MARITIME SECURITY AND THE LAW OF THE SEA

Natalie Klein

OXFORD MONOGRAPHS IN INTERNATIONAL LAW
MARITIME SECURITY AND
THE LAW OF THE SEA

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Maritime Security and the Law of the Sea

NATALIE KLEIN
Dedicated to my mother,
Sue Klein
General Editors’ Preface

‘Maritime security’ is an amorphous concern sitting within a reasonably well-defined legal framework. It embraces matters such as piracy, terrorism, drug-trafficking and the trafficking in persons, and large-scale illegal fishing. The peculiar characteristic of the cumulation of these threats and concerns is that the boarding of a foreign ship at sea may disclose a pirate deemed the enemy of all mankind or an asylum-seeker entitled to a range of procedural and substantive rights, or any other of a range of radically-different legal situations. This, coupled with the possibility that the boarding State and its laws and interests may be far removed from the nearest coastal States and their domestic legal systems and national interests, makes the management of maritime security a particularly complex legal task. Yet this area has also seen some of the boldest legal innovations in international legal collaboration to counter the threats.

Dr Klein’s timely study gives a lucid account of the current state of the law applicable in these contexts and of the impressive body of international collaborative arrangements, and a shrewd assessment of the ways in which the law might best develop. It is a rewarding study not only for those concerned with the law of the sea but for all concerned to foster international cooperation in addressing the threats facing the world.

AVL
Oxford. 28 October 2010
Foreword

The law of the sea, more than other provinces of international law, has proved itself capable of generating passionate ideological conflicts between so-called ‘internationalists’ and ‘nationalists’. ‘Internationalists’ insist that the *summun bonum* is to be achieved by subjecting more and more of the ocean space and its diverse uses to direct international control; for ‘nationalists’, by contrast, the *summun bonum* requires the preservation of national control in as much of the maritime area and for as many of its uses as possible.

Adapting Myres McDougal’s seminal approach, Professor Natalie Klein, in this splendid study of the new challenges to maritime security (and the opportunities they present), shows that conceiving of the law of the sea as a sort of zero-sum conflict between internationalists and nationalists obscures the true nature of the dynamic process of decision which structures and maintains the public order of the oceans. This process is continuously clarifying the ‘common interest’ and adapting it to new situations and demands for innovative resource uses—a collective effort which seeks to optimize the uses of maritime space for the entire community, by taking into account the interests of all actors. The common interest is implemented, at any moment, by means of both inclusive and exclusive allocations of competence: inclusive allocations assign competences to the international community and preclude individual state actors from appropriating maritime space or resources for their exclusive use, while exclusive allocations enable individual state actors to exclude other actors from some areas and uses.

These respective allocations are determined, in an ongoing process of decision, by reference to factors such as the nature of the use or resource in question in present and projected contexts and in terms of the most general international policies about the efficient production and widest sharing of the values at stake. The point of emphasis is that the common interest at any moment involves combinations of inclusive and exclusive competences. The ongoing challenge to scholars and decision makers is how to conceive of, fashion and implement those combinations.

Viewed in these terms, Hugo Grotius’s concept of *mare liberum* is seen as more of a slogan about optimizing the uses of the ocean for all users than a methodology for actually accomplishing it through time and changing environments. What is required to make the slogan effective is a praxis for deciding which new state claims, whether for inclusive or exclusive use, sound in the common interest, and which—however they may be packaged—are demands for special interests that are incompatible with the common interest and should therefore be rejected. This is precisely what Professor Klein provides.

This form of inquiry has proved its utility in the appraisal of claims to extend territorial and ‘patrimonial’ seas; to enclose hitherto high seas areas for short-term
or extended exclusive uses; to regulate fisheries or the resources of the deep sea, and so on. It is, as Professor Klein demonstrates, particularly useful for conceptualizing and evaluating, in terms of the common interest, contemporary claims for reallocating competences to serve various inclusive and exclusive maritime security concerns. The elaboration and application of this method will hopefully press policy-makers, as she writes, to an ‘adjustment in mindset or outlook when it comes to dealing with questions of maritime security’.

In this period of heightened anxiety about maritime security threats, such an adjustment in mindset and outlook is urgent and it is persuasively presented here. Professor Klein’s book is an important and timely addition to the literature on the law of the sea.

W. Michael Reisman

Yale Law School,
11 August 2010
Preface

The idea for this book grew out of an interest in maritime security triggered by former Prime Minister Howard’s announcement of a Maritime Identification Zone that would extend 1,000 nautical miles from Australia’s lengthy coastline and entail interdiction of vessels that refused to provide identification information. My examination of this issue led me to a vast range of legal developments that were principally motivated by the September 11, 2001, terrorist attacks on the United States. There seemed to be a snowball effect as one scenario after another was conceived of and attempts were made to respond to perceptions of burgeoning maritime security threats from legal, political, and operational perspectives. These developments occurred amid existing legal structures that reflected long-held and enduring security interests.

The aim of this book was not only to consider the recent developments in the law of the sea in seeking to improve maritime security, but more so to assess the totality of these changes against existing legal structures relevant to maritime security, taking into account some of the political dimensions that have coloured the legal developments. In attempting to take a holistic approach, it is inevitable that there will be regional agreements or arrangements or other multilateral, bilateral, or unilateral endeavours that have not been addressed. I have instead sought to examine some of the key examples to support (or temper) my argument. In this undertaking, it is hoped that the analysis will be of interest and use to all stakeholders in maritime security for examining and highlighting a broad spectrum of legal dimensions to maritime security, and for proposing where existing weaknesses could or should be overcome.

As this book has been in progress over several years, some sources previously available on the internet have been removed. I have attempted to provide as much bibliographic information as possible or indicated where the website is no longer available. The internet addresses were otherwise current as of 31 May 2010.

Natalie Klein

May 2010
Acknowledgements

My initial research in this area was supported by a Macquarie University New Staff Grant. That funding provided me with the opportunity to visit the IMO Library and I would like to thank the librarians at the IMO for all of their assistance during my visits there, as well as Agustín Blanco-Bazán for taking the time to meet with me and discuss the 2005 SUA Protocol. A significant portion of this book was written while I was a Visiting Fellow at Cambridge University’s Lauterpacht Centre for International Law. I am grateful for the opportunity to have spent time in such a positive research environment and particularly for the collegiality of my various office mates during my time there: Douglas Guilfoyle, Anne-Laurence Brugère, and Gabriele Porretto.

My work in maritime security has spanned several years, and during that time my views have been enriched from feedback from a number of colleagues who also work in this area. My thanks to Douglas Guilfoyle for many interesting conversations and for providing me with alternative perspectives. I am also grateful to Donald Rothwell and Joanna Mossop’s invitation to co-convene the Trans Tasman Maritime Security Project with them, as well as the stimulation provided by the other participants in that Project: Sam Bateman, Peter Cozens, Caroline Foster, Stuart Kaye, Cameron Moore, Chris Rahman, Shirley Scott, and Karen Scott. My thanks also to Don and Joanna for allowing me to use part of our joint Chapter in Maritime Security: International Law and Policy Perspectives from Australia and New Zealand (Routledge, Oxford 2010).

In drafting this book, some material is drawn from work I have previously published and I would like to acknowledge the permission of the following publishers to use and/or revise this work:


In the final stages of writing, Don Rothwell, Tim Stephens, Sam Bateman, and Karen Scott all kindly reviewed draft chapters and provided very useful feedback. I have also benefited tremendously from editorial assistance provided by Lauren Knapman and Shaun Star, graduates of Macquarie Law School. I not only appreciated their diligence and attention to detail, but also the good humour with which they approached their tasks. Any remaining errors are of course my own.

Finally, an enterprise of this kind is only possible with the support and interest of family and friends. My thanks to them for listening to various stories about pirates, whaling protestors and how Hollywood blockbusters were really about maritime security issues. I am especially grateful for the support and understanding of my husband, Matthew Kelly, and our children, Josh and Tessa. Ultimately, though, this book could not have been written without the support of my mother, Sue Klein, over the last few years. For this reason, I am dedicating it to her.

Natalie Klein
Contents

Abbreviations xvii
Table of Cases xix
Table of Treaties xx

1. Two Fundamental Concepts 1
   A. Introduction 1
   B. Two Fundamental Concepts 2
      (1) Defining maritime security 4
          (a) Security in the international system 4
          (b) Security interests in ocean space and ocean use 6
          (c) What is ‘maritime security’? 8
      (2) Freedoms of the high seas 11
          (a) Mare liberum 13
          (b) Inclusivity and exclusivity in the development of the law of the sea 16
   C. Maritime Security and the Law of the Sea 17

2. Passage and Military Activities 24
   A. Introduction 24
   B. Passage of Warships 25
      (1) Geographic application of passage regimes 28
      (2) Warships and innocent passage 30
      (3) Warships and transit passage and archipelagic sea lanes passage 33
      (4) Coastal state powers vis-à-vis passage of warships 35
      (5) Special requirements for submarines and nuclear-powered or equipped vessels 40
      (6) Conclusion 43
   C. Military Activities Beyond the Territorial Sea 43
      (1) Military activities in the EEZ 46
      (2) Weapons tests on the high seas 54
      (3) Security zones 58
   D. Conclusion 60

3. Law Enforcement Activities 62
   A. Introduction 62
   B. Ports and Internal Waters 65
      (1) Enforcement of laws for actions occurring in ports and internal waters 68
      (2) Enforcement of laws for actions occurring outside ports and internal waters 69
      (3) Conclusion 73
C. Territorial Sea
   (1) Innocent passage and exercise of criminal jurisdiction
   (2) Increasing enforcement powers of the coastal state: marine pollution
   (3) Increasing enforcement powers of the coastal state: fisheries
   (4) Encroachments on exclusive enforcement jurisdiction of coastal state

D. Straits

E. Contiguous Zone

F. Exclusive Economic Zone
   (1) Fishing
   (2) Marine pollution
   (3) Conclusion

G. Continental Shelf
   (1) Exploration and exploitation of the continental shelf
   (2) Submarine cables and pipelines
   (3) Artificial islands, installations, and structures
   (4) Conclusion

H. High Seas
   (1) Right of hot pursuit
   (2) Right of visit
      (a) Piracy
      (b) Slavery, people smuggling, and trafficking
      (c) Unauthorized broadcasting
      (d) Drug trafficking
      (e) IUU fishing
      (f) Conclusion

I. Conclusion

4. Terrorism and Proliferation of Weapons of Mass Destruction
   A. Introduction
   B. Initial Responses to Maritime Terrorism—1988 SUA Convention
   C. Initial Legal Responses to WMD Proliferation
   D. Increasing Port State Controls
      (1) ISPS Code
      (2) Container Security Initiative and WCO Framework of Standards
      (3) Conclusion
   E. Interdictions Outside the Territorial Sea
      (1) 2005 SUA Protocol
         (a) Offences under the 2005 SUA Protocol
         (b) Ship-boarding procedure
         (c) Location of ship-boarding
         (d) Requesting permission to board
         (e) Consent to ship-boarding
         (f) Required safeguards in undertaking a ship-boarding
         (g) Outcomes from a ship-boarding
      (2) Bilateral ship-boarding agreements
         (a) Offences
         (b) Ship-boarding procedure
         (c) Third states
      (3) Conclusion
5. Intelligence Gathering and Information Sharing

A. Introduction

B. Maritime Domain Awareness

C. Intelligence Gathering as a Military Activity
   (1) Foreign navies in coastal state waters
       (a) In the territorial sea and in straits
   (b) Exclusive Economic Zone
   (2) Military surveys and hydrographic surveys
   (3) Conclusion

D. Monitoring the Movement of Ships and Seafarers
   (1) Australian Maritime Identification System
   (2) Mandatory ship reporting systems
   (3) Identity of seafarers
   (4) ISPS Code and WCO Framework of Standards
   (5) Conclusion

E. Information Sharing and Law Enforcement
   (1) Piracy and armed robbery
   (2) Terrorism and proliferation of WMD
   (3) People smuggling
   (4) Drug trafficking
   (5) Illegal fishing
   (6) Conclusion

F. Conclusion

6. Armed Conflict and Naval Warfare: Shifting Legal Regimes

A. Introduction

B. Law of the Sea During Times of Armed Conflict

C. Armed Conflict
   (1) Threats or uses of force and armed attacks
       (a) Inter-state conflicts
       (b) Conflicts with non-state actors
       (c) Conclusion
   A. Introduction 301
   B. Laws Relating to Maritime Security Threats 302
      (1) Piracy and armed robbery 302
      (2) Terrorism 305
      (3) Trafficking in WMD 309
      (4) Drug trafficking 311
      (5) People smuggling and trafficking 313
      (6) IUU fishing 314
      (7) Intentional and unlawful damage to the environment 318
      (8) Expanding categories of maritime security threats 319
   C. Military Interests and Maritime Security 321

Bibliography 329
Index 347
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AIS</td>
<td>Automatic Identification System</td>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>AMIS</td>
<td>Australian Maritime Identification System</td>
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<tr>
<td>ATS</td>
<td>Australian Treaty Series</td>
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<tr>
<td>Canadian YBIL</td>
<td>Canadian Yearbook of International Law</td>
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<tr>
<td>CCAMLR</td>
<td>Convention on Conservation of Antarctic Marine Living Resources</td>
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<td>CCSBT</td>
<td>Convention on the Conservation of Southern Bluefin Tuna</td>
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<td>Consol TS</td>
<td>Consolidated Treaty Series</td>
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<tr>
<td>Cornell ILJ</td>
<td>Cornell International Law Journal</td>
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<tr>
<td>CSI</td>
<td>Container Security Initiative</td>
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<tr>
<td>CUP</td>
<td>Cambridge University Press</td>
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<tr>
<td>Denver JILP</td>
<td>Denver Journal of International Law and Policy</td>
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<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<tr>
<td>German YBIL</td>
<td>German Year Book of International Law</td>
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<td>Harvard JIL</td>
<td>Harvard Journal of International Law</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<tr>
<td>IJMCL</td>
<td>International Journal of Marine and Coastal Law</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>ILR</td>
<td>International Law Reports</td>
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<td>IMB</td>
<td>International Maritime Bureau</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>Indian JIL</td>
<td>Indian Journal of International Law</td>
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<tr>
<td>ISPS Code</td>
<td>International Ship and Port Facility Security Code</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>IUU fishing</td>
<td>Illegal, unreported, and unregulated fishing</td>
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<td>JMLC</td>
<td>Journal of Maritime Law and Commerce</td>
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<td>JTLP</td>
<td>Journal of Transnational Law and Policy</td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
</tr>
</tbody>
</table>
## Abbreviations

<table>
<thead>
<tr>
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</thead>
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<tr>
<td>LRIT</td>
<td>Long-Range Identification and Tracking</td>
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<td>MARPOL</td>
<td>International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto</td>
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<td>MDA</td>
<td>Maritime Domain Awareness</td>
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<td>MIZ</td>
<td>Maritime Identification Zone</td>
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<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>ODIL</td>
<td>Ocean Development and International Law</td>
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<td>OUP</td>
<td>Oxford University Press</td>
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<td>PSI</td>
<td>Proliferation Security Initiative</td>
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<td>ReCAAP</td>
<td>Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia</td>
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<td>RFMO</td>
<td>Regional Fisheries Management Organization</td>
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<td>RMSI</td>
<td>Regional Maritime Security Initiative</td>
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<td>SDLR</td>
<td>San Diego Law Review</td>
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<td>SOLAS Convention</td>
<td>Convention for the Safety of Life at Sea</td>
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<td>TMLJ</td>
<td>Tulane Maritime Law Journal</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>1988 Vienna Convention</td>
<td>United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances</td>
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<td>Virginia JIL</td>
<td>Virginia Journal of International Law</td>
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<tr>
<td>VMS</td>
<td>Vessel Monitoring System</td>
</tr>
<tr>
<td>WCO Framework of Standards</td>
<td>World Customs Organization Framework of Standards to Secure and Facilitate Global Trade</td>
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<td>WMD</td>
<td>Weapons of Mass Destruction</td>
</tr>
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<td>Yale JIL</td>
<td>Yale Journal of International Law</td>
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# Table of Cases

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<th>Citation</th>
</tr>
</thead>
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<td>39 ILM 666. 92</td>
</tr>
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<td>Case concerning the Land and Maritime Boundary between Cameroon and Nigeria</td>
<td><em>(Cameroon v Nigeria: Equatorial Guinea intervening)</em> (Merits) [2002] ICJ Rep 303. 267</td>
</tr>
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<td>Corfu Channel Case <em>(UK v Albania)</em> (Merits) [1949] ICJ Rep 4. 25, 26, 31, 32, 38, 50, 263, 267, 270, 303</td>
<td></td>
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<tr>
<td>Fisheries Jurisdiction Case <em>(Spain v Canada)</em> (Jurisdiction of the Court, Judgment) [1998] ICJ Rep 432. 138</td>
<td></td>
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<tr>
<td>Grand Prince <em>(Belize v France)</em> (Prompt Release) (2001) ITLOS Case No 8; 125 ILR 251. 106</td>
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<td>Guyana v Suriname <em>(Award of the Arbitral Tribunal)</em> (2008) 47 ILM 164. 47, 98, 99, 261, 321</td>
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<td>I'm Alone Case (1935) 3 RIAA 1609. 116–17</td>
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<tr>
<td>Juno Trader Case <em>(Saint Vincent and the Grenadines v Guinea-Bissau)</em> (Prompt Release) ITLOS Case No 13; (2005) 44 ILM 498. 92</td>
<td></td>
</tr>
<tr>
<td>Le Louis (1817) 2 Dods 210. 15, 105, 106, 122</td>
<td></td>
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<td>Monte Confurco Case <em>(Seychelles v France)</em> (Prompt Release) ITLOS Case No 6; 125 ILR 203. 92</td>
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<td>M/V 'Saiga' <em>(No 2)</em> <em>(Saint Vincent and the Grenadines v Guinea)</em> ITLOS Case No 2; (1999) 38 ILM 1323. 89, 99, 106, 109, 117</td>
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<td>Rainbow Warrior <em>(New Zealand v France)</em> (UN, ruling of the Secretary General, 1986) 74 ILR 241. 69</td>
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<td>Re Piracy Jure Gentium (1934) App Cas 586. 119</td>
<td></td>
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<td>Saudi Arabia v Arabian American Oil Company <em>(Aramco)</em> (Arbitration Tribunal) (1958) 27 ILR 117. 67</td>
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<td>Schooner Exchange v McFaddon 11 US (7 Cranch) 116 (1812). 68</td>
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</tr>
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<td>SS Lotus Case <em>(France v Turkey)</em> [1927] PCIJ Ser A No 10 (7 September). 106</td>
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<td>The Red Crusader <em>(Commission of Enquiry Denmark v United Kingdom)</em> (1962) 35 ILR 485. 116–17</td>
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<td>Volga Case <em>(Russia v Australia)</em> (Prompt Release) ITLOS Case No 11; (2003) 42 ILM 159. 92, 110, 113, 140, 228</td>
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# Table of Treaties

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<td>Convention for the Protection of Submarine Telegraph Cables</td>
<td>signed at Paris, 14 March 1884 USTS 380. 101</td>
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<td>1887</td>
<td>Convention Respecting the Liquor Traffic in the North Sea</td>
<td>signed at The Hague, 16 November 1887, reprinted in 1 UN Legislative Series, Laws and Regulations of the Regime of the High Seas 262. 115</td>
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<td>The Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War</td>
<td>(1907) USTS 545, 2 AJIL Supp 207. 285, 287</td>
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<td>opened for signature 10 September 1919 1922 LNTS 332. 115</td>
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<td>1924</td>
<td>Convention between the United Kingdom and the United States Respecting the Regulation of the Liquor Traffic</td>
<td>opened for signature 23 January 1924, entered into force 22 May 1924 27 LNTS 182. 115</td>
</tr>
<tr>
<td>1926</td>
<td>Convention to Suppress the Slave Trade and Slavery</td>
<td>opened for signature 25 September 1926, entered into force 9 March 1927 60 LNTS 253. 122</td>
</tr>
</tbody>
</table>
1947
General Agreement on Tariffs and Trade (opened for signature 30 October 1947, entered into force 1 January 1948) 55 UNTS 194. 66, 67

1949
Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 31. 286
Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 85. 286
Geneva Convention (III) relative to the Treatment of Prisoners of War (opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 135. 286
Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. 286

1951

1954

1956
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (concluded 7 September 1956, entered into force 30 April 1957) 226 UNTS 3. 122

1958
Convention on the Territorial Sea and the Contiguous Zone (concluded 29 April 1958, entered into force 10 September 1964) 516 UNTS 205. 30, 36, 38, 42, 74, 79

1962

1963

1965
European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories (concluded 22 January 1965, entered into force 19 October 1967) 634 UNTS 239. 129

1966
International Convention on Load Lines (concluded 5 April 1966, entered into force 21 July 1968) 640 UNTS 133. 70

1967
Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (opened for signature 14 February 1967, entered into force 22 April 1968) 634 UNTS 326. 51, 52
1968

1969
Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (concluded 29 November 1969, entered into force 6 May 1975) 970 UNTS 211. 93, 94

1970

1971
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor, and in the Subsoil Thereof (concluded 11 February 1971, entered into force 18 May 1972) 955 UNTS 115. 51

1972
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (concluded 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120. 41, 93
Convention on the International Regulations for Preventing Collisions at Sea (concluded 20 October 1972, entered into force 15 July 1977) 1050 UNTS 18. 70
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (concluded 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163. 155, 156, 172, 185

1973

1974

1976
Merchant Shipping (Minimum Standards) Convention (adopted 29 October 1976, entered into force 28 November 1981) (ILO Convention No 147) 15 ILM 1288. 70

1977

1978
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984) 1361 UNTS 190. 70
### 1979
International Convention against the Taking of Hostages (concluded 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205. 154

### 1980

### 1981

### 1982

Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment (opened for signature 26 July 1982, entered into force 1 July 1982) 21 ILM 1. 70

### 1985
South Pacific Nuclear Free Zone Treaty (concluded 6 August 1985, entered into force 11 December 1986) 1445 UNTS 177. 51

### 1988


### 1989

### 1990
Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea (Spain–Italy) (concluded 23 March 1990, entered into force 7 May 1994) 1776 UNTS 229. 135

### 1991

### 1992
### Table of Treaties

**1993**
- Memorandum of Understanding on Port State Control in the Asia-Pacific Region (concluded 2 December 1993, entered into force 1 April 1994) <http://www.tokyo-mou.org/>. 70

**1994**

**1995**
- Treaty on the Southeast Asia Nuclear Weapon-Free Zone (concluded 15 December 1995, entered into force 27 March 1997) 35 ILM 635. 51
- Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (concluded 16 September 1995, entered into force 21 October 2001) ATS 17. 41

**1996**
- Treaty on the Nuclear-Weapon-Free-Zone in Africa (concluded 11 April 1996, not yet in force) 35 ILM 698. 51, 52
- Comprehensive Nuclear Test-Ban Treaty (concluded 10 September 1996, not yet in force) 35 ILM 1439. 56
- Memorandum of Understanding on Port State Control in the Caribbean Region (concluded 9 February 1996) 36 ILM 231. 70

**1997**
- Memorandum of Understanding on Port State Control in the Mediterranean Region (signed 11 July 1997) <http://www.medmou.org/>. 70

**1999**

**2000**
Table of Treaties


2001


2002


2003


Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (concluded 10 April 2003, not yet in force) <http://www.state.gov/s/l/2005/87198.htm>. 79–81, 117, 136, 137, 249, 250, 312


2004


Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (concluded 11 November 2004, entered into force 4 September 2006) 2398 UNTS 199. 120, 121, 242, 243, 244, 304

2005

Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass


2006


2007


2008


2009

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (opened for signature 22 November 2009, not yet in force) FAO Doc C 2009/ LIM/11-Rev. 1. 72, 73, 140, 143, 253, 254, 315, 316
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Two Fundamental Concepts

A. Introduction

In essence, this book examines how security interests have influenced the development of the law of the sea and how these interests are currently changing the interpretation and application of the law of the sea. It argues that security interests should be given greater scope in our understanding of the law of the sea in light of the changing dynamics of exclusive and inclusive claims to ocean use. Security interests in the oceans have traditionally related to the military interests of different states and this dimension remains significant in inter-state relations, and in internal state decision-making on military priorities. While the protection of sovereignty and national interests remain fundamental to maritime security, there is increasing acceptance of a common interest that exists among states when seeking to respond to a variety of maritime security threats.

The reasons for dealing with this subject matter reflect the greater appreciation and apprehension of maritime security since September 11, and particularly the potential impact of terrorist attacks on global trade if the maritime industry was targeted. A number of legal initiatives have been undertaken with the intention of improving maritime security aboard ships, at ports and at sea. These recent international law developments include:

- the adoption and implementation of the International Ship and Port Facility Security Code (ISPS Code), a multilaterally-agreed code for risk management at ports;
- conclusion of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which permits ship-boarding at sea for the suppression of particular terrorist offences;
- bilateral agreements between the United States and the largest ship-registry states;
- informal partnerships operating under the non-binding Proliferation Security Initiative (which involves interdicting vessels carrying weapons of mass destruction (WMD)); and
- unilateral actions, such as Australia’s declaration of a 1,000 mile ‘identification zone’ (now known as the Australian Maritime Identification System).
Maritime security has increasingly been accorded a broader understanding and greater urgency, as states have sought to respond to diverse threats in the oceans and from the oceans. Piracy in the Gulf of Aden and surrounding areas has resulted in United Nations Security Council action and triggered new collaborative approaches among navies. Transnational criminal activity, particularly drug smuggling and people trafficking, continues to tax law enforcement efforts and has recently prompted greater consideration of shared policing authority in sovereign maritime areas. The devastating consequences of illegal fishing and marine pollution have led states to regard their environmental and economic security as threatened and they have responded accordingly. While some of these developments have been scrutinized for their consistency with existing international law, what has been lacking in these analyses is a reflection on how these developments in their totality operate vis-à-vis the existing legal paradigm and whether that paradigm is still appropriate to meet current security imperatives.

B. Two Fundamental Concepts

An assessment of maritime security and the law of the sea requires an initial examination of two fundamental questions: what is meant by ‘maritime security’, and how does maritime security relate to the basic structure of the law of the sea?

The scope and understanding accorded to the term ‘maritime security’ influence what activities are addressed and what interests are at stake in responding to any perceived problem. Inevitably, maritime security can mean different things to different people. As such, it may not be understood simply as a legal term of art, but must be considered in the broader perspective of international relations and what is understood by the very notion of ‘security’. ‘Security’ may be seen as an emotive term, extending to a sense of safety and hence freedom from fear. As a manifestation in international decision-making, security becomes a cadre of activities—legislative, executive, judicial, military, and police actions—designed to respond to a collective need for order and protection from internal and external threats. What may be considered as the security interests of a state needs to be understood, as these interests form the broad background to the maritime security of a state. It is then the threats to maritime security that become the catalyst for action and change, and subsequently influence the operation and development of the law of the sea.

Any discussion of the law of the sea takes as its starting point the fundamental principle of the freedoms of the seas, which is based on Hugo Grotius’s conception of *mare liberum*. Developments in the law of the sea have been premised on the idea that the oceans, barring a relatively narrow strip of water subject to coastal state sovereignty, are open to all users, and that any claims to ocean space or use are to be viewed as encroachments on the freedoms of the seas. As an initial point, it is important to explore why and how the pre-eminence of the freedoms of the seas has held sway for 400 years, what this means for maritime security, and indeed whether
the imperative for greater security measures constitutes a challenge itself to the pre-eminence of the *mare liberum* concept.

A key consequence of *mare liberum* has been the generation of a tension between ‘inclusivity’ and ‘exclusivity’ in claims to ocean space and its use. This approach informed the landmark, policy-oriented, law of the sea treatise by McDougal and Burke, *The Public Order of the Oceans*.\(^1\) Inclusive interests refer to those that are shared by the international community; inclusivity promotes the idea that the law of the sea should be constructed and understood in a way that supports common use of an area, so that a mutual benefit is shared by the majority. Exclusive interests are held by individual states and are asserted against the rights and responsibilities of all other states; exclusivity is premised on the idea that one state should have the authority to reach decisions over ocean space and use without necessarily accounting for the interests of others (beyond a due regard requirement).\(^2\) As a general matter, it is adherence to *mare liberum*, and the more recent notion of the common heritage of mankind applicable to the deep seabed, that has ensured an ongoing viability for the recognition of inclusive interests in the ways that ocean space and use are regulated. Exclusive interests in contrast threaten ongoing adherence to *mare liberum* and are seen most obviously in the phenomenon of ‘creeping jurisdiction’ whereby some coastal states have asserted sovereignty and/or jurisdiction in adjacent waters beyond the rights they strictly enjoy under the law of the sea. The law has accommodated these competing claims of exclusivity and inclusivity to establish a common interest and thereby enhance order on the oceans.

When maritime security is considered against this paradigm, it will be seen that the actions taken to respond to maritime security threats are often viewed as exclusive interests; the state wishing to respond to the threat is seeking to ensure that its own particular security interests are upheld. These claims may be seen as special interests that counter the broader common interest in regulating ocean space and use. Frequently, these individual actions also run counter to long-recognized inclusive claims, primarily the freedoms of navigation, overflight, and fishing. From this perspective, the tension is a familiar one. Exclusive interests are seeking to override the inclusive interests in the freedoms of the seas and there is resistance to jeopardizing such freedoms for the sake of claims to exclusivity. In this way, an argument could be advanced that maritime security concerns require a further realignment of the balance between exclusive and inclusive claims so that an overall accommodation of competing uses may be achieved.

It is argued in this book that maritime security, properly defined and limited, can and should be viewed as an inclusive interest given the common interest in combating an array of maritime security threats. All states should therefore be concerned with ensuring that necessary steps are taken to maintain maritime security, as would be the case for any other inclusive interest. While the argument that maritime security is an inclusive interest is a relatively simple one to establish,

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2 Ibid 51–2.
how it is applied in a variety of contexts is more difficult. To what extent, if any, are changes needed in the law of the sea to accommodate the idea that maritime security is a shared interest for all states? Is there a competition between inclusive interests? How may a balance be struck and how is this approach different to devising a new accommodation of exclusive and inclusive interests? There may be a need to reconcile an inclusive concept of maritime security with continuing exclusive interests centered on military prerogatives for upholding national sovereignty. These are the matters explored in this book, with the goal of demonstrating that an understanding of maritime security as an inclusive interest permits justifiable developments in the law in some instances and reaffirmation of existing approaches in others. Such an understanding should improve responses to identified maritime security threats. The rest of this chapter considers in more detail the definition of maritime security and explains the fundamental framework of the law of the sea that informs the subsequent analysis.

(1) Defining maritime security

An understanding of maritime security begins with an appreciation of how the concept of security is defined and deployed in international relations generally. The tendency to use security as a justification for a range of governmental actions indicates that there are many ideas bundled into the term, and it may inform how matters of security should be understood when considered from a maritime perspective. Moreover, matters of maritime security are intimately linked with what may be called territorial security, in that what is happening on the seas impinges on actions taken on land. So, for example, a terrorist attack against an oil tanker in the middle of a vital shipping channel will likely hamper the delivery of goods and slow commercial shipping, affecting a variety of industries within different states as a result. Another example is that surveillance activities undertaken at sea may be focused on ascertaining land defences and terrestrial military capabilities. This Part therefore considers how ‘security’ is understood more generally before turning to a consideration of what maritime security might mean more specifically.

(a) Security in the international system

From an academic perspective, ‘security’ is understood in different ways depending on the theoretical school utilizing the term.3 For example:

The Copenhagen School understands that security is a socially constructed concept and that discourse is a key element in the construction and identification of security issues. Based on the discourse which surrounds it, a public policy issue can be classified as non-politicized, politicized or securitized. A non-politicized issue is one which is excluded from the policy debate and ignored by policy. A politicized issue is identified as a matter of public

importance, brought into the policy discourse, and requires the commitment of public resources. A securitized issue is identified as a potential threat to the continued existence of the state. Once securitized, issues are perceived to be of such immediate importance that they are elevated above the ordinary norms of the political debate and the state acquires special rights to adopt extraordinary measures in order to protect itself.4

This approach emphasizes that security is of key importance in state decision-making and may warrant extraordinary steps to address particular issues.

Security has also been conceived of within a ‘tragedy of the commons’ scenario. In this regard, Andrew Mack has written: “The security dilemma arises when nation-states seek to maximize their security via policies of “peace through strength”—that is, by creating a military capability that will enable them to defeat... any opponent bent on opposition.”5 Applying this approach to the arms races of the Cold War, it could be seen that the increase in military capability of either opponent led to the other seeking greater capability, due to escalating fear and hostility, which in turn produced a greater likelihood that conflict would be initiated. Mack continues:

The net effect of the security dilemma is that the states that are subjected to it become both poorer and less secure. As with the tragedy of the commons, we can see how states acting in their ‘rational’ self-interest can produce outcomes that are in the interest of none of them.6 Applying this theory to the post-September 11 maritime security situation, where the United States and its allies have been seeking greater means to reduce the use of the oceans for terrorist purposes, it could be viewed that they are ultimately producing an outcome that is not in their own interests—namely, the introduction of greater restriction on the freedoms of the high seas than has traditionally been accepted in the past because of their utility to commercial and other military interests.

While international relations scholars have studied questions of security from different angles,7 it has been acknowledged that in the post-Cold War and globalization era that security concerns are no longer focused on military interests, in terms of a state being able to avoid war or otherwise prevail in any war.8 Globalization and the concomitant interdependence of states has led to mutual vulnerability, in that threats in one part of the world may affect the security of people in other

6 Ibid 411.
parts of the world. The foreign and domestic policy concerns of states may become increasingly intertwined to respond to a growing perception of a wide array of security threats.

The term ‘human security’ has been increasingly referred to as a way of focusing attention on the needs of individual human beings, rather than looking at the security needs of the state alone. Human security has been described as the freedom from fear and the freedom from want, and may be threatened in any of the following inter-related areas of security: economic, food, health, environmental, personal, community, and political. While the concept of human security has been much debated, at the very least these discussions may be credited for providing a vehicle to consider security beyond the confines of defensive or aggressive military policy of a state. Consistent with this approach, Buzan has observed that threats to a state’s security may not only be military, but also political, economic, societal, and ecological. In view of this broader understanding of security, the ‘security interests’ of a state may be seen as those that are intended to promote invulnerability to external forces that may jeopardize internal decision-making, community values and governance.

(b) Security interests in ocean space and ocean use

Consistent with broader views on security, security interests in relation to ocean space and use have traditionally been manifested in line with the military interests of a state, particularly in terms of asserting or defending state sovereignty as well as exerting power over other states or areas. Security interests have typically involved ensuring that the immediately adjacent coastal area of a state was not used in a way that would jeopardize the territorial integrity or political independence of the state, or that the economic resources of the area would not be exploited by others. The activities of vessels in the ports, internal waters, and territorial sea of a state have been of immediate concern in this regard. Similarly, the mobility and capability of naval forces have been a key concern when assessing a state’s security interests.

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14 See Buzan, People, States and Fear 116–33.
Technological developments that facilitate the exploitation of ocean resources in extended areas from the coast have warranted claims that a state’s economic and environmental interests require protection and have thereby extended understandings of security. The economic importance of living and non-living resources has also meant that states wish to protect not only the resources themselves but also information about those resources. Till has considered that the use of the oceans as a ‘source of power and dominion’ may be viewed as ‘hard security’, whereas ‘soft security’ is focused on ocean resources, transportation and trade, and exchange of information.\textsuperscript{15}

These latter concerns have motivated the phenomenon of ‘creeping jurisdiction’\textsuperscript{16} and warranted greater claims to exclusive use through recognition of the Exclusive Economic Zone (EEZ) and rights over the continental shelf. The broadening of security interests from military concerns to political, economic, societal, and ecological concerns has therefore been seen in the development of the law of the sea through the recognition of new maritime zones that accommodate the desire of states to have greater control over more ocean space and more ocean uses. In these instances, the exclusive claims of states have been upheld in the face of inclusive claims seeking to maintain as much ocean space as possible open to all users.

The exclusive claims of states to greater expanses of ocean area have fostered increasing competition and tension between states due to overlapping claims to maritime entitlements. The outer boundaries of exclusive maritime zones may also be challenged because of the consequent reduction in high seas areas open to all other users.\textsuperscript{17} The security concerns of a state may be intimately connected with defining and defending perceived entitlements to maritime areas.

Security interests in the oceans have also developed because of the interconnection of maritime activities with those on land that may impinge on territorial security. Transnational crime, terrorist attacks, and environmental harm may all have maritime elements and thereby pose risks to a state’s territorial security. The oceans have been viewed as ‘particularly conducive to these types of threat contingencies because of [their] vast and largely unregulated nature’.\textsuperscript{18} Maritime elements then come to the fore in dealing with these security interests. For island states or states with long coastlines, efforts to improve border security will have a significant maritime focus. It is often in this latter regard that discussions concerning a state’s ‘maritime security’ arise.


\textsuperscript{17} Disputes in this regard may result from controversial state decisions on the baselines from which the maritime zones are measured.

(c) What is ‘maritime security’?

The term ‘maritime security’ has different meanings depending on who is using the term or in what context it is being used. Consistent with the broadening of interests related to security, defence perspectives on maritime security encompass a greater range of threats than traditional notions of seapower. For example, the US Naval Operations Concept referred to the goals of ‘maritime security operations’ as including ensuring the freedom of navigation, the flow of commerce and the protection of ocean resources, as well as securing ‘the maritime domain from nation-state threats, terrorism, drug trafficking and other forms of transnational crime, piracy, environmental destruction and illegal seaborne immigration’.19

For operators in the shipping industry, maritime security is particularly focused on the maritime transport system and relates to the safe arrival of cargo at its destination without interference or being subjected to criminal activity.20 Consistent with this perspective, Hawkes has sought to define maritime security as ‘those measures employed by owners, operators, and administrators of vessels, port facilities, offshore installations, and other marine organizations or establishments to protect against seizure, sabotage, piracy, pilferage, annoyance, or surprise’.21 For the shipping industry, maritime security will comprise of avoidance of ‘maritime violence’, which allows for a general reference to acts of piracy, armed robbery or terrorism without needing to delve into the legal definitions involved for each specific act.22

The International Maritime Organization (IMO) has addressed questions of maritime security under the auspices of its Maritime Safety Committee since the 1980s.23 In this context, a distinction is drawn between maritime safety and maritime security. Maritime safety refers to preventing or minimizing the occurrence of accidents at sea that may be caused by substandard ships, unqualified crew or operator error, whereas maritime security is related to protection against unlawful, and deliberate, acts.24 The distinction has not always been an obvious one within the IMO, particularly as the same word has been used for ‘safety’ and ‘security’ in other languages, including Spanish and French.25 It was only with the revision of Chapter XI of the Safety of Life at Sea Convention (SOLAS Convention), to include

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22 Ibid 156.
23 Ibid 153.
the ISPS Code and other security measures, that new Spanish and French expressions were devised for purposes of referring to maritime security.  

International lawyers referring to questions of maritime security may seek to have regard to the United Nations Convention on the Law of the Sea (UNCLOS) as a point of reference for defining or at least understanding a term related to the law of the sea. Despite the states parties to UNCLOS desiring to settle ‘all issues relating to the law of the sea’, there are scant references to security in the treaty, and certainly no clear-cut definition of what maritime security might mean. At most, some indication of what is meant by security may be drawn from UNCLOS in its treatment of the right of innocent passage and the identification of a series of activities that would be inconsistent with that right and hence prejudicial to the peace, good order, and security of the coastal state. While maritime security is not defined in a positive sense, an indication is provided as to what might compromise security. From this perspective, it is not only a range of military activities that may pose a threat to the security of the coastal state (such as weapons exercises, threats or use of force, or the launching, landing, or taking on board of any aircraft of military devices), but also includes fishing activities, wilful and serious pollution, and research or survey activities.

It has been common for discussions surrounding maritime security to eschew a precise definition of the term, and instead to consider in more concrete terms what constitute maritime threats. A threat in this context has been defined as ‘an act that is designed to create a psychological condition in the target of apprehension, anxiety and eventually fear, which will erode the target’s resistance to change or will pressure it toward preserving the status quo’. Activities commonly identified as constituting maritime threats are terrorist attacks; the movement of terrorists, as well as raising of finances for terrorist activities through shipping activities; the shipping of WMD and related components; shipping of conventional weapons; drug trafficking; people smuggling; piracy and armed robbery at sea. For threats to represent a form of coercion, the purpose and outcome of the threat must be a

26 The Spanish version is protección marítima (as opposed to seguridad marítima) and the French is sûreté maritime (as opposed to securité maritime). See Mejia, ‘Maritime Gerrymandering’ 155.

27 There are references to states parties suspending passage through straits for security purposes, as well as art 302, a safeguard clause so that states do not need to disclose information that would be ‘contrary to the essential interests’ of the state’s security.


29 Ibid (referring to UNCLOS art 19).

30 eg, the proceedings of the Centre for Oceans Law and Policy Annual Conference entitled ‘Legal Challenges in Maritime Security’ does not contain a definition of maritime security, but a variety of maritime security threats are instead discussed. See Myron H. Nordquist et al (eds), Legal Challenges in Maritime Security (Martinus Nijhoff, Leiden 2008).


32 See eg, J. Ashley Roach, ‘Initiatives to Enhance Maritime Security at Sea’ (2004) 28 Marine Policy 41, 41. The 2008 CARICOM Agreement refers to activities ‘likely to compromise the security of a State Party or the Region if it involves’ trafficking in drugs, arms or people, terrorism, smuggling, illegal immigration, serious marine pollution, injury to off-shore installations, piracy, hijacking and other serious crimes, and ‘a threat to national security’. 2008 CARICOM Maritime and Airspace
reduction in the choices that are otherwise available to a state. Maritime security threats may not necessarily be coercive in nature, and so would not amount to a prohibited threat of force under international law. Nonetheless, they do constitute concerns that justify action on behalf of the state or states perceiving the threat.

The United Nations Secretary-General has acknowledged that there is no agreed definition of ‘maritime security’, and has instead identified what activities are commonly perceived as threats to maritime security. In his 2008 report on Oceans and the Law of the Sea, the Secretary-General identified seven specific threats to maritime security. First, piracy and armed robbery against ships, which particularly endanger the welfare of seafarers and the security of navigation and commerce. Second, terrorist acts involving shipping, offshore installations, and other maritime interests in view of the widespread effects, including significant economic impact, that may result from such an attack. Third, illicit trafficking in arms and weapons of mass destruction. Fourth, illicit traffic in narcotic drugs and psychotropic substances, which takes into account that ‘approximately 70 per cent of the total quantity of drugs seized is confiscated either during or after transportation by sea’. Fifth, smuggling and trafficking of persons by sea, posing risks due to the common use of unseaworthy vessels, the inhumane conditions on board, the possibility of abandonment at sea by the smugglers, and the difficulties caused to those undertaking rescues at sea. Sixth, illegal, unreported, and unregulated fishing (IUU fishing) in light of the identification of food security as a major threat to international peace and security. Finally, intentional and unlawful damage to the marine environment, as a particularly grave form of maritime pollution due to the potential to threaten the security of one or more states given the impact on social and economic interests of coastal states. This listing encompasses the varied concerns of shipping operators, government defence forces, law enforcement officials, and other maritime security analysts.

Even when a precise definition of ‘maritime security’ is eschewed, identifying what is a threat to maritime security has not been free from controversy. At the 2008 meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS), state representatives contested the inclusion of IUU fishing as a threat to maritime security. Instead, it was


36 Ibid para 63.
37 Ibid para 72.
38 Ibid para 82.
39 Ibid para 89.
40 Ibid para 98 (referring to UN Doc A/59/565, para 52).
41 Ibid paras 107–8.
proposed that the United Nations General Assembly recognize ‘that illegal fishing poses a threat to the economic, social and environmental pillars of sustainable development’ and that ‘some countries’ had found illegal fishing to be part of transnational criminal activity.\(^{43}\)

This brief survey indicates that while ‘maritime security’ is widely used and understood in the day-to-day workings of naval and law enforcement officials, other government officials, vessel owners and operators, as well as in the academic literature, it is rarely defined in a categorical way, and instead tends to have a context-specific meaning. In this book, the most useful approach for addressing questions of maritime security is to identify what are commonly perceived as existing or potential threats to maritime security and the steps that have been, or need to be, taken to address these threats. The approach here is to consider the varied maritime security threats but in doing so, it is possible to acknowledge what is actually being threatened given the broader understanding of security. Consequently, the understanding of maritime security underlying the argument in this book is that it means ‘the protection of a state’s land and maritime territory, infrastructure, economy, environment and society from certain harmful acts occurring at sea’.\(^{44}\) The harmful acts include those threats identified in the 2008 report of the UN Secretary-General. As observed by Indonesia at the ninth UNICPOLOS meeting, ‘in the absence of a universal definition the international community should take a comprehensive approach to the issue’.\(^{45}\)

(2) Freedoms of the high seas

President Jesus of the International Tribunal for the Law of the Sea (ITLOS) has remarked that:

For any system of law to be able to respond to the needs of society, it has to be able to change and adapt to the changing circumstances affecting the relations or the reality it purports to discipline and regulate. It should reflect the mood of new times and situations, absorb new requirements and dominant trends and adopt measures to prevent or repress negative developments that pose a serious threat.

International law of the sea is no exception to this. Like any other branch of law, international sea law is not static. To the extent that it embodies or attempts to interpret and reflect

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\(^{43}\) Ibid Part A, para 10(e).


a legal order for the oceans, it should be able to change and evolve in response to the challenges required by the need to secure and maintain an orderly use of the oceans.  

A prominent feature of the law of the sea is the enduring significance of *mare liberum*, which encapsulates the view that every state enjoys certain freedoms on the oceans. Writing in 1608, Hugo Grotius argued for the principle in order to promote the idea that all states shared an interest in using the oceans for the transportation of goods and people across the globe, and to fish freely in areas beyond the territorial sea. While there was initially some resistance to Grotius’s position, recognition of the common interests in utilizing ocean space, as well as the physical limitations involved in policing maritime areas in a comparable manner to land territory, resulted in a widespread and enduring endorsement of *mare liberum*.

The principle of *mare liberum* is embodied in the current ‘constitution’ for the oceans, UNCLOS, in recognizing the freedoms of the high seas, albeit subject to various restrictions, and seeking to preserve those freedoms in the face of a number of different exclusive claims. This balance is seen plainly in the creation of the regime of transit passage, which was the compromise attained for accepting wider breadths of territorial seas but guaranteeing navigational rights through important international straits. It is also evident in the structure of the EEZ in which freedoms of the high seas, as well as ‘other internationally lawful uses of the sea related to these freedoms’, are preserved but are subject to the exclusive jurisdiction and sovereign rights of the coastal state.

Negotiated over nine years, the adoption of UNCLOS in 1982 and its entry into force in 1994 signalled widespread agreement of the ‘package deal’, or, in other words, that a complex balance of competing interests had been successfully achieved. At the same time, there was still scope within the agreement to allow for further evolution of the treaty. As President Jesus has commented, ‘UNCLOS is undoubtedly an historic achievement, but its successful translation into an effective regime of international law is a process in need of frequent reassessment and adjustment.’ So much seems true when considering necessary responses to maritime security. This Part addresses how the law of the sea has developed and

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46 José Luis Jesus, ‘Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects’ (2003) 18 *IJMCL* 363, 381–2. President Jesus assumed the position of President of ITLOS in 2008 and had served as a judge from 1999.

47 The counter-argument to Grotius’s *mare liberum* was argued by British scholar John Selden. See John Selden, *Mare Clausum: Of the Dominion, Or, Ownership of the Sea* (1652) (Marchamont Nedham trans, from Latin, Arno Press, New York 1972).


49 UNCLOS art 58(1).


highlights aspects of the framework of the law of the sea that have particular relevance for assessing maritime security.

(a) Mare liberum

In seeking to establish foundational principles for the law of the sea, Grotius argued that the very nature of the oceans demanded that they be available to all users. Unlike land territory, which can be occupied, guarded, and secured against invasion, the physical characteristics of the oceans mean that the seas do not permit a comparable level of control. Grotius equally appreciated the economic importance of the high seas, as the ability of ships to transport people and goods around the globe without passage becoming subject to a state’s control would facilitate international trade. This economic interest was also manifest in the desire to maintain fishing grounds in as wide an area as possible. The shared interest in the freedom of navigation would allow not only the movement of goods and people, but also permit unhindered passage of naval fleets of the maritime powers to areas of political and military influence. At a time when shipping provided the only means for states to communicate with overseas colonies and dominions, the importance of securing the means for this assertion of authority was evident.

Even with considerable technological advances, the common interest that prevailed was to permit the ongoing characterization of ocean areas as *mare liberum* and thus maintain the freedoms of the high seas. During one of the early major efforts to codify the law of the sea at the 1958 Conference on the Law of the Sea, the Soviet Union affirmed the continuing relevance of the traditional paradigm:

... the principle of the freedom of the high seas had been for centuries reaffirmed in the effort to combat attempts by states to secure mastery over large maritime areas. The freedom of the high seas meant that they were open to all states on an equal footing, and that no state could claim sovereignty over them to the detriment of others; it was satisfactory to note that in modern times that principle had acquired a new and practical meaning for the people of countries which had recently won their independence.

Whenever states have sought to extend their sovereignty or jurisdiction over greater reaches of maritime space, other states have resisted this threat to *mare liberum* in accordance with their preference for maintaining the high seas freedoms. Any new claims of exclusivity over ocean space or resources have most commonly been

52 ‘The sea is common to all, because it so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider from the point of view of navigation or fisheries.’ Hugo Grotius, *The Freedom of the Seas: or, The Right which Belongs to the Dutch to Take Part in the East Indian Trade* (1633) (Ralph Magoffin trans, OUP, Oxford 1916) 28.


54 Grotius was particularly arguing the case of the Dutch East Indies Company at the time (as the very title of the work suggests), against Portuguese claims of sovereignty over the Indian Ocean. Grotius, *The Freedom of the Seas* Chapter V.

viewed as a derogation from the pre-existing freedoms of the high seas and so have been curtailed in accordance with these freedoms.\(^{56}\) For example, when states negotiated the status of the EEZ, it was argued that the freedoms of the high seas within this 200-mile zone were to be qualitatively and quantitatively the same as the high seas freedoms outside the zone.\(^{57}\) The high seas freedoms co-exist with the exclusive rights of the coastal state in this maritime zone, provided that they are not incompatible with the legal regime of the EEZ.\(^{58}\)

As currently formulated, the freedoms of the high seas have included not only the freedoms of navigation and fishing, but also freedoms to lay submarine cables and pipelines, and overflight.\(^{59}\) There has not been an exhaustive categorization of the high seas freedoms,\(^{60}\) and a variety of military activities are typically regarded as other freedoms of the high seas.\(^{61}\) States have generally accepted that the freedoms of the high seas entail certain responsibilities or implied restrictions.\(^{62}\) The purpose of such regulation was to safeguard the exercise of the freedom in the interests of the whole international community.\(^{63}\) The International Law Commission (ILC) set forth this view in its commentary to the draft articles for the 1958 High Seas Convention:

Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community.\(^{64}\)

\(^{56}\) eg, as noted above, claims to rights over the continental shelf, to increased breadths of territorial seas, and to the living resources in areas adjacent to the coast have always been countered by the rights of other users to the high seas.

\(^{57}\) Elliot L. Richardson, ‘Power, Mobility and the Law of the Sea’ (1979–1980) 58 Foreign Affairs 902, 907 (they must be qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete—and allow for future uses no less inclusive—than traditional high-seas freedoms).

\(^{58}\) UNCLOS art 58(2). In addition, the rights and duties located in arts 88 to 115 are deemed to apply to the EEZ provided they are not incompatible with Part V.

\(^{59}\) UNCLOS art 87(1).

\(^{60}\) The preferred legal formulation has been to set out an inclusive list of high seas freedoms (signalled by the phrase ‘inter alia’). See UNCLOS art 87.

\(^{61}\) Military activities have usually been included among the traditional freedoms of the high seas, even if not explicitly stated. See D.P. O’Connell (ed I.A. Shearer), The International Law of the Sea, 2 Vols (Clarendon Press, Oxford 1984) 809; P. Sreenivasa Rao, ‘Legal Regulation of Maritime Military Uses’ (1973) 13 Indian JIL 425, 435.


\(^{64}\) ILC, ‘Report of the International Law Commission’ (1956) 3(2) ILC Yearbook, 278. Professor D.P. O’Connell similarly wrote: ‘One common thread running through the formulation of the various jurisdictional zones in the contemporary law of the sea is the idea of accommodation of interests, or a
It is evident here that the common interest has been to favour inclusive interests through the maintenance of the high seas freedoms.

Instead of claims of rights or control over the high seas, a state has authority over the vessels that ply these areas under the flag of that state. It is the very fact that the high seas are open to all states that no one state is then able to exert control or authority over the vessels traversing the oceans unless that vessel has a tie to that particular state. As observed in the 1817 judgment of *Le Louis*: ‘In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another.’

While a grand statement of principle, it is predicated on the idea that states will exercise jurisdiction and implement international requirements in relation to vessels that are flagged or registered to them. The practice of flags of convenience, or open registries, enables commercial operators to register their vessels with whichever state offers the most attractive financial conditions and this economic competition tends to promote poor enforcement of international standards in what may be seen as an unfortunate ‘race to the bottom’. The use of flags of convenience has diminished the feasibility of complete adherence to exclusive flag state jurisdiction. Various attempts have been made to revise laws that, otherwise, will allow flag of convenience usage to flourish and will be discussed in this book. However, it will also be seen that the tenacious observance of exclusive flag state authority on the high seas has undermined efforts that would otherwise improve maritime security.

The freedoms of the high seas and how those freedoms have been moderated or abandoned in other maritime zones form the basis of the modern law of the sea. Further, the accompanying recognition of exclusivity of jurisdiction over vessels flagged to particular states and the relevance of this nationality in the conduct of various maritime activities in different maritime zones remains another feature of current legal regulations. These competing trends as encapsulated in and evolved from *mare liberum* may then be better understood within a paradigm that identifies inclusive and exclusive claims to maritime space and uses.

balancing of rights and duties, which can be summed up in the concept of “reasonable use”. The result is that there is little absolutism in the rights of States with respect to the sea.’ O’Connell, *The International Law of the Sea* 57.

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

66 This requirement is now enshrined in art 94 of UNCLOS.

67 ‘Functionally, a “flag of convenience” can be defined as the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels.’ Boleslaw Adam Boczek, *Flags of Convenience: An International Legal Study* (Harvard University Press, Cambridge 1962) 2.

(b) Inclusivity and exclusivity in the development of the law of the sea

The consequence of *mare liberum* has been the generation of a tension between inclusivity and exclusivity in claims to ocean space and its use. As mentioned previously, the law of the sea has traditionally encapsulated an appropriate balance between inclusive claims (accommodating all states) and exclusive claims (those benefiting single states) in order to achieve a common interest. McDougal and Burke described the common interest in a balance of exclusive and inclusive uses of the oceans:

The common interest of all states and their peoples in both exclusive and inclusive uses of the oceans of the world and in an economic accommodation of all uses is not . . . difficult to demonstrate. . . . All states which border upon the oceans have a common interest in those traditional exclusive assertions of control in nearby areas which permit a state both to protect its territorial base and organized social life from too easy invasion or attack from the sea and to take advantage of any unique proximity it may have to the riches of the sea bed and marine life. . . . Each state, whether coastal or not, has an interest in the fullest possible access, either for itself or for others on its behalf, to all the inclusive uses of the ocean . . . for the richest possible production of values. From this mutual interest of all states in all types of uses, it follows that each state has an interest in an accommodation of such uses, when they conflict, which will yield both an adequate protection to exclusive claims and yet the greatest possible access to inclusive uses. The net total of inclusive uses available for sharing among all states is directly dependent, further, upon the restriction of exclusive claims to the minimum reasonably necessary to the protection of common interest. If all states asserted and were protected in extravagant, disproportionate, exclusive claims, there would be little, if any, net total of inclusive use for common enjoyment. . . . The common interest is in an accommodation of exclusive and inclusive claim which will produce the largest total output of community values at the least cost.

This approach has taken into account the security interests of states:

By appropriate accommodation and compromise, a public order of the seas has been maintained to permit states to send their argosies to all the four corners of the world and to take adequate account of both the general security interest of the community of the states and the special security interest of particular states.

The emphasis has thus been on retaining inclusive enjoyment of ocean space, and only permitting exclusive claims to prevail if they ‘serve the common interest where the impacts of use are especially critical for a particular state and the restrictions upon inclusive use are kept to the minimum’. In the decades subsequent to McDougal and Burke’s analysis, the allocation of competences has continued to emphasize the importance of inclusive interests while still permitting recognition of certain exclusive claims. Although the predominant emphasis in the law of the sea

69 ‘[T]he common interest is an accommodation of exclusive and inclusive claims which will produce the largest total output of community values at the least cost.’ McDougal and Burke, *The Public Order of the Oceans* 52.

70 Ibid 51–2.

71 Ibid 54.

72 Ibid 749.
has been that the common interest is achieved through maintaining the freedoms of the high seas and respecting flag state authority in these areas, these central motivations may no longer be completely appropriate given the recent claims to undertake various measures for the enhancement of maritime security.

C. Maritime Security and the Law of the Sea

There are many ways in which maritime security will involve exclusive claims by states within the law of the sea. A state’s military interests will typically focus in the first instance on securing a state’s own national sovereignty. These military interests are likely to involve claims to undertake military exercises and weapons tests at sea, as well as to ensure that key navigational routes remain available. A state will also have a primary interest in securing its own border or borders from the unlawful entry of particular people (ranging from terrorists to other criminals to asylum seekers), vessels (posing environmental risks, for example) or certain cargo (such as drugs, WMD and related material, or hazardous waste). Steps taken to maintain border security could be seen as asserting exclusive rights in controlling movement across a state’s boundaries. On the high seas, there are claims to exclusive interests in vessels flying the flag of one state. The rights of hot pursuit and of visit immediately challenge the exclusive rights of a state in this regard.

While not denying the existence of these exclusive interests in relation to maritime security, there are a range of features concerning maritime security that demonstrate a shared interest of states in finding appropriate responses to maritime security threats. Following the terrorist attacks on the United States on September 11, 2001, a range of legal developments were initiated on the basis that a terrorist attack in a major port or vital shipping channel, particularly one that might involve use of a WMD, could potentially close down international commerce for a length of time, with devastating economic repercussions given that over 90 per cent of the world’s goods are transported by sea. Serious environmental damage may similarly affect international shipping, in addition to immediately adjacent states, if ports or shipping routes need to be closed or alternative routes put in place.

It is also likely that more than one state will need to address transnational crime if efforts to reduce its occurrence and effects are to succeed. Criminal activity, particularly drug and people smuggling, has grown to such an extent that a large number of states may be implicated during the criminal enterprise: the individuals involved may be nationals of different states, the vessel may be flagged to another state, more than one vessel may be utilized to further the criminal activities, the vessels may transit the waters of various states and call at different ports before reaching the final destination. Cooperation on both a regional and international basis has been embraced as a key response to this maritime security threat. One such example is the 2008 Maritime and Airspace Security Co-operation Agreement.

Other transnational criminal activity includes trafficking in endangered species and smuggling cultural artefacts.
adopted by the Caribbean Community, which creates broad powers for shared law enforcement activities in the territorial seas and against flagged vessels of member states.

Although military interests may be predominantly national, and exclusive, in focus, armed conflicts have increasingly involved a coalition of states, particularly when the UN Security Council acts under Chapter VII of the UN Charter to enforce sanctions regimes or authorizes other enforcement actions. By way of further example, NATO has authorized the escort of merchant vessels through the Straits of Gibraltar and boarded ships in the Eastern Mediterranean with flag state consent. States have also acted cooperatively in response to UN Security Council resolutions requiring states to take action against piracy off the coast of Somalia. The international response to address piracy off Somalia underlines how many states share an interest in securing the rights of international shipping through this maritime area.

Modern interests in maritime security are undeniably a shared interest, even if a state has specific needs or interests that co-exist. The common interest in ensuring maritime security may mean that a readjustment in the balance of exclusive and inclusive interests has become necessary. Such a shift is necessary because ‘no single nation has the sovereignty, capacity, or control over the assets, resources, or venues from which transnational threats endanger global security’. When the shared interests in maintaining maritime security are recognized, the development, interpretation, and application of legal rules and structures should equally account for this perspective. While cooperation may be a key mechanism and will feed into operational responses to maritime security threats, how we weight inclusive claims and emphasize particular interests will be the critical starting points.

This book examines how a view of maritime security as an inclusive claim influences, or should influence, rights and duties in different maritime areas and in relation to different maritime activities. What constitutes an inclusive maritime

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75 Ibid arts 7–9 and 11.
76 These are discussed in Chapter 6, Part C(3).
77 See Becker, ‘The Shifting Public Order’ 152 (discussing the 2003 NATO naval operation ‘Active Endeavour’).
78 See further Chapter 6, Part C(3)(b).
79 ‘Individual nations will always maintain unique and distinct security interests vis-à-vis the global community of nations; however, transnational threats represent an area of commonality which lends itself to increased international cooperation. By combining the resources and capabilities of many nations, the rigidly-defined and nationally-focused approach to security that triumphed in years past can be transformed into one that is flexible and cooperative.’ Jon D. Peppetti, ‘Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats’ (2008) 55 Naval Law Review 73, 77–8.
security interest may be discerned in relation to those threats that affect the maritime security of a majority of states and so there is a shared interest in seeking to minimize the realization of these threats. Individual assertions of naval power that serve to benefit the policy goals of one particular state, and its allies, would be more likely to fall outside inclusive claims to maritime security. Referring to an inclusive maritime security interest is intended to account for expanded views of security relating to ocean use beyond the military concerns designed to enhance national sovereignty.

Given that the dominant paradigm in the law of the sea is one that favors retention of the freedoms of the high seas, consideration will be accorded to the ways that inclusive interests in maritime security may be supported within this paradigm. It is possible that accommodation of particular maritime security concerns has already been sufficient for what is in the common interest and so efforts for additional adjustment should be resisted. In other cases, the assessment of maritime security and the law of the sea may indicate that if there is a greater emphasis on the inclusive interest then efforts to improve responses to maritime security threats may be enhanced. What is important is the adjustment in mindset or outlook when it comes to dealing with questions of maritime security; in shifting the common understanding of maritime security and the law of the sea there may be greater potential for policy-makers, shipping operators, naval and law enforcement officials to take the concrete steps necessary to respond to and pre-empt maritime security threats in the most effective way possible.

In examining maritime security and the law of the sea, this book explores the following. Chapter 2 addresses two main areas that have shaped the law of the sea in relation to security interests and remain of importance today: the passage of military vessels, and weapons tests and military exercises on the high seas. With respect to the passage of military vessels, the interest of maritime powers in this issue sharply escalated in response to claims to an increased breadth of territorial seas during the 1950s. This question was fought out during the First and Second Conferences on the Law of the Sea and was finally resolved through the creation of the transit passage regime in UNCLOS. The ability to test weapons on the high seas also proved controversial during the 1950s and led to inter alia the adoption of a standard of reasonable regard to the rights of other states in the use of the high seas.

These issues have typically been examined as contests between exclusive and inclusive claims and an accommodation was sought to be established on this basis. The exclusive interests have been those of coastal states seeking to extend the breadth of the territorial sea, as well as in claiming additional rights to protect economic interests through the EEZ. The inclusive interests are those involved in the freedom of navigation and ensuring that any state with the capability, resources, and inclination may utilize the seas for passage as well as for certain peacetime naval activities. The principles agreed upon in addressing these military activities ensured the protection of the key security interests at stake at the time, both because there was enough specificity in the rules to offer protection to navigational rights and because there remained enough ambiguity in the terms to allow an ongoing freedom of action for the maritime powers.
The deficiencies in these regimes have resulted in ongoing controversy—as seen in the differing opinions as to the permissibility of foreign navies conducting military exercises and activities in a coastal state’s EEZ (particularly controversial at present in relation to intelligence gathering, which is addressed in more detail in Chapter 5), and the use of security zones, either in addition to claims of an EEZ or for the purposes of military exercises and weapons tests. If the passage of military vessels and military activities should be regarded as part of the cadre of inclusive interests to be protected, this focus could influence how the remaining ambiguities are to be interpreted today.

Chapter 3 examines how the powers of a coastal state to enforce its laws are fundamental to enhancing maritime security. This chapter analyses these rights from the perspective of the particular maritime zone involved and in relation to the types of activities that may impinge on the security of the state. It will be seen that the enforcement powers of states are quite circumscribed, with limitations even in the territorial sea. Law enforcement in the EEZ involves a clear articulation of the powers of the coastal state because states negotiating UNCLOS were concerned that the coastal state may otherwise interfere with the freedom of navigation. Enforcement powers were limited to certain activities in the EEZ for that reason. Equally, on the high seas, the avenues for law enforcement have been limited in deference to the freedom of navigation and exclusive flag state control over vessels. The requirements for the right of hot pursuit and the right of visit reflect the policy preference to restrain the instances of interference with the freedom of navigation.

Law enforcement is taking on new importance in addressing illegal fishing, people smuggling, and the movement of asylum seekers. A broadened concept of maritime security incorporates concerns that the taking of important resources from a state’s waters is a threat to environmental and economic security. More policing resources have been diverted for this cause, and regional fisheries organizations have adopted schemes to improve enforcement. States have also become concerned about the economic impact of illegal immigrants seeking to arrive in their territory and the challenges imposed through the increasing practice of people smuggling. Greater resources are being deployed by states for their navies and law enforcement officials to confront these perceived threats. In the case of asylum seekers and people smuggling, government forces may be engaged in rescue missions when the vessels carrying these people sink or the forces may be used to prevent entry of such vessels into their territory. The applicable laws in these areas need to be elucidated to ensure that the exercise of any enforcement powers is lawful.

Chapter 4 focuses on the current developments in the law of the sea related to counter-terrorism and proliferation of WMD. The majority of recent legal developments in maritime security address concerns regarding terrorism and WMD and related material. At present, a piecemeal approach has been followed. States have recognized the need for undertaking risk management activities in the interface of ships and ports through greater port state control under the ISPS Code. The United States has also sought to enhance the security of shipping through its Container Security Initiative. The multilateral efforts in improving port security support the
idea that there is a common interest in increasing awareness of what is being shipped to where in the event it impinges on maritime security. There have, however, been concerns that the initiatives, as developed, have tended to favour the interests of the United States in particular and more must be done for wider benefits to be realized.

Outside of port areas, the United States has instituted the Proliferation Security Initiative (PSI) whereby states agree, though in a legally non-binding fashion, to interdict vessels in their territorial seas, internal waters, and ports or their flagged vessels where there are reasonable suspicions that the vessel is shipping WMD or related material. The legal ambiguity associated with the PSI has prompted the adoption by the United States of a handful of bilateral treaties to articulate when ship-boarding would be permissible. These treaties have now been supplemented by a multilateral instrument that also creates a procedure for boarding ships on the high seas: the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. States are thereby seeking to expand the traditional right of visit, which has existed as an exception to the freedom of the high seas and the long-recognized authority of states over vessels bearing their flag. These new regimes have been limited because of insistence on maintaining exclusive jurisdiction over vessels on the high seas and minimal interference with navigational rights. A greater acceptance of the common interest in addressing maritime security concerns related to terrorism and WMD would have allowed for the creation of stronger regimes.

Chapter 5 deals with intelligence gathering and information sharing. This chapter highlights an aspect of maritime security that has been obfuscated on occasions by more general examinations of military activities in certain maritime zones, or by passing reference in consideration of counter-terrorism and counter-proliferation initiatives. Intelligence gathering has become an increasingly important tool for states, especially as technological improvements have increased states’ capacity for electronic warfare and intelligence warfare. Policies of maritime domain awareness have been adopted as a result. It is important to revisit the rights of states to conduct these activities in certain maritime zones and to ask whether all forms of military research are permissible (hydrographic surveys being controversial in this regard).

The importance of the need to gather information was reflected in Australia’s adoption of a ‘Maritime Identification Zone’, which was initially articulated as operating within 1,000 nautical miles of Australia’s coast. Although ostensibly extending exclusive claims to a greater distance than has ever previously been asserted, Australia has maintained that it will not go beyond the existing bounds of international law in seeking identification information from vessels not flagged to Australia. The terms of this policy are now reflected (to varying extents) in the adoption of a new Regulation at the IMO on Long Range Identification and Tracking. The latter stands as another example of states seeking to increase the regulation of navigation for the purposes of enhancing their maritime security and shows how inclusive interests may emerge in responding to maritime security threats.
As a complement to intelligence gathering is the need for information sharing. This requirement has been incorporated into the recent counter-terrorism and counter-proliferation legal developments. In addition, law enforcement regimes to counter piracy, illegal fishing, and drug trafficking have incorporated information sharing requirements. However, these frequently have limitations that undermine the importance of information sharing to address the threats at issue. Information sharing is another area where an emphasis on common interest would enhance efforts at improving maritime security.

Chapter 6 explores when a state may resort to force, particularly when naval force may be used, and the law of naval warfare. Although maritime security is predominantly a preoccupation of peacetime uses of the oceans, this chapter looks at armed conflict and naval warfare, and the interface of maritime security with rules relating to the use of force. There has been considerable debate over the applicability of UNCLOS during times of war and what significance should be accorded to the ‘peaceful purposes’ provisions of that treaty. Some commentators argue that a lex specialis has emerged in relation to the rules of naval warfare; these rules governing the conduct of hostilities are premised on the existence of a war. A Manichean application of this body of law is no longer so evident given the changing nature of armed conflict: declarations of war are rarely made, the Security Council has a greater role in regulating the lawful use of force, and the so-called war on terror are all factors blurring the operation of these traditional rules.

This chapter considers the law on the use of force, particularly what acts of maritime violence might trigger the right of self-defence in light of the *Oil Platforms* decision,82 and what naval operations have been undertaken by virtue of the UN Security Council’s authority under Chapter VII of the UN Charter. Attention is given to the claims of self-defence proffered as justification of various initiatives to improve maritime security. The second half of this chapter analyses the law of naval warfare and highlights the rules that have been utilized in times of peace; while the rules themselves have been articulated in different contexts, the question of when they apply has proven challenging. The intersection of laws of naval warfare with responses to threats to maritime security is examined and there is reference back to how these laws intersect with rules on law enforcement.

Chapter 7 will reflect on how the diverse demands of maritime security have now made it important to bring clarity, and even specificity, to the conduct of navies and government law enforcement agencies. To this end, a number of initiatives have been undertaken, particularly since September 11—through multilateral and bilateral treaties, the adoption of unilateral requirements, Security Council resolutions, and the creation of political, non-legally binding, arrangements. However, these developments have been purpose-driven and are piecemeal in addressing the broader issue of maritime security. As a final outcome of this book, it is proposed to synthesize the array of laws in this area as they apply to the panoply of maritime security threats. This approach will enable gaps, inconsistencies and ambiguities to

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82 *Case concerning Oil Platforms (Islamic Republic of Iran v US) (Merits) [2003] ICJ Rep 161.*
be highlighted and allow for proposals to be made to ensure an effective legal regime in addressing maritime security.

The changes in the law of the sea as a result of efforts to improve maritime security will also be considered in their totality vis-à-vis the traditional law of the sea framework. It will be argued that we are no longer facing the same tension between exclusive interests and inclusive claims that featured in earlier law of the sea development. Instead, there is now an inclusive interest in preventing a major terrorist attack that would greatly disrupt the global economy and cause considerable loss of life. There are shared interests in ensuring that law enforcement actions in relation to illegal fishing and people smuggling are as effective as possible. It is this imperative that requires a loosening of the flag state stranglehold over ships.

Once the broader policies at stake are examined, it can be asked whether the existing rules should be understood in a different light, or as a foundation for the development of new rules? If so, then what nuances, or interpretations, or new rules are now appropriate and warrant adoption by states? Where does the common interest now lie when questions of maritime security are at issue? The book concludes by seeking to answer those questions.
Passage and Military Activities

A. Introduction

Two core, and long-held, interests for maritime security have been ensuring that warships\(^1\) can move freely about the globe and that the navies of the world are sufficiently equipped and trained to assert or defend the interests of the state to which they belong. In this context, maritime security is intimately related to the military interests of a state. The law of the sea has developed to account for these important interests, particularly in favour of the states with the greatest power in this regard. The existence of a territorial sea over which a coastal state could exercise sovereignty has long had ties to the national defence of that particular state, and hence had security implications for the state exerting rights off its coast. The so-called cannon-shot rule, attributed to Dutch jurist Bynkershoek, was based on the notion that a coastal state should be able to exercise control over an area of ocean space that could be controlled by force of arms.\(^2\) The connection of rights over the territorial sea to military purposes was evident in some of the earliest claims to this area. The United States, for example, claimed a 3-mile territorial sea in 1793 to deflect belligerent acts upon US shipping during the Napoleonic Wars.\(^3\)

While the law of the sea has developed in accordance with these demands for national security, the relevant rules have often been shrouded in ambiguity both to maintain flexibility for military purposes, as well as catering, at least ostensibly, to competing demands to control over ocean space voiced by coastal states. This chapter examines the developments in the law of the sea that particularly responded to demands related to the passage of warships and the use of the oceans for military activities. These developments clearly reflect the traditional dichotomy of exclusive versus inclusive claims to maritime space. The exclusive interests are those of coastal

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1 ‘Warships’ are defined in the UNCLOS as ‘a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline’. United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3 [‘UNCLOS’] art 29.

2 Bynkershoek limited this rule to the time that he was writing, acknowledging that the question was one of where the ‘power of men’s weapons ends’. Frederick C. Leiner, ‘Maritime Security Zones: Prohibited Yet Perpetuated’ (1983–1984) 24 Virginia JIL 967, 968 citing Cornelis van Bynkershoek, De Dominio Maris (1703) (2nd edn, Leyden 1744) 44.

3 Leiner, ‘Maritime Security Zones’ 969 (describing this as the first international effort to claim a territorial sea).
states seeking to control or limit access to their land territory, as well as ensuring protection of the resources needed for the prosperity of the state. The inclusive interest for warships relates to ensuring there is freedom of access to the oceans for transportation, communication and military purposes. For those favouring this perspective, this freedom of access is said to be in the interests of all. One question to be considered here is whether current maritime security concerns require new understandings of the ambiguous rules. Does a shared interest in maritime security warrant greater emphasis on assertions of inclusive rights?

At the outset, it is noted that any assessment of the passage of warships and military activities are closely connected to the rights and duties held by states in different parts of the ocean. In each instance that coastal states have sought to make claims over areas of ocean space adjacent to their land, consideration has been given to the implications for the military interests of third states in those particular areas. The debates over the extension of the breadth of the territorial sea from 3 miles to 12 miles, and legal recognition of the EEZ reflected these competing claims. The first half of this chapter addresses the passage of warships with a focus on the exercise of that right in areas over which a coastal state has sovereignty (the territorial sea, straits and archipelagic waters). The range of military activities that may be conducted in areas subject to state sovereignty is limited and is predominantly linked to the passage of the vessel itself. In the EEZ and on the high seas, the range of permissible military activities beyond passage increases and the second half of the chapter addresses this broader category of activities.

B. Passage of Warships

The right of warships to traverse maritime areas subject to the sovereignty of the coastal state has been recognized as a legitimate derogation on that state’s sovereignty. As stated by the Court in the Corfu Channel case, ‘[i]t is . . . generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation . . . without the previous authorization of a coastal State, provided that the passage is

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6 In this chapter, a general distinction is drawn between coastal states and third states whereby the latter signifies those states that have warships sailing in waters claimed by a state to which the vessel is not flagged.

7 Even the drawing of baselines has provoked concern from militarily powerful states in view of the fact that maritime zones are measured from these baselines. See generally J. Ashley Roach and Robert W. Smith, United States Responses to Excessive Maritime Claims (2nd edn Martinus Nijhoff, The Hague 1996).

