[348] Although it is important to account for this practice, any prosecution is complicated by the need to show that the mother ship has collaborated or supported the unlawful activities of its boats.[349]

While the precise parameters of this right are ambiguous as a matter of international law, further complications arise through different interpretations of the right of hot pursuit in domestic legislation.[350] Further, Poulantzas has examined an array of state practice on hot pursuit following fisheries violations and considers that domestic courts have misapplied international legal rules on the right of hot pursuit.[351] Under international law, a ship wrongfully stopped or arrested outside the territorial sea in circumstances that did not justify the exercise of the right of hot pursuit is entitled to compensation for any loss or damage that may have been sustained.[352] It is most likely that challenges to any hot pursuit will arise in the context of domestic law enforcement proceedings, rather than on a state to state basis.[353]

Ultimately, as Churchill and Lowe have observed, '[i]t seems both inevitable and desirable that the conditions for the exercise of the right of hot pursuit be given a flexible interpretation in order to permit effective exercise of police powers on the high seas'.[354] A more flexible interpretation will allow for greater use of technology to track and communicate with suspect vessels. As fishing and piracy enterprises rely on advanced technology for their operations, it is only appropriate that policing authorities should also have scope to do so. These small shifts in interpretation do not jeopardize the overall framework, nor the rather precise requirements, for the right of hot pursuit and should therefore be acceptable within the broader international community. When coupled with the fact that hot pursuits are most commonly undertaken in response to more serious violations of

[347] UNCLOS art 111 (1).

[348] See, eg, AFP, 'French Navy Capture Somali Pirate "Mother Ship", US calls for Action' *The Australian* (26 April 2009) <http://www.theaustralian.com.au/news/world/french-capture-pirate-mother-ship/story-e6frg6so-1225699306036>.

[349] See Gullett and Schofield, 'Pushing the Limits' 570.

[350] See Mossop, 'Maritime Security in New Zealand' 66–7. See also Natalie Klein, Joanna Mossop, and Donald R. Rothwell 'International Law Perspectives on Trans-Tasman Maritime Security' in Andrew Forbes (ed), *Australia and its Maritime Interests: At Home and in the Region* (Sea Power Centre, Canberra 2008) 209, 216–17.

[351] See Poulantzas, *The Right of Hot Pursuit* xvi–xix, referring to the *Koyo Maru No 2 case* and *The F/V Taiyo Maru No 28 case*. Poulantzas also considers that the 'legal technicalities of the right of hot pursuit were erroneously invoked' in relation to *The Answer Case*. Ibid xxv.

[352] UNCLOS art 111(8).

[353] Russia threatened to pursue litigation against Australia for its allegedly unlawful pursuit of the *Volga* during the prompt release proceedings for this vessel. See *The Volga—Application for Release of Vessel and Crew, Memorial of the Russian Federation* para 25. <http://www.itlos.org/case_documents/2002/document_en_209.doc>. This threat was never realized. The legality of Australia's hot pursuits has, however, been raised in prosecutions for fisheries offences. See Knecht, *Hooked* (discussing the litigation following the pursuit of the *Viarsa*) 205–41.

[354] Churchill and Lowe, *The Law of the Sea* 216. See also Allen, 'Doctrine of Hot Pursuit' 322–5 (discussing the use of modern technology to facilitate hot pursuit).

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coastal state laws, the impingement on exclusive flag state authority is contained 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 *reconnaissance*, 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.[355] The right to approach a vessel on the high seas to ascertain its identity and nationality is generally recognized under customary international law.[356] 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.[357] 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.[358] 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);[359] 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.[360] 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 *reconnaissance* 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 distaste 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 73). See further Shearer, '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 team inside: since the "mother ship" 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, 'Freedoms of the High Seas' 341–2.

[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 'innovatory'. 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.

Under Article 110, states anticipated that additional bases for conducting the right of visit could be agreed by states.[362] 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'.[363] 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.[364] 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.[365] 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'.[366] 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,[367] the prohibition on sale of liquor to persons on board fishing vessels in the North Sea,[368] and policing of North Sea fisheries.[369]

[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(1) 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 on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.' Convention on the High Seas (1958) 450 UNTS 11 art 6(1).

[364] Convention between the United Kingdom and the United States respecting the Regulation of the Liquor Traffic (1924) 27 LNTS 182. See also John Siddle, 'Anglo-American Co Operation in the Suppression of Drug Smuggling' (1982) 31 *ICLQ* 726, 726. The US concluded liquor treaties 'with a number of States to enable them to prevent violation of the rules on prohibition'. Dupuy and Vignes, *A Handbook on the New Law of the Sea* 854.

[365] Siddle, 'Anglo-American Co Operation' 726.

[366] Dupuy and Vignes, *A Handbook on the New Law of the Sea* 855–6.

[367] Convention on the Control of Trade in Arms and Ammunition (1919) 1922 LNTS 332, cited in N. March Hunnings, 'Pirate Broadcasting in European Waters' (1965) 14 *ICLQ* 410, 427.

[368] Convention Respecting the Liquor Traffic in the North Sea (1887) cited in Hunnings, 'Pirate Broadcasting' 427.

[369] Convention for Regulating the Police of the North Sea Fisheries (1882) cited in Hunnings, 'Pirate Broadcasting' 427.

