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13

MARITIME TRANSIT AND THE REGIME OF THE HIGH SEAS

1. INTRODUCTION[1]

The modern law of the high seas is largely set out in two multilateral treaties, one built substantially on and intended to replace the other, both setting out propositions in 'all states' form. The first is the Geneva Convention on the High Seas (GCHS),[2] the preamble of which asserts that its articles 'are generally declaratory of established principles of international law'. Its provisions were substantially co-opted by Part VII (High Seas) of the UN Convention on the Law of the Sea (UNCLOS),[3] which, despite the continued non-participation of some states, can for most purposes be taken to reflect the definitive position on the subject.[4]

The high seas traditionally encompassed all parts of the sea beyond the territorial sea and the internal waters of a state.[5] By contrast UNCLOS specifies that the provisions of Part VII 'apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State' (Article 86). This invites two observations. First, by

[1] Still of considerable authority are the Secretariat Memo of 14 July 1950, ILC *Ybk* 1950/II, 67 (believed to be the work of Gidel), and the reports of Special Rapporteur François: ILC *Ybk* 1950/II, 36; ILC *Ybk* 1951/II, 75; ILC *Ybk* 1952/II, 44; ILC *Ybk* 1954/II, 7. Further McDougal & Burke, *The Public Order of the Oceans* (1962) 730–1007; Bardonnet & Virally (eds), *Le Nouveau droit international de la mer* (1983); O'Connell, 2 *The International Law of the Sea* (1984) 792–830; Dupuy & Vignes (eds), *Traité du nouveau droit de la mer* (1985) 337–74; 3 Nordquist (1995); Churchill & Lowe, *The Law of the Sea* (3rd edn, 1999) 203–432; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005); Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009); Rothwell & Stephens, *The International Law of the Sea* (2010) ch 7.

[2] 29 April 1958, 450 UNTS 82.

[3] 10 December 1982, 1833 UNTS 3.

[4] There are currently 162 parties to UNCLOS, including the EU: www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm. The US is conspicuous by its continuing absence; it remains a party to the GCHS. Some US courts have declared UNCLOS to be reflective of customary international law: e.g. *Sarei v Rio Tinto*, 456 F.3d 1069, 1078 (9th Cir, 2006); but cf Mank (2007) *Utah LR* 1085.

[5] GCHS, Art 1.

no means all coastal states claim an Exclusive Economic Zone (EEZ). Secondly, many high seas freedoms are applicable in the EEZ (Articles 58, 86), and this is also the position in customary international law.[6]

The regime of the high seas does not apply to international lakes and land-locked seas, which are not open to free navigation except by special agreement. However, seas which are virtually land-locked may acquire the status of high seas: this is so of the Baltic and Black Seas. In such cases much turns on the maintenance of freedom of transit through the straits communicating with other large bodies of sea.[7] It is doubtful whether, apart from special agreements on access and other issues, the Baltic and Black Seas would have the status of open seas. The Caspian Sea does not.[8]

2. FREEDOM OF THE HIGH SEAS

(A) HISTORICAL AND JURISPRUDENTIAL ORIGINS

The modern law governing the high seas has its foundation in the rule that the high seas were not open to acquisition by occupation on the part of states individually or collectively: it was *res extra commercium* or *res communis*. The emergence of the rule is associated with the rise to dominance of maritime powers and the decline of the influence of states which had favoured closed seas. By the eighteenth century the position had changed completely. Dutch policies had supported freedom of navigation and fishing, and Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies.[9] After the accession of William of Orange to the English throne in 1689, English disputes with Holland over fisheries ceased. By the

[6] Cf the reference to freedom of navigation in the EEZ in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)*, ICJ Rep 1986 p 14, 111–12.

[7] On access to the Black Sea: the Montreux Convention Regarding the Regime of the Turkish Straits, 20 July 1936, 173 LNTS 214. This agreement in effect gave Turkey full control of the straits whilst guaranteeing the free passage of civilian vessels during peacetime. The International Court considered various questions of the delimitation of maritime boundaries in the Black Sea in *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, ICJ Reports 2009 p 61.

[8] Following the dissolution of the Soviet Union, the political and economic interests of the Caspian states (now Russia, Kazakhstan, Turkmenistan, Iran, and Azerbaijan) resulted in a prolonged and fruitless dispute over its status. Differing interpretations of the pre-existing Soviet–Iranian treaties led to a dispute over the international law applicable to the Caspian: e.g. Persia–Russian Socialist Federal Soviet Republic, Treaty of Friendship, 26 February 1921, 9 LNTS 383, Art 11; Iran–USSR, Treaty of Establishment, Commerce and Navigation, 27 August 1935, 176 LNTS 301, Arts 14, 15; Iran–USSR, Treaty of Commerce and Navigation, 25 March 1940, 144 BFSP 419 (referring to the Caspian as a 'Soviet–Iranian Sea'); Iran–USSR, Treaty concerning the Settlement of Frontier and Financial Questions, 2 December 1954, 451 UNTS 250. At the present time, the littoral states cannot agree on the overall legal status of the Caspian, though they appear to agree on sectoral division of the sea bed: Mehdiyoun (2000) 94 *AJIL* 179.

[9] *Mare Liberum sive de jure quod Batavis competit ad Indicana commercia dissertatio* (1609, tr Hakluyt 2004). *Mare Liberum* was a chapter of *De iure praedae*, which was not published until unearthed in the 19th century: *De iure praedae* (1868, tr Hamaker 2006). On its significance: Blom (ed), *Property, Piracy and*

late eighteenth century the British claim to sovereignty (the King's Chambers) was obsolete; insistence on the flag ceremony ended in 1805. Also by this time, the cannon-shot rule predominated and claims to large areas of sea faded away.[10] In the nineteenth century naval power and commercial interests dictated British, French, and American support for the principle of freedom of the seas. Whatever special interests the principle may have served historically, it commended itself as representing a sensible concept of shared use in circumstances where the level of technology did not threaten the maritime global commons.

Although the freedom of the high seas was described by Gidel as '*multi-forme et fugace*',[11] in truth it is a general principle of international law, a policy or concept from which particular rules may be inferred. But its application to specific problems often fails to give precise results. For example, weapons testing, which involves the temporary closure of large areas of ocean, is regarded by some as a legitimate use and by others as a serious denial of the freedom of the seas.[12] Gidel regards the concept as essentially negative, in the sense that states are prima facie obliged not to impede vessels under the flag of another state from going about their business on the high seas, and vice versa.[13] However, both the substance of the principle and its character as such give rise to certain presumptions which may aid in the resolution of particular problems, and some consideration of its positive content is, therefore, useful. Grotius stated two propositions: first, that the sea could not be the object of private or public appropriation; secondly, that the use of the high seas by one state would leave the medium available for use by another.[14] To these propositions it is necessary to add that the general principle applies in time of war or armed conflict as well as time of peace.[15] On two occasions the International Court has taken the opportunity to invoke 'the principle of the freedom of maritime communication'.[16]

(B) UNCLOS AND THE FREEDOM OF THE HIGH SEAS

UNCLOS Article 87 renders the principle of freedom of the high seas as follows:

Punishment (2009); Feenstra (ed), *Hugo Grotius Mare Liberum 1609–2009* (2009). Generally: Fulton, *The Sovereignty of the Sea* (1911).

[10] The extravagant Portuguese and Spanish pretensions had ended before this. Spain supported a six-mile limit in 1760. On earlier British claims and the general development of the concept of the territorial and high seas: Selden, *Mare Clausum* (1636); Churchill & Lowe (3rd edn, 1999) 71–5.

[11] Gidel, ILC *Ybk* 1950/II, 68.

[12] Churchill & Lowe (3rd edn, 1999) 206, 426; Gidel, in *Festschrift für Jean Spiropolous* (1957) 173; Oda & Owada (eds), *The Practice of Japan in International Law 1961–1970* (1982) 110–21 and the applications of Australia and New Zealand in *Nuclear Tests (Australia v France)*, ICJ Reports 1974 p 253; *Nuclear Tests (New Zealand v France)*, ICJ Reports 1974 p 457.

[13] Gidel, in *Festschrift Spiropolous* (1957) 691. Also: *SS Lotus* (1927) PCIJ Ser A No 10, 25.

[14] Grotius, *Mare Liberum* (1609, tr Hakluyt 2004) ch 5.

[15] On the modern law of maritime blockade: Guilfoyle (2010) 81 *BY* 9. Also: International Committee of the Red Cross, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994).

[16] *Corfu Channel (UK v Albania)*, ICJ Reports 1949 p 4, 22; *Nicaragua*, ICJ Reports 1986 p 14, 111–13.

1. The high seas are open to all States, whether coastal or land locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, for both coastal and land-locked States:
   (a) freedom of navigation;
   (b) freedom of overflight;
   (c) freedom to lay submarine cables and pipelines, subject to Part VI;
   (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
   (e) freedom of fishing, subject to the conditions laid down in section 2;
   (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard to the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities [on the sea bed and ocean floor and subsoil thereof].

Of the six freedoms enumerated in Article 87, only freedom of navigation, fishing, the laying of submarine cables and pipelines, and overflight were included in GCHS Article 2. These four freedoms are supported by arbitral jurisprudence and are inherent in many particular rules of law. Freedom of fishing is an assumption at the base of the decision in *Anglo-Norwegian Fisheries*[17] and the awards in the *Behring Sea Fisheries* arbitrations in 1893[18] and 1902.[19] Both arbitrations arose from attempts to enforce conservation measures on the high seas. In the former case the US had arrested Canadian sealers, and in the latter Russian vessels had arrested American sealers, with the object of preventing the depletion of seal stocks. Both awards rejected claims to enforce conservation measures against foreign vessels on the high seas. In the absence of a treaty, a coastal state could only apply such measures to vessels flying its own flag. Of the questions submitted for decision to the tribunal of 1893 the fifth concerned an issue of general law: 'Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?' The arbitrators found, by a majority, that 'the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit'.[20]

UNCLOS Article 86(1) places additional limitations upon high-seas freedoms as compared with the earlier law. The existing freedom to lay submarine pipes and cables

[17] *Fisheries (UK v Norway)*, ICJ Reports 1951 p 116; cf 187–9 (Judge Read, diss).

[18] (1893) 28 RIAA 263, 1 IELR 43.

[19] (1902) 9 RIAA 51. The seal fishery was later regulated by the Convention between Great Britain, Japan, Russia and the United States Requesting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean, 7 December 1911, 214 CTS 80.

[20] 28 RIAA 263, 267; 1 IELR 43, 53.

and the 'new' freedoms to construct artificial islands and other structures and to undertake scientific research are limited by UNCLOS Part VI, governing activities on the continental shelf. The freedom to fish is limited by Part VII, section 2, concerning the conservation and management of living resources on the high seas. In particular, Articles 117 and 118 condition the freedom to fish by requiring states parties to co-operate with other states in taking such measures for their respective nationals as may be necessary for the conservation and management of living resources on the high seas, to the extent of establishing subregional or regional fisheries management organizations to this end.[21]

UNCLOS Part XI is also relevant, regulating activities on the sea bed and ocean floor and its subsoil beyond the limits of national jurisdiction. It establishes the International Seabed Authority, an international organization through which the states parties to UNCLOS can organize and control seabed activities, with a particular focus on administering resources beneath the sea floor.[22]

The most significant modification to customary international law arising from by UNCLOS, however, is the emergence of the EEZ as a separate jurisdictional zone claimable by each coastal state as of right.[23] The concept of the EEZ only gained traction in the later part of the twentieth century;[24] it was not recognized in the third Geneva Convention of 1958, which instead endorsed a coastal state right of preference.[25] By 1974, however, when the Third UN Conference on the Law of the Sea (UNCLOS III) opened, it was clear that a majority of especially developing states supported the concept and that all that remained was its full articulation. UNCLOS Part V provides a set of rules which regulate EEZs, and, in Article 57, sets the outer limit of the EEZ at 200nm seaward of the coastal state's baselines: Article 56 provides for the rights, jurisdiction, and duties of the coastal state in its EEZ. As provided in Article 86, an EEZ does not form part of the high seas, though significant aspects of the regime of the high seas apply to the zone. This is seen primarily in the wording of Article 58(1), which sets out the rights and duties of other states in an EEZ, and preserves for them the freedoms of navigation, overflight, the laying of submarine cables and pipelines, and all other internationally lawful uses of the seas relating to these freedoms. Furthermore, Article 58(2) extends the application of Articles 88 to 115 (the bulk of

[21] On these organizations: Young, *Trading Fish, Saving Fish* (2011) 38–46.