8 This right is also accorded to commercial and other non-government vessels, but the discussion here is focused on warships.
innocent.’9 Navigation of warships through territorial seas and straits has always had considerable military importance in view of a range of strategic objectives of third states.10 The passage of a warship through the territorial sea of a coastal state, or through a particular strait,11 may be the safest and most expeditious route to a particular destination beyond that state’s territorial sea as well as being a necessary area to cross en route to the port or internal waters of a coastal state. The traditional naval interest has been to maintain a right of passage for naval forces that could not be limited, especially in a time of crisis, by coastal states.12 In view of the interests at stake, third states have been highly cautious about claims seeking to increase the amount of coastal state control over the passage of vessels through territorial seas, and most particularly through straits.13

Coastal states have their own security concerns in relation to the passage of warships in proximity to their coasts. From the perspective of national defence and security, a littoral state would want to limit the ability of a third state to conduct any ‘show of force’ in its waters as part of a broader political situation that may exist between them.14 A coastal state would also be concerned about intelligence

10 ‘To fulfill their deterrent and protective missions these forces must have the manifest capacity either to maintain a continuing presence in farflung areas of the globe or to bring such a presence to bear rapidly. An essential component of this capacity is true global mobility—mobility that is genuinely credible and impossible to contain.’ Elliot L. Richardson, ‘Power, Mobility and the Law of the Sea’ (1979–80) 58 *Foreign Affairs* 902, 907.
13 ‘[C]oastal states recognize the potential strategic value of straits, and some may attempt to manipulate the right to navigate international straits as a source of wealth or a means of achieving particular political objectives.’ Burke and DeLeo, ‘Innocent Passage’ 401. In a similar vein, Booth writes: ‘A new regime would considerably enhance the strategic significance of those countries at the choke points of the most important straits. A small group of states would be given the opportunity for the exercise of greatly enhanced political leverage’. Kenneth Booth, ‘The Military Implications of the Changing Law of the Sea’ in John King Gamble Jr (ed), *Law of the Sea: Neglected Issues* (The Law of the Sea Institute, University of Hawaii 1979) 328, 346.
14 The Soviet Union, for example, argued at the Second Conference on the Law of the Sea that a flexible breadth of territorial sea had ‘an important bearing on the security of coastal States, some of which were at present vulnerable to intimidation by demonstrations of force in their coastal waters, even in time of peace. There had been instances of large-scale naval manoeuvres, reconnaissance by sea and by air and attempts to interfere with shipping by foreign forces in the coastal waters of certain States.’ United Nations, *UN Second Conference on the Law of the Sea*, Official Records, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, Annexes and Final Act (UN, Geneva 1960), p 39 para 4 (Soviet Union) [‘Second UN Conference on the Law of the Sea’]. See also ibid p 105 para 32 (Byelorussian Soviet Socialist Republic); ibid p 125 paras 6, 7 (Romania); ibid p 77 para 24 (India); ibid p 101 para 14 (Albania). Cf Carl M. Franklin, ‘The Law of the Sea: Some
gathering by third states in its territorial sea to gain information that may be used in any future armed conflict. These maritime security concerns exist equally for states bordering straits.15 Although coastal states agitated for an increase in the breadth of the territorial sea to 12 miles on the basis that this buffer zone would limit the utility of weapons used against them, which reflected the cannon-shot rule concept for the breadth of the territorial sea,16 these arguments have lost all force with the development of weapons technology.17

Beyond concerns regarding national security, coastal states have an interest in protecting their marine environment from pollution and over-fishing in view of the negative economic impact that may otherwise result from mismanagement. Equally, coastal states have a general interest in maintaining law and order on land and this interest extends to policing adjacent maritime areas to prevent or deter criminal activities that have flow-on effects for law enforcement within the land territory of the coastal state. In this regard, coastal states regularly conduct policing activities over a range of crimes, including drug trafficking and customs and immigration violations. The law enforcement powers of the coastal state are discussed in more detail in the following chapter, but are mentioned here to signal the interests of the coastal state that are at play when regulating the navigation of vessels from third states, and particularly the passage of warships through territorial seas and straits.

The interests of coastal states over their adjacent waters and the interests of third states in ensuring the passage of their warships have been balanced under the law of the sea, primarily through the requirement that passage through the territorial sea must be innocent and in delineating the rights and duties of the coastal state in the regulation of this passage. The need to reconcile these competing claims was particularly evident during the debates in the 1950s and 1960s surrounding the breadth of the territorial sea and the repercussions that would result for the passage of vessels if coastal states were able to extend their sovereignty from a breadth of 3 miles to 12 miles. When both the First and Second Conferences failed to reach agreement on the breadth of the territorial sea for inclusion in a convention, the matter was left unresolved for a number of years. The United States and the Soviet

Recent Developments (With Particular Reference to the United Nations Conference of 1958)’ (1959–1960) 53 International Law Studies 1, 122–3 (estimating that ‘the deterrent effect and stabilizing influence of a display of naval force in a trouble-area of the world where a three-mile territorial sea exists would be reduced by at least 50% if the limit were extended to six miles; it would be reduced to nil with a 12-mile territorial sea’).

15 Burke and DeLeo, ‘Innocent Passage’ 401 (‘Coastal states are also concerned that traffic in straits adjacent to their shores may jeopardize their security interests. Such concerns stem from fears of attack, infiltration, or military intelligence activities conducted by vessels and aircraft passing through straits’).
16 These views were particularly aired at the Second UN Conference on the Law of the Sea. See ‘Second UN Conference on the Law of the Sea’ p 101 para 14 (Albania). See also ibid p 105 para 32 (Byelorussian Soviet Socialist Republic); ibid p 125 paras 6 and 7 (Romania); ibid p 104 para 16 (Iran).
17 These arguments were questioned on this basis even at the time of the First Conference. See United Nations, UN Conference on the Law of the Sea, Official Records (UN, New York 1958) Vol 3, p 167 para 3 (Mr Drew, Canada) (‘Carrier task forces, rocket-firing submarines, heavy bombers and long-range nuclear weapons had long since moved such matters on to another plane.’) [‘UN Conference on the Law of the Sea’]. For comparable views expressed at the Second UN Conference on the Law of the Sea, see, eg, ‘Second UN Conference on the Law of the Sea’ p 38 para 16 (Saudi Arabia).
Union both wished to have the question settled and began sounding out various governments on their views on holding another Conference.18 “[P]rotecting the mobility and use of warships was a central motivating force in organizing the Third United Nations Conference on the Law of the Sea.”19

The resulting compromise was enshrined in UNCLOS, with greater elaboration on the right of innocent passage and the creation of a new passage regime to be applied in certain straits and in archipelagic waters. This part first explains which passage regime applies in different ocean areas, and then addresses the rights of warships under each of these passage regimes. It next considers the counter-balancing rights accorded to coastal states in relation to the passage regimes, highlighting the grants of and limitations on these powers. Final consideration is given to the special regulations for nuclear-powered vessels and submarines. The regime in place has established a balance of interests that allows for recalibration to the extent that differing interpretations of rights and responsibilities may arise in relation to varying factual scenarios. As will be discussed, there is adequate scope to allow for the exigencies of modern maritime security concerns to be accommodated.

(1) Geographic application of passage regimes

The three passage regimes at issue are innocent passage, transit passage and archipelagic sea lanes passage. The right of ships of all states to enjoy innocent passage exists in the territorial sea.20 Innocent passage applies for navigation through the territorial sea—whether the vessel is entering the internal waters of the coastal state or not—and when a vessel is navigating from internal waters to beyond the territorial sea.21 Innocent passage will also be available in internal waters where those waters have been formed by the application of the straight baseline system set out in Article 7 of UNCLOS.22

The right of innocent passage also applies with respect to the passage of foreign ships through straits in particular circumstances. If there is a route outside the territorial sea of a state ‘of similar convenience with respect to navigational and hydrographical characteristics’, then innocent passage continues to apply through the strait and ships exercise the freedom of navigation through the alternative route.23 Similarly, innocent passage will apply in a strait that is formed by an island of a state bordering the strait and its mainland if there is a route through the high seas or the EEZ seaward of the island that is of similar convenience with respect to navigational and hydrographical characteristics.24 In both these situations, the possibility of vessels enjoying the freedom of navigation in alternative, but similarly

20 UNCLOS art 17.
21 UNCLOS art 18(1).
22 UNCLOS art 8(2).
23 UNCLOS art 36.
24 UNCLOS art 38(1).
convenient, routes permitted the ongoing application of the innocent passage regime in these areas. Finally, innocent passage continues to apply in a strait that links the high seas or an EEZ with the territorial sea of a state.\textsuperscript{25}

Transit passage then applies in respect of straits used for international navigation that lie between one part of the high seas or an EEZ and another part of the high seas or an EEZ.\textsuperscript{26} Article 38(3) of UNCLOS reads: ‘Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.’ In other instances, ‘passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits’\textsuperscript{27} and the rights of passage existing in these bodies of water are therefore subject to the terms of the relevant conventions. States may seek to adjust what particular passage regime applies in their adjacent waters by limiting the breadth of their claimed territorial sea. One such example may be seen in South Korea and Japan’s decision to establish a 6-mile territorial sea, thereby ensuring a strip of high seas remains in adjacent international straits and that the waters closest to them are therefore subject to the regime of innocent passage, rather than transit passage.\textsuperscript{28}

UNCLOS creates a regime for the legal recognition of archipelagic states,\textsuperscript{29} whereby these states are entitled to enclose their outermost islands with straight baselines, transforming the legal status of the waters within those lines into archipelagic waters over which sovereignty is exercised.\textsuperscript{30} Within archipelagic waters, the right of innocent passage exists for the ships of all states,\textsuperscript{31} except where the archipelagic state has designated sea lanes and air routes thereabove in which the right of ‘archipelagic sea lanes passage’ applies.\textsuperscript{32} In the event that such designation has not occurred, then ‘the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation’.\textsuperscript{33} This provision has been described as supplying ‘the lowest common denominator or “safety valve” which enabled the maritime states to accept the concept of archipelagic sea lanes passage’.\textsuperscript{34} The combination of these passage regimes was the necessary compromise for general recognition of archipelagic waters.

\begin{itemize}
  \item \textsuperscript{25} UNCLOS art 45(1)(b).
  \item \textsuperscript{26} UNCLOS art 37.
  \item \textsuperscript{27} UNCLOS art 35(c).
  \item The definition of ‘archipelago’ is ‘a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, water and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such’. UNCLOS art 46(b). An ‘archipelagic State’ is then constituted wholly by one or more archipelagos and may include other islands. UNCLOS art 46(a).
  \item UNCLOS arts 47 and 49.
  \item UNCLOS art 52 (noting this is subject to art 53).
  \item UNCLOS art 53.
  \item UNCLOS art 53(12).
\end{itemize}
(2) Warships and innocent passage

Warships by their very nature represent the military power of their state. Even in the absence of tension or hostilities between the states concerned, their passage through the territorial sea of another state still creates the situation of a benign show of force. The warship may be seen as reflecting the military status of a state. Ensuring that the passage of warships is indeed innocent as a legal matter requires a clear understanding of what is required to meet the standard of innocence. As the state that witnesses this benign show of force, it is unsurprising that the coastal state has scope for a subjective assessment on whether passage is innocent or not.

What constitutes innocent passage has been a matter of debate, both in terms of drafting appropriate standards for inclusion in international treaties and in the practice of states. At the First Law of the Sea Conference, it was proposed that ‘the sole test of the innocence of a passage was whether or not it was prejudicial to the security of the coastal State’. This test was intended to provide the ‘greatest measure of freedom of passage without in any way endangering the sovereignty of the coastal State’. A simple reference to ‘security’ was questioned, seemingly because broader security concerns beyond national defence would not be understood as included in the term. An alternative was to refer to the ‘interests’ of the coastal state, but this was criticized as far too broad. As a result, the 1958 Territorial Seas Convention stipulates that for passage to be ‘innocent’, it must not be prejudicial to the peace, good order or security of the coastal state.

UNCLOS also provides that passage is innocent ‘so long as it is not prejudicial to the peace, good order or security’ of the coastal state. However, unlike the 1958 Territorial Sea Convention, Article 19 of UNCLOS proceeds to articulate what activities will be viewed as prejudicial in this regard.

The majority of the stated activities are those that would most likely be undertaken by warships: any threat or...
use of force against the sovereignty, territorial integrity, or political independence of the coastal state; any weapons exercise or practice; information collection to the prejudice of the defence or security of the coastal state; the launching, landing, or taking on board of any aircraft or any military device; or interference with any systems of communication or other facilities or installations of the coastal state. The designated prejudicial activities also reflect coastal state concerns that implicate its law enforcement efforts and marine management; in this regard fishing, serious and willful pollution, and violations of customs, fiscal, immigration, or sanitary laws and regulations are also viewed as activities rendering passage non-innocent.

The listing of a range of activities that would be prejudicial to the peace, good order, and security of the coastal state arguably enhanced the rights of passage of warships inasmuch as some of the subjectivity allowed to coastal states in assessing the character of passage has been eliminated. However, the final clause of Article 19 sets a low threshold for the entire range of activities by stipulating that any activity ‘not having a direct bearing on passage’ could mean the passage is not innocent. This standard reinforces the requirement that passage through the territorial sea is to be continuous and expeditious and that stopping and anchoring is permissible only if it is incidental to ordinary navigation. The mere fact that a vessel is a warship will not of itself determine whether passage is innocent or not, but rather the acts undertaken by the warship will inform the nature of the passage.

The passage of warships is thereby limited to traversing the waters in question. It may be the case that the very act of passing through the territorial sea or a strait will be sufficient for strategic objectives of a show of force when the surrounding political situation is tense. Although such a show of force may be viewed by the coastal state as an unlawful threat of force, it will be the activities undertaken by the warship that will be decisive in determining the innocence of passage rather than the purpose of the mission. This point was underlined in the Corfu Channel Case. There, Albania contended that the passage of the British warships was not innocent but was in the nature of a political mission. In deciding whether the passage was innocent, the Court had regard to the manner in which the passage was

43 Burke and DeLeo, ‘Innocent Passage’ 393. Wilson and Kraska argue that ‘only a specific and recognized action that is noninnocent under the explicit terms of the Treaty are inconsistent with innocent passage’. Brian Wilson and James Kraska, ‘American Security and Law of the Sea’ (2009) 40 ODIL 268, 278.
44 UNCLOS art 19(2)(l).
45 UNCLOS art 18(2). Stopping and anchoring is also permissible under this provision if necessary because of force majeure or distress or to render assistance to persons, ships or aircraft in danger or distress.
47 On this issue, see Chapter 6, Part C(1).
49 Albania asserted that foreign ships had no right to pass through Albanian territorial waters without prior notification to, and the permission of, the Albanian authorities. The UK rejected this argument and sent the warships to test the resolve of Albania and to demonstrate the strength of British naval power. Albania fired on these ships as they passed through the North Corfu Channel.
carried out.50 In so doing, the Court took into account the facts that the guns of the warships were trimmed fore and aft, not loaded, and that the flotilla did not proceed in combat formation.51 From this decision, McDougal and Burke note that a ‘technical state of war’ (involving a high expectation of violence and the passage of warships that were principal supporters of the strait state’s opponents) was not a sufficient justification to deny access to foreign warships.52 Consequently, there are ‘no significant distinctions [that] have been added to the law which would empower coastal states to discriminate against warships in their territorial seas’.53

Stephens has argued that the ICJ’s decision in Nicaragua54 accepts that actions may be taken in order to preserve maritime freedom, including within the territorial sea.55 On this basis, he considers that the Court has indicated that the purpose of the passage is now relevant and that if there is an element of coercion that violates the principle of non-intervention, then coastal states would be entitled to take proportionate counter-measures.56 This approach is difficult, as acknowledged by Stephens,57 as the assessment of the purpose of a naval mission through territorial seas is highly subjective. As Article 19 already refers to ‘any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law’ in the UN Charter, the types of actions he envisages and that were discussed in Nicaragua are still incorporated within UNCLOS and it seems unnecessary to suggest that there may be additional or separate considerations in assessing whether passage is innocent. Another injection of subjectivity through the examination of the purpose of a mission seems unwarranted.

Even with the increased interest in addressing the current slew of maritime security threats, the balance between coastal state rights and the interests of states with warships in the conduct of innocent passage remains viable. Greater concerns may now arise as to the activities of commercial vessels, which may be involved in transnational criminal or terrorist activities, and their passage through the territorial sea of a coastal state. Questions for coastal states here concern what steps may be

51 Ibid.
52 McDougal and Burke, *The Public Order of the Oceans* 206–8. See also Gerard J. Mangone, ‘Straits Used for International Navigation’ (1987) 18 *ODIL* 391, 399 (noting the allegation that the voyage of the British vessels ‘was offensive, if not hostile’).
53 Scott C. Truver, ‘The Law of the Sea and the Military Use of the Oceans in 2010’ (1985) 45 *Louisiana Law Review* 1221, 1240. ‘This decision thus seems to stand for the proposition that even countries involved in armed conflicts cannot deny the ships of other nations the right to innocent passage through their coastal straits, and must warn the other nations of known hazards, even those hazards that have been placed in the waters to deter hostile ships and thus to protect coastal populations.’ Jon M. Van Dyke, ‘The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone’ (2005) 29 *Marine Policy* 107, 116.
54 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, 111–12 paras 213–14 (discussing the ‘freedom of communications and maritime commerce’).
56 Ibid 307.
57 Ibid (arguing that it is more politically realistic, however).
taken to respond to non-innocent passage and what law enforcement powers may be exercised. These are matters discussed in Chapter 3.

(3) Warships and transit passage and archipelagic sea lanes passage

In establishing a regime of transit passage in UNCLOS, there was an effort on the part of the more militarily powerful states to ensure that the restrictions associated with the passage of warships under the regime of innocent passage would not apply in vital traffic routes. The strategic importance of maintaining navigational rights in vital waterways is described by Grunawalt as follows: ‘The flexibility and mobility of naval forces are dependent upon their ability to transit choke points in sea lines of communication, and to do so as a matter of right rather than at the sufferance of the coastal or island nations concerned.’\(^{58}\) This motivation among states with considerable naval fleets ensured the creation of new passage regimes to protect these military interests.

As with innocent passage, transit passage requires ships and aircraft to proceed without delay.\(^{59}\) Rather than prohibiting a series of acts that may be prejudicial to the peace, good order or security of the coastal state, transit passage requires that warships refrain from any threat or use of force against the territorial integrity or political independence of the littoral state.\(^{60}\) Vessels in transit passage, including warships, must also refrain from activities ‘other than those incident to their normal modes of continuous and expeditious transit’ in their exercise of the freedom of navigation.\(^{61}\) Compared to innocent passage, transit passage allows for greater surface navigation rights. Transiting warships are permitted to perform activities that are incidental to passage through the strait and consistent with the security of the unit (such as the use of radar, sonar, and air cover).\(^{62}\) The manner of the passage, rather than the purpose of the passage, is again the important consideration in determining whether passage rights have been violated.\(^{63}\)

The reference to ‘normal mode’ has been considered as opening up the possibility of a wide range of activities being undertaken by different types of military vessels. For example, the ‘normal mode’ permitted for transit passage of aircraft carriers has been interpreted to include launching and recovering aircraft and helicopters and thus allows carrier task forces to put up combat air patrols as a

\(^{58}\) Grunawalt, ‘United States Policy’ 447.

\(^{59}\) UNCLOS art 39(1)(a).

\(^{60}\) UNCLOS art 39(1)(b). See David L. Larson, ‘Security Issues and the Law of the Sea: A General Framework’ (1985) 15 ODIL 99, 117 (noting that threats to the sovereignty, territorial integrity or political independence of the straits states is distinct from the peace, good order and security of the coastal State).

\(^{61}\) UNCLOS art 39(1)(c).

\(^{62}\) Rear Admiral Bruce A. Harlow, ‘UNCLOS III and Conflict Management in Straits’ (1985) 15 ODIL 197, 201.

Whether a particular activity falls within the scope of the normal mode of a particular warship will be a matter for interpretation in any given situation. Much will depend on how broadly the reference to ‘freedom of navigation and overflight’ is to be understood in the context of transit passage. In considering the debates as to whether transit passage is more like innocent passage or the freedom of navigation on the high seas, Reisman has noted that some limitation had to be imposed on the traditional freedom of navigation to prevent overt military exercises and weapons testing, surveillance and intelligence gathering, and refuelling, in international straits.

Similar debates for the application of transit passage in straits apply in relation to archipelagic sea lanes passage. There are nonetheless differences between the passage regimes, as archipelagic sea lanes passage is deemed a right, as opposed to a freedom as is the case with transit passage. Archipelagic sea lanes passage is also more restricted because vessels must stay within the designated sea lanes, whereas transit passage does not require vessels to stay within specific boundaries while traversing straits. Archipelagic sea lanes passage involves ‘the exercise in accordance with this Convention of the right of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or exclusive economic zone and another part of the high seas of an exclusive economic zone.’ As with transit passage, the creation of archipelagic sea lanes passage represents a compromise between the regime of innocent passage and freedom of navigation on the high seas. Transit passage was an acceptable passage regime to the relevant coastal states on the basis that the archipelagic sea lanes would not necessarily be close to land territory.

As with innocent passage, current maritime security concerns do not require any reconception of the rights of transit passage and archipelagic sea lanes passage. It could be argued that the exclusive interests of coastal states in terms of protecting
the marine environment and the resources therein have been heightened since the creation of the transit passage and archipelagic sea lane passage regimes. Policing requirements have intensified as a result, which again triggers issues related to law enforcement. The inclusive interest in ensuring access for warships and other government vessels has largely remained constant, though, and no shift in the current legal regime seems necessary to respond to growing maritime security concerns.

(4) Coastal state powers vis-à-vis passage of warships

The rights of warships in the exercise of innocent, transit or archipelagic sea lanes passage are subjected to varying amounts of control by the coastal state in light of the sovereignty that the coastal state has over these ocean areas. The extent that a coastal state may regulate warships’ passage has traditionally been controversial with an ongoing oscillation between the interests of warships and the rights of the coastal state. As mentioned, the exclusive interest of the coastal state relates to the power to extend their sovereignty over ocean space and thereby control or limit access to this area. Community interest in allowing warships freedom of movement across the globe has endeavoured to counter coastal state impingements on this passage.

One of the primary protections afforded to warships, and hence one of the greatest limitations on coastal state action against warships, is the sovereign immunity accorded to warships, as well as to other government ships operated for non-commercial purposes. Balanced against this immunity are the requirements that warships comply with the laws and regulations of the coastal state and that the flag state will be internationally responsible for any damage caused by a warship or other government ship. A coastal state may therefore expect that a warship will respect rules set in place for the protection of the marine environment and the security of the coastal population. In the event that a warship does not comply with a coastal state’s rules and regulations, its immunity means that the coastal state may not arrest or otherwise institute enforcement proceedings against the warship. The only response available to the coastal state is that it may require the warship to leave the territorial sea immediately, and utilize minimum force to compel its departure. If a warship violated the right of innocent passage through a use of force then the

73 Burke and DeLeo, ‘Innocent Passage’ 390.
74 UNCLOS refers to ‘ships owned or operated by a state and used only on government non-commercial service…on the high seas’: UNCLOS art 96. These vessels are referred to here as ‘government ships’.
75 UNCLOS arts 30 and 31.
76 Van Dyke, ‘The Disappearing Right’ 121.
77 UNCLOS art 30. ‘The power to require departure from its territory is of course the classic remedy for a State that lacks enforcement jurisdiction over the sovereign agent or instrumentality of a foreign State, be it a diplomat or a warship.’ Oxman, ‘The Regime of Warships’ 817.
78 Astley and Schmitt, ‘The Law of the Sea’ 131 (rationalizing that although specific remedies are not included in UNCLOS, the right to employ the minimum necessary force is a reasonable derivation of state sovereignty over the territorial sea). Stephens suggests that ‘the use of necessary and proportionate force to seize or finally even sink such vessels may be justified’ as a necessary step to prevent non-innocent passage. Stephens, ‘The Impact of the 1982 Law of the Sea Convention’ 309.
coastal state would be entitled to act in self-defence against that warship and potentially resort to more force than would be necessary just to expel the warship from the territorial sea.79

The coastal state may also make a determination as to whether the passage of a warship is innocent or not. Although the list of acts in UNCLOS rendering passage non-innocent reduces the discretionary powers of the coastal state, there is still considerable scope for decision-making by the coastal state.80 This power is reinforced by the authority of the coastal state to take any necessary steps to prevent passage that is not innocent.81 Concern had been expressed even prior to the adoption of the 1958 Territorial Sea Convention that too much power was accorded to the coastal state in assessing the innocence of passage.82 The United States and the then-Soviet Union proposed that if a coastal state questioned whether passage was innocent then the ship had to be given the opportunity to clarify its intentions or to correct its conduct.83 In any event, a small counterbalance to the discretion of the coastal state is that it faces the burden of explaining any decision, and ensuing enforcement action, to the relevant flag state.84

Coastal states may also be able to control the passage of warships to the extent that it is authorized to designate sea lanes and traffic separation schemes in its territorial sea.85 Astley and Schmitt have argued that warships must still operate with ‘due regard’ to other vessels although are not required to comply with traffic separation schemes.86 However, no specific exclusion or lesser standard is noted for warships in this regard and it is doubtful that immunity of the vessel justifies non-compliance. Warships would be expected to comply with such schemes or otherwise be asked to leave the territorial sea of the coastal state immediately.

79 The use of self-defence by the coastal state would still be conditioned by the principles of necessity and proportionality, as discussed further in Chapter 6.
80 Pirtle, ‘Transit Rights’ 481 (considering coastal state powers to be ‘far-reaching’ in this regard). But see Oxman, ‘The Regime of Warships’ 853 (considering that there is an objective, rather than subjective, test of innocence under art 19(2) given the need to focus on the conduct of the vessel rather than the type of vessel involved).
81 UNCLOS art 25(1). Reisman considers that coastal states have been given too much latitude thereby posing a threat to national security. Reisman, ‘The Regime of Straits’ 60–5.
82 The ILC had noted: ‘the danger of allowing the coastal State to be the sole judge of whether or not an act was prejudicial to its public policy, since such a provision was open to the widest possible interpretation. In face of the marked tendency to extend the rights of coastal States every effort must be made to ensure that the right of innocent passage was not endangered.’ ILC, Yearbook of the ILC(1955) Vol 1 p 95 para 38 (Salamanca) (agreeing with a point raised by Lauterpacht at previous session).
84 This argument was made in response to concerns about excessive coastal state power during the First UN Conference on the Law of the Sea. See ‘United Nations Conference on the Law of the Sea’ Vol 3, p 84 para 47 (1958) (Mr Yingling, USA). See also ibid p 94 para 19 (Mr Kusumaatmadja, Indonesia); ibid p 96 para 2 (Mr Sikri, India). For a more recent formulation of this view, see Bateman, ‘Security and the Law of the Sea’ 369 (‘The burden of proving non-innocent passage appears to rest with the coastal State as the enforcement authority’).
85 UNCLOS art 22.
States bordering straits subject to transit passage are entitled to designate sea lanes and prescribe traffic separation schemes for navigation through the strait, provided they are established in conformity with generally accepted international regulations, and may also adopt laws and regulations relating to navigation, pollution, fishing, and fiscal, immigration, and sanitary laws. Again, warships and other military vessels or aircraft would be expected to comply with these rules, but are afforded sovereign immunity in the event that there is a violation of the coastal state’s laws and regulations, and the flag state will then bear international responsibility for any loss or damage. Moreover, if a warship is not adhering to the requirements of transit passage (it has stopped, is hovering, or is otherwise engaged in non-expeditious passage without reason of force majeure or distress), the lawful response of the coastal state would be similar to that in response to non-innocent passage. Namely—although not stated specifically—the coastal state would be entitled to require the warship to leave the strait immediately.

Warships are also subject to coastal state control in relation to the designation and control of archipelagic sea lanes, as it is left to the archipelagic state to designate how many such sea lanes will traverse its waters, and what traffic separation schemes may apply within these sea lanes. In balance to this control, if the archipelagic state fails to designate sea lanes through and air routes over its waters, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation. The archipelagic state’s power to prescribe traffic separation schemes is more limited than straits states power to do so because the archipelagic state may only do so ‘for the safe passage of ships through narrow channels in such sea lanes’, rather than for any sea lanes.

The Convention anticipates that the selection of sea lanes, as well as traffic separation schemes, will entail the involvement and approval of the competent international organization (namely the IMO). Indonesia has proceeded to designate archipelagic sea lanes through the IMO and following discussions with key user states. As Indonesia has only designated north–south sea lanes, and no routes

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87 UNCLOS art 41.
88 UNCLOS art 42.
89 UNCLOS art 42(5).
90 I.A. Shearer, ‘Problems of Jurisdiction and Law Enforcement against Delinquent Vessels’ (1986) 35 ICLQ 320, 332 (referring to the exercise of enforcement powers by the coastal state for violation of the transit passage regime by any vessel).
91 Article 38(3) provides: ‘Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.’
92 Article 53 of UNCLOS specifies how these lanes are to be designated, however. See UNCLOS art 53(5), which provides: ‘Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points’. Further, the axis of sea lanes as well as traffic separation schemes must be indicated on charts that are given due publicity. UNCLOS art 53(10).
93 UNCLOS art 53(6). This right is also granted to straits states ‘where necessary to promote the safe passage of ships’. UNCLOS art 41.
94 UNCLOS art 53(12).
95 UNCLOS art 53(6).
96 UNCLOS art 53(9).
running east–west, the IMO has considered this a partial designation. Concerns from user states were then raised because Indonesia designated all of its waters apart from this partial designation of archipelagic sea lanes as subject to innocent passage. As a matter of international law, the east–west routes that have normally been used for international navigation will be subject to archipelagic sea lanes passage.

Some coastal states have sought further control over the passage of warships by requiring either prior notification or authorization of such passage through the coastal state’s territorial sea. State practice continues to be ambivalent on this point, with some states requiring either notification or authorization and other states denying that such permission must be sought for the passage of warships. In the Corfu Channel case, Albania argued unsuccessfully that prior authorization was required for the passage of British warships. This decision of the Court reflected the view reached during the 1930 Hague Codification Conference. However, the point remained contested both within the International Law Commission, and at the First UN Law of the Sea Conference. Reservations were subsequently entered to Article 23 of the 1958 Territorial Sea Convention to the effect that a
coastal state has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters. During the drafting of UNCLOS, amendments were proposed that would have enabled a coastal state to require prior notice or authorization, but were ultimately not pressed to a vote. No further clarification on the issue was possible at the time. The major naval powers have maintained that no such notice or authorization is required under international law. For those states that maintain notice or authorization requirements, there has been some evidence that these are met on an informal basis by a low-level contact or briefing note by a naval attaché to the local naval authorities.

A further means by which coastal states may exercise control over the passage of warships through its territorial sea, straits, or archipelagic waters relates to its powers of suspension and denial of passage. States are permitted to suspend innocent passage temporarily if essential for the protection of security, including for weapons exercises. Any such suspension must not discriminate in form or in fact among foreign ships, and a coastal state would therefore be prohibited from targeting the passage of warships from one particular state in suspending the right of innocent passage. Similarly, an archipelagic state is entitled temporarily to suspend innocent passage of foreign ships in specified areas of its archipelagic waters ‘if such suspension is essential for the protection of its security’ (although no explicit reference is made here to doing so for military exercises). Again, the suspension is not to discriminate among foreign ships.

The coastal state’s rights in terms of suspending or denying passage are considerably reduced in relation to straits, particularly those subject to transit passage, and archipelagic waters. States concerned about the ongoing passage of vessels through important navigational routes wanted to ensure that instances of the coastal state restricting passage could be minimized. Innocent passage through straits located between an island and mainland where a route of similar convenience exists on the high seas or in an EEZ as well as straits between the high seas or EEZ and the territorial sea of a state may not be suspended. There is also a prohibition in UNCLOS on the suspension of the right of transit passage. Moreover, straits

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106 See, eg, reservations by Bulgaria, Byelorussian SSR, Romania, Ukrainian SSR. Some reservations stated this need specifically. See, eg, reservations by Colombia, Czechoslovakia, Hungary.

107 Burke and DeLeo, ‘Innocent Passage’ 398–9 (considering the requirement of notice or prior authorization and what support it received during the negotiations of UNCLOS).

108 However, the President of the Third Conference is reported as stating that there is no need for warships to acquire the prior consent or even notification from the coastal state. Rauch, ‘Military Uses’ 245.

109 eg, in 1989, a Joint Statement issued by the USSR and the US stipulated that neither prior notification nor authorization would be required for the passage of warships through territorial seas. Union of Soviet Socialist Republics–US: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage (Union of Soviet Socialist Republics–US) (1989) 28 ILM 1444. As a matter of historical interest, it may be noted that US policy pre-World War II was that consent was required for the passage of warships through the territorial sea, as these vessels threatened whereas merchant vessels did not. Kaye, ‘Innocent passage’ 576 (referring to statements of Elihu Root in the North Atlantic Coast Fisheries Arbitration in this regard).


111 UNCLOS art 25(3).

112 UNCLOS art 52(2).

113 UNCLOS art 52(2).

114 UNCLOS art 45(2).

115 UNCLOS art 44.
states are not permitted to adopt laws and regulations that would have the practical
effect of denying, hampering or impairing the right of transit passage.\textsuperscript{116} This addi-
tional requirement was intended to allay concerns about transit rights being affected
‘under the guise of various forms of regulation, such as security, pollution, under-keel
clearance, construction, propulsion and so on’.\textsuperscript{117}

The rights of archipelagic states are similarly limited in that they are not
permitted to close archipelagic sea lanes.\textsuperscript{118} An express closure of the normal
passage routes used for international navigation through archipelagic waters as
well as conduct that has the effect of denying navigation rights would constitute
a violation of UNCLOS. In response to Indonesia’s closure of the Straits of
Lombok and Sunda for naval exercises, the US Department of State wrote:

No nation may, consistent with international law, prohibit passage of foreign vessels or
aircraft or act in a manner that interferes with straits transit or archipelagic sea lanes
passage. . . . While it is perfectly reasonable for an archipelagic state to conduct naval
exercises in its straits, it may not carry out those exercises in a way that closes the straits,
either expressly or constructively, that creates a threat to the safety of users of the straits, or
that hampers the right of navigation and overflight through the straits or archipelagic sea
lanes.\textsuperscript{119}

In addition, archipelagic sea lanes passage must be ‘unobstructed’ in accordance
with Article 53 of UNCLOS. Considerations as to what denies, hampers, or
impairs transit passage may also be pertinent in assessing whether archipelagic sea
lanes passage has been obstructed. Interpretations of the legal standard are compli-
cated here as the interests of commercial vessels and of warships are not necessarily
aligned and so what may be tolerable in relation to commercial vessels may not be
acceptable for warships. In any given factual situation, a careful assessment will be
necessary to ensure the balance of interests is maintained.

(5) Special requirements for submarines and nuclear-powered or
equipped vessels

While the basic rule of innocent passage through the territorial sea is applicable to
all types of ships, some restrictions are imposed on particular naval vessels—
namely, submarines and vessels that are either nuclear-powered or carrying nuclear

\textsuperscript{116} UNCLOS art 42(2).
\textsuperscript{117} Shearer, ‘Problems of Jurisdiction’ 331. A recent controversy has arisen in this regard with
allegations that Australia and Papua New Guinea are hampering transit passage through the Torres
Strait through the requirement of compulsory pilotage in order to protect the vulnerable marine
environment of the Strait. For discussion, see Robert C. Beckman, ‘PSSAs and Transit Passage—
Australia’s Pilotage System in the Torres Strait Challenges the IMO and UNCLOS’ (2007) 38 ODIL
325; Natalie Klein, ‘Litigation over Marine Resources: Lessons for Law of the Sea, International
Dispute Settlement and International Environmental Law’ (2009) 28 Australian Year Book of Intern-
national Law 131, 157–62; Sam Bateman and Michael White, ‘Compulsory Pilotage in the Torres
Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment’ (2009) 40 ODIL 184.
\textsuperscript{118} UNCLOS art 54 provides that UNCLOS art 44 applies mutatis mutandis to archipelagic sea
lanes passage. As such, archipelagic states must not hamper or suspend passage.
or other inherently dangerous or noxious substances. With respect to the latter, the coastal state is entitled to designate sea lanes within its territorial sea and may restrict nuclear-powered vessels, or vessels carrying nuclear material, to these lanes. These vessels must carry documents and observe special precautionary measures established for such ships by international agreements. These simple requirements under UNCLOS have been elaborated on through a web of international agreements and codes. Particular international agreements addressing the movement of nuclear material include the Basel Convention, the 1993 IMO Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships, the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and the 1980 Convention on Physical Protection of Nuclear Material.

Based on these requirements, some non-nuclear coastal states have maintained, despite arguments to the contrary, that prior notification or authorization for such shipments is required. The point has proven controversial in practice because states shipping nuclear material may wish to do so in secret to avoid the vessels being targeted by terrorists or pirates. At present, the passage of nuclear-powered vessels or vessels carrying nuclear material has been more problematic in relation to the EEZ where the coastal state has less authority than in the territorial sea. The combination of the international law framework requiring documentation and applying precautionary measures, as well as the interest of the shipowner in ensuring a safe and expeditious voyage, has resulted in minimal disputes in practice over requirements for innocent passage of these vessels.

It may well be the case that commercial vessels would fall within this category, particularly if they have been commissioned to carry nuclear waste for disposal. For discussion on this practice, see David B. Dixon, ‘Transnational Shipments of Nuclear Materials by Sea: Do Current Safeguards Provide Coastal States a Right to Deny Innocent Passage’ (2006) JILP 73.

120 UNCLOS art 22.
121 UNCLOS art 23.
124 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972) 1046 UNTS 120.
126 Van Dyke, ‘The Disappearing Right’ 111. States have gone so far as to prevent such shipments in their EEZ in addition to their territorial sea. Ibid; Dixon, ‘Transnational Shipments’ 77–8 (referring to the voyage of the Pacific Pintail and Chile’s insistence that it maintain its course outside Chile’s EEZ despite harsh weather conditions).
127 Dixon, ‘Transnational Shipments’ 75.
128 See, eg, Van Dyke, ‘The Disappearing Right’ 111–12.
The passage of submarines was a matter of especial focus in light of particular strategic concerns. Submarines were vital warships during World War II and subsequently became important assets in nuclear deterrence efforts during the Cold War. Protecting the passage rights of submarines was therefore a critical concern for the United States and the former Soviet Union during negotiations of UNCLOS.

Submarines are explicitly required to navigate on the surface and to show their flag during the course of innocent passage through the territorial sea. It had been argued that such a provision was superfluous: ‘[s]ince the coastal State had the right to enact regulations governing the passage of ships through its territorial sea, it could, if it so desired, require submarines to navigate on the surface and, if need be, to show their flag’. However, it was retained on the basis that submarines might be a serious danger both to navigation and to the security of the coastal state unless they surfaced and that coastal states must retain the right to refuse the right of passage to any such vessel that did not so navigate.

The extent of force a coastal state may use to prevent illicit submerged passage was highlighted by Sweden’s efforts to prevent a series of intrusions into its waters in 1982. Sweden utilized depth charges and mine detonations in its efforts to force a submarine that was near one of its naval bases to the surface, and further threatened to sink foreign submarines if they refused to surface and leave Sweden’s waters. This threat was generally tolerated by other states, and could thus be indicative of what responses may lawfully be taken to respond to this particular security concern.

In applying innocent passage to archipelagic waters and certain straits, all the limitations involved in that passage, as well as the rights of control accorded to the coastal state, are also applicable. Consequently, submarines would be required to navigate on the surface and show their flag in exercising the right of innocent passage through archipelagic waters and through straits where innocent passage remains applicable.

A controversial issue regarding transit passage has been whether there is a right of submerged passage for submarines. Submarine missiles were considered a vital element of nuclear deterrence during the Cold War, and the potential usefulness

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132 Ibid.
133 Territorial Sea Convention art 14(6); UNCLOS art 20.
135 ‘UN Conference on the Law of the Sea’, Vol 3, p 112 paras 28–9 (Mr Sorensen, Denmark). See also Kaye, ‘Innocent Passage’ 588 (noting that the ‘security interests of the coastal State greatly outweighed any prejudice to foreign powers’).
138 Ibid 256 and 261.
of submarine missiles was best enhanced if submarines could stay submerged.\textsuperscript{139} In UNCLOS, the requirement that submarines navigate on the surface and show their flag while exercising the right of innocent passage is not repeated in relation to transit passage or archipelagic sea lanes passage. The absence of an explicit provision addressing submerged passage through straits can be interpreted as permissive or proscriptive. The only guide on this matter is language whereby ships and aircraft must ‘refrain from any activities other than those incident to their normal modes of continuous and expeditious transit’.\textsuperscript{140} As submarines ‘normal mode’ of passage is submerged, then that passage is presumably permitted through straits and in archipelagic sea lanes.\textsuperscript{141} Following this interpretation reduces the likelihood of political conflict over the movement of submarines.

(6) Conclusion

Ensuring the passage of warships through the most convenient ocean routes, irrespective of where those routes may lie, has been a critical development in the law of the sea. Coastal state concerns have arisen from economic, environmental, as well as military interests, but freedom of access for warships has meant freedom from undue coastal state restraints.\textsuperscript{142} The restraints that may be imposed by coastal states have been set forth in UNCLOS, though elaborated in such a way that allows for a certain amount of subjectivity in decision-making. For the passage regimes, Burke and DeLeo comment: ‘Most of the problems arise from ambiguities in the language or application of the provisions, which could be exploited in favor of the more exclusive interests of coastal states’.\textsuperscript{143} They fear that these ambiguities ‘ultimately may undermine a policy of inclusive oceans usage’.\textsuperscript{144} While the balancing of interests is an ongoing exercise as conflicting claims arise, an inclusive interest in promoting maritime security does not appear to warrant a more expansive interpretation of warships’ rights of passage than has been accorded in the past.

C. Military Activities Beyond the Territorial Sea

The oceans have been utilized by the world’s navies for a range of military activities, extending from intelligence gathering, to training of forces, testing and use of vessels and equipment and installations, to weapons tests and military engagements either short of or amounting to armed conflict. Coastal states and states with significant naval fleets (often referred to as ‘maritime states’) will seek to undertake

\textsuperscript{139} See Reisman, ‘The Regime of Straits’ 49–53. Reisman comments: ‘In deterrence theory, detection of the submarine is as systematically dangerous as would be an antiballistic missile system to protect cities’. Ibid 52.
\textsuperscript{140} UNCLOS art 39(1)(c).
\textsuperscript{142} Burke and DeLeo, ‘Innocent Passage’ 391.
\textsuperscript{143} Ibid 405.
\textsuperscript{144} Ibid 406.
these military activities to safeguard their particular interests.145 This part of the chapter is primarily focused on military exercises (manoeuvres and training, and activities not amounting to armed conflict) and weapons tests. Intelligence gathering is addressed in Chapter 5, and military engagements as part of an armed conflict, as well as use of the military vessels in UN authorized actions, are examined in Chapter 6.

The military activities examined here are those very much connected with exertions of sea power. The ongoing importance of sea power exists because of the ever increasing complexities associated with the law of the sea and the competing claims over ocean resources and uses.146 Valencia has noted that military activities ‘in or over other’s EEZs are becoming more frequent due to the accelerating pace of globalization; the tremendous increase in world trade; the rise in the size and quality of the navies of many nations; and technological advances that allow navies to better utilize oceanic areas’.

Of course not every state shares the same interests in or reasons for maritime military activities. Major Western naval powers have focused on littoral operations and power projection, whereas regional navies concentrate on ‘sea denial operations intended to deny their littoral waters to the forces of a possible adversary’.148

While military activities are significantly curtailed as a legal matter within areas subject to the sovereignty of coastal states, the situation changes markedly in the maritime zones beyond the territorial sea, most notably on the high seas and then within the EEZ of coastal states.149 The regulation of military activities not part of armed conflict remains a controversial and unsettled area of the law of the sea. UNCLOS does not provide much by way of explicit provisions on this topic, primarily because the negotiators sought to incorporate sufficient ambiguity within this treaty to allow for differing interpretations.150 The issues here are again often

145 Truver, ‘The Law of the Sea’ 1221 (‘Sea power will be a fundamental tool of coercive and supportive diplomacy employed by coastal and maritime states alike to safeguard all their interests in the oceans, particularly in light of the potential for international tension and crisis to arise over ocean rights and obligations’).
146 As O’Connell notes: ‘the occasion for navies to be employed to influence events will be multiplied because the increasing complexities of the law of the sea, with its proliferation of claims and texts and regimes covering resources, pollution, security and navigation, are multiplying the opportunities for disputes and the circumstances for the resolution of disputes by the exertion of naval power.’ D.P. O’Connell, The Influence of Law on Sea Power (Manchester University Press, Manchester 1975) 10.
149 Within the contiguous zone, the coastal state is accorded particular law enforcement powers, as set forth in art 33 of the UNCLOS and discussed further in Chapter 3, Part E. Beyond these particular rights, the contiguous zone is otherwise part of the EEZ of the coastal state and the area is subject to that legal regime.
150 Majula R. Shyam, ‘The U.N. Convention on the Law of the Sea and Military Interests in the Indian Ocean’ 15 ODIL 147, 149. Booth considers that the drafters of UNCLOS deliberately followed the tactic of silence, and that a number of rights for navies are hidden within that silence. Booth, ‘The Military Implications’ 340. See also Rauch, ‘Military Uses’ 231 (noting that all substantive discussion of questions with security policy or military implications was off the record and that assorted euphemisms are used to refer to military uses).
assessed in terms of a balance between the interests of the coastal state in its EEZ and those of maritime states in maintaining the freedom of navigation, or in terms of all users exercising their rights on the high seas with due regard for the rights of others.

The ambiguities in the legal regime will be examined in more detail below, but as an initial matter, it should be recalled that the freedoms of the high seas, and most particularly the freedom of navigation, have generally been viewed as encompassing a wide range of military activities. The list of high seas freedoms set forth in UNCLOS, as well as in the 1958 High Seas Convention, was not intended to be an exclusive list and allows for the interpretation that military activities fall within these freedoms. As with all high seas freedoms, military activities are not devoid of all regulation; the primary limitation is the requirement that the freedoms of the high seas are exercised with due regard for the interests of other states in their exercise of the freedoms of the high seas. The legal framework is much more complicated within the EEZ, as all states enjoy the freedom of the high seas in these zones subject to the rights of coastal states as set forth in UNCLOS. This balance of rights, duties, and interests remains a point of controversy in the practice of states.

This part of the chapter addresses military activities in the EEZ and then turns to one of the most controversial military activities on the high seas: weapons tests, with a focus on nuclear tests. A final aspect considered in relation to military activities beyond the territorial sea is the use of ‘security zones’. These zones have been declared in addition to the widely-recognized maritime zones, or have been additional rights claimed by coastal states as part of their existing maritime zones. Security zones have also formed part of the process employed in weapons tests and their legitimacy has been questioned even in this narrow use. Finally, the increase in the range of security regulations now being adopted by states raises the question of whether there are in effect, even if not in precise designation, the emergence of such zones, particularly through the monitoring of international shipping. A common interest may be identified in this regard. It is in relation to the quest for knowledge about activities and vessel presence in maritime areas that contemporary maritime security concerns are most implicated and for which account should be taken. This argument is pursued further in Chapter 5. An inclusive perspective on maritime

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151 ‘So, battle fleets in past ages steamed in formations, conducted manoeuvres, and engaged in gunnery practice extending over hundreds of square miles. Provided that the rules of the road were observed and the range was kept clear, this was a lawful use of the high seas because other ships in the area continued to navigate without being diverted.’ D.P. O’Connell (ed I.A. Shearer), *The International Law of the Sea*, 2 Vols (Clarendon Press, Oxford 1984) 809. See also P. Sreenivasa Rao, ‘Legal Regulation of Maritime Military Uses’ (1973) 13 *Indian JIL* 425, 435.

152 UNCLOS art 87.


154 The inclusive listing is signalled by the phrase ‘inter alia’.

155 UNCLOS art 87(2). The High Seas Convention referred to a reasonable use test as a result of debates relating to military exercises and the testing of nuclear weapons. High Seas Convention art 2.

156 UNCLOS art 58(1).
security claims should not otherwise generally shift the current understandings and interpretations of the legal rules on military activities outside the territorial sea.

(1) Military activities in the EEZ

Within the EEZ, the coastal state has sovereign rights ‘for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil’.157 Rights in the EEZ thus encompass all natural resources in and on the seabed and the superjacent waters. The coastal state’s sovereign rights further extend ‘to other activities for the economic exploitation and exploration of the zone’.158 Within the EEZ, the coastal state also has jurisdiction in relation to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.159

The very nature of the EEZ, as indicated in its name, is that coastal states have been granted powers in this ocean area in order to protect and utilize the natural resources of their marine environment for economic reasons, rather than for traditionally conceived security interests.160 More modern conceptions of maritime security, which encompass economic security in terms of problems associated with illegal fishing and concerns regarding severe environmental pollution, result in coastal states being able to exercise sovereign rights or jurisdiction over activities that could be seen as having security dimensions.

Coastal states are not, however, granted any specific authority over military activities in the EEZ, either in terms of the right to regulate and enforce rules in relation to the military activities of third states or their own right to conduct military activities in the EEZ. There is no power vested in the coastal state to respond to acts that prejudice its peace, good order, or security as is the case with the territorial sea.161 One consequence has been that states have included references to security in national legislation, sometimes associated with economic well-being or environmental protection and resource preservation, but also for national security purposes.162 The rationale attributed to this practice is that coastal states have responded to perceived threats from other states since the EEZ regime is not...
sufficiently responsive to coastal state concerns. At present, however, such legislation could well be construed as in violation of international law.

The right of a coastal state to prevent or control military activities that occur within its EEZ remains controversial. Coastal states have objected to the conduct of military activities by third states on the basis that it may interfere with economic activities being conducted in the EEZ, and so to the extent that coastal states have the right to prevent interference with its economic interests then this right arguably extends to limiting what military activities are undertaken by third states. Burke has observed that the legislation of some (albeit a minority of) states leaves open the possibility that the coastal state will seek to regulate the freedom of navigation to ensure it is not exercised prejudicially to the interests of the coastal state. This argument is sustainable given the emphasis afforded to the economic rights of coastal states, but it is still constrained in that coastal states only have rights over third states’ military activities to the extent that they interfere with economic activities, or matters over which the coastal state exercises jurisdiction.

Article 58 of UNCLOS provides that all states (including land-locked states) enjoy within the EEZ ‘the freedoms referred to in Article 87 of navigation . . . , and other internationally lawful uses of the sea related to these freedoms’. Richardson argues that the freedoms of the high seas within the EEZ ‘must be qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete—and allow for future uses no less inclusive—than traditional high-seas freedoms’. However, it must be borne in mind that the rights of navigation are qualified in expansion, self-defence and national security, economic well-being, or environmental protection and resource preservation.

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163 Robert Nadelson, ‘The Exclusive Economic Zone – State Claims and the LOS Convention’ (1992) 16 Marine Policy 463, 486. See also Galdorisi and Kaufman, ‘Military Activities’ 289 (agreeing that UNCLOS ‘does not assuage coastal State fears, and so some States act independently of it to protect themselves’).


166 William T. Burke, ‘National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea’ (1981) 9 ODIL 289, 294 (setting out the view that generally coastal states have preferred limited to comprehensive authority and not extended that authority to matters of broadly inclusive interest). See also ibid 302 (‘It seems reasonably obvious that considerable effort and care were taken to assure that coastal-state authority in the economic zone could not lawfully be used directly to interfere with freedom of navigation and communication in the exclusive economic zone’).

167 Ibid, 294 (referring to legislation in India, Guyana, Mauritius, Pakistan, and Seychelles).

168 Other high seas freedoms are incorporated into the EEZ provided that they are not incompatible with the EEZ regime in Part V of the Convention. UNCLOS art 58(2). This cross-reference was intended to accommodate the conflicting positions of adherents to a sui generis or high seas regime of the EEZ. See Barbara Kwiatkowska, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (Martinus Nijhoff, Dordrecht 1989) 200.

various ways by Article 58, including by reference to ‘relevant provisions’ of UNCLOS, demanding ‘due regard to the rights and duties of the coastal State’ and in requiring compliance with ‘the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.’\(^{170}\) These limitations would seem to temper Richardson’s assessment of the scope of the freedoms enjoyed within the EEZ.

Some coastal states have taken the position that third states are prohibited from conducting military activities in their EEZ.\(^{171}\) This view is based on an interpretation of Article 58 that focuses on the listing of the specific freedoms and that not all military activities are related to the specified freedoms.\(^{172}\) Other states have opposed such views,\(^ {173}\) and negotiators of UNCLOS have maintained that the ‘general understanding’ at the time the treaty was drafted was that such activities were allowed.\(^ {174}\) A number of commentators have supported the view that military activities by any state are permissible within the EEZ.\(^ {175}\) Certainly an attempt to introduce a requirement of coastal state consent for naval operations other than navigation in the EEZ during the drafting of UNCLOS did not succeed.\(^ {176}\) However, the declarations filed by coastal states subsequent to the adoption of

\(^{170}\) See, eg, Ziafeng and Xizhong, ‘A Chinese Perspective’ 140 (arguing that the ‘“quality” and “quantity” of these freedoms is very different from the freedoms of the high seas in that there are more restrictions on them’).

\(^{171}\) Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, and Uruguay have all filed statements under art 310 that they understand the EEZ regime as forbidding third states from undertaking military activities in their EEZ. Van Dyke, ‘Military Ships’ 30.


\(^{173}\) Germany, Italy, the Netherlands and the United Kingdom in their respective statements. Van Dyke, ‘Military Ships’ 30. See also Wilson and Kraska, ‘American Security’ 282 (referring to the US position).

\(^{174}\) Nowhere is it clearly stated whether a third state may or may not conduct military activities in the exclusive economic zone of a coastal state. But, it was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted.’ Statement by the President of UNCLOS III, Ambassador Tommy T.B. Koh, cited in Van Dyke, ‘Military Ships’ 31.

\(^{175}\) See, eg, Doran, ‘An Operational Commander’s Perspective’ 341 (‘The Convention does not permit the coastal state to limit traditional non-resources related high seas activities in this EEZ, such as task force manoeuvring, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, military marine data collection, and weapons’ testing and firing.'); Oxman, ‘The Regime of Warships’ 838 (‘It is essentially a futile exercise to engage in speculation as to whether naval manoeuvres and exercises within the economic zone are permissible. In principle, they are.’); Rauch, ‘Military Uses’ 252 (arguing the freedom of navigation associated with the ‘operation of ships’ allows for a range of internationally lawful military activities, including manoeuvres, deployment of forces, exercises, weapons tests, intelligence gathering, and surveillance); Moritaka Hayashi, ‘Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms’ (2005) 29 Marine Policy 123, 128 (referring to Galdorisi and Kaufmann’s view that the freedoms referred to in art 87 of UNCLOS should be understood as high seas freedoms); Raul (Pete) Pedrozo, ‘Military Activities in and Over the Exclusive Economic Zone’ in Myron H. Nordquist, Tommy T.B. Koh and John Norton Moore (eds), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (Martinus Nijhoff, Leiden 2009) 235, 243 (‘Nothing in UNCLOS changes the right of military forces of all nations to conduct military activities in the EEZ’).

\(^{176}\) Francesco Francioni, ‘Peacetime Use of Force, Military Activities, and the New Law of the Sea’ (1985) 18 Cornell ILJ 203, 215. Francioni remarks, ‘[f]rom the text and legislative history of article 58, it seems difficult to infer that the establishment of the EEZ has involved a limitation on military operations of foreign navies other than pure navigation and communication’. Ibid, 216.
UNCLOS tend to refute a broad consensus on this issue, and instead reinforce that there was enough ambiguity left within the text of the treaty to permit contrary understandings. The question must therefore be posed as to whether these understandings have evolved in the 30 or so years since UNCLOS was negotiated. Should the understanding sway one way or another to respond to modern maritime security concerns?

Hayashi has noted the ongoing divergence of views following a review of state practice and academic commentary, and considers that the moderate position that tends to be adopted is that ‘naval exercises of reasonable scale without the use of weapons are permitted’. A more moderate position seems tenable today rather than the more extreme positions of an outright prohibition against military activities in the EEZ or that military activities equivalent to those conducted on the high seas are permissible. This moderate position is particularly supported by reference to the ‘due regard’ requirement included in Article 58(3) of UNCLOS. Under this provision, states are to have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. The banning of weapons tests, or seemingly training exercises involving weapons, may be disputed but it does seem arguable that once weapons are involved, the interference with coastal state rights is inevitable. Such activities are then more appropriately reserved for high seas areas.


177 The US has maintained a contrary position in stating that ‘the right to conduct [military] activities will continue to be enjoyed by all States in the exclusive economic zone’. Warren Christopher, United States of America Statement in Right of Reply (March 8, 1983) 17 Third Conference on the Law of the Sea, Official Records 244, U.N. Sales E.83.V.3 (1984) (emphasis added). While states supporting a right to regulate military activities in the EEZ are in the minority, the inclusion of China, India, Iran, North Korea, and Pakistan within this minority mean it is not an insignificant one. But see Peter A. Dutton, ‘Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace’ (2009) 103 AJIL 691, 696–7 (noting this minority and discounting its relevance in the face of the large number of states that support the US position).

178 Other countries have remained conflicted about this issue, expressing the view that they made strategic sacrifices during the Convention’s negotiations in order to achieve a universally acceptable Convention, and are still uneasy about other countries’ military activities close to their coasts. Van Dyke, ‘Military Ships’ 31.

179 One effort to address the divergent views in light of state practice was the development of the Guidelines for Navigation and Overflight in the Exclusive Economic Zone, which involved collaboration among senior officials and analysts participating in their personal capacities primarily from the Asia-Pacific region. However, disagreement persisted as to the interpretation of key phrases used in UNCLOS. See Sam Bateman, ‘Prospective Guidelines for Navigation and Overflight in the Exclusive Economic Zone’ (2005) 144 Maritime Studies 17, 22 (also attaching a copy of the Guidelines). For opposition to the use of guidelines that may undermine the guarantees in UNCLOS, see Pedrozo, ‘Military Activities’ 235.

180 Hayashi, ‘Military and Intelligence Gathering’ 129.

181 UNCLOS art 56(2). See also Burke, ‘National Legislation’ 302–3 (agreeing that the coastal state has no greater rights over high seas freedoms in the EEZ than it does on the high seas except as specifically provided in the Convention).
It must still be noted that no order of priorities between coastal states’ rights and third states’ rights in the EEZ is established in UNCLOS. A balance must instead always be struck. Much will ultimately depend on the particular activity in question and what influence it has on the rights and duties of the other user. Consistent with Hayashi’s proposed moderate position, Schmitt has suggested that if naval activities significantly interfere with coastal state fishing activities or are not in compliance with international regulations on pollution then the naval activities should be shifted elsewhere. On this approach, the broader security concerns of the coastal state, particularly concerns tied to national security, will not necessarily require any special protection by reference to a due regard requirement. During negotiations regarding the inclusion of reference to ‘due regard’ in relation to the exercise of freedoms of navigation and overflight in the EEZ, the Group of 77 proposed adding: ‘due regard to the security interests of the coastal State’, but this wording was not included in the negotiating text. China’s more recent arguments to this effect have also been refuted. It has instead been suggested that the Corfu Channel case continues to stand as ‘a strong precedent that maritime navigational freedoms cannot be interfered with, even to protect security interests, and that compensation must be paid when injuries to persons and property occur.

The position does not change with reference to the ‘peaceful purposes’ provision of Article 88, which applies within the EEZ. While the reservation of areas for ‘peaceful purposes’ has been used in multilateral treaties to refer to complete demilitarization or to excluding certain types of military activities, either as conventional obligations or as goals for states parties, the proscription under Article 88 reads: ‘The high seas shall be reserved for peaceful purposes.’ UNCLOS designates both maritime zones and activities as subject to the peaceful purposes requirement. See further UNCLOS art 141 (Area is to only be used for peaceful purpose); UNCLOS art 143 (marine scientific research in the Area is only to be for peaceful purposes); UNCLOS art 147 (installations in the Area also only for peaceful purposes); UNCLOS art 240 (marine scientific research is to be conducted for peaceful purposes).

Through the cross-reference in art 58, para 2, the reservation of the high seas for peaceful purposes is extended to the EEZ, to the extent that this obligation is not incompatible with the provisions of UNCLOS governing the EEZ.

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182 David Joseph Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press, Oxford 1987) 64, 66. See also Kwiatkowska, *200 Mile EEZ* 6, 214–15 (commenting that the careful balance between the exclusive and inclusive uses of the sea within the EEZ is governed by an overarching general duty of states to pay mutual due regard to their respective rights and obligations).

183 Bernard H. Oxman, ‘The Third United Nations Conference on the Law of the Sea: The 1976 New York Session’ (1977) 71 *AJIL* 247, 260–1 (‘It can be anticipated that these balanced duties will provide the juridical basis for resolving many practical problems of competing uses’).


185 Hayashi, ‘Military and Intelligence Gathering’ 133.

186 Ziafeng and Xizhong, ‘A Chinese Perspective’ 145; Hayashi, ‘Military and Intelligence Gathering’ 133.


188 Article 88 reads: ‘The high seas shall be reserved for peaceful purposes.’ UNCLOS designates both maritime zones and activities as subject to the peaceful purposes requirement. See further UNCLOS art 141 (Area is to only be used for peaceful purpose); UNCLOS art 143 (marine scientific research in the Area is only to be for peaceful purposes); UNCLOS art 147 (installations in the Area also only for peaceful purposes); UNCLOS art 240 (marine scientific research is to be conducted for peaceful purposes).

189 Through the cross-reference in art 58, para 2, the reservation of the high seas for peaceful purposes is extended to the EEZ, to the extent that this obligation is not incompatible with the provisions of UNCLOS governing the EEZ.

190 Boleslaw A. Bozcek, ‘Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea’ (1989) 20 *ODIL* 359, 361–3 (discussing the use of ‘peaceful purposes’ provisions for the regimes governing Antarctica, the moon and other celestial bodies and the seabed). See also Rüdiger...
UNCLOS is limited to threats or use of force as set forth in the UN Charter.\footnote{191} Consistent with this viewpoint, some coastal states have argued that military intelligence-gathering operations and some manoeuvres that do not have a direct bearing on passage or overflight are prohibited as encroachments on their national security because they amount to a prelude to an invasion and must therefore be seen as a threat of use of force and thereby prohibited by the peaceful purposes provision.\footnote{192} While the assessment is ultimately fact dependent, the preferred understanding continues to be the moderate position of allowing reasonable naval activities without the use of weapons. There are otherwise sufficient references to various military activities within UNCLOS that would seem to militate against any assertion that the peaceful purposes provision was to prohibit any military activities beyond the territorial sea.\footnote{193}

Beyond UNCLOS, states have moved to articulate particular limits on acceptable military activities at sea, as seen with the partial and comprehensive nuclear test ban treaties, which are discussed further below, the 1971 Seabed Treaty,\footnote{194} as well as nuclear weapon-free zone treaties.\footnote{195} The 1971 Seabed Treaty was intended to limit the spread and use of nuclear weapons through the prohibition on the emplacement of nuclear weapons and other WMD on the seabed and ocean floor beyond the territorial sea.\footnote{196} Also prohibited are structures, launching installations, or any other facilities specifically designed for storing, testing, or using WMD.\footnote{197}


\footnote{191} UNCLOS art 301. See further Van Dyke, ‘Military Ships’ 31; Van Dyke, ‘Military Exclusion’ 161; Hayashi, ‘Military and Intelligence Gathering’ 125. Some commentators have gone further, dismissing art 88 for having any practical or relevant meaning. See, eg, Larson, ‘Security Issues’ 116; Truver, ‘The Law of the Sea’ 1242 (stating that art 88 ‘seems to have very little substance’); Booth, ‘The Military Implications’ 328 (describing art 88 as ‘a familiar piece of pious rhetoric, calculated to degrade respect for the document rather than legitimize new patterns of behavior’).


\footnote{193} In this regard, Hayashi refers to the freedom of military vessels to navigate (art 87), the privileged status granted to military vessels (eg, arts 32, 95, 236); the prohibition of certain military activities within the territorial sea (but not outside the territorial sea) (art 19(2)); and the optional exclusion from compulsory judicial settlement of disputes concerning military activities (art 298). Hayashi, ‘Military and Intelligence Gathering’ 125.

\footnote{194} Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor, and in the Subsoil Thereof (1971) 955 UNTS 115 (Seabed Arms Control Treaty).


\footnote{196} Seabed Arms Control Treaty art I. Due to the controversy surrounding the breadth of the territorial sea at the time, the Treaty refers to a 12-mile limit, rather than territorial waters specifically. See Seabed Arms Control Treaty art II.

\footnote{197} Seabed Arms Control Treaty art I.
The nuclear weapon-free zone treaties are, broadly stated, intended to prohibit the testing, use, manufacture, production or acquisition of nuclear weapons.198 Their relevance for the law of the sea varies with the scope of application of each of the treaties. The Central Asia Treaty only applies to the land territory, harbours, lakes, rivers and streams, and the airspace above them.199 The Treaties of Tlatelolco, Rarotonga, and Pelindaba cover the territorial sea, internal waters, and archipelagic waters (where relevant) of states parties.200 Most pertinent for the current discussion on military activities in the EEZ is the Treaty of Bangkok, which extends its application to the continental shelves and EEZs of states parties.201 The parties to the Treaty of Bangkok not only prohibit the testing, use, or stationing of nuclear weapons, but must also prevent the dumping of radioactive wastes and other radioactive matter at sea.202 For the treaties covering maritime areas, all but the Treaty of Tlatelolco provide that nothing in the treaty is to affect rights or the exercise of the rights of any state under international law with regard to freedom of the seas.203 The nuclear weapon states have nonetheless expressed concern regarding the scope of the Treaty of Bangkok in covering the EEZ, partially because of ongoing disputes as to EEZ boundaries in the region but also because of limitations on the passage of nuclear-powered ships and on using (or firing) nuclear weapons within the treaty zone.204

As a final note on restraining coastal state control over military activities in their EEZ, it must be recalled that the vessels involved will be subject to sovereign immunity. Articles 95 and 96 provide for the complete immunity of warships as well as government ships on the high seas and in the EEZ.205 Any claims brought before the national courts of states, other than the relevant flag state, can be excluded from national jurisdiction on the basis of sovereign immunity. State responses to actions of warships and government ships must otherwise be pursued through diplomatic channels. Confrontations at sea would raise issues relating to the unlawful use of force.

The right of coastal states to regulate the military activities of third states in the EEZ has tended to overshadow the right of coastal states to undertake military activities of their own within the EEZ. All states are accorded the freedom of navigation and related freedoms in the EEZ under Article 58 of UNCLOS. To the extent that it is accepted that foreign navies are permitted to undertake military operations, including intelligence gathering and surveillance, then the coastal state

198 The Treaty of Tlatelolco does permit ‘explosions for peaceful purposes’ under art 18.
199 Central Asia Treaty art 2.
200 Treaty of Tlatelolco art 3(4); Treaty of Rarotonga art 1(b); Treaty of Pelindaba art 1(b).
201 Treaty of Bangkok art 1(b) and art 2(1).
202 Treaty of Bangkok art 3.
203 Treaty of Rarotonga art 2(2); Treaty of Bangkok art 7; Treaty of Pelindaba art 4(2).
205 See Reisman, ‘The Regime of Straits’ 57 (‘While the general freedom of navigation is potentially subject to some regulations, expressed either in the convention itself or in another treaty, no regulations may be applied to warships; they are immune from other than flag jurisdiction’).
must also be so entitled. This entitlement only becomes controversial at the point that the coastal state efforts to undertake surveillance and protect its own EEZ (and hence the waters closer to shore and land security) interfere with the activities or passage of foreign vessels. The benchmark for permissible coastal state action again becomes one of due regard to the rights and duties of other states, as well as acting in a manner compatible with UNCLOS.206

The primary avenue by which coastal states may seek to claim greater rights or control over matters concerning security, outside the context of economic and environmental concerns, may be through Article 59 of UNCLOS. Article 59 reads:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Shearer has described Article 59 as ‘an extraordinary article’ that ‘appears to negate the legal presumption…that any doubts as to rights or jurisdiction should be resolved in favour of high seas freedoms’.207 However, whether such a presumption exists may well be disputed. Coastal states may seek to argue that taking steps against foreign vessels in their EEZ is warranted to protect additional interests from maritime security threats, such as terrorist activity (including the transport of WMD) or transnational crime. Such an approach could be justified by reference to shared concerns in the international community as a whole under Article 59, particularly for steps taken to address maritime terrorism given the concerns that currently exist were not as prevalent at the time of the drafting of UNCLOS. States seeking to oppose such an interpretation would emphasize that the preservation of the freedom of navigation and other internationally lawful uses of the sea related to these freedoms, as articulated in Article 58, was a sufficient attribution of rights so as not to bring Article 59 into play.

Overall, the challenge for assessing the legality of military activities in the EEZ has been articulated by Attard as follows:

While territorial integrity may require the containment of the EEZ’s military uses, international security may require a certain military use of the sea. It is the balance between these contradictory realities which international law must achieve with regard to the EEZ’s use for peaceful purposes.208

While the precise nature of the military activities that may be conducted within the EEZ may be contested, it seems that some naval activities, those that do not interfere with coastal state rights, are permissible.209 As will be discussed in more

206 UNCLOS art 56(2).
207 Shearer, ‘Problems of Jurisdiction’ 334.
208 Attard, Exclusive Economic Zone 69.
209 Agreement on this point was reached among the group negotiating the Guidelines for Navigation and Overflight in the EEZ. See Bateman, ‘Prospective Guidelines’ 21 and Guidelines III.b, III.c, V.e, V.f, and V.g.
detail in Chapter 5, it is intelligence gathering, rather than overt shows of military strength, such as through military exercises, that is proving increasingly controversial in the EEZ.

(2) Weapons tests on the high seas

The balancing of rights that must be undertaken within the EEZ is also required in relation to military activities on the high seas inasmuch as there is also a requirement of due regard for the rights of other users in this area as well. Unlike the EEZ, there is no special priority given to economic interests of any particular state and so the balance is one between relevant freedoms of the high seas. One state could make a claim that its fishing vessels were being denied their freedom to fish because of the military activities being undertaken by another state within an area. For example, the former Soviet Union closed the so-called peanut hole in the Sea of Okhotsk, claiming that military manoeuvres were to be undertaken there but also effectively preventing any fishing in this high seas enclave surrounded by its territory.210

The question of balancing the freedoms of the high seas also emerges when a state seeks to close a particular high seas area to test weapons, and the vessels of another state are consequently required to divert their passage. It was the use of the high seas for weapons tests, particularly nuclear weapons tests, that raised the profile of this particular controversy and was especially contentious at the time the 1958 High Seas Convention was being drafted.

At the First UN Conference on the Law of the Sea, a number of states considered that the freedom of the high seas did not include the right to test nuclear weapons because it was contrary to the rights of other users.211 The United States took the position that it ‘conducted nuclear tests under rigid control to ensure a minimum degree of interference with the use of the high seas by other states, it was convinced that such use was reasonable, and consequently legal’.212 Despite these arguments, Poland, the Soviet Union, Czechoslovakia, and Yugoslavia proposed a provision for the 1958 High Seas Convention prohibiting outright nuclear tests on the high seas.213 It was noted that testing in other areas—such as on islands or in the territorial sea of a state—should also be prohibited.214 These proposals also worked to the distinct advantage of the Soviet Union, which conducted its nuclear tests on land at the time.215 The compromise position ultimately reached was to include a

211 See, eg, ‘UN Conference on the Law of the Sea’ Vol 4, p 19 para 5 (Bulgaria); ibid p 24 para 11 (Czechoslovakia); ibid p 31 para 16 (United Arab Republic); ibid p 31 para 19 (Ukrainian Soviet Socialist Republic); ibid p 45 para 35 (Romania).
214 ‘UN Conference on the Law of the Sea’ Vol 4, p 44 para 12 (Japan). India was also opposed to all sorts of nuclear testing, regardless of where it occurred. Ibid p 45 para 32.
215 Ibid p 44 para 18 (ROK).
provision in the 1958 High Seas Convention that required the exercise of the freedoms of the high seas with reasonable regard to the interests of other states.²¹⁶

The lawful conduct of nuclear weapons tests and their effect on the exercise of high seas rights and freedoms were potentially challenged through litigation instituted by Australia and New Zealand against France in 1973 at the ICJ.²¹⁷ In the **Nuclear Tests** cases, Australia and New Zealand alleged *inter alia* that the French nuclear tests were in violation of international law because of pollution of the marine resources; and interference with the freedoms of navigation and over-flight on the high seas.²¹⁸ During the oral pleadings, New Zealand’s Agent was asked how to distinguish between what uses of the high seas were to be considered lawful and what were unlawful. The Agent responded:

> [t]here is another and absolute sense in which the use of the high seas for the purposes of nuclear testing must be distinguished from its use for military traditional purposes. The use of the high seas for a purpose which is condemned by the international community can never be a reasonable or a legitimate use.²¹⁹

Nelson has commented that this view is extremely helpful in efforts to delineate what may count as a freedom of the high sea, taking into account the inclusive listing of high seas freedoms in Article 87 of UNCLOS.²²⁰ He further notes that it is ‘because all States possess general and common interests in the uses of the high seas that this element ought to play a significant role’.²²¹

The Court did not ultimately resolve the issue of whether nuclear weapons tests violated high seas freedoms, as France issued a communication stating that it would commence underground explosions, rather than atmospheric tests, upon the completion of the current round of tests.²²² As a result, the ICJ determined that the object of the case had been rendered moot.²²³ Nonetheless, the idea that a use of the high seas that is ‘condemned by the international community can never be a reasonable or a legitimate use’ may provide a further benchmark for assessing lawful acts on the high seas.

Nuclear weapons tests at sea were banned under the 1963 Partial Test Ban Treaty,²²⁴ but neither France nor China became parties to this agreement. A

²¹⁶ High Seas Convention art 2.
²²¹ Ibid.
²²³ Ibid para 59.
Comprehensive Test Ban Treaty was then adopted in 1996 (and to which France is a party), but it has not yet entered into force in view of the requirement that certain states listed in Annex 2 must become parties to the treaty. It is unlikely that there is a comprehensive ban on testing nuclear weapons under customary international law in view of the fact that key states have not become party to this treaty. Otherwise, if it could be accepted that there is such an obligation, those Annex 2 states that are not parties would be in the position of persistent objectors and thus not bound by the customary obligation. North Korea would notably fall into this category.

Except for the states bound by the Partial Test Ban Treaty, the legality of nuclear tests on the high seas remains to be determined under the existing law of the sea, and particularly requirements as to due regard to the rights of other users. Weapons tests are argued to be within the ambit of the peaceful purposes requirements of UNCLOS since the aim of these tests is to prepare a state for self-defence and hence allow the state to keep the peace and maintain national security. This position could be maintained in view of the Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons, which concluded that nuclear weapons may be lawful in extreme cases of self-defence. However, the standard proposed by the New Zealand Agent in the Nuclear Tests cases should arguably deny any lawful characterization of nuclear weapons tests.

While the legality of nuclear tests on the high seas itself may be open to question, the practice of establishing security zones in high seas areas for the purposes of weapons tests (nuclear or non-nuclear) has at least been largely accepted, and may even be viewed as required in order to protect other users of the area. The

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226 States listed in Annex 2 to the Treaty must all ratify for it to enter into force. Comprehensive Test Ban Treaty art XIV(1). States included in this Annex, such as India, Pakistan, and North Korea, have not yet signed the Treaty.
227 The United Kingdom, United States, and the former Soviet Union.
228 Van Dyke, 'Military Exclusion' 160–1. After reviewing state practice, Van Dyke concluded: ‘The current state of international law is, therefore, that missile testing on the high seas, and other similar military activities on the oceans, are legitimate only if they do not impede free navigation, interfere with fishing activities, cause any significant harm to the environment, or threaten human settlements.’ Ibid 168–9.
229 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996 ICJ Rep 226.
232 'Engaging in any live-fire military exercises creates dangers and requires the establishment of a warning or exclusionary zone to protect others using the affected ocean area.' Van Dyke, ‘Military Ships’ 35.
parameters of such zones have proven controversial, however.\(^{233}\) The United States has maintained the legality of these danger or warning zones as they have been predicated on comity and voluntary compliance (rather than explicitly closing off the area) and were limited in terms of the size of the zone, as well as the duration and the isolated location, thereby ensuring that the zones were internationally acceptable uses of the high seas.\(^{234}\) This view was also supported by the former Soviet Union.\(^{235}\) This practice has led other states to adopt similar approaches to testing their weapons.\(^{236}\) The reality of this practice is that exclusionary zones have been established and foreign flagged vessels were not permitted to enter the area.\(^{237}\)

Difficulties for states have arisen when environmental activists opposed to the weapons tests have not heeded the danger or warning zones, trying to use their presence within those zones as a means of stopping, or delaying, the proposed exercises. In one such situation, the United States considered that it was within its rights to establish a small ‘launch safety zone’ within its overall danger zone from which vessels could be excluded to enable the United States to exercise its high seas right to launch a missile safely.\(^{238}\) France has responded with force against protestors who sail into a testing area and has boarded and seized vessels of Greenpeace protestors that were within the proscribed warning zones.\(^{239}\) France’s purported exercise of jurisdiction on the high seas against the environmentalists was rightly met with protests from the national states of the protestors (New Zealand and Canada).\(^{240}\) As to where liability may fall in this situation, Van Dyke argues:

If a vessel chooses to enter an exclusionary or warning zone on the high seas, the nation seeking to test its missiles or conduct other military operations in that vicinity cannot lawfully seize or remove that vessel without the permission of the nation whose flag the vessel flies. If a vessel operating with the support of its flag government is damaged as a result of the missile test or other military operation, the nation causing the damage would be liable under international law.\(^{241}\)

While nuclear tests are of controversial legal status at present, it is nonetheless clear that weapons tests as a general matter may be conducted on the high seas provided conditions of reasonable, or due, regard to other users are met. This standard may be achieved through the establishment of a warning zone, although that zone may further be viewed as interference in the exercise of rights by other users. Such arguments should not hold sway if the exclusion zone is limited in size and

\(^{233}\) Churchill and Lowe, *The Law of the Sea* 206 (referring to Australia and New Zealand’s protests against *inter alia* the large area closed off by France in 1974).

