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OF THE SEA

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*Edited by*

**DONALD R ROTHWELL**

*Professor of International Law, Australian National University*

**ALEX G OUDE ELFERINK**

*Professor of International Law of the Sea, University of Tromsø and Utrecht University*

**KAREN N SCOTT**

*Professor of Law, University of Canterbury*

**TIM STEPHENS**

*Professor of International Law, University of Sydney*

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# FLAG STATES

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RICHARD A BARNES

## 1 INTRODUCTION

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FLAG State jurisdiction provides one of the principal ways of maintaining legal order over activities at sea, although its significance has lessened as a consequence of extensions in coastal State jurisdiction over ocean spaces.<sup>1</sup> Any State may grant to a ship the right to sail under its flag.<sup>2</sup> The flag State then enjoys primary legislative and enforcement jurisdiction over its ships on the high seas, subject to some limited exceptions.<sup>3</sup> Ships located within coastal waters are subject to a more sophisticated combination of flag State and coastal State jurisdiction. The basic parameters of jurisdiction are set forth in the 1982 United Nations Convention on the Law of the Sea (LOSC), although other instruments develop how such jurisdiction is to be exercised in the context of specific activities such as navigation and fishing. One of the most fundamental concerns facing the law of the sea is the ability and willingness of

<sup>1</sup> On order, see A Watts, 'The Protection of Merchant Ships' (1957) XXXIII *British Yearbook of International Law* 52, 67; MS McDougal and WT Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press New Haven, CT 1962) 794. On expansionism, see B Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 *American Journal of International Law* 830.

<sup>2</sup> 1982 United Nations Convention on the Law of the Sea (hereinafter LOSC), Art 90. See further R Rienow, *The Test of Nationality of a Merchant Vessel* (Columbia University Press New York 1937) 214–9; MacDougal and Burke, n 1, 1057ff.

<sup>3</sup> LOSC, n 2, Arts 94–111.

flag States to exercise effective control over ships flying their flag.<sup>4</sup> This has resulted in attempts to secure better flag State compliance with their responsibilities, as well as provoking the development of alternative models of control, such as port State control. These factors pull towards more sophisticated models of regulation. Accordingly, a more careful and holistic view of jurisdiction is essential to understanding how order is maintained at sea.

## 2 THE DEVELOPMENT OF FLAG STATE JURISDICTION

Since ancient times, ships have been identified with particular communities through the use of flags and other insignia.<sup>5</sup> A ship's flag was a visible way of identifying the allegiance of a ship and determining how to treat those on board. Documentation and regulation of ship ownership can be traced to the practice of medieval Italian city States, and, possibly, even to Roman law as a means of facilitating private maritime claims.<sup>6</sup> The growth of international trade and expansion of activities at sea from the sixteenth century onwards generated pressure for a public system of law and order over the oceans. This was facilitated by the emergence of the modern political State after the peace of Westphalia. Within the emergent legal order, freedom of the high seas consolidated as a legal principle during the seventeenth century, along with its corollary, the exclusive jurisdiction of the flag State.<sup>7</sup> From this time, the concept of the nationality of ships evolved as a means of determining which States were responsible for and entitled to control the activities of ships at sea.<sup>8</sup> While the grant of nationality to a ship was a unilateral act, it was often recognized through bilateral treaties of friendship commerce and navigation.<sup>9</sup> By the twentieth century, the right of States to determine which

<sup>4</sup> See United Nations General Assembly (UNGA), *Oceans and the law of the sea. Consultative Group on Flag State Implementation. Report of the Secretary-General*, UN Doc A/59/63 (2005) 3.

<sup>5</sup> JNK Mansell, *Flag State Responsibility. Historical Development and Contemporary Issues* (Springer Dordrecht 2009) 13–15.

<sup>6</sup> R Coles and E Watt, *Ship Registration: Law and Practice* (2nd edn Informa Law London 2013) 3.

<sup>7</sup> See *The 'Le Louis'* (1817) 2 Dods 210, 243 per Sir W Scott; *The Marianna Flora* (1826) 24 US 1, 42–3.

<sup>8</sup> Illustrative of this were the British Navigation Acts of the seventeenth and eighteenth centuries, which were used to limit the benefits of protection and commercial trade to British ships. See D Konig, 'Flag of Ships' in R Wolfrum (ed), *Max Plank Encyclopedia of Public International Law* (June 2009) [2], available at <[www.mpepil.com](http://www.mpepil.com)>.

<sup>9</sup> Eg 1946 Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, Art XXI(2).

ships could fly their flag was generally recognized.<sup>10</sup> However, the precise scope of this, as well as the international consequences of granting nationality to a ship, has continued to develop until the present day.

### 3 REGISTRATION AND NATIONALITY

Article 91(1) of the LOSC provides that 'ships have the nationality of the State whose flag they are entitled to fly'. States usually grant nationality to ships by way of registration. This is always a matter of domestic law, and its precise operation varies from State to State. However, given the importance of nationality, it is necessary to know the extent to which international law controls this.<sup>11</sup> Although it is generally accepted that States are entitled to determine the conditions for ship registration, the view that international law limits this authority has surfaced with some frequency and force.<sup>12</sup> For example, during the International Law Commission's (ILC) work on drafting the 1958 Convention on the High Seas (HSC), the view was advanced that State practice had established minimum requirements to be met if the nationality of a vessel was to be recognized.<sup>13</sup> This mainly concerned the requirement that the owner be a national or corporate domicile of the State.<sup>14</sup> However, given the ease with which ship-owning companies could move between countries and the growing objections to strong limits on the exercise of sovereignty, this approach faded. Instead, the concept of a genuine link emerged as a means of tackling the use of 'flags of convenience'.

In principle, there are three limits on the grant of nationality.<sup>15</sup> First, those accepted by the State when ratifying a treaty. Most shipping agreements assume the fact of registration as a prerequisite for the application of substantive law so such limits are uncommon in practice. One example is the right of establishment under

<sup>10</sup> This has been confirmed in the *Muscat Dhows (France/Great Britain)*, PCA 1905 (1961) XI RIAA 83 and *Lauritzen v Larsen* (1953) 345 US 571. See further CJ Colombos, *International Law of the Sea* (Longman London 1961) 250-1.

<sup>11</sup> At a minimum, international law requires documentation to be issued to ships evidencing registration. See LOSC, n 2, Art 91(2).

<sup>12</sup> See HW Wefers Bettink, 'Open Registry, the Genuine Link and the 1986 Convention on Registration Conditions for Ships' (1986) 18 *Netherlands Yearbook of International Law* 69, 81-7.

<sup>13</sup> 'Summary Records of the Third Session 16 May-27 July 1951' (1951) I *Yearbook of the International Law Commission* 330-4.

<sup>14</sup> DP O'Connell, *The International Law of the Sea* (Clarendon Press Oxford 1982-1984) Vol 2, 759.

<sup>15</sup> Boczek further suggests that a State cannot grant nationality to a ship if they reasonably suspect the ship will engage in illegal activities, although he provides no authority for this. BA Boczek, *Flags of Convenience. An International Study* (Harvard University Press Cambridge 1962) 106.