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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.[370] 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'.[371]

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.[372] 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.[373] 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.[374]

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'.[375] In the *I'm Alone* arbitration,[376] 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 value of human life, and here rum-running was not so grave as to warrant endangering human life.[377] He further considers that fisheries or minor pollution offences would also be out-balanced by the value of human life, and questions whether large cargo of narcotics, or gun-running, or dumping of poisonous chemicals would be different.[378] The *Red Crusader* incident also considered the

[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 Mellor, '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* (1935) 3 RIAA 1609.
[377] See Shearer, 'Problems of Jurisdiction' 341–2.
[378] See ibid 342. Shearer's view aligns with that of McDougal and Burke. McDougal and Burke, *The Public Order of the Oceans* 885–6.

legitimate use of force to stop a vessel.[379] 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.[380] 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.[381]

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'.[382] Efforts must first be made to hail the vessel or to fire across its bow before resorting to direct force against the vessel.[383] '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 electrics of the pursued vessel, harpooned sheets to foul propellers, etc.'[384]

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)*.[385] 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.[386] Gilmore attributes these additional specifications as reflections of the national sensitivities involved.[387] 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'.[388]

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

[379] *The Red Crusader (Commission of Enquiry Denmark v United Kingdom* (1962) 35 ILR 485.
[380] Ibid.
[381] Gilmore, 'Narcotics: *UK–US Cooperation*' 229.
[382] *M/V 'Saiga' (No 2)* para. 155.
[383] See Reuland, 'Interference with Non-National Ships' 1174.
[384] Shearer, 'Problems of Jurisdiction' 342.
[385] 2003 Caribbean Agreement art 22. See also Gilmore, *Caribbean Area* 36.
[386] 2003 Caribbean Agreement arts 22(7) and (9). A similar, albeit less detailed approach, was taken in the 2008 CARICOM Agreement. See 2008 CARICOM Agreement art XIV.
[387] Gilmore, *Caribbean Area* 37.
[388] Kwast, 'Maritime Law Enforcement' 65.

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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.[389] 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.[390]

Universal jurisdiction exists over pirates, who are viewed as *hostis humani generis*:[391] '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.'[392] This universal jurisdiction has been recognized due to the threat to commerce posed by acts of piracy.[393] 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.[394] '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.'[395] 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.[396] 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.[397]

Early definitions of piracy had sought to establish a broad basis for warranting the exercise of universal jurisdiction.[398] Oppenheim, for example, defined piracy as 'every unauthorized act of violence against persons or goods committed on the open sea

[389] 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 Acts of Maritime Violence' (2003) 2 *Journal of International Commercial Law* 153, 158 (noting the etymology of the word 'piracy' may be traced to Latin and Greek, denoting the existence of the act from as early as 140 BC).

[390] Churchill and Lowe, *The Law of the Sea* 209.

[391] Enemies of all humankind.

[392] UNCLOS art 105.

[393] See Tina Garmon, Comment, 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th' (2002) 27 *TMLJ* 257, 260.

[394] See Anna van Zwanenberg, 'Interference with Ships on the High Seas' (1961) 10 *ICLQ* 785, 805.

[395] Ibid.

[396] See Becker, 'The Shifting Public Order' 207.

[397] Ibid.

[398] Ibid 273–6.

either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.'[399] 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'.[400] 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'.[401]

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.[402] 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.[403] 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.[404] Also, that the act is for private ends has also narrowed the range of acts that may be classed as piracy.[405] Most typically, this restriction has excluded acts that have political motivations.[406] For example, the hijacking of the *Santa María*, 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.[407]

While clearly inadequate to respond to acts of maritime terrorism,[408] the narrow definition of piracy has provided an acceptable basis for states to exercise the right of

[399] Lassa Oppenheim (Hersch Lauterpacht ed), *International Law: A Treatise* (8th edn, McKay, New York 1955) 609.

[400] *Re Piracy Jure Gentium* (1934) App Cas 586, 598.

[401] Malvina Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety' (1988) 82 *AJIL* 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').

[402] UNCLOS art 101.

[403] See generally Halberstam, 'Terrorism on the High Seas'; Garmon, 'International Law of the Sea'.

[404] Churchill and Lowe, *The Law of the Sea* 210.

[405] See Garmon, 'International Law of the Sea' 265; Halberstam, 'Terrorism on the High Seas' 282.

[406] This common understanding has been credibly challenged by Guilfoyle, who argues that 'private ends' is not a question of subjective motivation of those involved but rather the lack of public sanction. See Guilfoyle, *Shipping Interdiction* 32–42.

[407] van Zwanenberg, 'Interference with Ships' 803–17; Halberstam, 'Terrorism on the High Seas' 286–7.

[408] It was due to the narrow definition of piracy included in UNCLOS, and now accepted as customary international law, that the 1988 SUA Convention was required. The acts of those responsible for the hijacking of the *Achille Lauro* and the murder of Mr Klinghoffer could not be

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visit against foreign vessels on the high seas. Some effort has been undertaken to merge consideration 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'.[409] 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.[410]

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.'[411] However, a resurgence occurred in the 1970s and 1980s when attacks on ships for private ends began to increase.[412] 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.[413] 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.[414]

In addition to initiatives to address armed robbery in the territorial sea and in straits,[415] states have sought greater cooperation to address piracy. At the proposal of Japan,[416] Southeast Asian states instead adopted in 2004 a Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

characterized as piracy. See Garmon, 'International Law of the Sea' 262; Halberstam, 'Terrorism on the High Seas' 276.