\(^{234}\) Van Dyke, ‘Military Exclusion’ 158 (citing statement of the US delegation to the First UN Conference on the Law of the Sea). See also ibid 163 (noting that advocates of such weapons tests consider them reasonable uses of the high seas); ‘Note: Exclusion of Ships’ 1050–1.

\(^{235}\) Van Dyke, ‘Military Exclusion’ 159.

\(^{236}\) For example, in early 2010, North Korea declared naval firing zones (reported as ‘exclusion zones’) for firing exercises near its disputed maritime boundary with South Korea. See ‘North Korea Warns the South of Naval Firing Exercises’ *BBC News*, 19 February 2010 <http://news.bbc.co.uk/2/hi/8523337.stm>.

\(^{237}\) Van Dyke, ‘Military Exclusion’ 168.

\(^{238}\) Ibid 159, 164. But see ‘Note: Exclusion of Ships’ 1055–6.

\(^{239}\) Van Dyke, ‘Military Exclusion’ 160.

\(^{240}\) Ibid.

\(^{241}\) Ibid 169.
duration. The risk here is that once the use of security zones is accepted in this context, assertions may arise that security zones for other purposes may also be legitimately established. This point is considered immediately below.

(3) Security zones

Security, or exclusion, zones in maritime space are generally accepted for use during armed conflict. In a military context, security zones may be used to protect a non-participant state and its shipping from belligerent activity, as well as being established by belligerents to denote an area of combat and in which neutral shipping may be at risk of collateral damage. In times of peace, security concerns have previously justified the recognition of maritime zones, and in this regard security zones may be viewed as precursors to the territorial sea and the contiguous zone. Yet despite the increased recognition of coastal state rights over maritime space that presently exists, states have still established security zones that do not necessarily align with the boundaries of recognized zones, or are claimed in addition to the other rights of the coastal state within these areas as a means of thwarting actions by third states.

For example, Nicaragua established a 25-mile zone to deter covert operations by the United States in 1983. Vietnam and North Korea have also declared security zones, while other states had included security zones within their legislation on the territorial sea. China, for example, has previously established a Military Warning Zone. North Korea’s 50-mile military boundary zone was for the purposes of ‘reliably safeguard[ing] the economic sea zone and firmly defend[ing] the national interests and sovereignty of the country’. Prior to declaring the Gulf of Sidra as a historic bay, Libya had instead asserted that the waters of the Gulf, extending 100 miles from the coast, were a ‘restricted area’, tantamount to a maritime security zone.

It is arguable that such security zones beyond the territorial sea of a coastal state are permissible to the extent that they do not interfere with commercial navigation, nor have a significant effect on the environment or resources of the region. The assertion of such zones would need to be assessed against the due regard standard

245 ‘Significantly, this first international effort to set a territorial sea rested squarely on the notion of establishing a protective neutrality zone, which ultimately was based on technology.’ Leiner, ‘Maritime Security Zones’ 969 (referring to US declaration of a territorial sea in 1793 during the Napoleonic wars).
246 ‘The Chinese military zone at the head of the Yellow Sea and the North Korean military zones do extend beyond the territorial seas of those countries . . . South Korea has also delineated special maritime zones extending well beyond its territorial waters.’ Mark J. Valencia, The Proliferation Security Initiative: Making Waves in Asia (Routledge, Oxford 2005) 11.
applicable for the uses of the EEZ. In these situations, it seems likely that security zones may be claimed by the coastal state rather than third states operating within the EEZ of the coastal state as the coastal state would likely have a strong argument that any such zone of another state would inevitably interfere with that country’s efforts to protect and exploit its marine resources.251 However, there seems little point in a coastal state declaring such a zone, if the declaration did not entail some level of enforcement. This situation raises questions as to lawful policing activities. In any event, the immunity of warships and government ships would remain intact.

Heintschel von Heinegg has argued that an ‘operational area’ (as opposed to a ‘zone’) could be:

[e]stablished in the context of the fight against transnational terrorism in order to enable the target States and their allies to identify and control international shipping and aviation or, if reasonable grounds for suspicion of an activity supportive of transnational terrorism exist, to prevent them from approaching the coastline of a State that has proved to be either unwilling or unable to comply with its obligations under the UN Security Council resolutions on transnational terrorism.252

Once again, the legality of this zone would be dependent on lawful policing powers being exercised.

The establishment of security zones has not generally been accepted under international law because of the vagueness that surrounds these zones and their susceptibility to abuse.253 Nonetheless, the use of information zones, which are ultimately critical to security, have been considered necessary and have met with varying degrees of acceptance. Australia declared a ‘Maritime Identification Zone’ at the end of 2004, which entailed acquiring information from all vessels intending to enter Australian ports when they were 1,000 miles from the Australian coast and from all vessels within Australia’s EEZ, irrespective of whether they were intending to enter an Australian port or not.254 Vessels failing to provide such information risked interdiction by Australian naval or government vessels.255 Following protests from neighbouring states, Australia abandoned the terminology of a ‘zone’ and referred to the Australian Maritime Identification System, which is purported to operate on a voluntary basis rather than under threat of interdiction. 256

While Australia’s efforts in this regard proved controversial, the policy objective has been met to some extent through further developments at the IMO, which has

251 Van Dyke, ‘Military Ships’ 35.
255 See Klein, ‘Legal Implications’ 345.
endorsed a Long Range Information and Tracking (LRIT) Regulation. This Regulation allows states to collect information from vessels that are up to 1,000 miles from their coast and this system could be construed as a 1,000 mile maritime zone of information that is now in place around states. The avoidance of such a characterization is understandable in view of the limited rights that accrue to states through the LRIT Regulation, the focus on the vessels rather than the maritime area itself, and ongoing concerns about ‘creeping jurisdiction’ into high seas areas.

In addition to tracking the movement of vessels through broader expanses of ocean space, the use of flight information zones is considered lawful. Air Defense Identification Zones (ADIZs), which extend outward from some coastal states, have also been characterized as lawful uses of the high seas, even though they do purport to claim rights over areas otherwise open to the freedom of overflight. These Zones emerged in the 1950s and 1960s, and there has been a resurgence of interest in their use post-September 11. This practice indicates that security zones, even if not nominated as such, for the purposes of identifying vessels and aircraft have increasing acceptance and reflect a common interest in enhancing maritime domain awareness.

D. Conclusion

Military presence on the oceans remains a critical component of the national security of many states. Reisman acknowledges this point as follows:

Terms such as ‘gunboat diplomacy’ and ‘showing the flag’ are rather anachronistic ways of expressing the fact that an integral part of political power at any level of social organization is the general expectation that an actor has the capacity and will to use force to conserve or extend vital interests.

While as a theoretical matter, this manifestation of power reflects an interest that would be shared by all ocean-going states, the reality is that not every state has the same military capacity and hence rules that favour the passage and activities of navies thereby favour the most militarily powerful states. Nonetheless, the community interest exists on the bases of the political alliances that subsist between more and less powerful states as well as the desirability of relative freedom of action for a state’s own naval forces irrespective of its size.

257 Discussed in more detail in Chapter 5, Part D(2).
258 Critics of the LRIT Regulation have identified the provision of information in such a wide zone as another encroachment on the freedom of the high seas. See Jason M. Krajewski, ‘Out of Sight, Out of Mind? A Case for the Long Range Identification and Tracking of Vessels on the High Seas’ (2008) 56 Naval Law Review 219, 242 and 248.
262 Reisman, ‘The Regime of Straits’ 51.
Military activities and the passage of warships in times of peace are constrained through recognition of a coastal state’s interests in protecting its land territory and its entitlements to resources. The requirements for the different passage regimes in the territorial sea, straits, and archipelagic waters reflect as much, as does the due regard requirement in the EEZ. On the high seas, the navigational rights and military activities of one state must be exercised in such a way as to show due regard to the rights of other users. The claims become expressive of special interest, and thus require rejection, only when they expand beyond need and disregard their impact upon others. How this plays out in any given circumstance must be assessed to assure an appropriate balance between different claims, and it may be the case that more specific rules will need to be articulated in order to maintain a stable world order. This latter approach has been followed in addressing the transport, use and testing of nuclear weapons.

Contemporary concerns for maritime security indicate that coastal states are increasingly concerned about activities at sea that may have severe repercussions for order on land. Rights regarding the passage of warships, and particularly their immunity, are generally not implicated by these threats. Greater appreciation of the law enforcement powers of coastal states may become necessary, and this issue is addressed in the next chapter. The issues related to balancing exclusive and inclusive interests for the conduct of military activities outside the territorial sea have not been completely static in view of improved technology and the increasing importance of intelligence gathering. These issues are discussed further in Chapter 5, but it must be observed at this point that the shared quest for knowledge as to what is being done, where, and by whom has driven assertions of security zones. While the abstract concept of a maritime zone for security purposes is usually rejected as a further infringement on the freedoms of the seas, it is arguable that informal zones are being created and accepted for information purposes. The actions that may be taken subsequent to the acquisition of this knowledge then become questions of law enforcement for the states concerned.

264 Van Dyke, ‘Military Exclusion’ 168.
Law Enforcement Activities

A. Introduction

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

Under international law, states have prescriptive jurisdiction, which refers to the power to adopt legislation and other rules, as well as enforcement jurisdiction, which refers to the power to give effect to those rules through police and/or judicial action.\(^1\) States are entitled to exercise jurisdiction on the basis of different connections that a particular activity might have with them. The bases of criminal jurisdiction most commonly recognized are territorial; nationality; passive personality; universal; and protective.\(^2\) Territorial jurisdiction entitles a state to regulate persons and activities within its territory. Nationality jurisdiction allows states to regulate the activities of persons who have the nationality of that state. On the basis of passive personality, a state may exercise criminal jurisdiction over a person who has committed offences that are harmful to nationals of that state. Universal jurisdiction refers to jurisdiction over particular activities that are considered so heinous (notably, piracy and war crimes)\(^3\) that all states may exercise jurisdiction over the perpetrators of those crimes irrespective of any other link a state may or

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\(^3\) There is some controversy as to what acts universal jurisdiction attaches. Shaw considers piracy and war crimes to be the most widely accepted crimes, but notes there are a number of treaties creating
may not have with the acts in question. Protective jurisdiction entitles states to exercise jurisdiction over activities considered prejudicial to the security of the state. As may be readily perceived, each of these bases of jurisdiction may be brought to bear in addressing maritime security threats, especially territorial, universal, and protective jurisdiction.

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

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

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

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

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


6 Ibid.

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


9 The threats identified by the UN Secretary-General were: piracy and armed robbery against ships; terrorist acts involving shipping, offshore installations and other maritime interests; illicit trafficking in arms and WMD; illicit traffic in narcotic drugs and psychotropic substances; smuggling and trafficking of persons by sea; illegal, unreported and unregulated fishing; and intentional and unlawful damage to the marine environment. See UNGA, ‘Oceans and the Law of the Sea: Report of the Secretary-General’ (10 March 2008) UN Doc A/63/63, para 39.
waters, the territorial sea, the contiguous zone, the EEZ, the continental shelf, and the high seas. Achieving an appropriate allocation of competences in each zone is critical to efforts to improve maritime security.

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

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

A second complicating factor for law enforcement is the recognition of complete immunity accorded to warships, as well as ships owned or operated by a state and used only on government non-commercial service, from the jurisdiction of any state besides the flag state. This immunity does not necessarily allow for non-compliance with substantive rules, but does prevent the exercise of jurisdiction and

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10 The deep seabed is excluded because the level of activity occurring in this area that relates to the identified maritime security threats is minimal.
11 As noted by Higgins, ‘there is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances’. Rosalyn Higgins, Problems and Process: International Law and How We Use It (OUP, Oxford 1994) 56.
13 R.R. Churchill and A.V. Lowe, The Law of the Sea (3rd edn, Manchester University Press, Manchester 1999) 179. See also Myres S. McDougal and William T. Burke, The Public Order of the Oceans; A Contemporary International Law of the Sea (New Haven Press, New Haven 1987) 1010 (‘both the substantive and jurisdictional policies comprising the established system of public order of the oceans project, and are built upon, a fundamental distinction between national and non-national vessels’).
14 See UNCLOS arts 32, 42(5), 95, 96, and 236.
measures of physical interference in the event of non-compliance.\textsuperscript{15} As a result, third state rights against foreign warships are virtually non-existent. The reciprocal advantages of this system are seen as indispensable for a state’s security.\textsuperscript{16} Instead, an attempt to exercise law enforcement jurisdiction against a foreign warship could be tantamount to a threat or use of force against a sovereign instrumentality of a foreign state.\textsuperscript{17} Although law enforcement powers at sea have been increased, the immunity of warships and other government vessels has not been altered in any way. To the extent that any maritime security threats or breaches are state sponsored, law enforcement powers against sovereign immune vessels are not available. Instead, questions involving the threat or use of force may arise and diplomatic or other avenues for dispute settlement must be pursued.

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

B. Ports and Internal Waters

States exercise sovereignty over their ports and internal waters.\textsuperscript{18} Flowing from this sovereignty is the right of the coastal state to control what vessels enter its ports and


\textsuperscript{16} McDougal and Burke, \textit{Public Order of the Oceans} 133.


\textsuperscript{18} Ports are described as ‘the outermost permanent harbour works which form an integral part of the harbour system’ and are regarded as forming part of the coast for the purposes of delimiting the territorial sea. UNCLOS art 11. Internal waters are those that lie landward of the baseline from which the territorial sea and other maritime zones are measured. UNCLOS art 8.
under what conditions.\textsuperscript{19} In many cases, access to port is governed by treaties between the states concerned,\textsuperscript{20} and states may have entered into agreements that permit free transit for trade purposes.\textsuperscript{21} In prescribing conditions for entry, states are entitled to regulate their ports consistent with the protection of various interests of the state.\textsuperscript{22} This regulatory power may provide an important means of responding to maritime security threats. The ISPS Code is an example of the actions that states may take to reduce the risk of terrorist attack against their port facilities and allows states to put in place notice requirements regarding the entry of a vessel into port.\textsuperscript{23} States may also regulate the access of vessels to their ports when the vessel poses environmental risks,\textsuperscript{24} which may be because of, \textit{inter alia}, the general seaworthiness of the vessel\textsuperscript{25} or the nature of the cargo that the vessel is carrying.\textsuperscript{26} States nonetheless have an incentive to ensure that their security restrictions are consistent with international standards so that their ports are commercially viable and business is not re-directed to another, less demanding, port.\textsuperscript{27}

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


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


\textsuperscript{23} Discussed in more detail in Chapter 4, Part D(1).

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

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


\textsuperscript{27} See McDorman, ‘Regional Port State Control Agreements’ 207–8, 218.
A particularly strong protective mechanism that may be available to states is the possibility of simply closing a port to foreign shipping. Unlike the limitations regarding a coastal state’s rights to suspend passage through the territorial sea or in straits, ports may be closed to vessels flagged to particular states without concern that such closure is discriminatory in practice. Ports may be closed to safeguard good order on shore, to signal political displeasure, or to defend ‘vital interests’. In practice, de La Fayette has observed that ports have been closed ‘for various reasons related to the protection of public health and safety; to ships carrying explosives; to ships carrying passengers with contagious diseases; to ships carrying dangerous cargoes, such as hazardous wastes; for general coastal pollution protection; to substandard ships; and to ships presenting hazards to maritime navigation.’ As the interface between a state’s land and maritime territory, it stands to reason that broad port state control is a vital element in maritime security. This power has led to increasing responsibility being placed on port states to police activities that have been inadequately managed by some flag states, as will be discussed further below.


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


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

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

Every vessel remains subject to the rules of its flag state throughout its voyage, including when it is in the ports and internal waters of other states. As a matter of practice, coastal states will not usually exercise jurisdiction over matters that are essentially internal to the ship and which do not affect the interests of the port state. In this regard, various criminal matters occurring on vessels are referred to the flag state unless the criminal act is so serious as to warrant the intervention of the coastal state.

Nonetheless, coastal states retain rights to enforce the laws of their territory over vessels when those vessels are in its ports and internal waters. As a general matter:

It is universally acknowledged that once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory for events relating to such use and that all types of vessels, military and other, are in common expectation obliged to comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters.

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

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

Molenaar, ‘Port State Jurisdiction’ 195.
UNCLOS art 25(2) provides: ‘In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.’
McDougal and Burke, The Public Order of the Oceans 156. Churchill and Lowe similarly write: ‘By entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State. Accordingly, that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules concerning sovereign and diplomatic immunities, which arise chiefly in the case of warships.’ Churchill and Lowe, The Law of the Sea 65.
McDougal and Burke, The Public Order of the Oceans 133. See also Schooner Exchange v McFaddon 11 US (7 Cranch) 116 (1812).
Ibid.
(2) Enforcement of laws for actions occurring outside ports and internal waters

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

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

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

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

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

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

44 Molenaar, ‘Port State Jurisdiction’ 196. Molenaar relies on traditional bases of jurisdiction (universal, protective, effects) to argue that there are times when the port state may be able to exercise jurisdiction over conduct that has occurred outside the port, and in waters beyond the territorial sea of the port state. See ibid.


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

This authority of the port state has been described as a ‘radical development’ when compared to the more limited jurisdiction of coastal states.\textsuperscript{53} Typically, a state may not enforce laws against foreign vessels that take place outside of its waters as it would offend the principle of extra-territoriality,\textsuperscript{54} as well as defying flag state jurisdiction on the high seas. The seriousness of the problem of marine pollution, coupled with the deficiencies in enforcement engendered through the use of flags of convenience, has warranted changes to the previously existing legal structure. While

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

\textsuperscript{48} UNCLOS art 218(2).

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


\textsuperscript{52} See Keselj, ‘Port State Jurisdiction’ 144–6.


\textsuperscript{54} See McDorman, ‘Port State Enforcement’ 313.
there was clearly pause over the extent of intrusion into flag state authority, the fact that any change was broadly accepted is remarkable. It shows that when a problem is widely considered serious enough, changes in state authority will be endorsed.

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

Port states have also been accorded greater responsibilities to deal with unlawful fishing on the high seas, particularly in relation to straddling stocks and highly migratory species. Fishing vessels have always been subject to more stringent rights of access to ports compared to merchant vessels.\(^{60}\) Under Article 23 of the 1995 Fish Stocks Agreement,\(^{61}\) the port state is to take measures to promote the effectiveness of conservation and management efforts, including inspecting documents, fishing gear, and catch on board fishing vessels, when they are voluntarily in port. Consistent with the port state’s authority to impose conditions for access, Article 23 further permits states to adopt regulations ‘empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas’\(^{62}\).

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\(^{56}\) Becker explains that this is because the power to prescribe is already accorded to the flag state under arts 94 and 211. See Michael A. Becker, ‘The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea’ (2005) *46 Harvard JIL* 131, 187. McDorman, however, argues that art 218 necessarily involves a prescriptive authority. McDorman, ‘Port State Enforcement’ 315.

\(^{57}\) UNCLOS art 230.

\(^{58}\) UNCLOS art 226(1)(a). Port states are liable for any loss or damage attributable to them if the measures taken are unlawful or exceed those reasonably required in light of available information. UNCLOS art 232.


\(^{60}\) See de la Fayette, ‘Access to Ports’ 4.

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

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

62 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009) FAO Doc C 2009/LIM/11-Rev. 1 ['2009 Port State Measures Agreement'].
65 2009 Port State Measures Agreement art 8 and Annex A.
66 2009 Port State Measures Agreement art 9.
67 2009 Port State Measures Agreement art 9(4).
68 2009 Port State Measures Agreement art 9(5).
69 2009 Port State Measures Agreement art 12(1). Agreement on the minimum levels of inspections is to be determined through RFMOs, the FAO or otherwise. 2009 Port State Measures Agreement art 12(2). Certain assistance is to be accorded to developing states in order to implement the Agreement. See 2009 Port State Measures Agreement art 21. The conduct of inspections is set out in art 13 and Annex B, with the form of the inspection report set out in Annex C.
70 2009 Port State Measures Agreement art 11(1)(a) and (b). As states have sovereignty over the territorial sea and sovereign rights over fishing in the EEZ, it may be presumed that ‘national jurisdiction’ is included within both of these entitlements over these maritime areas.
71 2009 Port State Measures Agreement art 11(1)(e).
use, as well as results of inspections, are to be communicated to the flag state as well as other relevant states (the coastal state where IUU fishing occurred, and the state of nationality of the vessel’s master), regional fisheries management organizations (RFMOs), and the Food and Agriculture Organization (FAO).72

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

(3) Conclusion

There has undoubtedly been an increase in enforcement authority that may be exercised over vessels coming into port. This development is necessary in the face of reduced control exercised by flag states, particularly flag of convenience states. Increasing port state control has been viewed as preferable to allowing greater coastal state jurisdiction.75 Yet, as mentioned, one drawback to port states taking on a greater role in policing activities such as marine pollution from vessels and unlawful fishing, particularly when this is irrespective of where those activities occurred, is that there is potential for ‘open ports’ or ‘ports of convenience’76 to

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

73 See 2009 Port State Measures Agreement art 18.

74 2009 Port State Measures Agreement art 20.


emerge in light of the economic advantages gained from increased port activity. Vessels that would be subject to inspections of enforcement action in some ports may well divert to others that do not threaten comparable responses and these ports will derive economic benefits through the payment of customs dues and the like, as well as increased employment. Widespread political will required to confront IUU fishing has been slow, but the possibility of utilizing port state authority at least stands as another example of states attempting to defeat the problems faced by the use of flags of convenience in addressing particular maritime security threats. Coastal state sovereignty over ports and internal waters thus provides critical legal and practical bases to undertake a range of measures to respond and prevent maritime security threats. Promoting port state enforcement powers, even with the ‘open port’ risk, is a logical step to enhance maritime security.

C. Territorial Sea

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

(1) Innocent passage and exercise of criminal jurisdiction

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

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

(a) if the consequences of the crime extend to the coastal state;
(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

83 Unless the laws give effect to generally accepted international rules or standards. See UNCLOS art 21(2). See further Churchill and Lowe, The Law of the Sea 95.
84 Exceptions identified by Churchill and Lowe include the immunity of warships and governments vessels operated for non-commercial purposes; for crimes committed prior to entering the territorial sea when the vessel is just passing through the territorial sea; and for civil matters where the liability was not incurred in connection with the voyage in the territorial sea. Churchill and Lowe, The Law of the Sea 98.
85 These rights extend to aircraft flying over the territorial sea, as aircraft have no right of innocent passage comparable to the right accorded to vessels.
86 As listed in art 19(2). See further Chapter 2, Part B(2).
87 Which are relevant to drug trafficking and people smuggling and trafficking.
88 See UNCLOS art 18(1) (defining the meaning of passage).
89 UNCLOS art 25(1). As discussed in Chapter 2, the steps that coastal states may take against warships are limited to requiring the warship to leave the territorial sea immediately.
90 Article 28 of UNCLOS deals with the exercise of civil jurisdiction. Under this provision, a coastal state ‘should not’ stop or divert a foreign ship for the purpose of exercising civil jurisdiction over a person on board the ship. It is prohibited from exercising enforcement jurisdiction over a ship unless it is in relation to ‘obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal state’. However, this prohibition does not prejudice the coastal state’s right to levy execution against or arrest a ship for any civil proceedings when the ship is lying in the territorial sea or passing through it after leaving internal waters. See further Shearer, ‘Problems of Jurisdiction’ 329.
(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state; or
(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.91

Questions may arise as to whether the activities rendering passage non-innocent are necessarily ‘of a kind to disturb the peace of the country or the good order of the territorial sea’ or whether the consequences of the activities extend to the coastal state, depending on the precise circumstances of the activities concerned. A coastal state could well be justified in taking the position that if an act is prejudicial to its peace, good order, or security then it should also be seen as disturbing the peace of the country.92 Such an approach is now warranted when the importance of responding to maritime security threats is taken into account.93 In that instance, the coastal state would need to have national legislation that reflects a variety of crimes associated with the activities viewed as prejudicial to its peace, good order, and security. The full range of enforcement actions would then be open to it.94 This approach enables a variety of maritime security threats to be addressed by the coastal state. This is not to suggest that it inevitably follows that the violation of any coastal state law renders passage non-innocent, always implicating what enforcement actions may be taken by the coastal state.95 In each instance, consideration will be needed to determine if a coastal state may take steps to prevent passage that is not innocent and whether further enforcement actions are permissible and warranted. This approach not only protects the exclusive interests of the coastal state, but also supports the inclusive interest in maritime security when considering the repercussions that may flow to other states as a result of maritime security breaches.

The designated instances for exercising criminal jurisdiction on board foreign ships are only relevant for ships that are in lateral passage, that is, not entering or

91 UNCLOS art 27(1).
92 Against this position, it would need to be noted that there is a difference in the language and so the phrases should not necessarily be understood as carrying identical meanings. As enforcement actions by the coastal state interfere with the freedom of navigation, it could be argued that the permissible extension of coastal criminal procedures should be limited. This approach is consistent with the traditional construct of the law of the sea and would not promote maritime security.
93 'If the crime is generally regarded as a serious one, such as homicide, or one for which, perhaps, any state might be competent to apply authority, the coastal state should be authorized to act despite the interference with navigation'. McDougal and Burke, The Public Order of the Oceans 294. Even after acknowledging the ongoing interest in supporting the freedom of navigation against coastal competence, McDougal and Burke note that coastal authority may be exercised for ‘events which either have effects upon the coastal state or involve crimes of considerable importance’. McDougal and Burke, The Public Order of the Oceans 302.
95 See ibid 13. The ILA Committee notes that any enforcement action must still fall within the requirements of what is reasonable, which entails consideration of what is necessary and proportionate under the circumstances. Ibid 14.
leaving internal waters of the coastal state, and do not affect the coastal state’s right to exercise enforcement jurisdiction against a ship leaving its internal waters. Arrest and investigation are also permissible if the foreign ship is intending to enter the internal waters of the state in relation to crimes committed inside or outside the territorial sea.

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

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

The enforcement powers of the coastal state have been expanded under UNCLOS in order to address threats derived from marine pollution. The coastal state may determine that passage is not innocent if an act of willful and serious pollution occurs. Criminal jurisdiction may also exist if the act of pollution is such that the ‘consequences of the crime extend to the coastal State’. Certainly intentional acts of pollution are those that have triggered the most concern as a threat to maritime security. Enforcement jurisdiction of the coastal state has been extended to address marine pollution that may have been accidental. Article 220(2) permits coastal state enforcement of its pollution laws where there are clear grounds for believing that a violation has occurred while navigating in the territorial sea. The enforcement actions permitted against vessels for violations occurring while navigating in the territorial sea include undertaking physical inspection, instituting proceedings and detaining the vessel. The coastal state may also take enforcement actions against vessels navigating in its territorial sea for pollution violations that occurred in its EEZ. These powers have thus gone beyond what has traditionally been accepted for coastal state action against foreign flagged vessels.

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96 Shearer, ‘Problems of Jurisdiction’ 326.
97 See UNCLOS art 27(2).
98 Shearer, ‘Problems of Jurisdiction’ 326.
99 UNCLOS art 19(2)(h).
100 UNCLOS art 27(1)(a).
101 As discussed in Chapter 1, the UN Secretary-General identified intentional and unlawful damage to the marine environment as a maritime security threat.
102 See further Becker, ‘The Shifting Public Order’ 196; Shearer, ‘Problems of Jurisdiction’ 328.
103 UNCLOS art 220(2). However, if procedures exist, the vessel may be released from detention upon bonding or other financial security arrangements. UNCLOS art 220(7).
104 UNCLOS art 220(3), 220(5), and 220(6). The limitations imposed on the coastal state in this instance are discussed further below. See below Part F(2).
navigating in its territorial sea, and allows for more action than may have been possible if the pollution was considered as abrogating the right of innocent passage.

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

Unlawful fishing within the territorial sea renders the passage of that fishing vessel to be non-innocent \(^{105}\) and entitles the coastal state to take the necessary steps in its territorial sea to prevent passage which is not innocent \(^{106}\). Criminal jurisdiction could also be exercised under Article 27 of UNCLOS on the basis that unlawful fishing disturbs the good order of the territorial sea, as well as potentially having consequences that extend to the state given the importance of a national fishing industry. In addition, under the 1995 Fish Stocks Agreement, a coastal state may also be able to board and inspect a foreign flagged fishing vessel for unlawful fishing on the high seas when that vessel has subsequently entered ‘an area under the national jurisdiction’ of the inspecting state \(^{107}\). To do so, the coastal state must be a member or participant in an RFMO and have clear grounds for believing that a fishing vessel flagged to another state party has engaged in unlawful activity in a high seas area subject to conservation and management measures by the RFMO \(^{108}\).

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

(4) Encroachments on exclusive enforcement jurisdiction of coastal state

As coastal states exercise sovereignty over the territorial sea, it is generally accepted that other states are not permitted to exercise enforcement jurisdiction within these areas. This situation can cause difficulties as foreign vessels engaged in unlawful activities beyond the territorial sea may flee to this zone precisely because a third state is not entitled to enter the area to arrest the vessel and its crew \(^{109}\). The problem is compounded when the coastal state in question lacks the resources, or does not consider it to be a priority, to police certain criminal activities within its territorial sea. These limitations have led to agreements between states where coastal states grant permission for other states to exercise enforcement jurisdiction within their territorial sea, subject to various conditions, in order to respond to

\(^{105}\) UNCLOS art 19(2)(i).
\(^{106}\) UNCLOS art 25(1).
\(^{107}\) 1995 Fish Stocks Agreement art 21(14).
\(^{108}\) 1995 Fish Stocks Agreement art 21(14).
\(^{109}\) As manifest in the restrictions on the right of hot pursuit. See UNCLOS art 111(3).
particular maritime security threats. A notable example of this phenomenon is seen in the 2008 CARICOM Maritime and Airspace Security Co-operation Agreement, which allows for state parties to patrol and conduct law enforcement operations in the territorial seas of other states parties in response to a wide variety of maritime security threats. More typically, states have concluded treaties expanding law enforcement powers in relation to particular maritime security concerns.

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

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

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111 UNCLOS art 27(1)(d). This provision had been included in the Convention on the Territorial Sea and the Contiguous Zone (1958) 516 UNTS 205 ["Territorial Sea Convention"] (without reference to psychotropic substances), though it was remarked that it was not based on state practice at the time, but reflects the move towards the universalization of jurisdiction over drug trafficking. See William C. Gilmore, ‘Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ (1991) 15 Marine Policy 183, 184; Shearer, ‘Problems of Jurisdiction’ 327.


sought to strike a balance between the need for enforcement cooperation in addressing drug trafficking with sovereignty concerns.\textsuperscript{114} Article 11 sets out general principles to govern these operations, and reaffirms that law enforcement operations in the territorial sea are subject to the authority of the coastal state. Consent is therefore required for law enforcement to occur and that consent may be subjected to any directions and conditions by the relevant coastal state.\textsuperscript{115} Moreover, the coastal state has priority in law enforcement operations as they are to be carried out by, or under the direction of, the coastal state’s own officials.\textsuperscript{116} Random patrols within or over the territorial sea by law enforcement officials of another state are not permitted.\textsuperscript{117} Another safeguard for the coastal state may be drawn from Article 40, which allows for the temporary suspension of obligations relating to the territorial sea if ‘required for imperative reasons of national security’.\textsuperscript{118} Further, any authorized and necessary use of force in law enforcement action must respect laws of the coastal state.\textsuperscript{119}

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

\textsuperscript{114} See ibid 23.
\textsuperscript{115} See 2003 Caribbean Agreement art 11(1) and (2).
\textsuperscript{116} 2003 Caribbean Agreement art 11(3). See further Gilmore, Caribbean Area 23.
\textsuperscript{117} 2003 Caribbean Agreement art 11(4).
\textsuperscript{118} 2003 Caribbean Agreement art 40 reads in full: ‘Parties to this Agreement may temporarily suspend in specified areas under their sovereignty their obligations under this Agreement if such suspension is required for imperative reasons of national security. Such suspension shall take effect only after having been duly published.’
\textsuperscript{119} See 2003 Caribbean Agreement art 23(5).
\textsuperscript{120} 2003 Caribbean Agreement art 12(1).
\textsuperscript{121} 2003 Caribbean Agreement art 12(1)(b).
\textsuperscript{122} 2003 Caribbean Agreement art 12(2).
\textsuperscript{123} See 2003 Caribbean Agreement art 12(4) and (5).
is to be promptly informed and the suspect vessel, its cargo, and those on board are to be detained and taken to a port within the coastal state, unless otherwise directed by the coastal state.124

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

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

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124 2003 Caribbean Agreement art 12(3).
125 Art 1(h) defines the ‘waters of a Party’ to cover its territorial sea and archipelagic waters, but does not refer to internal waters.
126 See Gilmore, Caribbean Area 28.
127 The IMO distinguishes between piracy and ‘armed robbery against ships’, with the latter term referring to maritime zones under the sovereignty of the coastal state: ‘any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy”, directed against a ship or against persons of property on board such a ship, within a State’s jurisdiction over such offences’. IMO Assembly, ‘Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships’ (29 November 2001) 22nd Session Agenda item 9 IMO Doc A 22/Res 922.
128 See Robert C. Beckman, ‘Combatting Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward’ (2002) 33 ODIL 317; José Luis Jesus, ‘Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects’ (2003) 18 IJMCL 363, 368, and 382 (‘The first important change that would strengthen in a significant way the legal protection of shipping against modern piracy would be to extend the regime of piracy to territorial waters, in a way that would, at the same time, totally preserve respect for the coastal state’s sovereignty over its territorial waters’).
130 Jesus, ‘Protection of Foreign Ships’ 383.
131 Ibid.
mercilessly to fall prey to such attacks. Moreover, he argues that since no state takes responsibility for the actions of pirates in their territorial seas and pirates attack vessels of any state indiscriminately then the same reasons for according jurisdiction over pirates on the high seas apply equally to areas under the sovereignty of the coastal state. While it is arguable that a state could be held internationally responsible for a failure to protect foreign shipping adequately within its territorial waters, the more salient point rests with the exploitation of existing legal rules by the criminals. In these circumstances, there should be scope for reconsideration of these rules.

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

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

133 Ibid 384 (Jesus refers to the exercise of ‘common jurisdiction’).
137 See Security Council, 5902 nd meeting, 2 June 2008, UN Doc. S/PV.5902 (the interventions of Indonesia, Viet Nam, South Africa, China and Libya).
A further response to piracy off Somalia has been an invitation from the Security Council that states enter into ship-rider agreements whereby law enforcement officials of countries willing to take custody of pirates would travel on the vessels of states and regional organizations fighting piracy off the coast of Somalia.\textsuperscript{139} Such agreements would still require the consent of Somalia’s transitional government for any exercise of third state jurisdiction in Somalia’s territorial waters.\textsuperscript{140} The use of embarked officers has been included in a non-binding Code of Conduct among states in the Western Indian Ocean and Gulf of Aden region.\textsuperscript{141}

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

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

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

\textsuperscript{139} UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851, para 3.
\textsuperscript{140} Ibid.
\textsuperscript{142} With the advent of the Proliferation Security Initiative, commentators have questioned whether the transport of weapons of mass destruction would fall foul of innocent passage. See further discussion in Chapter 4.
\textsuperscript{143} Kaye, ‘The Proliferation Security Initiative’ 215.
\textsuperscript{145} See ibid 115 (referring to the possible application of the Bush Doctrine on pre-emptive self-defence in waters under the territorial sovereignty of a coastal state).
third states exercising enforcement jurisdiction within their territorial seas, precisely because it is seen as a threat to the sovereignty of the coastal state. However, the inadequacies in policing, because of lack of resources or interest, have led to agreements between the states concerned to permit other states to exercise enforcement powers within another state’s territorial sea. These agreements could be seen as recognition that the greater interest is in responding to the maritime security threat rather than the sovereign interests of the state being all important. The shift in this regard is slight, however.

D. Straits

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

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146 See Chapter 2, Part B(1) for discussion of applicability of transit passage to various straits. Otherwise, enforcement powers of littoral states are determined by reference to the territorial seas or EEZ regimes, as appropriate.
147 Shearer, ‘Problems of Jurisdiction’ 331.
148 Art 41(2) refers to: (a) the safety of navigation and the regulation of maritime traffic, as provided in art 41; (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear; (d) the loading or unloading of any commodity, currency, or person in contravention of the customs, fiscal, immigration, or sanitary laws and regulations of States bordering straits.
149 UNCLOS art 42(2).
150 See Julian Roberts and Martin Tsamenyi, ‘The Regulation of Navigation under International Law: A Tool for Protecting Sensitive Marine Environments’ in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes (Martinus Nijhoff, Leiden 2007) 787, 798. See also Bing Bing Jia, The Regime of Straits in International Law (Clarendon Press, Oxford 1998) 161. By contrast, McDougal and Burke have noted (albeit in discussion of maritime areas adjacent to the territorial sea), ‘if particular states are not to be accorded the competence to apply the authority necessary to implement their prescriptions, conferring upon them a competence to prescribe would appear but a superfluous verbal exercise’. McDougal and Burke, The Public Order of the Oceans 621. Arguably, this view could apply in relation to straits in the absence of explicit enforcement powers within UNCLOS.
maritime environment of the straits. This absence of enforcement jurisdiction provides user states with ‘unlimited and maximum freedom of passage’. To deny the littoral states enforcement powers in straits is quite problematic in addressing maritime security concerns. The security of international shipping may be jeopardized if a state bordering a strait is unable to enforce requirements relating to, for example, navigational aids or criminal activity. Under Article 43 of UNCLOS, user states and states bordering a strait should cooperate in relation to necessary navigational and safety aids or other improvements in aid of international navigation and for the prevention, reduction and control of pollution from ships. To this end, separate agreements may be adopted to allow for explicit enforcement powers on the part of the littoral states. Such agreements could also be used to defray the expense of policing the straits to prevent acts of piracy or other attacks on ships. However, it would have to be anticipated that an increase of powers over straits would be resisted because of the possible imposition on the freedom of navigation. The freedom of navigation holds particularly high importance in the straits regime in view of the compromise that was reached in the creation of transit passage in response to greater claims of sovereignty in extending the breadth of the territorial sea.

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

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

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152 Roberts and Tsamenyi, ‘The Regulation of Navigation’ 798.
154 The first agreement implementing art 43, the Cooperative Mechanism for the Straits of Malacca and Singapore, did not address enforcement powers, but user states instead insisted that passage should remain unimpeded and otherwise consistent with existing international law. See Joshua H. Ho, ‘Enhancing Safety, Security, and Environmental Protection of the Straits of Malacca and Singapore: The Cooperative Mechanism’ (2009) 40 *ODIL* 233, 238.
155 As discussed in Chapter 2, Part B(3).
and policing of the areas in the 1990s. However, the security of the area took on new importance following the September 11 terrorist attacks. In 2004, the United States proposed a Regional Maritime Security Initiative (RMSI) to address threats of piracy, as well as maritime terrorism, people smuggling, and drug trafficking, in the Straits of Malacca and surrounding areas. Although Singapore is reported to have favoured RMSI, Malaysia and Indonesia were more reticent given their views of security as a domestic issue to be resolved internally, or on a regional basis, and that involvement of the United States would be more likely to foment terrorist activity than deter or suppress it. Japan’s offer of its naval forces to help patrol the area was also rejected. Malaysia and Indonesia were further concerned that it might compromise their sovereignty and sovereign rights in the area. Indonesia, Malaysia, and Singapore instead moved to coordinated patrols, and launched an ‘Eyes in the Sky’ programme with Thailand involving combined maritime air patrols to improve maritime domain awareness over the Straits of Malacca and Singapore.

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

In view of the lack of specific enforcement powers otherwise accorded to states bordering international straits, opportunities to take steps to prevent or respond to maritime security threats could well be limited. This position may be lamented in view of the fact that international straits are of such fundamental importance to international shipping and hence are in greatest need of protection. The entrenched importance of the common interest in navigation is likely to prevent meaningful

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156 See Sittnick, ‘State Responsibility’ 753.
159 See Phil DeCaro, ‘Safety Among Dragons: East Asia and Maritime Security’ (2006) 33 Transportation Law Journal 227, 246. Approximately 80 per cent of Japan’s oil from the Middle East traverses these waters. Ibid.
160 See Bateman, ‘Security and the Law of the Sea’ 373. See also Sittnick, ‘State Responsibility’ 755 (describing the negative reactions of Malaysia and Indonesia to RMSI).
161 See Sittnick, ‘State Responsibility’ 753 (referring to the operation code named MALSINDO).
164 Ibid 16 (referring to UNCLOS art 25(1)).
165 See Chapter 2, Part B(4).
developments that would augment coastal state authority as a means to improve maritime security. It would seem that the balance of interests that had to be achieved to secure passage through international straits remains too delicate to risk any adjustment.\textsuperscript{166}

E. Contiguous Zone

The contiguous zone is an area extending 24 miles from the baselines of a coastal state. The origins of the contiguous zone may be traced to the desire of the coastal state to provide greater protection to its interests, even if not going so far as to claim sovereignty over a wider expanse of ocean area.\textsuperscript{167} Although the contiguous zone is not recognized as a security zone, the protection currently afforded to the coastal state in the contiguous zone does accord with allowing for rights over certain activities that may be construed today as a threat to maritime security. In particular, Article 33 of UNCLOS refers to customs, fiscal, immigration, or sanitary laws, which may be relevant to address crimes associated with drug and people trafficking, or even potentially terrorism (if, for example, the activities concerned terrorist financing or smuggling contraband into a state for use in a terrorist offence).\textsuperscript{168} The contiguous zone is sometimes used by states (controversially) to assert a security jurisdiction that then requires notification of voyages by foreign warships, or foreign vessels generally.\textsuperscript{169}

Law enforcement may be undertaken by the coastal state in the contiguous zone. According to Article 33, states may exercise the control necessary to prevent and punish the infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea in a zone extending 24 miles from its baselines. In dissection of Article 33, Shearer notes that the first limb ‘applies to inward-bound ships and is anticipatory or preventive in character; the second limb, applying to outward-bound ships, gives more extensive power, and is analogous to the doctrine of hot pursuit.’\textsuperscript{170}

\textsuperscript{166} It may be the case that particular characteristics of a specific international strait warrant additional environmental protection, as may be seen in the steps taken by Australia and Papua New Guinea to have the Torres Strait declared a Particularly Sensitive Sea Area through the IMO. See Sam Bateman and Michael White, ‘Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment’ (2009) 40 ODIL 184.


\textsuperscript{170} Shearer, ‘Problems of Jurisdiction’ 330.
Coastal states only have ‘control’ and not sovereignty, sovereign rights, or jurisdiction in the contiguous zone. Shearer considers that ‘control’ must therefore ‘be limited to such measures as inspections and warnings, and cannot include arrest or forcible taking into port’. However, it has also been argued that while the scope of the contiguous zone is limited in that it only refers to three specific categories of laws and regulations, it provides powers of prevention as well as repression. Dupuy and Vignes consider that ‘this power can be exercised by means of all forms of constraint, such as arresting the ship, escorting it to the ports of the coastal State, the carrying out of legal measures, seizure, etc.’ In this regard, the primary limitation is the observance of proportionality. This latter interpretation is preferable in a more progressive approach to improving the ways states may address maritime security concerns. To this end, states could give greater attention to the scope of powers allowed in the contiguous zone to address maritime security threats.

F. Exclusive Economic Zone

In the EEZ, coastal states have sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of these waters and with regard to other activities for the economic exploitation and exploration of the zone. Coastal states also have jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment. Within the EEZ, other states enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.

In view of the delicately balanced interests at stake in this area, UNCLOS sets up a carefully defined regime for the enforcement of laws relating to pollution and fishing, so as to minimize the likelihood of coastal states interfering unnecessarily with navigation. Coastal states’ enforcement jurisdiction extends to authority to seize vessels violating coastal state laws and regulations related to these issues. A number of safeguards are included in UNCLOS to protect

171 Ibid 330. Although he notes that powers of arrest are greater under the second limb, since it refers to an offence that has already been committed within national territory.
172 Dupuy and Vignes, A Handbook on the New Law of the Sea 857 (acknowledging that there are more restrictive views on these powers than those they express).
173 Ibid 857.
174 UNCLOS art 56(1)(a).
175 UNCLOS art 56(1)(b).
176 UNCLOS art 58(1).
177 Articles 213, 214, 216, and 222 of UNCLOS address enforcement with respect to pollution from land-based sources, from seabed activities, by dumping and from or through the atmosphere respectively.
178 UNCLOS art 73.
180 UNCLOS art 73, art 220(6), and art 226(1)(c). ‘There appear to be no enforcement provisions relating to the jurisdiction enjoyed with respect to artificial structures and marine scientific research.’ Shearer, ‘Problems of Jurisdiction’ 335.
navigational rights in the face of this assertion of coastal state authority. As Becker notes, ‘the UNCLOS provisions place particular emphasis on system concerns: how coastal states must manage their living resources in the EEZ while keeping in mind the needs of the international system as a whole.’

As UNCLOS is explicit about what enforcement powers a coastal state has, it could be argued that the enforcement of laws relating to maritime security more generally stand on less sure footing. The precise articulation of the enforcement rights accorded to coastal states in the EEZ may counter any argument that enforcement of security requirements is permissible under UNCLOS, as the coastal state only has economic-related rights in the EEZ. The ITLOS decision in *M/V Saiga* (No 2) provides some indication that states may not seek to enforce laws that are not specifically related to coastal state rights in the EEZ. In that case, the *M/V Saiga*, an oil tanker sailing under the flag of Saint Vincent and the Grenadines, entered the EEZ of Guinea to supply fuel to three fishing vessels. Guinean customs patrol boats arrested the vessel outside of Guinea’s EEZ and subsequently detained the vessel and crew members. Guinea asserted that the arrest of the *M/V Saiga* had been executed following a hot pursuit motivated by a violation of its customs laws in the contiguous zone and ‘customs radius’ of Guinea.

Under Guinea’s Customs Code, the ‘customs radius’ extended 250 kilometres from its coast. Saint Vincent and the Grenadines maintained that Guinea was not entitled to extend its customs laws to the EEZ and that the Guinean action had interfered with the right to exercise the freedom of navigation as the supply of fuel oil fell within ‘other internationally lawful uses of the sea related to’ the freedom of navigation. The Tribunal determined that the application of customs laws to parts of the EEZ was contrary to UNCLOS. From this case, it seems that coastal states’ enforcement powers in the EEZ are therefore not likely to be recognized as lawful beyond those relating to the activities over which coastal states are specifically attributed jurisdiction or sovereign rights.

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

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182 *M/V Saiga* (No 2) (Saint Vincent and the Grenadines v Guinea) ITLOS Case No 2; (1999) 38 ILM 1323.
183 See paras 116–17, 124–5 (referring to Guinea’s customs laws) and para 142 (on hot pursuit).
184 Par 119 and 123.
185 Ibid para 136.
based on the nature of the ship and its cargo.\textsuperscript{187} This development has particularly been seen in the prohibition of transit of shipments of ultrahazardous nuclear cargoes through the EEZ.\textsuperscript{188} The status of any new customary principle allowing for coastal state law enforcement over activities beyond those specified in UNCLOS will usually be open to challenge given the generally accepted importance of protecting navigational rights within this maritime zone.\textsuperscript{189} It is therefore understandable that when it has been agreed that coastal states should have new law enforcement powers, these were carefully laid out in UNCLOS or other multilateral treaties. This section focuses on the two accepted activities over which coastal states have enforcement authority in the EEZ under UNCLOS: fishing and pollution.

(1) Fishing

Article 73(1) of UNCLOS allows the coastal state to take various measures to ensure compliance with its laws and regulations for the exploration, exploitation, conservation, and management of the living resources in its EEZ. Expansive prescriptive powers are reinforced by broad enforcement powers that enable coastal states to board, inspect, arrest, and institute judicial proceedings against vessels found in violation of fishing laws and regulations. Additional measures that coastal states have taken, or may take, to enhance enforcement with fishing laws and regulations include prescribing sea lanes for transiting fishing vessels; requiring report of entry and exit together with route used; and stowage of fishing gear during passage.\textsuperscript{190} The penalties imposed by the coastal state may not include imprisonment, in the absence of agreements to the contrary by the states concerned, or any form of corporal punishment.\textsuperscript{191} In cases of arrest or detention of foreign vessels, the coastal state must promptly notify the flag state through appropriate channels of the action taken and of any penalties subsequently imposed.\textsuperscript{192}

While a coastal state has ample rights to regulate fishing in its EEZ and the legal authority to enforce those rules, the practical reality is that there is usually a large expanse of water involved and considerable resources are required to undertake adequate policing. Fishing vessels have become increasingly sophisticated both in


\textsuperscript{188} Ibid 111.

\textsuperscript{189} See Natalie Klein, ‘Legal Implications of Australia’s Maritime Identification System’ (2006) 55 ICLQ 337 (discussing Australia’s plan to interdict vessels if they failed to provide particular identification information when entering Australia’s EEZ).

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

\textsuperscript{191} UNCLOS art 73(3).

\textsuperscript{192} UNCLOS art 73(4).
the techniques used, enabling large quantities of fish to be caught, and in the technology available to locate fish stocks and to avoid detection by coastal state authorities. These factors contribute to IUU fishing being perceived as a threat to the economic security of the coastal state.

The large incidence of IUU fishing indicates that the legal framework devised for prescribing and enforcing fisheries laws is inadequate.193 While there are of course practical limitations imposed on coastal states in terms of the capacity and resources that may be required to detect, arrest and prosecute unlawful fishing vessels, the current legal regime tends to underline these problems rather than provide any panacea. One such weakness relates to the right of hot pursuit, which is discussed in relation to the high seas below, and another is the procedure available under UNCLOS allowing flag states to challenge any failure by the coastal state to promptly release foreign flagged vessels upon payment of a reasonable bond.

The prompt release obligation is intended to protect the navigational rights of the vessels concerned, and is reinforced by the availability of a compulsory dispute settlement procedure before the International Tribunal for the Law of the Sea.194 Article 292 permits the institution of legal proceedings against the detaining state when it is alleged that the detaining state has not complied with the prompt release requirement of, *inter alia*, Article 73, paragraph 2.195 The prompt release proceedings under Article 292 can only deal with the question of release and the posting of a reasonable bond or other financial security, and not aspects relating to the merits of any alleged violations of a coastal state’s fisheries laws. Article 292(1) of UNCLOS provides that:

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

The prompt release decisions of the Tribunal have so far only addressed vessels detained for unlawful fishing.196 One of the difficult issues faced by the Tribunal has been balancing the efforts of coastal states to address the serious problem of IUU fishing with the navigational rights of fishing vessels.197 

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193 See Baird, ‘Illegal, Unreported and Unregulated Fishing’ 301.
195 Article 73(2) of UNCLOS reads: ‘Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.’
196 The prompt release procedure is also available for vessels detained for pollution offences. See Klein, *Dispute Settlement* 86.
197 For arrests of fishing vessels within the EEZ, the freedom of fishing is not at stake because coastal states have exclusive rights over the living resources within this area. It is a question of the
issue has been raised in the context of whether the bond set by the coastal state was reasonable or not. The approach of the Tribunal has tended to weight the need for prompt release over the conservation and management concerns of the coastal state. While it may be seen as appropriate for the rights of the flag state to be emphasized in view of the fact that Article 292 is available precisely to protect the freedom of navigation, this focus seems unwarranted in situations where evidence is presented of the extensive problems of over-fishing of a particular stock or species and the cooperative responses being pursued by coastal states. Greater appreciation of coastal state efforts to protect and manage fisheries is required when coastal states are engaged in collaborative endeavours; a different situation to one involving a coastal state over enthusiastically applying penalties to fishing vessels engaged in activities that violate national laws and regulations.

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

198 See eg the Volga Case (Russia v Australia) (Prompt Release) ITLOS Case No 11; (2003) 42 ILM 159, para 68; Monte Confurco Case (Seychelles v France) (Prompt Release) ITLOS Case No 6; (2000) ITLOS Reports 86, para 79. The factors considered in assessing the reasonableness of the bond include the gravity of the offence, the penalties imposed or imposable, the value of the vessel and its cargo, and the amount of the bond and its form. See Camouco Case (Panama v France) (Prompt Release) ITLOS Case No 5; (2000) 39 ILM 666, para 67. In the Juno Trader Case, ITLOS further stated that ‘[t]he assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties’. Juno Trader Case (Saint Vincent and the Grenadines v Guinea-Bissau) (Prompt Release) ITLOS Case No 13; (2005) 44 ILM 498, para 85. Judges in their separate opinions in the Volga did, however, refer to this aspect and suggest greater weight should have been accorded to this element. See, eg, Separate Opinion of Judge Cot, and Declaration of Judge Marsit. See further Tim Stephens and Donald R. Rothwell, ‘Case Note: The Volga (Russian Federation v Australia)’ (2004) 35 JMCL 283, 288 (‘The Tribunal therefore appears to have accorded little weight to the serious problem of IUU fishing or the uncontested evidence that the Volga was part of a fleet of vessels systematically violating Australian fisheries laws and CCAMLR conservation measures.’); Baird, ‘Illegal, Unreported and Unregulated Fishing’ 319–21.

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

201 See Klein, Dispute Settlement 111–12.

202 1995 Fish Stocks Agreement art 20(6).

203 Article 20(6) provides that the authorization to board the vessel on the high seas is without prejudice to art 111 of UNCLOS, which sets out the right of hot pursuit.
state authority over fishing in its EEZ as the 1995 Fish Stocks Agreement does not constitute the consent of the flag state for enforcement measures on the high seas for offences in the EEZ. Even without this treaty, the coastal state could have sought authorization of the flag state to board and inspect one of its vessels if there were reasonable grounds to believe that vessel had violated the coastal state’s laws.

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

(2) Marine pollution

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

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204 Boyle has noted that states were empowered to regulate pollution at sea, rather than being required to do so, prior to the adoption of UNCLOS. See Alan E. Boyle, ‘Marine Pollution under the Law of the Sea Convention’ (1985) 79 AJIL 347, 350–1.

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

206 MARPOL 73/78.

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

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

209 Roberts and Tsamenyi, ‘The Regulation of Navigation’ 800 (UNCLOS ‘provides the enforcement framework for IMO instruments by establishing the degree to which coastal States may legitimately interfere with foreign ships in order to ensure compliance with IMO rules and standards’).
augmented under UNCLOS, their enforcement powers have remained limited in
defere to the rights of flag states.\textsuperscript{210}

Responding to maritime casualties was one of the first major developments
according greater power to coastal states to react to threats to their environmental
security. The lack of recognized powers accorded to the coastal state had been
highlighted by the 1967 grounding of the Torrey Canyon and spillage of over
100,000 tons of crude oil in the high seas near Cornwall in the United Kingdom.
The British government ordered the bombing of the wrecked vessel as a means of
igniting the oil to reduce the amount of damage to the marine environment and
justified this action as self-defence.\textsuperscript{211} Given the questionable reliance on self-defence
in these circumstances, states instead moved to adopt an international treaty in 1969
to deal with situations of marine casualty and to permit measures on the high seas in
order ‘to prevent, mitigate or eliminate grave and imminent danger to their coastline
or related interests from pollution or threat of pollution of the sea by oil’.\textsuperscript{212}

Although the 1969 Marine Casualties Convention was limited to oil pollution, a
subsequent protocol removed the limitation to the right of intervention to pollution
by oil, and now covers a range of substances that are drawn up by a body acting
under the auspices of the IMO.\textsuperscript{213} Unless the danger is imminent, states parties
taking action are obliged to consult with experts and notify affected parties.\textsuperscript{214} Under
this treaty, any intervention measure taken must be proportionate to the damage
‘actual or threatened’ and may not be more than was ‘reasonably necessary’.\textsuperscript{215} The
criteria for assessing proportionality of the measures are set out in Article V(3) and
include the extent and probability of imminent damage if those measures are not
taken; their likely effectiveness and the extent of damage they may cause. If the
measures do not meet these criteria then the intervening party ‘shall be obliged to pay
compensation to the extent of the damage caused by measures which exceed those
reasonably necessary to achieve the end mentioned in Article I’.\textsuperscript{216}

The key provision of the 1969 Convention was incorporated into UNCLOS,
particularly as the UNCLOS negotiations were proceeding when the Amoco Cadiz
split in two off the coast of Brittany, spilling 1.6 million barrels of oil into the
ocean.\textsuperscript{217} Article 221 of UNCLOS adopts the approach of the 1969 Convention
with some modifications allowing for greater scope of action by the affected coastal
state.\textsuperscript{218} Article 221 allows for measures to be taken, as well as enforced, and does

\textsuperscript{210} See Boyle, ‘Marine Pollution’ 358.
\textsuperscript{211} Robert C.F. Reuland, ‘Interference with Non-National Ships on the High Seas: Peacetime
Exceptions to the Exclusivity Rule of Flag-State Jurisdiction’ (1989) 22 Vanderbilt Journal of Trans-
national Law 1161, 1220.
\textsuperscript{212} See Marine Casualties Convention art I.
\textsuperscript{213} MARPOL Convention 1973.
\textsuperscript{214} See Marine Casualties Convention art III.
\textsuperscript{215} See Marine Casualties Convention art V (1) and (2).
\textsuperscript{216} Marine Casualties Convention art VI.
\textsuperscript{217} See also Dupuy and Vignes, A Handbook on the New Law of the Sea 865.
\textsuperscript{218} See Shearer, ‘Problems of Jurisdiction’ 337 (characterizing art 221 as an ‘extreme form of
permitted intervention on the high seas’). Dupuy and Vignes consider that the breadth of art 221 and
its reference to its basis in customary and conventional law are justified when regard is had to the
not require there to be ‘grave and imminent danger’ but refers only to actual or threatened damage that may reasonably be expected to result in major harmful consequences.\textsuperscript{219}

UNCLOS further accords states with powers to prescribe laws over different sources of marine pollution, so long as these laws are consistent with international standards.\textsuperscript{220} Van Dyke has observed that coastal states have been adopting increasingly strict requirements against vessels in their EEZ for better protection of the marine environment.\textsuperscript{221} Flag states continue to have powers to enforce the applicable international rules and standards in relation to their vessels, and are to provide for effective enforcement irrespective of where a violation occurs.\textsuperscript{222} These requirements indicate that flag states continue to have a critical role in addressing threats to the marine environment.\textsuperscript{223} Enforcement powers are also accorded to coastal states, but are varied depending on the particular source of pollution.\textsuperscript{224} It is clear that the recognition of these powers within the EEZ has detracted from the typical deference accorded to flag state authority.\textsuperscript{225}

The key provision for coastal state enforcement powers to deal with vessel pollution is Article 220, which has been described as a \textit{lex specialis} to the enforcement powers set out in Article 73.\textsuperscript{226} While Article 220(3)--(6) of UNCLOS has been described as a ‘potent provision’ for coastal state enforcement,\textsuperscript{227} coastal states must meet a large number of requirements for various actions to be taken.\textsuperscript{228} Coastal states have enforcement powers over foreign vessels in their EEZ when there are clear grounds for believing that the vessel has violated relevant rules and standards on marine pollution.\textsuperscript{229} These powers are limited in the first instance to


\textsuperscript{219} See Dupuy and Vignes, \textit{A Handbook on the New Law of the Sea} 866.
\textsuperscript{220} See UNCLOS arts 207–12.
\textsuperscript{221} Following the breakup of the oil tanker \textit{Prestige} off the coast of Spain in November 2002, several European states issued decrees regarding advance notice of passage, as well as restricting the passage of single-hulled oil tankers. See Van Dyke, ‘The Disappearing Right’ 109–10. Some states then requested that their EEZs be declared ‘partially sensitive sea areas’ in their entirety in relation to single-hulled oil tankers and other vessels transporting dangerous cargoes, which further ‘provides strong support for their view that it is legitimate to restrict maritime freedom in order to protect the resources of the EEZ.’ Ibid 110.
\textsuperscript{222} UNCLOS art 217.
\textsuperscript{223} Boyle comments, ‘if properly adhered to, these provisions would greatly increase the effectiveness of flag state jurisdiction as the main means of control over shipping’. Boyle, ‘Marine Pollution’ 364.
\textsuperscript{224} See UNCLOS arts 213, 214, 215, 216, 221, and 222.
\textsuperscript{225} Boyle considers that there has only been a partial diminution in the traditional primacy of flag state jurisdiction. See Boyle, ‘Marine Pollution’ 365.
\textsuperscript{226} See ILA Committee, ‘Final Report’ 20 and 56.
\textsuperscript{227} See Van Dyke, ‘The Disappearing Right’ 109.
\textsuperscript{228} These have been described as a ‘graded’ enforcement scheme, whereby ‘[a]s the enforcement measures become more onerous, not only more evidence is required that a violation has taken place, but the consequences of the violation, or threat thereof, also have to be more serious’. ILA Committee, ‘Final Report’ 21.
\textsuperscript{229} More specifically, art 220 refers to violations of ‘applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards’. See UNCLOS art 220(3).
requiring information from the vessel as to ‘its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred’. The coastal state may undertake a physical inspection if: the violation results in a ‘substantial’ discharge that causes or threatens ‘significant’ pollution of the marine environment; the vessel either refuses to give information or gives information that is ‘manifestly’ at variance with the evident factual situation; and, if the circumstances of the case so justify. Proceedings may be instituted, and the vessel detained, if there is ‘clear objective evidence’ that a vessel in the EEZ committed a pollution violation ‘resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State’. However, the vessel must be allowed to proceed, if there are procedures in place, upon compliance with requirements for bonding or other appropriate financial security has been assured.

While there are clear limits to what a coastal state may be able to do to enforce its laws for the protection and preservation of the marine environment, whether the various standards are met in each instance will be a decision for the coastal state. It is therefore arguable that a considerable scope of power has been granted to the coastal state as a result. Nonetheless, if the requirements are not met, then enforcement powers remain with the flag state, or with a port state if the vessel enters the port voluntarily. Moreover, the flag state may require that any proceedings to impose penalties against one of its vessels for violations beyond the territorial sea be suspended while it instead takes action. This pre-emption of flag state authority is not unqualified, as no suspension is required in cases of major damage to the coastal state or where the flag state in question has repeatedly disregarded its obligations for effective enforcement. This latter aspect may be viewed as a blow against flag of convenience states that have failed to prevent substandard vessels from operating on a regular basis, particularly as it appears that the coastal state has the power to determine if suspension of its proceedings is required. Definite inroads into the exclusive authority of flag states may be seen in this regard.

230 UNCLOS art 220(3). 231 UNCLOS art 220(5). 232 UNCLOS art 220(6). 233 UNCLOS art 220(7). Detention is also permitted under art 226(1)(c) in relation to investigations of foreign vessels. 234 See Shearer, ‘Problems of Jurisdiction’ 335. See also ILA Committee, ‘Final Report’ 21 (‘the fact that they [the safeguards] are linked to a range of undefined criteria gives reason for concern as coastal states will have to interpret these in concrete situations. Objectivity and, consequently, uniformity, can therefore not be guaranteed’). 235 See discussion above. See also Charney, ‘The Marine Environment’ 892. 236 UNCLOS art 228(1). 237 UNCLOS art 228(1). 238 But see Boyle, ‘Marine Pollution’ 365 (arguing that the loss of exclusive jurisdiction is ‘severely qualified’).
(3) Conclusion

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

As an intrusion into the freedom of navigation, it is not surprising that the coastal state powers have been circumscribed to prevent possible abuse of navigational rights. The balance appears to be largely a realistic one. While the problem of IUU fishing is great, the difficulties countering this threat appear to be ones of practicalities in relation to physically policing the EEZ, rather than a lack of authority under international law for the coastal state to deal with this issue (except for the inadequate support to cooperative coastal state efforts proffered through the prompt release cases).\(^{239}\) Although the enforcement powers to deal with marine pollution have their limitations, it is remarkable that accidental pollution warrants this reaction, as opposed to limiting the responses to cases of willful and serious marine pollution, which is the more common environmental security threat identified.\(^{240}\) Overall, the enforcement powers granted to coastal states to protect their specific interests in fishing and the marine environment are, on the whole, appropriate to respond to these particular maritime security concerns.

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

\(^{239}\) Though there may be restrictions with national laws making prosecution more complicated. The key example here is in the difficulty in discovering beneficial ownership of vessels. See L. Griggs and G. Lutgen, ‘Veil over the Nets: Unravelling Corporate Liability for IUU Fishing Offences’ (2007) 31 Marine Policy 159.

G. Continental Shelf

Coastal states exercise sovereign rights over their continental shelves for the purposes of exploring and exploiting its natural resources.241 The particular law enforcement powers of the coastal state for activities related to the exploration and exploitation of the natural resources of the continental shelf must be drawn from the nature of sovereign rights, as well as from powers in relation to specific activities, such as the laying of submarine cables and pipelines and the presence of artificial islands, installations and structures. Some of these powers are drawn from the rights accruing to the coastal state within the legal regime of the EEZ in view of the fact that the EEZ incorporates sovereign rights over the seabed and its subsoil.242

The ability of a state to exert control over activities occurring on the continental shelf may be of fundamental national importance to a state given the economic benefits to be derived from this maritime area. A coastal state’s national security may therefore be at stake when a maritime boundary between two overlapping zones remains undelimited and provisional arrangements cannot be agreed. States have resorted to shows of force in contested maritime areas.243 This potential tension colours the exposition of coastal state law enforcement powers over the continental shelf.

Enforcement jurisdiction in relation to the continental shelf is of further importance for a state’s maritime security because of the potential economic disruption that may be caused with any interference with or damage to submarine cables and pipelines, as well as against oil platforms and similar structures. For example, at the end of 2008, four cables between Europe, the Middle East, and Asia were severed, affecting telephone and internet services, and consequently an array of financial transactions.244 It has been estimated that ‘over 95% of the world’s international voice and data traffic, including almost 100% of transoceanic internet traffic, is carried by undersea cables’.245 The 2004 suicide attack on the Iraqi oil platforms closed production in Iraq for two days, costing Iraq approximately $40 million and disrupting international trade in oil.246 Environmental damage may also occur if

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241 UNCLOS art 77.
242 UNCLOS art 56(1)(a). Though a distinction may be drawn for the laying of submarine cables and pipelines, which are recognized as a freedom of the high seas. UNCLOS art 87(1).
246 Louis Meixler, ‘Iraq resumes petroleum exports after suicide boats strike oil terminals’ Associated Press Newswire (Baghdad, 27 April 2004). It was further reported that ‘[i]n the weeks following the
there are leaks from pipelines or installations or structures associated with the exploitation of natural resources. These concerns arise irrespective of whether the damage has occurred accidentally or as a result of a terrorist act.

(1) Exploration and exploitation of the continental shelf

A coastal state is entitled to exercise enforcement jurisdiction against unlawful exploration and exploitation activities in relation to the natural resources of the continental shelf because of the sovereign rights it has over this maritime area. In utilizing the term ‘sovereign rights’, the International Law Commission indicated that these comprised ‘all rights necessary for and connected with the exploitation of the continental shelf... [and] include jurisdiction in connexion with the prevention and punishment of violations of the law’.\textsuperscript{247} Ronzitti considers that the sovereign rights of coastal states would include measures that could be ‘defined as police actions’.\textsuperscript{248} These statements indicate that the arrest, detention and prosecution of offending vessels may be expected for violations of the sovereign rights of a coastal state over its continental shelf.

In the maritime boundary dispute between Guyana and Suriname, the ad hoc arbitral tribunal considered whether acts of Surinamese gunboats seeking to prevent drilling activities in a disputed maritime area could be viewed as law enforcement activities.\textsuperscript{249} The tribunal implicitly accepted that a coastal state may be able to take law enforcement action in response to unauthorized drilling, but in this case, the force threatened by the Surinamese gunboats against the drilling rig amounted to ‘a threat of military action rather than a mere law enforcement activity’ and was hence unlawful as a result.\textsuperscript{250} The key restriction on enforcement activities would appear to be that the exercise of the coastal state’s rights over the continental shelf ‘must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other states’.\textsuperscript{251} This restriction may influence the enforcement steps taken by a coastal state, but the requirement that the interference be ‘justified’ tends to underline the need for ensuring force is only used as a last resort, and that the degree of force does not exceed what is reasonably required in the circumstances.\textsuperscript{252}

Unlawful exploration activities may be viewed as unauthorized marine scientific research. Under UNCLOS, marine scientific research on the continental shelf must be conducted with the consent of the coastal state.\textsuperscript{253} This consent may be

\textsuperscript{247} Yearbook of the International Law Commission (1956, Vol 2) 253, 297.
\textsuperscript{249} Guyana v Suriname (2008) 47 ILM 164, paras 441–5.
\textsuperscript{250} Ibid, para 445.
\textsuperscript{251} UNCLOS art 78(2).
\textsuperscript{252} See M/V ‘Saiga’ (No 2) paras 155–6.
\textsuperscript{253} UNCLOS art 246(2).

attack the world oil price rose 9.9 per cent, a clear sign that a successful attack could cripple Iraq’s economy and seriously disrupt global energy markets’. Sean Hobbs, ‘Guarding the Gulf’ \textit{The Diplomat} (March/April 2008) 23, 23.
withheld when the research is ‘of direct significance for the exploration and exploitation of natural resources’, if it involves drilling into the continental shelf or the ‘construction, operation or use of artificial islands, installations and structures’. If consent is granted, then the coastal state retains the right to suspend marine scientific research activities if they are not conducted in accordance with the terms on which the consent was based or if the researcher fails to comply with various requirements laid down by the coastal state. This suspension may lead to a requirement of cessation of the activities, though responsibility and liability may accrue to states and competent international organizations for measures taken against scientific research in contravention of UNCLOS. In this scenario, enforcement powers are limited to the cessation of the research rather than taking steps to arrest and prosecute the offending vessel. These powers are most relevant in terms of maritime security to the extent a coastal state may wish to argue that its economic security is being undermined or in a scenario where exploration activities may not only be useful for scientific purposes but also have military significance.

(2) Submarine cables and pipelines

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

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

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254 UNCLOS art 246(5). Though under art 246(6), this discretion to withhold consent for the exploration and exploitation of natural resources does not apply in relation to the continental shelf beyond the 200-mile limit unless the coastal state has designated specific areas in which such activities may be undertaken.

255 UNCLOS art 253.

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

257 UNCLOS art 263(2).

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

259 UNCLOS art 208 and art 214.

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

Ronzitti has gone slightly further, arguing that as the coastal state only exercises sovereign rights over this area, as opposed to sovereignty, a third state would be entitled to take action to prevent damage to its pipeline (or cable, presumably). This approach is in line with the general position of the International Law Commission as to what sovereign rights entail. Any steps taken in this regard would at least need to be consistent with the requirement set forth in Article 58 of UNCLOS that states must have due regard for the rights and duties of the coastal state and comply with its laws and regulations. This approach may be preferable rather than relying on the flag state, which may have no interest in the particular cable or pipeline, to take the necessary action against the offending vessel or individuals.

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

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

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


265 1884 Paris Convention art IX.

266 Ronzitti, ‘The Law of the Sea’ 7. See also Green and Burnett, ‘Security of International Submarine Cable Infrastructure’ 558.
Artificial islands, installations, and structures

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

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

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267 Which applies mutatis mutandis to the continental shelf by virtue of art 80 of UNCLOS.
268 Kaye notes ‘the extent of measures a state can implement to protect such platforms and their associated facilities is undefined’. Kaye, ‘International Measures’ 378.
269 UNCLOS art 60(5).
270 UNCLOS art 60(4).
273 Ibid 408.
continental shelf. These rights have particular importance when considering the number of small fishing and other vessels (dhow) that traverse the Persian Gulf and thereby pass in the vicinity of the oil terminals.

Greater enforcement powers for the protection of platforms have been accorded under the 1988 Protocol to the SUA Convention. The 1988 SUA Protocol applies to ‘fixed platforms’ on the continental shelf. A ‘fixed platform’ is defined as ‘an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes’. Among the exclusions from this definition are structures and installations used for marine scientific research or for military purposes.

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

However, gaps remain within this regime. One example is when a third state operates a fixed platform on the continental shelf of a coastal state. The third state would only be able to rely on claims of self-defence if it sought to rescue its nationals on the platform if they were being held hostage by terrorists. The 1988 SUA Protocol anticipates that existing rules of international law will continue to apply to situations not covered by its terms, and a third state would be unable to board a platform asserting jurisdiction that would run counter to the exclusive jurisdiction of the coastal state. While revisions to the 1988 SUA Protocol were undertaken in 2005 to expand the range of offences, third states were not given any authority to intervene to protect a fixed platform on the continental shelf of a coastal state.
While arguably the sovereign rights of the coastal state have been emphasized in relation to law enforcement powers over artificial islands, installations and structures, it is still notable that the freedom of navigation has been protected to the extent that only small safety zones are allowed. However, the powers of all states have been enhanced in relation to responding to certain acts of terrorism against fixed platforms under the 1988 SUA Protocol and the subsequent revisions in 2005. Gaps still remain in this regime but there has been a certain degree of consensus in addressing one of the key maritime security threats in relation to the exploration and exploitation of the continental shelf.

(4) Conclusion

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

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

Various scenarios expose the gaps that continue to exist in ascribing law enforcement powers for activities related to or on the continental shelf. Most notable in this regard is the continuing reliance on a legal regime created in 1884 to police offences against submarine cables. Protecting submarine cables is a vital element of a state’s maritime security in view of the economic dependence of a state on telecommunications, particularly for conducting financial transactions internationally. The inadequacies of the existing regime could be seen when Vietnamese fishermen pulled up long lengths of submarine cables to recover the copper used,
seemingly with the authority of the Vietnamese government.288 As a result of their actions, Vietnam was reduced to one working submarine cable to meet its communication needs.289 Analysts examining the international law repercussions of the incident struggled to determine what legal actions could be pursued to prevent the injury.290 Kaye has proposed ‘[a] more radical solution . . . [of] a system of registration of cables and pipelines, giving the State of registration a limited ability to enforce laws to protect pipelines and cables from interference’.291 Alternatively, more authority may need to be accorded to the coastal state to intervene to protect submarine cables and to establish safety zones to prevent anchoring in their vicinity.292

H. High Seas

As set forth in Chapter 1, for almost 400 years, the foundational concept for the law of the sea has been the principle of *mare liberum*, the freedom of the seas. The emphasis has thus been on retaining inclusive enjoyment of this ocean space, and only permitting exclusive claims to prevail if they ‘serve the common interest where the impacts of use are especially critical for a particular state and the restrictions upon inclusive use are kept to the minimum’.293

Instead of claims of rights or control over this ocean space, a state has authority over the vessels that ply these areas under the flag of that state. Garvey has proclaimed that ‘[f]lag state jurisdiction [is]...a highly significant embodiment of the general principle of freedom of the seas’.294 It is the very fact that the high seas are open to all states that means that no one state is then able to exert control or authority over the vessels traversing the oceans unless the vessel has a tie to that particular state. The focus in this part of the chapter is on the law enforcement powers granted to states on the high seas. In doing so, the exclusivity of flag state jurisdiction comes under further scrutiny. The pre-eminence of this position was articulated in the 1817 judgment of *Le Louis*:

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

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

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

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

295 Le Louis (1817) 2 Dods 210, 243 (per Lord Stowell, Sir W. Scott).
296 SS Lotus Case (France v Turkey) [1927] PCIJ Ser A No 10 (7 September) 25.
297 UNCLOS art 89 (‘No State may validly purport to subject any part of the high seas to its sovereignty’).
298 UNCLOS art 92. Joyner emphatically denies that there is any existing right under customary international law to permit the interdiction of foreign flagged vessels on the high seas. Daniel H. Joyner, ‘The Proliferation Security Initiative: Nonproliferation, Counterproliferation and International Law’ (2005) 30 Yale JIL 507, 536–7. ‘Customary law has always regarded the jurisdiction of the flag State over its vessels as primary, and exclusive except in as far as another jurisdiction is conceded by a rule of law or by treaty.’ Shearer, ‘Problems of Jurisdiction’ 339.
299 UNCLOS art 92.
301 UNCLOS art 91(1).
302 UNCLOS art 91(1).
304 In the IMCO Advisory Opinion, the ICJ stated: ‘The criterion of registered tonnage is practical, certain and capable of easy application. Moreover, the test of registered tonnage is that which is most consonant with international practice and with maritime usage’. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion) [1960] ICJ Rep 150, 169. On this basis, the Court accepted that registration eo ipso provided a sufficient link of nationality in relation to ships.
The standard has allowed for flags of convenience to flourish and shipping companies have profited by registering their vessels with states that impose low or no taxes or costs on registration and that provide minimal surveillance in enforcing various international requirements in relation to the vessel itself as well as its activities.