Article 49 of the Treaty on the Functioning of the European Union, which allows nationals from one Member State to pursue economic activities in other member States. This extends to the right to register ships in other Member States.<sup>16</sup> König suggests that the FAO Compliance Agreement is another such example.<sup>17</sup> However, it only limits State authorization of fishing activities, not the registration of ships.<sup>18</sup> A noteworthy attempt to regulate the grant of nationality was the 1986 United Nations Convention on Conditions for Registration of Ships (Registration Convention). Developed against concerns about the use of flags of convenience, the Convention sought to develop registration requirements in respect of national participation in ship-owning companies, manning of ships, and participation in the management of ship-owning companies.<sup>19</sup> However, these conditions were framed in discretionary and open-ended terms, so would not, even in the unlikely event the treaty enters into force, constrain States' rights to grant nationality.<sup>20</sup> The Registration Convention stands as a salutary lesson about States' resistance to limits on the exercise of sovereign powers. According to the LOSC, the right to grant nationality must be exercised in good faith.<sup>21</sup> Arguably, this means that States should refrain from registering vessels which will knowingly be used for acts contrary to international law. Given the ambiguities of this principle, such an argument is better articulated through specific treaty rules imposing limits on the right to grant nationality.<sup>22</sup> Of course, this faces the same challenge noted above.

Second, States cannot grant nationality to a ship already registered in another State.<sup>23</sup> Article 92 requires ships to sail under the flag of one State only. This serves to maintain order at sea by preventing overlapping and conflicting claims to jurisdiction. There is an exception to this in the case of ships chartered by demise. In such cases, it is common practice to permit the demise charterer to register the ship in a preferred jurisdiction, despite the existence of an original registration by the beneficial owner.<sup>24</sup>

<sup>16</sup> See *R v Secretary of State for Transport ex p Factortame* (Case 221/89) [1991] ECR I-3905, [20]–[22].

<sup>17</sup> 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereinafter FAO Agreement). See König, n 8, [21].

<sup>18</sup> FAO Agreement, Art III(3).

<sup>19</sup> Articles 8, 9, and 10 respectively. See SG Sturmeijer, 'The United Nations Convention on Conditions for Registration of Ships' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 97.

<sup>20</sup> ML McConnell, 'Business as Usual: an Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships' (1987) 18 *Journal of Maritime Law and Commerce* 435.

<sup>21</sup> See LOSC, n 2, Art 300, which provides that rights shall not be exercised in a manner which constitutes an abuse of right. See the Separate Opinion of Judge Anderson in *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits) [1999] ITLOS Rep 4, 132. See generally M Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 *McGill Law Journal* 389.

<sup>22</sup> See eg FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO Rome 2002) [35]–[36].

<sup>23</sup> Rienow, n 2, 10.

<sup>24</sup> A Odeke, *Bareboat Charter (Ship) Registration* (Kluwer Law International The Hague 1998) 23–31.

Third, international law requires there to be a genuine link between the ship and flag State.<sup>25</sup> This suggests that registration cannot be a mere administrative formality; otherwise, the act of registration would create a link and render meaningless the requirement of a genuine link.<sup>26</sup> However, beyond this, the meaning of genuine link is notoriously difficult to pin down.<sup>27</sup> Historically, maritime nations tended to require a link of ownership or nationality of the crew as a condition for registration.<sup>28</sup> However, this practice never consolidated into a clear rule of custom, and the emergence of open registries during the twentieth century confirms that ownership or crew nationality are not pre-requisites for registration. Some authors are strongly critical of the genuine link, seeking to limit its impact on liberal shipping regimes.<sup>29</sup> Others question the precise meaning of the concept, especially as regards the claims that effective control is a condition precedent to or consequence of registration.<sup>30</sup> Some are more sanguine, accepting that the existence of a genuine link is a consequence of registration.<sup>31</sup> Yet others argue more strongly for the existence of factual or legal elements that are a means of controlling flag ships.<sup>32</sup> Discussion of the genuine link frequently draws upon the concept of genuine connection as advanced in the *Nottebohm* case.<sup>33</sup> Here, the ICJ held, in respect of the grant of nationality to persons in the context of the law of diplomatic protection, that States cannot require other States to recognize municipal rules on nationality unless those are in accordance with the general aim of securing a genuine connection between an individual and the State. Although having obvious parallels with ship registration, this link between recognition and genuine link cannot now be sustained in light of the *M/V 'Saiga' (No 2)* and *M/V 'Virginia G'* cases in which the International Tribunal for the Law of the Sea (ITLOS) held that a genuine link is not a pre-requisite for the

<sup>25</sup> 1958 Convention on the High Seas, Art 5(1) (hereinafter HSC); LOSC, n 2, Art 91(1).

<sup>26</sup> International Law Commission, *Report of the International Law Commission*, ILC Art 29, Commentary [3(a)], reproduced in (1956) II *Yearbook of the International Law Commission* 253, 279.

<sup>27</sup> The ICJ side-stepped the issue in the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 171. For an excellent analysis of the genuine link, see RR Churchill, *The Meaning of the 'Genuine Link' Requirement in Relation to the Nationality of Ships* (Study prepared for the International Transport Workers Federation (ITF), 2000).

<sup>28</sup> See O'Connell, n 14.

<sup>29</sup> MS McDougal, WT Burke, and IA Vlasic, 'The Maintenance of Public Order at Sea and the Nationality of Ships' (1960) 54 *American Journal of International Law* 25.

<sup>30</sup> ML McConnell, "'... Darkening Confusion Mounted Upon Darkening Confusion': The Search for the Elusive Genuine Link' (1985) 16 *Journal of Maritime Law and Commerce* 365. Cf R Wolfrum, 'Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective' (1989) 29 *Virginia Journal of International Law* 387, 392.

<sup>31</sup> HE Anderson, 'The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives' (1996) 21 *Tulane Maritime Law Journal* 139, 149; NP Ready, *Ship Registration* (3rd edn Lloyds of London Press London 1998) 15.

<sup>32</sup> N Singh 'International Law Problems of Merchant Shipping' (1962) 107 *Recueil des Cours* 1, 55-64; H Meyers, *The Nationality of Ships* (Martinus Nijhoff The Hague 1967).

<sup>33</sup> *Nottebohm (second phase) (Liechtenstein v Guatemala)* (Judgment) [1955] ICJ Rep 4, 23.

grant of nationality to a ship.<sup>34</sup> The requirement of a genuine link is only intended to secure effective implementation of flag State duties.<sup>35</sup> Even if there is evidence of the absence of jurisdiction and control, States cannot refuse to recognize the right of a ship to fly the flag of the flag State.<sup>36</sup> Such an approach collapses the genuine link into the requirement that States exercise effective jurisdiction and control over flag ships. This seems logical since it is difficult to argue that a State which exercises actual control has no link to the vessel. ITLOS has also excised the ambiguities associated with genuine link from questions of jurisdiction; jurisdiction and control are thus questions of fact.<sup>37</sup>

It may be observed that the LOSC does not comprehensively deal with the consequences of an absence of a genuine link (or ineffective control).<sup>38</sup> During the drafting of the corresponding provision of the High Seas Convention, it was proposed that the absence of a genuine link would provide grounds for non-recognition.<sup>39</sup> This was removed from the final text since it undermined States' sovereignty and generated opposition from developing countries.<sup>40</sup> Regardless of this, some States have sought to dispute claims to the existence of a genuine link in particular cases.<sup>41</sup> However, no tribunal has yet upheld any such claim. Article 94 merely permits States to report to the flag State instances where proper jurisdiction and control have not been exercised. This is not the end of the matter, and it seems that the absence of a genuine link (effective jurisdiction) may entail the responsibility of a State under general international law (see further the discussion of due diligence in Section 6).

Notably, international law does not require the registration of small vessels, although the extent of this exception is unclear.<sup>42</sup> Such vessels remain in principle subject to flag State jurisdiction. However, this may generate problems in practice, particularly when such vessels engage in illegal, unreported, and unregulated (IUU) fishing<sup>43</sup> or people smuggling or irregular maritime migration.<sup>44</sup> Small or unflagged

<sup>34</sup> *M/V 'Saiga' (No 2)*, n 21, [83]; *M/V 'Virginia G' (Panama v Guinea-Bissau)* Judgment of the International Tribunal for the Law of the Sea (14 April 2014), [110].