409 Mejia, 'Maritime Gerrymandering' 173.

410 See discussion in Chapter 4, Part E(1). It may further be noted that the 1988 SUA Convention is now being relied on to cover acts of piracy in instances where states have enacted that treaty into domestic law and do not have laws concerning piracy in force. See James Kraska and Brian Wilson, 'The Pirates of the Gulf of Aden: The Coalition is the Strategy' (2009) 45 *Stanford Journal of International Law* 243, 281.

411 Zwanenberg, 'Interference with Ships' 799.

412 Jesus, 'Protection of Foreign Ships' 364.

413 See Johnstone, 'Maritime Piracy' 42. While insurgents would not necessarily be defined as 'pirates', some groups have sought to rob any vessel as a means of raising funds for their fighting efforts. Johnstone gives the example of the Indonesian Free Aceh Movement (GAM), in this regard.

414 Roach, 'Initiatives' 43.

415 Discussed above in Part C(4) and Part D.

416 See John F. Bradford, 'Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Responses' (2004) 26 *Contemporary Southeast Asia* 480, 492.

(ReCAAP),[417] which addresses piracy on the high seas and armed robbery within a state party's jurisdiction.[418] 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'.[419] 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.[420]

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.[421] 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.[422] The Security Council has also acted to enhance these law enforcement efforts when pirates have fled to the territorial sea,[423] or back to land.[424] 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.[425]

417 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (2004) 2398 UNTS 199 ['ReCAAP']. This Agreement is discussed in more detail in Chapter 5, Part D(1).

418 See ReCAAP art 1.

419 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 party, including the UNCLOS, and the relevant rules of international law.'

420 '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/data/ReCAAP%20factsheet%20_Nov06_%20%5BFINAL%5Das%20of%20281106.pdf>.

421 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' 245–6 and 262–3.

422 2009 Code of Conduct art 7. See also Guilfoyle, *Shipping Interdiction* 72–3.

423 UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816. See discussion above Part C(4).

424 UNSC Res 1851 (16 December 2008) UN Doc S/RES/1846, para 6.

425 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 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.

[426] See Michael Byers, 'Policing the High Seas: The Proliferation Security Initiative' (2004) 98 *AJIL* 526, 534–6.

[427] See Reuland, 'Interference with Non-National Ships' 1190–4 (tracing the evolution of this right). See also Becker, 'The Shifting Public Order' 209.

[428] As explained by Guilfoyle: 'An interdiction has two potential steps. The first stage is stopping, 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.

[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 $US5–7 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] Coastal state efforts to prevent the illegal entry of migrants may

[432] See Efthmyios 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, *Shipping Interdiction* 180–1. For a discussion on the difference in definition between human trafficking and slavery, see ibid 228–31.

[436] See eg Australian Federal Police, 'People smuggling' <http://www.afp.gov.au/policing/human-trafficking/people-smuggling.aspx>. See also Raul 'Pete' Pedrozo, 'International Initiatives to Combat Trafficking of Migrants by Sea' in Myron H. Nordquist and John Norton Moore (eds), *Current Maritime Issues and the International Maritime Organisation* (Martinus Nijhoff, The Hague 1999) 53, 53.

[437] Roach, 'Initiatives' 43.

[438] One of the more notorious incidents being Australia's refusal to allow the *M/V Tampa* to offload illegal migrants who had been rescued from a sinking vessel by the Norwegian cargo vessel. See Donald R. Rothwell, '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 regions).

[439] Convention relating to the Status of Refugees (1951) 189 UNTS 150; as amended by the Protocol Relating to the Status of Refugees (1967) 606 UNTS 267, art 33.

[440] See, eg, Richard Barnes, 'Refugee Law at Sea' (2004) 53 *ICLQ* 47; Penelope Mathew, 'International Association of Refugee Law Judges Conference: Address – Legal Issues Concerning Interception' (2003) 17 *Georgetown Immigration Law Journal* 221, 222–33; Papastavridis, 'Interception of Human Beings' 216–26.

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run counter to obligations associated with refugee protection if the denial effectively results in a refugee being returned to the place of persecution.[441] 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.[442]

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.[443] 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.[444] These measures must all be in conformity 'with the international law of the sea and all generally accepted relevant international instruments'.[445]

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.[446] For foreign flagged vessels, the recommendations allow for states to request authorization from the flag state 'to take appropriate measures in regard to that ship'.[447] Given their non-binding nature, these IMO recommendations did not constitute a power conferred by treaty for exercising the right of visit on the

[441] Guilfoyle, *Shipping Interdiction* 222–3; Barnes, 'Refugee Law at Sea' 62–3.
[442] Guilfoyle, *Shipping Interdiction* 225.
[443] IMO Assembly, 'Interim Measures For Combating Unsafe Practices Associated With The Trafficking Or Transport Of Migrants By Sea' (16 December 1998) IMO Doc MSC/Circ.896 ['IMO Interim Measures']. In 2001, the IMO issued revised guidelines for combating unsafe practices associated with the trafficking or transport of migrants by sea. IMO, 'Interim Measures For Combating Unsafe Practices Associated With The Trafficking Or Transport Of Migrants By Sea' (12 June 2001) Doc MSC/Circ.896/Rev.1. However, the core elements of the 1998 Circular, which are discussed here, were not altered.
[444] See IMO Interim Measures, Recommendation 4.
[445] IMO Interim Measures, Recommendation 5.
[446] IMO Interim Measures, Recommendation 11.
[447] IMO Interim Measures, Recommendation 12.

high seas. Such authority must be manifested in a binding instrument under Article 110 of UNCLOS. However, their availability provides a frame of reference for states that are not parties to any other binding agreement addressing this issue.