[22] UNCLOS, Arts 156–7.

[23] On the evolution of the EEZ: Attard, *The Exclusive Economic Zone in International Law* (1985); Orrego Vicuña, *The Exclusive Economic Zone* (1989); Churchill & Lowe (3rd edn, 1999) ch 9; Rothwell & Stephens (2010) ch 4.

[24] The first claim to an exclusive fisheries zone beyond 12nm was made by Chile and Peru in 1947, mutually recognized in the Santiago Declaration on the Maritime Zone, 18 August 1952, 1006 UNTS 325 (Chile, Peru, Ecuador). Currently *sub iudice*: *Maritime Dispute (Peru v Chile)* (2008, pending).

[25] Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 UNTS 285. This was the least successful of the four Geneva Conventions, having at its height only 38 parties. For the state of customary international law after 1958: *Fisheries Jurisdiction (UK v Iceland)*, ICJ Reports 1974 p 3, 24, 29; *(Federal Republic of Germany v Iceland)*, ICJ Reports 1974 p 175, 196, where the Court expressed matters in terms of opposability rather than validity of claims.

the general provisions regulating the high seas, with the exception of the additional freedoms of Article 87(1)) to the EEZ to the extent they do not conflict with the provisions of Part V, creating in the process substantial overlap between the two fields.

(C) JURISDICTIONAL ASPECTS OF THE HIGH SEAS REGIME

Although the basal principle of the law of the high seas is that one state cannot interfere with vessels sailing under the flag of another without the consent of the latter, UNCLOS Article 110 provides a number of exceptions, conferring power to stop, search, and even seize foreign vessels as an exercise of a state's jurisdiction to enforce in certain cases.[26] In other cases the parties are obliged only to incorporate the relevant prohibition in their national legislation, and enforcement is left to national courts in respect of the flag vessels and nationals of the forum state. The system of enforcement, whether specified by treaty or custom, rests on co-operation under international law and notably under the national laws of states possessing a maritime flag. Every state is under a duty to fix the conditions for the grant of nationality, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly.[27]

Insofar as jurisdiction is concerned, UNCLOS Part VII generally reflects customary international law, providing in Articles 88 and 89 respectively that the high seas are reserved for peaceful purposes[28] and that no state may subject any part of the high seas to its sovereignty. Article 90 grants every state, coastal or land locked, the right to sail ships flying its flag on the high seas. Article 92(1) provides that ships shall sail under the flag of one state only; subject to certain exceptions, ships are subject to the exclusive jurisdiction of the flag state whilst on the high seas. Article 94 fixes the obligations of states with respect to vessels flying its flag. The right to enjoy the protection of the law balances the responsibility of the flag state for the behaviour of its ships.[29]

A ship without nationality[30] loses the protection of the law with respect to boarding (and potentially seizure) on the high seas.[31] However, such ships are not outside the law altogether; their occupants are protected by elementary considerations of humanity.

[26] To be distinguished from a state's jurisdiction to prescribe, which is not regulated by UNCLOS but by the general law: Guilfoyle (2009) 7–10; and see chapter 21.

[27] GCHS, Art 5; UNCLOS, Art 91; Churchill & Lowe (3rd edn, 1999) 257–63.

[28] This has by no means demilitarized the oceans: Oxman (1983–84) 24 *Va JIL* 809, 830–1.

[29] On the nationality of ships: generally *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, ICJ Reports 1960 p 150; *M/V Saiga (No 2) (St Vincent and the Grenadines v Guinea)* (1999) 120 ILR 143. Also: O'Keefe (2000) 59 *CLJ* 428; Simmonds (1963) 12 *ICLQ* 56. Further: chapter 24.

[30] To which will be assimilated a vessel flying a flag without authority of the flag state and a ship sailing under the flags of two or more states, using them according to convenience: GCHS, Art 6.2; UNCLOS, Art 92(2); Churchill & Lowe (3rd edn, 1999) 213–14.

[31] *Naim Molvan v AG for Palestine* [1948] AC 351, 369; François, ILC *Ybk* 1950/II, 36, 38; but cf UNCLOS, Art 110(1)(d), which makes reference only to boarding, not seizure, with reference to ships without nationality: Guilfoyle (2009) 16–18. On the status of derelict vessels: *Costa Rica Packet* (1897), in Moore, 5 *Int Arb* 808.

The seizure of ships by insurgents has created some difficult problems, and the issues have been obscured by a tendency for courts to describe ships under the control of insurgents as pirates. Such ships, it seems, should not be interfered with provided they do not attempt to exercise belligerent rights against foreign vessels and the lives of any 'neutral' aliens on board are not threatened.

(D) PIRACY[32]

Piracy is the principal exception to the freedom of the high seas, and one that has attained a new significance. The dissenting opinion of Judge Moore in the *Lotus* provides a useful starting-point. He said that

> in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say 'piracy by law of nations', because the municipal laws of many States denominate and punish as 'piracy' numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations. Piracy by law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.[33]

The term 'universal jurisdiction' refers to the jurisdiction of a state to prescribe conduct occurring extraterritorially without a territorial, national or other internationally recognized nexus, as well as the capacity to enforce that jurisdiction on the high seas.[34]

(i) The definition of piracy

The definition of piracy was historically a source of controversy,[35] but UNCLOS Article 101 (reflecting almost verbatim GCHS Article 15) represents the existing

[32] Guilfoyle (2009) 26–74; Shearer, 'Piracy' (2010) *MPEPIL*. Also: Gidel, 1 *Le Droit international public de la mer* (1932) 303–55; Harvard Research in International Law, Draft Convention on Piracy (1932) 26 *AJIL Supp* 739; Secretariat Memorandum, ILC *Ybk* 1950/II, 70; Johnson (1957) 43 *GST* 63 (a useful mid-20th century signpost); McNair, 1 *Opinions* 265–81; Shubber (1968–69) 43 *BY* 193 (distinguishing aircraft hijacking from piracy); 2 O'Connell (1984) 967–83; Rubin, *The Law of Piracy* (1988).

[33] (1927) PCIJ Ser A No 10, 70.

[34] Further: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Reports 2002 p 3, 36–44 (Judge Guillaume), 53 (Judge Oda, diss), 56–7 (Judge Ranjeva), 62 (Judge Koroma), 75, 79–80 (Judges Higgins, Kooijmans & Buergenthal); O'Keefe (2002) 2 *JICJ* 735.

[35] Note that definitions by municipal courts are often out of date, and may involve an amalgam of municipal rules and international law, or the narrow issue of the meaning of 'piracy' in an insurance policy. The treatment in 2 Oppenheim, 610–14, presents an unusually wide conception of piracy. For judicial essays in definition: *United States v Smith*, 18 US 153, 163–80 (1820); *The Serhassan Pirates* (1845) 2 Wm Rob 354; *The Magellan Pirates* (1853) 1 Sp Ecc & Ad 81; *Republic of Bolivia v Indemnity Mutual Marine Assurance Co* [1909] KB 785; *In re Piracy Jure Gentium* [1934] AC 586; *Athens Maritime Enterprises Corporation v Hellenic*

customary law—or rather, custom has come to reflect it.[36] Article 101 provides:

1. Piracy consists of any of the following acts:

   (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or private aircraft, and directed:

      (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

      (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction or any State;

   (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

   (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The only innovation here as compared with the pre-1958 understanding of piracy is the reference to aircraft, a sensible application of analogy.[37] The essential feature is that the acts must be committed for private ends.[38] Piracy cannot be committed by warships or other government ships, or government aircraft, except where the crew 'has mutinied and taken control of the ship or aircraft' (Article 102). Acts committed on board a ship by the crew and directed against the ship itself or against persons or property on the ship are also not within the definition.[39]

Article 101(1) confines piracy to acts on the high seas or 'in a place outside the territorial jurisdiction of any State'. An illegal act of violence or depredation committed against a ship whilst in the territorial sea of a state is not piracy; it is armed robbery, murder or another crime under the municipal law of the territorial state committed at sea.[40]

Article 105 (replicating GCHS Article 19) provides:

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 taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Mutual War Risks Association (Bermuda) Ltd [1983] QB 647; *Castle John and Nederlandse Stichting Sirius v NV Mabeco & NV Parfin* (1986) 77 ILR 537.

[36] Guilfoyle (2009) 26–79. Also: the ILC draft and comment: ILC *Ybk* 1956/II, 282.

[37] The ILC draft did not refer to attacks by aircraft on aircraft. Further: Tokyo Convention Act 1967 (UK), s4 and Schedule, subsequently repealed and replaced by the Merchant Shipping and Maritime Security Act 1997 (UK), s26(1), (3), Schedule 5, which incorporates the UNCLOS, Art 101 definition of piracy and its associated reference to aircraft.

[38] Guilfoyle (2009) 32–42.

[39] Cf 2 Oppenheim, 751; Hall, *International Law* (8th edn, 1924) 314. Further: 2 O'Connell (1984) 970–3.

[40] Guilfoyle (2009) 42–5.

The second part of this provision reflects the maxim *pirata non mutat dominium*: the rightful owner is not deprived of his title by virtue of acts of piracy relating to his goods.[41] Seizures on account of piracy may only be carried out by warships or military aircraft, or other government ships or aircraft authorized to that effect (Article 107). Capture may occur in other circumstances as a consequence of acts of self-defence by an intended victim of piratical action.[42]

Piracy has often been considered to be something of a historical curiosity.[43] In the early part of the twenty-first century, however, interference by pirates operating from bases in Somalia with commercial shipping in the Gulf of Aden has become a matter of significant international alarm.[44] The human and economic cost of Somali piracy has resulted in a co-ordinated international effort to combat it. Concerns raised before the International Maritime Organisation (IMO) led to a Memorandum of Understanding to combat the problem on an African level.[45] UN Security Council Resolution 1816 utilized the powers of Chapter VII of the UN Charter to authorize foreign military incursions by 'co-operating states' into Somali territorial waters over an initial six-month period.[46] UN Security Council Resolution 1851 went further still, authorizing the use of military force to prosecute land-based operations against pirates.[47] A number of those detained for piracy have been handed over for trial in neighbouring states, notably Kenya.[48]

(ii) Other illegal acts committed on the high seas

The use of force against foreign vessels on the high seas may be unlawful and yet may not fall within the definition of piracy. From time to time, however, tribunals, governments, and writers have assimilated certain categories of acts to piracy,[49] though the definition in UNCLOS Article 101 would now appear to preclude any such extension. The subject as a whole is dominated by the problem of keeping order beyond the territorial jurisdiction of states and, in particular, of maintaining legal controls in respect of those not identifiable with a state on which responsibility may be placed. Thus Hall

[41] Wortley (1947) 24 *BY* 258.

[42] Further: ILC *Ybk* 1956/II, 283.

[43] E.g. Dickinson (1924–25) 38 *Harv LR* 334.

[44] Guilfoyle (2009) 61–74. Concern also arose in relation to pirate activity off the coast of South East Asia, South America, and Africa, but did not result in much attention from the SC: Churchill & Lowe (3rd edn, 1999) 209. Further: IMO, Acts of Piracy and Armed Robbery against Ships (MSC/Circ.4 – Series), available at www.imo.org/blast/mainframe.asp?topic_id=334.