<sup>35</sup> *M/V 'Saiga' (No 2)*, n 21, [83]; *M/V 'Virginia G'*, n 34, [112–13].

<sup>36</sup> *M/V 'Virginia G'*, n 34, [111].

<sup>37</sup> *M/V 'Saiga' (No 2)*, n 21, [66]; *Grand Prince (Belize v France)* [2001] ITLOS Rep 17, [81].

<sup>38</sup> See *M/V 'Virginia G'*, n 34, Dissenting Opinion of Judge Jesus [44].

<sup>39</sup> (1956) II *Yearbook of the International Law Commission* 15 and 278–9 (Draft Article 29, and Commentary).

<sup>40</sup> Discussed by Bettink, n 12, 86.

<sup>41</sup> See *M/V 'Saiga' (No 2)*, n 21, [66]; *Grand Prince*, n 37, [81]. See also *Magda Maria* (Netherlands Court of Appeal), noted in (1989) 20 *Netherlands Yearbook of International Law* 351; *Commission v Hellenic Republic* (Case 62/96) [1997] ECR I-6725, Opinion of AG Tesouro [13].

<sup>42</sup> LOSC, n 2, Art 94(2)(a).

<sup>43</sup> TL McDorman, 'Stateless Fishing Vessels, International Law, and the UN High Seas Fisheries Conference' (2007) 25 *The Journal of Maritime Law and Commerce* 531.

<sup>44</sup> R Barnes, 'The International Law of the Sea and Migration Control' in B Ryan and V Mitsilegas, *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff Leiden 2010) 102, 130–3; M den Heijer, *Europe and Extraterritorial Asylum* (Hart Oxford 2012) ch 6.



vessels are not beyond the law. Ships without nationality are susceptible to the jurisdiction of any State, subject to the right of relevant States to exercise diplomatic protection over nationals aboard the ship.<sup>45</sup> Unfortunately, this may pose problems in practice, when trying to identify the States entitled to exercise diplomatic protection and entrusting them to do so with due regard to the human rights of those aboard interdicted vessels.<sup>46</sup>

## 4 THE OPERATION OF FLAG STATE JURISDICTION

The principle that only *States* exercise jurisdiction over *ships* can be questioned in two respects. First, non-State actors may enjoy certain flag rights and duties.<sup>47</sup> Difficult questions arise about the position of Taiwan (Republic of China), which although not recognized as a State, operates a flag and has an important maritime presence, especially in respect of fisheries.<sup>48</sup> Its equivocal status means it has not ratified any international maritime treaties, although its participation is accommodated in some regional fisheries management agreements.<sup>49</sup> If one concedes that international personality is not limited to States, then it follows that other entities can be subject to rights and duties under international law.<sup>50</sup> Here, as in the case of

<sup>45</sup> RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn Manchester University Press Manchester 1999) 214; D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press Cambridge 2009) 18.

<sup>46</sup> Barnes, n 44, 103; Den Heijer, n 44, 252–66.

<sup>47</sup> For example, LOSC, n 2, Art 93 provides that ships employed by the UN, its specialized agencies or the International Atomic Energy Authority may fly the flag of that organization. Here, the flag is indicative of a particular status, rather than the law governing the operation of the vessel.

<sup>48</sup> Y-H Song, 'The Role of Taiwan in Global Ocean Governance' in HN Scheiber and J-H Paik (eds), *Regions, Institutions and Law of the Sea: Studies in Oceans Governance* (Martinus Nijhoff Leiden 2013) 293.

<sup>49</sup> See 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter FSA), Art 1(3); 2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Annex 1(1); 2003 Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established Between The United States of America and The Republic of Costa Rica, Art XXVIII. See further A Serdy, 'Bringing Taiwan into the International Fisheries Fold. The Legal Personality of a Fishing Entity' (2004) 75 *British Yearbook of International Law* 183.

<sup>50</sup> M Tsamenyi, 'The Legal Status and Substance of Fishing Entities in International Law. A Note' (2006) 37 *Ocean Development and International Law* 123.

how the genuine link concept and the right to grant nationality operates, a pragmatic approach prevails.<sup>51</sup> This seeks to ensure that ships are brought within the purview of international law.

Second, the idea that only ships are subject to flag State jurisdiction may be questioned. Surprisingly, the LOSC does not define the term 'ship', so the precise object of flag State jurisdiction might be unclear. Some instruments define the term 'ship' as a vessel intended for use in navigation.<sup>52</sup> Thus navigation seems determinative of the scope of flag State control and would normally exclude devices permanently fixed to the seabed, such as oil and gas platforms. However, there is a range of floating and mobile devices, which can be used for offshore resource exploitation.<sup>53</sup> As a rule of thumb, such devices are subject to coastal State control while fixed to the seabed and flag State control when manoeuvring into position, although the position is not entirely clear-cut.<sup>54</sup> The status of a particular vessel, and hence the relevance of flag State jurisdiction, will ultimately depend upon its location, the nature of the activity it is engaged in, and how the relevant legal instruments define their scope of application.

The modalities of flag State control largely depend upon where the vessel is located.<sup>55</sup> Flag States enjoy prescriptive and enforcement jurisdiction over ships flying their flag wherever the vessel is located.<sup>56</sup> When a ship is within internal waters, port, or the territorial sea, jurisdiction is concurrent with the port/coastal State.<sup>57</sup> In the territorial sea, some States assert plenary jurisdiction whereas others assert only limited jurisdiction over certain activities.<sup>58</sup> In either case, coastal State jurisdiction must accord with the limits set forth in Part II, Section 3 of the LOSC. In the exclusive economic zone (EEZ), coastal States have exclusive jurisdiction over resource related activities, and other States shall have due regard to this. In practice, coastal States generally refrain from exercising criminal jurisdiction over foreign ships as regards matters that are purely internal to the ship (whether as a matter

<sup>51</sup> N-T Hu, 'Fishing Entities: Their Emergence, Evolution, and Practice from Taiwan's Perspective' (2006) 37 *Ocean Development and International Law* 149, 156.

<sup>52</sup> See eg 1954 International Convention for the Prevention of Pollution of the Sea by Oil (hereinafter OILPOL), Art 1; 1972 International Regulations for Preventing Collisions at Sea, Rule 3(a); 1973 International Convention for the Prevention of Pollution, as modified by the Protocol of 1978, Art 2(4) (hereinafter MARPOL); 2006 Maritime Labour Convention, Art 2.

<sup>53</sup> For example, the development of large floating liquefied natural gas vessels like Shell's 'Prelude' generates interesting questions as to vessel status.

<sup>54</sup> See AV Lowe, 'Ships' in N Boschiero et al (eds) *International Courts and the Development of International Law* (Springer Berlin 2013) 294.

<sup>55</sup> See generally J-A Witt, *Obligations and Control of Flag States: Developments and Perspectives in International and EU Law* (Lit Verlag Münster 2007).

<sup>56</sup> See further EJ Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (Kluwer Law The Hague 1998) 95.

<sup>57</sup> See further Chapter 13 in this volume.