In 2000, the Convention on Transnational Crime was adopted,[448] and one of its protocols addressed the question of migrant smuggling, including migrant smuggling at sea.[449] The purpose of the 2000 Migrant Smuggling Protocol is 'to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants'.[450] 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.[451] 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.[452] 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'.[453]

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.[454] 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.[455] 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'.[456]

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

[448] Convention against Transnational Organized Crime (2000) 40 ILM 335.
[449] See Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the Convention against Transnational Organized Crime (2000) 40 ILM 384 (2001) ['Migrant Smuggling Protocol'].
[450] Migrant Smuggling Protocol art 2.
[451] See Migrant Smuggling Protocol art 6 (which also intends states to criminalize acts associated with migrant smuggling, such as producing fraudulent travel or identity documents).
[452] Migrant Smuggling Protocol art 4 (thereby seeming to exclude the less likely scenario of a one-off attempt at migrant smuggling, or independent operators).
[453] Migrant Smuggling Protocol art 3(a).
[454] Migrant Smuggling Protocol art 3(d).
[455] UNGA, Official Records (3 November 2000) 6th Comm 44th Session Doc A/55/383.Add.1, 18 cited in Roach, 'Initiatives' 50.
[456] Migrant Smuggling Protocol art 7.

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means.[457] States may otherwise proceed to take appropriate measures against stateless vessels 'in accordance with relevant domestic and international law'.[458]

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'.[459] The flag state is to be promptly informed of results of any measure taken.[460] 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.[461]

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.[462] For this purpose, flag states are to designate the necessary authorities and notify the Secretary-General of this designation.[463] 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.[464]

A series of safeguards in the Migrant Smuggling Protocol are to apply in relation to measures taken in boarding a suspect vessel exercising 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.[465] 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.[466] Consistent with Article 110(3) of UNCLOS, if suspicions prove to be unfounded following the

[457] Migrant Smuggling Protocol art 8(1).
[458] Migrant Smuggling Protocol art 8(7).
[459] Migrant Smuggling Protocol art 8(2).
[460] Migrant Smuggling Protocol art 8(3).
[461] UNGA, Official Records (3 November 2000) 6th Comm 44th Session Doc A/55/383.Add.1, 18 cited in Roach, 'Initiatives' 50.
[462] Migrant Smuggling Protocol art 8(4).
[463] Migrant Smuggling Protocol art 8(6).
[464] Migrant Smuggling Protocol art 8(5).
[465] Migrant Smuggling Protocol art 9(1).
[466] Migrant Smuggling Protocol art 9(3).

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.[467]

Regional efforts have also been pursued to respond to migrant smuggling, through bilateral treaties,[468] 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.[469] 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'.[470] 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.[471] 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.[472]

The right of visit has provided one tool to address the modern problem of people smuggling and people 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

[467] Migrant Smuggling Protocol art 9(2).
[468] See Papastavridis, 'Interception of Human Beings' 178–87.
[469] 'About the Bali Process' <http://www.baliprocess.net/index.asp?pageID=2145831401>.
[470] 'Bali Process Activities', <http://www.baliprocess.net/index.asp?pageID=2145831402>.
[471] 'About the Bali Process' <http://www.baliprocess.net/index.asp?pageID=2145831401>.
[472] See Guilfoyle, *Shipping Interdiction* 187–96 (discussing US practice in relation to Haiti, Cuba, and the Dominican Republic) and 197–8 (referring to confidential bilateral arrangements that Australia has entered into with Thailand, Cambodia, South Africa, and Nauru).

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reception by the general public contrary to international regulations.[473] The problem of unauthorized broadcasting grew at the end of the 1950s and into the 1960s, particularly in the Baltic, Irish, and North Seas.[474] At the 'height' of unauthorized broadcasting, there were 11 stations transmitting from ships and installations 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.[476] 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'.[477] 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.[478] States were also motivated by the desire to protect their own broadcasting monopolies or to prevent the development of commercial broadcasting.[479] Further, the pirate radio stations broadcast music without the appropriate royalty payments being made to those holding copyright and performing rights.[480] Finally, coastal states were concerned that the pirate broadcasters would avoid paying proper income and other taxes.[481] 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.[482]

[473] UNCLOS art 109(2).
[474] See Hunnings, 'Pirate Broadcasting' 410.
[475] See ibid; J.C. Woodliffe, 'The Demise of Unauthorised Broadcasting from Ships in International Waters?' (1986) 1 *International Journal of Estuarine and Coastal Law* 402, 402.
[476] See Woodliffe, 'The Demise of Unauthorised Broadcasting' 402.
[477] Ibid, 403, citing to debates in the UK House of Commons and House of Lords, respectively.
[478] Hunnings, 'Pirate Broadcasting' 413.
[479] Ibid.
[480] Ibid. See also Woodliffe, 'The Demise of Unauthorised Broadcasting' 418 (referring to 'broadcast [of] material (most of which consists of records of "pop" music) without the appropriate royalty payments being made').
[481] Hunnings, 'Pirate Broadcasting' 413.
[482] Horace Robertson, 'The Suppression of Pirate Radio Broadcasting: A Test Case of the International System for Control of Activities Outside National Territory' (1982) 45 *Law and Contemporary Problems* 71, 75.