[45] Guilfoyle (2009) 72–4; Roach (2010) 104 *AJIL* 397, 409–11.

[46] SC Res 1816 (2008); reenacted in SC Res (2008) and annually since that time. For a useful summary of the efforts of the IMO and Security Council to combat piracy, Guilfoyle (2008) 57 *ICLQ* 690.

[47] SC Res 1851 (2008).

[48] Kenya has concluded Memoranda of Understanding with the US and UK to accept and try piracy suspects apprehended off the Gulf of Aden. Universal prescriptive jurisdiction over non-nationals captured on the high seas is established through the provisions of the Kenyan Merchant Shipping Act, Act No 4 of 2009, Part XVI: generally Gathii (2010) 104 *AJIL* 416. Also: Guilfoyle (2008) 57 *ICLQ* 690; Roach (2010) 104 *AJIL* 397; Kontorovoch & Art (2010) 104 *AJIL* 436; UKMIL (2010) 81 *BY* 453, 675–87.

[49] E.g. the Nyon Agreement, 14 September 1937, 181 LNTS 137.

considered piracy to include acts done 'by persons not acting under the authority of any politically organized community, notwithstanding that the objects of the persons so acting may be professedly political'.[50]

(iii) Actions by insurgents at sea

Ships controlled by insurgents may not, without recognition of belligerency, exercise belligerent rights against the shipping of other states. Forcible interference of this kind is unauthorized by law and may be resisted. It is very doubtful that it is correct to characterize such acts as piracy:[51] UNCLOS Article 101(a) covers only acts committed 'for private ends'.[52] However, it may be lawful to punish acts constituting murder, robbery, and so on—carried out *ultra vires* by insurgents.[53] Opinions which favour the treatment of insurgents as such as 'pirates' are surely incorrect,[54] save perhaps in circumstances where insurgents attack foreign flagged private vessels in international waters, a conclusion reached not only from the plain words of the definition in Article 101, but from the general prohibition in international humanitarian law on attacks upon civilians.[55]

(iv) Acts committed with the authority of a lawful government

Illegal attacks on or seizures of innocent merchant ships by warships or government ships result in the responsibility of the flag state, but the offending ships do not become pirate ships. This was the basis for the older practice of privateering, in which a private ship authorized by a belligerent to act in its service, was not treated as piratical, even if acts of violence were committed against neutral ships. In the latter case the belligerent was responsible as principal.[56]

Guilfoyle's conclusion is persuasive:

The test of piracy lies not in the pirate's subjective motivation, but in the lack of public sanction for his or her acts. This is why vessels on military or government service, absent the revolt of the crew, cannot, by definition, be pirate vessels. To claim that a political motive can exclude an act from the definition of piracy is to mistake the applicable concept of 'public'

[50] Hall (8th edn, 1924) 311, 314; Johnson (1957) 43 *GST* 63, 77–80.

[51] For the view doubted: Hall (8th edn, 1924) 314, 318–19; 2 Oppenheim, 751–2; McNair, 1 *Opinions* 274–80; Lauterpacht (1939) 46 *RGDIP* 513; Secretariat Memorandum, ILC *Ybk* 1950/II, 70. Further: van Zwanenberg (1961) 10 *ICLQ* 798; Green (1961) 37 *BY* 496; Halberstam (1988) 82 *AJIL* 269, 282; Garmon (2002) 27 *Tul Mar LJ* 257, 265 (expanding the definition to terrorism).

[52] A limitation which has existed in the law since the preparation of the 1932 Harvard Draft Convention on Piracy (1932) 26 *AJIL Supp* 739. Further: Guilfoyle (2009) 32–42. This question was brought to a head in relation to the events surrounding the *Santa Maria* and the *Achille Lauro*, and the response was to create a new offence, not to extend the definition of piracy.

[53] Convention on the Rights and Duties of States in the Event of Civil Strife, 20 February 1928, 134 LNTS 45, Arts 1–2.

[54] E.g. *Ambrose Light* (1885) 25 F 408.

[55] Guilfoyle (2009) 35.

[56] Privateering was abolished by the Declaration of Paris, 16 April 1856, 61 BFSP 155.

and 'private' acts. The essence of a piratical act is that it neither raises 'the immunity which pertains to state or governmental acts' nor engages state responsibility.[57]

(v) Politically motivated acts by organized groups

Harassing operations by organized groups deploying forces on the high seas may have political objectives,[58] and yet be neither connected with insurgency against a particular government nor performed by agents of a lawful government. Ships threatened by such activities may be protected, and yet the aggressors not be regarded as pirates. However certain municipal courts have demonstrated flexibility in attributing private ends to prima facie political acts.[59]

(vi) Unrestricted submarine warfare

The term 'piracy' has been employed on occasion to describe acts by ships acting on the orders of a recognized government 'which are in gross breach of International Law and which show a criminal disregard of human life'.[60] By the 1937 Nyon Agreement[61] eight states agreed on collective measures 'against piratical acts by submarines' with regard to attacks on merchant ships in the Mediterranean during the Spanish Civil War, in effect creating an early species of naval exclusion zone.[62] The acts were stated to be 'acts contrary to the most elementary dictates of humanity which should be justly treated as acts of piracy'. The word 'piracy', however, was used purely for rhetorical effect and nothing in the Convention dealt with individual criminal liability.

(E) OTHER EXCEPTIONS TO THE PRINCIPLE OF THE FREEDOM OF THE HIGH SEAS

(i) The right of approach in time of peace[63]

To maintain order on the high seas, it is necessary to provide for an approach by warships in order to verify the identity and nationality of ships. Such a right of approach

[57] Guilfoyle (2009) 36–7, citing Harvard Research in International Law: Draft Convention on Piracy, (1932) 26 *AJIL Supp* 739, 798.

[58] E.g. the activities of the NGO Greenpeace in relation to French nuclear testing in the South Pacific, and in more recent times, the tactics of the anti-whaling organization Sea Shepherd in relation to Japanese whaling in the Southern Ocean: Roeschke (2009) 20 *Villanova ELJ* 99.

[59] E.g. the Belgian Court of Cassation in *Castle John and Nederlandse Stichting Sirius v NV Mabeco & NV Parfin* (1986) 77 ILR 537, which held that a Greenpeace vessel which attacked an allegedly polluting Dutch ship committed an act of piracy as the act in question was not political in character, 'but in support of a political point of view'. Further: Guilfoyle (2009) 36–7; Geiß & Petrig, *Piracy and Armed Robbery at Sea* (2010) 61; Klein, *Maritime Security and the Law of the Sea* (2011) 119.

[60] 2 Oppenheim, 750.

[61] 14 September 1937, 181 LNTS 137.

[62] Guilfoyle (2009) 37.

[63] 2 Oppenheim, 736–7; 1 Gidel (1932) 299; Colombos, *The International Law of the Sea* (6th edn, 1967) 311; François, First Report, ILC *Ybk* 1950/II, 41; Second Report, ILC *Ybk* 1951/II, 81; 2 O'Connell (1984) 802–3. Further: *United States v Postal*, 589 F.2d 862 (5th Cir, 1979); *United States v Monroy*, 614 F.2d 61 (5th Cir, 1980).

(*droit d'approche; enquéte ou vérification du pavillon; reconnaissance*) is recognized by customary law, though it is not mentioned expressly in UNCLOS Part VII. The right of approach exists in all circumstances, but does not extend to the actual examination of papers or seizure of the vessel.

(ii) Visit, search, and seizure in time of peace[64]

There is no general power of police exercisable over foreign merchant ships on the high seas, and the occasions on which ships can be visited and seized by warships in time of peace are limited.[65] Early British and American jurisprudence refused to admit a right of visit in the case of ships suspected of taking part in the slave-trade,[66] and, apart from piracy, the right could only exist on the basis of treaty or if a ship refused to show its flag.

The legal regime of high-seas freedom has met with a number of threats. Apart from attempts to extend the concept of piracy, claims to a right of self-defence on the high seas constitute another source of instability. A further source of confusion lies in the definition of the right of approach or verification of flag. It was realized that the right of visit could be abused and that there must be reasonable ground for suspicion, for example a refusal by a ship to hoist a flag.[67]

This has been codified in UNCLOS Article 110,[68] which provides as follows:

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

(a) the ship is engaged in piracy;

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

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

(d) the ship is without nationality;

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

[64] Generally: Guilfoyle (2009); Churchill & Lowe (3rd edn, 1999) 208–20; McNair, 1 *Opinions* 229–45; Colombos (6th edn, 1967) 310–14; 1 Gidel (1932) 288–300; McDougal & Burke (1962) 885–93; 2 O'Connell (1984) 757, 801–8, 1114–15. Also: *United States v Cadena*, 585 F.2d 1252 (5th Cir, 1978).

[65] McNair, 1 *Opinions* 233. For the contemporaneous US position, see 2 Hackworth 659–65; Moore, 2 *Digest* 987–1001.

[66] Cf the decisions of Lord Stowell in *Le Louis* (1817) 2 Dods 210; and the US Supreme Court in *Antelope* (1825) 10 Wheaton 66. Further: Moore, 2 *Digest* 914–18.

[67] E.g Hall (8th edn, 1924) 317–18 ('when weighty reasons exist for suspecting'); 1 Gidel (1932) 299; McNair, 1 *Opinions* 233, 240 ('vehement suspicion of Piracy'); François, ILC *Ybk* 1951/II, 81–3; Colombos (6th edn, 1967) 312–13; Churchill & Lowe (3rd edn, 1999) 210.

[68] Itself a descendent of GCHS, Art 22(1). UNCLOS, Art 110, however, provides for the right of visit in cases of unauthorized broadcast and statelessness, though the latter arguably already existed as a matter of custom: *Molvan v AG for Palestine* [1948] AC 351, 369.

The modalities of the exercise of jurisdiction over foreign ships on the high seas are spelt out in Article 110(2) to (5).

Despite the broad range of circumstances in which a warship may exercise the right of *visit* on the high seas, UNCLOS appears to limit the circumstances in which *seizure* may occur, expressly providing for such a right only with respect to pirate ships under Article 105 and ships engaged in unauthorized broadcasting under Article 109(4). A right of search and seizure with respect to the slave trade operates under a separate *sui generis* set of treaty obligations.[69] In an even more restrictive vein, UNCLOS Article 108(1) provides that states must co-operate in the suppression of the trafficking of narcotics and illicit drugs on the high seas, but does not expressly provide a right of seizure, or even a right of visit.

The matter is most complicated when considering stateless vessels. Article 110(1)(d) provides a right of visit but is silent on seizure. Guilfoyle identifies two schools of practice.[70] The first, adopted by the US and in certain circumstances the UK, is that a stateless vessel enjoys the protection of no state, and as such may be subject to the jurisdiction of any.[71] The second is that some further jurisdictional nexus is required to convert a right of visit into a right of seizure, a position more consistent with existing treaty practice.

The act of boarding, even when 'reasonable ground' for boarding exists, is a privilege, and under UNCLOS Article 107, if no act justifying the suspicions has been committed by the ship boarded, there is strict liability, and the flag state of the warship must compensate for 'any loss or damage'.[72] In its commentary the ILC stated that the severe penalty 'seems justified in order to prevent the right of visit being abused'.[73]

(iii) The right of self-defence

The claim to visit and seize vessels on the high seas may take the form of a 'security zone', a 'defence zone', or a 'neutrality zone'; the legality of these zones has been considered in chapter 11. Quite apart from claims to contiguous and other zones, however, some states have asserted a right to detain vessels on the ground of security or self-defence.[74] Nevertheless the legal basis of such a right, in the absence of an attack on other shipping by the vessel sought to be detained, is lacking. In the present context

[69] On maritime aspects of the slave trade: Guilfoyle (2009) 75–7.

[70] Ibid, 17–18. Also: McDougal & Burke (1966) 767, 881ff.