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

Adherence to the exclusive authority of flag states over vessels has inevitable implications for vessels lacking nationality, or, in other words, not being registered with any state. The common view here is that unregistered vessels have forfeited their right to freedom of navigation on the high seas. One result is that where a warship encounters a vessel and has a reasonable suspicion that the vessel lacks nationality, it may then board that vessel. Also, when a warship has suspicions as to the nationality of a vessel, including whether a ship is of the same nationality as the warship, even though flying a foreign flag or refusing to show its flag, the warship is entitled to board the ship to verify its suspicions.

This latter authority offered a lawful basis for the boarding of a vessel, the M/V So San, that departed North Korea and was headed to Yemen. Concerns about the nationality of the M/V So San provided the justification for the Spanish Navy to board the (seemingly) Cambodian vessel wherein 15 Scud missiles were discovered on board. Although the boarding was lawful in this context, there was no

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305 UNCLOS art 94(6).
307 Reuland has noted that ‘harsh treatment of stateless vessels is justified by the danger that stateless vessels pose to the international regime of the high seas’. Reuland, ‘Interference with Non-National Ships’ 1198. See also ibid 1199 (referring to the confiscation of the Asya, which flew a Palestinian flag and so was treated as stateless by the United Kingdom).
308 UNCLOS art 110(1).
309 UNCLOS art 110(1).
prohibition on the delivery of the weapons to Yemen and the vessel was released in order to complete its journey. Without the query as to nationality, the boarding would have been viewed as an illegal interference with high seas freedoms.

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

The instances where states may exercise enforcement powers against a foreign flagged vessel on the high seas are discussed in this part. One of the main avenues is the right of hot pursuit. Enforcement activities may also be undertaken on the high seas through the right of visit in relation to piracy, slave trading, drug trafficking, people smuggling, and unauthorized broadcasting. These enforcement activities may be undertaken by warships, as well as by vessels ‘clearly marked and identifiable as being on government service and authorized to that effect’. As such, government vessels that are not accorded policing powers may not carry out enforcement measures at sea.

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

315 Though to this end, McDougal and Burke comment as follows: ‘To purport to confer upon states a limited measure of occasional, exclusive competence to prescribe with respect to activities in contiguous zones, and in some instances even in noncontiguous areas, for securing common interests, and yet at the same time to deny to states the necessary means to make their prescriptions effective, could only be to make a mockery of processes of authoritative decision. Any adequate formulation of the doctrine of the freedom of the seas must, accordingly, be made flexible enough to accommodate this necessary measure of occasional, exclusive competence to apply.’ McDougal and Burke, The Public Order of the Oceans 869.
responding to maritime security threats warrants reconsideration of this entrenched position and anticipates that further challenges to exclusive flag state control should be pursued.

(1) Right of hot pursuit

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

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

The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state, including violations of laws and regulations of the EEZ and the continental shelf. While there is no specific limitation on what laws or regulations a coastal state may seek to enforce through hot pursuit, the

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318 See *M/V ‘Saiga’ (No 2)* para 146.

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


321 UNCLOS art 111(1) and (2). Article 111 follows art 23 of the High Seas Convention.
resources involved tend to augur in favour of coastal states only exercising this right in response to more serious offences.\textsuperscript{322} Recent dramatic pursuits include Australia’s 14-day pursuit of the \textit{South Tomi} and the 21-day pursuit of the \textit{Viarsa} in defence of Australia’s fisheries in the Southern Ocean.\textsuperscript{323}

Hot pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, archipelagic waters, territorial sea, or contiguous zone of the pursuing state, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted.\textsuperscript{324} Hot pursuit may begin in the contiguous zone, the EEZ, and the continental shelf for offences against the law relating to those zones. It is deemed to have commenced when the pursuing military vessel is satisfied by such practicable means as may be available that the ship pursued is within the limits of the territorial sea, contiguous zone, EEZ or above the continental shelf.\textsuperscript{325} This formulation permits some level of subjectivity and may allow for the situation that a hot pursuit is still lawful even when subsequent calculations indicate that the pursued vessel was just outside a maritime zone under the jurisdiction of the coastal state.\textsuperscript{326} It is an appropriate acknowledgement of difficulties that may be faced at the practical level. The permissible margin of error should diminish, however, as the technology to locate target vessels becomes more accurate and the pursuing state has access to this technology.

One of the criteria to be met for a lawful hot pursuit is that a visual or auditory signal to stop must be given by the pursuing ship within a distance for that signal to be seen or heard by the foreign ship.\textsuperscript{327} It has been suggested that this formulation prevents the use of radio.\textsuperscript{328} However, recent state practice has indicated that radio broadcasts are used as a signal to stop,\textsuperscript{329} and this practice should be accepted as a reasonable development of the signalling requirements. The pursuing ship does not have to be in the territorial sea or contiguous zone itself at the time that it gives the order to stop.\textsuperscript{330}

\textsuperscript{322} See Reuland, ‘The Customary Right’ 566–8; Allen, ‘Doctrine of Hot Pursuit’ 315.
\textsuperscript{323} See Baird, ‘Illegal, Unreported and Unregulated Fishing’ 325–7 (commenting on the pursuits of the \textit{South Tomi}, the \textit{Lena} and \textit{Viarsa I}). For a full account of the 21-day pursuit of the \textit{Viarsa}, see G. Bruce Knecht, \textit{Hooked: Pirates, Poaching, and the Perfect Fish} (Rodale, New York 2006).
\textsuperscript{324} UNCLOS art 111(1).
\textsuperscript{325} UNCLOS art 111(4).
\textsuperscript{326} This was the position taken by Australia in the \textit{Volga}, as it was determined that the fishing vessel was just outside Australia’s EEZ at the time the pursuit commenced. The arresting vessel was of the view that the pursued vessel was within the EEZ at the time. \textit{Volga Case} para 33. On the subjective approach, it could be argued that Australia’s pursuit was not unlawful for this reason. This point was not ultimately determined by ITLOS as it was a question outside the scope of the prompt release proceedings. Ibid para 83. See also Klein, \textit{Dispute Settlement} 96–7.
\textsuperscript{327} UNCLOS art 111(4).
\textsuperscript{328} See Reuland, ‘The Customary Right’ 583; McDougal and Burke, \textit{The Public Order of the Oceans} 917–18; O’Connell, \textit{The International Law of the Sea} 1091.
\textsuperscript{329} Baird, ‘Illegal, Unreported and Unregulated Fishing’ 328. Baird questions whether art 111(4) could be read so far as to allow communications via fax or email. Ibid 328.
\textsuperscript{330} UNCLOS art 111(1).
The right of hot pursuit is no longer available under UNCLOS once the ship pursued enters the territorial sea of its own state or of a third state. Reuland has posited that this limitation marks the balance between the coastal state’s interest in the enforcement of its laws, the community interest in the freedom of the seas, and the ongoing importance of territorial integrity. The requirement has been adjusted within the regional context of the Committee for Eastern Central Atlantic Fisheries whereby a contracting state, in whose territorial waters a pursued ship takes refuge, ‘has a duty to arrest the vessel and escort it to the pursuing patrol boat.’ Other international agreements have similarly sought to deviate from this position by a state allowing for hot pursuit by third states to continue into their territorial sea. An example is the bilateral treaties between Australia and France.

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

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

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

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

Another complicating scenario for the right of hot pursuit has been the use of ‘mother ships’, whereby a vessel is considered constructively present within the coastal state’s waters because it supports smaller vessels that so enter. There is reliance on the notion of constructive presence in this regard. UNCLOS refers to the foreign ship ‘or one of its boats’ being within the waters of the pursuing

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

341 McDougal and Burke have argued that the pursuit may be resumed when a pursued vessel re-emerges from the territorial sea of a third state. McDougal and Burke, The Public Order of the Oceans 898. See also Allen, ‘Doctrine of Hot Pursuit’ 320. Colombos, Poulantzas and Reuland have disagreed with this position. Poulantzas, The Right of Hot Pursuit 231; C. John Colombos, The International Law of the Sea (6th edn, D. McKay Co, New York 1967) 169–70; Reuland, ‘The Customary Right’ 581. Poulantzas qualifies his view, though, in suggesting that there is no interruption where the pursued vessel has entered the territorial sea with the obvious intention of evading the law. See Poulantzas, The Right of Hot Pursuit, 231.

342 See Baird, ‘Illegal, Unreported and Unregulated Fishing’ 328.


344 See Gullett and Schofield, ‘Pushing the Limits’ 568.

345 See Gullett and Schofield, ‘Pushing the Limits’ 568.

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

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

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

\begin{itemize}
\item \textsuperscript{347} UNCLOS art 111 (1).
\item \textsuperscript{349} See Gullett and Schofield, ‘Pushing the Limits’ 570.
\item \textsuperscript{351} See Poulantzas, The Right of Hot Pursuit xvi–xix, referring to the Koyo Maru No 2 case and The F/V Taiyo Maru No 28 case. Poulantzas also considers that the ‘legal technicalities of the right of hot pursuit were erroneously invoked’ in relation to The Answer Case. Ibid xxv.
\item \textsuperscript{352} UNCLOS art 111(8).
\item \textsuperscript{353} Russia threatened to pursue litigation against Australia for its allegedly unlawful pursuit of the Volga during the prompt release proceedings for this vessel. See The Volga—Application for Release of Vessel and Crew, Memorial of the Russian Federation para 25. <http://www.itlos.org/case_documents/2002/document_en_209.doc>. This threat was never realized. The legality of Australia’s hot pursuits has, however, been raised in prosecutions for fisheries offences. See Knecht, Hooked (discussing the litigation following the pursuit of the Viarsa) 205–41.
\item \textsuperscript{354} Churchill and Lowe, The Law of the Sea 216. See also Allen, ‘Doctrine of Hot Pursuit’ 322–5 (discussing the use of modern technology to facilitate hot pursuit).
\end{itemize}
coastal state laws, the impingement on exclusive flag state authority is contained and maritime security promoted.

(2) Right of visit

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

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

355 See Reuland, ‘Interference with Non-National Ships’ 1169 (distinguishing between the right of reconnaissance and the droit de visite, which involves the droit d’enquête du pavillon and the right of search).
356 See ibid 1169.
357 See ibid 1170. Reuland further notes, ‘Much remains...of the historical distaste for this right, which is regarded today as a necessary evil; while states indeed acknowledge the right, they do so grudgingly.’ ibid 1170 n 22.
358 There are also limited instances where a state may prescribe and enforce certain measures against foreign vessels in the EEZ and on the high seas in order to protect and preserve the marine environment (as in UNCLOS art 221), or for the management and conservation of fisheries (as anticipated in UNCLOS art 73). See further Shearer, ‘Problems of Jurisdiction’ 333–41. Anderson has also suggested the right exists in relation to “mother” ships: ‘A further application of the right is implied in Article 111(4) [of UNCLOS] in the case of a “mother ship” which remains outside the EEZ whilst its boats or other craft work as a team inside: since the “mother ship” could be the object of hot pursuit, it may be visited and searched, according to the doctrine of constructive presence, by a public vessel from the coastal State even before the commencement of pursuit.’ Anderson, ‘Freedoms of the High Seas’ 341–2.
359 See UNCLOS art 109(3).
360 UNCLOS art 110(1).
361 Jesus, ‘Protection of Foreign Ships’ 373. Dupuy and Vignes have described the inclusion of unlawful broadcasting and slavery among the bases for the right of visit as ‘innovatory’. Dupuy and Vignes, A Handbook on the New Law of the Sea 421. They further consider, ‘As a blow struck at the
Under Article 110, states anticipated that additional bases for conducting the right of visit could be agreed by states. Such an exception accounted for the fact that the right of visit had already been accorded for situations other than those listed in Article 110 prior to the adoption of UNCLOS. Article 6 of the 1958 High Seas Convention similarly permitted states to consent to interference with their vessels only ‘in exceptional cases expressly provided for in international treaties.’ States are thus entitled to enter into formal agreements to limit their sovereignty in relation to their authority over vessels flagged to them on the high seas. Therefore, despite the considerable emphasis placed on the pre-eminence of a flag state’s exclusive jurisdiction, it is apparent that this principle is not immutable.

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

principle of the exclusivity of the flag State, the States have always been hostile to the recognition of the right of search, even in the framework of a convention.’ Ibid 421.

Article 110 of UNCLOS anticipates additional ‘powers conferred by treaty’ in setting forth the right of visit. UNCLOS art 110(1).

Article 6(1) reads: ‘Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.’ Convention on the High Seas (1958) 450 UNTS 11 art 6(1).


Siddle, ‘Anglo-American Co Operation’ 726.


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

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

One polemic aspect of the right of visit has been the permissible degree of force that may be used. Article 25 of UNCLOS is, according to Shearer, the ‘sole reference to the degree of force to be used in enforcement measures’. In the *I’m Alone* arbitration, the incidental sinking of a vessel in the course of efforts to board, search, and seize a suspect vessel was considered acceptable, but the intentional sinking of such a vessel was not justified. However, Shearer has questioned this assessment in view of the circumstances involved and considers that the use of force was disproportionate as the gravity of the offence should be weighed against the value of human life, and here rum-running was not so grave as to warrant endangering human life. He further considers that fisheries or minor pollution offences would also be out-balanced by the value of human life, and questions whether large cargo of narcotics, or gun-running, or dumping of poisonous chemicals would be different. The *Red Crusader* incident also considered the

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371 UNCLOS art 110(2).
372 UNCLOS art 110(3).
374 See Mellor, ‘Missing the Boat’ 381.
375 Shearer, ‘Problems of Jurisdiction’ 341. Article 25(1) simply provides: ‘The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.’
376 *I’m Alone Case* (1935) 3 RIAA 1609.
378 See ibid 342. Shearer’s view aligns with that of McDougal and Burke. McDougal and Burke, *The Public Order of the Oceans* 885–6.
legitimate use of force to stop a vessel. There, a Commission of Inquiry considered that firing without warning of solid (as opposed to blank) gun shot and creating danger to human life on board was in excess of what was necessary in pursuit of a fishing vessel fleeing arrest. The implication is that firing live ammunition is impermissible in arresting vessels. Gilmore has noted that the I'm Alone and Red Crusader decisions are both controversial and of questionable value in framing rules of engagement.

More recently, this question was addressed in the M/V ‘Saiga’ (No 2). There, ITLOS considered that ‘the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances’. Efforts must first be made to hail the vessel or to fire across its bow before resorting to direct force against the vessel. ‘Methods other than gun-fire are to be used wherever possible where the pursued vessel refuses to stop, for instance, outmanoeuvring, high pressure water hoses to short the electrics of the pursued vessel, harpooned sheets to foul propellers, etc.’

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

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

379 The Red Crusader (Commission of Enquiry Denmark v United Kingdom (1962) 35 ILR 485.
380 Ibid.
382 M/V ‘Saiga’ (No 2) para. 155.
384 Shearer, ‘Problems of Jurisdiction’ 342.
385 2003 Caribbean Agreement art 22. See also Gilmore, Caribbean Area 36.
386 2003 Caribbean Agreement arts 22(7) and (9). A similar, albeit less detailed approach, was taken in the 2008 CARICOM Agreement. See 2008 CARICOM Agreement art XIV.
387 Gilmore, Caribbean Area 37.
388 Kwast, ‘Maritime Law Enforcement’ 65.
authority over vessels on the high seas, despite the seriousness of the problems that need to be addressed.

(a) Piracy

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

Universal jurisdiction exists over pirates, who are viewed as *hostis humani generis*: ‘On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.’ This universal jurisdiction has been recognized due to the threat to commerce posed by acts of piracy. Pirates are objects of international law inasmuch as their conduct is regarded as so heinous as to forfeit their right of protection of their state of nationality and an accusing state may therefore proceed directly against them. ‘This is because the character of piracy is such that it would be impossible to hold any State responsible for their acts and, by pursuing such a lawless occupation on the high seas, they have shown themselves unwilling to keep the laws and regulations of States generally.’ Application of universal jurisdiction to piracy could also be supported by the facts that it is largely reactive, rather than preventive, in nature, and that a party is liable under international law if a ship is seized without adequate grounds. However, at the point that the acts were not threatening to all states or the act was done under the authority of a state, universal jurisdiction would no longer be available.

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

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389 Jesus, ‘Protection of Foreign Ships’ 364 (noting also the view that the ‘very first time something valuable was known to be leaving a beach on a raft the first pirate was around to steal it’). See also Maximo Q. Mejia Jr, ‘Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence’ (2003) 2 Journal of International Commercial Law 153, 158 (noting the etymology of the word ‘piracy’ may be traced to Latin and Greek, denoting the existence of the act from as early as 140 BC).


391 Enemies of all humankind.

392 UNCLOS art 105.


395 Ibid.

396 See Becker, ‘The Shifting Public Order’ 207.

397 Ibid.

either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel. A line used simply to be drawn between acts of piracy and acts of war when addressing acts of violence at sea. This division is reflected in the English case of *In re Piracy Jure Gentium*, where the court accepted that piracy is ‘any armed violence at sea which is not a lawful act of war’. After surveying a range of commentators and codification efforts on piracy, Halberstam concluded that ‘[t]he customary law of piracy can be best understood as an attempt to balance the need for universal jurisdiction against the reluctance of states to permit encroachment on their exclusive jurisdiction’.

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

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

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400 *Re Piracy Jure Gentium* (1934) App Cas 586, 598.
401 Malvina Halberstam, ‘Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety’ (1988) 82 *AJIL* 269, 288. See also Becker, ‘The Shifting Public Order’ 207 (‘In simplest terms, the emphasis on suppression of piracy in the law of the sea reflects a long-shared view among states that the menace of piracy operates to the detriment of the community at large, and that the community benefits more from a shared capacity to police the seas against this threat than it is hurt by the limited exception to exclusive jurisdiction over vessels at sea’).
402 UNCLOS art 101.
406 This common understanding has been credibly challenged by Guilfoyle, who argues that ‘private ends’ is not a question of subjective motivation of those involved but rather the lack of public sanction. See Guilfoyle, *Shipping Interdiction* 32–42.
408 It was due to the narrow definition of piracy included in UNCLOS, and now accepted as customary international law, that the 1988 SUA Convention was required. The acts of those responsible for the hijacking of the *Achille Lauro* and the murder of Mr Klinghoffer could not be
visit against foreign vessels on the high seas. Some effort has been undertaken to merge consideration of piracy and terrorism. The Joint International Working Group for Uniformity of the Law of Piracy and Acts of Maritime Violence, organized by the Maritime Law Association of the United States and the Comité Maritime International, devised a Model National Law on Acts of Piracy or Maritime Violence, which was intended to incorporate acts covered in the 1988 SUA Convention as well as the definition of piracy to allow for a more comprehensive coverage through reference to ‘maritime violence’. This approach would certainly expand the steps that states may take against terrorists on the high seas, but has not been the preferred option in view of the efforts undertaken to revise the 1988 SUA Convention through the 2005 SUA Protocol.

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

Roach has commented:

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

In addition to initiatives to address armed robbery in the territorial sea and in straits, states have sought greater cooperation to address piracy. At the proposal of Japan, Southeast Asian states instead adopted in 2004 a Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia characterized as piracy. See Garmon, ‘International Law of the Sea’ 262; Halberstam, ‘Terrorism on the High Seas’ 276.

Mejia, ‘Maritime Gerrymandering’ 173.

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


Jesus, ‘Protection of Foreign Ships’ 364.

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


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

(ReCAAP), which addresses piracy on the high seas and armed robbery within a state party’s jurisdiction. Although the scope of the agreement therefore encompasses the territorial seas, archipelagic waters, and internal waters of the state parties, it does not allow for the exercise of enforcement jurisdiction where that role is ‘exclusively reserved for the authorities’ of the state party ‘by its national law’. The centrepiece of this agreement is the establishment of an Information Sharing Centre designed to improve operational cooperation in responding to acts of piracy and armed robbery, as well as enabling the development of more effective prevention measures.

The incidence of piracy remains of international concern, particularly in view of its surge off the coast of Somalia in recent years. States have responded by taking cooperative law enforcement action to protect international shipping, including the delivery of food aid to Somalia and the passage of recreational and fishing vessels. A Code of Conduct has been negotiated among states in the region, which allows for the use of ship-riders, whereby a law enforcement official from one state would travel on the vessel of another state and exercise flag state authority against its vessels. The Security Council has also acted to enhance these law enforcement efforts when pirates have fled to the territorial sea, or back to land. These Security Council authorizations are discussed further in Chapter 6. Piracy clearly poses an ongoing challenge to states seeking to improve maritime security. While definitional ambiguities and limitations remain, key responses to piracy appear to lie more in cooperative efforts at a practical level and in adjustments to national law to ensure that universal jurisdiction for prosecutions exist.

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417 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (2004) 2398 UNTS 199 [‘ReCAAP’]. This Agreement is discussed in more detail in Chapter 5, Part D(1).
418 See ReCAAP art 1.
419 ReCAAP art 2(5). Article 2(2) also provides: ‘Nothing in this Agreement shall affect the rights and obligations of any Contracting party under the international agreements to which that Contracting party is party, including the UNCLOS, and the relevant rules of international law.’
420 ‘Fact Sheet on Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)’ paras 5–6 <http://app.mot.gov.sg/data/ReCAAP%20factsheet%20Nov06_%20%5BFINAL%5Das%20of%20281106.pdf>.
421 The European Union has undertaken Operation Atalanta, the United States has been involved in a multinational coalition of naval forces and individual states have further deployed naval vessels to the region in an effort to combat the incidence of piracy. See Kraska and Wilson, ‘The Pirates of the Gulf of Aden’ 245–6 and 262–3.
422 2009 Code of Conduct art 7. See also Guilfoyle, Shipping Interdiction 72–3.
425 The deficiencies in national prosecution of pirates have resulted in the Security Council calling upon UN member states to criminalize piracy in their national laws, as well as asking the UN Secretary-General to examine ‘possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements’. UNSC Res 1918 (27 April 2010) UN Doc S/RES/1918.
(b) Slavery, people smuggling, and trafficking

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

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

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

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428 As explained by Guilfoyle: ‘An interdiction has two potential steps. The first stage is stopping, boarding and searching the vessel for evidence of the prohibited conduct. . . . Where boarding reveals evidence of such conduct, the arrest of persons on board and/or seizure of the vessel or its cargo may follow . . . The boarding and seizure stages of interdiction involve different exercises of enforcement jurisdiction.’ Douglas Guilfoyle, ‘Maritime Interdiction of Weapons of Mass Destruction’ (2007) 12(1) Journal of Conflict and Security Law 1, 4.
429 Le Louis (1817) 2 Dods 210.
430 Convention to Suppress the Slave Trade and Slavery (1926) 60 LNTS 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) 226 UNTS 3.
There has instead been a move away from this position with what is often considered a modern version of slavery: people smuggling and trafficking.\textsuperscript{432} ‘Interlinked transnational gangs traffic by land and by sea an estimated four million people every year as “human cargo”.’\textsuperscript{433} It has been estimated that the annual earnings from this trafficking have reached $US5–7 billion.\textsuperscript{434} A distinction is drawn between individuals who are subject to people smuggling and those subject to people trafficking, whereby the former refers to individuals who are either asylum seekers or are seeking to enter a country through illegal immigration routes, and those involved in the latter are subject to coercion or deception in illegally entering a country and may be subjected to continued exploitation upon arrival in another country. While slavery, people (or more specifically, migrant) smuggling, and people (or human) trafficking are distinct legal categories, when sea transportation is involved, slavery and people trafficking commonly involve smuggling.\textsuperscript{435}

Migrant smuggling is perceived as a threat by states because of concerns about the lack of identification of those arriving in a state (and particularly whether they have any criminal links), quarantine and health risks, logistical problems, and costs as well as the infringement of a state’s sovereignty given the unlawful violation of its borders.\textsuperscript{436} The transport of unlawful migrants has also become particularly hazardous as the vessels are often grossly overloaded or are extremely unsafe.\textsuperscript{437} States have taken increasingly active measures to curb flows of illegal migrants and refugees seeking to enter a state’s territory.\textsuperscript{438}

Issues responding to persons in distress at sea as well as questions of refugee law, and particularly the non-refoulement obligation,\textsuperscript{439} are relevant when addressing migrant smuggling at sea.\textsuperscript{440} Coastal state efforts to prevent the illegal entry of migrants may


\textsuperscript{433} Roach, ‘Initiatives’ 43.

\textsuperscript{434} Ibid.

\textsuperscript{435} See Guilfoyle, \textit{Shipping Interdiction} 180–1. For a discussion on the difference in definition between human trafficking and slavery, see ibid 228–31.


\textsuperscript{437} Roach, ‘Initiatives’ 43.

\textsuperscript{438} One of the more notorious incidents being Australia’s refusal to allow the \textit{M/V Tampa} to offload illegal migrants who had been rescued from a sinking vessel by the Norwegian cargo vessel. See Donald R. Rothwell, ‘The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty’ (2002) 13 \textit{Public Law Review} 118. See also Papastavridis, ‘Interception of Human Beings’ 149–50 (discussing recent European practice in the Atlantic and Mediterranean regions).

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

run counter to obligations associated with refugee protection if the denial effectively results in a refugee being returned to the place of persecution.\footnote{Guilfoyle, \textit{Shipping Interdiction} 222–3; Barnes, ‘Refugee Law at Sea’ 62–3.}

After reviewing state practice and the relevant legal obligations, Guilfoyle has commented:

Maritime interdiction of irregular migrants without providing some form of refugee screening process is strictly incompatible with the Refugee Convention and Protocol. However, as irregular migration by sea increases worldwide there appears a growing perception among ‘point of entry’ states that they are unable to cope with the numbers arriving and preventative maritime patrols are a legally permissible response.\footnote{Guilfoyle, \textit{Shipping Interdiction} 225.}

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

An initial response to the increasing problem of migrant trafficking came from the IMO. In 1998, the IMO adopted interim, non-binding measures for combating unsafe practices associated with the trafficking or transport of migrants by sea.\footnote{IMO Assembly, ‘Interim Measures For Combating Unsafe Practices Associated With The Trafficking Or Transport Of Migrants By Sea’ (16 December 1998) IMO Doc MSC/Circ.896 [‘IMO Interim Measures’]. In 2001, the IMO issued revised guidelines for combating unsafe practices associated with the trafficking or transport of migrants by sea. IMO, ‘Interim Measures For Combating Unsafe Practices Associated With The Trafficking Or Transport Of Migrants By Sea’ (12 June 2001) Doc MSC/Circ.896/Rev.1. However, the core elements of the 1998 Circular, which are discussed here, were not altered.\footnote{See IMO Interim Measures, Recommendation 4.} \footnote{IMO Interim Measures, Recommendation 5.} \footnote{IMO Interim Measures, Recommendation 11.} \footnote{IMO Interim Measures, Recommendation 12.}} Among the recommendations set forth by the IMO was that states ensure compliance with the SOLAS Convention; that they collect and disseminate information on ships believed to be engaged in unsafe practices associated with trafficking or transporting migrants; appropriate action to be taken against those involved on the vessel; and preventing any such ship from engaging in unsafe practices and, if in port, from sailing.\footnote{IMO Interim Measures, Recommendation 11.} These measures must all be in conformity ‘with the international law of the sea and all generally accepted relevant international instruments’.\footnote{IMO Interim Measures, Recommendation 12.}

In addition to these prevention measures, the IMO recommendations also extended to possible measures and procedures for suppression. In this context, states could request, and those states requested should render, assistance in dealing with a ship of that state’s nationality (or a stateless vessel) reasonably suspected for being engaged in unsafe practices associated with the trafficking or transport of migrants at sea.\footnote{IMO Interim Measures, Recommendation 12.} For foreign flagged vessels, the recommendations allow for states to request authorization from the flag state ‘to take appropriate measures in regard to that ship’.\footnote{IMO Interim Measures, Recommendation 12.} Given their non-binding nature, these IMO recommendations did not constitute a power conferred by treaty for exercising the right of visit on the
high seas. Such authority must be manifested in a binding instrument under Article 110 of UNCLOS. However, their availability provides a frame of reference for states that are not parties to any other binding agreement addressing this issue.

In 2000, the Convention on Transnational Crime was adopted, and one of its protocols addressed the question of migrant smuggling, including migrant smuggling at sea. The purpose of the 2000 Migrant Smuggling Protocol is ‘to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants’. As a result, the Migrant Smuggling Protocol requires states parties to criminalize a range of activities relating to migrant smuggling, as well as migrant smuggling itself. In the scope of offences for migrant smuggling addressed by the Migrant Smuggling Protocol, it is important to note that the offences are to be transnational in nature and involve an organized criminal group. These characteristics may potentially limit the scope of the treaty. Under the Migrant Smuggling Protocol, smuggling of migrants means ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’.

Section II of the Migrant Smuggling Protocol addresses smuggling of migrants at sea specifically. Vessels potentially targeted in relation to migrant smuggling by sea may encompass ‘any type of water craft’, except for those subject to immunity. The interpretive notes adopted at the time of the negotiations provide that in interpreting what vessels are ‘engaged’ in migrant smuggling, there is to be a broad interpretation to address vessels directly and indirectly involved, particularly so ‘mother ships’ would be included. An initial obligation imposed on states parties is to ‘cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea’.

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

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450 Migrant Smuggling Protocol art 2.
451 See Migrant Smuggling Protocol art 6 (which also intends states to criminalize acts associated with migrant smuggling, such as producing fraudulent travel or identity documents).
452 Migrant Smuggling Protocol art 4 (thereby seeming to exclude the less likely scenario of a one-off attempt at migrant smuggling, or independent operators).
453 Migrant Smuggling Protocol art 3(a).
454 Migrant Smuggling Protocol art 3(d).
456 Migrant Smuggling Protocol art 7.
means.\textsuperscript{457} States may otherwise proceed to take appropriate measures against stateless vessels ‘in accordance with relevant domestic and international law’.\textsuperscript{458} A state party that has reasonable grounds to suspect that a foreign flagged ship is engaged in migrant smuggling may request authorization from the flag state to take appropriate measures, including boarding and searching the vessel and, if evidence of migrant smuggling is found, to ‘take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State’.\textsuperscript{459} The flag state is to be promptly informed of results of any measure taken.\textsuperscript{460} These steps may be taken under Article 8 against a vessel ‘exercising freedom of navigation’ and hence in the EEZ or on the high seas. Interpretive notes adopted in the context of the negotiations of the Migrant Smuggling Protocol indicate that the measures set forth in relation to smuggling migrants at sea may only be taken in the territorial sea of another state with the permission or authorization of the coastal state concerned.\textsuperscript{461}

Requirements imposed on the flag state to facilitate these measures include responding expeditiously to requests regarding information for claims of registration of a vessel and to requests for authorization to board.\textsuperscript{462} For this purpose, flag states are to designate the necessary authorities and notify the Secretary-General of this designation.\textsuperscript{463} Consistent with traditional law of the sea principles, another state would not be able to act against the suspect vessel in the absence of receiving this information or authorization from the flag state. The flag state and the requesting state are to agree to conditions for the authorization to board the suspect vessel, including conditions as to responsibility and the extent of effective measures to be taken.\textsuperscript{464}

A series of safeguards in the Migrant Smuggling Protocol are to apply in relation to measures taken in boarding a suspect vessel exercising the freedom of navigation. These include ensuring the safety and humane treatment of people on board and that any measure taken with regard to the vessel is environmentally sound, as well as taking due account of the need not to endanger the security of the vessel or its cargo and not to prejudice the commercial or legal interests of the flag state or any other interested state.\textsuperscript{465} The safeguards extend to rights under international law generally, in terms of not undermining the authority of the flag state in the exercise of its jurisdiction and control in administrative, technical and social matters as well as seeking to protect the rights of coastal states in their EEZs.\textsuperscript{466} Consistent with Article 110(3) of UNCLOS, if suspicions prove to be unfounded following the

\textsuperscript{457} Migrant Smuggling Protocol art 8(1).
\textsuperscript{458} Migrant Smuggling Protocol art 8(7).
\textsuperscript{459} Migrant Smuggling Protocol art 8(2).
\textsuperscript{460} Migrant Smuggling Protocol art 8(3).
\textsuperscript{462} Migrant Smuggling Protocol art 8(4).
\textsuperscript{463} Migrant Smuggling Protocol art 8(6).
\textsuperscript{464} Migrant Smuggling Protocol art 8(5).
\textsuperscript{465} Migrant Smuggling Protocol art 9(1).
\textsuperscript{466} Migrant Smuggling Protocol art 9(3).
boarding of a vessel, then the vessel is to be compensated for any loss or damage that may have been sustained in situations where the vessel did not commit any act justifying the measures taken.\footnote{Migrant Smuggling Protocol art 9(2).}

Regional efforts have also been pursued to respond to migrant smuggling, through bilateral treaties,\footnote{See Papastavridis, ‘Interception of Human Beings’ 178–87.} as well as cooperative, political arrangements. One example of the latter was the creation of the Bali Process in 2002 among 38 source, transit, and destination states from throughout the Asia-Pacific region. The objectives of the Bali Process include developing more effective information and intelligence sharing; improving cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks; and the enactment of national legislation to criminalize people smuggling and trafficking in persons.\footnote{‘About the Bali Process’ <http://www.baliprocess.net/index.asp?pageID=2145831401>.}
The Bali Process does not create a further legal framework, but is instead driven towards activities that are ‘practical, targeted and focused on capacity building of operational level officials representing justice, law enforcement, foreign affairs and other key agencies involved in combating people smuggling, trafficking in persons and related transnational crime’.\footnote{‘Bali Process Activities’, <http://www.baliprocess.net/index.asp?pageID=2145831402>.} To this end, a number of operational workshops and seminars have been held, and have addressed topics such as model return agreements, as well as legislation workshops.\footnote{‘About the Bali Process’ <http://www.baliprocess.net/index.asp?pageID=2145831401>.} States that are particularly affected by migrant smuggling have sought to enter into bilateral agreements with the states from which the migrants are travelling to enhance law enforcement efforts.\footnote{See Guilfoyle, Shipping Interdiction 187–96 (discussing US practice in relation to Haiti, Cuba, and the Dominican Republic) and 197–8 (referring to confidential bilateral arrangements that Australia has entered into with Thailand, Cambodia, South Africa, and Nauru).}

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

\textbf{(c) Unauthorized broadcasting}

The right of visit is also permissible in relation to the transmission of radio or television broadcasts from a ship or installation on the high seas intended for
reception by the general public contrary to international regulations.\footnote{UNCLOS art 109(2).} The problem of unauthorized broadcasting grew at the end of the 1950s and into the 1960s, particularly in the Baltic, Irish, and North Seas.\footnote{See Hunnings, ‘Pirate Broadcasting’ 410.} At the ‘height’ of unauthorized broadcasting, there were 11 stations transmitting from ships and installations on the high seas.\footnote{See ibid; J.C. Woodliffe, ‘The Demise of Unauthorised Broadcasting from Ships in International Waters?’ (1986) 1 International Journal of Estuarine and Coastal Law 402, 402.} Coastal states were unable to enforce their laws against unlawful broadcasting, as the vessels on which the stations operated were usually registered with flag of convenience states by companies incorporated outside the relevant jurisdiction in order to conceal the true owners and financial interests involved.\footnote{See Woodliffe, ‘The Demise of Unauthorised Broadcasting’ 402.} Unauthorized broadcasting does not currently constitute a major maritime security concern. Its interest rests in demonstrating the steps states are prepared to take to improve law enforcement powers when confronted with activity perceived as a shared threat.

In devising responses to unauthorized broadcasting, there was resistance among the affected states at the time to utilize ‘strong arm action’ that would run ‘counter to the traditional British concept of the freedom of the seas’.\footnote{Ibid, 403, citing to debates in the UK House of Commons and House of Lords, respectively.} The motives for coastal states in claiming jurisdiction included the desire to prevent certain stations operating on wavelengths that had been allocated to other states under international agreement; or to prevent stations operating on wavelengths so close to those allocated that electrical interference was caused.\footnote{Hunning, ‘Pirate Broadcasting’ 413.} States were also motivated by the desire to protect their own broadcasting monopolies or to prevent the development of commercial broadcasting.\footnote{Ibid.} Further, the pirate radio stations broadcast music without the appropriate royalty payments being made to those holding copyright and performing rights.\footnote{Ibid. See also Woodliffe, ‘The Demise of Unauthorised Broadcasting’ 418 (referring to ‘broadcast [of] material (most of which consists of records of “pop” music) without the appropriate royalty payments being made’).} Finally, coastal states were concerned that the pirate broadcasters would avoid paying proper income and other taxes.\footnote{Hunning, ‘Pirate Broadcasting’ 413.} Robertson summarizes these concerns as follows:

The basic problem presented by pirate radio stations was that they struck at the very heart of the comprehensive and sophisticated national and international regulatory schemes adopted by the international community to ensure order and noninterference between uses and users of the radio spectrum. Since the spectrum of radio frequencies allocated to radio broadcasting is limited and a large number of broadcasting states were competing for places on the spectrum, the intrusion of broadcasting stations free to pick their own frequencies and radiated-power levels was bound to create interference with other states.\footnote{Horace Robertson, ‘The Suppression of Pirate Radio Broadcasting: A Test Case of the International System for Control of Activities Outside National Territory’ (1982) 45 Law and Contemporary Problems 71, 75.}
As it was primarily European states that were afflicted by this crime, they sought to adopt an agreement within the Council of Europe. Britain urged the position that there should be ‘concerted action taken within a framework of clearly established jurisdictional rules rather than by resort to innovatory extensions of criminal jurisdiction.’ Some delegations wished to take a bold new initiative to curb what all delegations agreed were abuses in the region, but the majority were cautious about extending the scope of maritime jurisdiction. The affected states within the Council of Europe proceeded to adopt a treaty that established jurisdictional rules in connection with the establishment, operation and facilitation of unlawful offshore broadcasting stations, rather than extending the reach of their criminal jurisdiction into the high seas. The 1965 European Agreement did not, therefore, allow states parties to proceed against each other’s vessels on the high seas.

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

The 1965 European Agreement formed the basis of a proposal for the negotiations of UNCLOS, which resulted in the adoption of Article 109. Under the latter provision, vessels entitled to exercise the right of visit must have jurisdiction over the unauthorized broadcasting based on the offending vessel or installation being of the same flag or registry, the nationality of the offenders, or the vessel or installation is flagged to the state where the transmissions can be received or where authorized radio communication is suffering interference. States are accorded

485 European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territory (1965) 634 UNTS 239.
489 See ibid. The UK could not detain it because it had broadcast outside of UK territory, however it was contrary to UK law to carry out repairs on such a ship, and was put up for sale as a result.
490 See ibid 404–5 (referring to an appeal to the Panamanian government in this regard).
492 Ibid 405–6.
493 UNCLOS art 109(3).
both legislative and enforcement jurisdiction in this regard.\textsuperscript{494} If a military vessel does not have jurisdiction on these grounds, it may not conduct a boarding or seize the suspected vessel or installation, or arrest and prosecute those on board. Note that along with the right of visit, there is a right (for certain categories of states) to seize the offending vessel as well.\textsuperscript{495} The inclusion of this provision [right of visit for unlawful broadcasting] in the Convention and the willingness of states to commit themselves to it is puzzling.\textsuperscript{496} Nonetheless, the importance of the freedom of the high seas demanded that one of these acknowledged bases of jurisdiction exist in order to subject a foreign vessel to the right of visit.

\textbf{(d) Drug trafficking}

Illegal drug trafficking by sea became an increasing problem, especially for the United States, throughout the 1970s. By 1999, one US Coast Guard official wrote: ‘The problems associated with the manufacture, distribution and consumption of illicit narcotics must now be numbered among the most invidious and persistent threats to national security and economic vitality in the post-Cold War era.\textsuperscript{497} The situation has only worsened post-September 11, as drug trafficking at sea has evolved into a major transnational organized criminal endeavour and terrorist groups are reported to use drug trafficking as a source of revenue.\textsuperscript{498}

As one aspect in the growth of this global trade, the United States recognized that there was an increasing use of foreign flag vessels bringing in narcotic substances and it initially developed a procedure for informal, case-by-case agreements to allow for boarding, search, and seizure of these vessels.\textsuperscript{499} Seeking consent in such an ad hoc manner made law enforcement efforts difficult, particularly when an operation could become more complicated (because of weather, time of day, or dumping of drugs overboard) while the US Coast Guard waited for permission to board.\textsuperscript{500} One practice followed by the United States was to undertake what it termed as ‘consensual boarding’ where consent was obtained from the master of the vessel in the first instance and the flag state would then be contacted if law enforcement measures such as arrest or seizure were warranted.\textsuperscript{501} The controversy surrounding this practice led to alternative methods to be sought that paid full respect to flag state authority.

As a starting point to the international legal framework, all that UNCLOS requires is that states parties cooperate in their efforts to suppress the illicit traffic

\textsuperscript{494} Churchill and Lowe, \textit{The Law of the Sea} 212.
\textsuperscript{495} See Dupuy and Vignes, \textit{A Handbook on the New Law of the Sea} 851.
\textsuperscript{497} Williams, ‘Bilateral Maritime Agreements’ 179.
\textsuperscript{498} Roach, ‘Initiatives’ 43.
\textsuperscript{500} See ibid 222 (referring to testimony of Admiral Cueroni of the US Coast Guard before the House of Representatives Subcommittee on Crime).
in narcotic drugs and psychotropic substances engaged in by ships on the high seas.502 The inclusion of this provision was still an advance on the 1958 High Seas Convention, which lacks a comparable provision. There is no specific right granted to warships in UNCLOS to visit, board, and seize a vessel if there is a reasonable suspicion that a vessel is engaged in this illicit trade.503 Instead, all that is anticipated is that the flag state may request the assistance of other states,504 rather than another state initiating action or undertaking more precise measures against foreign flagged vessels involved in drug trafficking on the high seas.505 It is therefore notable that drug trafficking stands in contrast to the rights granted to states to enforce laws related to slavery, piracy and unauthorized broadcasting.

The 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances506 built on the general requirement under UNCLOS to cooperate in the suppression of illicit drug trafficking on the high seas. Article 3 of the 1988 Vienna Convention specifies the most serious international drug trafficking offences and Article 4 requires states to establish jurisdiction over those offences, including when they are committed ‘on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed’. In relation to these offences as relevant for maritime security, the 1988 Vienna Convention refers to states cooperating ‘to the fullest extent possible’, which is intended to augment the requirement of cooperation included in Article 108 of UNCLOS.507 Further, this treaty improves on the situation set forth in UNCLOS by allowing the interception of a ship suspected of illicit trafficking by a state other than the flag state.508 Suggestions that there should be consideration of arrangements for law enforcement authorities to board vessels flying foreign flags were initially considered ‘inappropriate’ and best left to bilateral and regional arrangements.509 The 1988 Vienna Convention did not ultimately provide a general grant of authority for the right to visit foreign vessels suspected of involvement in drug trafficking. Instead, Article 17 sets up a procedure whereby a state party may request permission to board a vessel of another state party when the ship is outside the territorial sea of any state.510 Authorization may be afforded on an ad hoc basis,

502 UNCLOS art 108(1).
504 UNCLOS art 108(2).
505 Gilmore, ‘Drug Trafficking by Sea’ 185.
507 See Gilmore, ‘Drug Trafficking by Sea’ 187 (referring to paras 1 and 2 of art 17). See also Williams, ‘Bilateral Maritime Agreements’ 183.
508 Prescriptive jurisdiction is established under art 4 of the 1988 Vienna Convention.
509 See Gilmore, ‘Drug Trafficking by Sea’ 185 (referring to the response of the relevant expert group involved in drafting the Vienna Convention to a Canadian proposal).
510 1988 Vienna Convention art 17(3).
or by means of separate agreements or arrangements otherwise reached between the states parties.\textsuperscript{511}

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

Article 17 is not intended to be the definitive statement on interdictions to suppress drug trafficking, as the 1988 Vienna Convention expressly accounts for earlier agreements concluded between states addressing the problem, as well as providing a framework for subsequent bilateral and multilateral agreements. One such earlier agreement was an Exchange of Notes between the United States and the United Kingdom from 1981.\textsuperscript{516} This Agreement permitted the interdiction of British-flagged vessels in designated areas of the Caribbean, Gulf of Mexico, and Atlantic Ocean when those vessels were suspected of trafficking in drugs. Reciprocal rights were not accorded to the United Kingdom in relation to any United States vessel. ‘Its provisions are designed solely to facilitate the effective enforcement of US law subject to a number of safeguards for the UK.’\textsuperscript{517} United States law addressed a range of offences relating to the possession of drugs on vessels, as well as the forfeiture of drugs and vessels involved in smuggling.\textsuperscript{518} The Exchange of Notes facilitated efforts at enforcing these laws at sea. At the time of its adoption, the Exchange of Notes was described as a ‘significant departure from the customary rule that on the high seas jurisdiction follows the

\textsuperscript{511} 1988 Vienna Convention art 17(4).
\textsuperscript{512} 1988 Vienna Convention art 17(6). These conditions could include possible responsibility being imposed on the boarding state in the event that damage was caused by unjustified measures. See Gilmore, ‘Drug Trafficking by Sea’ 190.
\textsuperscript{513} See Gilmore, ‘Drug Trafficking by Sea’ 189–90 (referring to an explanatory statement of Australia during the negotiations).
\textsuperscript{514} 1988 Vienna Convention art 17(7).
\textsuperscript{515} 1988 Vienna Convention art 17(11). Concerns about how the boarding provision would implicate rights in the EEZ further led to a reference to its applicability when ‘a vessel [is] exercising freedom of navigation’. See 1988 Vienna Convention art 17(3). See further Gilmore, ‘Drug Trafficking by Sea’ 189 (referring to the implications for the EEZ being one of the primary controversies in the drafting of the boarding provision).
\textsuperscript{516} Great Britain and Northern Ireland: Narcotic Drugs: Interdiction of Vessels, Exchange of Notes (1981) 33 UST 4224 [‘1981 Exchange of Notes’].
\textsuperscript{518} See ibid 732.
flag. The United Kingdom further emphasized that the agreement was not to be regarded as a precedent for the conclusion of any further agreement affecting British vessels on the high seas.

Through this treaty, consent to the visit, search and seizure of the vessel was given in advance and so no further authorization was needed at the point that a vessel wished to conduct a boarding. A boarding by the US Coast Guard would only be justified if there was a reasonable belief that the vessel had on board a cargo of drugs for importation into the United States. Setting such a standard prevents random boardings from being conducted. Upon boarding, the US Coast Guard was required to take necessary steps to establish the place of registration of the vessel, and if these steps suggested that a drug trafficking offense under United States law was being committed, could proceed to search the vessel and then seize it and take it to a US port.

The United States could seize a vessel if ‘it appears that a breach of the laws of the United States’ is being or has been committed. This broader standard facilitates the operations of the US Coast Guard. In this situation, the United Kingdom did reserve its right to object to the continued exercise of US jurisdiction and could thereby forestall forfeiture proceedings. Furthermore, the United Kingdom reserved the right to object to the exercise of jurisdiction over any of its nationals who may have been arrested at the time of the seizure of the vessel, and in which case the United States would be required to release those nationals.

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

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519 Ibid 726. See also Gilmore, ‘Narcotics: UK–US Cooperation’ 226 (referring to a statement of the then Attorney General of the UK that the agreement was ‘quite a compromise of important principles’).
521 The 1981 Exchange of Notes provides that the United Kingdom ‘will not object to the boarding by the authorities of the United States’: art 1.
522 Ibid art 1.
523 UNCLOS arts 2 and 3.
524 1981 Exchange of Notes, para 3.
527 1981 Exchange of Notes art 5. The situation of other nationals may not be affected by this provision, but the UK has noted that all persons should be accorded equal treatment and did not deny that the prosecution of nationals of other states would be of primary concern to their state of nationality. Siddle, ‘Anglo-American Co Operation’ 743 (referring to the UK note accompanying the agreement).
for this purpose, but instead effectively upheld it through the conclusion of a series of treaties.529 The United States has particularly pursued the conclusion of bilateral agreements within the Caribbean and Central and South America.530

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

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

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

529 See Byers, ‘Policing the High Seas’ 539.
530 See Juliana Gonzalez-Pinto, ‘Interdiction of Narcotics in International Waters’ (2008) 15 University of Miami International and Comparative Law Review 443, 453–4 (referring to an inclusive list of 28 states with which the US has concluded agreements to combat drug trafficking and outlining their key features). See also ibid 472–8 (which sets out a model maritime agreement used by the US).
532 Williams, ‘Bilateral Maritime Agreements’ 187.
533 See ibid 188.
534 Rattray, ‘Caribbean Drug Challenges’ 212.
letter or spirit of the 1988 Vienna Convention were not acceptable. There are several aspects of the 1995 European Agreement that elaborate and improve on the requirements set forth in the 1988 Vienna Convention. However, Article 6 of the 1995 European Agreement retained the need for flag state authorization prior to the boarding of a ship by another state party. Proposals relating to the treaty itself affording a basis of consent to a boarding by states parties, or that tacit consent could be established when a flag state failed to respond to a request were rejected. It appears that this requirement is more easily dispensed with when states are negotiating treaties on a bilateral basis, rather than a multilateral basis.

Under the 1995 European Agreement, the flag state must consider a request for boarding in a timely fashion and provide a response, ‘whenever practicable’ within four hours. The flag state retains the authority to determine if any conditions are to be imposed prior to permitting one of its vessels to be boarded, including the possibility to deny permission for the boarding. The boarding state would normally be authorized to stop and board the vessel, establish effective control over it and search for evidence of an offence, as well as requiring the vessel and those on board to be taken to that state’s port for further investigations. Further, arrest and detention of the persons concerned is permissible if evidence is found of an offence. The flag state is to be informed without delay, and either the state

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


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

540 Gilmore, ‘Narcotics: Europe Agreement’ 7. Gilmore does note that some of the negotiating parties were willing to permit a more liberal approach to boarding than was enshrined in art 6 and so predicted the possibility of further bilateral agreements. Ibid.

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

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

543 See 1995 European Agreement art 8.


545 1995 European Agreement art 10.

546 1995 European Agreement art 10(2).
conducting the boarding or the flag state then prosecute any offenders, with the flag state being accorded preference in such a situation of concurrent jurisdiction.\textsuperscript{547}

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

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

\textsuperscript{547} 1995 European Agreement arts 3, 10, and 14.
\textsuperscript{548} These agreements continue in effect under art 31 of the 2003 Caribbean Agreement.
\textsuperscript{549} See Gilmore, \textit{Caribbean Area} 4.
\textsuperscript{550} See 2003 Caribbean Agreement Pmb, art 35. See further Gilmore, \textit{Caribbean Area} 8.
\textsuperscript{551} Ibid. 8. The reference to ‘territories’ takes into account those areas for which their foreign affairs are conducted by other states.
\textsuperscript{552} Ibid 8. The reference to ‘territories’ takes into account those areas for which their foreign affairs are conducted by other states.
\textsuperscript{553} See 2003 Caribbean Agreement art 9.
\textsuperscript{555} 2003 Caribbean Agreement art 6(4).
\textsuperscript{556} See Gilmore, \textit{Caribbean Area} 18.
Consent for ship-boarding is accorded under the terms of the agreement, and so consent does not need to be sought on a case-by-case basis similar to Article 17 of the 1988 Vienna Convention. However, states do have the option of requiring such express consent at the time they sign, ratify, approve or accept the 2003 Caribbean Agreement, or of creating a system where there is deemed consent for boarding if no response is forthcoming within a four-hour period. In the latter two instances, a state party may authorize the requesting state to take all necessary actions to prevent the escape of the vessel pending verification of nationality and decision on authorization for boarding. Allowing for these alternative options to consent by virtue of the treaty itself reflected that states were 'mindful of the fact that such a radical departure from past multilateral treaty practice might pose policy, legal or other difficulties for some jurisdictions.' Further deference to the flag state is seen in its retention of primary jurisdiction over detained vessels and persons, although this right may be waived.

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

**(e) IUU fishing**

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

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557 See 2003 Caribbean Agreement art 16(1).
558 2003 Caribbean Agreement art 16(2).
559 2003 Caribbean Agreement art 16(3).
560 2003 Caribbean Agreement art 16(4).
561 Gilmore, *Caribbean Area* 29.
564 As acknowledged in UNCLOS art 87 and art 116.
the living resources of the high seas’. This provision allows for states to take action against their nationals who engage in IUU fishing even if the national is on a vessel flagged to another state.565

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

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

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

565 Guilfoyle, Shipping Interdiction 101.
567 Fisheries Jurisdiction Case (Spain v Canada) (Jurisdiction of the Court, Judgment) [1998] ICJ Rep 432. Canada had, however, altered its acceptance of compulsory jurisdiction in relation to the enforcement of its conservation and management measures in the relevant maritime area and the Court therefore lacked jurisdiction to resolve the dispute.
568 See Byers, ‘Policing the High Seas’ 537–8.
570 1995 Fish Stocks Agreement art 18(2). Presumably, though, this provision is self-judging in the first instance and it may only be in the context of dispute settlement proceedings that another state party may challenge a state’s decision on its capability under this article.
571 1995 Fish Stocks Agreement art 18(3).
572 1995 Fish Stocks Agreement art 19.
States parties to the 1995 Fish Stocks Agreement must permit access by duly authorized inspectors from other states consistent with subregional and regional schemes for cooperation. The inspection regime is detailed in Articles 21 and 22, and applies in the absence of boarding and inspection procedures being developed within an RFMO. The inspection regime applies to vessels within high seas areas covered by a subregional or regional fisheries management organization or arrangement, irrespective of whether the flag state of those vessels is a member of the organization or arrangement.

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

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

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573 1995 Fish Stocks Agreement art 18(3)(g)(i).
574 1995 Fish Stocks Agreement art 21(3).
575 1995 Fish Stocks Agreement art 21(1). Of course the flag state must at least be a party to the 1995 Fish Stocks Agreement for the vessel to be subjected to this regime.
576 1995 Fish Stocks Agreement art 22(1)(a).
577 1995 Fish Stocks Agreement art 22(1)(b). The inspectors may not interfere with the master’s ability to communicate with the authorities of the flag state either. 1995 Fish Stocks Agreement art 22(1)(c).
578 1995 Fish Stocks Agreement art 22(1)(d).
579 1995 Fish Stocks Agreement art 22(1)(f).
580 1995 Fish Stocks Agreement art 21(5).
581 1995 Fish Stocks Agreement art 21(8). What constitutes a ‘serious violation’ is defined in art 21(1) and includes fishing without a valid licence, failure to maintain accurate records, using prohibited fishing gear, multiple violations which together constitute a serious disregard of conservation and management measures, and such other violations as may be specified by the particular RFMO.
582 See 1995 Fish Stocks Agreement arts 21(6), (7), and (12).
the fact that it is only available in relation to vessels registered to states parties to the treaty. The ability of vessels to re-flag to avoid such obligations will thereby reduce the effectiveness of enforcement measures designed to improve the conservation and management of fish resources. Alternative mechanisms for non-flag state enforcement are thus critical if goals of fisheries conservation and management are to be achieved.

The FSA provides a framework for and thus anticipates that enforcement regimes will be developed through RFMOs in respect of particular fisheries or fish stocks. To this end, it may be observed that various RFMOs have established ways to enforce the conservation and management measures set forth by the organization and to deter IUU fishing. These enforcement mechanisms applicable between the states parties include what may be described as the more traditional maritime enforcement measures, such as stopping, inspecting and potentially arresting a vessel. Further steps have been necessary in seeking to implement and enforce conservation and management measures in view of the extensive harm caused by IUU fishing. As part of the responses to the threat of IUU fishing, RFMO have established catch documentation schemes, which track landings of fish and the trade flow of particular species. Vessel monitoring systems have also been required as a means of tracking the location of vessels. This practice was undermined to a certain extent by the Volga case where ITLOS determined that the use of a vessel monitoring system could not be required as a condition of bond following the arrest of a vessel under Article 73 of UNCLOS. RFMOs have also relied on reputational challenges through the listing of vessels and flag states that have violated conservation and management measures. The adoption of the 2009 Port State Measures Agreement may provide

583 See 1995 Fish Stocks Agreement arts 21(2) and 21(15).
584 See Guilfoyle, Shipping Interdiction 112–16.
586 In exercising sovereign rights in the EEZ, coastal states may adopt laws and regulations ‘specifying information required of fishing vessels, including . . . vessel position reports’. UNCLOS art 62(4)(c). For discussion in relation to particular RFMO, see Rosemary Gail Rayfuse, Non-Flag State Enforcement in High Seas Fisheries (Martinus Nijhoff, Leiden 2004) 269–70, 300; Tore Henriksen, Geir Honneland and Are Sydnes, Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes (Martinus Nijhoff, Leiden 2006) 184–5.
587 This decision was particularly problematic because ‘[e]vidence obtained in the course of the Volga investigation showed a consistent pattern of fraudulent VMS use and VMS tampering to indicate fishing vessels were not in the areas in which they purported to be fishing’. Rayfuse, Non-Flag State Enforcement 283.
588 eg, the Commission for CCAMLR adopted a Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures that provided a basis for vessels sighted in contravention of CCAMLR efforts to be informed of that conduct and that information to be circulated to the flag state, along with member states and the CCAMLR Secretariat. Rayfuse,
another avenue for states to respond to unlawful fishing on the high seas. A variety of legal techniques have therefore been put in place to boost law enforcement efforts against unlawful fishing.

(f) Conclusion

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

The endurance of the law enforcement regime on the high seas may also be questioned in light of recent efforts by environmental protestors to disrupt certain activities. These groups may not typically be regarded as pirates, as their goals are not for ‘private ends’ but are related to the quest for marine environment protection. States have nonetheless sought to take action against environmental protestors when they have interfered with particular maritime activities; most notably, in relation to protests against nuclear and other weapons testing, and the recent clashes between Japanese whaling vessels and members of the Sea Shepherd Conservation Fund in waters off Antarctica. Options for law enforcement on the high seas have been limited, despite the risks posed to navigation and other activities in this area.

The encounters between the Japanese whalers and the Sea Shepherd protestors, which intensified in the 2008–2009 and 2009–2010 seasons, particularly highlight this point. In attempting to thwart Japan’s whaling, Sea Shepherd has launched

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

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

590 See discussion in Chapter 2, Part C(2).
butyric acid (or rotten butter) onto Japanese vessels and the whalers have used water cannons to keep the protestors at bay.\footnote{Natalie Klein, ‘Whales and Tuna: The Past and Future of Litigation between Australia and Japan’ (2009) 22 Georgetown International Environmental Law Review 143, 170.} Sea Shepherd protestors boarded a Japanese vessel in 2008 to deliver a letter of protest.\footnote{Ibid.} In early 2010, the Japanese \textit{Shonan Maru 2} collided with the \textit{Ady Gil}, which was flagged to New Zealand, causing the \textit{Ady Gil} to sink after those on board were rescued.\footnote{Such collisions have previously occurred between protestors and targeted vessels. See Harry N. Scheiber, Kathryn J. Mengerik and Yann-huei Song, ‘Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IIU Fishing Conundrum’ (2007) 30 University of Hawaii Law Review 97, 158 (referring to earlier incidents between Greenpeace and Sea Shepherd and the Japanese whaling fleet).} The captain of the \textit{Ady Gil} subsequently boarded the \textit{Shonan Maru 2} to deliver a demand for compensation for the destroyed vessel.\footnote{Natalie Klein, ‘Whaling Protesters are Behaving like Pirates’ The Australian (18 February 2010) <http://www.theaustralian.com.au/news/opinion/whaling-protesters-are-behaving-like-pirates/story-e6frg6zo-1225831542623> .} While the Sea Shepherd protestors lacked authority to board Japanese vessels,\footnote{Sea Shepherd has relied on the terms of the World Charter for Nature, particularly Principle 21, as the basis for its right to prevent Japanese whaling. UNGA, ‘World Charter for Nature’ (28 October 1982) UN Doc A/RES/37/7; ‘Mandate’ <http://www.seashepherd.org/who-we-are/mandate.html>. However, as a General Assembly resolution, the World Charter for Nature is not binding. At most, its terms could be viewed as soft law. Lynton Keith Caldwell, \textit{International Environmental Policy: From the Twentieth to the Twenty-First Century} (3rd edn, Duke University Press, Durham 1996) 100.} Japan was similarly limited in the steps that it could lawfully take in pursuing what Japan has considered a legal activity on the high seas.\footnote{For an assessment of the legality of Japan’s whaling activities in Antarctic waters, see Report of the International Panel of Independent Legal Experts on Special Permit (‘Scientific’) Whaling Under International Law, para 83 (Paris, 12 May 2006). The Panel was comprised of Laurence Boisson de Chazournes, Pierre-Marie Dupuy, Donald R. Rothwell, Philippe Sands, Alberto Székely, William H. Taft IV, and Kate Cook. For an argument supporting Japan’s position, see Eldon V.C. Greenberg, Paul S. Hoff, and Michael I. Goulding, ‘Japan’s Whale Research Program and International Law’ (2002) 32 California Western International Law Journal 151.} Japan had to appeal to the relevant flag states,\footnote{‘Australian Govt Urged to Rein in Sea Shepherd’ ABC News (7 February 2009) <http://www. abc.net.au/news/stories/2009/02/07/2484925.htm> .} and reportedly issued an international arrest warrant against Captain Paul Watson, the leader of Sea Shepherd.\footnote{ABC/AFP, ‘Japan wants Sea Shepherd’s captain arrested’ ABC News (30 April 2010) <http://www.abc.net.au/news/stories/2010/04/30/2886762.htm> .} While Japan released the protestors who boarded in 2008,\footnote{‘Japan “agrees to free” Sea Shepherd activists’ ABC News (16 January 2008) <http://www.abc.net.au/news/stories/2008/01/16/2139306.htm> .} the captain of the \textit{Ady Gil} was returned to Japan where he was subsequently charged with trespass and other offences.\footnote{ABC/AFP, ‘Japan wants Sea Shepherd’s captain arrested’ ABC News (30 April 2010) <http://www.abc.net.au/news/stories/2010/04/30/2886762.htm> .} States not only need to resolve the source of the dispute prompting these altercations at sea, but should also consider whether the existing legal frameworks are sufficient if order is to be maintained on the oceans.
Roach has advocated that cooperation between the coastal state and the flag state is the cornerstone for improving maritime security.\(^{601}\) Sharma has equally observed that although the authority of the flag state is maintained, regional or subregional cooperation has been developed in the face of maritime security threats.\(^{602}\) In the absence of provisions for coastal or third states to take action in their own account, the need for cooperation is certainly critical. Even though enforcing obligations to cooperate is not without difficulties, a cooperative endeavour at least underlines the shared concern in seeking to promote maritime security. The 2008 CARICOM Agreement may otherwise stand as a useful model of a treaty allowing for the right of visit to respond to a variety of maritime security threats.\(^{603}\)

I. Conclusion

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

Balancing new claims of jurisdiction to prescribe and enforce against the principle of navigational freedom will be an uneasy exercise in lawmaking, but there is room for a more aggressive interdiction regime to the extent that its proponents keep in mind the needs and claims of the system as a whole. The non-interference principle merits respect, but only to the extent that it remains a valuable and effective tool for promoting the general welfare of the international system and all its participants.\(^{604}\)

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

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

\(^{601}\) See Roach, ‘Initiatives’ 63.
\(^{602}\) O.P. Sharma, ‘An Indian Perspective’ (2005) 29 Marine Policy 147, 150.
\(^{603}\) 2008 CARICOM Agreement art IX.
huge, as a range of protections and preferences are still accorded to flag states in addressing these issues. Nonetheless, such multilateral endeavours may be seen as reflecting the inclusive interest in responding to particular maritime security threats. The balance of interests has been altered and refined.

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

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

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

605 UNCLOS art 27(1).
The authority accorded to the coastal state in its contiguous zone is laid out in Article 33 of UNCLOS, and is potentially relevant for responding to maritime security threats associated with transnational crime as well as terrorism. Although there has been some debate as to the precise limits of the ‘control’ that a coastal state may exercise in this maritime zone, it is argued here that the approach to be preferred is one that allows for the full panoply of enforcement activities and not merely inspections and warnings. The latter, more limited, perspective will curtail the ways that states may respond to maritime security threats. Given that the heads of authority in the contiguous zone are already limited to customs, fiscal, immigration, or sanitary laws and that such delineation protects navigational rights, further restriction is unnecessary when allowing for responses to transnational crime or terrorism.

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

Sovereign rights to explore and exploit the natural resources of the continental shelf have been viewed as incorporating jurisdiction to prevent and punish violations of the coastal state’s laws concerning these activities. This position remains true for coastal state authority over pipelines that are part of such exploitation. Flag states of vessels and states with jurisdiction over persons who break or injure either cables or pipelines have authority to address this punishable offence. Law enforcement authority may also be derived in relation to safety zones around artificial islands, installations, and structures, as well as from the 1988 SUA Protocol. Efforts to improve or to articulate enforcement powers have been resisted because of concerns relating to the freedom of navigation and concomitantly, not wishing to extend the powers of the coastal state over the continental shelf. Further consideration and clarity should be accorded to this area of law enforcement, particularly for the protection of submarine cables, if states are to be adequately equipped to respond to maritime security threats associated with activities on the continental shelf.
On the high seas, the starting position is that this area is open to all users and that the flag state has exclusive enforcement powers over its vessels. There are only limited exceptions to this position, which are based on the right of hot pursuit and the right of visit. Each entails the satisfaction of a range of requirements for their lawful exercise and these conditions reflect the preeminent importance accorded to flag state authority. There has, however, been sufficient concern relating to particular activities that impinge on global maritime security that these rights have evolved and expanded. A flexible interpretation of the right of hot pursuit has been advocated and tolerated to account, to some extent, for improved technologies in monitoring and communication between vessels and for cooperative efforts at enforcing regional or multilateral standards (especially in the fishing context). States have sought to recognize greater powers of interdiction over foreign flagged vessels to prevent and respond to maritime security threats such as migrant smuggling, drug trafficking, and IUU fishing. In each instance, any expansion of powers away from the flag state has been tightly constrained to reaffirm the dominant legal position of the flag state. The use of flags of convenience provides some motivation to move away from this entrenched view. More particularly, the nature of the maritime security threats being addressed and the wide concern in establishing the means to address these threats warrant responses that account for the common interest in promoting maritime security. The assortment of agreements concluded allowing for increased powers of interdiction reflect this shared concern but arguably the response to the concern could have been stronger if less deference was accorded to the exclusivity of flag state jurisdiction.

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

A. Introduction

While terrorism and weapons of mass destruction are not new maritime security threats, greater focus has been accorded to these concerns in the last decade. The terrorist attacks on the United States on September 11, 2001 highlighted the potential for terrorists to use other means of transport to wreak death, destruction, and economic havoc. Little imagination was needed to consider the impact of a small boat packed with explosives ramming into a vessel carrying oil or gas as it visits a mega-port or transits one of the waterways considered vital for international shipping. Vessels carrying gas or oil or other potentially hazardous material could be hijacked and crashed for similar effect. Less dramatically, terrorists use international shipping for personal transport, as well as shipping their supplies and as a means to finance their activities.

The concept of maritime terrorism was initially understood within the context of piracy whereby any unauthorized act of violence on the high seas would be characterized as piracy.¹ However, as the formal definition of piracy under international law came to be understood as limited to acts of violence perpetrated for financial purposes,² there were still acts of violence at sea undertaken for political or other ‘public’ reasons. These violent acts, if performed outside the territorial sea, were not recognized as crimes over which all states could exercise jurisdiction, as is the case with piracy.³ Instead, these acts came to be branded as

² Guilfoyle disputes that this common interpretation is well-founded. See Douglas Guilfoyle, Shipping Interdiction and the Law of the Sea (CUP, Cambridge 2009) 33–42 (considering that the reference to ‘private ends’ is intended to emphasize the much broader notion that ‘the violence involved lacks state sanction or authority’).
³ Halberstam argued that universal jurisdiction should apply to terrorism: ‘Terrorists today, like pirates of old, are a threat to all states and no state is willing to assume responsibility for their acts. Since they do not confine their attacks to the vessels of a particular state, but attack vessels and nationals of many states indiscriminately, they are hostis humani generis in the truest sense. Since no state has accepted responsibility for their acts, there is no state against which claims for redress can be made.’ Halberstam, ‘Terrorism on the High Seas’ 289.
maritime terrorism. Joyner describes maritime terrorism as ‘the systematic use or threat to use acts of violence against international shipping and maritime services by an individual or group to induce fear and intimidation in a civilian population in order to achieve political ambitions or objectives’. The issues surrounding maritime terrorism and the rights of states to prescribe and enforce jurisdiction over these acts of violence outside the territorial sea came most strongly to the fore in contemporary international law with the hijacking of an Italian vessel, the Achille Lauro, and murder of a US national on board by Palestinian Liberation Forces in 1985.

Terrorist acts against vessels have become more common since the Achille Lauro incident. The Tamil Tigers (Liberation Tigers of Tamil Eelam—LTTE) particularly utilized terrorist attacks against shipping as part of their liberation struggle; inter-island ferries in the Philippines have been targeted by terrorists; and, guerrillas alleged to be affiliated with Al Qaeda launched a suicide attack in 2000 against the US Navy destroyer Cole in Yemen, and an attempted attack against the USS Sullivans in 1999.

Subsequent to September 11, a terrorist attack was perpetrated against the French supertanker Limburg as it neared a Yemeni port as well as on approach to the Iraqi oil loading terminal of Khawr al Amaya through the use of small vessels packed with explosives. Attacks have also been perpetrated at various ports through car bombs, parcel bombs, and suicide bombers. Al Qaeda reportedly owns or controls ‘about 15 cargo ships that could be used as floating bombs against cruise ships and other high interest vessels, or to smuggle explosives, chemical or biological weapons, such as a radioactive dirty bomb into a US port, or to transport al Qaeda members into a third country.’ In addition, there have been concerns expressed about shipping being used to finance terrorist activities, both through illegal fund-raising means (such as drug trafficking or smuggling diamonds) as well as legitimate businesses. Following September 11, there was

4 Jesus notes that terrorism at sea is a recent phenomenon compared to piracy. Jesus, ‘Protection of Foreign Ships’ 388.
7 Nincic, ‘Challenge of Maritime Terrorism’ 630.
cognizance of the range of terrorist acts that could be perpetrated, and that the existing legal regimes were inadequate to meet these threats.

Heightening concerns about maritime terrorism has been recognition that terrorists may seek to acquire weapons of mass destruction (WMD). The discovery of a clandestine nuclear smuggling ring headed by the Pakistani scientist Abdul Qadeer escalated concerns of terrorists acquiring WMD for use in attacks; these supplies most likely being shipped between the interested parties. ‘Experts predict a 70% chance of an attack with [WMD] somewhere in the world in the next decade.’ In the post-Cold War era, the spectre of smaller states and non-state actors obtaining WMD has changed the security dynamic and means that international actors are acquiring considerable leveraging and deterrent capabilities, disproportionate to their small resource bases and conventional military arsenals, when compared to a larger state or group of states. The possible shipment of WMD, their delivery systems, component parts and technologies, and related material to non-state actors (predominantly terrorist groups, or those trading with terrorist groups) or to states that are believed to facilitate sale or supply to terrorists has been the focus of legal, political, and operational developments.

Within this dynamic, states have become concerned not only with non-proliferation, which is intended to slow and ideally reverse proliferation trends, but also with counter-proliferation, which involves preventing specific actors from obtaining WMD-related materials and technologies, or reducing if not eliminating an actor’s existing WMD capability. Non-proliferation activities include the conclusion of possession and proliferation treaties, establishing safeguards and inspection regimes, export control regimes, export control assistance measures, and economic sanctions. Counter-proliferation has then entailed ‘traditional efforts of deterrence and containment, efforts of defense and mitigation of attack, use of early detection technologies, interdiction of suspected transfers of sensitive items, and preemptive and preventive acts of force against either actual or potential

11 The variety of threats are canvassed in Nincic, ‘Challenge of Maritime Terrorism’ 621–31.
14 Described collectively in this book as ‘WMD and related materials’. The term ‘WMD, their delivery systems and related materials’ has been used in US practice, and is discussed further below. See text to nn 243–6 below.
It is some of these latter activities that have proven controversial in the maritime context.

The protection of international shipping from terrorist attack is acute given it is commonly estimated that over 90 per cent of the world’s goods are transported by sea. An attack that successfully closed a mega-port or vital waterway would likely cause major economic disruption around the world. As a result, states have generally recognized that there is a shared interest in addressing the terrorist threat posed to maritime security. Equally, the proliferation of WMD and related material constitutes a broad concern for states given the very nature of these weapons and their effects if used. The inclusive interest in maritime security when addressing terrorism and WMD and related material is apparent. Responding to this maritime security threat has been polemic because of, once again, the strong interest in the freedom of navigation. The reconciliation of shared interests in navigation and protection from terrorism and the proliferation of WMD is examined in this chapter.

This chapter examines the legal responses to threats to maritime security posed by terrorism and WMD. By way of background, it first explores the adoption of the 1988 SUA Convention as the reaction to the Achille Lauro incident and also looks to the existing WMD legal regimes that have bearing on proliferation of WMD at sea. The second section considers two key steps that have been taken to better protect ports from terrorist acts, including the use of a WMD at port and the shipment of WMD and related materials. These are the ISPS Code, and the US-led Container Security Initiative. The third section explores the new legal instruments devised by states to permit interdictions on the high seas, namely a series of bilateral treaties instigated by the United States and revisions to the 1988 SUA Convention, adopted as the 2005 SUA Protocol. Finally, the chapter analyses the Proliferation Security Initiative, a political arrangement that addresses the WMD threat at port, in territorial seas, and on the high seas. The PSI may be seen as an overlay to the other recent initiatives addressing terrorism and WMD and a critical question here is the extent that the PSI may be re-shaping international law.

These efforts clearly reflect the shared recognition that states will all benefit from a cooperative and collaborative approach to addressing terrorism and the proliferation of WMD as maritime security threats. The inclusive interest in maritime security has enabled the establishment of greater international control over security processes at port and aboard ships through the creation and adoption of universal

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18 Ibid. Joyner subsequently notes that non-proliferation efforts have not traditionally posed problems under international law as these activities have largely been based on the consent of states. Ibid 545–6. Counter-proliferation efforts have proven more problematic since ‘fundamental aspects of their character, design, and purposes, are often much harder to square with international law’. Ibid 546. See further Jason D. Ellis, ‘The Best Defense: Counterproliferation and US National Policy’ (2003) 26 Washington Quarterly 115.

19 This Code was developed as an amendment to the 1974 Safety of Life at Sea Convention and came into force on 1 July 2004. The ISPS Code is enshrined in Regulation XI-2/3 of the SOLAS Convention.
standards and procedures. Greater claims to rely on the right of visit for the purposes of detecting terrorist and WMD offences also reflect the shared interest in responding to these maritime security threats. However, inclusive claims in maritime security have been diminished by inclusive claims to uphold the freedom of navigation and the concomitant exclusive right of a state to exercise jurisdiction over vessels flying its flag. Exclusive interests in determining the most efficient and profitable ways to run ports have also influenced efforts to enhance maritime security. As will be discussed, the legal regimes created to respond to these threats could have been improved if greater emphasis had been accorded to shared interests in maritime security. Such an improvement was warranted and would not have overly forsaken interests in the freedom of navigation.

B. Initial Responses to Maritime Terrorism—1988 SUA Convention

One of the most dramatic acts of maritime terrorism to instigate an international legal response was the 1985 hijacking of the Achille Lauro. The Achille Lauro, an Italian vessel, was hijacked by four members of the Palestinian Liberation Front in October 1985, approximately 30 miles off the coast of Egypt. The hijackers had posed as passengers on the vessel prior to taking control. The hijackers demanded the release of 50 Palestinians imprisoned in Israel in return for the safe release of the 400 passengers on board. A national of the United States was murdered by the hijackers before they surrendered to Egyptian authorities in return for passage on board an Egyptian plane to Tunis. En route, the United States authorized its aircraft to intercept and force the Egyptian plane to land in Italy, at which point the hijackers were taken into Italian custody and prosecuted. The factual circumstances of the incident prevented the hijackers from being labelled as pirates under international law, and provided for the possibility of a variety of states being entitled to exercise jurisdiction over the offenders as a matter of international law, subject to the criminal offences existing within the domestic laws of each of the concerned states.

Given the legal conundrum caused by the Achille Lauro hijacking, Austria, Egypt, and Italy proposed the adoption of a treaty under the auspices of the IMO to set forth ‘comprehensive requirements for the suppression of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives;


21 The acts were not committed for ‘private ends’, nor were two vessels involved. See Joyner, ‘Suppression of Terrorism’ 351; Halberstam, ‘Terrorism on the High Seas’ 276–91.
jeopardise the safety of persons and property; seriously affect the operation of maritime services and, thus, are of grave concern to the international community as a whole.  

These efforts led to the adoption of the 1988 SUA Convention. The importance of this treaty at the time of its adoption was that it identified certain unlawful acts against ships and provided bases by which states could establish jurisdiction over the perpetrators of those unlawful acts. A Protocol negotiated and adopted at the same time addressing terrorist acts against fixed platforms on the continental shelf similarly identified offences and established jurisdiction over them.