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.'[483] '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.'[484] 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,[485] rather than extending the reach of their criminal jurisdiction into the high seas.[486] The 1965 European Agreement did not, therefore, allow states parties to proceed against each other's vessels on the high seas.[487]

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.[488] 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.[489] 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.[490] 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).[491]

The 1965 European Agreement formed the basis of a proposal for the negotiations of UNCLOS, which resulted in the adoption of Article 109.[492] 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.[493] States are accorded

[483] Woodliffe, 'The Demise of Unauthorised Broadcasting' 403.
[484] Anderson, 'Freedoms of the High Seas' 341.
[485] European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territory (1965) 634 UNTS 239.
[486] Woodliffe, 'The Demise of Unauthorised Broadcasting' 403.
[487] See Reuland, 'Interference with Non-National Ships' 1226.
[488] Woodliffe, 'The Demise of Unauthorised Broadcasting' 404.
[489] See ibid. The UK could not detain it because it had broadcast outside of UK territory, however it was contrary to UK law to carry out repairs on such a ship, and was put up for sale as a result.
[490] See ibid 404–5 (referring to an appeal to the Panamanian government in this regard).
[491] By virtue of the Sound Broadcasting Act 1972 (UK). See ibid, 403, n 14.
[492] Ibid 405–6.
[493] UNCLOS art 109(3).

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both legislative and enforcement jurisdiction in this regard.[494] 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.[495] '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.'[496] 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.'[497] 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.[498]

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.[499] 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.[500] 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.[501] 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

[494] Churchill and Lowe, *The Law of the Sea* 212.
[495] See Dupuy and Vignes, *A Handbook on the New Law of the Sea* 851.
[496] Reuland, 'Interference with Non-National Ships' 1227–8 (noting that it probably represented progressive development of the law at the time). Robertson describes it as an 'exercise in overkill'. Robertson, 'The Suppression of Pirate Broadcasting' 101.
[497] Williams, 'Bilateral Maritime Agreements' 179.
[498] Roach, 'Initiatives' 43.
[499] See Gilmore, 'Narcotics: *UK–US Cooperation*' 220.
[500] See ibid 222 (referring to testimony of Admiral Cueroni of the US Coast Guard before the House of Representatives Subcommittee on Crime).
[501] Gilmore, 'Narcotics: *Europe Agreement*' 7.

in narcotic drugs and psychotropic substances engaged in by ships on the high seas.[502] 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.[503] Instead, all that is anticipated is that the flag state may request the assistance of other states,[504] rather than another state initiating action or undertaking more precise measures against foreign flagged vessels involved in drug trafficking on the high seas.[505] 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[506] 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.[507] 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.[508] 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.[509] 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.[510] Authorization may be afforded on an ad hoc basis,

[502] UNCLOS art 108(1).
[503] The existence of a customary international law right was denied by Italy's highest court in 1992. See Erik Franckx, '*Pacta Tertiis* and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea' (2000) 8 *Tulane Journal of International and Comparative Law* 49, 68.
[504] UNCLOS art 108(2).
[505] Gilmore, 'Drug Trafficking by Sea' 185.
[506] UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) 28 ILM 493 (1989) ['1988 Vienna Convention'].
[507] See Gilmore, 'Drug Trafficking by Sea' 187 (referring to paras 1 and 2 of art 17). See also Williams, 'Bilateral Maritime Agreements' 183.
[508] Prescriptive jurisdiction is established under art 4 of the 1988 Vienna Convention.
[509] 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).
[510] 1988 Vienna Convention art 17(3).

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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 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

[511] 1988 Vienna Convention art 17(4).

[512] 1988 Vienna Convention art 17(6). These conditions could include possible responsibility being imposed on the boarding state in the event that damage was caused by unjustified measures. See Gilmore, 'Drug Trafficking by Sea' 190.

[513] See Gilmore, 'Drug Trafficking by Sea' 189–90 (referring to an explanatory statement of Australia during the negotiations).

[514] 1988 Vienna Convention art 17(7).

[515] 1988 Vienna Convention art 17(11). Concerns about how the boarding provision would implicate rights in the EEZ further led to a reference to its applicability when 'a vessel [is] exercising freedom of navigation'. See 1988 Vienna Convention art 17(3). See further Gilmore, 'Drug Trafficking by Sea' 189 (referring to the implications for the EEZ being one of the primary controversies in the drafting of the boarding provision).

[516] Great Britain and Northern Ireland: Narcotic Drugs: Interdiction of Vessels, Exchange of Notes (1981) 33 UST 4224 ['1981 Exchange of Notes'].

[517] Gilmore, 'Narcotics: *UK–US Cooperation*'. See also Siddle, 'Anglo-American Co Operation' 726.

[518] See ibid 732.

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,[528] 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

[519] Ibid 726. See also Gilmore, 'Narcotics: *UK–US Cooperation*' 226 (referring to a statement of the then Attorney General of the UK that the agreement was 'quite a compromise of important principles').

[520] See Siddle, 'Anglo-American Co Operation' 739 (referring to statements made in the UK Parliament, and in the letter accompanying the agreement). See also Gilmore, 'Narcotics: *UK–US Cooperation*' 226.

[521] The 1981 Exchange of Notes provides that the United Kingdom 'will not object to the boarding by the authorities of the United States': art 1.

[522] Ibid art 1.

[523] UNCLOS arts 2 and 3.

[524] 1981 Exchange of Notes, para 3.

[525] See Siddle, 'Anglo-American Co Operation' 741.

[526] 1981 Exchange of Notes art 4.