[71] *United States v Cortes*, 588 F.2d 106, 110 (5th Cir, 1979); *United States v Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir, 1982). Also: *Molvan v AG for Palestine* [1948] AC 351, 369.

[72] Cf *Marianna Flora* (1826) 11 Wheaton 1; Moore, 2 *Digest* 886.

[73] ILC *Ybk* 1956/II, 284.

[74] E.g. Hall (8th edn, 1924) 328; Colombos (6th edn, 1967) 314–15. Also: ILC *Ybk* 1950/II, 61; *United States v F/V Taiyo Maru*, 395 F.Supp 413 (D Me, 1975); *United States v Gonzales*, 776 F.2d 931 (11th Cir, 1985) (purporting to enable the extension of the contiguous zone for security reasons). Further Churchill & Lowe (3rd edn, 1999) 216–18. Generally on the use of force under this title: Brownlie, *Use of Force* (1963) 305–8. Also: chapter 33.

it is significant that the ILC, and the majority of states, do not accept the legality of security zones and that states are unlikely to regard an ambulatory exercise of a right of (anticipatory) self-defence with any favour.[75] Similarly, UNCLOS Part VII contains no express right of self-defence.

(iv) Blockade and contraband

In time of war the exercise of belligerent rights will be justified and may take the form of a blockade of the enemy's ports and coast. Enforcement may take place on the high seas adjoining the coast, and neutral merchant ships may be confiscated if they attempt to break the blockade. The right of visit, search, and capture may be exercised against neutral ships or aircraft carrying contraband or engaged in acts of non-neutral service.[76] Self-evidently, a blockade which is illegal under international law will not support a right of visit, search, and capture. A controversial example of the right of visit, search, and capture in order to preserve the integrity of a blockade occurred in relation to the *Mavi Marmara*,[77] a passenger vessel carrying humanitarian aid and construction materials which attempted to breach the Israeli–Egyptian blockade of the Gaza Strip in May 2010. The matter was complicated in that Hamas, the target of the blockade, was a non-state actor and the blockade was in aid of a non-international armed conflict.[78] Whilst still on the high seas, the flotilla was intercepted by the Israeli Navy, and boarded by Israeli commandos, resulting in the deaths of nine civilians and injury to several dozen more. Several Israeli soldiers were also injured. An investigation by a UN Human Rights Commission fact-finding mission concluded that as the blockade itself was illegal under international law due to the humanitarian crisis that had developed in Gaza, so too was Israel's visit, search, and capture of the *Mavi Marmara*[79] and that, even if the blockade could be considered legal, the disproportionate force exercised by Israeli forces rendered its exercise of the right unlawful.[80] In contrast, the Palmer Report, commissioned by the United Nations Secretary-General, concluded that the blockade was lawful but the use of force excessive.[81]

[75] ILC *Ybk* 1956/II, 284. Also the Secretariat Memorandum, ILC *Ybk* 1950/II, 71.

[76] ICRC, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994) §§67–71 (purporting to codify custom).

[77] Generally: Guilfoyle (2010) 81 *BY* 9.

[78] Limited precedents include the Confederate States of America during the US Civil War: Guilfoyle (2010) 81 *BY* 9, 21.

[79] A/HRC/15/21, 27 September 2010, §261. Also: Guilfoyle (2010) 81 *BY* 9.

[80] A/HRC/15/21, 27 September 2010, §264.

[81] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, 3 September 2011, available at www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf. The Israeli inquiry, The Public Commission to Examine the Maritime Incident of 30 May 2010, 23 January 2011, available at www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf exonerated Israeli forces entirely.

(v) The right of hot pursuit[82]

Although a state may not, with certain exceptions, enforce its laws on the high seas, it may continue on the high seas a pursuit validly commenced in the territorial sea or contiguous zone (or by extension the EEZ) and if it apprehends the suspect vessel, may arrest it on the high seas. The right of hot pursuit, and its rationale, was expressed by Hall as follows:

> The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.[83]

This statement remains a neat encapsulation of the concept, despite its considerable geographical extension beyond the territorial sea.

In its present form hot pursuit had appeared in Anglo-American practice in the first half of the nineteenth century, but it was not until the Hague Codification Conference of 1930 that there was sufficient evidence of general recognition by states. This provided the basis for the draft article adopted by the ILC,[84] which, with some amendment, became GCHS Article 23, now UNCLOS Article 111(1).[85] Hot pursuit may be undertaken when the authorities of the coastal state have good reason to believe that a foreign ship has violated applicable laws and regulations of that state. Such pursuit must be commenced when the ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing state and may only be continued outside that zone if the pursuit has not been interrupted.

Article 111(2) applies the right of hot pursuit *mutatis mutandis* to violations of the laws of the territorial state in the EEZ or the continental shelf, including safety zones around continental shelf installations. Under Article 111(3) the right of hot pursuit is exhausted as soon as the ship pursued enters the territorial waters of another state, whether or not the flag state. Article 111(4) stipulates the conditions under which hot pursuit may commence, requiring the pursuing ship to confirm that the pursued ship—or any craft using the pursued ship as a mother ship—is within its territorial waters, contiguous zone or EEZ before giving chase. It further requires that a visual or auditory signal to stop (the proverbial 'shot across the bow') is given prior to commencing pursuit.[86] Under Article 111(5) only military or clearly identifiable government ships or aircraft are capable of giving hot pursuit. Under Article 111(8), if it turns out

[82] McDougal & Burke (1962) 893–923; 2 Hackworth, 700–9; François, First Report, ILC *Ybk* 1950/II, 43–5; Second Report, ILC *Ybk* 1951/II, 89–91; Bowett, *Self-Defence in International Law* (1958) 82–6; McNair, 1 *Opinions* 253–5; 2 O'Connell (1984) 1075–93; Gilmore (1995) 44 *ICLQ* 949. The question of hot pursuit was among the issues raised by *I'm Alone* (1935) 3 RIAA 1609. Also: Fitzmaurice (1936) 17 *BY* 82. Irregularities in hot pursuit do not affect ITLOS's prompt release jurisdiction: *The Volga (Russia v Australia) (Prompt Release)* (2002) 126 ILR 433 (failure to warn within 200nm).

[83] Hall, *International Law* (1st edn, 1880) 309.

[84] ILC *Ybk* 1956/II, 284–5.

[85] Itself derived from GCHS, Art 23.

[86] There is a historical controversy as to whether a signal by radio meets this criterion: Klein (2011) 110; cf ILC *Ybk* 1956/II, 285.

that the right of hot pursuit has been exercised mistakenly, the ship and its owners must be compensated for loss or damage which may have resulted.

(F) RESTRICTIONS BY TREATY

Treaties conferring powers of visit and capture beyond those permitted by customary law relate to a variety of subject-matter. Great Britain was a party to numerous bilateral treaties after 1815 concerning repression of the slave-trade; in 1841 the Treaty of London[87] provided that warships with special warrants could search, detain, or send for trial suspected merchant ships flying the flags of contracting states. The General Act for the Repression of the Slave Trade of 1890 provided for a limited right of search of suspected vessels in a defined zone.[88] The General Act was in major part abrogated as between parties to the Treaty of St Germain-en-Laye,[89] and the Slavery Conventions of 1926[90] and 1956[91] do not provide for visit, search, and seizure: a right of visit is provided for, however, in GCHS Article 23 and UNCLOS Article 110. Mutual powers of visit and search are conferred by bilateral treaties the parties to which are concerned to conserve fish stocks, to control smuggling, or to repress certain aspects of the trade in arms.[92]

The Convention for the Protection of Submarine Cables of 1884, Article 10, confers the right to stop and verify the nationality of merchant ships suspected of breach of the treaty.[93] GCHS Articles 26 to 29 do not refer to such a right, but it was not intended to supersede the Convention of 1884; the same is true of UNCLOS Article 311(2). States have also been willing to agree by treaty on the mutual exercise of hot pursuit.[94]

3. JURISDICTION OVER SHIPS ON THE HIGH SEAS

(A) THE DECISION IN THE *LOTUS*

UNCLOS affirms the general principle enunciated by the Permanent Court in the *Lotus*:

Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any

[87] 20 December 1841, 92 CTS 437 (Austria, Great Britain, Prussia, and Russia. Belgium acceded. France signed but did not ratify).

[88] 2 July 1890, 173 CTS 293.

[89] Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes, 10 September 1919, 226 CTS 186.

[90] Convention to Suppress the Slave Trade and Slavery, 25 September 1926, 60 LNTS 254.

[91] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 226 UNTS 3.

[92] Guilfoyle (2009) chs 6, 9.

[93] 14 March 1884, 163 CTS 391. Also: McDougal & Burke (1962) 843; 4 Whiteman 727–39.

[94] E.g. Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, 9 July 1992, 32 ILM 136.

territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.[95]

Thus UNCLOS Article 92(1) provides that '[s]hips 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'.[96] Article 97(1) provides:

In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

This provision negatives the decision in the Lotus that there could be concurrent penal jurisdiction in respect of collisions on the high seas. In its commentary on the relevant draft article, the ILC commented:

This judgement, which was carried by the President's casting vote after an equal vote of six to six, was very strongly criticized and caused serious disquiet in international maritime circles. A diplomatic conference held at Brussels in 1952 disagreed with the conclusions of the judgement. The Commission concurred ... It did so with the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation.[97]

(B) JURISDICTION OVER OIL POLLUTION CASUALTIES

States may claim special zones of jurisdiction over areas of high seas adjacent to their coasts in order to regulate activities of various kinds: the contiguous zone is an example. But new problems requiring regulation may arise. When the *Torrey Canyon*, registered in Liberia, ran aground off the Cornish coast in 1967 and lost some 60,000 tons of oil, the British government ordered that the wreck be bombed, after salvage attempts had failed. Even so, British and French coasts received serious pollution. Such remedial action may be justified on the ground of necessity (but not of self-defence).[98] This led to the conclusion of an International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.[99] The use of protective measures is now recognized by UNCLOS Article 221(1), which preserves the right of states 'to

[95] (1927) PCIJ Ser A No 10, 25.

[96] Also: GCHS, Art 6(1).

[97] ILC *Ybk* 1956/II, 281, citing the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collisions and Other Incidents of Navigation, 10 May 1952, 439 UNTS 233.

[98] Brown (1968) 21 *CLP* 113; Queneudec (1968) *AFDI* 701; Caflisch (1972) 8 *RBDI* 7; 2 O'Connell (1984) 997–1012; Churchill & Lowe (3rd edn, 1999) 328–96. On necessity as a defence: chapter 25.

[99] 29 November 1969, 970 UNTS 211.

take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coast line or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty ... which may reasonably be expected to result in major harmful consequences'.[100]

(C) UNAUTHORIZED BROADCASTING[101]

The Council of Europe sponsored the conclusion in 1965 of an Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories.[102] The Convention focuses on acts supporting 'pirate' broadcasting committed within the national jurisdiction of states parties and does not authorize interference with foreign ships, aircraft, or nationals. By contrast UNCLOS provides for broad bases of jurisdiction and powers of arrest in respect of 'the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls' (Articles 109 to 110).[103]

(D) DRUG INTERDICTION

In respect of certain varieties of transnational crime, sui generis treaty regimes provide states with high-seas boarding rights.[104] One of these is the interdiction of drug traffickers.[105] Whilst UNCLOS Article 27(1)(d) provides a coastal state with jurisdiction over a foreign ship suspected of carrying illicit narcotics within its territorial sea, waiting for drug runners to enter the territorial sea before exercising a right of arrest may not be practicable. Article 108(1) provides a minor exhortation to states to co-operate in suppressing the trafficking of illicit narcotics on the high seas. Article 108(2), however, provides only that any state 'with reasonable grounds for believing' that a vessel sailing under *its own* flag is engaged in the trafficking of illicit narcotics 'may request' the co-operation of other states, leaving unaddressed the (much more likely) situation in which a state suspects a ship sailing under the flag of *another* state to be carrying such substances.[106]

[100] Generally: Boyle (1985) 79 *AJIL* 347; Brubacker, *Marine Pollution and International Law* (1993); Churchill & Lowe (3rd edn, 1999) ch 15. In protection of the marine environment: chapter 15.