<sup>58</sup> Churchill and Lowe, n 45, 92–100.

of comity or legal duty), leaving such matters to the flag State.<sup>59</sup> Flag States also remain responsible for the operational standards outlined in Article 94(5) within all of these zones.<sup>60</sup> However, it is important to note that flag States cannot exercise enforcement jurisdiction within the territory or territorial sea of third States, at least without their consent.<sup>61</sup> Coastal State jurisdiction over warships and State operated non-commercial vessels is limited because such vessels enjoy sovereign immunity.<sup>62</sup> However, the flag State is responsible for any loss or damage suffered by the coastal State resulting from the non-compliance of warships with the coastal State's laws and regulations concerning passage through the territorial sea or with other provisions of the LOSC or other rules of international law.<sup>63</sup>

On the high seas, the flag State enjoys exclusive jurisdiction subject to certain well-established exceptions.<sup>64</sup> First, the competent authorities of a coastal State may exercise the right of hot pursuit against a foreign ship.<sup>65</sup> Related to this is the doctrine of constructive presence, which allows the coastal State to take action against foreign vessels on the high seas that use their boats or work with other vessels to commit offenses within coastal waters.<sup>66</sup> Second, warships enjoy the right of visit in respect of vessels suspected of engaging in four types of activity: piracy, slave trade, unauthorized broadcasting, and vessels without nationality. These are longstanding exceptions and are considered in detail in other chapters.<sup>67</sup> The exceptions cover activities in which all States have an interest and, hence, authority to take action. They also reflect potential limitations in flag State jurisdiction, such as the lack of enforcement capacity or political will to deal with the offence. In recent years, concerns about maritime security have resulted in efforts to increase the role of non-flag States in enforcement activities on the high seas, for example by way of the Proliferation Security Initiative.<sup>68</sup> While these steps do not challenge the exclusive authority of flag States, they demonstrate a need for greater cooperation in addressing illegal activities on the high seas.

<sup>59</sup> *Wildenhus* (1887) 120 US 1, 12; *McCulloch* (1963) 372 US 10, 20–1. H Yang, *Coastal State Jurisdiction over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer Berlin 2006) 90ff.

<sup>60</sup> See also LOSC, n 2, Arts 211(2) and 217. <sup>61</sup> Molenaar, n 56.

<sup>62</sup> LOSC, n 2, Art 32. This was reaffirmed in the *ARA Libertad (Argentina v Ghana)* (Provisional Measures) [2012] ITLOS Rep 21, [95]. On immunity of warships, see further TK Thommen, *Legal Status of Government Merchant Ships in International Law* (Martinus Nijhoff The Hague 1962) 3–8.

<sup>63</sup> LOSC, n 2, Art 31. <sup>64</sup> See Chapter 10 in this volume.

<sup>65</sup> LOSC, n 2, Art 111 and HSC, n 25, Art 23. See O'Connell, n 14, Vol 2, 1075–93; NH Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff The Hague 2002).

<sup>66</sup> Churchill and Lowe, n 45, 215–16; Y Tanaka, *The International Law of the Sea* (Cambridge University Press Cambridge 2012) 165–6; EJ Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa 1* and the *South Tomi*' (2004) 19 *International Journal of Marine and Coastal Law* 19.

<sup>67</sup> For further discussion on the high seas and piracy, see Chapters 10 and 37 in this volume.

<sup>68</sup> See Chapter 26 in this volume.

## 5 FLAG STATE RIGHTS AND DUTIES

### 5.1 Flag State rights

Flag State rights are mainly defined in terms of the right to exercise jurisdiction over flag ships. Absent any coastal State right to take action against ships in its coastal waters, flag States enjoy prescriptive and enforcement jurisdiction in respect of their ships. Flag States may permit third States to board and inspect flagged ships. Such permission constitutes a waiver of the right to exercise exclusive jurisdiction, and so is to be construed narrowly. Any authority to take further enforcement action, such as arrest or detention, must be expressly granted by the flag State.<sup>69</sup> Two important, related rights are the right to be notified of flag ship detentions and the right to apply for the prompt release of such ships.<sup>70</sup>

The right of navigation is the most important substantive right enjoyed by flag States. This is either freedom of navigation on the high seas and EEZ or rights of passage in the territorial sea, archipelagic waters and straits. The LOSC is somewhat inconsistent in the way it attributes such rights. Article 90 directly refers to the right of States, but Articles 17, 38, and 52 refer to the right of ships, although this may make little difference in practice, since navigation is mostly conducted by private persons. Other substantive rights include the right to fish on the high seas and to enjoy other freedoms of the high seas.<sup>71</sup>

Oxman and Bantz note that flag State rights and duties exist independently of each other.<sup>72</sup> This suggests that rights are not normally contingent on a duty to exercise them in a particular way. However, this seems to play down the relevance of the due regard principle in Article 87(2) of the Convention. It also runs counter to the way in which the genuine link concept has developed.<sup>73</sup> Moreover, as those authors accept, there are specific exceptions to the general rule, including Article 228(1), which denies a flag State the ability to suspend proceedings against its ships for pollution violations when the flag State has repeatedly disregarded its obligations to take enforcement action against its ships.<sup>74</sup> Also notable is Article 8(4) of the 1995 UN Fish Stocks Agreement, which makes fishing for certain stocks contingent upon participation in regional fisheries management mechanisms. This and other qualifications on flag State rights aim at strengthening the link between rights and duties.<sup>75</sup>

<sup>69</sup> Guilfoyle, n 45, 9–10.      <sup>70</sup> LOSC, n 2, Arts 73(4) and 292(2), respectively.

<sup>71</sup> LOSC, n 2, Art 87. See Chapter 10 in this volume.

<sup>72</sup> BH Oxman and V Bantz, 'MV Saiga (No 2) (Saint Vincent and the Grenadines v Guinea) Judgment (ITLOS Case No 2)' (2000) 94 *American Journal of International Law* 140, 149.

<sup>73</sup> See Section 3 above.      <sup>74</sup> See also FSA, n 49, Art 8(4).

<sup>75</sup> See the discussion in Section 6 below.

## 5.2 Flag State duties

Article 94 of the LOSC is the keystone provision on flag State obligations. It sets out a general and non-exhaustive range of duties. Although located in the part of the LOSC dealing with the high seas, its application is not limited spatially. It is subject to qualification in respect of the relevant rules permitting concurrent jurisdiction to be exercised by coastal/port States.<sup>76</sup> States are required to exercise effective jurisdiction and control over the somewhat ambiguously phrased ‘administrative, technical and social matters’.<sup>77</sup> Since flag State jurisdiction is exclusive, this phrase must be construed broadly to include any matters affecting vessel operations in order to avoid regulatory lacunae. The term ‘jurisdiction and control’ indicates the full gamut of prescriptive, adjudicative, and enforcement jurisdiction.<sup>78</sup> This extends to assuming jurisdiction under domestic law over the ship and its crew as regards such matters.<sup>79</sup> More specifically, every State is to maintain a register of ships flying its flag, including details on the ship’s name and particulars. The extent of particulars to be recorded is not defined and so left to domestic law.<sup>80</sup> Certain vessels may be excluded from the LOSC’s registration requirements on account of their small size. The aim of this exception was to prevent burdensome and unworkable standards being applied to vessels, which because of their small size, would generally be used only within coastal waters. The range of excepted vessels is not defined in further detail, but it should be noted that the provision was not meant to exclude ocean-going vessels.<sup>81</sup> The range of ships falling within this framework is normally addressed within specific agreements constituting generally accepted international rules.<sup>82</sup> However, problems may arise in practice with regards to unflagged or stateless vessels, especially those engaged in IUU fishing<sup>83</sup> and people

<sup>76</sup> *Virginia Commentaries*, Vol. III, 136–43.

<sup>77</sup> LOSC, n 2, Art 94(1). For comments, see McDougall and Burke, n 1, 1015–16.

<sup>78</sup> Y Takei, ‘Assessing Flag State Performance in Legal Terms: Clarifications of the Margin of Appreciation’ (2013) 28 *International Journal of Marine and Coastal Law* 97, 101–2.