Although the 1988 SUA Convention filled lacunae identified in response to the *Achille Lauro* incident, there were still a number of limitations and weaknesses in the treaty. It followed the approach of other so-called sectoral terrorism treaties, in that it dealt with one particular type of terrorist activity and was focused on the establishment of those activities as crimes over which states with pertinent connections to the offences could exercise jurisdiction. Further, the 1988 SUA Convention adopted the principle of *aut dedere aut judicare* consistent with the earlier terrorism treaties. This approach was preferred as a more moderate one rather than expanding the definition of piracy, as states did not wish to make these terrorist offences ones over which all states could exercise jurisdiction.

The offences set forth in the 1988 SUA Convention were significant at the time of adoption, as they not only drew from the preceding terrorism treaties to recognize offences in the maritime context, but also elaborated on that earlier work. Article 3 of the 1988 SUA Convention provided that it was an offence under the treaty if an individual unlawfully and intentionally:

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23 As Halberstam notes, ‘its operative provisions deal not so much with the suppression of such acts, as with the apprehension, conviction and punishment of those who commit them.’ Halberstam, ‘Terrorism on the High Seas’, 292.

24 1988 SUA Protocol. Ronzitti described this protocol as a *renvoi* Protocol in that there is a *renvoi* to the relevant provisions of the 1988 SUA Convention, rather than reformulating the provisions within the protocol. Natalino Ronzitti, *The Prevention and Suppression of Terrorist Acts Against Fixed Platforms on the Continental Shelf* in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff, Dordrecht 1990) 91, 91. Within the definition of fixed platforms under the Protocol are artificial islands and installations or structures permanently attached to the sea-bed for the purpose of exploration and exploitation of resources or for other economic purposes. See also Chapter 3, Part G(3).


26 1988 SUA Convention art 10. See also Joyner, ‘Suppression of Terrorism’ 345–6 (‘The cardinal purpose of the IMO Convention is to insure that persons who commit acts of unlawful violence that endanger safe navigation of ships are either tried in the State where they are found, or extradited to another State for prosecution’). Unlike more recent counter-terrorism treaties, there is no provision preventing a state from refusing to extradite on the basis of the political offence exception.

27 Treves, ‘The Rome Convention’ 71. Joyner also notes that the offences set forth in the 1988 SUA Convention are distinct from the traditional international crime of piracy. See Joyner, ‘Suppression of Terrorism’ 348. Jesus, however, is of the view that the 1998 SUA Convention ‘seems to apply to piracy or armed robbery against ships’. Jesus, ‘Protection of Foreign Ships’ 381.
(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; \(^2\) or
(g) injures or kills any person, in connection with the commission or the attempted commission of any of the [above offences].

Attempts or complicity in these offences were also identified as offences within the 1988 SUA Convention. \(^2\) The inclusion of a principal offence of injuring or killing a person in connection with the commission or attempted commission of any of the other principal offences was a new addition in the 1988 SUA Convention. States parties to the 1988 SUA Convention were required to take the necessary measures to be able to exercise jurisdiction over these offences. \(^3\) The gaps created by the 1988 SUA Convention in terms of addressing a situation when a foreign vessel is in the hands of terrorists were noted at the time, but was a scenario left to be addressed under the existing, albeit unsatisfactory, rules. \(^4\)

One of the primary limitations of the 1988 SUA Convention was that it failed to grant states any right to exercise enforcement jurisdiction (particularly the right of visit) in the prevention and suppression of the offences set forth in the treaty. Article 9 expressly states to this end: ‘Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag’. Joyner interprets this provision as ‘explicitly mandat[ing] that there is no right of visit and search of vessels exercising free passage on the high seas in a situation of non-belligerency’. \(^5\)

\(^2\) In the 2005 SUA Protocol to the 1998 SUA Convention, this provision is rendered gender-neutral. See 2005 SUA Protocol art 4(2) (replacing ‘he’ with ‘that person’).

\(^3\) 1988 SUA Convention art 3(2).


\(^6\) Joyner, ‘Suppression of Terrorism’ 357.
The provisions related to the prevention and suppression of the prescribed offences are limited to requirements to cooperate in prevention of potential offences and the exchange of information.\(^{33}\) Even the provision requiring cooperation for the prevention of the offences was shortened in the 1988 SUA Convention, compared to the models in the earlier Hostages Convention,\(^{34}\) although this drafting change was not intended to be a departure from the expectations enshrined in the Hostages Convention.\(^{35}\) Article 14 of the 1988 SUA Convention simply calls on states to use ‘all practicable measures’ to prevent preparations for, or commission of, the specified offences, without providing any clarity (beyond exchanging information) as to what these measures should or could entail.\(^{36}\) Gaja has suggested that the requirements to take preventive measures and to prosecute or extradite offenders imply an obligation to respond to terrorist acts as they take place.\(^{37}\) Mellor goes even further asserting: ‘It is clear from customary law that States do owe a duty to each other to prevent terrorist acts, but this duty extends only as far as a state’s means practically allow.’\(^{38}\) The 1988 SUA Convention does not embrace this position but is predominantly reactive, rather than preventative, in nature.\(^{39}\) For a treaty purporting to deal with ‘suppression’ of unlawful acts, there is little in the 1988 SUA Convention that supports this particular purpose. It is therefore unsurprising that the treaty was considered ripe for review with increasing interest in protecting against the occurrence of terrorist attacks and proliferation of WMD.

C. Initial Legal Responses to WMD Proliferation

The key treaties in place addressing the proliferation of WMD and associated materials are the Nuclear Non-Proliferation Treaty (NPT),\(^{40}\) the Chemical Weapons

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\(^{33}\) See 1988 SUA Convention arts 13 and 14. Joyner notes, ‘these two provisions supply the only fiats directly relating to the suppression of unlawful acts against maritime navigation’. Joyner, ‘Suppression of Terrorism’ 363. The only other references to prevention in the 1988 SUA Convention are located in the preamble, and so are not strictly binding.

\(^{34}\) International Convention against the Taking of Hostages (1979) 1316 UNTS 205 [‘Hostages Convention’] art 4(1)(a) provides: ‘States shall cooperate in the prevention of the offences set forth ... particularly by . . . taking all practicable measures to prevent preparations in their respective territories for the commission of these offences within or outside their territories including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages.’ The phrase beginning ‘included . . .’ was deleted on the rationale that it did not add anything to the text.


\(^{36}\) See Joyner, ‘Suppression of Terrorism’ 367.


\(^{39}\) Ibid 384.

\(^{40}\) Treaty on the Non-proliferation of Nuclear Weapons (1968) 729 UNTS 161 [‘NPT’].
The Chemical Weapons Convention bans the development, production, acquisition, stockpiling, retention or transfer to anyone of weapon-grade toxic chemicals and their precursors. However, one of the difficulties with this treaty in relation to the shipment of WMD and related materials is that the ban does not extend to chemicals that are to be used for peaceful purposes. The Biological Weapons Convention prohibits state parties from developing, producing, stockpiling or otherwise acquiring or retaining biological weapons for hostile purposes or for use in armed conflict, which leaves open the possibility of doing so for defensive purposes. Finally, the NPT is addressed precisely to the question of proliferation of nuclear weapons but is limited in that it only recognizes the existence of five nuclear weapon states, and not states such as Pakistan, India, Israel, and North Korea. Moreover, nuclear weapon states that are outside the NPT are not bound by prohibitions of shipping nuclear weapons and materials to each other. Even for those states within the NPT regime, they are entitled to research, produce, and use nuclear energy for peaceful purposes. The United States has interpreted the NPT to require states parties to interdict vessels suspected of carrying illegal nuclear materials in their territorial seas, but Valencia notes that this requirement is not explicit in the NPT.

The operation of these treaty regimes has been supplemented by various political arrangements between interested states. Most relevant for the shipment of WMD and related materials are the multilateral export control regimes, which are more specific in relation to transfer and possession than the WMD treaties, but are not formally binding under international law. One such arrangement is the Australia Group, which deals with the coordination and harmonization of national export controls for chemical and biological weapons-related material. The Zangger Committee and the Nuclear Suppliers Group provide oversight to the export controls of the NPT. The Missile Technology Control Regime (MTCR) consists of a non-binding political arrangement to control the proliferation of rocket and unmanned air vehicle systems capable of delivering WMD. Through the MTCR, 90 states have been part of a declared Hague International Code of Conduct Against Ballistic Missile Proliferation—Joyner describes it as ‘com[ing] into force as a non-binding arrangement among its ninety declantants’. These treaties and regimes have not proved sufficient in ending the black market in WMD and related material.

42 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972) 1015 UNTS 163 ['Biological Weapons Convention'].
43 NPT art IX(3) provides: ‘For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967’.
44 NPT art IV(1).
45 Valencia, The Proliferation Security Initiative 53 (referring to art I of the treaty in this regard).
Difficulties as to their effectiveness exist in terms of their enforcement and whether there is widespread subscription and compliance with their strictures.48

Beyond the deficiencies and gaps in the existing non-proliferation regimes, there are further complications confronting states that wish to improve maritime security by dealing with shipments of WMD and related material for either non-proliferation or counter-proliferation efforts. In the first instance, the transfer of these weapons is not necessarily unlawful under international law.49 Moreover, as noted by Joyner, ‘with few exceptions there is very little hard or formal international law not only on the question of transfers of nuclear, chemical, and biological materials, agents, and compounds and the associated myriad dual-use items and technologies that could be used to turn those materials into weaponized devices, but even more fundamentally on the question of the possession of such technologies’.50 So as a preliminary matter, states need to exercise prescriptive jurisdiction to devise specific offences related to the shipment of WMD and related materials.51

The exercise of prescriptive jurisdiction is complicated here because many of the components, technologies and production materials associated with WMD are dual-use in nature (that is, they have civilian as well as military end-uses). Beck has stated that ‘95 percent of the ingredients for WMD are dual-use in nature, having both civilian and WMD applications.’52 The NPT, Chemical Weapons Convention, and the Biological Weapons Convention all permit states parties to possess and trade dual-use materials. The problems associated with the transfer of dual-use items became apparent with the weapons inspections conducted in Iraq after the 1991 Gulf War and the discovery of an advanced WMD programme that had primarily relied on the import of dual-use materials from companies in the West.53

For enforcement jurisdiction to be exercised, it would be incumbent on the enforcing state to show that the dual-use item in question was in fact to be used for weapons development, rather than an alternative peaceful, legitimate, and legal purpose.54 The means for exercising enforcement jurisdiction over these new offences also needs to be established in view of the limited instances where states

48 Becker, ‘The Shifting Public Order’ 138; ibid 139 (‘there appears to be a growing consensus within the international community that multilateral treaty instruments by themselves lack the necessary control intention to transform their prescriptions of legal norms into effective international law’).

49 Valencia, The Proliferation Security Initiative 42.


51 Kaye has suggested that UN Security Council Resolution 1540, which was adopted under Chapter VII of the UN Charter and is therefore legally binding on all member states, provides a basis under international law for rendering unlawful the shipping of weapons in the circumstances contemplated by the PSI. Stuart Kaye, ‘Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction’ in David Freestone, Richard Barnes and David M. Ong (eds), The Law of the Sea: Progress and Prospects (OUP, Oxford 2006) 347, 359. See text to nn 364–6 below.


54 Lehrman, ‘Enhancing the Proliferation Security Initiative’ 233.
are able to exercise law enforcement powers outside their territorial seas. In this regard, Valencia writes:

Some analysts argue that interdiction is critical to preventing the spread of WMD because of the rapid growth in states and groups pursuing WMD programmes, the purported expanding nexus between WMD and terrorism, and the failure of the current non-proliferation architecture. Interdiction fills the lacunae by ensuring commitments are kept and stops proliferation-related exports by states outside existing non-proliferation regimes. Moreover, it deters suppliers and customers and makes proliferation more costly and difficult.55

The lacunae arising from the WMD proliferation regime in the maritime context could therefore be seen in relation to the authority for states to stop the transport of WMD and related material at sea, as well as the existence of appropriate jurisdictional bases for action at port and in the territorial sea. When WMD proliferation is coupled with the possibility of their acquisition and use by terrorists, the impetus for action is greater. As discussed in the following parts, legal initiatives have been undertaken to address the threat of terrorism and proliferation of WMD both in port and at sea.

D. Increasing Port State Controls

Improving port security to address the maritime security threats of terrorism and proliferation of WMD has been essential for several reasons. In the first instance, ports are of course the interface for international shipping with the production and delivery of goods. Ports are the vital starting and end points in maritime transport. The disruption of this interface because of a terrorist attack will obviously hinder international trade and the unavailability or reduced capacity of a port could well have consequences that negatively affect other ports in the transport chain. Moreover, the vulnerability of ports in this regard is underlined when it is recalled that ports have already been targeted for attacks in the past.56 Finally, port security is important because it is ultimately easier from a purely practical perspective to inspect vessels when they are in port rather than when those vessels are at sea. These factors have motivated multilateral reform within the IMO with the adoption of the ISPS Code. Further, the US-led development of the Container Security Initiative has sent benchmarks for reform in countries that are home to the more important ports for international trade and also instigated change under the auspices of the World Customs Organization.

(1) ISPS Code

Well prior to the attacks on September 11, 2001, the IMO had considered ways to improve security of ships both at port and at sea through the adoption of a circular

56 Bryant, ‘Historical and Legal Aspects’ 1–4.
in 1986 entitled ‘Measures to Prevent Unlawful Acts against Passengers and Crew on Board Ships’. The recommendations contained therein were voluntary and were not at all widely adopted by the governments of ship operators. This situation was to be significantly redressed subsequent to September 11. One of the key developments in addressing ship and port security was the adoption of the ISPS Code.

This Code was developed as an amendment to the 1974 Safety of Life at Sea Convention (SOLAS Convention) and came into force in July, 2004. The ISPS Code is enshrined in Regulation XI-2/3 of the SOLAS Convention. In attaching the ISPS Code to the SOLAS Convention, states parties to the SOLAS Convention agreed to amend Chapter XI of this treaty to include special measures to enhance maritime security in a new part. The amendments to the SOLAS Convention were made by what is known as the tacit acceptance system whereby the amendments automatically come into force once adopted by the IMO, unless sufficient states object. In the ISPS Code’s adoption, the SOLAS Convention was extended beyond questions of maritime safety to issues of maritime security. Part A of the Code sets out mandatory security-related requirements for governments, port authorities, and shipping companies. Part B then comprises a series of non-mandatory guidelines as to how these requirements might be met.

The ISPS Code is intended to identify and allow for preventive measures against security incidents, which are ‘any suspicious act or circumstance threatening the security of the ship’. It applies to passenger ships and cargo ships of 500 gross tonnage and upwards, including high-speed craft, mobile offshore drilling units, and port facilities serving such ships engaged on international voyages. The extent to which the ISPS Code applies to ships thus depends on ‘the type of ship, its cargoes and/or passengers and the trading patterns of visiting vessels’. More than 98 per cent of the world’s shipping operates under the SOLAS Convention. However, the ISPS Code does not apply to warships or other government ships used for non-commercial service, nor does it apply to any fishing vessel of any

58 Bryant, ‘Historical and Legal Aspects’ 5.
62 Reference to ‘security incidents’ appears to be a somewhat oblique reference to terrorist attacks.
63 Hesse, ‘Maritime Security’ 331.
Immediate difficulties arise here given the potential for vessels ostensibly being used for fishing purposes instead being put to terrorist purposes. For example, the vessels used to attack the USS Cole and Iraqi oil platforms would not have been covered by the ISPS Code so were not potentially identifiable as a maritime security risk. The IMO has taken one step to address this problem through the adoption of non-mandatory guidelines on security aspects of vessels falling outside the ISPS Code and other amendments to the SOLAS Convention.  

It remains to be seen whether this circular is a precursor to more formal requirements to otherwise redress this gap. The continual recognition of immunity of warships and designated government vessels also poses potential risks for non- and counter-proliferation efforts.

‘The purpose of the ISPS Code is to provide a standardised, consistent framework for evaluating risk, enabling governments to offset changes in threat levels with changes in vulnerability for ships and port facilities.’ The ISPS Code is intended to be a risk-management exercise whereby levels of security are determined by the extent of risk to which a port is exposed and what measures need to be put in place in relation to the assessed risk at any one port.

The ISPS Code accords a variety of roles to port, coastal, and flag states, as well as particular individuals who are to act as Port Facility Security Officers, Company Security Officers, and Ship Security Officers. Particular duties for each of these individual roles are set out in the ISPS Code and are essentially intended to improve communication and cooperation between ships, their offices, port facilities, and the relevant states, as well as creating a ‘culture of security’ ashore and on board the ship in regular shipping operations.

Flag states are responsible for approving the Ship Security Plans that must be held by each vessel to which the ISPS Code applies and developing a Declaration of Security to clarify the duties between the port facility and the ship. Flag states further have the responsibility for assessing security threats and setting security levels as appropriate for their vessels. Coastal states must develop and implement Port Facility Security Plans on the basis of a Port Facility Security Assessment, as well as train the Port Facility Security Officer. Security assessments involve identifying and evaluating important assets and infrastructure; identifying the
threats to those assets and infrastructure; and assessing possible aspects of port vulnerability.\textsuperscript{74} Port states determine the security levels for their ports.\textsuperscript{75} To reduce vulnerabilities, ships ‘will be subject to a system of survey, verification, certification and control to ensure that their security measures are implemented’.\textsuperscript{76}

The ISPS Code involves the provision of information to ports regarding vessels seeking to enter that port. This information includes the security level at which the ship is operating and had been operating during the previous 10 port visits, as well as any special or additional security measures that were undertaken in any previous port.\textsuperscript{77} Information may further be sought in relation to ship-to-ship activity as well as a range of other practical security-related information, though not on the ship’s security plan.\textsuperscript{78} The security information to be provided prior to entry into port has been proposed by the IMO Maritime Safety Committee with the intention of harmonizing what data set may be required from each port.\textsuperscript{79} However, states still retain the option to seek additional or supplementary information as a condition for entry into a port located within its territory.\textsuperscript{80} The required minimum time for the submission of information is not to be less than 24 hours, which is roughly equivalent to 500 nautical miles from a state’s coast.\textsuperscript{81}

This flow of information is therefore a critical aspect of the successful operation of the ISPS Code. However, if there are shortcomings in the information provided, limited enforcement options are available to port states. If a master of a ship declines to provide the requested information, then a state may opt to deny entry of that ship into port. In the further event that the assessment of the available information leads to the conclusion that there are clear grounds for believing that the ship is in non-compliance with the requirements of Chapter XI-2 of the SOLAS Convention or Part A of the ISPS Code,\textsuperscript{82} then the port state may require that efforts be undertaken to rectify the non-compliance.\textsuperscript{83}

If the non-compliance is not rectified, the port state is entitled to require the ship to proceed to a specific location in its territorial sea or internal waters, inspect the ship in its territorial waters prior to entry into port, or deny the ship entry into port.\textsuperscript{84}

\textsuperscript{74} ISPS Code, Part A, s 15.5.
\textsuperscript{75} Ibid s 14.1.
\textsuperscript{77} SOLAS Convention Chapter XI-2, Regulation 9, s 2.1.
\textsuperscript{78} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} See Natalie Klein, ‘Legal Implications of Australia’s Maritime Identification System’ (2006) 55 ICLQ 337, 339 (noting that 48 hours’ notice would be equivalent to a 1,008 nautical mile distance for a ship travelling at 21 knots).
\textsuperscript{82} It should further be noted that the very failure to provide the information requested is an example of clear grounds of non-compliance. IMO Maritime Safety Committee, ‘Guidance Relating to the Implementation of SOLAS Chapter XI-2 and the ISPS Code’ (7 June 2004) IMO Doc MSC/Circ.1111 [‘Guidance for ISPS Code’] 10 [3.7].
\textsuperscript{83} SOLAS Convention Chapter XI-2, Regulation 9, s 2.4.
\textsuperscript{84} SOLAS Convention Chapter XI-2, Regulation 9, s 2.5.
Before those steps may be initiated, the master of the ship is to be notified of the port state’s intentions in this regard so that the master has the opportunity not to enter that port.\textsuperscript{85} For the inspection of the ship in the territorial sea, the Maritime Safety Committee envisages that it would ‘be undertaken normally when there was information/intelligence . . . suggesting that there were “clear grounds” for suspecting that the ship was not in compliance with the provisions or posed a threat to the port facility’.\textsuperscript{86} The obvious difficulty here is that if a security threat is perceived by virtue of this information-seeking process, the port state is only able to take steps to reduce or eliminate that threat once the vessel is in port or within 12 miles of its coast. Such proximity to a port state’s maritime assets may be quite undesirable.

Port states may further verify that a vessel has an International Ship Security Certificate, which confirms that a ship is compliant with Chapter XI-2 of SOLAS and the ISPS Code. If a certificate is not provided or there are clear grounds to believe that a vessel is not in compliance with the ISPS Code or Chapter XI-2 of SOLAS, then certain control measures may be taken if a state still allows the ship to enter its port. These measures are limited to inspection, delaying, detaining of the ship, or restrictions of its operation in port, or lesser administrative or corrective measures.\textsuperscript{87} The control measures are to be implemented in such a manner to ensure that they are proportionate, reasonable and of the minimum severity and duration necessary to rectify or mitigate the non-compliance.\textsuperscript{88} Again, the problem arises that the very presence of the vessel in port may be a danger in its own right.

States are, however, left with some discretion, as the Maritime Safety Committee of the IMO has envisaged the possibility of action additional to the threats anticipated under the ISPS Code and the measures that may be taken in response:

On the question of what was understood to be an ‘immediate threat’ in regulation XI-2/9.3.3, the Committee agreed that this could cover two scenarios: firstly, that the ship did not comply with the provisions of SOLAS chapter XI-2 and part A of the ISPS Code and therefore was considered to be a threat, or secondly, . . . intelligence or other information had been received indicating that the ship posed an immediate threat or was under threat itself. The Committee recognized that there may be other scenarios where, under international law, Contracting Governments could take additional measures outside of SOLAS regulation XI-2/9 for national security or defence, even if a ship fully complied with SOLAS chapter XI-2 and part A of the ISPS Code.\textsuperscript{89}

Although ‘additional measures’ may therefore be taken, these steps remain constrained to the dictates of the existing law of the sea.

A critical issue in relation to the success of the ISPS Code in responding to threats to maritime security is the question of compliance with its requirements. ‘It

\textsuperscript{85} SOLAS Convention Chapter XI-2, Regulation 9, s 2.5.
\textsuperscript{86} IMO Maritime Safety Committee, ‘Guidance for ISPS Code’, 3 [23] (emphasis added). Any inspection is to be carried out within the scope of the SOLAS Convention. Ibid 3 [24].
\textsuperscript{87} Ibid 11 [3.8.1.1].
\textsuperscript{89} IMO Maritime Safety Committee, ‘Guidance for ISPS Code’ 4 [26].
is anticipated that market forces and economic factors will drive compliance. However, there is rightly concern that reliance on flag states to adhere to the requirements of the ISPS Code will undermine its effectiveness. This concern stems from the economic capacity of developing states with considerable fleets, such as Panama, to administer the requirements of the ISPS Code. Thus far, despite initial concerns about the necessary measures being implemented in time, compliance with the ISPS Code has been favourably reported. Port facilities have apparently taken longer to achieve compliance than ships.

It does seem that the restriction of the port state’s responses to assessed risks to areas within its territorial seas, internal waters and ports will not alleviate all concerns to counter terrorism threats as may be required. While the ISPS Code does permit greater transparency in terms of knowing more about the voyage of a particular vessel, there still could have been greater scope accorded to port authorities in responding to vessels perceived to be a security risk. Consistent with other agreements concluded at the IMO, enforcement is a matter left to flag states and so no new enforcement powers were granted to port states under the ISPS Code.

Nonetheless, as a risk-management exercise for ports, which ensures that ports have procedures in place to handle terrorist threats, the ISPS Code is a considerable advance in the laws related to maritime security. It fits squarely within the traditional construct of the law of the sea as it is consistent with the sovereignty exercised by states over their ports, internal waters and territorial seas. Moreover, certain deference is still accorded to the freedom of navigation, as the master of a ship is given the opportunity to avoid a port when that master knows control measures may be instituted against the ship. In addition, the control measures are balanced against needs to maintain the efficiency of international shipping. In these respects, the ISPS Code stands as an example of states cooperating to improve maritime security, reflecting the shared interest in reducing security risks for ports and the majority of ships.

91 Hale, ‘ISPS Code’ 4. While costs vary considerably, estimates for the initial implementation of the ISPS Code ranged from USD20,000 to USD37,000 per vessel and annual costs of around USD 12,000. Ramage, ‘Creating a Security Culture’.
92 ‘Consternation over security’ Fairplay (Surrey) (3 April 2003) 23 (‘observers are almost certain that the July 1, 2004 deadline for compliance with the IMO’s maritime security code will not be met by everyone’). See also Regina Asariotis, ‘Implementation of the ISPS Code: An Overview of Recent Developments’ (2005) 11 Journal of International Maritime Law 266, 267–9 (referring to a range of concerns about ensuring timely compliance).
93 Frances Huggett, ‘ISPS—One year on’, Fairplay (Surrey) (22 September 2005) 21–2 (‘But despite the burdens now being placed on crew and security officers, the general consensus within the shipping industry and the IMO is that onboard security has been implemented effectively’).
94 Bryant, ‘Historical and Legal Aspects’ 11.
(2) Container Security Initiative and WCO Framework of Standards

The security of ports has also been bolstered through the US-led Container Security Initiative (CSI), which is intended to provide greater information about what is being shipped where and to who as a means of protecting the global supply chain from terrorism. The CSI commenced in January 2002 and is preventative in nature in terms of seeking information about what is being carried in containers as a means of thwarting terrorist activity. Approximately 90 per cent of current global trade in goods is through the use of shipping containers. In particular, the United States was concerned about shipping containers being used for the transport of WMD and terrorists, along with their supplies. One scenario of concern has been the detonation of a so-called dirty bomb or nuclear device in a US port after being unloaded from a container ship. This possibility seemed greater when it was taken into account that over 8,000 ships make 51,000 port calls and deliver around 7.5 million overseas containers in the United States annually, and of those containers, only 2 per cent are actually inspected.

The nature of international shipping is such that a large number of individuals, such as manufacturers, exporters, importers, carriers, and customs and port officials, may be involved in handling the cargo or providing information about the contents of the container. Keefer describes the consequences for security as follows:

Opportunities for security breaches occur primarily in the following stages of the shipping process: (1) the packing process at the foreign warehouse or factory; (2) the transport of the packed goods from that location to the foreign port at which the goods will be loaded; and (3) the preparation of the cargo manifest setting forth the contents and other information about the goods being shipped. Given these opportunities to tamper with the shipment


96 Richardson has described the discovery of a suspected terrorist in a container in an Italian port, who was discovered when he was seeking to make larger air holes. His container was set up as living accommodation and maps of different airports were found within the container. See Michael Richardson, A Time Bomb for Global Trade: Maritime-Related Terrorism in an Age of Weapons of Mass Destruction (Institute of Southeast Asian Studies, Singapore 2004) 2.


100 Keefer, ‘Container Port Security’ 142–3.
process, container security efforts focus in large part on container inspection and document-
tation, container seals, and the secure storage of containers.101 If containers are intercepted offshore, then any potential damage may be limited. However, the practicalities of inspecting containers while they are packed on a vessel are not conducive to offshore interdictions. As containers are more easily inspected on land, the United States opted to undertake these checks before the containers reach the United States, hence in the ports of other states prior to the containers being shipped.

While the CSI was initially undertaken pursuant to pre-existing statutory authority in the United States, it was subsequently codified in 2006 in the Security and Accountability for Every Port Act (SAFE Port Act).102 To support the CSI, the United States has also instituted additional security measures through national legislation. The range of programs instituted for port security is referred to collectively as the ‘US Cargo Security Strategy’.103 While these are domestic measures, they have inevitably impacted on international shipping given the extent of international trade involving the United States. One such initiative is known as the 24 Hour Rule, which was implemented in January 2003.104 Under the 24 Hour Rule, information on goods to be shipped to or through the United States must be provided to US officials 24 hours prior to the cargo being lade aboard a vessel in a foreign port.105

The United States has also instituted requirements for the use of particular types of container seals and to provide information on cargo manifests as to the seal number for each container.106 A further initiative has been the Customs-Trade Partnership Against Terrorism (C-TPAT), which emphasizes coordination between the shipping industry and government customs officials. If industry participants voluntarily meet specified minimum security criteria then they are entitled to various benefits in relation to decreased cargo examination and more expeditious access into US ports.107 C-TPAT was initially criticized because of its reliance on trust, rather than verification.108 These initiatives all hold significance under the law of the sea because the many countries shipping to the United States must conform to these requirements and because the United States has successfully sought bilateral and multilateral acceptance of its standards.109

101 Ibid 143 (citations omitted).
102 Bowman, ‘Thinking Outside the Border’ 204.
103 Ibid 203.
104 The 24 Hour Rule was adjusted so that information could be submitted electronically via the Automated Manifest System. Bryant, ‘Historical and Legal Aspects’ 15.
106 The requirement was first established under section 204 of the SAFE Port Act 2006. The notice setting out the details is contained in 73 Fed Reg 46029 (7 August 2008).
108 Ibid 162.
109 See generally Shirley Scott, ‘Whose Security is it and How Much of it Do We Want? The US Influence on the International Law against Maritime Terrorism’ in Natalie Klein, Joanna Mossop and
For pre-screening under the CSI, the United States concluded agreements with various port states, particularly those with the largest volume of cargo destined for the United States, but with the goal of pre-screening occurring at all ports of departure regardless of size and traffic volume. The three key elements of the CSI are:

1. establishment of criteria for the identification of high-risk containers based on advanced information and risk targeting;
2. pre-screening of containers before they arrive in the United States; and
3. full utilization of technology to pre-screen high-risk containers.

In undertaking security checks in foreign ports, the CSI is intended to push out US borders so that US government functions related to border security are undertaken outside US territory and relies upon the cooperation of foreign governments.

To identify high-risk containers based on advanced information and strategic intelligence, US customs officials share information on a bilateral basis with its CSI partners. To be involved in the CSI, participant states must commit *inter alia* ‘to sharing critical data, intelligence, and risk management information…in order to do collaborative targeting, and developing an automated mechanism for these exchanges’. While US officials may access shipment information and act in an advisory capacity to identify shipments of concern, the foreign host governments determine whether, when, and how to inspect potentially problematic containers.

Each state concludes its own agreement with the United States and implements new law or revises its law to give effect to the agreement. The bilateral nature of these arrangements has proven problematic in some instances. The United States entered into bilateral agreements with eight European states, provoking a dispute within the European Union on the basis that the bilateral agreements were in violation of European law since they potentially gave those states an unfair competitive advantage over European Union member states with ports not involved in the CSI. In addition, as bilateral agreements, the United States has ostensibly granted reciprocal rights to its treaty party to undertake similar security checks in the United States. However, it is widely recognized that the implementation of the


110 Mellor, ‘Missing the Boat’ 356.
112 Keefer, ‘Container Port Security’ 164; Bowman, ‘Thinking Outside the Border’ 216.
113 ‘CSI Fact Sheet’ 3.
114 Bowman, ‘Thinking Outside the Border’ 205.
115 ‘CSI Fact Sheet’ 5.
CSI has been heavily skewed in favour of the United States. In addition, civil penalties may be imposed on shippers if there is a failure to comply with the new regulations, and permission to load or unload cargo to or from the vessel may be denied.

In pursuing the CSI, the United States has endeavoured to highlight the advantages for international trade. Economic benefits from the CSI arise in that cargo bound for the US is processed on an expedited basis upon arrival as it has already been inspected at a foreign port, and any port involved in the CSI would be less disrupted in the event of a terrorist attack in light of the fact that it has a security system in place. A further purported benefit is that the improved security will allow for a decrease in the cost of insurance. Costs for states involved in the CSI may arise from the need to obtain new inspection equipment, although the United States characterizes this as an investment comparable to insurance. A further financial implication of the CSI is that the examination costs have been shifted from the US importer to the foreign shipper. There are concerns that costs will then be passed on to the consumer. The arguments that international trade is facilitated through the CSI need to be stronger if maritime security concerns are not widely accepted as sufficient justification for a concerted, unilateral, effort at revising port operations.

The CSI has raised concerns about infringing on state sovereignty, particularly in relation to interference with another state’s ports and closer regulation of the activities of the shipping industry by one, albeit powerful, state. This interference in state sovereignty is underlined by the lack of true reciprocity in most of the bilateral agreements concluded by the United States for the purposes of the CSI. The imposition of sanctions whereby vessels navigating to or from the United States may not provide transportation to ports with ineffective security measures has also been seen as a way of imposing US standards for maritime security throughout the world. The assertion of such special interests could have been deemed as incompatible with the common interest. Beckman has suggested that the infringements

117 Bowman, ‘Thinking Outside the Border’ 205.
121 ‘CSI Fact Sheet’ 4.
125 ‘Political or legal realist arguments thus can be made that, despite all official pronouncements of multilateral support for these U.S.-initiated cargo security programs, the countries involved know there is a double standard at play, and that other countries are expected to fully honor their commitments even if the United States chooses not to do so. To the extent that this is the case, it could weaken the multilateral justification for these cargo security programs.’ Bowman, ‘Thinking Outside the Border’ 231.
on sovereignty would not have been tolerated by states prior to the September 11 attacks.127 Noortmann has argued that the CSI is an appropriate mechanism to use to respond to maritime security threats because it avoids novel interpretations of coastal state rights within the territorial sea, and particularly the risk of unilateral enforcement measures that would be outside the confines of the existing law of the sea.128 Instead, the CSI is geared to improving security measures at ports, ostensibly with the consent of the states concerned, and may ultimately lead to a harmonization of standards for cargo security, at least between ports dealing with the highest volume of containers.129 The US Secretary for Homeland Security justifies this approach with the view that ‘shipping is a global industry; terrorism is a global problem; and our collective security requires a global solution’.130 To the extent that the CSI may reflect a collective response to a maritime security threat, it is less objectionable to an exclusive claim to impose the requirements of one state upon many. The US dominance in instituting the CSI tends to undermine the collective nature of the response.

Beyond the bilateral agreements pursued by the United States to protect the global supply chain through the CSI and other domestic regulations, there has been support within the World Customs Organization, the European Union, APEC, and the G8 for the expansion of the CSI principles, including non-intrusive inspection standards on a global level.131 The World Customs Organization adopted a resolution in June 2002 to enable ports in its member states to begin developing CSI-like programmes, which would include ‘collection of data concerning both outbound shipments in electronic form, use of risk management to identify and target high-risk shipments, and use of radiation detection and large-scale technology to identify containers that pose a security threat’.132 This resolution then paved the way for the adoption in June 2005 of the Framework of Standards to Secure and Facilitate Global Trade.133

The WCO Framework of Standards draws on elements of the CSI, as well as the 24 Hour Rule and C-TPAT.134 It is described as involving two pillars, creating a customs-to-customs network on the one hand and a customs-to-business

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129 Bowman, ‘Thinking Outside the Border’ 244–5.
132 Roach, ‘Initiatives to Enhance’ 44.
134 Bowman, ‘Thinking Outside the Border’ 228.
partnership on the other.\footnote{WCO Framework 5.} Four core elements then rest on these pillars: (1) harmonizing the advance electronic cargo information requirements on inbound, outbound, and transit shipments; (2) employing a consistent risk-management approach to security threats; (3) performing on request outbound inspection of containers and cargo identified as high risk; (4) defining benefits for businesses that meet minimal supply chain security standards and best practices.\footnote{WCO Framework 4.}

More specific standards are provided in an accompanying Annex, and these are intended to set forth a minimal threshold for WCO members, with gradual implementation while the necessary capacity building and legislative authority are developed.\footnote{WCO Framework 6.} The WCO Framework of Standards seeks to facilitate the transit of legitimate trade through electronic documentation, rather than physical inspection of every container. The preference is then for high-risk cargo to be inspected through non-intrusive means, such as large-scale X-rays. Much thus depends on the accuracy of the documentation. The precise lists and criteria used to identify high-risk cargo are classified, but it has been predicted that the criteria could be deciphered and then descriptions of cargo altered to prevent detection.\footnote{Bralliar, ‘Protecting US Ports’ 37.} Nonetheless, the processes proposed within the WCO Framework of Standards is the most realistic given the effort to balance maritime security measures with objectives to facilitate international trade.

One significant feature of the WCO Framework of Standards is that it provides a mechanism for member states to take the necessary steps to develop a certain level of uniformity and predictability between customs agencies in the international shipment of goods, especially through the reduction in multiple reporting requirements.\footnote{Yana E. Barzoskaya and Alexander S. Skaridov, ‘Simplification of the State Procedures for Tankers Engaged in International Oil Transportation’ (2008) 39 JMLC 97, 105.} Another significant feature is that it reflects an internationalization of US cargo security policy and the multilateral support received may be considered indicative of the acceptance of states of the intrusion into their sovereign authority over ports because of the shared interest in taking steps to augment maritime security. This acceptance may have been more readily achieved precisely because a binding treaty was not adopted and because the WCO Framework contemplates the need for gradual capacity building, rather than obliging the implementation of new procedures by a specific deadline.\footnote{Perhaps since the 1999 Protocol of Amendment to the International Convention the Simplification and Harmonization of Customs Procedures had not entered into force at the time the WCO Framework of Standards was adopted, there was a view that it would be impolitic to have two unenforceable treaties regarding customs and that a non-binding agreement would be a more, or equally, effective tool for the particular objectives of enhancing supply chain security.}
(3) Conclusion

Although the law enforcement powers of port states have been augmented to deal with threats to the marine environment, no comparable powers of investigation and detention have been accorded to port states in the event of reasonable suspicions of a vessel being involved in some way in terrorism or the proliferation of WMD. The prime benefits of the ISPS Code appear to lie in its operational requirements in that there are now international standards required for assessing risk and formalized procedures for addressing security issues between ships and ports. More attention is necessarily accorded to questions of security in the maritime transport industry as a result. For combating terrorism and the proliferation of WMD, the provision of information may be a vital tool in determining whether suspicions about a particular vessel may reasonably be raised. In the event of such suspicions, the mechanisms under the ISPS Code do not provide for new enforcement powers but when these suspicions are coupled with existing powers related to innocent passage and national criminal authority over ports then the legal frameworks of states may be sufficient to respond to or prevent these maritime security threats.

Both the CSI and the ISPS Code provide examples of efforts to improve the security of international shipping without overly restricting international trade. Each development has needed to take into account the economic costs of reducing efficiency in trade through potentially burdensome reporting and inspection requirements. The United States has sought to reduce these impacts in various ways, including conducting inspections at times when the cargo would be sitting in ports anyway. Ultimately, the steps that the United States takes have greater legitimacy if they are endorsed on a multilateral basis rather than imposed because of its economic and political strength. The WCO Framework of Standards goes some way to provide multilateral support to the CSI, and is particularly useful for the potential harmonization of reporting requirements and inspection standards to be followed on a global level. The improvements to port state controls through the ISPS Code and the CSI reflect some recognition of the need to respond to terrorist and proliferation threats to maritime security but the resistance to interference in sovereign matters of states has continued to limit the preventive efforts.

E. Interdictions Outside the Territorial Sea

One of the key responses to maritime security threats of terrorism and proliferation of WMD are interdictions in an EEZ or on the high seas (areas collectively referred to as ‘international waters’ by the United States and in various international instruments). While inspections of vessels may be more easily accomplished

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141 See Chapter 3, Part B(2).
142 The US refers to ‘international waters’ to cover maritime areas that are not part of the territorial sea, archipelagic waters or internal waters of a state.
when a vessel is at port, the political dynamics may be such that a port state will not conduct an inspection if it risks antagonizing the port state’s relationship with the flag state of the vessel in question. Interdictions in international waters may constitute an urgent response to prevent a vessel reaching its target destination. An interdiction at sea may also allow for a suspect vessel being escorted to a port of the interdicting state or one of its allies to facilitate a closer inspection.

While reasons may therefore exist to support interdictions at sea as a means of thwarting terrorism and proliferation of WMD, the legal basis for doing so has needed to be developed. The right of visit has not previously extended to these maritime security threats, and the traditional paradigm of the freedom of navigation coupled with the flag state’s exclusive jurisdiction over its vessels in these maritime areas has meant that any right of visit has required the consent of the flag state, either under treaty or on an ad hoc basis. There has been considerable opposition on the part of flag states to forgo their exclusive authority despite agreement as to the seriousness of terrorism and WMD proliferation as maritime security threats. The United States has been the prime instigator seeking to overcome this resistance, even though it shares an interest in protecting the freedom of navigation. The fact that it is the United States that has spearheaded these initiatives may have contributed to some states opposing significant changes under the law of the sea.

While the balance to be achieved is undeniably a fine one, results thus far appear to favour the inclusive interest in the freedom of navigation over a common interest in maritime security. It is understandable that more states may consider that they have greater stakes in navigational freedoms than in responding to what may seem as speculative concerns about terrorist attacks and the shipment of WMD. While the risks of one of these threats being realized may seem low, the consequences are sufficiently severe that greater acknowledgement should have been accorded to the common interest in maritime security. The failure to grant greater weight to interests in maritime security is manifest in the 2005 SUA Protocol, and also in the US efforts to conclude bilateral agreements allowing for interdictions in international waters, which are both discussed in this part of the chapter.

(1) 2005 SUA Protocol

The United States sought to improve the multilateral legal framework of the 1988 SUA Convention by permitting international recognition of an expanded range of terrorist offences (encompassing concerns related to the proliferation of WMD) and procedures for exercising jurisdiction in the face of these suspected offences at sea. These efforts resulted in the adoption at the IMO of a second Protocol to the 1988 SUA Convention on 14 October 2005.

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143 See Chapter 3, Part H(2).
144 1988 SUA Protocol.
In revising the 1988 SUA Convention, states had the opportunity to update its provisions in line with subsequent counter-terrorism treaties, as well as specifically confront new forms of maritime terrorism. With respect to the former, treaties such as the Terrorist Bombing Convention, the Terrorist Financing Convention, and the Nuclear Terrorism Convention had been adopted and included text that overcame some of the controversial aspects of the 1988 SUA Convention. Modifications could therefore be made to the application of the political offence exception, the application of counter-terrorism treaties to the armed forces of a state, and reference to a generally agreed description (albeit not a strict definition) of terrorism. The 2005 SUA Protocol thus incorporates these various developments. The inclusion of new offences over which states could establish and enforce jurisdiction proved more controversial.

In undertaking the negotiations to amend the 1988 SUA Convention, the critical task was to find a balance between the need to respond to (and pre-empt) new threats to the security of shipping, as well as to states more generally, and showing deference to well-entrenched interests in maintaining the pre-eminent authority of the flag state over its vessels. Jesus has promoted this approach:

As with everything in life, a balance of interests should be found between the different states. While the jurisdiction to board, search, seize and arrest the ship and offenders should be accepted as another exception to the flag state exclusive jurisdiction on the high seas or in territorial waters in exceptional crime circumstances, such jurisdiction extension would have to be balanced with respect for the flag state’s rights, by adopting safeguard provisions on compulsory conflict resolution, compensation for damage and loss in case of unwarranted exercise of police jurisdiction, and sharing of information with the flag state as to the police action and its results.

Ultimately, however, the 2005 SUA Protocol creates a much tighter balance in that the protections for the flag state do not include all those mentioned by Jesus but nor does it establish by dint of the treaty alone a new exception to exclusive flag state jurisdiction. It is argued here that the trade-offs should have been greater on both sides of the scales in order to create a more effective instrument. This section addresses the new offences recognized in the 2005 SUA Protocol and focuses on the new ship-boarding procedure established under this agreement.

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149 2005 SUA Protocol art 3, adding art 2bis (2) to the 1988 SUA Convention.
150 2005 SUA Protocol art 4, adding art 3bis to the SUA Convention. Article 3bis provides: ‘A person commits an offence if that person unlawfully and intentionally, when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act…’.
151 Jesus, ‘Protection of Foreign Ships’ 396.
(a) Offences under the 2005 SUA Protocol

The initial focus on revisions to the 1988 SUA Convention concerned the expansion of offences under Article 3 over which states parties could establish jurisdiction.\(^{152}\) In setting out offences, Article 3 of the 1988 SUA Convention included violence against or destruction of ships; seizure or exercising control over a ship by force or intimidation; and communication of false information that endangers the safe navigation of the ship.\(^ {153}\) The United States’ initial proposals for expanding Article 3 centred on offences related to the release of harmful substances that would cause death or serious bodily injury, without necessarily endangering the safe navigation of the ship; transportation of persons or items for terrorist purposes; and criminalizing the use of a ship or cargo as a weapon.\(^ {154}\)

The offences in the 1988 SUA Convention have therefore been expanded under the 2005 SUA Protocol to include reference to ‘serious injury or damage’, which is defined to include ‘substantial damage to the environment’ and incorporates reference to offences involving a ‘BCN weapon’, which is defined as biological weapons, chemical weapons, and nuclear weapons and other nuclear explosive devices.\(^ {155}\) While incorporating reference to BCN weapons, the 2005 SUA Protocol does not affect rights, obligations and responsibilities under the Biological Weapons Convention, the Chemical Weapons Convention nor the NPT.\(^ {156}\)

An offence is created under Article 3bis(1)(b) in relation to the transport on board a ship of any explosive or radioactive material knowing that it is to be used in a terrorist attack, and the transportation of biological, chemical and nuclear weapons, and related materials. ‘Some states have objected to the inclusion of

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155 2005 SUA Protocol art 2, amending art 1 of the 1988 SUA Convention to include these definitions. Article 2 of the 2005 SUA Protocol elaborates on the meaning of biological and chemical weapons.

156 2005 SUA Protocol art 3, adding art 2bis to the 1988 SUA Convention. In addition, art 3bis(2) allows for a carefully-worded exception to the possible offences under that article if the transport of nuclear weapons is consistent with the NPT.
[a provision on the transport of WMD and related materials] as a matter of principle because it created offences relating to the non-proliferation of WMD or other materials that were not directly linked to terrorism. In this regard, the revision of the 1988 SUA Convention appears to have provided an opportunity to enhance non-proliferation efforts generally. This point is reinforced by the fact that the transport of component parts of WMD does not necessarily endanger the safety of the ship or the safety of maritime navigation. To have taken this step nonetheless reflects that concerns about security are holistic in that threats at sea may constitute, or become, threats on land. It was therefore appropriate for states to seek to close these gaps in this regard.

Article 3bis(1)(a) of the 2005 SUA Protocol adds offences when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act and an offender:

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

Article 3ter then establishes an offence for the transport of an offender with the intention to assist that person in evading criminal prosecution. The offender may not only be culpable under the 1988 SUA Convention and 2005 SUA Protocol in this regard, but also in relation to nine other counter-terrorism treaties that are included in a new annex to the 1988 SUA Convention under Article 7 of the 2005 SUA Protocol. The scope of this provision is again notable, as it accounts for the linkage of maritime security with security on land. The new offences under the 2005 SUA Protocol also extend to those who attempt, participate, organize, or direct others, or contribute to various of the principal offences set forth in the 1988 SUA Convention or the 2005 SUA Protocol.

(b) Ship-boarding procedure

What was missing from the 1988 SUA Convention was a means effectively to apprehend offenders. Since the adoption of that treaty, ship-boarding procedures had been included in other multilateral treaties, such as the UN Convention against

157 Beckman, ‘International Responses’ 264.
158 Ibid.
Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention), and also the 2000 Migrant Smuggling Protocol. The inclusion of a procedure in the 2005 SUA Protocol to allow states to board ships marks a shift from merely providing lawful bases to establish jurisdiction to creating the means to exercise jurisdiction. The decision to include such a procedure was not taken lightly in view of the fundamental principles believed to be at stake. Hence, during the course of negotiations, the Legal Committee of the IMO recognized that:

the inclusion of boarding provisions constituted a significant departure from the fundamental principles of freedom of navigation on the high seas and exclusive jurisdiction of flag states over their vessels. It was accepted that the principle of flag State jurisdiction must be respected to the utmost extent, recognized in that a boarding by another State on the high seas could only take place in exceptional circumstances. Any exception must be precise, unambiguous and internationally accepted.

The inclusion of a ship-boarding provision in the revised protocol emerged in August 2002 following discussions among a Correspondence Group established by the United States. As the 1988 SUA Convention needed updating to reflect developments from subsequent counter-terrorism treaties, the United States similarly proposed that the amendments should take into account ship-boarding provisions that had developed through the 1988 Vienna Convention, the Migrant Smuggling Protocol, as well as agreements relating to cooperation in suppressing illicit maritime trafficking in narcotic drugs and psychotropic substances in the Caribbean. In drawing on these treaties, the amendments to the 1988 SUA Convention thus expanded not only to reflect developments in relation to the suppression of international terrorism but also to create a new legal basis by which states would be able to exercise the right of visit on the high seas. The United States, a key participant in negotiations, considered that the 2005 SUA Protocol ‘establish...
the most well-developed boarding procedures and safeguard in any instrument of its type.\textsuperscript{166}

(c) Location of ship-boarding

The 2005 SUA Protocol sets out in Article 8bis procedures by which states parties may request that flag states of suspect vessels permit boarding outside the territorial sea of any state.\textsuperscript{167} Article 8bis is premised on the scenario of a state party wishing to board a vessel that either flies the flag or displays marks of registry of another state party. The drafters of the 2005 SUA Protocol considered how the nationality of vessels was to be described. A number of delegates supported inclusion of reference to a ship ‘claiming its nationality’, but the compromise text settled on was ‘displaying marks or registry’,\textsuperscript{168} which provided greater precision than a claim to nationality.

There is no suggestion in the 2005 SUA Protocol that the boarding provisions will interfere with a coastal state’s exercise of sovereignty over its territorial sea. Further, there is no explicit reference to the EEZ or the high seas and hence no overt recognition of how the rights of states may vary within these different maritime areas. This issue had proved polemic during the drafting of the 1988 Vienna Convention, with negotiating states settling on reference to vessels exercising the freedom of navigation in order to account for both the EEZ and the high seas.\textsuperscript{169} In the 2005 SUA Protocol, the only means by which any distinction is acknowledged is in respect of the safeguards to be in place during the boarding, and the requirement that a state party take due account of the need not to interfere with or affect ‘the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea’.\textsuperscript{170} It would appear that boarding must therefore take account of the right of coastal states in exercising sovereign rights and jurisdiction in the EEZ so as not to interfere with those rights.

\textsuperscript{166} International Conference on the Revision of the SUA Treaties, ‘Consideration of: A draft protocol to the Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988 and a draft protocol to the protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, 1988: Comments on counter-terrorism, non-proliferation and boarding provisions, Submitted by the United States’ (22 September 2005) IMO Doc LEG/CONF.15/15, para 3.


\textsuperscript{170} 2005 SUA Protocol art 8bis(10)(c)(i).
(d) Requesting permission to board

For boarding to be authorized under the 2005 SUA Protocol, a requesting state must have ‘reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence’ as set out in Article 3, 3bis, 3ter or 3quater of the 1988 SUA Convention and 2005 SUA Protocol.\textsuperscript{171} In the first draft, one of the conditions to authorize boarding was a reasonable suspicion of being involved in an offence, or a reasonable belief that the vessel was a target of one of those offences.\textsuperscript{172} This standard was subsequently tightened to refer to ‘reasonable grounds to believe’ that a vessel ‘has been or is about to be involved in, or the target of, the commission of an offence’.\textsuperscript{173} This change was to align the terminology with the standards set out in UNCLOS, the 1988 Vienna Convention and the Migrant Smuggling Protocol.\textsuperscript{174} However, in subsequent negotiations, preference was again expressed for reference to ‘reasonable grounds to suspect’.\textsuperscript{175} It is difficult to discern whether these slight differences in terminology will ultimately have any practical significance. It is less likely to be relevant on the international level in dealing with any possible disputes arising between states parties as to the interpretation and application of the 2005 SUA Protocol, but may be more significant in the standards applied in subsequent criminal proceedings following the arrest of an alleged offender or suspect vessel at sea in accordance with the Article 8bis procedure.

Any request to board ‘should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information’.\textsuperscript{176} Notably, there is no requirement expressly imposed on the state requesting permission to board to provide information explaining why it has reasonable grounds to suspect that a ship or person on board is involved in a proscribed act under the 1988 SUA Convention or

\textsuperscript{171} 2005 SUA Protocol art 8bis(5).
\textsuperscript{174} Referring to arts 108(2), 17(20) and (3), and 8(1) and (2) of these instruments, respectively.
\textsuperscript{176} 2005 SUA Protocol art 8bis(2).
2005 SUA Protocol.\textsuperscript{177} By contrast, this requirement is included in the bilateral ship-boarding agreements with the United States.\textsuperscript{178} In any event, the right of the flag state to impose conditions on its authorization to board or the general reference to ‘other relevant information’ may be enough to warrant the disclosure of evidence related to the suspected offences if desired by the flag state.\textsuperscript{179}

A request may be issued orally, but must be confirmed in writing as soon as possible. It is incumbent on the flag state to acknowledge receipt of any oral or written request immediately.\textsuperscript{180} Although not completely clear on the face of the text, it appears that in making the request, the requesting state also seeks confirmation from the flag state as to the claim of nationality of the suspect vessel.\textsuperscript{181}

(e) Consent to ship-boarding

The three possible avenues by which a boarding may occur pay deference to the pre-eminence of the flag state in its authority over vessels on the high seas.\textsuperscript{182} The first avenue anticipates consent on an \textit{ad hoc} basis. Second, consent is accorded implicitly if prior authorization is notified to the IMO Secretary-General and no response to a request is forthcoming from the flag state after four hours. Finally, if prior authorization is notified to the Secretary-General then consent is again considered implicit but there is no need to wait four hours for permission to visit

\textsuperscript{177} France had made a proposal to this effect but it was not incorporated into the text. See IMO Review Working Group, ‘Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Complements to the “Boarding” section, Submitted by France’ (30 June 2004) 1st Session IMO Doc LEG/SUA/WG.1/2/1, art 8\textit{bis}(2). See also IMO Review Working Group, ‘Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States’ (12 July 2004) 1st Session IMO Doc LEG/SUA/WG.1/2/6 (a proposal that would have required the requesting party to hand over any evidence to the flag state); IMO Legal Committee, ‘Report of the Legal Committee on the Work of its Ninetieth Session’ (9 May 2005) 90th Session IMO Doc LEG 90/15, para 66 (referring to a comparable proposal from India but was rejected, with some delegations stating it was already covered by the text of para 5).

\textsuperscript{178} See text below to n 249.

\textsuperscript{179} 2005 SUA Protocol art 8\textit{bis}(7).

\textsuperscript{180} 2005 SUA Protocol art 8\textit{bis}(2).

\textsuperscript{181} 2005 SUA Protocol art 8\textit{bis}(5)(a) (‘it shall request, in accordance with paragraphs 1 and 2, that the first Party shall confirm the claim of nationality’).

\textsuperscript{182} In its first articulation, the US proposed two methods by which a flag state could authorize the boarding of one of its vessels outside of territorial waters: ‘either advance authorization when the enumerated conditions are met, or a procedure for granting authorization on an as-requested basis, including authorization when no reply is given within four hours’. IMO Legal Committee, ‘Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States’ (17 August 2002) 85th Session IMO Doc LEG 85/4, para 12. As the paragraph is finally drafted, the precise sequence of decision making is not completely clear and logical given the alternatives for authorizing boarding. An alternative proposed structure would have been preferable in this regard. See IMO Legal Committee Working Group on the Review of the SUA Convention and Protocol [‘Review Working Group’], ‘Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation’s proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States’ (30 June 2004) 1st Session IMO Doc LEG/SUA/WG.1/2, para 13 (which delineates more clearly the alternatives and appropriate sequence of events).
the suspect vessel. Considerations in developing these procedures included mini-
mizing the possible inconvenience that may be caused to a suspect vessel during its
journey while still limiting the circumstances by which that vessel could escape
inspection.\textsuperscript{183} This structure underlines that permission to board requires express
flag state authorization and that tacit and advance authorizations to board are only
optional.\textsuperscript{184} The agreement reached in the 2005 SUA Protocol in this regard stands
in marked contrast to the consent system created under the United States bilateral
ship-boarding agreements.\textsuperscript{185}

When proceeding on an \textit{ad hoc} basis, the requesting state must first await
confirmation of nationality from the flag state before seeking authorization to
board and take appropriate measures with respect to the suspect ship.\textsuperscript{186} States parties
must respond to requests pursuant to Article 8\textit{bis} as expeditiously as possible.\textsuperscript{187}
Ambiguity as to the precise time constraint appears to have been preferred to a specific
timeframe.\textsuperscript{188} For example, a proposal to require a decision ‘as soon as possible and,
wherever practicable, within four hours’, consistent with the Council of Europe’s
implementation of the 1988 Vienna Convention, was not adopted.\textsuperscript{189} France, in
particular, proposed a regime to be put in place in the event that no response came

\textsuperscript{183} IMO Legal Committee, ‘Review of SUA Convention and Protocol: Draft amendments to the
SUA Convention and SUA Protocol, Submitted by the United States’ (17 August 2002) 85th Session
IMO Doc LEG 85/4, para 12.

\textsuperscript{184} IMO Legal Committee, ‘Review of SUA Convention and Protocol, Draft Amendments to the
SUA Convention and Protocol, Submitted by the United States’ (15 September 2004) 89th Session
IMO Doc LEG 89/4/5, para 12. See also IMO Legal Committee ‘Report of the Legal Committee on
the Work of its Eighty-Ninth Session’ (4 November 2004) 89th Session IMO Doc LEG/89/16, para 51 (supporting China’s proposal that a provision specifically stating the need for express authorization be included in the SUA Protocol).

\textsuperscript{185} See below Part E(2)(b).

\textsuperscript{186} 2005 SUA Protocol art 8\textit{bis}(5)(b).

\textsuperscript{187} Earlier drafts had referred to the need of states parties to respond expeditiously to a request
confirming nationality as well as requests for authorization to take appropriate measures with regard to
that ship. IMO Legal Committee, ‘Review of SUA Convention and Protocol, Draft amendments to
the SUA Convention and SUA Protocol, Submitted by the United States’ (13 February 2004) 88th Session
IMO Doc LEG 88/3 Annex 2 art 8\textit{bis}(3). These separate requirements were subsequently
replaced by the one general requirement in para 1 of the article. See Review Working Group, ‘Review of
SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol,
US delegation’s proposed revisions to the proposed Protocol to the SUA Convention (Annex 1),

\textsuperscript{188} IMO Legal Committee ‘Report of the Legal Committee on the Work of its Eighty-Ninth Session’ (4 November 2004) 89th Session IMO Doc LEG/89/16, para 47 (‘unless a clear time limit
was established, legal uncertainty would arise as to what the requesting Party would be entitled to do in
the event an answer was not received’). See also Review Working Group, ‘Review of the draft Protocol
to the Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988
(1988 SUA Convention) [Review of draft Protocol], Submitted by the Secretariat’ (3 December
2004) 2nd Session IMO Doc LEG/SUA/WG.2/2/1 Annex art 8\textit{bis}, para 3(d) (‘[O]ne delegation
proposed the insertion of a new subparagraph (d) that would set out consequences in the event of a
request Party’s failure to respond. This proposal was discussed but not accepted by the LEG 89 Formal
Working Group.’).

\textsuperscript{189} IMO Review Working Group, ‘Review of SUA Convention and Protocol: Draft amendments
to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA
Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States’ (12 July
2004) 1st Session IMO Doc LEG/SUA/WG.1/2/6 (referring to the 1995 European Agreement, which
provides: ‘The flag State shall immediately acknowledge receipt of a request for authorization under
from the flag state, involving alerts to shipping in the area or decision among states parties.  However, ‘[s]everal delegations stated that the proposal was not needed, since the requesting State had a right to warn other Parties which could be implemented without any specific authorization being conferred by a provision in the protocol.’

China considered that the ‘generic requirement’ to respond to a request as expeditiously as possible was sufficient and avoided unreasonable and impracticable difficulties in specifying a time limit. In agreement with China’s views, a majority of delegations considered that the imposition of a time limit was unnecessary as states would not ignore their obligations under the 1988 SUA Convention, or that such a limit was ‘too constraining, impracticable (especially if different time zones were involved) and served no real purpose’. It was further feared that giving a warning to states parties if there was no response would permit arbitrary judgment on the part of the requesting state and may well be ‘intimidating and counterproductive to the aims of the Protocol’. Given these views, it is apparent that a lack of response was not intended to be construed as an authorization to board but that deference to flag state authority prevailed.

The flag state is given four options under the 2005 SUA Protocol in deciding on how the boarding should proceed. It may authorize the boarding by the requesting state either on its own or with officials of the flag state, and, in either instance, subject the boarding to any conditions relating to responsibility for and the extent of measures to be taken. Alternatively, the flag state may conduct the boarding and search the suspect vessel itself, or decline to authorize a boarding and search. What appears to be lacking in this provision is an obligation on the flag state to take measures against one of its vessel when there are reasonable grounds to suspect the involvement of that vessel in the commission of an offence under the 1988 SUA Convention or 2005 SUA Protocol. This possibility of flag

Article 6, and shall communicate a decision thereon as soon as possible, and wherever practicable, within four hours of receipt of the request’.


195 2005 SUA Protocol art 8bis(5)(c), (7).

196 2005 SUA Protocol art 8bis(5)(c).
state inaction would appear to be an unfortunate lacuna in the enforcement regime created in the 2005 SUA Protocol.

For *ad hoc* authorizations and boardings, the requesting state must receive express authorization from the flag state in order to proceed with boarding and other measures in respect of a suspect vessel. This preferred approach is obviously consistent with the traditional adherence to flag state authority in high seas areas. In earlier formulations of Article 8bis, the United States had proposed that requesting states could imply authorization if a flag state did not respond to the request to board after four hours. The United States considered that a four-hour default rule was ‘essential to the prompt conduct of the boarding, to minimize delay of the suspect ship, and to the early release of the warship . . . to conduct its other missions’. Concerns during negotiations about authorizing boarding through implicit consent during negotiations resulted in a proposal that states could opt out of such a situation by notifying the Secretary-General that boarding would only be authorized by express consent. In this case, implicit consent remained the default rule with the onus placed on states to take steps to exclude such a possibility through notification to the Secretary-General. However, the ‘opt-out’ formula proved unpopular during negotiations, as it was viewed as inconsistent with the right of a flag state to exercise exclusive jurisdiction. Ultimately, the need for express consent to be afforded on an *ad hoc* basis prevailed and implied consent after four hours was re-configured as an ‘opt-in’ clause.

This implicit authorization after a four-hour wait therefore constitutes an alternative avenue for states parties to consent to a ship-boarding. Paragraph 5(d) of Article 8bis permits a boarding to proceed in these circumstances provided the flag state had previously notified the Secretary-General to this effect. While this approach is more deferential to flag states, it does not overcome a number of the difficulties described by those opposing any form of implicit authorization. The four-hour time limit was again criticized as impracticable due to the problem of time zones and public holidays. In particular, the International Chamber of Shipping, the International Shipping Federation, and the International Confederation of Free Trade Unions opposed implicit authorization given concerns about the need for masters of vessels to have sufficient time to consult with ship owners as well as distinguishing between what would be a lawful tacit boarding and piracy or terrorism and proliferation of WMD.

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201 Ibid.
armed robbery at sea. However, this last issue should not have proved a major concern given that boardings under the 2005 SUA Protocol are to be conducted by law enforcement or other officials, and such persons and their ships would presumably be clearly marked and identified for these purposes.

A third alternative is that a flag state may notify the Secretary-General that a requesting state is ‘authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence set forth . . . has been, is being or is about to be committed’. This ‘opt-in’ clause creates a power conferred by treaty to exercise the right of visit, and is comparable in this regard to the United States–United Kingdom Exchange of Notes in relation to drug trafficking. Given that it is an ‘opt-in’ provision, though, the emphasis remains on the freedom of choice afforded to flag states as to whether they will relinquish their authority for the purposes of preventing or responding to the offences addressed in the 1988 SUA Convention and 2005 SUA Protocol.

The pre-eminent power of the flag state is further affirmed by the fact that the notifications relating to either form of implicit authorization may be withdrawn at any time. During negotiations, although several delegations supported a suggestion that the text should reflect that a withdrawal would only become effective after a certain period of time, no such time limit was included. While withdrawal from a treaty may generally not take effect until a reasonable period of time passes, it is not certain that the same rule would apply to the ‘opt in’ notification. In any event, the possibility that the withdrawal of notification has immediate effect is not barred in view of the failure of states explicitly to exclude this possibility in the text of the agreement.

(f) Required safeguards in undertaking a ship-boarding

In addition to detailing the manner by which a state may board a foreign vessel, a number of safeguards are incorporated into Article 8bis to temper the manner by
which the boarding may be conducted and to ensure consistency with international law standards. In this regard, paragraph 10 sets forth duties imposed on the requesting state such as the protection of the persons on board, the safety and security of the ship and its cargo, and not prejudicing the commercial or legal interests of the flag state. These sorts of protections are largely consistent with other treaties authorizing interdictions. Questions may arise as to the precise application of these safeguards in any particular factual context.

The conduct of the boarding must also be consistent with international law requirements relating to the use of force. At the outset of negotiations, it was proposed that any use of force in the course of undertaking a boarding of a suspect vessel was to be consistent with national law standards as well as the minimum reasonably necessary under the circumstances. States subsequently objected to national law exclusively governing the boarding of a vessel, so it was amended to refer to boardings consistent with international law. Further support was drawn from the formulation on the use of force in boardings included in the Fish Stocks Agreement. Article 8bis provides that the use of force is to be avoided ‘except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions’. Requesting states are further required only to use the minimum degree of force that would be necessary and reasonable in the circumstances. Similar to the other safeguard provisions, there is room for disagreement as to whether any particular use of force will be considered unnecessary or unreasonable in the context of a particular boarding.

It could be foreseen that any ambiguities in interpretation will ultimately be determined in the context of whether greater weight should be accorded to the interests of the state conducting the boarding or to the flag state of the interdicted

209 These provisions were primarily driven by the International Confederation of Free Trade Unions, which insisted on maintaining protection for seafarers in the 2005 SUA Protocol in a comparable manner to those afforded in the ISPS Code and SOLAS Convention, as well as being consistent with the high priority accorded to what was referred to as the human element in the work of the IMO. See IMO Legal Committee, ‘Review of SUA Convention and Protocol: Submitted by the International Confederation of Free Trade Unions (ICFTU)’ (11 September 2003) 87th Session IMO Doc LEG 87/5/2, paras 4–6.

210 Guilfoyle, Shipping Interdiction 266–7.


214 2005 SUA Protocol art 8bis(9).
vessel. The balance is a difficult one because the treaty reflects the importance of taking action against terrorism and WMD proliferation, but also reflects the reticence of states to grant an excess of authority over their vessels to other states. Given the traditional emphasis is on the exclusive authority of flag states, it is imaginable that the safeguards will be enforced in a robust manner, rightly or wrongly, to protect this authority.

(g) Outcomes from a ship-boarding

If evidence of unlawful conduct in relation to the offences under the 1988 SUA Convention and 2005 SUA Protocol is discovered as a result of the boarding, the flag state is to be promptly informed. The flag state may also authorize the detention of the ship, cargo, and persons on board. In these circumstances, the 2005 SUA Protocol specifies that the flag state has the right to exercise jurisdiction, or that the flag state may consent to another state exercising jurisdiction if that state would have jurisdiction by virtue of Article 6 of the 2005 SUA Protocol and 1988 SUA Convention. This formulation emphasizing the authority of the flag state reflects earlier drafts that explicitly referred to the primary right of the flag state to exercise jurisdiction. As such, it would seem that the requesting state that conducts the boarding and uncovers unlawful conduct under the terms of Article 3, 3bis, 3ter, and 3quater may not ultimately be authorized to proceed with the prosecution of the alleged offenders if a jurisdictional nexus under Article 6 does not exist.

In the event that a boarding is conducted and the grounds for such measures are unlawful or prove to be unfounded, the burden then falls to the requesting state to compensate for ‘any damage, harm or loss attributable to [that state] arising from measures taken pursuant to’ Article 8bis. The possible attribution of liability in

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215 2005 SUA Protocol art 8bis(6).
216 2005 SUA Protocol art 8bis(6).
217 It was acknowledged during the course of negotiations that ‘while as a general rule, the flag State will normally remain in charge of the boarding operation and of the subsequent steps that might follow, including criminal prosecutions, there may be situations in which it would be more sensible to allow the intervening State—or a third State—to exercise its jurisdiction.’ IMO Legal Committee ‘Report of the Legal Committee on the Work of its Eighty-Ninth Session’ (4 November 2004) 89th Session IMO Doc LEG/89/16, para 56.
219 Proposals to refer to compensation payable or to joint and several liability were not adopted. See Review Working Group, ‘Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Comments on US delegation’s proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by Brazil’ (9 July 2004) 1st Session IMO Doc
these circumstances would tend to indicate that any decision to request authorization to board must in reality exceed the mere existence of a reasonable ground to suspect. However, a state conducting a boarding in this situation will not be liable if the ship boarded has committed an act justifying the suspicion in the first place.\textsuperscript{220} This limitation is consistent with the requirements set out in Article 110 of UNCLOS.\textsuperscript{221}

\section*{(2) Bilateral ship-boarding agreements}

Both prior and subsequent to the adoption of the 2005 SUA Protocol, the United States has sought to enter into ship-boarding agreements with states holding the largest shipping registries, and hence having the greatest number of flag vessels under their control and exclusive jurisdiction. The agreements are intended to facilitate cooperation by establishing points of contact in each state as well as setting out procedures to expedite requests to board and search suspect vessels in waters beyond the territorial sea. This approach enables the United States to establish authority that it would not otherwise have to board vessels suspected of carrying illicit shipments of WMD and related material. In pursuit of this policy, the United States has signed ship-boarding agreements with the Bahamas,\textsuperscript{222} Belize,\textsuperscript{223} Croatia,\textsuperscript{224} Cyprus,\textsuperscript{225} Liberia,\textsuperscript{226} Marshall Islands,\textsuperscript{227} Malta,\textsuperscript{228} and several other states.

\begin{itemize}
\item \textsuperscript{220} 2005 SUA Protocol art \textit{8bis}(10)(b)(i).
\item \textsuperscript{221} UNCLOS art 110(3).
\end{itemize}
Mongolia,\textsuperscript{229} and Panama.\textsuperscript{230} According to the United States, the ‘combination of states with which we have signed bilateral ship boarding agreements, plus the commitments made by other Proliferation Security Initiative partners under the Statement of Interdiction Principles, translates into more than 60 percent of the global commercial shipping fleet dead weight tonnage now being subject to rapid action consent procedures for boarding, search, and seizure’.\textsuperscript{231}

These ship-boarding agreements have some similarities to the ‘shiprider agreements’ that the United States has entered into with other states to permit boarding and searching of vessels flagged to those other states in order to curb drug trafficking.\textsuperscript{232} These treaties are ‘typically bilateral agreements that provide a mechanism, customized to the conditions and capabilities of the parties to the agreement, whereby law enforcement officials of either party may receive preauthorization to board and search flag vessels of the other state for the purpose of curbing the illicit traffic in drugs.’\textsuperscript{233} As such, the new bilateral ship-boarding agreements that are specifically directed at countering WMD threats constitute ‘powers conferred by treaty’ under Article 110 of UNCLOS to permit the right of visit that would not otherwise be countenanced under the freedoms of the high seas.

The preambles to the bilateral ship-boarding agreements recall a variety of sources of international law, including the NPT, the Chemical Weapons Convention, the Biological Weapons Convention, and the ISPS Code as well as the 1992 Security Council Presidential Statement,\textsuperscript{234} Security Council Resolution 1540 (adopted subsequent to the establishment of the PSI),\textsuperscript{235} and the Statement of


\textsuperscript{231} Media Note, Office of the Spokesman, Washington, D.C., The United States and Belize Proliferation Security Initiative Ship Boarding Agreement (4 August 2005). This percentage has undoubtedly increased with the adoption of subsequent bilateral ship-boarding agreements between the US and the Bahamas, Malta and Mongolia, especially as the Bahamas has the third largest flag registry of merchant ships in the world, according to gross tonnage, and operates as an open registry for ship owners from numerous countries. Office of the Spokesman, Washington DC ‘The United States and the Bahamas Proliferation Security Initiative Ship-boarding Agreement, Fact sheet’ (11 August 2008) <http://merln.ndu.edu/archivepdf/ARA/State/108128.pdf>.

\textsuperscript{232} Lehrman, ‘Enhancing the Proliferation Security Initiative’ 228, 236. The agreement with Panama is an amendment to the ship-rider agreement that was already in place between the two states.

\textsuperscript{233} Ibid 228, 236–7. See also Chapter 3, Part H(2)(d).

\textsuperscript{234} See text to nn 355–8 below.

\textsuperscript{235} See also Chapter 6, Part C(3)(c).
Interdiction Principles for the PSI. The preambles also reaffirm the importance of customary international law as reflected in UNCLOS. The object and purpose of each of the agreements is usually articulated as promoting cooperation between the parties to prevent transportation by sea of items of proliferation. In doing so, the parties also confirm that their obligations are to be carried out consistently with principles of sovereign equality and territorial integrity, but acknowledge that the cooperation may be limited by the availability of resources and must be in compliance with the constitutions and applicable national laws of each state.

Further legal safeguards are built in through the inclusion of a clause that nothing in the agreements will ‘prejudice the position of either Party with regard to international law’, and to otherwise allow for ship-boarding under alternative authority, although still in accordance with international law. While the without prejudice clause in the US–Belize Agreement is very broad, the US–Cyprus Agreement elaborates on the position of parties under international law by stipulating that nothing in the agreement ‘shall be interpreted or applied in a manner that would derogate from the right of the national military authorities of a Party to engage in sea transport of any weapons, military materiel, or equipment for national defense purposes that is otherwise consistent with international law, including international agreements to which that State is party’.

Beyond these introductory clauses, all of the agreements set forth similar offences, ship-boarding procedures, and safeguards. While a template agreement was clearly used, the negotiations with each state obviously required refining or tailoring of the provisions to address separate circumstances and concerns. The discussion here primarily looks to those points of similarity across all of the bilateral

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236 Items of proliferation are usually defined as ‘WMD, their delivery systems, and related material’. Related materials are then defined as ‘materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists of either Party, or as otherwise agreed by the Parties for the purposes of this Agreement, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery’. This definition allows for the Parties to decide how they will characterize dual-use materials in any given situation.

237 The extent that sovereign equality has been at play between the US and the states with which it has concluded these agreements has been questioned by some commentators. See text below to nn 253–4. Byers has noted that Liberia does not have its own navy and so there is a complete absence of reciprocity in its bilateral agreement with the US. See Michael Byers, ‘Policing the High Seas: The Proliferation Security Initiative’ (2004) 98 AJIL 526, 530.

238 See, eg, US–Belize Agreement art 2(2) and 2(3).

239 US–Belize Agreement art 15. There is a further savings clause in the same article that nothing in the agreements will ‘alter the rights and privileges due any person in any administrative or judicial proceeding conducted under the jurisdiction of either Party’.

240 US–Belize Agreement art 4(6).

241 Eg, US–Cyprus Agreement art 15.

agreements. Also discussed is the treatment of third states under some of the agreements, which may be relevant for cooperative endeavours that are needed in any given situation.