[101] On 'pirate' radio: François (1965) 12 *NILR* 113; Bos (1965) 12 *NILR* 337; Woodliffe (1965) 12 *NILR* 365; 2 O'Connell (1984) 814–19; Guilfoyle (2009) 170–9.

[102] 2 January 1965, 4 ILM 115.

[103] UNCLOS, Article 109 introduces to the high seas regime the offence of unauthorized broadcasting from the high seas, and grants the capacity to arrest, seize, and prosecute to states affected. Further *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (CA). With the end of state monopolies on broadcasting the problem of commercial 'pirate' radio stations has not recurred.

[104] Churchill & Lowe (3rd edn, 1999) 218–19.

[105] Generally: Guilfoyle (2009) ch 5.

[106] Gilmore (1991) 15 *Mar Policy* 183, 185.

In this respect UNCLOS is supplemented by the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Narcotics Convention).[107] Article 17(1) requires states parties to co-operate to the fullest extent possible to suppress the carriage of drugs by sea, in conformity with the law of the sea.[108] Article 17(2) and (3) provides that a party with 'reasonable grounds' to suspect that a vessel flying the flag of another party and 'exercising freedom of navigation' may request 'confirmation of registry and...authorization to take appropriate measures'.[109] If consent is granted, Article 17(4) provides that the flag state may authorize the inquiring state to board and search the vessel and take appropriate action.[110] The inclusion of the words 'exercising freedom of navigation' in Article 17(3) arguably encompasses all vessels outside territorial waters, including in the EEZ.[111]

(E) MIGRANT SMUGGLING

Migrant smuggling is the unlawful movement of persons with a view to evading immigration control;[112] it frequently involves maritime transport often in hazardous conditions. As defined by the Migrant Smuggling Protocol, it involves the procurement of a person's entry into a state 'of which the person is not a national or permanent resident' for personal gain without complying with municipal migration laws.[113]

The Migrant Smuggling Protocol principally provides for the criminalization of the movement of persons across international borders (Articles 3 and 6), but also includes high seas interdiction provisions based on Article 17 of the Narcotics Convention. Article 7 of the Protocol provides that 'States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea'. Article 8(2) permits a state party with a reasonable suspicion that a ship flying the flag of another state party is smuggling migrants to request the permission of the flag state to take appropriate measures, in response to which the flag state may authorize boarding, search or seizure as it sees fit.[114] Article 8(5) expressly preserves the jurisdiction of the flag state. Where the

[107] 20 December 1988, 1582 UNTS 95. Further Guilfoyle (2009) 83–5.

[108] E.g. Agreement to facilitate the interdiction by the United States of vessels of the United Kingdom suspected of trafficking in drugs, 13 November 1981, 1285 UNTS 197; Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea, 23 March 1990, 1776 UNTS 229; Agreement on Illicit Traffic by Sea implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 3 January 1995, ETS 156. Further Siddle (1982) 31 *ICLQ* 726; Gilmore (1989) 13 *Mar Policy* 218; Gilmore (1996) 20 *Mar Policy* 3.

[109] UN Narcotics Convention, 28th meeting, E/CONF.82/C.2/SR.28, §7.

[110] The discursive nature of this list implies that the flag state may decide exactly how far the inquiring state may exercise its enforcement jurisdiction. Flag states may therefore reserve their position on seizure until evidence of illicit narcotics is discovered; Gilmore (1991) 15 *Mar Policy* 183, 190; Guilfoyle (2009) 83–5. Also: UN Narcotics Convention, 29th meeting, E/CONF.82/C.2/SR.29, §§8, 108, 123–4.

[111] Guilfoyle (2009) 83–4; *cf* Gualde (1996) 4 *Sp YIL* 91, 95.

[112] Generally: Guilfoyle (2009) 182–226.

[113] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, GA Res 55/25 (Annex III), 15 November 2000, Arts 3, 6.

[114] Narcotics Convention, Art 17(4).

vessel in question appears stateless, Article 8(7) allows the interdicting state to board and search the vessel if there are reasonable grounds to suspect that it is engaged in migrant smuggling. If evidence confirming the suspicion is found, the interdicting state may take appropriate measures in accordance with relevant international and municipal law. This perpetuates the ambiguity regarding the exercise of prescriptive and enforcement jurisdiction over stateless vessels.[115]

Unlike the Narcotics Convention, however, the Protocol does not expressly permit the interdicting state to exercise prescriptive jurisdiction over an intercepted vessel. The jurisdiction of the flag state will prevail unless it permits the interdicting state to prosecute.[116]

(F) HUMAN TRAFFICKING

The modern equivalent of slavery, human trafficking involves the recruitment and transportation of persons by coercive means for the purpose of exploitation, including sexual exploitation, forced labour, and 'slavery or practices similar to slavery'.[117] The Human Trafficking Protocol does not provide for the interdiction of ships engaged in human trafficking on the high seas, due principally to the fact that those trafficked are seldom moved in large groups or by sea.[118] There is, however, an overlap between migrant smuggling and human trafficking in the sense that someone may agree to be smuggled by sea, only to be exploited when they reach their destination. This would arguably provide a nexus for interdiction under the Migrant Trafficking Protocol, Article 8.[119]

(G) SUPPRESSION OF TERRORISM AND THE MARITIME TRANSPORT OF WEAPONS[120]

Another *sui generis* regime relating to the suppression of terrorist activities against ships (and latterly, the suppression of the maritime transport of chemical, biological, and nuclear weapons) is the object of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) adopted on 10 March 1988 at a diplomatic conference convened by IMO[121] and later amended by way of a Protocol concluded in 2005 (SUA Protocol).[122]

[115] UNCLOS, Art 110(1)(d); Narcotics Convention, Art 17(2). Further Guilfoyle (2009) 185.

[116] Guilfoyle (2009) 186.

[117] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, GA Res 55/25, Annex II, 15 November 2000.

[118] Obokata (2005) 54 *ICLQ* 445, 448; Guilfoyle (2009) 227.

[119] Guilfoyle (2009) 227–8. If a person is being trafficked into outright slavery, a right of visit and search would arise under UNCLOS, Art 110(1)(b).

[120] (2004) 98 *AJIL* 526; Guilfoyle (2007) 12 *JCSL* 1; Guilfoyle (2009) ch 9.

[121] 10 March 1988, 1678 UNTS 221. Further Ronzitti (ed), *Maritime Terrorism and International Law* (1990); Halberstam (1988) 82 *AJIL* 269; Tuerk (2008) 15 *U Miami ICLR* 337.

[122] Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 14 October 2005, IMO Doc LEG/CONF.15/21.

Drafted in the wake of the *Achille Lauro* affair,[123] the SUA Convention is one of the 13 'sectoral' agreements concluded once it became apparent that agreement on a comprehensive and general definition of terrorism was not in prospect. Article 3 defines an offence of ship hijacking, for example unlawfully 'seizing or exercising control over a ship by force or threat thereof or any other form of intimidation' and cognate acts. The scope of the SUA Convention was altered by the SUA Protocol, which was directed not at maritime terrorism but at enhancing the Treaty on the Non-Proliferation of Nuclear Weapons.[124] On its entry into force in 2010, the SUA Protocol became the first international instrument creating a crime of transporting biological, chemical or nuclear weapons (BCN weapons) by sea: it also provides for high seas interdictions. It had its origins in the 'Proliferation Security Initiative' (PSI), a US project,[125] though its inspiration was arguably UN Security Council Resolution 1540, the second attempt by the Security Council to create 'international legislation' by using Chapter VII of the UN Charter: it obliged states to take measures against trade in such weapons and their precursors.[126] Article 3*bis*(1) creates an offence of intentionally using a ship as part of an action 'likely to cause death or serious injury' when the purpose of that act 'by its nature or context, is to intimidate a population, or compel a government or international organization to do or abstain from doing any act', irrespective of whether that action involves the carriage of a BCN weapon. The high seas interdiction regime of the SUA Convention is contained in Article 8*bis*. It provides for an interdicting state to request from the flag state authorization to board and search the vessel. The flag state is under no obligation to accede to the request (thus replicating the weakness seen in Article 17 of the Narcotics Convention).[127]

4. REGIMES OF TRANSIT TO AND FROM THE HIGH SEAS

A vital aspect of the law of the sea in general, and UNCLOS in particular, is its articulation of the various maritime transit regimes. The scope of transit rights depends on the zones in question.

[123] In 1985 the *Achille Lauro* was hijacked by members of the Palestinian Liberation Front (PLF) while still in port: Halberstam (1988) 82 *AJIL* 269; Guilfoyle (2009) 32–42.

[124] Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 UNTS 161.

[125] Murphy (2004) 98 *AJIL* 349, 355–7. A complete list of PSI bilateral treaties can be found at www.state.gov/t/isn/trty/index.htm. Further Guilfoyle (2005) 29 *Melb ULR* 733, Guilfoyle (2009) 246–54.

[126] The first such resolution was SC Res 1373 (2001). Generally: Talmon (2005) 99 *AJIL* 175; Bianchi (2006) 17 *EJIL* 881; Hinojosa-Martinez (2008) 57 *ICLQ* 333.

[127] SUA Convention, Arts 8*bis*(4), 8*bis*(5) reflect UNCLOS, Art 108(2) and Narcotics Convention, Art 17 in relation to the interdiction of drug shipments on the high seas.

(A) INNOCENT PASSAGE[128]

Customary law recognizes the right of innocent passage through the territorial sea, reflected in UNCLOS Article 17. Article 8 preserves the right of innocent passage in internal waters previously considered part of the territorial sea or high seas where enclosed by straight baselines. These provisions were based on GCTS Articles 14 and 15.

Historically the right of innocent passage evolved at a time when special zones of jurisdiction were not clearly distinguished from zones of sovereignty: the maritime belt was considered to be the high seas but with restrictions in favour of the coastal state. As a question of policy innocent passage is a sensible accommodation between the necessities of sea communication and the interests of the coastal state.

The definition of innocent passage was previously a matter of some difficulty. But the basic rule of innocent passage is now clear; it is elaborated upon in UNCLOS Articles 18 and 19. Article 18(1) lists the purposes for which innocent passage may be exercised: these do not include coastal trade (*cabotage*) or fishing. Under Article 18(2), passage must be 'continuous and expeditious'. Article 19(1) provides that passage shall be considered innocent 'so long as it is not prejudicial to the peace, good order or security of the coastal State'. Article 20 provides that '[i]n the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag'.

Whilst Article 19 is phrased in terms of the 'peace, good order and security' of the coastal state, the list in Article 19(2) makes mention of several acts which can be considered as causing solely economic prejudice to the coastal state, notably fishing.[129] Indeed, Article 19(2)(l) provides that any activity not having a direct bearing on passage will be considered prejudicial to the coastal state's interests.

Under UNCLOS Article 25(1) the coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent. Vessels exercising the right of passage are subject to local laws and regulations, providing these conform with international law and treaty obligations (Articles 21, 22, and 25(2)). Article 25(3) confers on the coastal state a right to suspend innocent passage *temporarily* in specified areas of the territorial sea if such suspension 'is essential for the protection of its security'. Article 26 provides that no charge may be levied on foreign vessels by reason only of their passage, but only for specific services rendered to the ship.

UNCLOS Article 30 contains a special regime applicable to warships and other government ships operated for non-commercial purposes. It excludes enforcement

[128] 3 Gidel (1934) 193–291; 4 Whiteman 343–417; François, ILC *Ybk* 1952/II(2), 38; Fitzmaurice (1959) 8 *ICLQ* 73, 90–108; McDougal & Burke (1962) 174–269; 1 O'Connell (1982) 260–98; Lucchini & Voelckel, 2 *Droit de la mer* (1996) 202–303.