<sup>79</sup> LOSC, n 2, Art 94(2). It is not clear how far this extends to passengers and persons aboard illegally. On the one hand, in the *M/V ‘Saiga’ (No 2)*, n 21, [106], the ship was to be regarded as a unit for the purpose of the flag State exercising protective jurisdiction. On the other, the focus was on the master and other members of the crew, the owners or operators and other persons involved in the activities of the ship, although at points in the judgment it refers to persons generally, *ibid*, [105].

<sup>80</sup> 1986 United Nations Convention on Conditions for Registration of Ships, Art 11(1) might be regarded as illustrative of the kinds of detail to be included. More important is the present requirement of maintaining a Continuous Synopsis Record under 1974 International Convention for the Safety of Life at Sea, Art XI-1(5) (hereinafter SOLAS).

<sup>81</sup> *Virginia Commentaries*, Vol III, 146.

<sup>82</sup> This relates to the defined material scope of conventions. Thus the 1966 International Convention on Load Lines excludes warships, fishing vessels and pleasure craft from the scope of the rules (Arts 2 and 5). In contrast, the 1972 Convention on the International Regulations for Preventing Collisions at Sea (hereinafter COLREG) adopts a broad definition of ship in Rule 3(a).

<sup>83</sup> TL McDorman, ‘Stateless Fishing Vessels, International Law, and the UN High Seas Fisheries Conference’ (2007) 25 *Journal of Maritime Law and Commerce* 531.

smuggling or irregular maritime migration.<sup>84</sup> Such ships are not beyond the law, since ships without nationality are susceptible to the jurisdiction of any State, subject to the right of relevant States to exercise diplomatic protection over nationals aboard the ship.<sup>85</sup> However, this may pose problems in trying to identify the States entitled to exercise diplomatic protection and entrusting them to do so with due regard to the human rights of those aboard an interdicted vessel.<sup>86</sup>

### 5.3 Safety

Article 94(3) of the LOSC requires States to take measures to ensure safety, with regard to, *inter alia*, construction, equipment and seaworthiness, manning, labour conditions and training, and collisions regulation. This is reinforced by the requirement to take further measures to ensure vessels are periodically surveyed and equipped with suitable nautical charts and navigational equipment, and that masters and crew are appropriately qualified and conversant with the applicable international regulations.<sup>87</sup> Safety matters are addressed by a wide range of instruments which require flag States to transpose detailed technical standards into domestic law.<sup>88</sup> Day-to-day implementation will be carried out by ship owners/operators, with flag States' maritime agencies retaining responsibility for general authorizations and certification, monitoring and inspection, and enforcement measures. The problems of ineffective control by flag States over safety matters are well known, although this is compounded by easy movement of shipping between States and shortcomings within the private sector.<sup>89</sup> Appropriate responses are required not just from the flag State, but from across the maritime sector as a whole.<sup>90</sup>

<sup>84</sup> R Barnes, n 44, 130–3; M den Heijer, n 44, ch 6.

<sup>85</sup> Churchill and Lowe, n 45, 214; Guilfoyle, n 45, 18.

<sup>86</sup> Barnes, n 44, 103. Den Heijer, n 44, 252–66. <sup>87</sup> LOSC, n 2, Art 94(4).

<sup>88</sup> 1966 International Convention on Load Lines; 1969 International Convention on Tonnage Measurement; COLREG, n 82; 1972 International Convention for Safe Containers; SOLAS, n 80, and 1988 Protocol; 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (revised 1995); 1979 International Convention on Maritime Search and Rescue; 1989 International Convention on Salvage.

<sup>89</sup> Sir A Clarke, 'Port State Control or Substandard Ships: Who is to Blame? What is the Cure?' [1994] *Lloyds Maritime and Commercial Law Quarterly* 202; G Pambourides, *International Shipping Law: Legislation and Enforcement* (Kluwer Law International The Hague 1999); M Hayashi, 'Towards the Elimination of Substandard Shipping: The Report of the International Commission on Shipping' (2001) 16 *International Journal of Marine and Coastal Law* 501, 507. See also OECD, *Policy Statement on Sub-standard Shipping by the Maritime Transport Committee of OECD* (2002), available at <<http://www.oecd.org/sti/transport/maritimetransport/2080990.pdf>>.

<sup>90</sup> T Coghlin, 'Tightening the Screw on Substandard Shipping' [2005] *Lloyds Maritime and Commercial Law Quarterly* 316.

## 5.4 Maritime casualties and assistance at sea

Article 98 of the LOSC obliges every State to require the master of a flagged ship to render assistance to persons and vessels in distress, unless this will place the ship in danger. It is also subject to a requirement of reasonableness. Assistance may be required upon receipt of a distress call or after a collision between the flag ship and another vessel.<sup>91</sup> Apart from rendering assistance, Article 94(7) concerns the duty of flag States to conduct enquiries into maritime casualties occurring on the high seas. This provision refers to harm occasioned upon vessels and installations of other States, and so requires cooperation between all concerned States. In general, it appears that there are significant variations in the investigation or reporting of casualties.<sup>92</sup>

## 5.5 Pollution

Some flag States have come in for sharp criticism of their lack of diligence in controlling substandard shipping and threats of pollution.<sup>93</sup> As in other areas, flag States do not have sole responsibility for poor shipping standards, but criticism tends to flow from the fact that they have primary legal responsibility for such matters. Article 211(2) of the LOSC extends flag State duties to include the adoption of laws and regulations to prevent, reduce and control pollution of the marine environment from ships. Article 212(1) provides the same for atmospheric pollution. Such laws and regulations shall have at least the same effect as generally accepted international rules and standards.<sup>94</sup> The corresponding enforcement jurisdiction is articulated in Article 217. This requires enforcement measures to be provided for regardless of where the violation occurs. Vessels should not be permitted to sail unless they comply with pollution control requirements. Furthermore, flagged ships shall be properly certificated.<sup>95</sup> In the event of a violation of pollution laws, the flag State shall investigate, and if appropriate, institute proceedings and impose penalties against the responsible parties.

<sup>91</sup> See generally R Barnes, 'Refugee Law at Sea' (2004) 53 *International and Comparative Law Quarterly* 44.

<sup>92</sup> Mansell, n 5, 156–60.

<sup>93</sup> 'Safer Ships, Cleaner Seas': *The Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping*, Cmd 2560 (17 May 1994). A K-J Tan, *Vessel Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge University Press Cambridge 2006) ch 2.

<sup>94</sup> MARPOL, n 52, as modified by the 1978 Protocol, and, potentially, the 1994 International Convention for the Control and Management of Ships' Ballast Water and Sediments. See further the discussion of generally accepted international rules and standards below, Section 6.

<sup>95</sup> LOSC, n 2, Art 217(2).

## 5.6 Fisheries and mineral resources

As the Sub-Regional Fisheries Commission (SRFC) 2013 request to ITLOS for an advisory opinion indicates, there remain concerns within the international community regarding the effectiveness of flag State control over fishing activities.<sup>96</sup> There are well-documented concerns about weak ship registration mechanisms, gaps between fishing rights and responsibilities, and poor compliance with regulatory standards (by both States and individual vessels).<sup>97</sup> Although coastal States have exclusive authority for fisheries conservation and management within the territorial sea and EEZ, there is no reason why flag States should not also take steps to ensure fishing vessels flying their flag comply with such conservation and management requirements, especially when these are secured through international agreements.<sup>98</sup> On the high seas, flag States are subject to a general duty to take such measures, either individually or in cooperation, as are necessary for the conservation and management of living resources.<sup>99</sup> This cooperation extends to measures for straddling and highly migratory fish stocks.<sup>100</sup> The LOSC is notoriously vague as to the meaning of conservation and management, but has since been augmented by other instruments, principally the 1993 FAO Compliance Agreement<sup>101</sup> and the 1995 UN Fish Stocks Agreement 1995. Although not identical in scope, both these instruments require States to ensure vessels flying their flag do not engage in activities that undermine conservation and management.<sup>102</sup> They require flag States to authorize fishing only when they are able to exercise effectively their flag State responsibilities,<sup>103</sup> and to take enforcement measures, regardless of the place of violation, to investigate and initiate judicial proceedings, and impose sanctions.<sup>104</sup> Both agreements require flag

<sup>96</sup> *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, International Tribunal for the Law of the Sea Case No 21 (pending), available at <<http://www.itlos.org/index.php?id=252>> (hereinafter *SRFC Advisory Opinion*).