[527] 1981 Exchange of Notes art 5. The situation of other nationals may not be affected by this provision, but the UK has noted that all persons should be accorded equal treatment and did not deny that the prosecution of nationals of other states would be of primary concern to their state of nationality. Siddle, 'Anglo-American Co Operation' 743 (referring to the UK note accompanying the agreement).

[528] Siddle, 'Anglo-American Co Operation' 730–2.

for this purpose, but instead effectively upheld it through the conclusion of a series of treaties.[529] The United States has particularly pursued the conclusion of bilateral agreements within the Caribbean and Central and South America.[530]

One technique established in these treaties has been the use of 'ship-riders' whereby an official of one state would be placed on a US Coast Guard vessel so that the official riding with the Coast Guard could authorize interdictions of any of its flag vessels, as well as allow for pursuit into the territorial seas of that official's state and for the United States to commence hot pursuit in the official's territorial sea.[531] The advantage to the other party is that the cooperation enables more effective patrols of its territorial sea as well as increasing their law enforcement capability beyond its territorial sea.[532] These bilateral agreements also allow for the possibility of law enforcement officials to board and search vessels claiming to be flagged by one of the two states when those vessels are located outside territorial seas and are reasonably suspected of drug trafficking. Consent on the basis of these treaties (rather than seeking consent on a case-by-case basis as is required under Article 17 of the 1988 Vienna Convention) renders law enforcement efforts more effective, especially in saving time at critical moments, as well as minimizing disruption to maritime navigation.[533]

Safeguards set forth in these bilateral agreements include due account to be accorded to the need not to endanger the safety of life at sea, the security of the suspect vessel and its cargo as well as not prejudicing the commercial and legal interests of the flag state or any other interested state.[534] The right of law enforcement officials to use force is also constrained so that it is only available in the exercise of the right of self-defence, to compel the suspect vessel to stop when warnings to do so have not been heeded, and to maintain order on board the suspect vessel during boarding, search, or detention, including if there is resistance to these actions.[535]

Another separate agreement that contemplates shipboarding in relation to drug trafficking is the 1995 Council of Europe Agreement on Illicit Traffic by Sea.[536] This Agreement has been described as 'intimately connected' with the 1988 Vienna Convention, and any proposals during negotiations that were contrary to the

[529] See Byers, 'Policing the High Seas' 539.

[530] See Juliana Gonzalez-Pinto, 'Interdiction of Narcotics in International Waters' (2008) 15 *University of Miami International and Comparative Law Review* 443, 453–4 (referring to an inclusive list of 28 states with which the US has concluded agreements to combat drug trafficking and outlining their key features). See also ibid 472–8 (which sets out a model maritime agreement used by the US).

[531] Byers, 'Policing the High Seas' 539 and n 111. See further Thomas D. Lehrman, 'Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture' (2004) 45 *Virginia JIL* 223, 236–7.

[532] Williams, 'Bilateral Maritime Agreements' 187.

[533] See ibid 188.

[534] Rattray, 'Caribbean Drug Challenges' 212.

[535] Ibid 212–13.

[536] Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1995) 2136 UNTS 81 ['1995 European Agreement'].

letter or spirit of the 1988 Vienna Convention were not acceptable.[537] There are several aspects of the 1995 European Agreement that elaborate and improve on the requirements set forth in the 1988 Vienna Convention.[538] 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.[539] Proposals relating to the treaty itself affording 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.[540] It appears that this requirement is more easily dispensed with when states are negotiating treaties on a bilateral basis, rather than a multilateral basis.[541]

Under the 1995 European Agreement, the flag state must consider a request for boarding in a timely fashion and provide a response, 'whenever practicable' within four hours.[542] 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.[543] 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.[544] Further, arrest and detention of the persons concerned is permissible if evidence is found of an offence.[545] The flag state is to be informed without delay,[546] and either the state

[537] 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).

[538] See Gilmore, 'Narcotics: *Europe Agreement*' 6. 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.

[539] 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 by virtue of this Agreement, without the authorisation of the flag State.'

[540] Gilmore, 'Narcotics: *Europe Agreement*' 7. 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] 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 or having the nationality of the other Party', cited in Gilmore, 'Narcotics: *Europe Agreement*' 7, n 57. See further Guilfoyle, *Shipping Interdiction* 85–6.

[542] 1995 European Agreement art 7. The ability to respond promptly is to be enhanced by states making arrangements for its authorities to be available at all times. See 1995 European Agreement art 17(1).

[543] See 1995 European Agreement art 8.

[544] See 1995 European Agreement art 9. See Gilmore, 'Narcotics: *Europe Agreement*' 9.

[545] 1995 European Agreement art 10.

[546] 1995 European Agreement art 10(2).

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.[547]

The 2003 Caribbean Agreement brought together many of the features of the bilateral agreements between the United States and Caribbean states,[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.[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.[550] The new agreement is described by Gilmore as 'more ambitious, innovative and comprehensive'.[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.[552] The 2003 Caribbean Agreement incorporates the use of 'ship-riders' to provide authority for entry into that official's waters and air space.[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.[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'.[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.[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.

[547] 1995 European Agreement arts 3, 10, and 14.
[548] These agreements continue in effect under art 31 of the 2003 Caribbean Agreement.
[549] See Gilmore, *Caribbean Area* 4.
[550] See 2003 Caribbean Agreement Pmbl, art 35. See further Gilmore, *Caribbean Area* 8.
[551] Gilmore, *Caribbean Area* 8.
[552] Ibid 8. The reference to 'territories' takes into account those areas for which their foreign affairs are conducted by other states.
[553] See 2003 Caribbean Agreement art 9.
[554] See 2003 Caribbean Agreement art 9(1). See further Gilmore, *Caribbean Area* 20.
[555] 2003 Caribbean Agreement art 6(4).
[556] See Gilmore, *Caribbean Area* 18.