[129] Fishing vessels are capable of undertaking passage, though any unauthorized act of fishing actually occurring in the territorial waters of the coastal state will render passage prejudicial to the interests of the coastal state and hence not innocent.

against warships, which in case of non-compliance with the regulations of the coastal state can only be required to leave the territorial sea.[130]

(B) CRIMINAL JURISDICTION DURING INNOCENT PASSAGE

Although the coastal state has both prescriptive and enforcement jurisdiction over its territorial sea, this jurisdiction does not extend to foreign ships exercising a right of innocent passage unless certain conditions are met. In relation to criminal matters, UNCLOS Article 27(1) provides that jurisdiction over a foreign ship passing innocently through the coastal state's territorial waters can only be exercised if: (a) the consequences of the crime extend to the host state; (b) the crime is of such a nature as to disturb the peace of the coastal state or the good order of its territorial sea; (c) the assistance of the coastal state has been requested by the master of the foreign ship or a diplomatic or consular official of its flag state; or (d) such measures are necessary for the suppression of illicit traffic in narcotic drugs or other psychotropic substances.[131] Where the foreign ship has entered the territorial sea from the coastal state's internal waters, the coastal state does not lose its right to arrest the foreign ship, provided the flag state is notified.[132]

UNCLOS Article 28(1) provides that the coastal state should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising its civil jurisdiction in relation to a person on board. Likewise, Article 28(2) provides that the coastal state may not levy execution against or arrest the foreign ship for the pursuit of any civil proceedings,[133] save only in respect of liabilities incurred by the ship during such passage. But if the foreign ship is passing through the territorial sea after leaving internal waters or has dropped anchor in the territorial sea in a manner inconsistent with innocent passage,[134] jurisdiction may be exercised under Article 28(3).

[130] Harvard Research (1929) 23 *AJIL Sp Supp* 295–6; 3 Gidel (1934) 227–89; Jessup (1959) 59 *Col LR* 234, 247–9; François, ILC *Ybk* 1952/II, 42–3; UN Legislative Series, *Laws and Regulations on the Regime of the Territorial Sea* (1957) 361–420; McDougal & Burke (1962) 192–4, 216–21; Oxman (1984) 24 *Va JIL* 809; Butler (1987) 81 *AJIL* 331; 1 O'Connell (1982) 274–98; Roach & Smith, *United States Responses to Excessive Maritime Claims* (2nd edn, 1996) 251–78; Hakapää, 'Innocent Passage' (2008) *MPEPIL*; Heintschel von Heinegg, 'Warships' (2009) *MPEPIL*; US–USSR, Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, 28 ILM 1444, 1446. Also: *Corfu Channel*, ICJ Reports 1949 p 4, 28.

[131] The position may not be absolute. UNCLOS, Art 27(1) commences with the words 'should not', which were deliberately chosen to exhort restraint not impose absolute limitations: Shearer (1986) 35 *ICLQ* 320, 327; Churchill & Lowe (3rd edn, 1999) 95–8; Guilfoyle (2009) 11. Nonetheless, there is some state practice suggesting the provision is exhaustive: e.g. the US–USSR, Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, 28 ILM 1444.

[132] UNCLOS, Arts 25(5), 27(2).

[133] E.g. by attempting to seize a ship in order to enforce an arbitral award where that ship is merely passing innocently through the enforcing state's territorial sea.

[134] That is, in situations other than where the ship is lying in the territorial sea in a manner incidental to ordinary navigation, by reason of *force majeure* or in order to respond to a distress signal: UNCLOS, Art 18(2).

As to foreign warships or government vessels operating for non-commercial purposes, UNCLOS Article 32 preserves their customary immunity. Such vessels must still comply with the rules applicable to all ships in exercising innocent passage but in the event of violation the most that the coastal state can do is require the offending vessel to depart its territorial sea under Article 30. In the event that the non-compliance of such a vessel results in any loss or damage to the coastal state, the flag state bears responsibility under Article 31.

(C) TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS[135]

Transit passage refers to the movement of a foreign vessel through international straits in order to access the high seas or the EEZ. UNCLOS Part III governs such movement. Article 37 provides that the section applies to 'straits which are used for international navigation between one part of the high seas or an [EEZ] and another part of the high seas or an [EEZ]'. Article 38(2) defines transit passage as 'the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait' and includes passage 'for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State'.

The right of transit passage in the territorial sea is subject to fewer constraints than the right of innocent passage. But Articles 36 and 38(1) only apply where there is no 'route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics'. UNCLOS also provides obligations specific to ships in transit passage in Article 39(2) and aircraft in Article 39(3).

(D) PASSAGE THROUGH THE EEZ

For the purposes of passage through the EEZ, UNCLOS treats the zone much the same as the high seas as a whole, a position consistent with custom.[136] Article 58 reserves the freedoms of navigation, overflight, and the laying of submarine cables in the EEZ, as well as the rights and obligations laid out in Articles 88 to 115. The conditions of passage with respect to the EEZ accordingly have less in common with passage through the territorial sea or international straits, and more in common with the more liberal high seas regime.

(E) ARCHIPELAGIC SEA LANES PASSAGE

UNCLOS Articles 52(1) and 53(2) provide for 'the right of archipelagic sea lanes passage in such sea lanes and air routes'. This type of passage is akin to transit passage

[135] Churchill & Lowe (3rd edn, 1999) ch 5; Rothwell & Stephens (2010) ch 11.

[136] *Nicaragua*, ICJ Reports 1986 p 14, 111–12.

in international straits. The right is not entirely uncontrolled, however: under Article 53(1) the archipelagic state may designate sea lanes and air routes suitable for the continuous and expeditious passage for foreign ships and aircraft through or over its archipelagic waters and territorial sea. Moreover, Article 52(2) allows the archipelagic state to suspend temporarily in its archipelagic waters the innocent passage of foreign ships if this is essential for the protection of its security.

(F) COMPULSORY PILOTAGE[137]

In certain situations, a coastal state may insist that a vessel passing through superjacent waters take on an approved pilot to navigate it through particularly treacherous waters or through significant and delicate ecosystems. Pilotage regimes must accord with the terms of UNCLOS, and recommendatory programmes will prima facie comply. Compulsory regimes are more controversial.

Under UNCLOS Article 21(1)(a) and (f), the coastal state may adopt laws and regulations relating to innocent passage through the territorial sea for various protective purposes: this includes, where necessary, the introduction of a compulsory pilotage regime.[138]

The imposition of compulsory pilotage through international straits is more controversial, and states have demonstrated their willingness to challenge compulsory pilotage with respect to transit passage, notably in relation to Australian and Papua New Guinean attempts to introduce a pilotage regime to the Torres Strait.[139] Charging for the cost of pilot services is not in contravention of UNCLOS and will not impair transit.[140]

5. REGULATION OF HIGH SEAS FISHERIES[141]

(A) HISTORICAL OVERVIEW

After freedom of navigation, the freedom to fish is arguably the fundamental historical freedom of the high seas. Fish were historically seen as an inexhaustible

[137] Generally: Kachel, *Particularly Sensitive Sea Areas* (2008) 202–4; Mahmoudi, 'Transit Passage' (2008) *MPEPIL*; Kaye, 'Torres Strait' (2009) *MPEPIL*; Hakapää, 'Innocent Passage' (2008) *MPEPIL*; Bateman & White (2009) 40 *ODIL* 184.

[138] E.g. the pilotage regime with regard to navigation through the Great Barrier Reef: Great Barrier Reef Marine Park Act 1975 (Cth) Part VIIA.

[139] The Australian and Papua New Guinean governments succeeded in gaining IMO support for a recommended pilotage regime for certain large vessels and oil and gas tankers: IMO Res A.619/13, 6 November 1991. The IMO further agreed to extend the Great Barrier Reef's PSSA designation to include the Torres Strait, but did not expressly provide for compulsory pilotage: IMO Res MEPC.133/53, 22 July 2005. Further Bateman & White (2009) 40 *ODIL* 184.

[140] 2 Nordquist (1995) 236.

[141] On fisheries: Burke, *The New International Law of Fisheries* (1994); Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (1999); Churchill & Lowe (3rd edn, 1999) ch 14; Guilfoyle (2009) ch

resource,[142] an expectation which has been thoroughly debunked by the refinement of industrial fishing technology since the Second World War.[143]

The modern law of fisheries can be divided into two phases. The first is the period up to the mid-1970s, characterized by generally narrow coastal state maritime zones, with a large number of high seas fisheries regulated by international commissions. The second is the period since the mid-1970s, typified by the emergence of the EEZ. The EEZ embraced most commercially exploitable fish stocks, reducing somewhat the role of the international fisheries commissions. Their exclusion from coastal fisheries led distant water fishing states to focus on often remote and slow-breeding species (e.g. Patagonian toothfish). The result has been a progressive tragedy of the commons, redeemed by a few cases of successful coastal state or regional regulation (e.g. Norwegian spring spawning herring).

(B) FREEDOM OF FISHERIES AND ITS LIMITATIONS

The freedom of fishing on the high seas was well established in customary international law, though it did little more than to state the existence of the principle in a negative sense: states should not interfere with vessels fishing under another flag.[144] But while freedom of navigation has been relatively unabated since its Grotian formulation, the freedom to fish has been constrained in various ways in an attempt to promote the goals of conservation and orderly access.

UNCLOS Article 87(1)(e) establishes the freedom of fishing on the high seas, subject to the conditions laid down in UNCLOS Part VII, Section 2.[145] Article 116 provides that all states have the right for their nationals to engage in fishing on the high seas, subject to treaty obligations, the rights, duties, and interests of the coastal state. Article 63(2) concerns straddling stocks, that is, where the same or associated fish species occur within an EEZ and adjacent high seas areas. In such cases co-operation is mandated, either directly or through an appropriate fisheries organization.

The position under customary international law was at one time less clear. In the *Fisheries Jurisdiction* cases,[146] the Court was asked to determine the validity of Iceland's extension of its fishing limits from 12 to 50nm. It held that according to custom, a coastal state particularly dependent on fishing for its economic livelihood

6; Young (2011); Serdy (2011) 60 *ICLQ* 387. On the practice and ecology of fishing as a whole: Jennings, Kaiser & Reynolds, *Marine Fisheries Ecology* (2001).

[142] Grotius, *Mare Liberum* (1609, tr Hakluyt 2004) 25–30; Wolff, *Jus gentium methodo scientifica pertractatum* (1764, tr Drake 1934) 64; cf Vattel, *Le Droit des gens* (1758, tr Anon 1797) I.xxiii.§287.

[143] Roberts & Hawkins (1999) 14 *TEE* 241, 241; Caddy & Garibaldi (2000) 43 *OCM* 615, 649–50; Churchill & Lowe (3rd edn, 1999) 279–83.

[144] Orrego Vicuña (1999) 13.

[145] 29 April 1958, 559 UNTS 285. Art 1(1) contains the freedom to fish. Further Orrego Vicuña (1999) 18–21.

[146] *Fisheries Jurisdiction (FRG v Iceland)*, ICJ Reports 1974 p 175, 195; *(UK v Iceland)*, ICJ Reports 1974 p 4, 26.

enjoyed in certain circumstances preferential rights of access to high seas fisheries adjacent to its territorial sea. The judgment was criticized for the lack of evidence and general imprecision of the rule so identified.[147] No coastal state before or since the Court's judgment has attempted to rely on it to further its share of a high seas fishery, and the decision—transitional in terms—has been superseded by the introduction of the EEZ.