(a) Offences

The agreements are directed to operations against ‘suspect ships’, which are those used for commercial or private purposes in respect of which there are reasonable grounds to suspect they are engaged in the illicit transportation of WMD and related materials.243 ‘Related materials’, which is an undefined term in the PSI context,244 is described broadly in the agreements as ‘materials, equipment and technology, of whatever nature or type, that are related to and destined for use in the development, production, utilization or delivery of WMD’.245 This definition does not overcome difficulties associated with dual-use materials and is dependent on a finding that the materials are to be used for military purposes. The agreements do not specifically criminalize the illicit transport of WMD and associated materials, but provides a basis in international law for the flag state to exercise jurisdiction over a detained ship, cargo, or other items and persons on board.246 The exercise of jurisdiction in this context is said to extend to seizure, forfeiture, arrest, and prosecution.247

(b) Ship-boarding procedure

Under these agreements, a state party may request confirmation of the nationality of a suspect ship, and, if the claim of nationality is confirmed, that authorization be accorded for the boarding and search of the suspect ship, cargo, and persons found on board.248 These requests are to include information identifying the particular vessel, as well as the basis for the suspicion warranting the request.249 The flag state may ask for additional information.250 In responding to requests, the flag state may verify nationality and, if satisfied that it is a suspect ship, the flag state may either conduct the boarding and search itself, permit the other state

243 See, eg, US–Cyprus Agreement art 3, incorporating the definitions of ‘suspect ship’ and ‘proliferation at sea’ as set forth in art 1.
244 Although a note has been included defining this term in relation to UN Security Council Resolution 1540. The preferred US definition does not require reference to specific lists but allows for a case-by-case approach. Roach, ‘Countering Proliferation by Sea’ 378–9.
246 See, eg, US–Belize Agreement art 5(1). That it is the flag state that has jurisdiction is made explicit in the US–Cyprus Agreement. The US–Marshall Islands Agreement and the US–Liberia Agreement allow for the possibility that the state with primary jurisdiction may waive that right and authorize enforcement of the other party’s law.
247 See, eg, US–Belize Agreement art 5(1).
249 See, eg, US–Liberia Agreement art 4(2). This latter feature is notable because it is not included in the 2005 SUA Protocol. The US–Cyprus Agreement refers in art 4(2) to ‘sufficiently reliable information forming the basis for the suspicion’.
to do so, or both states may do so together, or the flag state has the option of denying permission to board and search.\textsuperscript{251}

Essential in the process of issuing requests and receiving authority (or not) to proceed is an open chain of communication between the states parties and within the domestic authorities of each state. For this purpose, a provision is included whereby points of contact are to be maintained current and that those points of contact must have the capability to receive, process, and respond to requests and reports at any time.\textsuperscript{252} However, to answer concerns that such authorizations may not be forthcoming, or may not occur in a sufficiently timely manner, the bilateral ship-boarding agreements establish implied consent regimes. As such, each flag state has a limited time to respond to a request for authority to board a suspect vessel (although it may request additional time in which to respond). Otherwise, the time allowed for a response is two hours for the Bahamas, Belize, Liberia, Mongolia, and Panama; and four hours for Croatia, Cyprus, Malta, and the Marshall Islands. If there is no response within that time, the requesting country is deemed to have conferred such authority (a notable exception to this is the US–Croatia ship-boarding agreement). This system of implied consent has been subject to criticism, as it reflects the unequal bargaining power of the United States with some of its negotiating partners, particularly vis-à-vis the Bahamas, Belize, Liberia, Panama, Cyprus, and the Marshall Islands. Garvey notes: ‘Two hours is obviously a period of time grossly inadequate to assess the credibility of a request for interdiction and the interests involved.’\textsuperscript{253} In these circumstances, the notification period has been described as ‘window-dressing’ for sovereign equality.\textsuperscript{254}

A series of safeguards is incorporated into the bilateral ship-boarding agreements in relation to the boarding procedure. These include strict requirements that any use of force, as well as the conduct of each states’ personnel, be in conformity with international standards, as well as the applicable laws and policies of the parties.\textsuperscript{255} There is also specification that account is to be taken of safety of life at sea and of

\textsuperscript{251} See, eg, US–Liberia Agreement art 4(3).
\textsuperscript{252} See, eg, US–Belize Agreement art 11.
\textsuperscript{254} Ibid, 142. Guilfoyle argues, on the other hand, that ‘this may represent a means for a small State to externalize some of its security or reputation costs’. Douglas Guilfoyle, ‘Maritime Interdiction of Weapons of Mass Destruction’ (2007) 12 Journal of Conflict and Security Law 1, 23.
\textsuperscript{255} See, eg, US–Belize Agreement art 8. The US–Croatia Agreement does not refer to either national or international standards specifically in relation to the use of force but instead requires that force is to be ‘avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this Agreement shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances’. US–Croatia Agreement art 9(1). It is further provided: ‘Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by Security Force or other officials of either Party’. US–Croatia Agreement art 9(2). This formulation also appears in art 9 of the US–Mongolia Agreement and the US–Bahamas Agreement. This clause would seem to indicate that the international standard is the most appropriate point of reference in assessing the use of force in a boarding.
the security of the ship and its cargo;\textsuperscript{256} that the commercial or legal interests of the flag state are not prejudiced; and that measures taken are environmentally sound, that the persons on board are afforded their rights and that the master has the opportunity to contact the ship’s owner, manager, or flag state at the earliest opportunity.\textsuperscript{257} It is further required that reasonable efforts be taken to avoid a suspect ship from being unduly detained or delayed.\textsuperscript{258} Unlike Article 110 of UNCLOS, there is no specific provision that the victims of an unlawful or unjustified boarding are entitled to compensation. However, there is provision that any claims arising from an operation or the actions of authorized personnel of the state party are to be resolved in accordance with domestic law, and in a manner consistent with international law.\textsuperscript{259} While there may be some quibbles as to the precise content of these safeguards, the various requirements are largely consistent with those found in other agreements authorizing interdiction.\textsuperscript{260} Their ultimate utility will of course depend on the facts arising and the respective bargaining powers of the parties in resolving any differences that may arise in the application of the bilateral treaties.

\paragraph*{(c) Third states}

These treaties are relevant for other states interested in enhancing their maritime security to the extent that they provide an opening for third states to exercise the right of visit on the high seas, and as a possible model for other states to enter into their own bilateral agreements with relevant states.

The bilateral agreements of their nature are intended to bind only the states party to these treaties. Consistently with the law of treaties, the bilateral agreements do not create rights or duties for third states.\textsuperscript{261} However, the agreement with Liberia does include a specific provision whereby Liberia agrees to extend all rights concerning suspect vessels claiming its nationality to third states as it may deem appropriate.\textsuperscript{262} In this instance, there is the possibility of these bilateral agreements conferring rights on a third state but some discretion is still exercised by Liberia, as it is entitled to determine if the extension of the agreement is appropriate or not.\textsuperscript{263} The agreements with Panama, Mongolia, and the Marshall Islands have comparable provisions.\textsuperscript{264}

\\textsuperscript{256} The US–Marshall Islands Agreement elaborates in art 8(1)(a) on taking account of safety of life at sea by referring to taking precautions not to hazard unduly the vessel or its crew while boarding, as well as taking account of the vessel location to avoid inadvertently endangering other vessels.

\textsuperscript{257} See, eg, US–Cyprus Agreement art 8(1).

\textsuperscript{258} See, eg, US–Cyprus Agreement art 8(2).

\textsuperscript{259} See, eg, US–Cyprus Agreement art 13.

\textsuperscript{260} Guilfoyle, \textit{Shipping Interdiction} 266–7.

\textsuperscript{261} Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 art 34 (‘A treaty does not create either obligations or rights for a third State without its consent’).

\textsuperscript{262} US–Liberia Agreement art 18. There is no such clause in the US–Belize Agreement.

\textsuperscript{263} This approach is consistent with art 36 of the Vienna Convention on the Law of Treaties.

\textsuperscript{264} US–Panama Agreement art 3; US–Marshall Islands Agreement art 18; US–Mongolia Agreement art 18.
There may be reasons for the United States seeking a broader application of these agreements given that it may not have the necessary vessels to undertake the boarding and inspection in the relevant location. In this situation, the United States may seek permission from the flag state to permit a third state to conduct the boarding in its stead. A scenario may emerge where a third state has particular suspicions of a vessel and has its own warships or other government vessels in the vicinity with the ability to carry out a boarding. While there is no formal requirement for Croatia, Cyprus, the Bahamas, or Belize to permit such action under their bilateral agreements, as a matter of comity, permission may well be granted in any given instance. Such agreement may be more forthcoming when the requirements for conducting a boarding, including the array of safeguards, have already been articulated.\textsuperscript{265} Obviously, there is no guarantee of consent and this third state is otherwise required to revert to the strictures of the traditional legal framework, which preserves the exclusive rights of the flag state in these instances.

Other states may seek to conclude comparable bilateral treaties with the major ship registry states. The US-initiated agreements may thereby serve as a model for other bilateral treaties. However, it must be noted that when placed in the multilateral setting of negotiations for the 2005 SUA Protocol, the United States was unable to implement a comparable system of implied notice.\textsuperscript{266} This multilateral precedent, coupled with the possible lesser political power of a third state, may mean that another state will not achieve the same results in modifying the exclusivity of flag state authority as has been the case for the United States in formulating bilateral agreements. The bilateral agreements provide an interesting point of comparison to the 2005 SUA Protocol, precisely because the latter agreement reflects a multilateral approach. The interests of a greater number of states in enhancing maritime security may therefore be discerned from this process, including the willingness to impinge on the exclusivity of flag state jurisdiction in the exercise of the freedom of navigation. Greater advances could clearly be achieved on a bilateral basis than was possible on a multilateral basis, despite what should be a common interest in combating terrorism and WMD proliferation.

(3) Conclusion

The adoption of the 2005 SUA Protocol marks an important advance in devising a lawful means for the exercise of the right of visit against a foreign flagged vessel on the high seas in response to concerns regarding terrorism and the proliferation of WMD and related materials. The existence of this procedure coupled with the expanded range of offenses addressed by the 2005 SUA Protocol will be a significant addition to counter-terrorism efforts, provided it attracts a large enough cohort of states parties. The possibility also exists that the United States may provide incentives to states parties to agree to the ‘opt-in’ consent methods so as to

\textsuperscript{265} See Roach, ‘Countering Proliferation by Sea’ 414.
\textsuperscript{266} See above Part E(1)(e).
strengthen the position of the state wishing to board the foreign vessel. There are, however, a number of constraints within the 2005 SUA Protocol that may well hinder its effectiveness.

First, even though it was adopted in 2005, the SUA Protocol has only recently achieved the necessary number of ratifications to enter into force. This slow ratification remains the case despite the adoption of Security Council Resolution 1373 and subsequent work of the Council’s Counter-Terrorism Committee leading to a marked improvement in the adherence of states to a range of counter-terrorism treaties. By contrast, over 150 states are parties to the 1988 SUA Convention. Without the necessary political will, the effectiveness of this new regime will be moribund.

Second, the limits of the 2005 SUA Protocol, notably in terms of retaining the emphasis on express consent of a flag state for boarding, the risk of lost opportunity due to flag state delay in authorization and the possibility of obstructive conditions in conducting a boarding, may undercut its utility, even if it does ultimately gain sufficient adherence among relevant states. These weaknesses exist because of what appears to amount to undue deference being accorded to the traditional paradigm emphasizing freedom of navigation and exclusive jurisdiction of flag states on the high seas. Given that all states share a mutual interest in preventing and suppressing terrorist acts against international shipping such regard is no longer entirely appropriate. Jesus has confirmed this view:

The possible acceptance of jurisdiction of any state party to police ships suspected of being involved with terrorist acts on the high seas areas of the ocean would be another encroachment on the state’s sovereignty or exclusive jurisdiction over ships flying their flag. However, it would be a legitimate encroachment to the extent that it would be done for a good purpose, benefiting all states.

With less deference accorded to flag state control, states may have been willing to create a basis of consent for ship-boarding by virtue of the treaty (comparable to the procedure agreed on a bilateral basis with the United States). Even if this consent would not be accorded, the ‘opt-out’ form of tacit consent may have been preferable to the ‘opt-in’ consent procedure included in the agreement. Less weight on exclusive flag state control may have further resulted in the removal of a clause permitting the flag state to impose conditions on the boarding, additional to the

267 See International Law Programme Discussion Group at Chatham House, ‘The Proliferation Security Initiative: Is It Legal? Are We More Secure?’ (24 February 2005) <http://www.chathamhouse.org.uk/publications/papers/view/-/id/278/> (reporting on suggestion that the US may persuade states to ‘opt-in’ in a similar manner to the way that the United States has convinced states parties to the Statute of the International Criminal Court to conclude treaties as per art 98 of the Court’s Statute so as to exclude the jurisdiction of the Court over US nationals).


269 2005 SUA Protocol. As of 30 April 2010, there are 156 state parties, representing 94.73% world tonnage.

270 Jesus, ‘Protection of Foreign Ships’ 395 (emphasis added).
safeguards already included in the instrument, or may have at least anticipated mutually agreed conditions. Other possible adjustments to the 2005 SUA Protocol, if there had been less deference to flag state control, would have anticipated enforcement jurisdiction being exercised by the boarding state consequent to the common interest of all states parties in preventing and suppressing these crimes, as well as a reconsideration of the range of safeguards included for flag states specifically.

In light of these shortcomings, it is helpful that there are several provisions within Article 8bis that recognize the existence and ongoing validity of other regimes for the boarding of ships. For example, a paragraph was included to reflect the customary law rules enshrined in Article 110 of UNCLOS in relation to the right to board and inspect a vessel if the ship is without nationality or may be assimilated to a ship without nationality.271 The 2005 SUA Protocol is not intended to apply or limit boardings that are based on the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag state to take law enforcement or other action.272 This latter exclusion allows for the possibility that a requesting state may reach agreement with the flag state not to follow the strict contours of Article 8bis of the 2005 SUA Protocol but proceed on an alternative basis of consent. This provision thereby protects the bilateral ship-boarding agreements pursued by the United States.

Article 8bis is also accorded the character of being a framework for operations between states parties, as paragraph 13 anticipates that states parties ‘may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this article’. In view of the increased scope of Article 3, and particularly the references to the transporting of nuclear, chemical and biological weapons, it is possible to interpret this provision as providing some allowance for the existence of the PSI. It further enables the United States to maintain its bilateral ship-boarding agreements without modification in view of the more flag-state-oriented provisions of the 2005 SUA Protocol.

The 2005 SUA Protocol is an important addition to the legal framework to enhance maritime security, as it enables ship-boarding for a range of terrorism and proliferation offences and so addresses concerns that could not otherwise be addressed through the bilateral ship-boarding agreements (or the PSI, as will next be discussed). There are clearly gaps in the way it will operate, though, and it is important to recall that it is merely another tool in the armory to promote maritime security. It may have helped tighten the net a bit more, but as another layer on the traditional body of the law of the sea, it has to be understood against this background, and this factor demonstrates a more limited improvement than may have otherwise been the case.

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272 2005 SUA Protocol art 8bis(11).
F. Proliferation Security Initiative

The Proliferation Security Initiative (PSI) was spearheaded by the United States in 2003 and is concerned with the shipment of WMD and related material through all ocean areas. The PSI is a political agreement between states whereby commitments are given to take steps within existing legal structures to prevent the movement of WMD and related materials between states and non-state actors of proliferation concern.273 These commitments are set out in a Statement of Interdiction Principles. The intention of the participants is not to create legally binding commitments,274 but instead, the Statement of Interdiction Principles calls on states to ‘take specific actions in support of interdiction . . . to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks’.275 The extent the requirements of the PSI are consistent with existing international law, and the potential of the PSI to reshape international law in order to promote maritime security, have been the cause of some concern and are addressed in this section.276

From a policy perspective, the PSI has been described as ‘a multilateral intelligence-sharing project incorporating cooperative actions and coordinated training exercises to improve the odds of interdicting the transfer of weapons of mass destruction’.277 An important feature of the PSI is its nature as a political and cooperative regime, which facilitates coordination between the states concerned and allows for the better flow of information and interaction at an operational level between the participants. As such, it is a deviation from other, more traditional,

273 More precisely, the US has described it as follows: ‘PSI participants are committed . . . to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council.’ Office of the Press Secretary, The White House, Washington DC ‘Proliferation Security Initiative: Statement of Interdiction Principles, Fact Sheet’ (4 September 2003) [Statement of Interdiction Principles, Fact Sheet’ <http://carnegieendowment.org/publications/index.cfm?fa=view&id=20225>]. See also Bureau of International Security and Nonproliferation, The White House, Washington DC, ‘Interdiction Principles for the Proliferation Security Initiative’ (4 September 2003) [Statement of Interdiction Principles preamble <http://www.state.gov/t/isn/c27726.htm>]. The PSI extends to the prevention of proliferation of WMD by sea, land and air. See Statement of Interdiction Principles principle 4(e) and 4(f). However, the maritime aspects are most relevant for present purposes.


275 Statement of Interdiction Principles principle 4.

276 The criticism is not limited to the potential legal ramifications, as Valencia has noted that the PSI ‘has been criticised for lack of transparency, stretching if not violating the principles of international law, weakening the UN system, being ineffective and politically divisive, and diluting other non-proliferation efforts’. Valencia, The Proliferation Security Initiative 8.

277 Joseph, ‘The Proliferation Security Initiative’ 6. The practical aspects of the PSI were highlighted by Australia, which was one of the core participants: ‘Australia shares President Bush’s vision of expanding PSI cooperation into the realm of law enforcement, particularly through Interpol. The PSI is fundamentally a practical measure. So it should focus some of its effort on strengthening the capacity of these key professions.’ Alexander Downer, ‘The Threat of Proliferation: Global Resolve and Australian Action’ (Speech to Lowy Institution, 23 February 2004) <http://www.iranwatch.org/government/Australia/australia-mfa-proliferation-threat-022304.htm>.
institutional means to meet non-proliferation goals. Consistent with this new multilateralism model, the PSI has been continuously characterized as ‘an activity, not organization’, as a ‘collection of interdiction partnerships’. This disavowal of international institutions in the formulation and operation of the PSI has led Garvey to claim that ‘the PSI is a rejection of international organisation as we have known it’. The United States argues that by virtue of being a partnership/activity, as opposed to a formal treaty-based organization, the PSI has the flexibility for timely action when international standards have been violated. In this regard, the PSI creates a framework for states to cooperate when necessary in dealing with shipments of WMD and related materials, rather than a formal structure requiring specific procedures or consensus gathering.

The reasons for establishing the PSI as ‘an activity’ were largely related to perceived needs to address proliferation concerns as rapidly as possible (that is, without waiting for the laborious negotiation process required in multilateral institutions to run their course), and to redress deficiencies in the existing legal structures. With respect to the latter, the incident referred to most commonly as the impetus for the PSI was the interdiction of the So San, a Cambodian vessel carrying Scud missiles from North Korea to Yemen. The Spanish Navy had doubts about the nationality of the vessel and so boarded for the purposes of checking the

278 Lehrman, ‘Enhancing the Proliferation Security Initiative’ 240 (‘The PSI marks a fundamental reordering of the institutional means employed to further the goal of nonproliferation’).
280 Garvey, ‘The International Institutional Imperative’ 129. See also Samuel E. Logan, ‘The Proliferation Security Initiative: Navigating the Legal Challenges’ (2005) 14 JLP 253, 255 (referring to the PSI as a ‘loose alliance’).
281 Garvey, ‘The International Institutional Imperative’ 130. See also Andrew C. Winner, ‘The Proliferation Security Initiative: The New Face of Interdiction’ (2005) 28 Washington Quarterly 129, 130 (‘Like other nonproliferation efforts, the PSI conceptually resembles an international regime—a set of principles, norms, rules and decision-making procedures in a given issue areas. It is a regime, however, designed for a new era . . .’).
284 The former Australian Foreign Minister, for example, commented: ‘so sophisticated and widespread is this threat [of proliferation of WMD] that we must confront it directly—with action, not merely talk of action.’ Alexander Downer, former Australian Minister for Foreign Affairs, ‘The Threat of Proliferation: Global Resolve and Australian Action’ (Speech to Lowy Institution, 23 February 2004) <http://www.iranwatch.org/government/Australia/australia-mfa-proliferation-threat-022304.htm>.
285 Winner comments that a failed interdiction attempt during the first Clinton administration against a Chinese vessel suspected of carrying chemicals to Iran for the production of poisonous gases also influenced the perceived need for the PSI. See Winner, ‘The Proliferation Security Initiative’ 130–1.
registration. The boarding party observed sealed containers that were not listed on the cargo manifest, and opened them to find the Scud missiles and associated material. The So San was ultimately released to continue to Yemen, affirming that there was no clear legal authority to seize these weapons, nor was Yemen prohibited from taking delivery of such weapons from North Korea. Although this incident is attributed as a catalyst for the development of the PSI, the positioning of the PSI within existing national legal authorities and international law has meant that the events like the So San could not be handled any differently. In one respect the outcome of the So San incident would be no different under the PSI as the shipment of scud missiles to Yemen is not prohibited under international law (the legality would only be affected if there was a Security Council resolution establishing sanctions on the sale or supply of weapons to a particular state). In another respect, and as will be discussed below, no new basis for conducting a right of visit has been established by virtue of the PSI under international law.

To understand how the PSI fits within and influences the framework of the law of the sea, this section first considers which states are involved and which states and non-state actors are otherwise affected by the PSI. The consistency of the PSI with existing international law is then examined and provides the background for assessing to what extent the PSI has the potential to transform legal principles in this area. The PSI thus reflects how states may act to respond collectively to particular maritime security threats, and the difficulties faced when the interest in responding to a maritime security threat is not widely enough shared.

(1) Participants and non-participants in the PSI

The PSI was initially established among 11 core members, subsequently expanding to 15 core members. Importantly, the PSI expanded to include Russia, Japan, and Singapore. The addition of these states as core participants was important for the political support afforded (particularly geopolitically in respect of Japan), as well as being noteworthy for their geographic significance (especially

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287 Ibid.
288 Byers, ‘Policing the High Seas’ 526 (referring to a statement of White House Spokesperson Ari Fleischer). Secretary of State Colin Powell also indicated that the ship had been released to continue its journey ‘in acknowledgement of the fact that it was on international waters and it was a sale that was out in the open and consistent with international law’. Cited in Joyner, ‘The Proliferation Security Initiative’ 509. Some commentators suggest that the US was also, or primarily, motivated by political concerns given its ties with Yemen in addressing terrorist threats. See, eg, Becker, ‘The Shifting Public Order’ 153.
289 These core members were Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Singapore, Spain, Russia, the United Kingdom, and the United States. Joseph has commented that it was surprising to some that France and Germany were willing to be involved in the PSI in view of their objection to the 2003 war in Iraq. Joseph, ‘The Proliferation Security Initiative’ 13. He notes, though, that their involvement may have been less motivated by the aims of the PSI than the desire to influence and limit it. Ibid.
290 Russia was only willing to become a core participant if it could be assured that PSI activities would not violate national or international law. Prosser and Scoville, ‘The Proliferation Security Initiative in Perspective’ 1.
Singapore). In addition to the core members, the United States further reported that the PSI had received the support of another 60 states.291 States were ‘asked to participate based on their ability and willingness to contribute’.292 In August 2005, the core group was dismantled, primarily because it was not needed once the basic principles of interdiction had been established.293

The Statement of Interdiction Principles further ‘seeks cooperation’ from states whose vessels or territory may be used for proliferation purposes.294 The level of participation required has been vividly described by Joseph:

One can liken PSI and its day-to-day execution to that of a deputized posse: the United States and a group of other like-minded states, using existing legal powers, have organized to hunt down illicit shipments of dangerous weapons. On any particular day, some members of that posse may choose not to ride out.295

The fact that the PSI involves a self-designated elite group of states limits the likelihood that its objectives will be achieved when taking into account that the overall strategy requires global participation to achieve full effectiveness.296

One state of significance remaining outside the PSI is China. China has the world’s third-largest merchant fleet and is reported to have a long record as a proliferator of nuclear weapons technology and missile systems.297 China has been opposed to the PSI because of its concerns that it will operate in violation of international law.298 Given that North Korea is an obvious target of the PSI, China’s involvement is critical not only because of its political influence, but also because it controls some of the sea lanes leading to North Korea.299 However,


292 Department of Foreign Affairs Website, Canada cited in McDorman, ‘From the Desk’ 382. See also Statement of Interdiction Principles. See further ‘Statement of Interdiction Principles, Fact Sheet’ (‘The PSI seeks to involve in some capacity all states that have a stake in non-proliferation and the ability and willingness to take steps to stop the flow of such items at sea’, as well as those states whose vessels or territory may be used for proliferation purposes).


294 Statement of Interdiction Principles, explanatory paragraphs.


298 Prosser and Scoville, ‘The Proliferation Security Initiative in Perspective’ 2. See also Becker, ‘The Shifting Public Order’ 165–6 (discussing China’s relationship with the PSI and describing it as ‘level-headed, if cautiously skeptical’).

China has maintained that the best way to curtail proliferation is through dialogue, and not force.\(^{300}\)

(2) Targets of the PSI

The PSI is intended to target certain states and non-state actors. The states and entities targeted are those engaged in proliferation either through efforts to develop, acquire or transfer WMD and their related material.\(^{301}\) There has not been any indication, however, as to what evidence is necessary for a state or person to be targeted or how targets will be designated.\(^{302}\)

The United States has sometimes referred to North Korea, Iran, and Syria as states of proliferation concern.\(^{303}\) Former US Under-Secretary of State Bolton stated that Israel, India, and Pakistan will not be targets as these states possess WMD ‘legitimately’,\(^{304}\) and do not pose the most immediate threat to PSI participants.\(^{305}\) This uneven approach has been criticized for not only provoking political tension (particularly for Japan as it does not wish to alienate North Korea), but also defying the fundamental principle of sovereign equality, which entitles all states to the same rights and protections under international law.\(^{306}\) By contrast, Joseph has defended the selectivity as follows: ‘Because it is a voluntary activity and is not governed by treaty mandates, so long as PSI’s member states operate within the bounds of existing domestic and international law, they are free to engage in selective enforcement in line with their preferences and resources.’\(^{307}\) North Korea strenuously objected to the PSI, demanding that the Bush administration explicitly renounce any intent to confront North Korea economically or militarily.\(^{308}\) Becker considers that if North Korea is disproportionately targeted by PSI operations, it is more likely that the actions could be construed as unlawful acts of military aggression.\(^{309}\) North Korea has also asserted that any interdiction of its vessels, or a blockade, would be viewed as an act of war, and thereby abrogate the Armistice Agreement that ended the Korean War.\(^{310}\)

(3) Consistency with international law

As the Statement of Interdiction Principles intends participants to take action ‘to the extent their national legal authorities permit and consistent with their

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\(^{300}\) Ibid.
\(^{301}\) ‘Statement of Interdiction Principles, Fact Sheet’ principle 1.
\(^{303}\) Winner, ‘The Proliferation Security Initiative’ 133.
\(^{304}\) Prosser and Scoville, ‘The Proliferation Security Initiative in Perspective’ 2.
\(^{305}\) Valencia, ‘Unsettling Asia’ 57.
\(^{306}\) Ibid.
\(^{307}\) Joseph, ‘The Proliferation Security Initiative’ 8
\(^{308}\) Valencia, ‘Unsettling Asia’ 56.
\(^{309}\) Becker, ‘The Shifting Public Order’ 159.
obligations under international law and frameworks’, the PSI is immediately constrained by the traditional requirements of exclusive flag state control and the freedom of the high seas. However, Valencia has argued that the PSI has proven controversial, particularly among Asian states, ‘because it stretches if not breaks the fundamentals and limits of existing international law, operated outside the United Nations system, and has limited effectiveness’. In rebuttal, Joseph responds to critics in arguing: ‘What all of these criticisms share is a certain paranoia based more on how PSI may evolve rather than a realistic interpretation of the present-day PSI.’ Winner is more direct: ‘the initiative was clearly conceived to operate within existing legal bounds’. Nonetheless, the ‘paranoia’ is not completely without merit when regard is had to Principle 3 of the Interdiction Principles, which intends that the participant states will take action to ‘strengthen when necessary relevant international law and frameworks in appropriate ways’. The consistency of the PSI, as articulated in the Statement of Interdiction Principles, with existing international law in relation to rights over ports, internal waters, territorial sea, and contiguous zones, as well as in relation to interdictions beyond these maritime zones, is examined immediately below. The concerns reflect challenges to be faced by states when taking steps to enhance maritime security.

(a) Interdictions by participants in their ports, internal waters or territorial sea

In recognition of the greater authority that states have over their ports, internal waters, and territorial seas, the participant states are committed to taking appropriate action in respect of vessels that are reasonably suspected of carrying cargos of proliferation concern. These actions may involve stopping and/or searching vessels in internal waters, territorial seas, or contiguous zones (where states have declared the latter), or enforcing conditions on vessels that enter or leave ports, internal waters, or territorial seas that require the boarding, searching and seizure of cargos of proliferation concern.

The Statement of Interdiction Principles consistently refers to actions being taken when there is a reasonable suspicion that a particular vessel is carrying cargos of proliferation concern. The use of a flexible standard, such as ‘reasonable suspicion’, is intended to enhance the deterrent value of the PSI. It is not completely novel, but is comparable to the standard imposed in relation to

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311 Statement of Interdiction Principles principle 4.
315 Statement of Interdiction Principles, Fact Sheet’ principle 3.
316 Ibid principle 4(d).
317 Statement of Interdiction Principles principle 4(d).
318 Lehrman, ‘Enhancing the Proliferation Security Initiative’ 232.
permissible interdictions where there are reasonable grounds for suspecting a
ship is engaged in the slave trade, piracy or unauthorized broadcasting.319

(i) Ports and internal waters

Obviously, the very fact that inspections may be carried out with greater ease when
a vessel is in port than conducting an interdiction at sea means that the agreement
of a port state to address proliferation concerns consistent with PSI commitments is
important. With the adoption of the ISPS Code in 2004 and the commencement
of the CSI in 2002, these efforts enhanced aspects of the PSI addressing commit-
ments by port states. As discussed previously,320 ports are essentially assimilated
to the land territory of a state and as such, states may control what vessels enter
their ports and under what conditions. A similar situation exists in respect of
internal waters and PSI participant states have committed to stopping and
searching vessels reasonably suspected of carrying cargos of proliferation concern
in this maritime area, as well.

The restrictions that are imposed on the port state’s application of its laws to
vessels in port only relate to the inapplicability of local labour laws and situations
when a vessel has entered port as it is in distress.321 These limitations on port state
control are clearly inapplicable in relation to activities associated with the PSI.322 If
states have the appropriate national legislation in place, authority will exist to board,
search, and even seize cargo that is prohibited under national law.323 A more
relevant limitation may be found in sovereign immunity inasmuch as a port state
will not have authority to inspect any warships and government vessels used only
for non-commercial purposes.324 This immunity has been said to ‘represent[] the
greatest challenge posed by the PSI to the law of the sea’.325 One of the key
difficulties here is that the participant states in the PSI would not want to create an
exception to the complete immunity of warships and non-commercial government
vessels for the purposes of WMD inspections, as a target state may then similarly
rely on this exception to interfere with the warships of a PSI participant state.326

Becker has observed that PSI participants could argue for a greater role for port
states in redressing concerns about the proliferation of WMD on the basis that there
has already been some authority accorded to port states in situations where the
flag state has failed to act (either because of an inability or unwillingness to do so).327 However, he critiques this viewpoint in noting that such authority has only
been accorded to port states precisely in relation to the matters over which flag
states have responsibility, and not in relation to matters outside the duties of flag

320 See Chapter 3, Part B.
322 Ibid 211.
324 UNCLOS art 32.
326 Ibid.
states enumerated in Article 94. Following the model of port state enforcement for vessel pollution on the high seas, the port state could seek to exercise jurisdiction over vessels suspected of trafficking WMD and related material on the high seas. It could be argued that the lack of flag state regulation over the cargoes carried would warrant the port state stepping into the gap and the exercise of authority to address this problem. Such an extension of law enforcement powers has not yet been recognized under international law but a combination of national criminal legislation and obligations imposed under Security Council Resolution 1373, discussed in more detail in Chapter 6, should be sufficient to address the problem.

(ii) Territorial seas

Principle 4(d) of the Statement of Interdiction Principles commits participants to taking appropriate action, including stopping and searching vessels in the participant states’ territorial seas. While coastal states have sovereignty over their territorial seas, coastal state control over foreign vessels in this maritime zone is limited by the right of those vessels to innocent passage. More particularly, there is no authority to disrupt the passage of foreign vessels through a state’s territorial sea unless the passage is prejudicial to the peace, good order or security of the coastal state. Commentators have raised doubts that the mere passage of WMD through the territorial seas is a violation of the right of innocent passage. Garvey, for example, argues that the right of innocent passage ‘is not offended by a shipment of WMD material that does not constitute a threat to the coastal state, which of course would describe the typical situation, in that the threat presented by WMD material is determined by the intended use at the point of destination, not transit’. Ronzitti similarly argues that when a vessel is arriving from the high seas and is traversing the territorial sea of a coastal state, without intending to stop at any port in that state, this vessel would not be violation of the right of innocent passage, even if it aims to engage in terrorist activities in a third state, since Article 19(2)

328 Ibid.
329 Chapter 6, Part C(3)(d).
330 Statement of Interdiction Principles principle 4(d).
331 UNCLOS art 2(1).
332 UNCLOS art 17. It may be recalled here that aircraft enjoy no such passage right but are subject to the sovereignty of the coastal state when over its territorial sea.
333 UNCLOS art 19(1) (‘Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State’). See also Chapter 2, Part B(2); Rüdiger Wolfrum, ‘Freedom of Navigation: New Challenges’ in Myron H. Nordquist, Tommy T.B. Koh and John Norton Moore (eds), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (Martinus Nijhoff, Leiden 2009) 79, 90.
334 Prosser and Scoville, ‘The Proliferation Security Initiative in Perspective’ 3. See also Logan, ‘The Proliferation Security Initiative’ 259 (‘it is not the mere transport of WMD that threatens a state’s sovereignty, but the use of these weapons against it’).
335 Garvey, ‘The International Institutional Imperative’ 131. Equally, it has been observed that UNCLOS does not foreclose such an interpretation. Lehrman, ‘Enhancing the Proliferation Security Initiative’ 232. See also Kaye, ‘The Proliferation Security Initiative’ 214 (‘Clearly the delivery of WMD to terrorists may well be highly prejudicial to the peace, good order and security of a coastal State, and an argument could be made that such a passage is therefore not innocent, and the restrictions on coastal State authority over the passing vessel are removed’).
requires that the acts prejudicial to the coastal state occur in its territorial sea.\footnote{Ronzitti, ‘The Law of the Sea’ 5.} It should further be noted in this regard that Article 23 of UNCLOS expressly gives ships carrying nuclear weapons the right of innocent passage albeit subject to precautionary measures established by international agreement.

However, Churchill and Lowe take the position that the violation of the right of innocent passage does not require a specific act or violation of any law, including the laws of the coastal state.\footnote{Churchill and Lowe, \textit{The Law of the Sea} 86. See also Joyner, ‘The Proliferation Security Initiative’ 529. It is therefore not relevant that the coastal state is limited as to what laws and regulations it may adopt under art 21 of UNCLOS. Cf Kaye, ‘The Proliferation Security Initiative’ 213.} This position is not rebutted by the listing of activities in Article 19(2).\footnote{Joyner, ‘The Proliferation Security Initiative’ 529.} On this basis, it would not be necessary, as Valencia argues, for the coastal state to have legislation in place criminalizing WMD proliferation or being able to demonstrate that the vessel is threatening its security because of the presence on board of WMD destined for persons intending to undertake terrorist activities in areas under its jurisdiction.\footnote{Valencia, \textit{The Proliferation Security Initiative} 41. See also Wolfrum, ‘Freedom of Navigation’ 91 (critiquing the use of national legislation to circumvent the ‘inherent limits of Article 27’).}

Joyner does not believe it would be difficult to overcome the right of innocent passage to permit coastal state action against a foreign vessel, as it is the characterization of the passage that is important rather than the commission of any particular act.\footnote{Joyner, ‘The Proliferation Security Initiative’ 536.} Under all the circumstances currently associated with the proliferation of WMD, Joyner believes that a coastal state would have a basis to overcome the right of innocent passage for the purposes of interdiction.\footnote{Ibid.} If regard to the listing of activities in Article 19(2) was necessary, reference to any threat of force in Article 19(2)(a) could be relied on, as it is not limited to threats against the coastal state, but may include threats to other states.\footnote{Ibid, 529.} When concerns regarding the proliferation of WMD and related material to non-state actors is coupled with the discretion accorded to the coastal state to determine what passage is prejudicial to its peace, good order and security, the preferred interpretation should be one that favours the entitlement of the coastal state to take steps against a vessel violating the right of innocent passage.

A question then arises as to what are ‘the necessary steps’ a coastal state may take to prevent passage which is not innocent. Interdiction and the exercise of criminal jurisdiction will only be allowed ‘if the crime is of the kind to disturb the peace of the country’.\footnote{UNCLOS art 27(1).} It will again be important for the coastal state to have the necessary legislation in place that would allow for arrest and detention of vessels that have passed into the territorial sea from its internal waters.\footnote{UNCLOS art 27(2).} If the vessel has not been in the internal waters of the coastal state, the coastal state may not exercise jurisdiction
in connection with any crime outside its territorial sea. However, national legislation that criminalizes the illicit passage of WMD and related material would overcome this particular restriction. The legal tools are therefore available for states that wish to police their territorial seas to prevent the proliferation of WMD and related materials to non-state actors.

(iii) Contiguous zone
As the coastal state may exercise jurisdiction to prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws within its territory or territorial sea, participant states could only operate within existing law if the passage of WMD and associated materials through this zone could be characterized as a violation of customs laws. However, if the vessel is merely transiting the contiguous zone of a participant state without stopping in its ports or entering its territorial sea, there would be no justification for the interdiction of the vessel for customs law violations.

(b) Interdictions by participant states of their flagged vessels
When there is reasonable suspicion that particular vessels are of proliferation concern, participant states are committed to taking action to board and search those vessels flying their own flag when those vessels are either in their territorial seas or internal waters, or when outside the territorial waters of another state. Even where vessels are flagged to the participant states, then these states commit to giving serious consideration as to whether other states should be permitted to board and search those vessels in pursuit of the PSI objectives. These commitments are consistent with traditional principles reflecting exclusive flag state control over vessels outside their territorial seas—both in terms of permitting the flag state to exercise jurisdiction over its own vessels and in acknowledging the need for consent of the flag state to stop one of its vessels. Moreover, the Statement of Interdiction Principles does not seek to add any new right of visit to those recognized under Article 110 of UNCLOS. As the Statement of Interdiction Principles are not legally binding, they cannot constitute a ‘power conferred by treaty’ under Article 110 permitting an additional basis for the exercise of enforcement jurisdiction on the high seas.

An oft-cited example of the success of the PSI is the interdiction of the BBC China, which was flagged to Antigua and Barbuda, but German-owned. British and US intelligence had learned that the ship was carrying thousands of gas centrifuge components to Libya and requested that Germany, a PSI participant, take steps to check the cargo. Germany secured the owner of the vessel’s consent to divert it to

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345 UNCLOS art 27(5).
346 UNCLOS art 33.
348 Statement of Interdiction Principles principle 4(b).
349 Ibid principle 4(c).
an Italian port where the cargo of centrifuges could be confirmed. The discovery has been attributed to contributing to Libya’s decision to denounce its WMD programme.\textsuperscript{350} It does not appear that the consent of Antigua and Barbuda was obtained, but the persuasive involvement of Germany in dealing with the German owner permitted the change in route and allowed for inspection in Italy.

\textbf{(c) Interdictions by participant states of foreign vessels}

The Statement of Interdiction Principles does not purport to set out any right of participant states to interdict foreign flagged vessels on the high seas, unless the consent of the flag state is obtained.\textsuperscript{351} The absence of any such claim underlines that the PSI is \textit{prima facie} consistent with established international law. The difficulty with strict adherence to exclusive flag state control in the proliferation context is that it remains unlikely that vessels flagged to states of proliferation concern will agree to their ships being boarded on the high seas. As Lehrman correctly notes:

Under the \textit{mare liberum} principle, the interdiction of a flag vessel of a foreign state is generally considered to be the prerogative of the flag state in question, not of third-party states patrolling the high seas. Thus, freedom of the seas is in tension with the perceived need of third-party states to exercise their power over interdiction.\textsuperscript{352}

It has been suggested that to avoid some of these strictures, the United States could use a ‘broken tail-light’ approach – that is, a vessel may be lawfully stopped for one reason, but this may offer the opportunity to discover that it is actually involved in an activity of much greater concern to the PSI participants.\textsuperscript{353} In doing so, the \textit{prima facie} consistency of the PSI with existing international law, as drawn from the Statement of Interdiction Principles, is maintained.

\textbf{(4) Law-making nature of the PSI}

The law-making, or normative, nature of the PSI requires consideration not only in terms of its consistency with existing international law, but also to what extent it builds on that law and whether it has the necessary characteristics to constitute groundwork for, or even the crystallization of, new principles of international law.

\textsuperscript{350} See, eg, Becker, ‘The Shifting Public Order’ 156 (discussing the interdiction).

\textsuperscript{351} Spadi comments that the US did seek automatic authorization for boarding PSI participant vessels, but had to drop the proposal due to lack of agreement among the core participants. Fabio Spadi, ‘Bolstering the Proliferation Security Initiative at Sea: A Comparative Analysis of Ship-boarding as a Bilateral and Multilateral Implementing Mechanism’ (2006) 75 Nordic Journal of International Law 249, 255.

\textsuperscript{352} Lehrman, ‘Enhancing the Proliferation Security Initiative’ 229. Garvey similarly notes: ‘Flag state jurisdiction cannot be ignored because it is pre-eminently a matter of international legitimacy, as a highly significant embodiment of the general principle of freedom of the seas. It is of critical importance to securing the interests of the global economy and the world’s major navies, and epitomizes international law where adherence is firm and universal in its political basis.’ Garvey, ‘The International Institutional Imperative’ 132.

\textsuperscript{353} Joseph, ‘The Proliferation Security Initiative’ 8.
The Statement of Interdiction Principles is prefaced by reference to various international instruments and statements by international bodies on which the PSI is intended to build. In particular, the PSI is said to be ‘a step in the implementation of the UN Security Council Presidential Statement of January 1992’, and is also consistent with statements of the G8 and the European Union. The 1992 Security Council Presidential Statement notes that the proliferation of WMD constitutes a threat to international peace and security, but only that the ‘members of the Council commit themselves to working to prevent the spread of technology related to the research for or the production of WMD and to take appropriate action to that end’. In respect of the general membership of the United Nations, the Statement merely ‘underline[s] the need . . . to fulfill . . . obligations in relation to arms control and disarmament; to prevent the proliferation in all its aspects of all weapons of mass destruction . . .’. Presidential statements reflect informal consultations between the President of the Security Council and its members and are not intended to reflect a decision of the Council as a whole. The precise status of these statements is unclear, as the Council has not defined their scope, content or nature in its rules of procedure or elsewhere.

The most controversial aspect of the PSI has been whether it is contributing to the development of a new right of visit against foreign flagged vessels on the high seas when there are reasonable suspicions that the vessel is of proliferation concern. Subsequent to the establishment of the PSI, the United States and the United Kingdom sought a resolution from the Security Council that would authorize states to stop, board, and inspect a vessel suspected of carrying WMD and related material. Valencia characterizes this effort as the United States effectively wanting to legitimize the PSI under international law but leave the enforcement aspects of interdiction activities outside of the purview of the United Nations. He further considers that the very fact that the United States sought a resolution from the Security Council in relation to interdiction of vessels carrying WMD was viewed as a tacit admission that authority did not otherwise exist under international law to carry out the interdictions on the high seas against foreign flagged vessels.

355 UNSC, Note by the President of the UNSC, UN Doc. S/23500 (31 January 1992).
356 Ibid.
358 Ibid.
359 Joyner emphatically denies that there is any existing right under customary international law to permit the interdiction of foreign flagged vessels on the high seas. Joyner, ‘The Proliferation Security Initiative’ 536–7.
361 Ibid 48.
362 Ibid 47.
The effort ultimately proved unsuccessful, as Russia and China were both opposed to an express authorization for interdictions that would legally validate the PSI. Resolution 1540 instead criminalizes certain proliferation activity of non-state actors and provides a basis for states to adopt legislation controlling and outlawing this activity. The prescriptive jurisdiction accorded to states under this resolution is limited to activities of non-state actors, as the resolution does not encompass transfers between states. There are no sanctions imposed on states for any failure to comply with the resolution, but a committee was established to monitor its implementation.

In assessing the effect of the PSI on customary international law, Perry has argued that if the PSI is to operate in such a way to achieve its goals and in line with the views of its architects, there is potential for actions taken pursuant to the PSI to influence the development of the law of the sea in this area. Former National Security Adviser Condoleezza Rice signalled the intention of the United States to change the current international law regime: ‘While all actions will be taken consistent with existing national and international legal authorities, we are also seeking ways to expand those authorities.’ A similar sentiment was reportedly expressed by Australia’s former Minister for Foreign Affairs, who supported ‘changing the law permitting free navigation on the high seas in order to stop North Korea’s shipping of missiles, nuclear materials, and drugs to allies or customers.’ Such statements reinforce concerns that more powerful states are seeking to change international law through state practice and are the ones most likely to claim that a new rule of customary international law has been established after whatever period of time they determine. However, the extent that the PSI is likely to achieve changes in international law appears to be limited by the very nature of the activity.

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363 Ibid 48.
364 See discussion in Chapter 6, Part C(3)(c).
367 Timothy C. Perry, ‘Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea’ (2006) 37 ODIL 33, 40. Perry also points to the number of states involved in the PSI, including states with the largest ship registries, and likelihood of acquiescence in the US activities that may support the formulation of new customary international law. Ibid 44–5. However, the fact that the US has entered into bilateral treaties with the states with the largest ship registries (rather than relying purely on the PSI) tends to reinforce the existing legal rules on the right of visit, which requires a treaty or other manifestation of consent of the flag state, instead of contributing to the formulation of a new right of visit on the high seas.
369 Ibid 27 (referring to an article in the Canberra Times, 12 June 2003). See also Alexander Downer, ‘The Threat of Proliferation: Global Resolve and Australian Action’ (Speech to Lowy Institute, 23 February 2004) <http://www.iranwatch.org/government/Australia/australia-mfa-proliferation-threat-022304.htm>: ‘The non-proliferation agenda is too important to be bound by rigid dogma.’
In the first instance, information as to what interdictions have actually taken place under the rubric of the PSI is scarce,\textsuperscript{371} and the secrecy surrounding the PSI tends to diminish the likelihood that clarity and acceptance of new norms will be established. Former US Under-Secretary of State Bolton commented that the reason for not publicizing the interdictions was to ensure the ongoing effectiveness of the programme.\textsuperscript{372} Information on actual interdictions has been restricted on the basis that the details often involve sensitive intelligence matters.\textsuperscript{373} It had at least been reported that up to 9 June 2005, the United States had cooperated with other PSI participants on what were described as 11 ‘successful’ occasions, including the prevention of the transshipment of material and equipment bound for ballistic missile programs in countries of concern, including Iran.\textsuperscript{374} Valencia posits that the reasons for such secrecy associated with the interdictions may not only be to protect intelligence sources and methods, but also to hide any violations of international law and to avoid negative publicity towards the PSI.\textsuperscript{375} In these circumstances, the absence of information about the precise operation, and consequent interpretation or application of the Statement of Interdiction Principles tends to deny the potential for existing laws to be altered.

Second, given the ambiguity inherent in so many aspects of the PSI, the question inevitably arises as to how this ambiguity should be overcome, and what mechanisms exist to provide such elucidation. It would seem that ‘determinations would be made either unilaterally or in consultation with a small number of other PSI participants and on no objective international legal basis whatsoever’.\textsuperscript{376} The ambiguity associated with the PSI may allow for power and influence to play a greater role in any given situation so that ‘in a diplomatic game of chicken, militarily strong states will tend to defeat militarily inferior states when conditions of uncertainty obtain’.\textsuperscript{377} From a political standpoint, the lack of clarity associated with many aspects of the PSI may work to the advantage of the United States in achieving its security goals. While the actions of politically powerful states no doubt influence the development of international law,\textsuperscript{378} there is still a need for some

\textsuperscript{371} ‘PSI states remain secretive about the methods being employed and the number of actual interdictions being carried out.’ Prosser and Scoville, ‘The Proliferation Security Initiative in Perspective’ 1.

\textsuperscript{372} Cited in Joyner, ‘The Proliferation Security Initiative’ 510.


\textsuperscript{375} Valencia, The Proliferation Security Initiative 38.

\textsuperscript{376} Joyner, ‘The Proliferation Security Initiative’ 543.

\textsuperscript{377} Perry, ‘Blurring the Ocean Zones’ 43.

determinacy in the rules to be created. Garvey considers that the very absence of the means to articulate substantive and procedural standards within an organizational structure impedes the articulation of new normative standards for interdictions on the high seas. Without the formality of international organization, there is no mechanism to devise norms of greater specificity. International organization is important as it allows ‘participant states the opportunity for critique and a role in fashioning the action involved, endorsement may be secured that otherwise would not be available’.

Third, there has been some concern expressed that the PSI as a political commitment is binding on governments, rather than states, and so any change in government in a PSI participant state may result in differing levels of commitment to the PSI. The changeable level of support is reinforced by the nature of the PSI as an activity, rather than a formal international organization and the posse-like level of participation, as characterized by Joseph. PSI participant states are not considered bound by the commitments set forth in the Statement of Interdiction Principles and face no legal consequences (potentially only political consequences) if they do not adhere to those principles. These features affirm the political nature of the PSI, rather than supporting any move towards the creation of a new legal regime or principles.

Finally, the PSI participants may not actually wish new norms permitting interdictions of foreign flagged vessels of proliferation concern on the high seas as it may impinge on the rights of their own vessels to the freedom of navigation. Byers has emphasized the United States’ ongoing interest in maintaining exclusive flag state jurisdiction on the high seas for both military and economic reasons. Moreover, the PSI participants will likely prefer to respect the sovereign immunity of warships and government vessels employed on non-commercial services, as they may not wish to provoke reciprocal treatment of their warships and government vessels.

(5) Conclusion

The establishment of the PSI prompted much concern over its consistency with existing principles of international law. Certainly these concerns appeared warranted given the perception that high seas interdictions of foreign flagged vessels would be involved, the legal ambiguities arising with the shipment of dual-use materials and the room for differing interpretations as to whether the transport of

380 Garvey, ‘The International Institutional Imperative’ 137.
381 Ibid 139. ‘The formulation of a specific text, passing before each participant, becomes a tool for making effective political support, that otherwise would be clouded by the ambiguities of multifarious pronouncements by the governments involved.’ Ibid 140.
382 Ibid 141.
383 Ibid 145.
384 See text to n 295 above.
WMD and related material through the territorial sea would be in violation of the right of innocent passage. States not involved in the PSI could rightly be concerned that special interests were being promoted over the common interest in the freedom of navigation. Nonetheless, rights of interdiction outside the territorial sea, as set out in the Statement of Interdiction Principles, were consistent with existing rules of international law, but this legal alignment tended to undermine the very purposes of the PSI as a result.

Ultimately, the primary significance of the PSI has been twofold. First, it has allowed for greater coordination between like-minded states on an operational level and ensured that there are improved channels of communication and consistency of approach in addressing concerns relating to certain shipments of WMD and related material. Second, the PSI signalled that there were inadequacies in the existing international legal structures and may consequently be viewed as a catalyst for developments in treaty law on a bilateral and multilateral basis.

G. Conclusion

The common interest in preventing acts of maritime terrorism and the proliferation of nuclear weapons is manifest. Yet, the new legal regimes developed for the purposes of meeting concerns about global terrorism and proliferation of WMD and related materials have a range of shortcomings. Obviously any new treaty designed to overcome limitations on law enforcement powers will need to have the widest possible number of states parties in order to be effective. It is quite likely that the states of greatest proliferation concern for the United States and its allies—such as North Korea, Iran, and Syria—are unlikely to consent to these treaties. Involvement in certain political arrangements, such as the CSI or the PSI, may be more feasible inasmuch as soft commitments may be more easily obtained than consent to binding rules, but as these initiatives are being led by the United States, it is unrealistic to expect that cooperation from these so-called rogue states will be forthcoming. It is only in the context of modifying agreements that already bind these states of concern, such as amending the SOLAS Convention, that new measures have become binding on a significant number of states.

Given the limitations that continue to exist within the legal regimes created to respond to terrorism and proliferation at sea, other options may have to be considered by states seeking to address concerns about global terrorism and proliferation of WMD and related materials. A Security Council resolution could provide the necessary authority, as a Chapter VII resolution will over-ride other

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386 Within its first year of operation, nearly 20 multilateral exercises were carried out in different parts of the world with various participants. Winner considers that these exercises have been important to build capability, emphasizing largely tactical interoperability among the various armed forces and agencies; to provide evidence to the public of a genuine political commitment; and to send a deterrent message to current and potential proliferators’. Winner, ‘The Proliferation Security Initiative’ 134.

387 Byers, ‘Policing the High Seas’ 528.

388 Syria, North Korea, and Iran are all parties to the SOLAS Convention.
treaty commitments. States may also seek to claim rights of interdiction and seizure of cargo on the basis of the right of self-defence. Reliance on the latter doctrine may be pertinent since the acquisition and use of WMD are most commonly associated with acts of aggression or with the defence of a state. The right of self-defence, the relevance of the law of naval warfare, and the use of the Security Council as alternative means to ensure maritime security are discussed in more detail in Chapter 6.

The normative framework to address threats of terrorism and proliferation of WMD and related material at sea requires further development. One difficulty in formulating rules for interdiction of WMD is that there is a distinction in normative regulation between these items, and, for example, drugs or unlawful radio broadcasting, or robbery. It is more common for states to have legislation or aspects of their criminal code that will address robbery and certain acts of violence at sea, as well as drug trafficking, whereas it is less so the case to have national legislation addressing WMD, particularly if states are not parties to the major WMD treaties or part of the informal groups dealing with export controls and the like. The actions of the Security Council under Resolutions 1373 and 1540 go some way in creating obligations for states to take the steps necessary to ensure that the legislative framework for addressing these crimes of international concern is put in place at the national level.

A further difficulty is the ongoing limitation posed by the doctrine of sovereign immunity. The possible use of vessels entitled to sovereign immunity to ship WMD and related materials to non-state actors or other states remains unchallenged in any of the legal frameworks developed in response to concerns regarding maritime terrorism and proliferation at sea. The PSI, bilateral ship-boarding agreements, and the 2005 SUA Protocol, make no attempt to change this principle. Sovereign immunity of vessels has been subject to much less penetration than the exclusive jurisdiction of the flag state. It appears that it is primarily in relation to respect for coastal state rights over economic interests in the EEZ, and with respect to the protection and preservation of the marine environment that there has been some acknowledgement of these sovereign immune vessels being subject to any external regulation. There has been no indication that sovereign immunity of vessels will be challenged in any way for the purposes of improving maritime security. While any change in this regard seems extremely unlikely at the present time, this view is not intended to suggest that the position is forever immutable.

Byers suggests that states may simply opt for violating international law in the face of concerns about WMD proliferation or terrorist activity at sea. He argues:

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389 UN Charter art 103.
390 It is submitted that the potential use of sovereign immune vessels to ship WMD to non-State actors represents the greatest challenge posted by the PSI to the law of the sea. Such vessels cannot, under international law, be interfered with by port States or coastal States without the consent of the flag State or the master. Kaye, ‘The Proliferation Security Initiative’ 225.
391 See Chapter 2, Part C(1) (discussing military activities in this zone).
392 See Chapter 3, Part F(2).
393 Byers, ‘Policing the High Seas’ 528, 543.
In the truly exceptional situation where there is a strongly felt compulsion to act, consent
from the relevant sovereign state cannot be obtained, and the Security Council is not
prepared to authorize action, states may choose to breach the rules without advancing
strained and potentially destabilizing legal justifications. By doing so, they allow their
action to be assessed subsequently, not in terms of the law, but in terms of its political and
moral legitimacy, with a view to mitigating their responsibility rather than exculpating
themselves.394

In these situations, states may seek to rely on circumstances precluding the
wrongfulness of their acts, such as necessity or self-defence. The plausibility of
these justifications will depend on the facts of each incident in question.
Wide acceptance of a right of visit to thwart terrorism and the proliferation of
WMD is desirable. Becker makes a strong point to this end:

The extension of non-exclusive jurisdiction, even to ships on the high seas, for the limited
purpose of WMD counter-proliferation potentially meets the test for a new set of rules. . . .
Because the threat is open-ended in duration, decentralized in organization, and geo-
graphically disperse, old solutions may not be suitable. Furthermore, the WMD threat is
overwhelming in a way that the other modes of disorder addressed by oceans policy—
piracy, over-fishing, drug smuggling, and pollution—simply are not. Although those problems
are serious, the impact of any one instance of over-fishing or drug smuggling has a marginal
negative impact on world public order. The same could be said for some shipments of WMD-
related materials; the final product of consequence could be many years and many more
shipments away. But the risk of one successful attack, or the danger of certain states or non-
state actors even acquiring the capability to make credible threats, set the WMD threat apart
from the other problems constituting the disorder of the oceans.395

In relation to maritime terrorism, Jesus has argued that rights of interdiction
associated with piracy have not significantly damaged the prerogatives of flag states
and so no equivalent threat should be perceived in exercising jurisdiction over
terrorists.396

The controversy that has long surrounded the definition of terrorism and the
available tools to address such acts indicates that an endorsement of universal
jurisdiction for terrorists found at sea is unlikely. The 2005 SUA Protocol was
one of the best opportunities available to states to take the necessary steps within a
multilateral forum to establish and exercise jurisdiction over terrorist acts and
prevent proliferation of WMD and related material to non-state actors, but the
greater emphasis on protecting the freedom of navigation and exclusive jurisdiction
of flag states hampered the creation of an instrument that would have served
community interests in responding to these maritime security threats.

394 Ibid 543.
Intelligence Gathering and Information Sharing

A. Introduction

A critical element to protecting maritime security is ensuring that states have the necessary information at their disposal to take preventative or responsive action. As Colby notes:

There are no limits to the types and sources of information which may be useful. The processing of intelligence refers to the treatment accorded the raw data which has been collected. It generally includes appraisal of the relevance of the information, as well as editing and cataloguing in forms useful to decision-makers. These tasks vary enormously in complexity, depending in large measure on the amount and quality of data requested and actually collected.¹

The vastness and nature of the oceans present particular challenges for states seeking to improve their knowledge of the range of activities undertaken at sea. Intelligence gathering involves a range of operational and policy perspectives as well as legal considerations. The legal dimension provides a framework or informs the operational exercises of states in seeking intelligence for the purposes of promoting or ensuring their maritime security. The policy of Maritime Domain Awareness (MDA) and similar policies have been critical drivers and goals for intelligence gathering at sea, as well as information sharing. The specific legal rules therefore need to be understood against strategic policy initiatives.

Laws relating to the collection and dissemination of information as a matter of international law come from a range of sources and this remains true in the law of the sea more specifically. As a general matter, Fleck has written that ‘intelligence activities as such may not be wrongful under present international law, but the wrongfulness may derive from additional conditions, such as illegal intervention, breach of foreign sovereignty, or common crimes committed in the course of espionage acts’.² For the law of the sea, intelligence gathering may implicate, if not violate, coastal state rights over the territorial sea or the EEZ. In some respects,

intelligence gathering goes very much to the military interests of a state and may be considered as an exclusive use of the oceans as a result. Yet when that intelligence is relevant for confronting the full panoply of maritime security threats an inclusive interest in intelligence gathering may be discerned.

When there is a common interest in obtaining information about maritime security threats, then the need to share that information between states becomes paramount:

Distributing intelligence requires identifying who needs to know what information for what purposes and forwarding such information accordingly. The satisfaction of such demands generally involves a complex on-going process, as the needs of decision-makers for information shift to meet the problems which confront them. Therefore, not only the distribution effort but also the initial gathering and processing tasks, must continuously react to these changes in decision-makers’ requirements for intelligence.3

The importance of intelligence gathering and information sharing is evident in law enforcement efforts and recent developments intended to enhance maritime security have incorporated legal mechanisms for the timely exchange of information. This particular dimension to law enforcement is examined in this chapter.

It is noted at the outset that various obligations arise in relation to sharing information derived from marine scientific research.4 Similarly, information-sharing obligations are set out in UNCLOS for matters concerning the protection and preservation of the marine environment; the delimitation of the outer continental shelf; the conservation and management of living resources; the development and transfer of marine technology; and semi-enclosed seas.5 However, this chapter focuses on the laws relating to intelligence gathering and information sharing that are most relevant in efforts to ensure maritime security.

This chapter therefore begins with an overview of the policy of Maritime Domain Awareness as applied in different states. From this basis, legal rules relating to intelligence gathering in different maritime zones are examined in the second part. The exclusive interests commonly driving intelligence gathering tend to militate against an expansive reading of rights for this activity. However, the relevance of MDA and its use for law enforcement, including against terrorist activities and WMD proliferation, may justify reconsideration of this position. States arguably have a common interest in improving information sharing mechanisms and promoting intelligence gathering for the greater good of enhancing overall maritime security. However, the exclusive dimension is likely to prevent this perspective from gaining ground. Concerns about protecting national security, especially due to the diverse uses of any information, seem likely to prevail. The third part of the chapter looks at some specific initiatives under international law designed to enhance a state’s knowledge about who is operating and what is

3 Colby, ‘The Developing International Law’ 53.
4 UNCLOS arts 246(5)(d), 248, 249(1)(f), and 252–4.
happening at sea. Seafarers identification and the Long Range Identification and Tracking Regulation of the IMO are considered in this regard. The fourth part considers how information sharing has featured in various law enforcement efforts in response to maritime security threats. These analyses show that while an inclusive interest in improving information collection and sharing has prompted a range of legal initiatives, there is still a greater accommodation of exclusive interests and this emphasis has hampered the full effectiveness of these developments.

B. Maritime Domain Awareness

One of the main US policy initiatives in relation to intelligence gathering since September 11 has been the creation of a system of MDA, which seeks to generate and use information concerning vessels, crews and cargos. According to the US National Plan to Achieve Maritime Domain Awareness, ‘Maritime Domain Awareness is the effective understanding of anything associated with the maritime domain that could impact the security, safety, economy, or environment of the United States.’ The purpose of MDA is thus to facilitate timely, accurate decision-making, so as to enable actions that neutralize threats to US national security interests.

The primary elements of a global MDA include: a global network of regionally based maritime information exchange partnerships; the institution of worldwide standards for broadcast of vessel position and identification; automated tools to discern patterns, changes, and potential threats; and alerting maritime partners of suspicious behavior and potential threats. The need for international cooperation to achieve MDA and a shared interest among states for situational awareness and threat awareness to improve maritime security cannot be gainsaid.

MDA not only requires greater cooperation across different government departments and agencies, both within a state and then with other states, but also collaboration with private industry. The latter interaction is essential when considering that international shipping is predominantly undertaken by the commercial sector. It has been suggested that the system would be greatly improved if commercial information from manufacturers and shippers could be made

8 ‘Navy Maritime Domain Awareness Concept’ 9–11.
available. However, difficulties here are that valuable and detailed commercial information is not likely to be made available to the US government in the absence of domestic legislation requiring this, and even then the information may not be reliable or prove insufficient for the purposes for which it was sought.

Other states and regional groups have developed their own coordinated approaches to handling information relevant to maritime security. As one example, the European Commission proposed in 2008 a European Border Surveillance System (EUROSUR), to prevent unauthorized crossings by immigrants, reduce loss of life at sea, and enhance Europe’s security. Australia and New Zealand have both adopted similar MDA policies in light of the large expanse of their EEZs and Search and Rescue Regions. The Western Pacific Naval Symposium created a Regional Maritime Information Exchange (ReMIX) to share non-sensitive information on maritime security threats. The adherence of different states to this approach underlines that MDA is ‘the key to maritime security’. The need to collect, process and share information is fundamental to the range of law enforcement and military activities that are likely to be needed to ensure maritime security. The legal dimensions of this policy are explored in this chapter, and should be understood against this inclusive interest in enhancing knowledge about who is engaged in what maritime activities.

C. Intelligence Gathering as a Military Activity

When states seek to gather intelligence, the effort entails collecting information (broadly construed) so that as much as possible is known in advance of any particular course of action being undertaken. As mentioned earlier, intelligence

10 See Justin S.C. Mellor, ‘Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism’ (2002) 18 American University International Law Review 341, 360 (referring to comments of Admiral Loy, who was then the Commandant of the US Coast Guard).
11 See Mellor, ‘Missing the Boat’ 360–1. See also Goward, ‘Maritime Domain Awareness’ 518 (referring to a ‘culture of secrecy’ that pervades maritime operations).
13 See Rahman, ‘Maritime Domain Awareness’ 213 and 219 (Australia and New Zealand have the world’s third and fifth largest EEZs, respectively).
16 ‘The product of the security intelligence function, the intelligence itself, is defined in simplest form as dealing “with all the things which should be known in advance of initiating a course of action”’, Colby, ‘The Developing International Law’ 53 (citing US Commission on Organization of the
gathering at sea has predominantly concerned the pursuit of information that may prove useful for a state’s national security. In other words, what does a state need to know about the maritime areas of another state, or what may otherwise be learned about a state (including its defensive or aggressive capacity) from the water surrounding it? This intelligence enables states to make decisions about their own national defence. The first section here considers the rights of foreign navies in coastal state waters.

How intelligence gathering may be characterized becomes a critical question for assessing its legality. Beyond the conduct of intelligence gathering activities by foreign flagged vessels in the territorial sea or EEZ of coastal states, information gathering rights and obligations arise in relation to different research activities. UNCLOS makes reference to marine scientific research, survey activities, and hydrographic surveys, but provides no definition of each. The second section looks to some of the difficulties arising from potential overlaps in characterizations of these different activities, focusing particularly on differing views in relation to military surveys and hydrographic surveys. While the latter has clear military benefits, it may be argued that it should be treated differently to other military intelligence gathering activities.

(1) Foreign navies in coastal state waters

Fleck has observed that ‘[n]o general norm exists in international law expressly prohibiting or limiting acts of intelligence gathering.’ This statement remains largely true in relation to the law of the sea. Even in areas under the sovereignty of coastal states, such as the territorial sea and in straits, intelligence gathering activities are not specifically outlawed as a matter of international law, but affect the characterization of the passage of foreign vessels. The legal situation is even less clear when examining the rights of states in the EEZ. Questions arise as to the contours of the rights of coastal states and the freedom of navigation enjoyed by third states. The lack of legal clarity has become especially problematic as technological advances have not only improved the range and accuracy of both weaponry and intelligence collection, but also changed the very art of both warfare and intelligence gathering. These difficulties are highlighted below.
(a) In the territorial sea and in straits

Intelligence gathering within the territorial sea or in straits subject to coastal state sovereignty may comprise of simple surveillance, including monitoring of communications, or more active challenges to test the defense warning systems of a state. Intelligence gathering within the territorial sea or in straits subject to coastal state sovereignty may comprise of simple surveillance, including monitoring of communications, or more active challenges to test the defense warning systems of a state.21 Navies may wish to gather information about the geographic features of the coastal areas in the event that forces need to be deployed or that different naval vessels, including submarines, will need to traverse these waters.

The possibility of third states lawfully conducting intelligence gathering activities within the territorial sea of a coastal state is virtually non-existent. The coastal state exercises sovereignty over this breadth of water, including the air space above it,22 with the primary constraint on that sovereignty being that ships of all states enjoy the right of innocent passage through these waters.23 As discussed in Chapter 2, passage is considered innocent under UNCLOS if it is not prejudicial to the peace, good order, or security of the coastal state.24 Among the activities that will be construed as prejudicial in this context are research and survey activities,25 as well as ‘any act aimed at collecting information to the prejudice of the defence or security of the coastal State’.26 Ultimately any activity ‘not having a direct bearing on passage’ could mean that the passage is not innocent.27 Whether passage is innocent or not is a question largely left to the discretion of the coastal state.28 Colby suggests that the exclusive interest of the coastal state rightly prevails here, as only states with the resources and capability to undertake intelligence gathering would otherwise benefit.29

While it could be argued that the coastal state is in the more powerful position when it comes to controlling activities in its territorial sea, in practice the collection of data required for the safe navigation of a ship during passage may produce data of additional use and the coastal state would not even be aware that this information was gathered.30 There may be no external indication of intelligence gathering

EEZ: Definition of Key Terms’ (2005) 29 Marine Policy 123, 130 (commenting that ‘provisions of the 1982 UNCLOS are not adequate to regulate the use of these new [electronic warfare] and [information warfare] technologies by military vessels and aircraft’).

22 UNCLOS art 2.
23 UNCLOS art 17.
24 UNCLOS art 19(1).
25 UNCLOS art 19(2)(j). Coastal states have ‘the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea’. UNCLOS art 245.
26 UNCLOS art 19(2)(c). Intelligence activities that ‘interfere[e] with any systems of communication or any other facilities or installations of the coastal State’ would also be prejudicial to the coastal state. UNCLOS art 19(2)(k).
27 UNCLOS art 19(2)(l).
29 Colby, ‘The Developing International Law’ 68.
30 Bateman, ‘Hydrographic Surveying in the EEZ’ 165 (referring to depth sounding and the observation of wind speed and direction in this regard). Colby has similarly noted: ‘The normal
activity from the movements or configuration of a ship or ships and so a coastal state would have no concrete grounds for taking steps against the exercise of innocent passage by such a vessel.31

In straits subject to the regime of transit passage,32 UNCLOS requires that ships and aircraft must proceed without delay through the strait and ‘refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit’.33 What constitutes the ‘normal mode’ for a vessel or particular type of aircraft leaves considerable room for debate, and it may be argued that a vessel could collect not only data that was incidental to safe navigation, but also operate equipment and sensors that would normally be used in the operation of the vessel or aircraft.34 Again, it is possible that this information may be collected without any noticeable effect on the coastal state and could still arguably fall within the legal contours of the rights of transit passage. Such a broad interpretation should be tempered by the prohibition on foreign ships carrying out any research or survey activities without the prior authorization of the states bordering the strait.35 Moreover, as states parties to UNCLOS are required to fulfill their obligations in good faith and not exercise their rights in a manner that would constitute an abuse of right,36 it would seem that a wide variety of intelligence gathering activities during transit passage should not be read into the ‘normal mode’ characterization. For intelligence gathering in the territorial sea or in straits, interpretations of permissible activities should augur in favour of the exclusive rights of the coastal state consistent with the sovereignty of states in these maritime areas, and in view of the fact that intelligence gathering is most likely for the national defence of the third state rather than responding to collective maritime security threats.

(b) Exclusive Economic Zone

The type of intelligence gathering that may be conducted in the EEZ has developed significantly since the formulation of UNCLOS.37 In this regard, Hayashi has

requirements of navigation, including the taking of bearings by reference to stationary points on land, involve many of the same tasks associated with “passive” observation and monitoring of a coastal state.’ Colby, ‘The Developing International Law’ 66.

32 UNCLOS art 37, and UNCLOS Part III generally. See also Chapter 2, Part B(1).
33 UNCLOS art 39(1)(c).
35 UNCLOS art 40. The same is true in relation to archipelagic sea lanes passage. See UNCLOS art 54.
36 UNCLOS art 300.
37 Valencia has described this phenomenon as follows: ‘[A]s technology advances, misunderstandings regarding military intelligence gathering activities in foreign EEZs are bound to increase. There have been vast improvements in the range and accuracy of both weaponry and intelligence collection including Aegis, satellites, submarines, aircraft carriers, missiles, and over-the-horizon weaponry. Indeed, some argue that technology has so dramatically changed the art of warfare and intelligence
described the use of active signals intelligence activities, which may be conducted from either aircraft or ships and may be deliberately provocative to generate programmed responses.\textsuperscript{38} He continues:

Other [signals intelligence] activities intercept naval radar and emitters, thus enabling the location, identification and tracking of surface ships as well as the planning and preparation of electronic or missile attacks against them. These activities appear to involve far greater interference with the communication and defense systems of the targeted coastal State than any traditional passive intelligence gathering activities conducted from outside national territory.\textsuperscript{39}

Hayashi further notes that these are ‘qualitatively an entirely new activity’ and new efforts are required to reach a common understanding as to the permissibility of such activities.\textsuperscript{40}

The controversy surrounding the rights of states to conduct signals intelligence activity was highlighted in April, 2001 when a United States EP-3E Aries collided with a Chinese F-8-II ‘finback’ fighter, killing the Chinese pilot and forcing the US aircraft to make an emergency landing on Hainan Island in China.\textsuperscript{41} The United States was of the view that its aircraft had been exercising the freedom of overflight, whereas China considered such ‘spy flights’ were contrary to international law and had previously sent fighters to fly at close range to the US planes in efforts to deter them from passing close to China’s coast and engaging in intelligence gathering.\textsuperscript{42} China’s view was that the information gathered could be used in an armed conflict, and was a violation of the sovereign rights and jurisdiction of a coastal state over its EEZ.\textsuperscript{43}

Further incidents include the December 2001 Japanese coast guard attack on and sinking of a North Korean spy vessel travelling in Japan and China’s EEZ with the loss of all on board, and also the protested presence of Chinese intelligence ships in Japanese waters, sometimes posing as research vessels.\textsuperscript{44} The United States and China have continued to have confrontations in the South China Sea, with the United States claiming that its surveillance vessels were entitled to undertake operations in the disputed South China Seas and China seeking to hinder these operations.\textsuperscript{45} Notably, the USNS Impeccable, which is designed to detect underwater threats such as submarines, was surrounded by five Chinese vessels in an effort to block its passage, and China has undertaken military fly-bys and used gathering that extending restrictions in the EEZ to constrain military and intelligence gathering will be largely ineffective.’ Valencia, ‘Military and Intelligence Gathering Activities’ 98.

\textsuperscript{38} Hayashi, ‘Military and Intelligence Gathering Activities’ 126.

\textsuperscript{39} Ibid 126.

\textsuperscript{40} Ibid 126.


\textsuperscript{44} See Valencia, The Proliferation Security Initiative 20–2.

Intelligence Gathering as a Military Activity

high-intensity spotlights against the USNS Victorious, a vessel described as an ocean surveillance ship.46

The permissibility of intelligence gathering activities in the EEZ centres on the interpretation of Article 58 of UNCLOS, and whether intelligence gathering is one of the ‘other internationally lawful uses of the sea related’ to the high seas freedoms set out in Article 87. This issue is relevant not only for states wishing to gather intelligence or conduct military surveys in the EEZ of another state, but also for coastal states seeking to gain greater information about foreign vessels within their own EEZ. This latter aspect was seen in Australia’s declaration of a Maritime Identification Zone, which was intended to gain information from all vessels, apart from day recreational vessels, traversing Australia’s EEZ.47 Nonetheless, it is the situation of a state wishing to conduct military activities in the EEZ of another state that has proven most controversial.48

As discussed in Chapter 2, there is no explicit recognition of the right of third states to conduct military activities in the EEZ of a coastal state within the text of UNCLOS. Nor is there any express prohibition on such conduct. However, those involved in the negotiations of UNCLOS have maintained that the general understanding was that such activities could be conducted,49 even though some states argued against such a position at the time.50 Since the adoption of UNCLOS, state practice has been inconsistent on this issue.51

This debate about the legality of military activities is reflected in relation to intelligence gathering more specifically, with arguments that ‘[t]raditionally, intelligence gathering activities have been regarded as part of the exercise of freedom of the high seas and therefore, through Article 58(1), lawful in the EEZ as well.’52 Rauch, for example, has argued that the freedom of navigation associated with the ‘operation of ships’ allows for a range of internationally lawful military activities, including, most importantly for present purposes, intelligence gathering and surveillance.53

46 Ibid.
48 Valencia has described why this issue remains polemic: ‘Military and intelligence gathering activities by foreign nations in or over others EEZs are becoming more frequent due to the accelerating pace of globalization; the tremendous increase in world trade; the rise in the size and quality of the navies of many nations; and technological advances that allow navies to better utilize oceanic areas.’ Valencia, ‘Military and Intelligence Gathering Activities’, 98.
49 See Jon M. Van Dyke, ‘Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country’ (2004) 28 Marine Policy 29, 31 (referring to a statement by Ambassador Tommy Koh, who presided over the final negotiations of UNCLOS). See also ibid 31 (‘The United States took the consistent position during these negotiations that military activities on the high seas and in the EEZ were consistent with the ‘peaceful purpose’ requirement if they were conducted in a non-threatening fashion in order to prepare for legitimate self-defense’).
50 Ibid 31.
51 See ibid 32.
52 Hayashi, ‘Military and Intelligence Gathering Activities’ 130.
Within the EEZ, the gathering and sharing of intelligence would be unlawful if it unduly interfered with legitimate valid claims of the coastal state to exercise its sovereign rights and jurisdiction over this zone. In addition, consideration should be given as to whether intelligence gathering falls foul of the due regard requirement. Bateman suggests that ‘[t]ypically this would be the case if the research or data collection were being undertaken to support contingency plans for military operations against the coastal State.’ Such activity could also arguably be in violation of Article 301 of UNCLOS if the intelligence gathering runs counter to the prohibition on the threat or use of force.

Some states have rebutted the argument that military intelligence gathering falls within the freedom of navigation, with China specifically arguing that ‘these freedoms must be balanced against the security interests of coastal states.’ While the security interests of a coastal state have not typically been considered as part of the coastal state rights within the EEZ, the increasing sophistication of surveillance capabilities may require reconsideration of the appropriate balance between coastal state and third state interests. Hayashi has referred to these developments as follows:

Of particular concern are the increasing [Electronic Warfare] capabilities and the widespread moves to develop information warfare (IW) capabilities. Airborne [Signals Intelligence] missions are often provocative as visible efforts to penetrate the electronic secrets of the targeted country. Indeed, important aspects of regional [Signals Intelligence] and [Electronic Warfare] capabilities may invite attack, and thus encourage pre-emption.

Chinese scholars have argued that the legal protection afforded to coastal states in the EEZ needs to be increased in light of this improved technology, arguing that the reconnaissance activities now conducted in the EEZ are comparable to those that used to be conducted in the territorial sea and for which legal protection was accepted as necessary.

related high seas activities in this EEZ, such as task force manoeuvring, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, military marine data collection, and weapons ’testing and firing’.