<sup>97</sup> There is a vast literature on the regulation of fisheries, especially IUU fishing. On flag States aspects of this, see FAO, *Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing*. Sydney, Australia, 15–19 May 2000. *Fisheries Report No 666* (2001); R Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff Leiden 2004) ch 1; High Seas Task Force, *Closing the Net. Stopping illegal fishing on the high seas* (High Seas Task Force London 2006); MA Palma, M Tsamenyi, and W Edeson, *Promoting Sustainable Fisheries. The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Leiden 2010) ch 5.

<sup>98</sup> Although the LOSC contains no express provision on this, this seems to be implicit in Art 58(3) and, possibly, Art 62(4). Takei, n 78, 106.

<sup>99</sup> LOSC, n 2, Arts 117–18. <sup>100</sup> *Ibid*, Arts 63(2) and 64.

<sup>101</sup> See also FAO Code of Conduct for Responsible Fisheries, Art 8.2, available at <<http://www.fao.org/docrep/005/v9878e/v9878e00.htm>>; and FAO Voluntary Guidelines for Flag State Performance (adopted 8 February 2013), available at <[ftp://ftp.fao.org/FI/DOCUMENT/tc-fsp/2013/VolGuidelines\\_adopted.pdf](ftp://ftp.fao.org/FI/DOCUMENT/tc-fsp/2013/VolGuidelines_adopted.pdf)>.

<sup>102</sup> FAO Agreement, n 17, Art III; FSA, n 49, Art 18(1).

<sup>103</sup> FAO Agreement, n 17, Art III(3); FSA, n 49, Art 18(2).

<sup>104</sup> FSA, n 49, Arts 18–19; FAO Agreement, n 17, Art III(8). Interestingly, the Fish Stocks Agreement also facilitates enforcement by non-flag States within regional arrangements (FSA, n 49, Art 21).



States to ensure that vessels can be identified<sup>105</sup> and that catch and landing information is recorded.<sup>106</sup> Flag States must also cooperate and engage in information sharing with regard to fishing activities.<sup>107</sup> Given its additional focus on prescriptive measures, the FSA provides more extensive duties, such as the use of the precautionary approach,<sup>108</sup> cooperation in scientific research,<sup>109</sup> and cooperation with coastal States and the development of compatible conservation and management measures.<sup>110</sup> Specific flag State duties are articulated within a range of regional fisheries management organizations.<sup>111</sup> These represent important steps in strengthening the responsibilities of (flag) States, but they do not allay all concerns, particularly in respect of compliance with such standards.

Many provisions of the LOSC seek to balance flag State rights and coastal State rights, a balance frequently reiterated by commentators.<sup>112</sup> This includes provisions on enforcement of fishing laws and prompt release under Articles 73 and 292. However, this balance may no longer be tenable, reflecting as it does an outdated view of how international fishing activities operate.<sup>113</sup> As noted by Judge Shearer in his Dissenting Opinion in *The 'Volga'* case, the fishing rights associated with flag States are frequently enjoyed by private companies that are readily able to manipulate the registry process and avoid control.<sup>114</sup> This requires a new balance to be struck between coastal States and private parties, a theme running through the SRFC request for an advisory opinion. The SRFC has requested an opinion on four points, three of which focus on flag States: (1) the obligations of flag States in cases of IUU fishing in third States' EEZs; (2) the extent of flag State liability for IUU fishing; and (3) the liability of a flag State or international agency for violations of coastal State fishing laws when fishing is conducted under a license issued under an agreement with the flag State or international agency. If ITLOS determines that it has jurisdiction to issue an advisory opinion, then it must answer some difficult questions concerning the extent of flag State responsibilities. In light of its earlier jurisprudence on the importance of effective flag State jurisdiction and control, it would be disappointing and problematic for the Tribunal to eschew strong flag State responsibility for such activities. What may be more challenging is the question of where to draw the threshold for the exercise of due diligence over flag ships.<sup>115</sup>

<sup>105</sup> FAO Agreement, n 17, Art III(6); FSA, n 49, Art 18(3)(c)–(d).

<sup>106</sup> FAO Agreement, n 17, Art III(7); FSA, n 49, Art 18(3)(e).

<sup>107</sup> FAO Agreement, n 17, Arts V–VI; FSA, n 49, Art 14. <sup>108</sup> FSA, n 49, Art 6.

<sup>109</sup> *Ibid*, Art 14. <sup>110</sup> *Ibid*, Arts 7–8. <sup>111</sup> See further Chapter 20 in this volume.

<sup>112</sup> DR Rothwell and T Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests' (2004) 53 *International and Comparative Law Quarterly* 171, 174.

<sup>113</sup> L Little and M Orellana, 'Can CITES Play a Role in Solving the problem of IUU Fishing?: The Trouble with Patagonian Toothfish' (2004) 15 *Colorado Journal of International Environmental Law and Policy* 22, 61.

<sup>114</sup> *The 'Volga' (Russian Federation v Australia)* (Prompt Release) [2002] ITLOS Rep 10 [19].

<sup>115</sup> See further Section 6 below.

The regulation of mineral resources beyond the limits of national jurisdiction is an issue which may require greater consideration in the future as regards the position of vessels used in support of mineral resource exploitation in the Area. Presently, such activities are governed under the Mining Code.<sup>116</sup> However, under the Code principal responsibility for the conduct of operations is placed upon the Contractor, and this appears to overlap with traditional flag State responsibilities in respect of safety, labour, and health standards.<sup>117</sup>

## 5.7 Crime and maritime security

Although many instruments stay faithful to the principle of flag State authority, a number of recent developments demonstrate the need for greater international cooperation to prevent crimes and security threats, especially on the high seas. Also, as the need for control over a wider range of illegal conduct at sea has grown, so too have the specific legal responsibilities of flag States.<sup>118</sup> The 1988 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention) establishes a range of offences involving the use of violence at sea and acts intended to intimidate populations or compel governments or international organizations to act, and measures for the extradition and prosecution of alleged offenders.<sup>119</sup> Although attributing a range of duties to States in different capacities, it stays faithful to the principle of exclusive flag State jurisdiction. Flag States are required to take measures to establish jurisdiction over offences committed against or on board flagged ships.<sup>120</sup> Flag States retain the right to permit and stipulate conditions in respect of boarding measures.<sup>121</sup> More specifically, flag States are required to consider requests for boarding of ships and further enforcement action.<sup>122</sup> When the master of a vessel seeks to deliver suspects to a receiving State, the flag State shall ensure, whenever practical and possible, that the authorities of the receiving State are notified and that the master furnishes the authorities with the relevant evidence in his possession.<sup>123</sup> The flag State may be requested to accept delivery of suspects from the receiving State, to consider such a request and, if the request is refused, to provide reasons for this.<sup>124</sup>

<sup>116</sup> International Seabed Authority (ISA), Mining Code, available at <<http://www.isa.org.jm/en/mcode>>.