(i) The obligation of conservation and co-operation

The principal obligation of states as to high seas fisheries is that of conservation and co-operation. UNCLOS Article 117 requires parties to 'take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas'. This is not only an obligation to regulate the behaviour of flag vessels; it arguably extends to *all nationals* irrespective of the flag they sail under.[148] This interpretation has been endorsed by the UN Food and Agriculture Organization (FAO).[149]

UNCLOS Article 118 establishes an obligation on the part of states parties to co-operate for the purpose of conserving and managing living resources on the high seas.[150] Articles 63 to 67 lay down further specific conservation and co-operation obligations in relation to straddling stocks, highly migratory species, marine mammals, and anadromous[151] and catadromous[152] species. Of particular significance are the provisions on straddling stocks and highly migratory species. Article 63(2) provides that any states with an interest in a straddling stock

> shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

As to highly migratory species, Article 64 provides that the coastal state and other states whose nationals fish in the region for such species 'shall co-operate directly or

[147] Churchill & Lowe (3rd edn, 1999) 285; Orrego Vicuña (1999) 15–17.

[148] Guilfoyle (2009) 101.

[149] FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 23 June 2001, §18, available at www.fao.org/docrep/003/y1224e/y1224e00.htm.

[150] The Lacey Act, 16 USC §§3371–8, makes it a crime for US nationals to violate any applicable fisheries regulations anywhere, effectively co-opting other states' conservation measures adopted under UNCLOS. For prosecutions: *United States v Cameron*, 888 F.2d 1279 (9th Cir, 1989) (violating International Pacific Halibut Commission regulations); *Wood v Verity*, 729 F.Supp 1324 (SD Fla, 1989) (violating Bahamian EEZ regulations). Also: the forfeiture proceedings in *United States v 594,464 Pounds of Salmon, More or Less*, 687 F.Supp 525 (WD Wash, 1987) (violation of Taiwanese Salmon regulations); *United States v Proceeds from Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F.Supp 385 (SD Fla, 1993) (Turks and Caicos Islands fishing restrictions); *United States v 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir, 2005) (Russian Federation fishing and resource protection laws).

[151] Species of fish which migrate from salt to fresh water to breed, such as the various species of Pacific salmon: UNCLOS, Art 66.

[152] Species of fish which migrate from fresh to salt water to breed, such as the freshwater eels of the genus *Anguilla*: UNCLOS, Art 67.

through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region'.

Obligations of co-operation and conservation are insufficient. High seas fisheries can only be managed appropriately through international cooperation, for example through the creation of regional or species-specific agencies. However, except for highly migratory species (Article 64), states parties are under no obligation in this regard; UNCLOS either presents the creation of regional bodies as an alternative to direct negotiation, as in the case of straddling stocks (Article 63), or qualifies the obligation with considerations of 'appropriateness', as seen more generally in Article 118.

(ii) Regional fisheries management organizations

Despite these somewhat weak obligations of co-operation, numerous regional fisheries management organizations (RFMOs) have been created.[153] As their name implies, RFMOs co-operate in managing high seas fisheries for certain stocks in a defined area, principally through the prescription of management and conservation measures. There are common responsibilities such as the collection and distribution of fisheries statistics,[154] the evaluation and management of fish stocks within their jurisdiction,[155] the determination and allocation of the total allowable catch (TAC),[156] the regulation of equipment,[157] and the oversight of scientific research. RMFO agreements frequently contain dispute resolution provisions or provide for a compliance committee.[158]

(iii) Straddling and highly migratory stocks

The creation of credible RFMOs has been aided by the development of the Straddling Stocks Agreement,[159] which reflects considerable effort to create a comprehensive

[153] E.g. Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, 20 April 2001, 41 ILM 257 (2002) (SEAFOC); Convention on the Conservation of Antarctic Marine Living Resources, 20 May 1980, 19 ILM 841 (1982) (CCAMLR); Convention for the Conservation of Southern Bluefin Tuna, 10 May 1993, 1819 UNTS 360 (CCSBT); Treaty between the Government of Canada and the United States of America concerning Pacific Salmon, 28 January 1985, 1469 UNTS 358 (PST).

[154] SEAFOC, Art 6(3)(k)–(l); CCAMLR, Art IX(1)(c)–(d); CCSBT, Arts 5(2), 8(1); PST, Arts II(17), XIV(c).

[155] SEAFOC, Art 6(3)(a)–(b), (g)–(h); CCAMLR, Art IX(1)(e), (1)(f), (2), XI; CCSBT, Art 8(2); PST, Art II(8).

[156] SEAFOC, Arts 6(3)(c), (8)(a)–(c); CCAMLR, Art IX(1)(f), (2)(a)(g); CCSBT, Art 8(3)(a), (4); PST, Art IV(3), (4), (5).

[157] SEAFOC, Arts 6(3)(c), 8(d)–(e); CCAMLR, Art IX(1)(f), (2)(h); CCSBT, Art 8(3)(b), (4); PST, Art IV(3)–(5).

[158] SEAFOC, Art 9; CCAMLR, Art XXV; CCSBT, Art 16; PST, Art XXI, Annex III. The capacity for these provisions to oust the jurisdiction of an ITLOS tribunal under UNCLOS, Part XV and Annex VII was highlighted in the Annex VII tribunal decision in the *Southern Bluefin Tuna* decision, which concerned CCSBT, Art 16: *Southern Bluefin Tuna (Australia and New Zealand v Japan)* (2000) 119 ILR 508. The decision has been criticized heavily: Boyle (2001) 50 *ICLQ* 447; Boyle, 'Southern Bluefin Tuna' (2008) *MPEPIL*.

[159] 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, 4 December 1995, 2167 UNTS 3.

regulatory framework for the management of high seas fisheries, while addressing some of the weaknesses stemming from the generalized terms of UNCLOS.[160]

Articles 8 to 13 of the Agreement assign a central role to RFMOs in the co-operative management of straddling and highly migratory fish stocks. Article 8(1), like UNCLOS,[161] calls for co-operation in relation to straddling and highly migratory fish stocks. But it envisages a regime which attempts to eliminate free riders and a system whereby 'only those who play by the rules can fish'.[162] In particular Article 8(4) provides that only states which are members of or agree with the RFMO shall have access to the fisheries which the RFMO oversees.

These obligations are bolstered by a boarding, inspection, and enforcement regime which exceeds that directed to even more serious international maladies such as drug running, human trafficking, the smuggling of migrants, and the transport of biological, chemical, and nuclear weapons. Members of RFMOs are instructed to establish schemes whereby one member of the RFMO can board and inspect vessels of any state party to the Straddling Stocks Agreement (whether a member of the RFMO or otherwise).[163] Where, following a boarding and inspection, there are clear grounds for believing that a vessel has engaged in activity contrary to an applicable RFMO regime, the interdicting state shall secure evidence and promptly notify the flag state of the alleged violation.[164] The flag state may then investigate itself or authorize the interdicting state to do so.[165] Where the interdicting state or its own investigators uncover sufficiently incriminating evidence, the flag state is bound to take enforcement action, or to authorize the inspecting state to take such enforcement action as the flag state specifies, consistent with the terms of the Agreement.[166] This is subject to the flag state's right to require that the vessel be released to it,[167] in which case the flag state's obligation to take appropriate enforcement action will remain.

(iv) The role of the WTO[168]

The World Trade Organization (WTO) is relevant to the management of high seas fisheries in that WTO Members interested in the preservation of threatened fish stocks are able to introduce discriminatory trade policies which would otherwise

[160] Orrego Vicuña (1999) 201; Churchill & Lowe (3rd edn, 1999) 309–10; Guilfoyle (2009) 103.

[161] Notwithstanding the use of the term 'states parties' here, the Straddling Stocks Agreement makes reference throughout to 'states', raising a question whether the Agreement purported to require even non-states parties to comply with its provisions: Guilfoyle (2009) 104. The Chairman of the drafting conference, however, reiterated the parties' understanding that the Agreement was to apply to states parties only: Rayfuse (1999) 20 *AYIL* 253, 268.

[162] Balton (1996) 27 *ODIL* 125, 138. Also: Guilfoyle (2009) 104.

[163] Straddling Stocks Agreement, Art 21(1). Further Churchill & Lowe (3rd edn, 1999) 310; Guilfoyle (2009) 106.

[164] Straddling Stocks Agreement, Art 21(5).

[165] Ibid, Art 21(6).

[166] Ibid, Art 21(7).

[167] Ibid, Art 21(12).

[168] Generally: Young (2011) ch 5.

be in violation of various provisions of the General Agreement on Tariffs and Trade (GATT).[169] GATT Article XX(b) provides that nothing in the GATT can be construed to prevent the adoption or enforcement by a WTO Member of a trade policy which is *necessary* to protect human, animal or plant life or health. Likewise, under GATT Article XX(g), a Member may introduce an otherwise GATT-inconsistent measure which *relates to* the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. The measures in question must also comply with the so-called 'chapeau' conditions of GATT Article XX.

In the *Tuna Dolphin* I decision, a GATT panel held that a US embargo on tuna caught using fishing methods which resulted in a high level of dolphin mortality could not be justified under these provisions, as the measure was neither 'necessary' for the preservation of animal health nor sufficiently 'related to' the conservation of an exhaustible natural resource, a conclusion reiterated in the *Tuna Dolphin* II decision.[170] In particular, the unilateral nature of the regime was seen as objectionable. The decisions were never adopted, but were treated as received wisdom. They were overturned when the Appellate Body returned to consider GATT Article XX in the *US—Shrimp* decision, which concerned another US embargo, this time on shrimp caught by trawlers without a device to exclude sea turtles. The Appellate Body considered the measure as one 'related to' the conservation of an exhaustible natural resource,[171] but held that some negotiation with the state or states affected is required to meet the chapeau conditions.

A similar set of circumstances also gave rise to a long-running dispute over swordfish fisheries in the South Pacific between Chile and the EU.[172] Before the International Tribunal for the Law of the Sea (ITLOS), Chile claimed that the EU had failed to cooperate with the coastal state in order to ensure the conservation of highly migratory swordfish stocks in violation of UNCLOS.[173] This proceeding was issued in response to a parallel action before the Dispute Settlement Body, claiming that Chile's denial of port access violated GATT Article V relating to freedom of transit for goods.[174]

[169] Marrakesh Agreement Establishing the World Trade Organization (Annex 1A: GATT 1994), 15 April 1994, 1867 UNTS 187.

[170] *US—Restrictions on the Imports of Tuna* (1991) 30 ILM 1594; *US—Restrictions on the Imports of Tuna* (1994) 33 ILM 839. Further Matsushita, Schoenbaum & Mavroidis, *The World Trade Organization* (2nd edn, 2006) 794–6. The decisions prompted vigorous criticism from those who wish to see a stronger link between trade and the environment: e.g. Charnovitz (1994) 27 *Cornell ILJ* 459; Charnovitz (1993) 6 *GIELR* 1; Bhagwati, in Zaelke et al (eds), *Trade and the Environment* (1993) 159; cf Petersmann (1993) 27 *JWT* 43.

[171] WTO Doc WT/DS58/AB/R, 12 October 1998, §§134–42. For commentary: Howse (2002) 27 *Col JEL* 491; Mann (1998) 9 *Ybk IEL* 28; Schoenbaum (1998) 9 *Ybk IEL* 35; Wirth (1998) 9 *Ybk IEL* 40.

[172] Generally: Stoll & Vöneky (2002) 62 *ZaöRV* 21.

[173] *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, Order of 20 December 2000 [2000] ITLOS Rep 148.

[174] Request for Consultations: *Chile—Swordfish*, WTO Doc WT/DS193/1, 26 April 2000. Request for Establishment of a Panel: *Chile—Swordfish*, WTO Doc WT/DS193/2, 7 November 2000.

The parties suspended proceedings in 2001 following an agreement for bilateral co-operation.