54 UNCLOS art 58(3).
55 Bateman, ‘Hydrographic Surveying in the EEZ’ 172.
56 Chinese scholars have argued in this regard: “freedoms of navigation and overflight” in the EEZ does not include the freedom to conduct military and reconnaissance activities in the EEZ and its superjacent airspace. Such activities encroach or infringe on the national security interests of the coastal State, and can be considered a use of force or a threat to use force against that State. The 1982 UNCLOS clearly states that the EEZ should be used only for peaceful purposes.’ Ren Ziafeng and Cheng Xizhong, ‘A Chinese Perspective’ (2005) 29 Marine Policy 139, 142. See further Zhang Haiwen, ‘Is it Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo’s Article on Military Activities in the EEZ’ (2010) 9 Chinese Journal of International Law 31, 44–5.
57 Van Dyke, ‘Military Ships’ 33.
The current legal position appears to support the legality of intelligence gathering by third states in the EEZ.\textsuperscript{60} Is this desirable, though? A change may be warranted in light of the international tension created through intelligence gathering activities in the EEZ, most clearly evidenced in the encounters between China and the United States, and the increasing securitization of the EEZ. In this vein, Bateman has observed:

Virtually by definition, littoral operations must be in the EEZ of one country or another. Successful operations in the littoral depend heavily on good oceanographic and hydrographic knowledge of the coastal environment, particularly for submarine operations, anti-submarine warfare (ASW), mine laying, mine counter-measures, and amphibious operations. A coastal State might well argue that it gains some security by restricting the availability of knowledge on its coastal environment, including its EEZ.\textsuperscript{61}

Modern means of warfare, especially the use of information warfare and electronic warfare, support an argument that the position should shift to prevent intelligence gathering in another state’s EEZ. However, so long as intelligence gathering is conceived of as part of the broader freedom of navigation, the limitations on this activity may only be drawn from due regard requirements and the prohibition on threats or uses of force. It seems unlikely that any modification in this position will find broad acceptance in the near future.

(2) Military surveys and hydrographic surveys

To avoid conflicts as to the range of permissible military activities allowed in another state’s coastal maritime zones, different characterizations of intelligence gathering have been presented. Countering suggestions that military intelligence gathering should be governed by the laws relating to marine scientific research, the United States and other maritime states have sought to distinguish military intelligence gathering on the basis that it is not related to resource exploitation nor would it normally be published or disseminated as is the case for scientific research.\textsuperscript{62}

Another aspect of intelligence gathering that has proven particularly problematic is whether a distinction is to be drawn between military surveys and hydrographic surveys. Such a distinction has implications for these activities in both the territorial sea and the EEZ. Roach and Smith have provided the following description of each:

(1) Hydrographic surveys: ‘to obtain information for the making of navigational charts and the safety of navigation, and includes determination of one or more of several classes of data in coastal or relatively shallow areas—depth of water,

\textsuperscript{60} As discussed in Chapter 2, the appropriate standard for military activities in the EEZ would permit naval exercises of reasonable scale without the use of weapons. See Chapter 2, Part C(1). Intelligence gathering falls within this standard.

\textsuperscript{61} Bateman, ‘Security and the Law of the Sea’ 383.

\textsuperscript{62} Van Dyke, ‘Military Ships and Planes’ 34. See also Brian Wilson and James Kraska, ‘American Security and Law of the Sea’ (2009) 40 ODIL 268, 283 (‘The U.S. position is that . . . [marine scientific research] does not include hydrographic surveys or other survey activities unrelated to economic development, which are separate and distinct activities’).
configuration and nature of the natural bottom, directions and force of currents, heights and times of tides and water stages, and hazards of navigation—for the production of nautical charts and similar products to support safety of navigation.\(^{63}\)

(2) Military surveys: ‘refer to activities undertaken in the ocean and coastal waters involving marine data collection (whether or not classified) for military purposes, and can include oceanographic, marine geological, geophysical, chemical, biological and acoustic data. Equipment used can include fathometers, swath bottom mappers, side scan sonars, bottom grab and coring systems, current meters and profilers.’\(^{64}\)

The question that has arisen is whether hydrographic surveys should be considered as part of the marine scientific research legal regime, and so be subject to the consent of the coastal state. Alternatively, hydrographic surveys, like military surveys, fall within the freedom of navigation and are regulated accordingly.

Hydrographic surveys are not permitted in the territorial sea as part of innocent passage,\(^{65}\) or during transit passage without prior authorization.\(^{66}\) At the time that UNCLOS was drafted, the technology available meant that hydrographic surveys effectively had to be conducted with the consent of the coastal state as the surveys involved participation from land.\(^{67}\) Hydrographic surveying was viewed at this time as a technical activity related to the safety of navigation and so was not part of the marine scientific research regime.\(^{68}\)

With the development of Global Positioning System (GPS) technology in the 1990s, coastal state involvement was no longer essential for hydrographic surveys and consequently opened up the possibility of these surveys being conducted without the knowledge, and hence permission, of the coastal state.\(^{69}\) Hydrographic surveying is a clear and distinct activity that, as evident in the low altitude of the aircraft, its repetitive flight pattern, and the typically relatively shallow waters of the area being surveyed, is not easily confused with other marine scientific research.\(^{70}\) It was perhaps for this reason that there is no specific reference in UNCLOS as to what legal regime should be applicable to these surveys in a state’s EEZ.\(^{71}\)

The United States considers that both military and hydrographic surveys are consistent with the freedom of navigation, and can be undertaken in the EEZs of

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\(^{63}\) J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (2nd edn Martinus Nijhoff, The Hague 1996) 426. See also Sam Bateman, ‘Hydrographic Surveying in Exclusive Economic Zones: Jurisdictional Issues’ (2004) *5 International Hydrographic Review* 76, 81 (‘The primary use of the data collected by hydrographic surveys is to compile nautical charts and other documents to facilitate and ensure the safety of navigation and for use by others concerned with the marine environment such as ocean engineers, oceanographers, marine biologists and environmental scientists’).

\(^{64}\) Roach and Smith, *United States Responses* 427.

\(^{65}\) UNCLOS art 19 (survey activities falling outside the meaning of innocent passage) and art 21 (permitting the coastal state to regulate hydrographic surveys).

\(^{66}\) UNCLOS art 40. Prior authorization is also required for hydrographic surveys by vessels exercising the right of archipelagic sea lanes passage. See UNCLOS art 54.

\(^{67}\) See Bateman, ‘Hydrographic surveying in the EEZ’ 168.

\(^{68}\) See Bateman, ‘Hydrographic Surveying in Exclusive Economic Zones: Jurisdictional Issues’ 79.

\(^{69}\) See Bateman, ‘Hydrographic Surveying in the EEZ’ 168.

\(^{70}\) See Bateman, ‘Hydrographic Surveying in Exclusive Economic Zones: Jurisdictional Issues’ 81.

\(^{71}\) See Bateman, ‘Hydrographic Surveying in the EEZ’ 168.
other countries, without coastal state regulation, notification or consent. Other states have taken the view that their consent is necessary for third states to undertake hydrographic surveys in their EEZs. Most notably in this regard was China’s decision in 2002 to enact law stating that any “survey or mapping” activities cannot involve State secrets or hurt the State, and that all such surveys must have prior permission. China has also reportedly viewed ‘military hydrographic survey’ activities in the EEZ without coastal state permission as, ‘in a military sense, a type of battlefield preparation, and thus a threat of force’ against the coastal state.

It may be argued that since hydrographic surveys require permission if they are to be conducted during transit passage, and that their conduct would violate the right of innocent passage, then there is no need for hydrographic surveys as part of the safety of navigation for the passage of each vessel. It follows that if there is no such link between hydrographic surveys and navigation in these maritime zones then these surveys cannot be read into ‘other internationally lawful uses of the sea related to the freedom of navigation.’ Moreover, Bateman has argued that hydrographic data has considerable commercial value, and is important for national development. The economic importance of hydrographic surveys further supports the view that it should be subject to a regime of coastal state consent, similarly to any other marine scientific research relating to resources. It is therefore appropriate to single out hydrographic surveys as a distinct form of intelligence gathering and as one subject to coastal state regulation. Hydrographic surveys are undertaken for the development of navigational charts that are broadly beneficial to international shipping. The marine scientific research regime ensures that hydrographic survey activities are consistent with national needs as well as benefiting international shipping through the publication of charts resulting from the surveys.

(3) Conclusion

Some effort to resolve the controversy over the legality of intelligence gathering under the law of the sea may be seen in the Guidelines for Navigation and Overflight in the Exclusive Economic Zone, which were developed by a group of senior officials and analysts from the Asia-Pacific region in 2005. These Guidelines

72 Hayashi, ‘Military and Intelligence Gathering Activities’ 131.
73 Bateman, ‘Hydrographic Surveying in the EEZ’ 163.
74 Hayashi, ‘Military and Intelligence Gathering Activities’ 131.
76 Bateman, ‘Hydrographic Surveying in the EEZ’ 170. Bateman has also noted: ‘A distinction must be drawn between a ship operating its sonar or echo sounding equipment in the interests of safe navigation (and reporting any hazards detected to the appropriate authority) and hydrographic surveying as a purposeful and systematic activity. The former is incidental to the safety of navigation while the latter is obviously within the scope of ‘any research or survey activities’ as identified in UNCLOS.’ Bateman, ‘Hydrographic Surveying in Exclusive Economic Zones: Jurisdictional Issues’ 79.
77 Bateman, ‘Hydrographic Surveying in the EEZ’ 170.
78 Bateman, ‘Hydrographic Surveying in the EEZ’ 169–70.
79 Consistent with art 246 of UNCLOS for hydrographic surveys in the EEZ.
80 UNCLOS arts 244 and 249(1)(e).
are intended to address the differences of opinion regarding military activities in the EEZ and represent a common understanding and approach to these issues within the region.\textsuperscript{81} Most significantly for present purposes, the Guidelines support ‘the general principle that military activities in the EEZ, including military surveying and intelligence collection, are part of the freedoms of navigation, overflight and engagement in other internationally lawful uses of the sea associated with the operations of ships and aircraft.’\textsuperscript{82} While the drafters of the Guidelines seek to influence the development of international law in this area, until they are widely accepted and endorsed, there remains scope for states to argue the opposite position.

The law remains unsettled in relation to the permissibility of the full range of intelligence gathering in another state’s EEZ. There are a number of arguments favouring the view that intelligence gathering in a foreign EEZ is lawful but this position should rightly be queried in light of technological progress. The primary interests at stake revolve around competing exclusive claims, which are both premised on individual states’ desires to improve their military position vis-à-vis another state (or states). In the absence of further clarity, it is this ongoing uncertainty, coupled with recognition of coastal state rights over the territorial sea, that form the background to a range of legal and policy developments that have been undertaken post-September 11 to improve intelligence capability for the purposes of promoting maritime security.

D. Monitoring the Movement of Ships and Seafarers

While intelligence gathering, as discussed in the previous Part, may most typically be linked to the military objectives of a particular state, the broader understanding of maritime security, and consequent emphasis on MDA, demands that any understanding of laws related to intelligence gathering be extended in scope. For maritime security, states now want more details about what vessels are going where, with what, and with whom on board, especially if those ships are approaching their own shores. This Part examines unilateral and multilateral endeavours to improve the collection of information in relation to the movement of ships and seafarers. Particular initiatives analysed in this regard are the Australian Maritime Identification System, the IMO Regulation on LRIT, and seafarers’ identity documents. Concerns about terrorism and proliferation of WMD have proven especially motivating in this regard, and the ISPS Code and WCO Framework of Standards may also be highlighted for their emphasis on intelligence gathering, as well as information sharing. The dissatisfaction expressed with Australia’s unilateral effort as well as multilateral attempts to improve intelligence gathering in monitoring the


\textsuperscript{82} Ibid 22–3.
movement of ships and seafarers clearly reflects the inclusive interest that exists in enhancing maritime security. It is argued that state endorsement of this collective interest is essential to enable the legal frameworks and principles to support fully policies of MDA.

(1) **Australian Maritime Identification System**

On 14 December 2004, Australia’s Prime Minister announced the institution of a ‘Maritime Identification Zone’ (MIZ) as part of Australia’s effort to strengthen its offshore maritime security.83 The creation of this zone, extending 1,000 nautical miles from Australia’s lengthy coastline, was to enable a Joint Command, comprising of the Australian Defence Force and the Australian Customs Service, to identify vessels (including their crew, cargo, and course of journey) seeking to enter Australian ports.84 The provision of this information was viewed as a means of enhancing the effectiveness of civil and military maritime surveillance, particularly in protecting offshore oil and gas facilities from terrorism.85 In the MIZ, information would not only be sought from port-bound vessels entering this zone, but upon entering Australia’s EEZ ‘the aim [would] be to identify all vessels, other than day recreational boats’.86

The declaration of the MIZ immediately attracted attention from Australia’s neighbours, as the maritime zones of New Zealand, Indonesia, Papua New Guinea, New Caledonia, and Timor Leste would have all overlapped with the MIZ. Initially, New Zealand voiced concerns that the new zone would stretch into the territorial waters of New Zealand’s South Island.87 After discussions with Australia, New Zealand announced that the request for information in the MIZ would not be inconsistent with pre-existing regulations that vessels provide coastal authorities with certain information 48 hours prior to reaching port.88 New Zealand already had comparable requirements in place and noted that the 48-hours notice would be equivalent to a 1,008 nautical mile zone for a ship travelling at 21 knots.89 Strong opposition was voiced in Indonesia, where a spokesman for the Foreign Minister commented that the MIZ would be a violation of Indonesian sovereignty and was in contravention of international law.90

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84 PM Media Release 2.
85 Ibid, 1–2.
86 Ibid, 2.
89 Ibid 1.
90 ‘Indonesia Rejects Australian Maritime Zone’ (18 December 2004) <http://www.laksamana.net/vnews.cfm?ncat=48andnews_id=7746> [previously online]. See also Matthew Moore, ‘Indonesia
Even states in the region outside the reach of the MIZ questioned Australia’s authority to institute the new zone.  

Some aspects of the MIZ, as it was originally formulated, could be justified under existing international law principles, but this was by no means true of the MIZ in its entirety. Australia’s right to request information from vessels seeking to enter its ports does not run contrary to the freedom of navigation, but was consistent with its rights under the changes to the SOLAS Convention and adoption of the ISPS Code. In addition to these rights, Australia would still be entitled to request information from vessels seeking to enter its ports under UNCLOS or customary international law, as merely requesting information would not constitute an unreasonable infringement on the freedom of navigation on the high seas. Within the EEZ, the mutual due regard requirement may be infringed by Australia in demanding identification information from all vessels (excluding day recreational vessels), particularly when those vessels would merely be transiting and not intending to stop in an Australian port. ‘[T]he comprehensive nature of Australia’s information requirements may indicate that it [had] insufficient regard for the freedom of navigation.’  

Beyond simply requesting information, the Australian Prime Minister announced that the Australian Defence Force would ‘take responsibility for offshore counter-terrorism prevention, interdiction and response capabilities and activities.’ However, such efforts at interdiction to enforce the information requirement on the high seas or in the EEZ would have been unlawful. There is no exception to flag state authority on the high seas that would permit the right of visit to enforce a coastal state requirement to provide information in pursuit of that state’s maritime security policies. Even under the SOLAS Convention, if a master of a vessel fails to comply with a request for information, the only consequence is that the vessel may not be allowed to enter the port of that particular state. For enforcement under the ISPS Code, the emphasis is for port states to expel the ship


92 See generally Klein, ‘Legal Implications’.

93 Australia implemented the ISPS Code through the Maritime Transport and Offshore Facilities Security Act 2003 (Cth).


95 Ibid 358.

96 Ibid 360.

97 PM Media Release 1.


99 IMO, ‘Guidance to Masters, Companies and Duly Authorized Officers on the Requirements Relating to the Submission of Security-Related Information Prior to the Entry of a Ship into Port’
from port, refuse entry to port, or curtail the operations of the ship, such as delaying the vessel in port while further security measures are undertaken.\textsuperscript{100} This aspect of Australia’s maritime information policy appears to have been abandoned.

Australia’s unprecedented assertion of authority over vessels at such distance from its coast, particularly the claim of authority to interdict vessels over which Australia had no jurisdiction, raised serious concerns about the legality of the MIZ under international law. As a result, Australia reformulated it into the Australian Maritime Identification System (AMIS), so that ships would be requested to provide information on a wholly voluntary basis and the new System would be based on cooperative international arrangements, particularly with neighbouring states.\textsuperscript{101} Australia has emphasized that its actions under the AMIS will conform to existing international law.\textsuperscript{102} The AMIS is now focused on its operational dimensions, and is encapsulated through the creation of an Australian Maritime Information Fusion Centre.

What began as a test of the parameters of international law for the improvement of maritime security has evolved into a policy initiative that reflects the idea of MDA and otherwise seeks to operate in conformity with existing international law. The strong policy objectives evinced by this episode is a reminder of the potential of states to claim rights over an increasing expanse of ocean areas, and that this will be done for security reasons as well as economic motives. In this instance, Australia sought to assert exclusive interests in order to improve its national security, but the shared interest in obtaining information from ships at sea has been manifest in initiatives pursued at the IMO. These multilateral endeavours are next considered.

(2) Mandatory ship reporting systems

Monitoring the movement of ships is by no means a new phenomenon, but may be recognized as a vital element for promoting the safety of navigation. Maritime security concerns have refocused attention on ship monitoring. As a result, existing ship reporting systems came under scrutiny because they were variously limited as to which states may receive the information, the distance over which the information could be sent and for what purposes the information would be sent. For example, some states and shipping companies have developed and installed Vessel Monitoring Systems (VMS) that are used in marine accident investigations, search

\textsuperscript{100} As discussed in Chapter 4, Part D(1).


\textsuperscript{102} Ibid, referring to a statement by the Australian Customs Service. Australia is also making arrangements to ensure the lawful operation of the AMIS at a national level. See generally Cameron Moore, ‘Turning King Canute into Lord Neptune: Australia’s New Offshore Protection Measures’ (2006) 3 \textit{University of New England Law Journal} 57. See also Donald R. Rothwell and Cameron Moore, ‘Australia’s Traditional Maritime Security Concerns and Post-9/11 Perspectives’ in Natalie Klein, Joanna Mossop and Donald R. Rothwell (eds), \textit{Maritime Security: International Law and Policy Perspectives from Australia and New Zealand} (Routledge, Oxford 2010) 37, 46–53.
and rescue, sailing plans, as well as safety and pollution prevention. The type of information collected may include the course of the vessel, its speed, draft, and estimated time of arrival and departure from various positions—again, the information to be provided will depend on the purpose sought to be achieved in collecting the information. Traffic reporting and routing systems approved by the IMO may also be established to protect coastal state interests in protecting the marine environment, which has been considered as ‘a shift in the balance between coastal and maritime States’ relative interests’ with respect to vessel-source pollution in the EEZ.

The use of VMS has also become an important means of deriving information about the location of fishing vessels, which in turn provides an indication as to whether the vessel is fishing in an area without authority. In exercising sovereign rights in the EEZ, coastal states may adopt laws and regulations ‘specifying information required of fishing vessels, including…vessel position reports’. While states may include the use of VMS as part of its domestic fisheries law, its imposition as a condition for the release of an arrested fishing vessel was successfully challenged before ITLOS. The value of VMS has been recognized by regional fisheries organizations and attempts have been made to introduce VMS as a means of enhancing surveillance and enforcement efforts. The CCAMLR Commission has adopted the use of VMS on all vessels, except those involved in the krill fishery. However, its use has been problematic and the relevant data has not always been provided to the CCAMLR Secretariat.

The IMO has in place an Automatic Identification System (AIS) under the SOLAS Convention, which is a maritime safety and vessel traffic system that broadcasts position reports and short messages with information about the ship and its voyage. A shortcoming of the AIS for security purposes has been that the range for ship to ship communications is usually 20 miles and for ship to shore

105 The ISPS Code and the LRIT Regulation do not apply to fishing vessels because of their smaller size.
106 UNCLOS art 62(4)(e).
107 See Volga Case (Russia v Australia) (Prompt Release) ITLOS Case No 11; (2003) 42 ILM 159. See Chapter 3, Part F(1).
109 See ibid 270 (noting that not all vessels have an automated VMS and that fraudulent and incomplete VMS data is sometimes supplied).
110 See subparagraph 2.4 of Regulation 19 of Chapter V of SOLAS. The AIS was intended to enhance the safety of shipping as an aid to navigation and collision avoidance rather than being a tool for maritime security enhancement. See Murphy, ‘Lifeline or Pipedream?’ 24.
communications, only 40 miles. A further concern has been that broadcasts may be accessed by anyone with the appropriate AIS equipment and so could potentially be accessible by criminal organizations. Other weaknesses identified have included inaccurate information entered into the equipment and the non-mandatory use of AIS aboard ships that are less than 300 gross registered tonnage and that fall outside the SOLAS Convention requirements.

In light of the various shortcomings of AIS, the IMO revised the SOLAS Convention again in order to increase the tools available to governments to learn about vessels in their surrounding waters. Regulation 19–1 on LRIT, adopted in 2006 and in force in July 2009, sought to create a ‘system [that] had to be satellite-based, could not be an open broadcast network, information distribution needed to be restricted and existing equipment had to be used rather than new equipment to enable ship owners to forgo additional expense and staff training’. This new system was thus developed because states sought to secure information over a greater distance and over more vessels than had previously been possible. While alternative uses for existing VMS and AIS were considered, the preference among Contracting Governments to the SOLAS Convention was to develop a new system to meet their particular security interests.

The new regulation was adopted under Chapter V of SOLAS, rather than the new Chapter XI-2, which addresses maritime security and includes the ISPS Code. Part of the reason for including the LRIT Regulation in Chapter V was because of the wide purposes of the information beyond simply monitoring the movement of vessels for security interests. Under Regulation 19–1, ships are required to automatically transmit information as to the identity of the ship, its position (longitude and latitude), and the date and time of the position provided. This information is to be received for ‘security and other purposes as agreed’ by the IMO. Some states anticipated that the information could equally be used for search and rescue purposes, as well as for safety and environmental applications, and in relation to traffic planning purposes in narrow channels.
and congested ports.\textsuperscript{118} It was subsequently agreed in IMO Resolution MSC.242 (83) ‘that Contracting Governments may request, receive and use, LRIT information for safety and marine environment protection purposes’.\textsuperscript{119}

The LRIT system builds on the global ship reporting system AMVER, which has been used exclusively to support search and rescue operations since 1958.\textsuperscript{120} Ships of over 140 flags have voluntarily participated in AMVER, though the data collected in this system has been protected as commercial proprietary information and so only provided upon request to recognized rescue coordination centres that are coordinating responses to distress situations.\textsuperscript{121} The data to be collected and distributed for LRIT purposes was also intended to be done in a secure and private environment to maintain commercial confidentiality and prevent unauthorized access or disclosure.\textsuperscript{122}

In view of existing technology and equipment, it was anticipated that most ships subject to the LRIT Regulation would already have the necessary transmission equipment because of existing radio communications requirements,\textsuperscript{123} and that the crew would not be required to engage in activities outside of their normal duties.\textsuperscript{124} The LRIT system is intended to work without any intervention from the ship’s crew in that the reports are received at pre-determined time intervals and remote instructions can be sent for more frequent reports when required.\textsuperscript{125}

What needed to be created for the purposes of the LRIT system were National, Regional or Cooperative data centres, as well as an International LRIT Data Center to be used by vessels of a flag state not participating in a National, Regional or Cooperative Data Center,\textsuperscript{126} and an International LRIT Data


\textsuperscript{119} IMO Res MSC.243(83) (12 October 2007) IMO Doc MSC 83/28/Add.2 (Annex 6).


\textsuperscript{121} Ibid 185.

\textsuperscript{122} See IMO Maritime Safety Committee, ‘Measures to Enhance Maritime Security: A Practical System for Implementing Long Range Identification and Tracking of Ships (LRIT)’ (2 March 2005) 80th Session IMO Doc MSC 80/5/5, 3–4 (submitted by the International Mobile Satellite Organization (IMSO)).

\textsuperscript{123} US Federal Register, ‘Long Range Identification and Tracking of Ships’ (29 April, 2008) 33 CFR Part 169; Proposed Rule 33 CFR Part 169, Wednesday October 3, 2007, 56605. In addition, the equipment necessary to transmit LRIT data is not a new carriage. See ibid 56606.

\textsuperscript{124} Ibid 56606.

\textsuperscript{125} See IMO Maritime Safety Committee, ‘Measures to Enhance Maritime Security: A Practical System for Implementing Long Range Identification and Tracking of Ships (LRIT)’ (2 March 2005) 80th Session IMO Doc MSC 80/5/5, 3 (submitted by the International Mobile Satellite Organization (IMSO)).

\textsuperscript{126} This International Data Centre was not to be established at the outset given the lack of economic feasibility for its creation. See ‘LRIT-Related Matters: Report of the Working Group’ (3 December 2007) IMO Doc MSC 83/WP.6/Rev.1, 20. Contracting Governments without data centres were instead recommended to establish contacts with those planning to establish national, regional or cooperative data centres. See ibid, 19. See also IMO Maritime Safety Committee, ‘Guidance on the Implementation of the LRIT System’ (5 June 2008) IMO Doc MSC.1/ Circ.1256, Annex, para 4.4.1.
The variety of centres was necessary to respond to, on the one hand, sovereignty concerns related to information being sent to one central source and, on the other hand, concerns over the cost of requiring each state to establish its own national centre. It is up to the flag state to determine to which LRIT Data Center its vessels must report. The Data Center selected by a flag state collects the information and ensures that the LRIT information is only sent to those entitled to receive it. If the Data Center collects information outside the scope of Regulation 19–1, then only the information specified in that Regulation is transmitted to the other Data Centers through the International LRIT Data Exchange.

As a formal mechanism for information sharing, Regulation 19–1 takes into account commercial and governmental sensitivities involved in the transmission of LRIT information. Contracting governments are to ‘recognize and respect the commercial confidentiality and sensitivity’ of the information, as well as ‘protect the information they . . . receive from unauthorized access or disclosure’. Moreover, the information received is to be used ‘in a manner consistent with international law’, which may suggest that the LRIT information should not be used for military purposes that may amount to an unlawful use of force under Article 2(4) of the UN Charter.

The LRIT information may be received by the flag state of the vessel regardless of where the vessel is located. A port state may also receive the information once a foreign flagged vessel has indicated its intention to enter that port, except when the vessel is on the landward side of baselines of another state. Finally, a coastal state may receive the information from a foreign flagged vessel when it is ‘navigating within a distance not exceeding 1,000 nautical miles of its coast’, but again with the exception that no information will be provided if the vessel is on the landward side of baselines of another state. Each state must bear the costs of any information requested and received.

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127 The International LRIT Data Exchange is to be established on an interim basis in the United States. See IMO Res MSC.243(83) (12 October 2007) IMO Doc MSC 83/28/Add.2.
128 Regional and Cooperative Data Centres may internally transmit data among its users without going through the International Data Exchange. IMO Maritime Safety Committee, ‘LRIT Matters: Outcome of the MSC/ISWG/LRIT 2’ (18 July 2007) 83rd Session IMO Doc MSC 83/6/2, para 49 (note by the Secretariat) (though a journal for these transactions is to be kept for an initial assessment of the functioning of the entire LRIT system).
129 See Murphy, ‘Lifeline or Pipedream?’ 19.
130 Regulation 19–1 para 10.2 and 10.3.
131 Regulation 19–1 para 10.4.
132 Regulation 19–1 para 8.1.1.
133 Regulation 19–1 para 8.1.2. Reference is to a ‘port facility . . . or a place under the jurisdiction of the Contracting Government’.
134 Regulation 19–1 para 8.3. In establishing the LRIT system, the location from which data could be collected proved controversial inasmuch as states have contested maritime boundaries, including disputed baselines. As a result, in the adoption of an IMO circular on the implementation of the LRIT system, a series of caveats preserving states’ rights are included within a separate appendix. See IMO Maritime Safety Committee, ‘Guidance on the Implementation of the LRIT System’ (5 June 2008) IMO Doc MSC.1/Circ.1256, Appendix.
135 Regulation 19–1 para 11.1.
This reference to ‘waters landward of the baselines’ is quite a narrow limitation, as it in essence covers situations of information being transmitted while the vessel is in the port of another state, but still allows for information to be sent as soon as the vessel reaches the territorial sea of a foreign state. The sovereignty that a coastal state exercises over its territorial sea and the authority it has over foreign flagged vessels within its territorial sea does not trump the requirement of a vessel to transmit the LRIT information. Regulation 19–1 does, however, stipulate that LRIT information will not be sent to a coastal state from the territorial sea of the state to which the vessel is flagged. In other words, if a North Korean vessel is in the North Korean territorial sea and still within 1,000 nautical miles of China and not going to a Chinese port, then China is not entitled to receive LRIT information until the vessel leaves the North Korean territorial sea.

The entitlement of coastal states to receive information from vessels that are not coming into the ports of those states was a point of controversy during the formulation of the LRIT Regulation. During negotiations, a 2,000 nautical mile range within which coastal states could request and receive information was mooted. Other states sought to align the distance with the breadth of the EEZ (200 miles), but the shorter distance was impractical given that this distance is usually covered by a vessel in approximately 12 hours. Further, aligning the distance with the breadth of the EEZ may have arguably had implications for the rights and duties involved in that legal regime.

In view of the controversy surrounding receipt of information by a coastal state, the LRIT Regulation permits that a state may decide that vessels flying its flag will not provide information to coastal states ‘in order to meet security or other concerns’. This decision may be taken at any time, and may be subsequently

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136 Regulation 19–1 para 8.4.
138 See, eg, IMO Maritime Safety Committee, ‘Consideration and Adoption of Amendments to Mandatory Instruments: Long-range identification and tracking of ships’ (7 March 2006) 81st Session IMO Doc MSC 81/3/8, para 5 (submitted by Brazil) (proposing that coastal states would be entitled to tracking information up to 200 miles from the coast unless the flag state notifies the IMO that coastal states may extend their tracking range beyond that); IMO Maritime Safety Committee, ‘Development of the Draft SOLAS Amendment on Long-Range Identification and Tracking: Draft SOLAS regulation on LRIT’ (20 September 2005) 1st Session IMO Doc MSC/ISWG/LRIT 1/3/4, Annex 2, para 4.3 (submitted by the Russian Federation) (providing that coastal states could receive information from vessels navigating up to 200 nautical miles from their coast in order to be consistent with the EEZ).
139 One proposal set the distance at 400 nautical miles on the basis that it would be the average distance a ship might be expected to travel in 24 hours and that 24 hours advance notice before arrival into port was the practice of a number of states. IMO Maritime Safety Committee, ‘Development of the Draft SOLAS Amendments on Long-Range Identification and Tracking’ (19 September 2005) 1st Session IMO Doc MSC/ISWG/LRIT 1/3/2, para 5 (submitted by [EU Member States] and the European Commission).
140 Regulation 19–1 para 9.1.
amended, suspended, or annulled at any time.\textsuperscript{141} If a state so decides then the ‘right, duties and obligations, under international law’ of the ships involved ‘shall not be prejudiced’.\textsuperscript{142} The implication here would seem to be that if a vessel is not providing information to a coastal state by virtue of a decision of the flag state of that vessel, no action should be taken by the coastal state to treat that vessel as acting in a suspicious manner and interfere with its passage.

In addition, the LRIT Regulation anticipates that there will be times when the systems and equipment providing identification information may be switched off, or otherwise cease providing information.\textsuperscript{143} These situations are when international agreements, rules, or standards provide for the protection of navigational information, or ‘in exceptional circumstances and for the shortest duration possible where the operation is considered by the master to compromise the safety and security of the ship’.\textsuperscript{144} This latter exception appears as somewhat of a safety net, as the master is accorded with discretion as to when information will not be transmitted, and although the circumstances for doing so are limited (‘exceptional circumstances’, ‘shortest duration possible’), it is nonetheless a subjective determination. If the latter does occur, the master is required to inform the Administration ‘without undue delay’ and to set out the reasons for the decision and the period of time involved in the record of navigational activities and incidents, which must be kept by virtue of Regulation 28 of the SOLAS Convention.

The enforcement provisions of the LRIT Regulation are extremely limited, consistent with the IMO preference to leave enforcement matters to member states. The only recourse for a state in the event that the requirements of the Regulation are not being observed or adhered to is to report the case to the IMO.\textsuperscript{145}

States are not given any new enforcement powers at sea or at port under the Regulation; a point confirmed by para 1 of Regulation 19–1, which reads in relevant part:

Nothing in this regulation . . . shall prejudice the rights, jurisdiction or obligations of States under international law, in particular, the legal regimes of the high seas, the exclusive economic zone, the contiguous zone, the territorial seas or the straits used for international navigation and archipelagic sea lanes.

Thus, although the substantive rights are an important improvement, the ability of states to respond to failures or breaches in the operation of these rules is quite restricted.

The establishment of the LRIT system caused difficulties that may ultimately undermine its operation. Not every Contracting Government will be seeking

\textsuperscript{141} Regulation 19–1 para 9.1.
\textsuperscript{142} Regulation 19–1 para 9.3.
\textsuperscript{143} One such situation specifically mentioned was when a ship was undergoing repairs in dry-dock or in port or is laid up for a long period (either for lack of employment or because it is under judicial arrest). See, eg, IMO Maritime Safety Committee, ‘LRIT-Related Matters: Report of the Third Session of the Ad Hoc LRIT Group’ (5 May 2008) 84th Session IMO Doc MSC 84/6/1/Add. 2, 22–3.
\textsuperscript{144} Regulation 19–1 para 7.
\textsuperscript{145} Regulation 19–1 para 13.
LRIT information, including Singapore and Hong Kong China, which both indicated that the information was either of little use or could be sought through alternative, cheaper, means. Given the importance of Hong Kong and Singapore as major shipping hubs, the decision not to access this information indicates either that the LRIT system is not especially useful in practice for its purposes or that two important shipping hubs are at risk for failure to take sufficient steps to monitor shipping near their port assets and infrastructure. Nonetheless, some of the major flag states have indicated that they will be exercising their rights under the LRIT system, as will states that do not otherwise participate in some of the multilateral initiatives that have been undertaken to improve maritime security.

Concerns about the financial viability of the system were also raised at the IMO, especially by flag states, which considered that the greatest financial burden would fall to them in view of the lack of commitment of port and coastal states to share the costs. Contracting Governments considered that the user pays principle should be maintained, as it had been a basic principle during the development of the LRIT system and flag, port, and coastal states all had a shared interest in and responsibility for ensuring the long term viability and sustainability of LRIT. Nonetheless, it was acknowledged that the LRIT Regulation only established the right to request and receive LRIT information. States are not compelled to request the information and so would not necessarily incur any financial obligations the payment of which would help run the system. In view of the ‘collective interest’ involved, all contracting governments were to be encouraged to request, receive, and pay for LRIT information as port and/or coastal states.

The LRIT Regulation has clear limitations in both the legal regime created and in its actual operation. Its relevance for enhancing maritime security lies not only in its existence but will also be dependent upon widespread usage. The LRIT Regulation stands as recognition of the shared interest in improving maritime security. Its ultimate success rests in states acknowledging this interest and taking action accordingly.

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146 See IMO Maritime Safety Committee, ‘LRIT Matters; Summary of Responses to the Questionnaire on LRIT-Related Matters’ (3 October 2007) 83rd Session IMO Doc MSC 83/WP.9 (note by the Secretariat).

147 North Korea, Iran and the United States all intend to use the LRIT System. See ‘LRIT-Related Matters: Summary of Responses to the Questionnaire on LRIT-Related Matters’ (7 May 2008) 84th Session IMO Doc MSC 84/WP.9 (note by the Secretariat).


150 Ibid 9.

151 Ibid.
(3) Identity of seafarers

In reviewing the security of international shipping following the September 11 attacks, the entry and transit of seafarers into and through a state’s territory also came under scrutiny. The intimate involvement of seafarers in the international transportation of all manner of goods prompted concern that more information was required as to who was arriving aboard vessels and in particular what identity documents were necessary to allow for this movement. While the IMO broached this topic in the context of the ISPS Code and in relation to the SOLAS Convention,152 it was ultimately the International Labour Organization (ILO) that focused on information regarding the identity of seafarers.153

Under the auspices of the ILO, the 1958 Seafarers’ Identity Documents Convention154 had responded to earlier acknowledgement of the need for an internationally recognized identity document to facilitate the professional movement of seafarers.155 The 1958 Seafarers Convention did not create one uniform document, however, but set standards for the issuance and content of national identity documents and provided for reciprocal recognition of these different documents.156 These principles were subsequently incorporated into the 1965 IMO Convention on the Facilitation of International Maritime Traffic.157

While there was widespread adherence to these treaties,158 ‘immigration authorities [were] often unsure if such a seafarers’ identity document [was] genuine or counterfeit, or whether the State in question [had] even ratified the relevant Convention’.159 The use of false or fraudulent documents and the fallibility of identity systems in developing countries raised particular security concerns.160

152 The ISPS Code addresses procedures related to shore leave for ship’s personnel as well as access to visitors to the ship as part of the port facility security plans. ISPS Code, Part A, para 16.3.15. The parties to the SOLAS Convention adopted a resolution in 2002 recognizing the importance of a seafarers identity document to maritime security and invited the ILO to continue efforts to develop such documentation. SOLAS Conference Resolution 8, adopted December 12, 2002.

153 The IMO and the ILO have both considered and adopted non-binding measures on fraud and forgery of seafarers’ certificates and regulating seafarer access to port areas. See Martin Tsamenyi, Mary Ann Palma, and Clive Schofield, ‘International Legal Regulatory Framework for Seafarers and Maritime Security Post-9/11’ in Rupert Herbert-Burns, Sam Bateman and Peter Lehr (eds), Lloyd’s MIU Handbook of Maritime Security (CRC Press, Boca Raton 2009) 233, 244–6.


156 Ibid para. 5.


158 The 1958 Seafarers Convention was ratified by 61 states, and the 1965 Facilitation Convention has 110 states parties. The ILO has also noted that there had been de facto adherence to the 1958 Seafarers Convention even though states had not formally ratified it. ILO, ‘Briefing Paper, Consultation Meeting on Improved Security of Seafarers’ Identification’ (9–10 May 2002) ILO Doc CMISSI/2002/BR, para 6.

159 Ibid para 7.

Further concerns were expressed that the national identity cards were generally of poor quality, the absence of expiry dates meant that they became out-dated, and the personal data included was often less than is provided in a passport. The ILO thus sought to develop positive and verifiable identification, whereby ‘positive’ meant that the document holder was the person to whom the document was issued and ‘verifiable’ would allow for the validation of the authenticity of the document by reference to a source.

Two of the key aims in revising the 1958 Seafarers Convention were to improve the security of seafarers’ identification and to maintain the rights and facilities needed by seafarers. The United States elaborated on these objectives as follows:

(i) Positive and verifiable identification by means of a standard ensuring both the identity between the document recipient and holder and the validation of authenticity by a source;
(ii) Uniformity by means of a universal standard;
(iii) Acceptability by means of a convenient, user-friendly, commerce-friendly and cost-effective standard;
(iv) Reliability by means of a practicable standard;
(v) Security by means of a standard ensuring that the system is resistant to compromise; and
(vi) Interoperability by means of a standard providing for the exchange of information between member States, in the form of a seafarer’s identification system capable of immediate data access.

Ensuring an acceptable international standard for a seafarers’ identity document, as opposed to varying national standards, was thus essential for facilitating trade, securing the rights of seafarers and meeting security concerns.

In 2003, the General Conference of the ILO adopted the Seafarers’ Identity Documents Convention (Revised). Under this treaty, states parties are to issue seafarers’ identity documents to all of its seafarers who are nationals and so apply. Seafarers are defined as ‘any person who is employed or is engaged or works in any

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166 Seafarers’ Identity Documents Convention (Revised) art 2(1). Provision is also made for the issuance of identity documents to permanent residents. See Seafarers’ Identity Documents Convention (Revised) art 2(3).
capacity on board a vessel, other than a ship of war, ordinarily engaged in maritime navigation.\textsuperscript{167} The precise nature and content of the identity document is set out in Article 3 and Annex I to the treaty, which allows for possible amendment with technological advancements.\textsuperscript{168} Details that must be included on the document encompass: the name of the issuing authority, indications enabling rapid contact with that authority, the date and place of issue of the document, the full name, sex, date, and place of birth and nationality of the document holder, any special physical characteristics that may assist identification, a digital or original photograph and signature.\textsuperscript{169}

In addition, biometric information must also be included on the identity document,\textsuperscript{170} provided a range of safeguards are met.\textsuperscript{171} These safeguards were included to address concerns that had been expressed relating to privacy and other human rights, as well as concerns regarding cost and reliability.\textsuperscript{172} The inclusion of biometric information allows port and other border officials to verify the seafarer’s identity by comparing fingerprints to the biometric information on their identity document, as well as comparing the biometric information with details held on the Issuing Authority’s database. An international standard for biometric identity verification that would be internationally interoperable was developed subsequent to the adoption of the Revised Seafarers Convention,\textsuperscript{173} and followed work that had been undertaken by the International Civil Aviation Organization.\textsuperscript{174}

Each member state is to maintain a national electronic database, storing a record of each seafarer’s identity document issued, suspended or withdrawn.\textsuperscript{175} To respond to inquiries regarding the authenticity or validity of documents, states parties are required to designate a ‘permanent focal point’ and advise the ILO of these details.\textsuperscript{176} Seafarers are then to be allowed to examine and check the validity of information that is held or stored in the database.\textsuperscript{177} How these obligations will be implemented has raised concerns, particularly in view of the costs and that states have different national laws on privacy rights and confidentiality of information.\textsuperscript{178}

\textsuperscript{167} Seafarers’ Identity Documents Convention (Revised) art 1(1).
\textsuperscript{168} Seafarers’ Identity Documents Convention (Revised) art 3(1).
\textsuperscript{169} Seafarers’ Identity Documents Convention (Revised) arts 3(5) and 3(7).
\textsuperscript{170} Biometric information refers to physiological or behavioural characteristics unique to each individual, such as fingerprints, signature, hand geometry, voice or facial recognition, and iris and retina patterns. See ILO, ‘Briefing Paper, Consultation Meeting on Improved Security of Seafarers’ Identification’ (9–10 May 2002) ILO Doc CMISSI/2002/BR, 21.
\textsuperscript{171} Seafarers’ Identity Documents Convention (Revised) art 3(8).
\textsuperscript{172} There was initial disagreement as to the inclusion of any biometric information. See ILO, ‘Third and Fourth Informal Special Sitting on Improved Security of Seafarers’ Identity Documents’ (4–5 February 2003) ILO Doc SSSID/2003/1, para 5.
\textsuperscript{175} Seafarers’ Identity Documents Convention (Revised) art 4(1).
\textsuperscript{176} Seafarers’ Identity Documents Convention (Revised) art 4(4).
\textsuperscript{177} Seafarers’ Identity Documents Convention (Revised) art 4(3). Representatives of the shipowners and the US had advocated for seafarers to have full knowledge of all information contained in the document. See ILO, ‘An Informal Special Sitting on Improved Security of Seafarers’ Identity Documents’ (25 June 2002) ILO Doc SSSID/2002/1, para 27.
As a result of holding the seafarers’ identity document, seafarers are to be granted temporary shore leave while the ship is in port, provided arrival formalities of the ship have been fulfilled and there is no reason to refuse permission based on public health, public safety, public order, or national security grounds. Further, seafarers have rights to enter territory to join their ship or transfer to another, or pass in transit to join their ship in another country or for repatriation.

An important feature of the Revised Seafarers Convention is an initial provision that seafarers are not required to hold a visa for the purpose of shore leave. Allowing the seafarers’ identity document to replace the need for visas had been strongly argued for during negotiations by shipowners and seafarers, as shore leave is so important to the welfare of seafarers, as well as facilitating international commerce through the efficient movement of seafarers to and from vessels as needed. Setting a uniform standard in this regard would have been a significant development in light of the varied practices of states on visa requirements or waivers for sea crews. However, the Revised Seafarers Convention goes on to acknowledge that states parties may not be able to implement this requirement fully, and, in that situation, the state is to ensure that its ‘laws and regulations or practice provide arrangements that are substantially equivalent’. On this basis, there is still some onus on states to facilitate the procurement of a visa by seafarers. The state further retains the right to deny entry to a seafarer who is suspected of being a threat to national security. This central aspect of the treaty appears to allow national security concerns to trump the individual needs of seafarers as well as the collective interests in facilitating international commerce.

The costs of the new system were also a matter of considerable concern, particularly as the majority of seafarers come from developing countries and there were a large number of states that were affected even though they had only a small

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179 Seafarers’ Identity Documents Convention (Revised) art 6(4).
180 Seafarers’ Identity Documents Convention (Revised) art 6(5).
181 Seafarers’ Identity Documents Convention (Revised) art 6(7). Again, permission may be refused based on public health, public safety, public order or national security grounds. Seafarers’ Identity Documents Convention (Revised) art 6(8).
182 Seafarers’ Identity Documents Convention (Revised) art 6(6). This requirement is not made explicit in relation to the transit and transfer of seafarers, however. The 1958 Seafarers Convention had similar provisions. See Seafarers’ Identity Documents Convention (1958) ILO Convention No 108 art 6.
184 See ibid 3.
185 See ibid 13–17. It also responded to the practice of the United States in refusing shore leave to any crew member who did not hold a visa following the September 11 attacks. See Douglas B. Stevenson, ‘Confused Seas: Admiralty Law in the Wake of Terrorism’ (2003) 77 Tulane Law Review 1407, 1418.
186 The US has indicated an unwillingness to allow seafarers shore leave without holding a visa. See Stevenson, ‘Confused Seas’, 1423.
187 Seafarers’ Identity Documents Convention (Revised) art 6(6).
189 See Seafarers’ Identity Documents Convention (Revised) arts 6(5) and 6(8).
number of seafarers.\textsuperscript{190} It has been estimated that the number of seafarers affected by security requirements number well over one million.\textsuperscript{191} Moreover, verification equipment would be needed at every access and transit point, which would entail a significant roll-out programme to put the necessary security requirements in place.\textsuperscript{192} These concerns regarding implementation jeopardize the obtainment of the aims of the Revised Seafarers Convention.

Although it entered into force in 2005, the Revised Seafarers Convention has not received many ratifications.\textsuperscript{193} While the existence of a uniform identity document for seafarers would provide a significant security benefit, particularly a national security benefit for states concerned with securing their borders against unwanted entrants, the limitations of the agreement as well as the expense in implementation may undermine its relevance to promoting maritime security. Efforts need to be undertaken to ensure that a balance is achieved between legitimate port security requirements, the needs of seafarers during the course of their employment, and shared interests in the ongoing efficiency and security of international shipping. The individual interests of different states appear to have undermined this endeavour.

\textbf{(4) ISPS Code and WCO Framework of Standards}

In various ways, the LRIT Regulation complements information requirements that had already been put in place under the ISPS Code and proposed in relation to the WCO Framework of Standards. The information to be provided by ships prior to entry into port under the ISPS Code includes information on the security level at which the ship is currently operating and had been operating during the previous 10 port visits, as well as any special or additional security measures that were undertaken in any previous port.\textsuperscript{194} Information may also be requested in relation to ship-to-ship activity, though a vessel is not required to provide its security plan to a port state.\textsuperscript{195} The IMO Maritime Safety Committee has proposed what sort of

\textsuperscript{190} Doumbia-Henry, ‘How Biometrics Helps’ 35. See also ILO, ‘Report of the Discussion’, Second Informal Special Sitting on Improved Security of Seafarers’ Identity Documents (17 October 2002) ILO Doc SSSID/2002/2, paras 12 and 18 (setting forth the views of Namibia and Egypt in this regard). The Philippines, which is the source of the largest numbers of seafarers, indicated it was not so concerned about costs as it planned to pass these on to the shipowners. See ibid para 20.

\textsuperscript{191} See Doumbia-Henry, ‘How Biometrics Helps’ 35 (further noting that the figure may rise to over two million when other trades employed in the shipping industry, such as cruise ships, are taken into account).

\textsuperscript{192} Ibid 35 (noting that there are over 2,876 ports, in addition to train stations and airports that may also serve as transit points for seafarers).


\textsuperscript{195} Ibid Annex, Chapter 3, p 8 para. 3.1.
security information should be provided prior to entry into port with the intention of harmonizing the data set that may be required from each port.\textsuperscript{196} However, Contracting Governments to the SOLAS Convention are clearly left with the option to seek additional or supplementary information as a condition for entry into a port located within its territory.\textsuperscript{197} If this information is not provided, then the port state may opt to deny entry of that ship.\textsuperscript{198}

In view of the resources accorded to the implementation of the ISPS Code, it is clear that it has improved the capability of ports to assess security risks and potentially avert the realization of such risks. As discussed in Chapter 4, the main weakness of the ISPS Code lies in its enforcement options for states when they receive information that a vessel is considered a risk.\textsuperscript{199} The control measures that may be imposed against a non-compliant vessel are limited to inspecting, delaying, or detaining the ship; imposing restrictions on its operations in port; or lesser administrative or corrective measures. Depending on the circumstances, it may be more preferable to address the risk of the vessel well before it is in the vicinity of a port or other harbour infrastructure. The ISPS Code does nonetheless reflect another layer of legal regulation seeking to improve the monitoring of ship movements.

Similarly, the WCO Framework of Standards is intended to enhance available information, specifically in relation to what is being shipped to, from, and between states. Reliance on electronic documentation, rather than physical inspection, is a central feature of the WCO Framework of Standards and further involves reliance on particular criteria to identify cargo that would be considered as high risk.\textsuperscript{200} It is a non-binding system that builds on the CSI that the United States has initiated on a bilateral basis with a number of states,\textsuperscript{201} and further allows for gradual capacity building.\textsuperscript{202} Once fully operational, the WCO Framework of Standards will provide another layer of information to port states as a means of enhancing national security as well as global interests in security through the facilitation of international trade and navigation.

\textsuperscript{197} Ibid.
\textsuperscript{198} The options available to a port state in the face of non-compliance with the requirements of the ISPS Code by a particular vessel are otherwise limited to action being taken once the vessel is already in port or in the territorial sea. At this point, the proximity of the vessel to maritime assets may pose a threat to maritime security. See Natalie Klein, ‘Legal Limitations of Ensuring Australia’s Maritime Security’ (2006) 7 Melbourne Journal of International Law 306, 321.
\textsuperscript{199} Chapter 4, Part D(1).
\textsuperscript{200} See Chapter 4, Part D(2).
\textsuperscript{201} See Chapter 4, Part D(2).
(5) Conclusion

Monitoring the movement of ships, seafarers and goods at sea reflects a dimension of intelligence gathering that is designed to enhance the national security of a state’s borders and achieve wide agreement on the means by which this information may be obtained. A shared interest may be identified both in terms of a common exclusive interest in securing borders and a common inclusive interest in promoting international trade through secure shipping practices. This position may be contrasted with the laws (and their accompanying ambiguities) in place in relation to intelligence gathering by foreign flagged vessels or aircraft in a coastal state’s maritime zones. For the latter, the exclusive interest in national security predominates and special interests of particular states, notably the United States and China, are in competition. By comparison, a broader, collective endeavour may be identified within the work of the IMO, ILO, and WCO discussed in this part.

The fact that new agreements have been reached to improve intelligence gathering for monitoring ships, seafarers, and goods is significant in highlighting further ways that states have responded to improve their maritime security under international law. Obviously, weaknesses in enforcement authority and difficulties or resistance to implementation undermine the advances made in creating these legal standards in the first instance. States clearly need to work through the initial hurdles if the avenues for monitoring ships, seafarers, and goods at sea are to provide longer term benefits for maritime security. These hurdles may include national restrictions related to the confidentiality of information, political distrust as to the use of information once obtained, economic strain in procuring and utilizing necessary equipment, as well as alternative priorities rather than enhancing this particular dimension of maritime security. More emphasis on the shared interest in securing international shipping in national decision making may be necessary in this regard.

E. Information Sharing and Law Enforcement

In gaining additional information about a range of maritime activities, the passage of vessels and what persons are traversing the oceans, states are better placed to undertake policing activities as a means of responding to maritime security threats. The international nature of shipping and, concomitantly, of criminal activity at sea requires states to cooperate if efforts to prevent and suppress unlawful activities are to succeed. In this regard, both intelligence gathering and information sharing are vital tools to improve maritime security.

This part highlights varied efforts to enhance the legal frameworks for information sharing between states for law enforcement purposes. It is by no means a comprehensive catalogue when account is taken of the many treaties concluded in responding to maritime security threats and the common inclusion of at least one provision seeking cooperation for information sharing. In addition, agreements may be pursued between relevant agencies and government departments rather than at an
inter-state level to put procedures or mechanisms in place at an operational level. In surveying some of the legal arrangements for information sharing for law enforcement purposes, this part examines responses to piracy and armed robbery, terrorism and proliferation of WMD, people smuggling, drug trafficking, and illegal fishing. These examples demonstrate that there is a clear interest among states concerned to improve the quantity and quality of information obtained as an important mechanism for improving law enforcement efforts. Consistent with other areas designed to improve knowledge as to what is happening at sea, the common interest in enhancing intelligence gathering and information sharing is undercut by ongoing concerns related to the use to which certain information will be put.

(1) Piracy and armed robbery

Information concerning piracy and armed robbery is made available to both states and private operators through the International Maritime Bureau (IMB) Piracy Reporting Centre and through monthly and quarterly circulars issued by the IMO. The IMB Centre is mainly funded through voluntary contributions from protection and indemnity clubs, ship owners, and insurers. Its primary purpose is to receive reports at any time of day from the shipping industry with regards to areas of high risk associated with piratical attacks or with armed robberies on board ships. Information received by the IMB Centre is then shared with relevant government officials in order to reduce this criminal activity. In addition, alerts are issued to other ships in the region as to possible threats.

The need for information as a means of promoting cooperation in the suppression and prosecution of piracy and armed robbery was a prime motivator for Asian states, particularly given the amount of piracy and armed robbery occurring in the Malacca Straits and the Singapore Straits. In 2005, the 10 states of ASEAN, plus Bangladesh, China, India, Japan, South Korea, and Sri Lanka adopted a Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). Now that the agreement has entered into force, it is open to any other state to become party to the agreement.

A key feature of ReCAAP is the creation of an Information Sharing Centre, which is based in Singapore and undertakes the collection, collation and analysis of...
information received from the Contracting Parties and ensures a flow of information between them all. In order to facilitate this process, each Contracting Party designates a ‘focal point’ responsible for communication to the Centre, and provides notification of this designation. Information concerning incidents of piracy or armed robbery is then notified to the Centre through this focal point. The Contracting Party still has to ensure that there is coordination between relevant national authorities and the focal point to the extent that there are agencies or governmental officials involved in dealing with piracy and armed robbery and not formally part of the focal point. This need is underlined by the fact that Contracting Parties may have reports from ships, ship owners, or ship operators going to national authorities who are not necessarily the same as the focal points.

Maintaining the confidentiality of information is an important aspect of the work of the Information Sharing Centre. To this end, Article 8 states: ‘In carrying out its functions, the Centre shall respect the confidentiality of information provided by any Contracting Party, and shall not release or disseminate such information unless the consent of that Contracting Party is given in advance.’ In addition, Contracting Parties are to respect the confidentiality of information transmitted from the Centre. During negotiations, there was some concern about how information may be used. In this regard, Bradford has noted, ‘Indonesian policymakers associate the transmission of data which may portray the state badly as costly, and they are therefore reluctant to agree to measures which share information or improve transparency.’ It seems, however, that the inclusion of confidentiality provisions was necessary to attain the overall goal of improving national response and capability to prevent and suppress piracy and armed robbery.

States bordering the Gulf of Aden and the Western Indian Ocean concluded a Code of Conduct in Djibouti in January 2009 as a means of promoting regional cooperation for the prevention and suppression of piracy and armed robbery. The Djibouti Code of Conduct is not formally binding but is intended to lay the groundwork for the signing of such an agreement after two years. One of the purposes of the Code is to share and report relevant information, although this aim is limited with the requirements that the participants act consistently with ‘their available resources and related priorities, their respective national laws and

210 ReCAAP art 7 (setting out the functions of the ISC).
211 ReCAAP art 9(5).
212 See ReCAAP art 9(3).
213 ReCAAP art 9(4).
214 ReCAAP art 9(2).
215 ReCAAP art 8(2).
regulations, and applicable rules of international law'. Information sharing is nonetheless the centrepiece of the Code, particularly when account is taken of the replication of pre-existing international law requirements for the prevention and suppression of armed robbery and piracy.

The Djibouti Code of Conduct was inspired by ReCAAP, and seeks to establish three information exchange centres. Each participant in the Code then designates a national focal point to allow for communication, and most particularly alerts as to piratical acts, between the centres and other focal points. Beyond issuing alerts where necessary, the centers are also intended to prepare statistics and reports on the basis of information gathered and analysed. The sources extend to information concerning individuals and transnational organized criminal groups involved in piracy and armed robbery as well as information concerning piracy and armed robbery against ships.

Participants in the Code should also ensure that ships flagged to them provide prompt notification of incidents of piracy and armed robbery. Even if this is achieved, a difficulty here is that ships do not always report acts of piracy, and ships flagged to states outside the region may fail to provide the relevant information to the centers and hamper efforts in this regard. Similarly to ReCAAP, there is also provision for respecting the confidentiality of information that is transmitted from a participant. While the Djibouti Code of Conduct thus also has its limitations, it is still notable that the recognition of improving information sharing was a first important step forward in suppressing piracy and armed robbery. Although the existing laws as to the exercise of enforcement powers at sea were barely altered, improving information sharing may be seen as a significant initial development in promoting cooperation to respond to this maritime security threat.

218 2009 Code of Conduct art 2(1)(a).
220 2009 Code of Conduct art 8(1). Those centres are in Kenya, Tanzania, and Yemen.
221 2009 Code of Conduct art 8(3).
224 2009 Code of Conduct art 9(5).
225 2009 Code of Conduct art 8(5).
227 2009 Code of Conduct art 8(6).
228 The General Assembly has emphasized the importance of information sharing in addressing the problem of piracy and armed robbery. See UNGA Res 63/111 (5 December 2008) UN Doc A/RES/63/111, para 61.
(2) Terrorism and proliferation of WMD

Responses to terrorism and the proliferation of WMD have also acknowledged the importance of information sharing and the development of legal tools to that end. In Resolution 1373, the Security Council required states to take ‘the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information’. Adopted under Chapter VII in mandatory language, this obligation is binding on all UN member states. The Security Council’s decision is reinforced by recommendations that states ‘find ways of intensifying and accelerating the exchange of operational information’ and to exchange information in accordance with international and domestic law. Furthermore, the early warning requirement is overseen by the Counter-Terrorism Committee of the Security Council to ensure the implementation of the Resolution into states’ national laws. It applies to terrorist activities generally, and not just maritime terrorism. The legislative nature of the resolution may provide a means to fill in gaps in multilateral treaties that do not otherwise specify that modalities of information exchange are to be developed.

By contrast, in Resolution 1540, the Security Council called for international cooperation and coordination to address proliferation of WMD to non-state actors. This position is reflected in para 9 of the resolution, ‘[calling] upon all States to promote dialogue and cooperation on non-proliferation so as to address the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery’. The resolution further recognizes that some states will need to request other states for assistance in order to fulfil their obligations under the resolution and promotes cooperative action on non-proliferation. The resolution clearly endorses the need for states to pursue joint action where cooperation will be paramount. It does not, however, specify how this cooperation is to be achieved.

The need to establish information sharing mechanisms as a legal response to counter terrorism was recognized with the adoption of the 1988 SUA Convention, as Article 13 of that treaty sets forth a general obligation on states parties to cooperate in the prevention of offences through the exchange of information in accordance with national law. In addition, Article 14 requires that any states believing that an offence under the 1988 SUA Convention will be committed must furnish information to states that would have jurisdiction over the offence.

230 UN Charter art 25.
232 Ibid para 3(b).
234 UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540, para 9. See also ibid Preamble (‘recognizing the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security’).
Mellor has criticized these provisions as ‘vague and highly permissive’. He continues:

These provisions pose several problems. First, they restrict the flow of information about possible attacks to only those states that may exert jurisdiction, despite the fact that any act involving maritime shipping would likely have implications for a multitude of third-party states. Second, Article 15 requires reporting to the Secretary General any action taken pursuant to the Convention, such as a prosecution; the Secretary General then transmits it to all other states parties. Unless the Secretary General establishes an efficient information clearinghouse with proper procedures, this requirement may slow down the transmission of valuable information by creating an unnecessary intermediary. The third problem is that the passing of information must follow the national law of the state who possesses the information. Given the classified nature of information on terrorism and the existence of onerous official secrets acts, information might not always be timely and forthcoming. The final problem with the Convention is that it only requires the transmission of information when there is suspicion of a likely attack, not as a matter of course.

When states revisited the 1988 SUA Convention post-September 11, the main points of focus in amending the treaty were to expand the range of offences over which states could establish jurisdiction and to create a procedure for states parties to visit foreign flagged vessels outside the territorial sea. As a result, the provisions in the 1988 SUA Convention on information exchange were not altered beyond expanding their coverage in relation to the new offences identified in the 2005 SUA Protocol.

The ship-boarding procedure in Article 8bis of the 2005 SUA Protocol does anticipate some cooperation regarding intelligence gathering and information sharing, even though the latter is not the central focus of the procedure. As a state party must have ‘reasonable grounds to suspect’ that an offence set forth in the 1988 SUA Convention or 2005 SUA Protocol is being or is about to be committed as a predicate to a boarding, it must be assumed that some amount of intelligence gathering is required to establish this (somewhat vague) standard. The information exchange aspects of the ship-boarding procedure is seen through the requirement that a request for boarding ‘should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information’. There is no specific obligation on the state wishing to conduct the boarding to provide the intelligence that led to reasonable grounds for suspicion, but a flag state

236 Mellor, ‘Missing the Boat’ 384.
237 Ibid 385.
may require the receipt of additional information as a condition for consent to board. To facilitate this process, it has been anticipated that as a matter of practice, states that are likely to seek consent to conduct boardings will establish a single point of contact within the maritime authority infrastructure of a state in advance, and thereby maintain a list of current contacts to be updated by diplomatic notes.

Following a boarding under the 2005 SUA Protocol, the state conducting that boarding must report on the results of its actions to the flag state of the vessel. This information exchange facilitates any decisions as to possible prosecution, or whether any liability has otherwise arisen due to any damage, harm, or loss attributable to the boarding state because of the measures taken. While an advance in enhancing opportunities to arrest and prosecute maritime terrorists, in terms of improving rights to acquire information and duties to share information, the 2005 SUA Protocol represents only a modest gain. Greater precision and more explicit reference to information sharing were needed to overcome the deficits in the 1988 SUA Convention.

The situation under the 2005 SUA Protocol may be contrasted with that of states operating pursuant to the PSI. There, the importance of intelligence is also implied in the requirement that participant states will take appropriate action in respect of vessels that are reasonably suspected of carrying cargos of proliferation concern. Securing the necessary intelligence is fundamental to the ability to form a reasonable suspicion, and what level of information is sufficient to permit boarding and inspection of a vessel or to permit seizure of a vessel and its cargo may vary between the participants depending on their respective policy and legal thresholds. More information may be sought from a flag state if one of its vessels has to be diverted and its journey delayed, or when the use of force might be likely to compel compliance, than may otherwise be the case. Winner points out that

242 2005 SUA Protocol art 8bis, paras 5(c) and 7. See also Klein, ‘The Right of Visit’ 321.
244 2005 SUA Protocol art 8bis, para 6. That report must also include information as to the discovery of evidence of illegal conduct that is not subject to the 1988 SUA Convention. 2005 SUA Protocol art 8bis, para. 6.
246 Becker discusses ambiguities in the PSI, including in relation to the level of evidence required to be a suspect actor. See Michael A. Becker, ‘The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea’ (2005) 46 Harvard JIL 131, 161. See further Allen, ‘The Limits of Intelligence’ 41 (notes that there is a level of suspicion or belief that must be legally satisfied to justify a boarding, and so information is needed to be able to establish these, admittedly vague, standards).
248 Allen, ‘The Limits of Intelligence’ 38.
the quality of information required to support a policy decision may be more flexible than certain legal thresholds, such as establishing whether a particular export law has been broken.249

While the PSI has undoubtedly proven useful on an operational level, no new powers have been granted to states to conduct intelligence gathering activities under the law of the sea, nor has any clarity been brought to bear on the legal rights and duties of states in conducting intelligence gathering in the EEZs of coastal states. The PSI instead provides an additional avenue for states to cooperate in improving information sharing on terrorism and proliferation issues. Ultimately, it is Security Council Resolution 1373 that has provided the strongest basis for improving information sharing to respond to threats of maritime terrorism.

(3) People smuggling

One of the purposes of the 2000 Migrant Smuggling Protocol is to promote cooperation among states parties to prevent and combat the smuggling of migrants.250 To this end, Article 10 of the Protocol requires states to exchange information on a range of matters, including:

• embarkation and destination points, as well as routes, carriers and means of transportation;
• identity and methods of organizations known to be engaged in people smuggling;
• authenticity and use of travel or identity documents;
• means and methods of concealment and transportation;
• legislative experiences and practices and measures to prevent and combat the smuggling of migrants;
• scientific and technological information useful to law enforcement.

The level of detail set forth as to the type of information to be shared is notable. While a considerable advance over more generic references to information exchange, there are a number of limitations included as well. In particular, this information may be subject to any restrictions on its use as imposed by the state transmitting the information, and is to be provided consistently with domestic legal and administrative systems.251 The latter may allow domestic limitations as to confidentiality and national security to prevail.

An operational dimension to these legal obligations may be seen through the Bali Process. The Bali Process was inaugurated through a Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime held in 2002. Over 50 states are involved in the Bali Process.252 It is a voluntary, non-binding grouping, which is intended to develop programmes of

249 Winner, ‘The Proliferation Security Initiative’ 139.
251 Migrant Smuggling Protocol art 10.
practical cooperation, including ‘the development of more effective information and intelligence sharing’. Cooperation between the relevant agencies becomes paramount to enabling information regarding people smuggling to be gathered and shared for a timely and conveniently-located response. This example highlights that while legal frameworks are in place, much still depends on the operational response and reliability of networks for obtaining and sharing relevant information to address this problem.

(4) Drug trafficking

Improvement of transnational information networks has also been recognized in efforts to combat illicit drug trafficking. The operational aspect has been taken into account in Article 17(7) of the 1988 Vienna Convention, which requires the designation of national authorities to respond to requests regarding the nationality, boarding and search of vessels. Such notifications would need to be updated consistently to ensure the efficiency and operability of the legal regimes in place. The importance of designating a national authority ‘flows from the fact that . . . requests will emerge in an enforcement context and will relate directly to the often difficult operational environment presented by open ocean areas’.254

An important aspect of the 2003 Caribbean Agreement was improving the modes of communication between the states parties to facilitate obtaining consent where necessary for law enforcement procedures against drug traffickers on vessels or aircraft flagged to those states parties. Article 1(b) of this Agreement defines a ‘national competent authority’ as those designated under the 1988 Vienna Convention and those notified to Costa Rica, the Depositary of the 2003 Caribbean Agreement. Under Article 18, each state party is encouraged, not required, to establish a single point of contact to act as the national competent authority. This authority is then to be capable of receiving, processing and responding to requests and reports at any time.255 One of the more important tasks of the national authority is to verify promptly the nationality of any particular vessel,256 as this initial determination influences what steps the state requesting the information may then be able to take in relation to the vessel. The competent national authority must also be able to authorize the boarding and search of suspect vessels, provide expeditious disposition instructions for vessels detained on its behalf, and authorize entry into its waters and air space in support of law enforcement activities of

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253 Ibid.
256 See Gilmore, Caribbean Area 17 (discussing art 6 and noting that there were ‘weighty operational reasons’ for the competent national authority to be able to respond effectively and efficiently to such requests).
other parties under the agreement. A similar system has been established under the CARICOM Maritime and Airspace Security Co-Operation Agreement.

The UN Office on Drugs and Crime has been instrumental in promoting information exchange and interagency cooperation through a Container Control Programme, which allows for the identification of high risk containers. A number of regional initiatives have also been pursued to enhance interagency coordination and cooperation, partially on the basis of intelligence exchange. Securing cooperation at an operational level has thus been the critical means of enhancing information sharing to suppress illicit drug trafficking.

(5) Illegal fishing

Information sharing is an important aspect of conserving and managing fish stocks, especially when trying to monitor compliance and enforce obligations both in a coastal state’s EEZ and under regional agreements. Information sharing can relate to scientific research into particular stocks or species and the dissemination of information and data in order to meet obligations as to determining maximum sustainable yields, or otherwise devising appropriate management plans in regional organizations. It is on the basis of this information that states make decisions as to the total allowable catch of any particular stock or species to ensure the ongoing economic viability of the fishery. These catch limitations are then enforced by navies or law enforcement officials of coastal states or officials of member states of the relevant regional fisheries organizations. Policing of fishing activities is dependent on information as to what fishing vessels are present in the maritime zone of a coastal state and what that vessel is doing in that area. This aspect may be seen as part and parcel of maritime domain awareness.

Coastal states and states fishing on the high seas are required under the 1995 Fish Stocks Agreement to implement and enforce conservation and management measures through effective monitoring, control and surveillance. For fishing on the

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257 See 2003 Caribbean Agreement art 7(1).
258 CARICOM Maritime and Airspace Security Co-Operation Agreement (2008) <http://www.caricomlaw.org/docs/CARICOM%20Maritime%20and%20Airspace%20Security%20Co-operation%20Agreement.pdf> art XVI (establishing points of contact for each of the state parties) art XII (requiring the exchange of operational information on the detection and location of suspect vessels through a regional entity ‘as may be agreed by’ the states parties).
260 Ibid para 88.
261 As required by art 61 of UNCLOS.
262 So much was acknowledged in the development of Australia’s Maritime Identification System, as it was envisaged that identification information would be sought to improve the effectiveness of civil and military maritime surveillance in support of fisheries protection. ‘Strengthening Offshore Maritime Security’ Media Release of the Prime Minister of Australia, John Howard (14 December 2004) [PM Media Release], 2. See also Klein, ‘Legal Implications’ 353.
263 FSA art 5(1). The FAO International Plan of Action on IUU Fishing contained a variety of requirements for information to be collected from fishing vessels and shared among interested parties as part of efforts to prevent, deter and eliminate IUU Fishing. See FAO, Committee of Fisheries, ‘International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and
high seas, flag states bound by this treaty are further required to establish national schemes and programs for monitoring, control and surveillance of their vessels.\(^{264}\)

The 1995 Fish Stocks Agreement requires RFMOs to establish mechanisms for surveillance and enforcement,\(^{265}\) and they are expected to play a central role in this regard.\(^{266}\) The Northwest Atlantic Fisheries Organization, for example, allows for inspections of member states’ vessels to verify compliance with the Organization’s quotas and VMS tracking systems.\(^{267}\)

As a further example of such a mechanism, the South Pacific Forum Fisheries Agency has facilitated the negotiation of agreements with distant water fishing states on matters such as surveillance and enforcement within the EEZs of member states.\(^{268}\) In addition, the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, which was adopted under the auspices of the Agency, sets out requirements to cooperate to develop regionally agreed procedures for the conduct of surveillance.\(^{269}\) In particular, each party is to provide information to the Forum Fisheries Agency or to any other party directly about the location and movement of foreign fishing vessels; foreign fishing vessel licensing; and fisheries surveillance and law enforcement activities.\(^{270}\) This list is simply indicative, and not exclusive, of the information that may be shared among the participant states. To enhance these efforts, the parties to the Niue Agreement are to develop standard forms and procedures for reporting information, as well as effective methods of communicating such information.\(^{271}\) The limitation on this information sharing obligation is that it may only occur ‘to the extent permitted by [a Party’s] national laws and regulations’.\(^{272}\)

Beyond traditional policing activities, observation and inspection regimes have been put in place to monitor compliance and thereby ensure through information collected under the regimes that any catch limitations or other management requirements are being followed. Within its EEZ, the coastal state is entitled to adopt laws and regulations relating to the placement of observers on board fishing vessels.\(^{273}\) The 1995 Fish Stocks Agreement then accords a central role to regional

Unregulated Fishing’ 24th Session (2 March 2001), endorsed by the 120th Session of the FAO Council (23 June 2003) \(<http://www.fao.org/DOCREP/003/y1224E/Y1224E00.HTM>\).

\(^{264}\) FSA art 18(2)(g).

\(^{265}\) See FSA art 10.

\(^{266}\) Tore Henriksen, Geir Honneland and Are Sydnes, Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes (Martinus Nijhoff, Leiden 2006) 36.


\(^{268}\) Rayfuse, Non-Flag State Enforcement 297.

\(^{269}\) Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (1992) 32 ILM 138 art III(2).

\(^{270}\) Niue Treaty art V(1).

\(^{271}\) Niue Treaty art V(2).

\(^{272}\) Niue Treaty art V(1).

\(^{273}\) UNCLOS art 62(4)(g).
fisheries organizations in implementing conservation measures, particularly in adopting joint schemes of control and inspection. In this regard, the Western Central Pacific Fisheries Commission has authorized a regional observer programme whereby independent and impartial observers collect data and monitor fishing activities. Guidelines have been developed for the operation of the programme and have needed to address inter alia the confidentiality of the data.

As part of its Scientific Research Program, states parties to the CCSBT established standards for a Scientific Observer Program for which each flag state is responsible in respect of its own vessels and is intended to reach coverage of 10 per cent for catch and effort as a target level for each fishery. While information gathered is to be exchanged through the Secretariat of the organization, all data and information obtained through the programme belongs to the flag state of the observed vessel and an observer is not to disclose any information without the permission of the flag state. While in principle, the programme should enhance enforcement efforts, the protections afforded for the information gathered may undermine the overall goals. As such, it may have been preferable to accord the observer more of a neutral role and allow for reporting of information without requiring the permission of the relevant flag state.

To combat IUU fishing, states have sought to collect and exchange trade information relating to species regulated through RFMOs. For example, the Trade Information Scheme under the CCSBT requires all imports and exports of southern bluefin tuna to be documented; a Catch Documentation Scheme under the CCAMLR seeks to track landings and trade flows of Patagonian toothfish; and the International Commission for the Conservation of Atlantic Tunas (ICCAT) uses a certification scheme for the import of bluefin tuna. Catch certification schemes generally cover all fish and fish products, whereas trade documentation

274 Hemriksen, Honneland and Sydnes, *Law and Politics* 36.
276 See Hemriksen, Honneland and Sydnes, *Law and Politics* 185. A further example is the Scheme of International Scientific Observation as well as the System of Inspection adopted under CCAMLR. See Rayfuse, *Non-Flag State Enforcement* 266–78.
278 Ibid 8.
279 To meet WTO standards, these trade-related schemes must be applied to all states so as to be non-discriminatory, should be transparent and established on a multilateral basis. See Shrimp-Turtle WT/D558/AB/R (12 October 1998), paras 161–86. See also Marcus Haward, ‘IUU Fishing; Contemporary Practice’ in A.G. Oude Elferink and D.R. Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff, Leiden 2004) 87, 93–4; Tyler, ‘Saving Fisheries’ 84–94. Trade monitoring for some fish species may also occur through inclusion of the particular species within the regimes established under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) 993 UNTS 243.
280 See Rayfuse, *Non-Flag State Enforcement* 202 and 270. See also Haward, ‘IUU Fishing’ 95–6. While the ICCAT scheme targets trade in Atlantic bluefin tuna and Atlantic swordfish, the CCAMLR regime seeks to target toothfish at the point they are caught and brought on board a vessel. See Rachel Baird, ‘CCAMLR Initiatives to Counter Flag State Non-Enforcement in Southern Ocean Fisheries’ (2005) 36 *Victoria University Wellington Law Review* 733, 743. The Northeast Atlantic Fisheries Commission has also instituted trade measures to combat IUU fishing. See Olav Shram Stokke, ‘Trade
schemes usually only relate to fish and fish products that are part of international trade.\textsuperscript{281} Haward has noted that certification of where, when, and how fish are taken provides an important tool to combat IUU fishing.\textsuperscript{282} Yet one difficulty encountered in these initiatives has been the fraudulent production of catch certificates.\textsuperscript{283}

Compiling vessel lists has been another means of gathering information to expose vessels engaged in IUU fishing, as well as the flag state supporting such activity. The FAO has established a High Seas Vessel Authorization Record database, which contains information on IUU fishing vessels, including their registration and authorization status.\textsuperscript{284} Under CCAMLR, a scheme was adopted to allow for vessels sighted in contravention of CCAMLR efforts to be informed of that conduct and that information to be circulated to the flag state, along with member states and the CCAMLR Secretariat.\textsuperscript{285} ICCAT has also employed list systems to identify IUU fishing vessels both among contracting parties and non-contracting parties.\textsuperscript{286} While the General Assembly has encouraged the development of a global record, such a record still needs to respect confidentiality requirements under national laws in relation to the beneficial ownership of vessels.\textsuperscript{287} The use of such lists has further been criticized as it drives IUU fishing vessels to change their registration details and make it more difficult to track a particular IUU fishing operation.\textsuperscript{288}

In addition to monitoring catch through certification and listing schemes, the 2009 Port State Measures Agreement provides a basis for port states to acquire additional information about fishing vessels that either unload catch in or transship through these states. The Agreement sets out a general obligation to exchange information, with due regard to confidentiality requirements, between relevant states, the FAO and other international organizations as well as RFMOs.\textsuperscript{289} Parties to the Agreement are to establish communication mechanisms that allow for direct electronic exchange of information and allow for information sharing between existing databases.\textsuperscript{290} More particularly, port states are to require that information as to a vessel’s fishing and transshipment authorizations, as well as the catch onboard and the catch to be offloaded be provided before granting entry to a vessel.\textsuperscript{291} On the basis of

\begin{footnotesize}
\begin{enumerate}
\item Haward, ‘IUU Fishing’ 94.
\item Tyler, ‘Saving Fisheries’ 77; Baird, ‘CCAMLR Initiatives’ 747–8.
\item Rayfuse, \textit{Non-Flag State Enforcement} 271–2.
\item Baird, ‘CCAMLR Initiatives’ 752.
\item Swan, ‘Ocean and Fisheries Law’ 40.
\item See Tyler, ‘Saving Fisheries’ 78.
\item Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009) FAO Doc C 2009/LIM/11-Rev.1. [‘2009 Port State Measures Agreement’] art 6(1).
\item 2009 Port State Measures Agreement art 16(1) and (2).
\item 2009 Port State Measures Agreement art 8(1) and Annex A.
\end{enumerate}
\end{footnotesize}
this information, the port state decides whether to permit or deny entry to the
vessel. If the port state denies entry because the vessel has conducted or
supported IUU fishing, this information is communicated to the flag state, as
well as potentially any relevant coastal states, RFMOs or other international
organizations. Information is also to be shared when a port state conducts an
inspection so that results are sent to the flag state, as well as relevant RFMOs, the
FAO and other international organizations and states of which the master is a
national and states wherein IUU fishing occurred. This process of information
sharing between the relevant stakeholders, once in place, has the potential to
enable states and RFMOs to target particular vessels and thereby reduce the
ability of vessels engaged in IUU fishing to evade policing efforts.