<sup>117</sup> See ISA, Standard Clauses for Exploration Contracts, clauses 14–15, available at <<http://www.isa.org.jm/files/documents/EN/Regs/Code-Annex4.pdf>>.

<sup>118</sup> See generally N Klein, *Maritime Security and the Law of the Sea* (Oxford University Press Oxford 2011).

<sup>119</sup> 1988 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, amended by the 2005 Protocol, Arts 3 and 3(bis) (hereinafter SUA).

<sup>120</sup> *Ibid*, Art 6(a).      <sup>121</sup> *Ibid*, Art 8bis(8); Guilfoyle, n 45, 256–7.

<sup>122</sup> SUA, n 119, Art 8bis(5)(c).      <sup>123</sup> *Ibid*, Art 8(2).      <sup>124</sup> *Ibid*, Art 8(5).

The International Ship and Port Security (ISPS) Code was adopted within Chapter XI-2 of SOLAS.<sup>125</sup> Its mandatory provisions require, *inter alia*, flag States to approve ship security plans and to develop a Declaration of Security.<sup>126</sup> They are also responsible for assessing security threats and setting security levels for flagged ships.<sup>127</sup> Enforcement is left to flag States and the Code provides for flag States to issue guidance on measures to reduce security risks to ships.<sup>128</sup>

Flag States are obliged to take steps to ensure vessels flying their flag comply with Security Council resolutions adopted in order to maintain international peace and security.<sup>129</sup> The content of such resolutions has been characterized as legislative, and certainly impacts upon flag State authority.<sup>130</sup> In recent years, resolutions have implemented sanctions and controlled weapons proliferation, allowed for counter-piracy measures and facilitated counter-terrorism measures.<sup>131</sup> Security Council based sanctions typically impose embargoes, but may also require flag States to prevent the supply of goods on flagged ships.<sup>132</sup> Iran and the Democratic People's Republic of Korea (DPRK) have been subject to measures to counter the proliferation of weapons of mass destruction (WMD) and related material.<sup>133</sup> United Nations sanctions generally provide for boarding and inspection at sea, but flag State permission is still required for boarding and inspections at sea, although the flag State is expected to provide this. Notably, UNSC Resolution 1874 against the DPRK required flag States to direct vessels to port for inspection if consent to inspection on the high seas is refused.<sup>134</sup> While such resolutions allow flag States a degree of discretion as to how they implement the measures, they demonstrate the importance of coordinated and collective action. Outside the Security Council, the USA-led Proliferation Security Initiative has sought to coordinate existing efforts to control WMD proliferation.<sup>135</sup> Although it is designed to be consistent with the existing rights and duties of flag, port, and coastal States, it has resulted in supplementary steps by way of bilateral

<sup>125</sup> IMO Doc SOLAS/CONF.5/32 (12 December 2002) and IMO Doc SOLAS/CONF.5/34 (17 December 2002).

<sup>126</sup> *Ibid.*, Part A, §§ 5 and 9.

<sup>127</sup> *Ibid.*, Part A, § 4.

<sup>128</sup> *Ibid.*, Part B, § 4.21.

<sup>129</sup> 1945 United Nations Charter, Art 25. See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* [1992] ICJ Rep 16, [39].

<sup>130</sup> Guilfoyle, n 45, 238.

<sup>131</sup> See Takei, n 78, 113–14; Klein, n 118, 276–85.

<sup>132</sup> Congo: UNSC Res 1493 (2003) [20]; Liberia: UNSC Res 1521 (2003) [2(a)]; Sudan: UNSC Res 1556 (2004) [7]; Côte d'Ivoire: UNSC Res 1572 (2004); Eritrea: UNSC Res 1907 (2009) [5], [6], and [12]; Libya: UNSC Res 1970 (2011) [9].

<sup>133</sup> Iran: UNSC Res 1737 (2006) [3] and [7]; UNSC Res 1747 (2007), [5] and [6]; UNSC Res 1803 (2008) [8]; UNSC Res 1929 (2010) [8]; North Korea: UNSC Res 2094 (2013) [22].

<sup>134</sup> North Korea: UNSC Res 2094 (2013) [13].

<sup>135</sup> For details on the Statement of Interdiction Principles and related practice see United States Department of State, Bureau of Security and Non-Proliferation, *Proliferation Security Initiative*, available at <<http://www.state.gov/t/isn/c10390.htm>>. See generally M Byers, 'Policing the High Seas: The Proliferation Security Initiative' (2004) 98 *American Journal of International Law* 526; Klein, n 118, 193–210.

agreements that facilitate ship boarding and inspection by the participating States. To these collectively orientated efforts we should add recent initiatives in the field of maritime piracy.<sup>136</sup>

## 6 KEY ISSUES

Flag State jurisdiction has not failed, but it is far from effective.<sup>137</sup> The consequences of ineffective flag State control are not to be tolerated, but the question remains how to reconcile new approaches with the principle of sovereign equality that underpins flag State jurisdiction. The multiplicity of actors and expanding range activities occurring at sea demands more sophisticated and flexible mechanisms for the exercise of jurisdiction by States. A binary approach relying upon the use of either flag or spatially based control is ill equipped to deal with contemporary issues of ocean use. In response to concerns about substandard shipping, illegal fishing, and security threats, more nuanced forms of jurisdiction and control are emerging in three ways: greater use of international minimum standards, improved enforcement and compliance mechanisms, and developing stronger links between rights and duties.

The principal means of setting international minimum standards is through the use of 'generally accepted international rules and standards' (GAIRS). Rules of reference in the LOSC allow for the development of more detailed standards of conduct within a coherent framework. This maintains the pre-eminence of international standards over domestic laws and regulations, thereby contributing to uniformity. GAIRS also help define the extent of discretion in the exercise of flag State jurisdiction.<sup>138</sup> The effectiveness of this mechanism depends on the existence of clear rules of reference and then being able to identify whether or not an instrument is 'generally accepted'. While clear rules of reference exist for shipping and pollution, the position of other activities, especially fisheries, is less certain.<sup>139</sup> Although not critical to the development of such international standards, the use of rules of reference has generated debate and uncertainty as to the precise relationship between

<sup>136</sup> See further Chapter 37 in this volume.

<sup>137</sup> Molenaar, n 56, 88ff; Rayfuse, n 97; M Gianni, *Real and Present Danger. Flag State Failure and Maritime Safety and Security* (International Transport Workers' Federation London 2008). See also the text and references at footnotes 89–90, 92, 93, and 96–97.

<sup>138</sup> J-P Cot, 'The Law of the Sea and the Margin of Appreciation' in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Martinus Nijhoff Publishers Leiden 2007) 396; Takei, n 78, 115ff.

<sup>139</sup> LOSC, n 2, Art 119(1)(a) merely exhorts taking account of generally recommended international minimum standards.

different fisheries agreements and their impact upon non-States parties.<sup>140</sup> The means of identifying GAIRS has been considered at length elsewhere, but ultimately depends upon the practice of States.<sup>141</sup> Arguably the most important such test of this is the inclusion of an instrument within the various Memoranda of Understanding (MOUs) on port State control (PSC). Although non-binding, these MOUs establish common standards of conduct and seek to coordinate existing legal authority to act.<sup>142</sup> They provide clear evidence of State practice and create institutional support mechanisms. Furthermore, they provide scope for the inclusion of soft law non-binding instruments and so can accommodate non-treaty standards. In light of these advantages, it is suggested that this form of recognition, especially within a regional mechanism that gives effect to international standards through inspection and compliance mechanisms, provides the clearest indication of the international standards to which flag States must adhere. PSC mechanisms seem likely to expand to complement and reinforce, rather than replace flag State control.<sup>143</sup> Notably, this is extending to fisheries with the adoption of the FAO Port State Agreement in 2009.<sup>144</sup>

An interesting alternative to securing compliance through PSC regimes is the use of market-based controls. These are being developed in the context of IUU fishing and target the economic incentives for such activities by removing or limiting the market for IUU catch.<sup>145</sup> This supplements traditional legal controls and engages a wider range of private actors in regulation.