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.[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,[558] or of creating a system where there is deemed consent for boarding if no response is forthcoming within a four-hour period.[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.[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'.[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.[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 paramountcy 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,[563] as well as under other treaties.[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

[557] See 2003 Caribbean Agreement art 16(1).
[558] 2003 Caribbean Agreement art 16(2)
[559] 2003 Caribbean Agreement art 16(3).
[560] 2003 Caribbean Agreement art 16(4).
[561] Gilmore, *Caribbean Area* 29.
[562] 2003 Caribbean Agreement art 24. See also Gilmore, *Caribbean Area* 30 and 39.
[563] See UNCLOS arts 117–20.
[564] As acknowledged in UNCLOS art 87 and art 116.

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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.

[566] Tim Stephens, *International Courts and Environmental Protection* (CUP, Cambridge 2009) 212–13.

[567] *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction of the Court, Judgment) [1998] ICJ Rep 432. Canada had, however, altered its acceptance of compulsory jurisdiction in relation to the enforcement of its conservation and management measures in the relevant maritime area and the Court therefore lacked jurisdiction to resolve the dispute.

[568] See Byers, 'Policing the High Seas' 537–8.

[569] Peter Örebech, Ketill Sigurjonsson and Ted L. McDorman, 'The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement' (1998) 13 *IJMCL* 119, 129.

[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 18(3).

[572] 1995 Fish Stocks Agreement art 19.

inspection. States parties to the 1995 Fish Stocks Agreement must permit access by duly authorized inspectors from other states consistent with subregional and regional schemes for cooperation.[573] The inspection regime is detailed in Articles 21 and 22, and applies in the absence of boarding and inspection procedures being developed within an RFMO.[574] The inspection regime applies to vessels within high seas areas covered by a subregional or regional fisheries management organization or arrangement, irrespective of whether the flag state of those vessels is a member of the organization or arrangement.[575]

In the process of boarding and inspecting a vessel, the duly authorized inspectors must present credentials to the master and a copy of text setting out the conservation and management measures in force in the high seas area.[576] The flag state is to be given notice at the time of the boarding and inspection,[577] and a copy of the report from the boarding and inspection is to be provided to the flag state.[578] The use of force is to be avoided 'except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties', and must otherwise not exceed what is reasonable in the circumstances.[579]

When there are clear grounds for believing that a vessel has engaged in any activity contrary to conservation and management measures applicable in the area, the inspecting state must promptly notify the flag state.[580] If the flag state does not then act, and there are clear grounds for believing that a 'serious violation' has been committed, the inspectors may remain on board the vessel and secure evidence, which may include the vessel going in to the nearest appropriate port.[581] At each stage, the flag state's authority to conduct enforcement action holds sway over the actions of the inspecting state.[582] The 1995 Fish Stocks Agreement maintains the position that every flag state will take all the necessary steps to ensure that vessels registered to it are fulfilling their international obligations in relation to fisheries conservation and management. As such, there is no scope on the high seas for states with greater surveillance and enforcement capacity to police the fishing activities of vessels flagged to states with lesser capacity or incentive to enforce conservation and management measures. Moreover, a core weakness of this regime ultimately rests in

[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)(f).

[580] 1995 Fish Stocks Agreement art 21(5).

[581] 1995 Fish Stocks Agreement art 21(8). What constitutes a 'serious violation' is defined in art 21(11) and includes fishing without a valid licence, 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).

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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.

The FSA provides a framework for and thus anticipates that enforcement regimes will be developed through RFMOs in respect of particular fisheries or fish stocks.[583] To this end, it may be observed that various RFMOs have established ways to enforce the conservation and management measures set forth by the organization and to deter IUU fishing. These enforcement mechanisms applicable between the states parties include what may be described as the more traditional maritime enforcement measures, such as stopping, inspecting and potentially arresting a vessel. Further steps have been necessary in seeking to implement and enforce conservation and management measures in view of the extensive harm caused by IUU fishing.[584] 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

[583] See 1995 Fish Stocks Agreement arts 21(2) and 21(15).

[584] See Guilfoyle, *Shipping Interdiction* 112–16.

[585] See, eg, Rachel Baird, 'CCAMLR Initiatives to Counter Flag State Non-Enforcement in Southern Ocean Fisheries' (2005) 36 *Victoria University Wellington Law Review* 733; Marcus Haward, 'IUU Fishing: Contemporary Practice' in A.G. Oude Elferink and D. R. Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff, Leiden 2004) 87, 93–8. However, concerns have been raised as to the operation of such regimes vis-à-vis international trade law. See, eg, Philip Bender, 'Trade Restrictions for Antarctic Conservation under the Free Trade Principles of the WTO System' (2006) 14 *Southeastern Environmental Law Journal* 163; Ian J. Popick, 'Are There Really Plenty of Fish in the Sea? The World Trade Organization's Presence is Effectively Frustrating the International Community's Attempts to Conserve the Chilean Sea Bass' (2001) 50 *Emory Law Journal* 939.

[586] In exercising sovereign rights in the EEZ, coastal states may adopt laws and regulations 'specifying information required of fishing vessels, including . . . vessel position reports'. UNCLOS art 62(4)(e). For discussion in relation to particular RFMO, see Rosemary Gail Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, Leiden 2004) 269–70, 300; Tore Henriksen, Geir Honneland and Are Sydnes, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Martinus Nijhoff, Leiden 2006) 184–5.