(C) REGULATION OF WHALING[175]

Whaling is the subject of a separate international agreement, the 1946 International Convention for the Regulation of Whaling (ICRW).[176] It established the International Whaling Commission (IWC), which plays the role of international regulator of whaling and whaling practices. Initially catch limits were set too high and the use of generalized units of capture resulted in the near-extinction of several species. By 1974, a new procedure had been introduced, and the hunting of all but the five most populous species of whale was prohibited.[177] Then in 1986 the IWC adopted a total moratorium on all commercial whaling.[178] The measure was objected to by Japan, Norway, and the USSR, but Japan subsequently withdrew its opposition, though it still undertakes a programme of 'scientific' whaling by reference to ICRW Article VIII(1).[179] Norway returned to commercial whaling in 1994 and Iceland has similarly resumed whaling since 2006, having left the IWC in 1992 and returned in 2002 with a (controversial) reservation to the moratorium.

6. THE SEABED AND OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION

(A) THE PRE-EXISTING SEABED REGIME[180]

Under classical international law, the seabed of the high seas was not susceptible of appropriation by states, and the regime of the freedom of the high seas applied (GCHS Article 2). Historic title and prescription could play a role, and title to certain seabed (sedentary) fisheries (e.g. pearl, oyster, and sponge fisheries) could be acquired on the basis of prescription, but these were marginal exceptions, in the nature of *profits à prendre* rather than involving a right to the seabed as such.[181] The category of sedentary fisheries was made effectively redundant by the continental shelf and the EEZ.

[175] Generally: Gillespie, *Whaling Diplomacy* (2005).

[176] 2 December 1946, 161 UNTS 72; amended by the Protocol to the International Convention for the Regulation of Whaling, 19 November 1956, 338 UNTS 336.

[177] Churchill & Lowe (3rd edn, 1999) 317–18.

[178] Whaling Convention, Schedule, §10(e).

[179] In May 2010, Australia filed a challenge to Japan's whaling programme in the International Court: *Whaling in the Antarctic (Australia v Japan)* (2010, pending).

[180] 1 Gidel (1932) 493–501; François, ILC *Ybk* 1951/II, 94–9; O'Connell (1955) 49 *AJIL* 185; 1 O'Connell (1982) 449–57; Churchill & Lowe (3rd edn, 1999) 223–54; Nandan, in Freestone, Barnes & Ong (eds), *The Law of the Sea* (2006) 75.

[181] McNair, 1 *Opinions* 258–64.

(B) UNCLOS AND THE INTERNATIONAL SEABED AUTHORITY[182]

During the 1960s it was asserted that exploitation of the mineral resources of the deep seabed and ocean floor was technically possible in areas not included in the regime of the continental shelf, and proposals were made which would have permitted either the partition of the ocean floor between coastal states or the development of mining operations by individual enterprises. The prize in view took the form of allegedly vast deposits of polymetallic nodules, principally in the Pacific and Indian Oceans, containing manganese, nickel, copper, and cobalt.

On 1 November 1967, Dr Arvid Pardo (Malta) presented a proposal to the First Committee of the UN General Assembly to the effect that the seabed and its resources beyond the limits of national jurisdiction should be declared to be part of the 'common heritage of mankind'.[183] This proposal became a key issue of UNCLOS III. In the event UNCLOS Part XI contained a regime for the internationalization of the mineral resources of the deep seabed. These 'resources' and the 'Area' were declared to be 'the common heritage of mankind' (Article 136).

This regime applied beyond the 200nm EEZ limit, and thus overlapped with those areas of continental shelf extending beyond that limit (see Articles 82, 134, 142). In general the treaty regime for the mineral resources of the Area co-existed with the legal regime of the high seas. Thus Article 135 provided that the treaty regime would not affect the legal status of the waters superjacent to the Area or that of the airspace above those waters. The institutional underpinning of the regime relating to the resources of the Area was to be the International Seabed Authority, of which all states parties are *ipso facto* members, which is empowered to organize and control activities in the Area (Article 157).[184]

The regime for the development of the resources of the Area had four key elements. First, it purported to establish an *erga omnes* regime: no state could claim sovereignty or sovereign rights over any part of the Area or its resources and no state or natural or juridical person could appropriate any part thereof (Article 137(1)). Secondly and correlatively, activities in the Area were to be organized and controlled exclusively by the Authority and carried out for the benefit of mankind as a whole.[185] Thirdly, exploration and exploitation of the Area would involve parallel activities by the Enterprise (an organ of the Authority) and by operators;[186] such operators had to possess the

[182] Anand, *Legal Regime of the Seabed and the Developing Countries* (1976); Bennouna (1980) 84 *RGDIP* 120; Kronmiller, 1–3 *The Lawfulness of Deep Seabed Mining* (1980–81); Paolillo (1984) 188 Hague *Recueil* 135; Dupuy & Vignes (eds), *Traité du nouveau droit de la mer* (1985) 499–686; Brown, 1–3 *Sea-Bed Energy and Mineral Resources and the Law of the Sea* (1986); Joyner (1986) 35 *ICLQ* 190; Churchill & Lowe (3rd edn, 1999) 223–54.

[183] Churchill & Lowe (3rd edn, 1999) 224–9.

[184] UNCLOS, Art 157. For the delimitation of the outer limits of the continental shelf (and therefore of the Area): chapter 12.

[185] UNCLOS, Arts 137(2), 140, 150(i), 153(2), 156, 157. Also: Art 149 ('Archaeological and historical objects').

[186] UNCLOS, Art 153.

nationality of a state party or be effectively controlled by a party. Fourthly, the Authority was required to provide for the equitable sharing of the economic benefits of activities in the Area,[187] but in doing so was entitled to pay special regard to the interests of developing states.[188]

This was an ambitious regime, and a claim by UNCLOS parties to represent the international public domain of the Area. But it was vulnerable in a number of respects. First, from an economic viewpoint it depended on sufficient recoverable resources being discovered and being commercially exploitable (at a time of volatile demand for land-based minerals). Secondly, despite the uncertain economic prospects, a substantial bureaucratic structure was created and had to be funded. Thirdly, the claim of UNCLOS parties not merely to represent the international public domain but to appropriate all its benefits was legally problematic: *nemo dat quod non habet.*[189] The issue of non-parties was made even more acute in that potential seabed miners having the nationality of and controlled by non-parties to UNCLOS or their nationals were disqualified: they thus had no incentive to organize so as to bring themselves within the regime, and every reason to oppose it. In an attempt to head off such opposition, the Preparatory Commission (Prepcom) undertook the recognition of so-called 'pioneer investors' (Resolution II).[190]

Partly for these reasons and partly out of ideological opposition to schemes of 'international government', a group of states, mostly western but eventually including Japan and Russia, developed a competing regime of reciprocal recognition of claims to deep seabed resources.[191] This produced something of a diplomatic impasse: under neither scheme did any significant seabed exploration, still less exploitation, occur.

The diplomatic impasse was resolved in 1994 when the General Assembly adopted the Agreement relating to the Implementation of Part XI (Deep Seabed Agreement),[192] thereby allowing UNCLOS to enter into force in amended form, with the express or tacit consent of all signatories. Under this dispensation the Deep Seabed Agreement and UNCLOS are to be interpreted and applied together 'as a single instrument'

[187] UNCLOS, Arts 140(2), 160(2)(f)(i).

[188] UNCLOS, Arts 140(1), 144(2), 148, 150, 152(2), 160(2)(f)(i). Reference was also made to the 'special need' of the land-locked and geographically disadvantaged states among the developing states: Arts 148, 152(2), 160(2)(k).

[189] Bennouna (1980) 84 *RGDIP* 120; 2 Brown (1986); 1 Kronmiller (1981) 207–521; Malone (1983) 46 *LCP* 29.

[190] Churchill & Lowe (3rd edn, 1999) 230–1. Registrations were lodged of sites for India, France, Japan, and the USSR with respect to eight investors.

[191] Deep Seabed Hard Mineral Resources Act 1980 (US), 19 ILM 1003, and equivalent interim legislation passed by France, Germany, Italy, Japan, Russian Federation, and UK; Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Seabed, 2 September 1982, 21 ILM 950 (France, Germany, US, UK); Provisional Understanding Regarding Deep Seabed Matters, 3 August 1984, 23 ILM 1354 (Belgium, France, Germany, Italy, Japan, the Netherlands, UK, US). Also: Agreement on the Resolution of Practical Problems with Respect to Deep Seabed Mining Areas, 14 August 1987 (Canada, Belgium, Italy, Netherlands, USSR); Exchange of Notes between the United States and the Parties to the Agreement, 14 August 1987, 26 ILM 1502.

[192] Agreement relating to the Implementation of Part XI, 28 July 1994, 1836 UNTS 3.

(Article 2). The Deep Seabed Agreement modified certain aspects of Part XI in order to meet the objections raised by the US and others.[193]

(C) THE AMENDED SEABED REGIME

(i) The Deep Seabed Agreement and the Mining Code

The Deep Seabed Agreement is relatively brief, consisting of 10 operative provisions, a preamble and a substantive Annex. It is largely procedural, but its Annex includes new rules for the operation of the seabed regime, including an agreed interpretation of certain provisions of Part XI and new provisions regarding the operation of the Authority. Articles 4 and 5 provide a unified and simplified approach to the granting of state consent to be bound by UNCLOS and the Deep Seabed Agreement operating in severalty under Article 2. The Agreement thus modifies UNCLOS, providing alternative rules to secure universal participation.

In 2000 the International Seabed Authority adopted the Regulation on Prospecting and Exploration for Polymetallic Nodules in the Area (RPNM). This is the first instrument to be promulgated by the Authority in what is known as the Mining Code,[194] a set of comprehensive rules, regulations, and procedures to be issued by the Authority to administer the prospecting, exploration, and exploitation of marine minerals in the Area. In 2010 the Authority also adopted the Regulations on Prospecting and Exploration for Polymetallic Sulphides and a third set of Regulations on Prospecting and Exploration for Cobalt-Rich Crusts will eventually be adopted as well. The RPNM enabled the Authority in 2001 to enter into a series of 15-year contracts for the exploration of polymetallic nodules. In this way the Prepcom's regime of Resolution II came to an end.[195]

(ii) State liability for sponsored entities and contractors

In its Advisory Opinion on responsibility and liability for international seabed mining,[196] the Seabed Disputes Chamber of ITLOS made several important clarifications regarding a state's liability for private entities that it sponsors to carry out seabed mining.

First, the basic obligation of a state in such cases is 'to ensure' that 'activities in the Area' conducted by a sponsored entity or contractor are in conformity or compliance with UNCLOS Part XI, relevant Annexes to UNCLOS, the regulations and procedures of the Authority, the terms of its exploration contract with the Authority, and any other

[193] Nash (1994) 88 *AJIL* 733; Oxman (1994) 88 *AJIL* 687; Sohn (1994) 88 *AJIL* 696; Charney (1994) 88 *AJIL* 705.

[194] Available at www.isa.org.jm/en/documents/mcode.

[195] Oude Elferink & Rothwell, *Oceans Management* (2004) 341–5.

[196] *Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case No 17 (Advisory Opinion, 1 February 2011).

obligations under UNCLOS and the Seabed Agreement.[197] Sufficient due diligence on the project must also be done, and undertaken in light of the precautionary principle, best environmental practices, and an environmental impact assessment.[198]

Second, UNCLOS Article 139(2) sets out the limits of state liability in respect of the actions of sponsored entities and contractors, and identifies several 'liability gaps' in respect of which states do not bear residual liability.[199] ITLOS raised the possibility of an addition to the Mining Code that may assign liability within these lacunae, and further hinted that the obligation to preserve the environment of the high seas and the seabed may be *erga omnes* in character.[200]

Finally, states must have in place effective laws and supporting administrative regulations that oversee such operations which exceed mere contractual safeguards. These must be 'no less effective than international rules, regulations and procedures' adopted by the Authority and other international bodies.[201]

[197] Ibid, §§103–4.

[198] Ibid, §§110–20, 125–37, 141–50, 148. Further *Southern Bluefin Tuna* (1999) 117 ILR 148.

[199] *Seabed Advisory Opinion*, ITLOS Case No 17, §204.

[200] Ibid, §180 (citing ARSIWA, Art 48).

[201] Ibid, §241; UNCLOS Art 209(2).