More generally, international efforts are focusing on holding States to account. In December 2013, the IMO Assembly adopted a mandatory members State audit scheme.<sup>146</sup> The IMO Instruments Implementation Code (III Code) will replace the Voluntary Member State Audit Scheme and become binding on member

<sup>140</sup> See E Franckx, 'Pacta Tertiis and the Agreement for the Implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December Relating to the Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks' (FAO Legal Papers Online 8 June 2008), available at <[http://www.fao.org/fileadmin/user\\_upload/legal/docs/lpo8.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/lpo8.pdf)>.

<sup>141</sup> R Van Reenan, 'Rules of Reference in the new Convention on the Law of the Sea in particular connection with the pollution of the sea' (1981) 12 *Netherlands Yearbook of International Law* 3; B Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 *New York University Journal of International Law and Politics* 109; G Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Control Regime* (Martinus Nijhoff Leiden 1993) 38ff; ILA, *Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution* (2000) 31ff, available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/12>>; J Harrison, *Making the Law of the Sea* (Cambridge University Press 2011) 171–9.

<sup>142</sup> See Chapter 13 in this volume.

<sup>143</sup> EJ Molenaar, 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use' in D Freestone, R Barnes, and D Ong (eds), *Law of the Sea Progress and Prospects* (Oxford University Press Oxford 2006) 192.

<sup>144</sup> 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

<sup>145</sup> See DS Calley, *Market Denial and International Fisheries Regulation* (Martinus Nijhoff Leiden 2012).

<sup>146</sup> IMO Res A.1070(28), *IMO Instruments Implementation Code (III Code)* (4 December 2013).

States through amendments of the relevant IMO agreements. *Inter alia*, the III Code requires flag States to effectively implement international standards under domestic law,<sup>147</sup> prohibit flag ships sailing unless compliant with such standards,<sup>148</sup> and put in place evaluation and review procedures in order to assess its performance.<sup>149</sup> This will put pressure on States to improve compliance with international standards by developing clearer and more transparent standards of accountability.

The strengthening of the link between the rights and duties of the flag State is most apparent with regard to the development of the due diligence principle.<sup>150</sup> When primary obligations are framed in terms of result, including the duty to exercise effective control over flagged ships, the principle of due diligence requires States 'to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'.<sup>151</sup> The principle is not new, having been articulated in the *Alabama Claims* and *Corfu Channel* cases.<sup>152</sup> It is an extension of the responsibility of States to ensure that activities within their jurisdiction or control do not cause harm to other States.<sup>153</sup> However, it has gained particular traction within the field of environmental law, as indicated in the *Pulp Mills Case* and the *Area Advisory Opinion*.<sup>154</sup> The principle can be used to reinforce flag State duties, for example, by drawing into the scope of due diligence those policy and guidance measures in soft law instruments that articulate how a State should give effect to its obligations of conduct.<sup>155</sup> While the acts of private ships cannot be attributed to the flag State, a failure to exercise effective control over flag ships may constitute an internationally wrongful act incurring the responsibility of that State.<sup>156</sup> A single breach by an individual vessel would probably be insufficient to incur responsibility, unless this State has clearly failed to comply with its own flag

<sup>147</sup> *Ibid*, [15]–[17].

<sup>148</sup> *Ibid*, [22].

<sup>149</sup> *Ibid*, [42]–[44].

<sup>150</sup> R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9; D French, 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber's 2011 Advisory Opinion' (2011) 26 *International Journal of Marine and Coastal Law* 525, 537ff; Takei, n 78, 124ff.

<sup>151</sup> *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10 [109] (hereinafter *Area Advisory Opinion*).

<sup>152</sup> *Alabama Claims of the United States of America against Great Britain* (1872) XXIV RIAA 125; *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, 22. See also *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 32, [63]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 4, [157].

<sup>153</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [29]; Also, the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, [53].

<sup>154</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 (hereafter, *Pulp Mills*); *Area Advisory Opinion*, n 151.

<sup>155</sup> See *SRFC Advisory Opinion*, n 96, Written Statements by the Federated States of Micronesia [23]–[24] and [33], and New Zealand [19]–[30].

<sup>156</sup> *Ibid*, Written Statement of the Federated States of Micronesia, [46]; Takei, n 78, 131–2.

State responsibilities. In this respect, a more general pattern of individual violations by flag ships might be enough to substantiate such a claim.<sup>157</sup>

The precise content of a due diligence obligation is difficult to ascertain, but it appears to have a number of key elements. First, it is to be construed in a contextual manner.<sup>158</sup> For example, riskier activities entail a higher degree of diligence than less risky activities. This means that due diligence may operate differently in the context of ship safety, fisheries or security. Thus, for example, IUU fishing may be regarded as both probable and serious, and so demanding of more vigilance than ship safety standards. Second, while States are left with a degree of discretion as to how they achieve certain outcomes, this discretion is not unfettered.<sup>159</sup> At a minimum, it entails some degree of positive vigilance over the conduct of private parties and positive steps of prevention.<sup>160</sup> This might include listing of vessels engaged in IUU fishing.<sup>161</sup> Third, it follows that States must have some degree of institutional capacity to control such activities.<sup>162</sup> This in turn, entails that States actually implement appropriate domestic laws, regulations and enforcement mechanisms in respect of their international obligations.<sup>163</sup> A failure to do so may give rise to a presumption that due diligence has not been exercised. Fourth, adherence to related direct obligations is relevant in meeting an obligation of due diligence.<sup>164</sup> In the context of flag State duties, this would mean ratifying relevant international agreements. Fifth, while due diligence is contextual and may be contingent on a States scientific knowledge and technical capacities, this does not provide a blanket excuse to release States from their obligations.<sup>165</sup> This point is crucial in the context of flagging since it is highly desirable to have a uniform regulatory regime.

Flag State jurisdiction provides just one component within an increasingly complex system of institutions and practices. These three areas of development do not depart from the principle of flag State jurisdiction; they seek to redefine the way in which it operates. The developments do not relieve flag States of their obligations; indeed they reinforce flag State responsibilities. However, they also require a more nuanced appreciation of the role and relationship of the flag State to other actors and institutions.

<sup>157</sup> R Rayfuse, 'Protecting the Marine Environment: Non-flag State Enforcement and IUU Fishing' in MH Nordquist, TB Koh, and JN Moore (eds), *Freedom of the Sea, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Leiden 2009) 573, 584–8.

<sup>158</sup> *Area Advisory Opinion*, n 151, [117]; Takei, n 78, 125.

<sup>159</sup> *Area Advisory Opinion*, n 151, [230].

<sup>160</sup> *Pulp Mills*, n 154, [197]; *Area Advisory Opinion*, n 151, [119] and [218].

<sup>161</sup> *SRFC Advisory Opinion*, n 96, Written Statement of the EU [60]–[61].

<sup>162</sup> See the 2001 International Law Commission Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, reproduced in (2001) II(2) *Yearbook of the International Law Commission* 155, Commentary on Art 3 [17].

<sup>163</sup> *Area Advisory Opinion*, n 151, [108] and [218].

<sup>164</sup> *Ibid*, [123].

<sup>165</sup> *Ibid*, [156]–[161], especially [159].