[587] This decision was particularly problematic because '[e]vidence obtained in the course of the *Volga* investigation showed a consistent pattern of fraudulent VMS use and VMS tampering to indicate fishing vessels were not in the areas in which they purported to be fishing'. Rayfuse, *Non-Flag State Enforcement* 283.

[588] eg, the Commission for CCAMLR adopted a Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures that provided a basis for vessels sighted in contravention of CCAMLR efforts to be informed of that conduct and that information to be circulated to the flag state, along with member states and the CCAMLR Secretariat. Rayfuse,

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

Non-Flag State Enforcement 271–2. CCAMLR now follows a Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties. See 'Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties' <http://www.ccamlr.org/pu/E/cds/policy%20to%20enhance.pdf>.

[589] See Jesus, 'Protection of Foreign Ships' 379. Halberstam similarly comments: 'The "for private ends" proviso may be interpreted as excluding from the laws of piracy not only insurgents who direct their acts solely against the state whose government they seek to overthrow, but also all those whose acts have no personal motive, whether monetary or otherwise.' Halberstam, 'Terrorism on the High Seas' 282. However, E.D. Brown has reported on the decision of Dutch courts that Greenpeace protestors were guilty of piracy as the private ends referred to a personal point of view on a particular problem. See E.D. Brown, *The International Law of the Sea* (Aldershot, Dartmouth 1994) vol 1, 301–2.

[590] See discussion in Chapter 2, Part C(2).

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butyric acid (or rotten butter) onto Japanese vessels and the whalers 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 *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.

[591] Natalie Klein, 'Whales and Tuna: The Past and Future of Litigation between Australia and Japan' (2009) 22 *Georgetown International Environmental Law Review* 143, 170.

[592] Ibid.

[593] Such collisions have previously occurred between protestors and targeted vessels. See Harry N. Scheiber, Kathryn J. Mengerik and Yann-huei Song, 'Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum' (2007) 30 *University of Hawaii Law Review* 97, 158 (referring to earlier incidents between Greenpeace and Sea Shepherd and the Japanese whaling fleet).

[594] Natalie Klein, 'Whaling Protesters are Behaving like Pirates' *The Australian* (18 February 2010) <http://www.theaustralian.com.au/news/opinion/whaling-protesters-are-behaving-like-pirates/story-e6frg6zo-1225831542623>.

[595] Sea Shepherd has relied on the terms of the World Charter for Nature, particularly Principle 21, as the basis for its right to prevent Japanese whaling. UNGA, 'World Charter for Nature' (28 October 1982) UN Doc A/RES/37/7; 'Mandate' <http://www.seashepherd.org/who-we-are/mandate.html>. However, as a General Assembly resolution, the World Charter for Nature is not binding. At most, its terms could be viewed as soft law. Lynton Keith Caldwell, *International Environmental Policy: From the Twentieth to the Twenty-First Century* (3rd edn, Duke University Press, Durham 1996) 100.

[596] For an assessment of the legality of Japan's whaling activities in Antarctic waters, see Report of the International Panel of Independent Legal Experts on Special Permit ('Scientific') Whaling Under International Law, para 83 (Paris, 12 May 2006). The Panel was comprised of Laurence Boisson de Chazournes, Pierre-Marie Dupuy, Donald R. Rothwell, Philippe Sands, Alberto Székely, William H. Taft IV, and Kate Cook. For an argument supporting Japan's position, see Eldon V.C. Greenberg, Paul S. Hoff, and Michael I. Goulding, 'Japan's Whale Research Program and International Law' (2002) 32 *California Western International Law Journal* 151.

[597] 'Australian Govt Urged to Rein in Sea Shepherd' *ABC News* (7 February 2009) <http://www.abc.net.au/news/stories/2009/02/07/2484925.htm>.

[598] ABC/AFP, 'Japan wants Sea Shepherd's captain arrested' *ABC News* (30 April 2010) <http://www.abc.net.au/news/stories/2010/04/30/2886762.htm>.

[599] 'Japan "agrees to free" Sea Shepherd activists' *ABC News* (16 January 2008) <http://www.abc.net.au/news/stories/2008/01/16/2139306.htm>.

[600] ABC/AFP, 'Japan wants Sea Shepherd's captain arrested' *ABC News* (30 April 2010) <http://www.abc.net.au/news/stories/2010/04/30/2886762.htm>.

Roach has advocated that cooperation between the coastal state and the flag state is the cornerstone for improving maritime security.[601] Sharma has equally observed that although the authority of the flag state is maintained, regional or subregional cooperation has been developed in the face of maritime security threats.[602] In the absence of provisions for coastal or third states to take action in their own account, the need for cooperation is certainly critical. Even though enforcing obligations to cooperate is not without difficulties, a cooperative endeavour at least underlines the shared concern in seeking to promote maritime security. The 2008 CARICOM Agreement may otherwise stand as a useful model of a treaty allowing for the right of visit to respond to a variety of maritime security threats.[603]

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.[604]

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

[601] See Roach, 'Initiatives' 63.

[602] O.P. Sharma, 'An Indian Perspective' (2005) 29 *Marine Policy* 147, 150.

[603] 2008 CARICOM Agreement art IX.

[604] Becker, 'The Shifting Public Order' 230.

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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 protects 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.

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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.

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