Information sharing is therefore a vital component of efforts to address
IUU fishing; it is relevant for determining fish catch totals in the first instance,
then in regulating and monitoring those involved in fishing activities to ensure the
allowable catch is maintained, and in pursuing those who violate the agreed
standards either through inspections at sea or in port and particularly in seeking
to track what quantity of fish is taken and from where. While implementation and
enforcement remains a challenge given the vast expanses of ocean area at issue and
the limited policing capacity of many states, the web of agreements to improve
knowledge about IUU fishing is an important aspect to address this maritime
security threat. The fact that mechanisms are being devised to reach fishing vessels
flagged to non-participants in RFMOs, even if it is just a name and shame
approach, further reflects the important role of information sharing for fisheries
law enforcement.

(6) Conclusion

While information sharing may be a vital component of law enforcement efforts in
responding to maritime security threats, states have often restricted what informa-
tion will be exchanged. Some information will not be divulged because a state
considers it is confidential, either as a matter of commercial practice or as a matter
of sovereignty. A further limitation is that most obligations regarding information
sharing prohibit intelligence being distributed to other sources or interested parties
due to requirements within national laws or policies. This approach allows for
national security interests to trump international security interests. To do so is

292 2009 Port State Measures Agreement art 9(1).
293 2009 Port State Measures Agreement art 9(3). A similar requirement of notification is imposed if a
port state denies the use of its port to a particular vessel. 2009 Port State Measures Agreement art 11(3).
294 2009 Port State Measures Agreement art 15. See further 2009 Port State Measures Agreement
art 18 (setting forth notification requirements as part of port state actions following an inspection
where there are clear grounds for believing that a vessel has engaged in or supported IUU fishing);
art 19 (requiring information to be provided as to recourse in the port state in the event of measures
being taken by the port state).
arguably no longer entirely viable given the global and regional threats presently faced.

These limitations may prevent a state from being able to respond to a security threat in a timely manner. For example, the delay in seeking additional information on an ad hoc basis to confirm suspicions may result in a lost opportunity to prevent a terrorist attack or other unlawful act from occurring, or may otherwise complicate a law enforcement operation because of the gaps in legal authority. More collaborative approaches to information exchange need to be formally endorsed in recognition of the global goals to be achieved.

F. Conclusion

It is readily apparent that intelligence gathering and information sharing are fundamental components for improving maritime security. The interest of states in this regard ties in to a state’s national security as well as the collective concerns generated from the varied maritime security threats that are currently recognized. While the common interest in sharing information has motivated a number of legal reforms, particularly in relation to the monitoring of vessels, seafarers, and cargo and in the law enforcement context, each of these developments has accounted for particular exclusive interests in states. These exclusive interests may relate to national security and sovereignty in guarding information for the state’s own purposes or concerns as to the varied uses of information being provided. The accommodation achieved reflects a tension between these interests and questions may rightfully arise as to whether special interests should have given away more to common interests in enhancing maritime security.

In this situation, Allen is correct to note that ‘[t]he goal therefore cannot be perfect security but rather optimal security, and optimal security decisions will inevitably be based not on perfect knowledge but rather on optimal intelligence assessments.’ As discussed, these ‘optimal intelligence assessments’ have been enhanced through a number of legal initiatives to improve maritime security. However, for every advance made, there have been limitations incorporated into information sharing and intelligence gathering rights and obligations and consideration should be given to overcoming such restrictions.

The limitations are most easily seen in the law enforcement context. Some of the agreements between states require no more than that states are to cooperate, leaving states to decide on what precise information should be shared, how it is to be transmitted and when it is to be shared. When more detail on information

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295 eg, port inspection may no longer be a possibility and so the more complicated interdiction on the high seas would need to be pursued instead, provided a legal basis to do so was still available.

296 In this regard, Colby writes: ‘Thus, while each participant makes demands for more intelligence in order to enhance its own security, there is a growing recognition for the need to collaborate in the performance of the security intelligence function if mutual security is to be achieved.’ Colby, ‘The Developing International Law’ 57.

297 Allen, ‘The Limits of Intelligence’ 44.
exchange obligations is provided, there are often restrictions due to national security, sovereignty, or commercial confidentiality concerns. In the absence of a fully effective legal framework, the less formal interaction of agencies and government officials becomes essential, both within the state itself and then with points of contact outside the state, especially when dealing with neighbouring countries. The operational perspective consequently becomes more important than the legal perspective if the goals related to securing greater knowledge of activities at sea are to be achieved.

There are also instances where there is no recourse against a state if it is failing to provide information that would be relevant for law enforcement purposes. So, for example, a warship on the high seas or a port state has limited legal responses available if a vessel is failing to abide with reporting requirements under the SOLAS Convention. The long standing approach of the IMO has been to leave matters of enforcement to member states, and primarily the flag states concerned. If the greater goal is achieving maritime security for all states, given the global interests at stake, then these sorts of limitations are not appropriate and states should work to overcome them.
6

Armed Conflict and Naval Warfare: Shifting Legal Regimes

A. Introduction

The threats most commonly of concern to maritime security are predominantly a preoccupation of peacetime uses of the oceans. The broad spectrum of maritime security threats may tie in to military interests—counter-proliferation efforts are obviously aimed at forestalling an armed conflict; surveillance of criminal activities may have military utility; and terrorist attacks against international shipping may threaten the mobility of naval vessels, for example. Maritime security threats may clearly escalate to the point that a state considers resort to force is necessary, particularly as states seek to protect access and use of natural resources, redress concerns related to WMD, and promote more generally their national interest in their region and potentially further afield.

While means and methods of warfare have changed dramatically with technological improvements, ‘the fundamental role of navies continues to be to establish control at sea or to deny it to the enemy, linking that control to broad political and economic issues ashore’. This role is relevant in times of peace and war, but how the role is fulfilled varies depending on the context. The range of military activities considered in Chapter 2 reflects peacetime operations of naval vessels in anticipation of engagement in armed conflict. This chapter is concerned with armed conflict at sea and the law of naval warfare; that is, the permissible military activities undertaken when states are engaged in uses of force. While a distinct body of naval warfare law exists, this chapter highlights the many grey areas for applying this body of law given the varied views on what steps may lawfully be taken to respond to maritime security threats. In this chapter, the intersection of maritime security with armed conflict is examined, especially the reliance on the laws related to armed conflict in peacetime and their potential application in armed conflict.

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1 The threats identified in Chapter 1 are: piracy and armed robbery; terrorist acts; illicit trafficking in arms and WMD; illicit trafficking in drugs; smuggling and trafficking of persons by seas; IUU fishing; intentional and unlawful damage to the environment.
conflict to justify responses to maritime security threats. The critical question in this regard is whether further (or any) distortion regarding the applicability of the law of naval warfare is warranted to improve maritime security.

This chapter first explores the ongoing paradigm that distinguishes peaceful uses of the oceans from the laws applicable during times of armed conflict. There has been considerable academic debate over the applicability of UNCLOS during times of war and what significance should be accorded to the ‘peaceful purposes’ provisions of that treaty. While it may be posited that a lex specialis has emerged in relation to the rules of naval warfare, the changing nature of armed conflict no longer allows for the discrete application of separate bodies of law. The greater role of the Security Council in regulating the lawful use of force, and the so-called war on terror are just some of the factors blurring the operation of these traditional rules.

The second part of the chapter identifies when the law of naval warfare is most clearly engaged. The exercise of the right of self-defence and enforcement actions at sea under authorization from the UN Security Council are the two critical instances examined in this regard. It will be seen that individual states’ interpretations of the right of self-defence, as well as the Security Council’s role in responding to modern maritime security threats, have complicated decisions as to when the laws of naval warfare apply. Modern conditions also influence how the laws of naval warfare operate in relation to neutrals and belligerents (the ‘enemy’) and are discussed in the third part of the chapter. Finally, the last part provides a broader consideration of the interrelationship of the laws of naval warfare with peacetime rules under the law of the sea, particularly how these laws intersect with rules on law enforcement and in relation to major maritime security issues.

The lack of clarity that sometimes exists in determining the applicability of the laws of naval warfare and those related to peacetime uses of the oceans also obscures whether or when particular inclusive or exclusive claims should be upheld. Trigger points for the use of force have included the denial of navigational rights, the protection of resources (fish and oil), surveillance activities, as well as responding to threats posed by terrorists and the proliferation of WMD and related material. The balance between the disputing states may be examined through the lens of lawful enforcement jurisdiction, which permits a certain amount of force at sea, and the issues as discussed in Chapter 3 arise once more. Alternatively, the law of naval warfare may be engaged. In the latter situation, the freedoms of the high seas do not hold the same pre-eminent position as compared to the situations discussed in previous chapters. These freedoms are generally subject to other applicable rules of international law, and belligerent rights during times of armed conflict are recognized as such rules. Yet even within the law of naval warfare, the protection of navigation rights remains of importance given the overall value of international trade. Many aspects of this law indicate a successful balancing.

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4 Fenrick, ‘The Exclusion Zone’ 114.
of trade interests with military interests. In the context of armed conflict, the military interests of belligerents necessarily results in an array of exclusive claims. Inclusive claims become the counter-balance for the ongoing protection of other ocean uses during times of armed conflict; the resulting accommodation of competences to prescribe and enforce law can be said to reflect the common interest of participants. It is argued in this Chapter that the current maritime security threats do not warrant any adjustment of this balance.

**B. Law of the Sea During Times of Armed Conflict**

Commentators have grappled with the issue as to whether UNCLOS continues to apply during times of armed conflict. The arguments have varied from one extreme to the other—from considering that UNCLOS is not applicable during armed conflict, to UNCLOS being applicable because the laws of naval warfare are no longer relevant with the changes in laws relating to when states may lawfully resort to force. As may be expected, a more moderate position whereby ‘the maritime rights and duties States enjoy in peacetime continue to exist, with minor exceptions, during armed conflict’ is the most tenable view, particularly when account is taken of the efforts to recognize the legal framework created by UNCLOS in modern iterations of the laws of naval warfare. Even if the ongoing applicability of UNCLOS is assumed, there remains scope for belligerent parties to argue that their respective treaty relations *inter se* may be suspended during the conflict.

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7 Elmar Rauch, ‘Military Uses of the Oceans’ (1984) 28 *German YBIL* 229, 233 (noting that UNCLOS was never intended to regulate the law of naval warfare); Brian Wilson and James Kraska, ‘American Security and Law of the Sea’ (2009) 40 *ODIL* 268, 277 (‘Because the Convention is a peacetime agreement, it does not displace the body of the law of naval warfare and neutrality that applies during time of armed conflict at sea’).


to what laws are regulating contentious activities and this situation is compounded by the blurring as to what activities fall within or are outside the laws of armed conflict.

One issue that arises in discussing the applicability of UNCLOS during armed conflict is the relevance of the ‘peaceful purposes’ provisions. Several articles stipulate that certain areas of the oceans, as well as particular activities, are to be only for peaceful purposes. The reservation of areas for ‘peaceful purposes’ has been used in multilateral treaties to refer to complete demilitarization or to exclude particular military activities—either as conventional obligations or as goals for states parties. In the UNCLOS context, the reservation of the high seas for peaceful purposes in Article 88 has largely been considered redundant rather than creating a meaningful restraint on the military activities that may be undertaken there. In this vein, Larson has argued:

Exactly what this means in practice is rather difficult to define, since the superpowers in particular use the [high seas] to deploy sub-surface submarines and surface vessels and use the air space above for naval and other military purposes. As a result, the practical effect of reserving the [high seas] for peaceful purposes is almost non-existent.

At most, the peaceful purposes provisions arguably go no further than requiring states to abide by prohibitions on the threat or use of force. If this view is accepted then no compelling argument can be mounted that various actions to support a state’s maritime security could be justified on the basis that those actions are to ensure that the high seas (and by virtue of Article 58, the EEZ) are only used for peaceful purposes.

States do occasionally resort to force in the course of their policing activities and earlier chapters discussed the parameters of such force when states seek to prevent

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11 See United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3 ['UNCLOS'] art 88 (reservation of high seas for peaceful purposes); UNCLOS art 141 (Area is to only be used for peaceful purpose); UNCLOS art 143 (marine scientific research in the Area is only to be for peaceful purposes); UNCLOS art 147 (installations in the Area also only for peaceful purposes); UNCLOS art 240 (marine scientific research is to be conducted for peaceful purposes).


15 This position is consistent with Wolfrum’s view that the legislative history of art 88 shows that it was not an essential part of UNCLOS and so should not be over-emphasized. Wolfrum, ‘Restricting the Use of the Sea’ 213.
offenders from fleeing from their jurisdiction.\textsuperscript{16} Treaties that have addressed law enforcement capabilities of the arresting states typically require that any use of force must be in accordance with international law.\textsuperscript{17} Concerted law enforcement efforts, particularly in the protection of fish resources, have led to labels of ‘war’ by commentators and media outlets seeking to underline the seriousness of the dispute. The ‘Turbot War’ between Canada and Spain,\textsuperscript{18} and the ‘Cod Wars’ between the United Kingdom and Iceland,\textsuperscript{19} stand out in this regard. Even clashes between state vessels and environmentalists at sea have resulted in this nomenclature, as has been seen with the ‘Whale War’ in Antarctic waters between Japanese whaling vessels and the Sea Shepherd Conservation Society.\textsuperscript{20} Ultimately, it is a question of degree as to when law enforcement becomes unlawful military action. In the \textit{Guyana/Suriname} arbitration, the demands of Surinamese gunboats against a drilling rig amounted to ‘a threat of military action rather than a mere law enforcement activity’ and were hence unlawful as a result.\textsuperscript{21}

Drawing this line between law enforcement and military action is necessary as Article 301 of UNCLOS provides that all military activities in the oceans are governed by the proscriptions of the Charter on the threat or use of force. Military acts prohibited at sea are therefore those that are either directed against the sovereignty, territorial integrity, or political independence of another state or constitute an attack on the sea forces or the marine fleets of another state.\textsuperscript{22} In this regard, UNCLOS simply prohibits acts that amount to a threat or use of force and allows for military activities that otherwise fall short of this characterization.\textsuperscript{23} Permissible military activities during times of peace were discussed in Chapter 2. For present purposes, the military activities, and especially the actions taken to

\textsuperscript{16} See Chapter 3, Part H(2) (in relation to the right of visit), Chapter 2, Part B(4) (in preventing non-innocent passage), and Chapter 3, Part G(1) (in relation to the prevention of unlawful exploitation activities of the continental shelf).

\textsuperscript{17} The bilateral treaties that the US has concluded with various states to address WMD proliferation are one such example. See Chapter 4, Part E(2).


\textsuperscript{22} Wolfrum, ‘Restricting the Use of the Sea’ 217.

\textsuperscript{23} Rex J. Zedalis, ‘Military Uses of the Ocean Space and the Developing International Law of the Sea: An Analysis in the Context of Peacetime ASW’ (1979) 16 SDLR 575, 613 (noting that so long as the military purposes are not aggressive then they are permitted under UNCLOS). Truver gives a number of examples about military uses of navies; particular naval weaponry and strategic use of naval power. See Truver, ‘The Law of the Sea’ 1221.
improve maritime security, that fall foul of the prohibition on the threat or use of force are of interest and are examined in the following part.

C. Armed Conflict

The UN Charter prohibits the resort to force except in the exercise of self-defence, or unless authorized by the Security Council under Chapter VII. One critical question here concerns what actions amount to a threat or use of force; do any maritime security threats constitute an unlawful threat of force? This issue is first examined in this part of the chapter, because the characterization of a particular activity as a threat or use of force or as an armed attack is a precursor to determining the lawful response of a state. The second section then turns to the right of self-defence; the scope of this right has been questioned in the context of maritime security as some interdiction plans or activities have relied on this right rather than risk being challenged as illicit law enforcement. The final section then considers the variety of actions taken by the UN Security Council. As a legal matter, the Security Council constitutes the best avenue for ensuring that forceful responses to maritime security threats are indeed lawful. Though of course reliance on the Security Council necessarily entails all the difficulties associated with the operation of a highly political body.

(1) Threats or uses of force and armed attacks

The current rules regulating the lawful use of force are drawn from the principles set out in the UN Charter and customary international law. Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any state. Article 51 then refers to the inherent right of self-defence arising ‘if an armed attack occurs’. The dividing line between threats or uses of force and armed attacks is unclear, as is the line between ‘shows of force’ or ‘gun boat diplomacy’ and threats or uses of force. The characterization of the actions involved is highly significant as it indicates how the victim of the relevant conduct may respond and what body of law is in operation. In the latter regard, the question is whether the laws of naval warfare are engaged or whether peacetime rules under the law of the sea are still determinative.

(a) Inter-state conflicts

There is room for debate as to the extent that a maritime security threat constitutes a ‘threat of force’ that is in violation of Article 2(4) of the Charter. Threats that do not jeopardize peace nor lead to massive human rights violations tend to be

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24 See Charter of the United Nations (1945) 59 Stat 1031 ['UN Charter'] art 2(4) and art 51.
25 See UN Charter arts 39–42.
accepted or tolerated within the international legal system. Hayashi has suggested that threat must be ‘closely tied to what the target State perceives as the readiness of another State to use force’ and ‘usually has a coercive intent to compel the target State to take or not to take certain specific action’. For a threat of force to be unlawful, the use of force threatened must also be unlawful. The maritime security threat must therefore at least be concerned with threats or uses of armed force, as arguments that the prohibition on ‘force’ in Article 2(4) may extend to other types of force, such as economic force, have generally not been accepted.

Corfu Channel, which was examined in Chapter 2 in relation to the requirements for innocent passage, remains instructive for what constitutes a threat of force at sea, as that case involved warships proceeding through a strait at a time of high tension between Albania and the United Kingdom. In the case, the Court focused on the manner in which the passage was undertaken by the British warships rather than the purpose of their transit. Notably, the Court considered that the passage of the warships ‘was designed to affirm a right which had been unjustly denied’. This language has suggested that states may undertake a show of force in response to a coastal state’s unjustified attempts to deny navigational rights. There is ample state practice that supports the view that warships may be used as a means of protesting certain maritime claims by coastal states. While potential violations of the right of innocent passage, such military action would not constitute a violation of the prohibition on the threat of force.

In Nicaragua, the ICJ drew a distinction between the threat or use of force on the one hand, and armed attacks on the other. It is only the latter that triggers the right of self-defence, as Article 51 of the UN Charter provides: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .’.

26 Romana Sadurska, ‘Threats of Force’ (1988) 82 AJIL 239, 250. Sadurska does go on to note that it is difficult to discern how much unilaterally applied coercion may be tolerated. Ibid 252.
33 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14 [‘Nicaragua [1986]’] 110 (referring to ‘measures which do not constitute an armed attack but may nevertheless involve a use of force’) and 101 (finding it ‘necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’). See also Case concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Merits) [2003] ICJ Rep 161 [‘Oil Platforms’] para 64.
An ‘armed attack’ ‘presupposes a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property’. The exact scale required is difficult to judge. In the *Oil Platforms* case, the Court did not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defence”. The Definition of Aggression identifies the blockade of the ports or coasts of a state by the armed forces of another state, as well as an attack by armed forces on the sea forces or marine fleets of another state, as acts of aggression. These actions would also fall under the rubric of an ‘armed attack’.

The *Oil Platforms* case before the ICJ examined particularly what would constitute an armed attack in the maritime context, thereby justifying the exercise of the right of self-defence. Iran instituted proceedings against the United States at the ICJ on the basis of the bilateral 1955 Treaty of Amity, Economic Relations and Consular Rights, claiming that by its attacks on Iranian oil platforms, the United States had violated Article X, paragraph 1, which establishes the freedom of commerce between their territories. The background to this case concerned the Tanker War between Iran and Iraq whereby both states declared war zones in the Persian Gulf and fired on commercial vessels and warships, particularly those involved in transporting oil for the other side. The United States, along with other neutral states, had sought to protect its vessels through the right of convoy, providing naval escorts to merchant vessels. Despite these efforts at protection, ships flagged to the United States or owned by US nationals were still damaged during the conflict.

The particular incidents at issue before the Court concerned a missile attack in October 1987 on the *Sea Isle City*, which was a Kuwaiti tanker that had been reflagged to the United States, and damage caused by a mine to the US warship USS *Samuel B. Roberts* in international waters in April 1988. Subsequent to the missile attack, the United States attacked Iranian offshore oil production installations, the Reshadat and Resalat complexes. The United States then destroyed the Nasr and Salman complexes following the mine damage caused to the USS *Samuel B. Roberts*. Iran claimed that these actions by the United States were in violation of the 1955 Treaty whereas the United States asserted that they were justified under Article XX, paragraph 1(d) whereby the treaty does not preclude the application of measures by a party ‘necessary to protect its essential security interests’.

At the time of the attacks, the United States claimed to be acting in self-defence and the destruction of the oil platforms was assessed against the requirements of self-defence by the Court. In attacking the Reshadat and Resalat complexes, the United States not only referred to the missile attack on the *Sea Isle City* as triggering the right of self-defence, but also to the following:

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34 Dinstein, *War, Aggression and Self-Defence* 193.
35 *Oil Platforms*, paras 71–2.
36 UNGA Res 3314 (XXIX) (14 December 1974) art 3(c) and (d).
38 *Oil Platforms*, para 25.
• the mining of the US-flagged Bridgeton.
• the mining of the US-owned Texaco Caribbean.
• firing on US Navy helicopters.
• mining of waters by the Iranian vessel, the Iran Ajr.

The United States argued that the attack against the Sea Isle City gave rise to the right of self-defence, but that the additional attacks showed a pattern of unlawful armed attacks that ‘added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response’.39

The critical question for the Court was whether these acts could be attributed to Iran. Iran alleged that it was not responsible for these actions, suggesting that Iraq could have been culpable instead. The Court’s assessment of the evidence led to the conclusion that the United States had not established that the acts in question were committed by Iran.40

The Court further considered that even if Iran was responsible for these actions, they ‘[e]ven taken cumulatively ... do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in [Nicaragua], qualified as a “most grave” form of the use of force’.41 Two key points may be drawn from this conclusion. First, there is an emphasis that the armed attack must clearly be targeted against the state that acts in individual self-defence. Second, the particular acts in question, namely mining of vessels and firing on helicopters, were not grave enough to be viewed as ‘armed attacks’ triggering the right of self-defence, even when considered cumulatively. Articulating additional criteria for an ‘armed attack’ is consistent with an approach that seeks to reduce the instances where states may resort to force, even if they are doing so in self-defence.42

In examining whether a particular state is targeted or not, this question has especial importance in the maritime context because of the use of flags of convenience. Clearly, the United States was concerned with ensuring that it was responsible for the particular vessels it had under convoy given that various Kuwaiti vessels were reflagged to the United States. In Oil Platforms, the Court did not accept that an attack on a vessel, the Texaco Caribbean, was an attack on the United States since it did not have a US flag but was owned by US nationals.43 This position did not take into account the law of naval warfare whereby prize courts might look beyond nationality of the vessel to issues of ownership.44 Such a stance may

39 Oil Platforms, para 62.
40 Oil Platforms, para 61. Judges Higgins and Buergenthal both criticized the Court’s methodology in assessing the evidence, and particularly its failure to articulate what standard of proof was necessary. Ibid para 41 and para 44 (Sep Op Buergenthal); paras 33–4 (Sep Op Higgins).
41 Oil Platforms, para 64.
43 Oil Platforms, para 66 (the Texaco Caribbean, whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State).
44 San Remo Manual, para 117. Prize courts, or alternatively courts with prize jurisdiction, determine whether vessels have been lawfully seized during times of armed conflict.
have been justified because looking beyond the nationality is primarily to determine if a vessel is a neutral or enemy merchant vessel, rather than determining which neutral state is responsible for the ship in question.

A further aspect of this requirement that a particular state is targeted or not indicates that there is an element of intention that must be discerned in an armed attack to warrant the exercise of the right of self-defence. The Court considered that the missile attack was not against US ships in particular but against shipping in general. This criterion appears as a novel addition to ascertaining whether an armed attack has occurred. It is unclear whether this element of intention must be assessed on all occasions or whether it is only relevant in assessing an attack against a third state that is not otherwise one of the belligerents.

The determination that the mining of vessels and firing on naval helicopters were not ‘grave’ enough to be considered as armed attacks has been criticized for utilizing the standards considered in Nicaragua in a different context. Raab has noted that the reference to most grave and less grave uses of force in Nicaragua was based on the particular wording of the Definition of Aggression in relation to sending armed bands into the territory of another state. In referencing the gravity of the acts to determine if there was an armed attack or not, the Court extended its reasoning in Nicaragua without justification. The indication appears to be that any use of force must be assessed as to its gravity. However, it has been more commonly held that if regular military forces are engaged in armed action then there is no need to assess the gravity of the particular acts. Moreover, the UN Charter does not refer to a ‘grave’ armed attack in Article 51 and the severity of an armed attack mediates what constitutes a proportionate response rather than whether there has been an armed attack at all.

The Court, in referring to the series of acts complained of, does appear to accept that they could have been considered cumulatively and as such allows for the possibility that a number of small incidents may amount to an armed attack, provided they are sufficiently grave. Given that a single attack on a merchant vessel is unlikely to be viewed as an armed attack, it is understandable that an

46 Oil Platforms, para 64.
47 Raab, “‘Armed Attack’” 728. Gray comments that the Court provides only a brief and rather obscure discussion on this difficult point. Christine Gray, International Law and the Use of Force (2nd edn, OUP, Oxford 2004) 119.
49 Ibid 724.
51 Raab, “‘Armed Attack’” 725 (also referring to the views of Brownlie, Higgins and Fleck in this regard); Dieter Fleck, ‘Rules of Engagement for Maritime Forces and the Limitation of the Use of Force under the UN Charter (1988) 31 German YBIL 165, 177; Rosalyn Higgins, Problems and Progress: International Law and How We Use It (OUP, Oxford 1994) 251.
52 Taft, ‘Reflections on the ICJ’s Oil Platforms Decision’ 300.
53 Raab, “‘Armed Attack’” 732.
54 See Gray, International Law 118.
accumulation of events should be considered. The Court has not explicitly addressed this issue, but its decision in *Oil Platforms*, as well as *Nicaragua* and *Cameroon/Nigeria*\(^\text{55}\) tend to support the notion that an accumulation of events could be an armed attack.\(^\text{56}\)

In setting forth these criteria for what constitutes an armed attack, the Court appears to have been reducing the instances in which a state might in turn resort to the use of force by way of self-defence. The *Oil Platforms* decision has been criticized as a result, particularly because it reduces the means by which states, notably the United States, may respond to terrorist attacks.\(^\text{57}\) The Court not only created parameters for what would constitute an armed attack but arguably removed any exercise of discretion for decision-makers in determining when to resort to force.\(^\text{58}\)

While states may not be able to rely on a right of self-defence, a denial of navigational rights may give rise to a right of a state to undertake proportionate counter-measures, which may involve a show of force.\(^\text{59}\) Acts that may create such a right include violations of the prohibition against intervention, violations of sovereignty and the freedom of navigation and communication.\(^\text{60}\) A violation of the principle of non-intervention ‘would give rise to a right by the coastal State to employ proportionate countermeasures to restore the *status quo ante*, even if the overt manner of the transit by the naval task force was consistent with the literal requirements of innocent passage’.\(^\text{61}\) As noted above, the passage of British warships through the Corfu Channel at action stations was accepted as lawful by the ICJ in response to a denied right of navigation.\(^\text{62}\)

In *Oil Platforms*, the Court’s interpretation of the 1955 Treaty between the United States and Iran meant that it considered whether the US reliance on its ‘essential security interests’ to justify the attacks was a question to be resolved by reference to the law on the use of force.\(^\text{63}\) It is disappointing the Court did not look

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\(^{55}\) *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) (Merits) [2002] ICJ Rep 303.*


\(^{58}\) See David Kaye, ‘Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law’ (2005) 44 *Columbia Journal of Transnational Law* 134, 138–40. Kaye observes: ‘[The Court] did not look to overall threats, the history of past acts, the possible ratification of acts by Iran, and other issues that may have put in context how the policymaker deciding to use force in self-defense could come to such a decision.’ Ibid 140. Professor Kaye served as co-counsel to the United States in *Oil Platforms*.


\(^{62}\) *Corfu Channel* 30.

\(^{63}\) See *Oil Platforms*, paras 37–42. This decision was criticized by Judges Buergenthal, Higgins, Kooijmans, Owada and Parra-Aranguén, who considered that the application of Article XX did not need to be assessed at all given the finding that the US had not violated Article X, para 1 requiring freedom of commerce between the two states.
at the broader meaning of Article XX, paragraph 1(d) in as much as it may have been an opportunity to indicate what level of force may be lawful as a proportionate counter-measure in response to violations of the territorial sovereignty, or the principle of non-intervention, or freedom of navigation. Judge Higgins noted in her Separate Opinion that whether Nicaragua or the Oil Platforms decisions allowed for only non-forceful counter-measures in response to less grave forms of the use of force remained a matter of conjecture.64

(b) Conflicts with non-state actors

Following the response to the terrorist attacks on September 11, 2001, it is now established that an armed attack may include attacks against a state by non-state actors whose acts are not attributable to a state.65 Dinstein has noted that earlier controversy on whether an armed attack by non-state actors was envisaged under Article 51 had been settled by international practice following the September 11 attacks.66 Moreover, Security Council Resolutions 1368 and 1373 of 2001 both recognized and reaffirmed the inherent right of self-defence in reference to the September 11 terrorist attacks. Similarly, NATO and the states parties to the Inter-American Treaty of Reciprocal Assistance also affirmed the right of self-defence in response to the terrorist attacks against the United States.67

The Court considered in Nicaragua that the supply of arms and other support to ‘armed bands’ in the territory of another state could not be equated with an armed attack.68 The Court instead determined that the arming and training of the contras were violations of the prohibition on the recourse to the threat or use of force,69 and the principle of non-intervention.70 Judge Jennings, in dissent, took the view that there may be an ‘armed attack’ through the supply of weapons if it was coupled with logistical or other support.71 The Definition of Aggression does not speak to the issue of supply of arms and support, but considers the ‘sending’ of armed groups that carry out particularly grave acts of armed force to amount to an act of aggression.72 Gray has argued persuasively that the views of the dissenting judges

64 Oil Platforms, para 43 (Sep Op Higgins).
66 Dinstein, War, Aggression and Self-Defence 206–7. Gray, however, has pointed out that links between the Al Qaeda terrorist organization and the Taliban regime in Afghanistan were relied upon to justify action taken against Afghanistan. See Gray, International Law 165–7.
69 Ibid 118–223 paras 227–38.
70 Ibid 123–6 paras 239–45.
71 Ibid 543 (Diss Op Jennings).
72 UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/29/3314 art 3(g) (‘The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein’).
in *Nicaragua* are not in line with state practice and that the supply of arms should be viewed as a violation of the obligation of non-intervention and not an armed attack triggering the right of self-defence.\(^73\) Her position undermines arguments of states relying on self-defence to justify actions preventing the shipment of weapons to terrorists.

What falls within the category of a ‘threat of force’ or ‘use of force’ has been elaborated on in the Declaration on Friendly Relations,\(^74\) and includes prohibitions on aggression, reprisals, as well as the following:

*Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.*

*Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.*

These prohibitions are relevant for maritime security in as much as state-sponsored terrorism is prohibited and that no state may assist in terrorist acts that would involve a threat or use of force. A state that refrained from taking steps to prevent—or actively assisted—preparatory acts of a terrorist group that blows up a port or causes a vessel to explode in a strait, for example, could be viewed as violating Article 2(4) of the UN Charter. The reach of the Declaration on Friendly Relations to modern maritime security threats is otherwise quite limited.

The distinction between threats or uses of force and armed attacks generally means that states may not rely on the right of self-defence to justify responses for current maritime security threats.\(^75\) So, for example, the supply of weapons to hostile non-state actors in another state may constitute a threat of force for another state and a prohibited intervention in its internal affairs. Yet it does not necessarily constitute an armed attack justifying the interdiction of a foreign flagged vessel on the high seas pursuant to a right of self-defence.\(^76\) Whether a right of anticipatory or pre-emptive self-defence may arise is discussed below.

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\(^73\) *Gray, International Law* 109–11.


\(^75\) But see Ian Patrick Barry, ‘The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative’ (2004) 33 *Hofstra Law Review* 299, 317 (‘The right of a coastal State to seize foreign vessels on the high seas may exist as a function of the inherent right of every State to self defense’). Barry does acknowledge, though, that this would be exceptional. Ibid 325 (‘It must be noted that the right of visit and search upon the high seas as a right of self-defense does not only apply in time of war, but may, in exceptional circumstances be exercised by a state at peace’).

(c) Conclusion

In sum, in addressing military activities, international law has provided a gradation from intervention to threats of force to use of force to armed attack. Which activities fall within these various categories will be a question for the protagonists and other decision-makers at the relevant time. The case law of the ICJ has been shaping these parameters through the *Corfu Channel*, *Nicaragua* and *Oil Platform* decisions. As noted, what constitutes a prohibited threat of force does not align easily with the range of modern maritime security concerns that have been the focus of discussion in this book. At most, the shipment of weapons to support a terrorist attack against another state is a threat of force. Also in relation to maritime security, support of terrorist acts may amount to a violation of the prohibition on the use of force but the circumstances for such a characterization appear quite constrained in this regard if there is strict adherence to the wording of the Declaration of Friendly Relations. From the judgment in *Oil Platforms*, the threshold to establish that an armed attack has occurred is quite high. The Court at least indicated that a single attack on a warship may be an armed attack, although the mining of merchant vessels were not.

The characterization of particular acts as a threat or use of force or as an armed attack is important because it determines the lawful response of the victim state. Proportionate counter-measures are likely to be the available remedy to the prohibition on intervention and threats of force and may allow for force that is proportionate to the degree and nature of the threat. A state may only rely on the right of self-defence if there has been an armed attack. The recent jurisprudence of the ICJ tends to indicate that there is a policy preference to reduce the instances in which states may lawfully rely on self-defence. Consequently, the criteria for what constitutes an armed attack, according to the Court, are quite strict. States seeking to respond to maritime security concerns have occasionally relied on self-defence, and the following section examines further when a state may lawfully act on the basis of this right.

(2) Requirements for the lawful exercise of the right of self-defence

Article 51 of the UN Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
Notable from this provision is that the ‘inherent right’ of self-defence still allows for customary international law standards to inform the exercise of this right. Further, states may exercise the right of self-defence on either an individual or a collective basis. Article 51 also establishes, on a prima facie basis, that an armed attack must have taken place prior to a state acting in self-defence. This classic position on self-defence has been subject to challenge, particularly by reference to customary international law standards.

Academic analyses of the right of self-defence have produced different views as to whether there is an anticipatory right of self-defence under international law. The UN High Level Panel noted the restrictive position of Article 51 and posited that ‘a threatened State . . . can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate’. The concept of an anticipatory right of self-defence has been relevant in the maritime security context in counter-terrorism and counter-proliferation efforts. States could arguably seek to prevent the passage of WMD and related material or the shipping of arms to known terrorists when it is established that these weapons will be used against the state as an armed attack.

The United States moved beyond the doctrine of anticipatory self-defence to a doctrine of pre-emption in 2002. This policy was set forth in the National Security Strategy as follows:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. . . . To forestall or prevent such hostile attacks by our adversaries, the United States will, if necessary, act preemptively.

In explaining the need for this policy shift, former President George W Bush is reported as stating: ‘I believe it is essential—that when we see a threat, we deal with those threats before they become imminent. It’s too late if they become imminent.'

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77 Nicaragua [1986], 94 para 176.
78 Collective self-defence arises where a state that is a victim of an armed attack has requested assistance from a third state in responding to that attack. The third state need not be under threat itself. See Nicaragua [1986], 120 para 232.
79 Dinstein writes: ‘Self-defence cannot be exercised merely on the ground of assumptions, expectations or fear. It has to be demonstrably apparent that the other side is already engaged in carrying out an armed attack (even if the attack has not yet fully developed.’ Dinstein, War, Aggression and Self-Defence 191–2.
80 The contrary positions have been succinctly summarized by Gray. See Gray, International Law 98–9 (and sources cited therein). See further ibid 129–33.
81 Report of the Secretary General’s High Level Panel on Threats, Challenges and Change (2 December 2004) <http://www.un.org/secureworld/report.pdf> para 188 (emphasis in original). This view is said to be based on ‘long established international law’. Ibid.
82 As discussed above in Part C(1)(b), terrorists may commit an ‘armed attack’ justifying states to resort to the right of self-defence.

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It’s too late in this new kind of war. The UN High Level Panel suggested that the preventive use of force may be allowed in some instances if approved by the UN Security Council. This more expansive interpretation of self-defence would, if accepted, provide greater justification for interdictions of vessels reasonably suspected of carrying WMD and related material.

While the doctrine of pre-emption has been subject to considerable criticism, the Bush Administration went one step further in 2008 and stated:

the United States will hold any state, terrorist group or other nonstate actor or individual fully accountable for supporting or enabling terrorist efforts to obtain or use weapons of mass destruction—whether by facilitating, financing or providing expertise or safe haven for such efforts.

Such acts would warrant conventional strikes on militant targets in another state, without that state’s consent if it failed to halt the threat on its own. Wedgwood similarly proposed that if a state allows its territory to be used by terrorists and fails to take action, the state sheltering those terrorists should expect that measures of self-defence will be taken against it. This amounts to extra-territorial law enforcement as a mode of self-defence. The Quadrennial Defense Review Report issued by the Obama Administration has instead emphasized the need to work in concert with allies and partners, which would be more likely to be consistent with a collective right of self-defence, albeit retaining ‘the ability to act unilaterally and decisively when appropriate’.

In addition to the prerequisite of an armed attack, two fundamental requirements for the lawful exercise of the right of self-defence are necessity and proportionality. These elements ensure that the response should seek to halt and repel an

88 Ibid.
89 Ruth Wedgwood, ‘Responding to Terrorism: The Strikes against Bin Laden’ (1999) 24 Yale JIL 559, 565. See also Dinstein, War, Aggression and Self-Defence 245.
90 Dinstein, War, Aggression and Self-Defence 247.
92 Ibid 10.
93 These requirements are drawn from the Caroline case. The Caroline case, Diplomatic Correspondence, 29 British and Foreign State Papers 1137–8 and 30 British and Foreign State Papers 195–6. According to the correspondence over this incident, any act in self-defence must involve ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’, as well as ‘nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it’. The requirements of necessity and proportionality
attack, rather than being retaliatory or punitive in nature. Controversial claims to self-defence are most frequently criticized for the failure to meet necessity and proportionality requirements, rather than because the actions were too anticipatory in nature.

In *Oil Platforms*, the ICJ affirmed that the lawful exercise of the right of self-defence depends on observance of the criteria of necessity and proportionality in relation to the measures taken. The United States targeted the platforms because they were used to ‘collect[] and report[] intelligence concerning passing vessels, acted as a military communication link coordinating Iranian naval forces and served as actual staging bases to launch helicopter and small boat attacks on neutral commercial shipping’. Iran, by contrast, argued that the platforms had military personnel purely for defensive purposes in light of previous Iraqi attacks against Iranian oil production facilities. Since the United States had primarily complained to Iran of attacks against neutral shipping and mining, the Court did not consider that the attacks against the oil platforms were necessary, particularly as responses to the attacks on the *Sea Isle City* and the USS *Samuel B. Roberts*.

In assessing proportionality, the Court considered that the first attacks on the oil platforms may have been proportionate but as the second attacks were part of a much wider operation, the latter could not be considered as proportionate to the mining of the US warship. However, an assessment of proportionality has generally required an assessment of the nature of the threat being addressed, and not simply a response to whatever force the attacking state has just used.

Interdictions on the high seas have been justified by states on the basis of the right of self-defence, as a necessary and proportionate response to an imminent attack. The threat involved must be ‘sufficiently grave to justify encroachment upon the traditional and dearly-held freedom of the high seas’ and as such ‘hypothetical threats are insufficient’. In this regard, Bowett has argued it is not reasonable to expect a state to remain inactive while ‘a serious menace to its security’ exists on the high seas.

have been confirmed by the ICJ. *Nicaragua* [1986], 94; *Advisory Opinion on Nuclear Weapons*, 245; *Oil Platforms*, para 76.


96 *Oil Platforms*, para 74. 97 *Oil Platforms*, para 74.

98 *Oil Platforms*, para 75. 99 *Oil Platforms*, para 76. Taft has argued against the suggestion that states are required to make specific complaint about particular targets prior to exercising the right of self-defence. Taft, ‘Reflections on the ICJ’s Oil Platforms Decision’ 304.

100 *Oil Platforms*, para 77.

101 Taft, ‘Reflections on the ICJ’s Oil Platforms Decision’ 305.


103 Ibid 1223.

who wrote, ‘a State which has received an injury has the right to provide for its future security by depriving the offender of the means of doing harm’. 105

Arguably, when dealing with WMD, the threat associated with these weapons compared to conventional weapons shifts in favour of allowing for states to act in self-defence where an interdiction on the high seas would be a necessary and proportionate response. 106 On this basis, United States officials initially characterized the PSI by reference to the right of self-defence. 107 The PSI cannot easily be viewed through the lens of anticipatory self-defence, given that this concept incorporates reference to the principles of necessity and proportionality, and the PSI is more in the nature of a preventive action without an imminent threat posed by any particular foreign vessel. 108 Reliance on the right of self-defence to justify the PSI was soundly criticized by commentators, 109 particularly as it related to pre-emptive self-defence, 110 and was dropped from subsequent rhetoric on the PSI.

Reference to the right of self-defence has also been reasserted more recently as a legal justification for the boarding of foreign vessels on the high seas in pursuit of terrorists. After September 11, 2001, the United States began boarding vessels in the Indian Ocean, the Red Sea, and the Strait of Hormuz looking for Osama bin Laden and al Qaeda associates. 111 Although consent from masters was generally sought for these inspections, the United States notified the maritime industry that it would compel boarding if the vessel was suspected of transporting terrorist suspects. 112 The specific legal basis for this action was never explicitly articulated, but President Bush generally referred to acts of self-defence in response to the attacks by al Qaeda. 113

106 See Barry, ‘The Right of Visit’ 324; Byers, ‘Policing the High Seas’ 532.
110 ‘The international repugnance surrounding the doctrine of anticipatory self-defence would be sufficient to ensure that none of the PSI States would seek to use it to justify their PSI activities, if any other ground was available.’ Stuart Kaye, ‘The Proliferation Security Initiative in the Maritime Domain’ (2005) 35 Israel Yearbook of Human Rights 205, 221. See also Samuel E. Logan, ‘The Proliferation Security Initiative: Navigating the Legal Challenges’ (2005) 14 JILP 253, 270 (‘Because pre-emptive military action is not currently accepted as a legitimate exercise of self-defense, the right of self-defense probably fails to justify the PSI’).
112 Ibid, 25 (citing Defense Institution of International Legal Studies (DIILS), Conference on Maritime Operations Organized by the Russian Academy of Liberal Arts and Information Technologies Education and DIILS 11–8 (St Petersburg, Russia, June 2003)).
113 Ibid 25.
This recent practice should be seen against previous practice where there was far less acceptance of reliance on the right of self-defence to justify intrusions against the freedom of navigation on the high seas.\footnote{Churchill and Lowe point to earlier examples of interference with shipping based on claims to self-defence, but indicate that the response to France’s interdictions during the Algerian emergency of 1956–62, and the practice of the United Kingdom in not interfering with French shipments of arms to Argentina during the 1982 Falklands/Malvinas conflict may have represented a shift against this justification for the boarding of foreign vessels on the high seas. R.R. Churchill and A.V. Lowe, The Law of the Sea (3rd edn, Manchester University Press, Manchester 1999) 216–17.} France asserted a right of visit in order to attempt to restrict the shipment of weapons to Algeria during 1956 and 1962. The flag states of the vessels concerned strongly opposed France’s actions as an unlawful interference with the freedom of navigation, especially as it was considered that France’s actions were disproportionate to the threat posed.\footnote{Barry, ‘The Right of Visit’ 326–7 (noting that almost 5,000 foreign vessels were searched in one year).} Byers considers that this example shows that the opposition generated towards France’s action would tend to militate against a claim that there exists any extended right of self-defence against weapons shipments on the high seas.\footnote{Ibid 533.}

Israel claimed a right of self-defence when it intercepted the \textit{Karin-A}, an Iraqi-flagged vessel carrying, Israel claimed, a range of weapons destined for the Palestinian Authority.\footnote{Ibid 534.} Byers considers that the lack of international comment on Israel’s action is indicative that the action did not contribute to the development of any customary international law for interdictions on the high seas.\footnote{Cited in Jon M. Van Dyke, ‘The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone’ (2005) 29 Marine Policy 107, 118.} US Defense Secretary Donald Rumsfeld later characterized the Israeli action as ‘a legitimate act of self-defense, noting that the US had conducted similar maritime operations’.\footnote{‘Israelis “Seize Iran Arms Ship”, BBC News, 11 April 2009 <http://news.bbc.co.uk/2/hi/middle_east/8341737.stm>. Israel’s boarding of the \textit{M/V Mavi Marmara} on 31 May 2010 garnered considerable comment but was justified by Israel as a lawful response to a breach of its blockade of the Gaza Strip. See eg ‘Deaths as Israeli forces storm Gaza aid ship’, BBC News, 31 May 2010 <http://www.bbc.co.uk/news/10195838>.} Israel continues to inspect vessels and seize arms shipments thought to be destined to Hezbollah or Hamas.\footnote{UN Charter art 51.} The preventive nature of the actions concerned, coupled with the lack of any immediate need that should be inherent to an anticipatory right of self-defence, weigh against the lawful interdiction of armaments, and WMD and related materials shipments on the grounds of self-defence.

Any action in self-defence does not preclude the Security Council from taking action in its own right.\footnote{UN Charter art 51.} UN member states are required to report to the Security Council their exercise of the right of self-defence, and Article 51 further provides that the right of self-defence exists ‘until the Security Council has taken measures necessary to maintain international peace and security’. States may continue to act in self-defence in the face of a range of Security Council measures, and only lose the right of self-defence when the Council’s measures have succeeded in restoring
Security Council actions may ultimately provide a more legitimate means to counter maritime security threats rather than relying on claims of threats of force, armed attack, or self-defence. These actions are addressed in the next section.

(3) Enforcement actions at sea under Chapter VII of the UN Charter

States may be entitled to resort to the use of force at sea if authorized to do so by the UN Security Council. The Security Council may act under Chapter VII of the UN Charter when there is a threat to the peace, a breach of the peace or an act of aggression. In these circumstances the Council may act under Article 41 and Article 42 of the UN Charter, both of which anticipate action at sea to maintain or restore international peace and security. Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Security Council may clearly authorize complete or partial interruption of sea communication under this provision. Article 42 then reads:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Acts of naval warfare are undoubtedly anticipated under Article 42. As will be discussed in this section, the Security Council has taken diverse steps either to authorize the use of force at sea or to address various maritime security threats.

(a) Enforcement of economic sanctions

A critical component of the Security Council’s function to maintain or restore international peace and security is the authority to impose various economic sanctions or embargos against a state and then ensure those sanctions are enforced. Politakis and McLaughlin both support the view that naval forces may be used for enforcement of mandatory economic sanctions under Article 41. McLaughlin considers that after the 1991 war against Iraq, naval interdiction operations continued as a means of enforcing embargos against Iraq on the basis of Article 41. Similarly, he...
argues, Security Council resolutions on the former Yugoslavia and Haiti also founded naval interdiction operations on Article 41.\footnote{Ibid 255 (referring to Resolutions 787 (16 November 1992) and 820 (17 April 1993), as well as Resolutions 815 (30 March 1993) and 917 (6 May 1994)).} The use of naval interdictions in these circumstances may be seen as a UN-sanctioned blockade.

An early instance of Security Council-imposed interdictions was in response to Ian Smith’s unilateral declaration of independence for Southern Rhodesia. The Security Council authorized a series of measures, including the institution of an oil embargo.\footnote{See UNSC Res 217 (20 November 1965) UN Doc S/RES/217 para 8.} Following reports that oil was still reaching Southern Rhodesia through the Mozambique port of Beira, the Security Council called upon the United Kingdom, under Article 41, ‘to prevent, by the use of force if necessary’ such shipments of oil.\footnote{UNSC Res 221 (9 April 1966) UN Doc S/RES/221 para 5.} This authorization came before any mandatory sanctions regime was decided upon by the Council and has been regarded as anomalous as a result.\footnote{McLaughlin, ‘United Nations’ 258 (citing George P. Politakis, ‘UN-Mandated Naval Operations and the Notion of Pacific Blockade: Comments on Some Recent Developments’ (1994) 6 African Journal of International and Comparative Law 173).} The direct reference to force has not been used in later Security Council resolutions that allow for naval interdiction in support of sanctions measures under Article 41.\footnote{Ibid 259.}

Following Iraq’s invasion of Kuwait in 1990, the Security Council adopted Resolution 661, calling for an embargo of all imports into and exports from Iraq, except for medical supplies and food-stuff for humanitarian circumstances.\footnote{UNSC Res 661 (6 August 1990) UN Doc S/RES/661.} In Resolution 665, the Security Council then:

\emph{Call[ed] upon those member states cooperating with the government of Kuwait, which are deploying maritime forces to the area, to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure the strict implementation of the provisions related to such shipping laid down in Resolution 661.}

This language has become boilerplate for instances where the Security Council authorizes the enforcement of embargos at sea.\footnote{McLaughlin, ‘United Nations’ 255 (referring to UN Security Council Resolutions 787 (16 November 1992), 820 (17 April 1993), 875 (16 October 1993) and 917 (6 May 1994) in this regard).} For example, maritime interdiction was also approved by the Security Council in relation to Sierra Leone under Resolution 1132, which authorized the Economic Community of West African States to enforce the embargo on import of petroleum products and arms ‘by halting inward maritime shipping in order to inspect and verify their cargoes and destinations.’\footnote{Van Dyke, ‘The Disappearing Right’ 118.}
During the conflict in the former Yugoslavia, the Security Council imposed arms and export embargos against Serbia and Montenegro. Initially, goods were still allowed to travel through Serbia and Montenegro under the resolution, but this exception in the embargo regime was exploited with goods being confiscated within Serbia. The Council then moved to end this transshipment, and further called upon states to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the resolutions. The scope of this resolution was extended to the territorial sea by Resolution 820. From this situation, Soons has argued that there needs to be explicit authorization for enforcement of a resolution to occur within the territorial sea of a state, but McLaughlin considers it was an expansion in scope of the initial authorization from ships carrying goods for Serbia and Montenegro to all vessels exercising the right of innocent passage (irrespective of whether they were carrying cargo for Serbia and Montenegro or not). The application of Security Council measures to the territorial sea falls within the reference under UNCLOS to passage being innocent only if it conforms to ‘other rules of international law’.

A distinction may then be drawn with Security Council resolutions that impose embargos but do not authorize states to halt and inspect international shipping. In Resolution 733, the Security Council decided that ‘all States shall, for the purpose of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise’. It could be argued that the ‘implementation’ of this Resolution necessarily entailed stopping and searching vessels suspected of delivering weapons to Somalia. Such an interpretation seems unwarranted in view of the Security Council’s practice at that time of explicitly authorizing that ships be halted and cargo inspected and verified under Chapter VII.

The Security Council has instead decided more recently in relation to Somalia that ‘States shall take the necessary measures to prevent the direct or indirect

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139 Ibid 265–6.
140 UNCLOS art 19(1).
supply, sale or transfer of weapons and military equipment' to designated individuals or entities. This language arguably goes further than referring to an embargo but has not specified interdictions in a comparable way to previous resolutions. If the argument is assessed against the traditional emphasis on flag state authority in the law of the sea, it remains questionable that interdictions have been authorized in the absence of specific language to that effect. Nonetheless, reference to ‘necessary measures’ in a Chapter VII resolution may be considered as sufficient authority for interdictions at sea to enforce the Security Council’s sanctions regime. This approach is a reasonable one in light of the policy objective to be achieved, and should be favored as one that promotes maritime security.

North Korea’s nuclear tests also provoked action by the Security Council. After the first nuclear test in 2006, the Security Council adopted Resolution 1718 to impose inter alia a ban on the import and export of a variety of goods, including large-scale arms and WMD and related materials. To ensure compliance, states were called upon ‘to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from [North Korea], as necessary’. This wording did not therefore allow for military enforcement of the embargo. When North Korea conducted its second nuclear test in 2009, the Security Council called upon states to inspect cargo in their ports, consistent with international law, and to inspect vessels on the high seas ‘with the consent of the flag State’ if there were reasonable grounds to believe that the vessel was carrying prohibited cargo. The Security Council further called upon states to cooperate with the inspections and if the flag state did not consent, then the flag state would be required to direct the vessel to proceed to an appropriate and convenient port for inspection by local authorities.

The action authorized by the Security Council against North Korea deviates from earlier practice in that the grant of power to conduct interdictions is moderated by the requirement of flag state consent in the first instance and then allowing the flag state some say in where and by whom an inspection should occur. As such, it would allow for a situation, for example, of the United States wanting to inspect a Chinese merchant vessel and being denied the opportunity to do so with China instead directing the vessel to a port in Viet Nam. This approach should not be problematic for the overall enforcement of the sanctions provided the flag state does direct the vessel to a port and allow for inspection as required by the resolution. It is nonetheless a notable example of according greater deference to flag state authority on the high seas than has been evident in earlier resolutions. Moreover, the Security Council specified in its two resolutions against North Korea that it was taking measures under Article 41, which may be viewed as limiting the

145 Ibid para 8(f).
extent of force being authorized under each of the resolutions. This decision may have been considered necessary specifically in North Korea’s case so as to reduce the belligerent dimension that may have otherwise been attributed to the resolution.

The limited use of force in the context of Article 41 sanctions is arguably separate to enforcement actions authorized under Article 42.\textsuperscript{148} Under the latter provision, the Council may further authorize action by sea as may be necessary to maintain or restore security.\textsuperscript{149} ‘For the purposes of use of force in maritime interdiction operations conducted as part of a wider peace support operation, the relationship between Articles 41 and 42 is ambiguous, and is arguably best left that way.’\textsuperscript{150} In practice, the Security Council has not specifically invoked Article 42 but usually refers more generally to Chapter VII of the Charter.\textsuperscript{151} It remains to be seen whether the approach of specifying Article 41 measures, as was the case for North Korea, becomes a way of moderating the amount of force authorized for enforcing sanctions regimes.

(b) Piracy in Somalia

Security Council Resolution 1816 of 2008 provided for a different form of enforcement action in seeking to address the problem of piracy off the coast of Somalia. The resolution was adopted under Chapter VII but also with the consent of the transitional government of Somalia. The threat to international peace and security is identified as the situation in Somalia generally, rather than piracy and armed robbery in its own right,\textsuperscript{152} and so does not ostensibly create a broader precedent for the Security Council stepping in to deal with other serious or endemic situations of piracy and armed robbery at sea in specific regions. Irrespective of these caveats, it seems likely that ongoing, or particularly violent acts of piracy and armed robbery at sea could be viewed as a threat to international peace and security enabling the Council to act under Chapter VII if there was sufficient political will to do so.\textsuperscript{153}

In Resolution 1816, the Council decided that for a six-month period states cooperating with the transitional government could enter the territorial waters of Somalia and use all necessary means for the purpose of repressing acts of piracy and armed robbery at sea, provided that advance notification was given to the


\textsuperscript{149} UN Charter art 42.

\textsuperscript{150} McLaughlin, ’United Nations’ 257.

\textsuperscript{151} Dinstein, War, Aggression and Self-Defence 304. See further ibid 310 (’Permissive enforcement action, predicated either on a recommendation or on an authorization issued by the Council, acquires its intrinsic legal validity not from Article 42 but from Article 39’).

\textsuperscript{152} UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816, pmbl. The delegate of South Africa also emphasized that the threat to the peace was the situation in Somalia, rather than piracy or armed robbery at sea \textit{per se}. Security Council, 5902nd meeting, 2 June 2008, UN Doc S/PV.5902, p 4.

\textsuperscript{153} ’The expanding interpretation accorded to a ‘threat to the peace’ under art 39 of the UN Charter warranting enforcement action under Chapter VII of the Charter is well-recognized. See, eg, Frederic L. Jr Kirgis, ’Security Council’s First Fifty Years’ (1995) 89 AJIL 506.
transitional government and the action taken would be consistent with the suppression of piracy on the high seas.\textsuperscript{154} The consent of a coastal state has been sought in relation to enforcement activities in its territorial sea authorized by the Security Council, but there are debates as to whether this is a legal or a political necessity.\textsuperscript{155} The Security Council further extended the authorization of action to the land territory of Somalia in Resolution 1851.\textsuperscript{156}

A range of safeguards were included in Resolution 1816 to ensure that various rights under the law of the sea would be preserved, including the right of innocent passage of third states through the territorial sea of Somalia,\textsuperscript{157} that the resolution should not be construed as establishing customary international law and that it ‘shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the [UNCLOS], with respect to any other situation’.\textsuperscript{158} Each of the statements issued by Security Council members both prior to and after the adoption of the resolution emphasized the uniqueness of Somalia’s situation, the importance of the consent of the transitional government, and the inapplicability of the resolution to modify UNCLOS in any way.\textsuperscript{159} This intention that the Security Council resolutions on piracy in Somalia should not modify existing international law has been reiterated in subsequent Security Council resolutions on this topic.\textsuperscript{160} Even within these parameters, the fact that the Security Council authorized interdictions to respond to a maritime security threat remains notable.

(c) Proliferation of WMD

The Security Council has not only acted to enforce sanctions against particular states because of proliferation concerns but has also imposed broader requirements


\textsuperscript{155} The consent of the coastal state would seem to obviate the need for a resolution adopted under Chapter VII of the UN Charter. Treves considers the consent of the transitional government was highlighted to reinforce the status of this government, to ‘pay homage to state sovereignty’ and to overcome question marks as to the lawful breadth of Somalia’s territorial sea. Tullio Treves, ‘Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia’ (2009) 20 European Journal of International Law 399, 407–8.

\textsuperscript{156} UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851, para 6 (authorizing states and regional organizations to ‘undertake all necessary measures that are appropriate in Somalia’). This resolution was renewed for a further 12-month period by UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897, para 7.


\textsuperscript{158} Ibid para 9.

\textsuperscript{159} See Security Council, 5902nd meeting, 2 June 2008, UN Doc S/PV.5902.

on all member states to address this issue. Resolution 1540 was adopted shortly after the discovery of the nuclear trafficking ring headed by Pakistani scientist, Dr Abdul Qadeer Khan. The Security Council intended to address the problem that the existing non-proliferation regimes were not concerned with the transfer of WMD to non-state actors, nor did they comprehensively address the need for national action to be instituted in order to restrict the manufacturing and trafficking of WMD and related materials. Originally, the United States and the United Kingdom sought a resolution from the Security Council that would authorize states to stop, board, and inspect a vessel suspected of carrying WMD and related material. This approach would have allowed for the criminalization of proliferation on a broad scale.

Instead, Resolution 1540, which was adopted under Chapter VII, requires states to take and enforce measures at a national level to prevent proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials. In particular, states are to develop and maintain ‘law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law’. These requirements impel states to adopt more comprehensive legislation to control and prohibit various proliferation activities, and have been important for creating a basis of prescriptive jurisdiction in the event that enforcement against vessels in a state’s maritime zones may be warranted.

The resolution further recognizes that some states will need to call on other states for assistance in order to fulfill their obligations under the resolution and promotes dialogue and cooperation on non-proliferation. The United States considers that the resolution ‘establishes clear international acknowledgement that cooperation, such as PSI, is both useful and necessary.’ Russia and China were both opposed, however, to an express authorization of interdictions that would legally validate the PSI. The implementation of the resolution is monitored by a Security Council Committee, and governments report on their compliance measures, particularly what national laws exist or have been adopted as well as what export and border controls are in place.

The clearest endorsement, albeit not explicit, of the PSI can be discerned from paragraph 10 of the resolution, which calls upon all states ‘in accordance with their

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165 Ibid para 3(c).
166 Ibid paras 7, 9.
national legal authorities and legislation and consistent with international law, to
take cooperative action to prevent illicit trafficking’ in WMD and related materi-
als.\textsuperscript{169} It should be noted that this paragraph ‘calls upon’ states rather than decides
that states shall take certain action, and as such can be construed more as ‘invita-
tion-making’ instead of ‘obligation imposing’.\textsuperscript{170} Nor is there any express reference
to interdiction of vessels and so the range of measures contemplated in the PSI are
not fully endorsed by the resolution.\textsuperscript{171} This example reflects the tension whereby
the Security Council potentially has authority to permit actions that would pro-
mote maritime security. These expectations may not be met, though, when other
political priorities intrude.

\textit{(d) Counter-terrorism resolutions}

Following the attacks on the United States on September 11, 2001, the Security
Council adopted Resolution 1368, which

\textit{Call[ed] on all States to work together urgently to bring to justice the perpetrators,
organizers and sponsors of these terrorist attacks and stresses that those responsible for
aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will
be held accountable.}\textsuperscript{172}

In Resolution 1373, the Security Council specifically set out requirements of all
states to prevent their nationals or their territories being used to support terrorist
activities.\textsuperscript{173} The scope of prohibitions is such that the resolution could imply that
states may not allow their nationals or ships to transport terrorists or goods that are
intended for acts of terrorism.\textsuperscript{174}

If such a restriction on shipping is accepted as one imposed by the Security
Council under Chapter VII of the UN Charter and is thereby binding on all states,
then the question arises as to what steps may be taken in the event that a state
violates this particular obligation. Neither Resolution 1368 nor Resolution 1373
explicitly authorizes interdictions of foreign flagged vessels but both confirm the
existence of the right of self-defence. By contrast, other Security Council resolu-
tions addressing international terrorism do not refer to the right of self-defence and
include ambiguous language as to whether or not interdictions are permissible.\textsuperscript{175}

When a vessel is known to be violating Resolution 1373, Heintschel von Heinegg
suggests that interdicting the vessel on the high seas would be permissible without
the consent of the flag state, as ‘requiring such notice would jeopardize the
effectiveness of the international efforts against international terrorism in an

\textsuperscript{169} UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540, para 10.
\textsuperscript{170} Joyner, ‘The Proliferation Security Initiative’ 541. See also Byers, ‘Policing the High Seas’ 532.
\textsuperscript{171} Kaye, ‘The Proliferation Security Initiative’ 209.
\textsuperscript{172} UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.
\textsuperscript{173} UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373. See particularly, ibid paras 1, 2.
\textsuperscript{174} Heintschel von Heinegg, ‘The Legality of Maritime Interception/Interdiction Operations’ 261.
\textsuperscript{175} See, eg, UNSC Res 1617 (29 July 2005) UN Doc S/RES/1617, para 1(c); UNSC Res 1618 (4
1624, preamble and para 2; UNSC Res 1735 (22 December 2006) UN Doc S/RES/1735, preamble.
intolerable way’. Equally, when there are suspicions of a vessel’s violation, interdiction on the high seas may be permissible because such control measures ‘merely serve the purpose of countering international terrorism as effectively as necessary’.

Requiring the effective enforcement of Security Council resolutions for matters of international peace and security is certainly desirable and makes sense from a policy perspective. It would seem, however, that more is needed as a legal matter to establish a basis for lawful interdictions on the high seas. It could be argued that the agreement necessary to allow interdictions on the high seas is derived from the agreement to be bound by Security Council resolutions, and if the Security Council has prohibited certain activities then a flag state has no choice but to agree to a boarding to police those activities. The difficulty with this argument is that there has traditionally been so much emphasis on the importance of flag state consent for interdictions of vessels. It is therefore imaginable that a state would argue that a requirement of interdiction would need to be clearly stated in the resolution—as has happened (relatively clearly) in the context of the enforcement of embargos—rather than being implied from the text. The Security Council’s practice indicates that if flag state authority on the high seas is to be abrogated then the authority to do so must be unambiguous. The invocation of the right of self-defence may be enough in this regard as an alternative mechanism to reliance on Articles 39 and 41 of the UN Charter.

(4) Conclusion

This discussion demonstrates that there are limited instances in which the laws relating to the use of force are engaged for modern maritime security threats. Those most closely implicated are maritime terrorism and the proliferation of WMD. Careful consideration must be accorded to the conduct concerned in order to establish whether the laws on the use of force, and especially the right of self-defence, are the relevant parameters for measuring responses to maritime security threats. It seems most likely that states will be dealing with potential violations of the principle of non-intervention or threats of force (rather than armed attacks) and so the lawful response must be framed in terms of proportionate counter-measures rather than self-defence. Alternatively, the matter may more properly be seen as a question of lawful policing activities and so issues relating to law enforcement arise.

Responsibility rests with the UN Security Council to take the necessary steps to respond to maritime security threats. The power to do so clearly exists, given that what constitutes a ‘threat to the peace’ under Article 39 has been given an increasingly broad interpretation and that the Security Council has already taken

176 See, eg, UNSC Res 1617 (29 July 2005) UN Doc S/RES/1617, para 1(c); 262.
178 UN Charter art 25.
some steps to allow for interdictions at sea. There has been resistance within the Council to permit wide-ranging interdictions, which would seem to be drawn not only from political preference but adherence to the view that the freedom of navigation must be upheld to the greatest extent possible. The latter perspective was palpable in the adoption of Resolution 1816 dealing with piracy off Somalia. This situation would therefore be one where it would be helpful, for the purposes of improving responses to maritime security threats, for the members of the Council to evince a greater appreciation of the inclusive interest in maritime security and potentially allow for a smaller intrusion on the freedom of navigation when to do so would provide a greater benefit for order on the oceans.

D. Law of Naval Warfare

Once states have lawfully resorted to the use of force then the means and manner of using force are at issue. For the use of force at sea, the law of naval warfare becomes relevant.\(^{180}\) The law of naval warfare is primarily derived from customary international law, as a reflection of the changing nature of armed combat throughout the twentieth century and to the present day.\(^{181}\) While the international rules governing the conduct of naval warfare were prescribed by a series of conventions adopted in 1907,\(^ {182}\) as well as the London Declaration of 1909,\(^ {183}\) not all of these treaties were widely accepted,\(^ {184}\) and further efforts prior to World War II to address different aspects of naval warfare were mostly unsuccessful.\(^ {185}\) After World

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\(^{180}\) ‘The parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used.’ San Remo Manual para 1. Any clash between the naval forces of two or more states then falls within this definition. Doswald-Beck, *San Remo Manual* 73.


\(^{184}\) Roach notes that only the convention on automatic submarine contact mines and portions of Hague Conventions XI and XIII, relating to capture and neutral powers, respectively, remain relevant today. Roach, ‘The Law of Naval Warfare’ 65.

War II, the second Geneva Convention provided for the protection of wounded, sick, and shipwrecked.\textsuperscript{186}

Currently, the fundamental rules concerning the conduct of armed conflict set out in the 1949 Geneva Conventions,\textsuperscript{187} as well as Additional Protocol I,\textsuperscript{188} apply to naval warfare in additional to land warfare.\textsuperscript{189} The most detailed and current rules for the conduct of naval warfare are to be found in the San Remo Manual,\textsuperscript{190} as well as national military manuals of various states, including the US Commander’s Handbook on the Law of Naval Operations,\textsuperscript{191} and the German Handbook of International Humanitarian Law.\textsuperscript{192} The San Remo Manual was prepared under the auspices of the International Institute of Humanitarian Law by a group of legal and naval experts as a ‘contemporary restatement of international law applicable to armed conflicts at sea’.\textsuperscript{193} Green has commented: ‘Although it is an unofficial statement, it is generally regarded as expressive of accepted customary law’.\textsuperscript{194}

This section does not seek to reproduce in any detail the rules contained therein,\textsuperscript{195} but instead highlights the aspects of the law of naval warfare that are most relevant to maritime security and are most likely to overlap with actions taken during times of peace. The first section outlines the general principles of the law of naval warfare. The focus then shifts in subsequent sections to specific issues relating to the protection of merchant vessels, blockades, and exclusion zones.

\textsuperscript{186} Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) 75 UNTS 85.

\textsuperscript{187} The three other treaties adopted at the same time as the Second Geneva Convention were: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31; Geneva Convention (III) relative to the Treatment of Prisoners of War (1949) 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287.

\textsuperscript{188} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3 [‘Additional Protocol 1’].

\textsuperscript{189} Roach notes that there is no treaty provision rendering the law of war on land applicable to naval warfare but the San Remo Manual and various national military manuals accept that some of the fundamental principles should be applied at sea. Roach, ‘The Law of Naval Warfare’ 69. See also Leslie C. Green, \textit{The Contemporary Law of Armed Conflict} (3rd edn, Manchester University Press, Manchester 2008) 188.

\textsuperscript{190} Doswald-Beck, \textit{San Remo Manual}.


\textsuperscript{192} Dieter Fleck (ed), \textit{The Handbook of Humanitarian Law in Armed Conflicts} (2nd edn, OUP, Oxford 2008).


\textsuperscript{194} Green, \textit{The Contemporary Law of Armed Conflict} 45.

\textsuperscript{195} Excluded from the discussion in this chapter are principles relating to the use of particular weapons at sea, including mine and submarine warfare; hospital ships; and protected persons at sea. For further information on these subjects, see, eg, Wolff Heintschel von Heinegg, ‘The Law of Armed Conflict at Sea’ in Dieter Fleck (ed), \textit{The Handbook of International Humanitarian Law} (2nd edn, OUP, Oxford 2008) 475.
(1) General principles

Of critical importance within the law of naval warfare is the law of neutrality. This law in the maritime context governs the rights and duties of third states using ocean areas under the sovereignty or jurisdiction of warring states, as well as the rights and duties of belligerents vis-à-vis ships flagged to neutral states.¹⁹⁶ The San Remo Manual defines ‘neutrals’ as ‘any State not party to the conflict’.¹⁹⁷ Neutral states are not to participate in the conflict and are required to maintain impartiality between the belligerents, as they otherwise risk losing their entitlement not to be adversely affected by the conflict.¹⁹⁸ Special protections are afforded to the neutral state’s maritime zones as well as to vessels flagged to those states.

The recognition of a broad range of maritime zones has reduced the ocean space available for the lawful conduct of naval warfare. In this regard, the intersection of UNCLOS with the law of naval warfare may clearly be seen. Belligerent naval operations are traditionally prohibited in areas under the sovereignty of a neutral coastal state,¹⁹⁹ and it has been suggested that the due regard requirement for coastal state interests in the EEZ and on the continental shelf must also be observed by belligerents.²⁰⁰ One of the essential principles here is that neutral shipping is not to be denied the freedom of navigation on the high seas.²⁰¹ Rights of innocent passage, transit passage, and archipelagic sea lanes passage are all maintained for neutral shipping, as well as for belligerent vessels through neutral waters.²⁰² However, one modification is that warships are not to remain in neutral ports or territorial seas for more than 24 hours.²⁰³ Navigational rights are otherwise tempered by the belligerent’s rights in the conduct of its operations. The navigational

¹⁹⁶ The traditional rules relating to belligerent naval operations and neutrality are derived from the 1907 Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War. There has been some debate about the ongoing validity of the law of neutrality but this seems unwarranted in light of its ongoing invocation during armed conflicts post-World War II, as well as articulation of neutral rights and duties in national military manuals and international rules, such as the San Remo Manual and the ILA Helsinki Principles on the Law of Maritime Neutrality. International Law Association, ‘Final Report of the Committee on Maritime Neutrality’, Report of the 68th Conference, Taipei (ILA London, 1998) 496 [‘Helsinki Principles’].

¹⁹⁷ San Remo Manual para 13d.


¹⁹⁹ 1907 Hague Convention XIII art 1; San Remo Manual para 15.


²⁰² San Remo Manual paras 20, 23, 26, 27, 31, and 32. 1907 Hague Convention XIII established a series of rules regulating the rights of belligerent vessels in the territorial sea and ports of neutral states, as well as neutral duties in relation to belligerent warships in the same areas.

rights of neutral shipping are thus subjected to search and visit, as well as the operation of blockades and exclusion zones, as will be discussed in more detail below.

As with other aspects of the law of armed conflict, the principles of military necessity and proportionality are fundamental in the operation of the laws of naval warfare.\textsuperscript{204} Other restrictions on the means and methods of naval warfare may be drawn from basic principles of international humanitarian law set out in Additional Protocol I to the Geneva Conventions, which have been included in the San Remo Manual. In particular, the choice of means and methods of warfare is not unlimited,\textsuperscript{205} and there are prohibitions on the employment of weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,\textsuperscript{206} or which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment.\textsuperscript{207} Civilians may not be targeted or subjected to indiscriminate attacks, and belligerents must distinguish between civilian and military objectives so as to direct their operations against military objectives only.\textsuperscript{208} These rules have particular relevance for naval warfare in relation to the type of weapons systems used and how they are used, as well as emphasizing deployment against military targets.\textsuperscript{209}

The laws regulating the means and methods of naval warfare are applicable when states are acting either in self-defence or in accordance with Security Council authorization under Chapter VII. However, the rights and duties of neutrals do not apply where the Security Council has identified an aggressor to a conflict and required all states to take certain actions under Chapter VII of the UN Charter.\textsuperscript{210} The San Remo Manual affirms that the law of neutrality may not justify conduct that is incompatible with obligations under the UN Charter or with decisions of the

\textsuperscript{204} San Remo Manual para 4. See also O’Connell, \textit{The International Law of the Sea} vol II, 1105–6 (discussing military necessity).


\textsuperscript{206} San Remo Manual para 42.

\textsuperscript{207} Additional Protocol I art 35. The San Remo Manual specifically addresses environmental concerns and provides: ‘Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.’ San Remo Manual para 44. See also San Remo Manual para 11; Commander’s Handbook para 8.4.

\textsuperscript{208} Additional Protocol I arts 48 and 52. Military objectives are defined as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’. Additional Protocol I art 52(2). This requirement is made specifically applicable to sea warfare in arts 49(3) and 57(4). See also San Remo Manual paras 39 and 41; Heintschel von Heinegg, ‘The Law of Armed Conflict’ 490–4. Heintschel von Heinegg notes some controversy over the applicability of provisions of Additional Protocol I to naval warfare, but accepts that the relevant principles are applicable as a matter of customary law. Ibid 491–3.

\textsuperscript{209} O’Connell, \textit{The International Law of the Sea} vol II, 1130–1.

\textsuperscript{210} Heintschel von Heinegg, ‘Current Legal Issues’ 224. See also Commander’s Handbook para 7.2.1; Bothe, ‘The Law of Neutrality’ 575.
Actions of the Security Council to promote maritime security may therefore prove critical in determining how the law of naval warfare may apply in any one situation.

(2) Treatment of merchant vessels

In addition to military combat, a core feature of the conduct of naval warfare is limiting the maritime commerce of the opposing belligerents. Non-participants in the conflict then have their own interests in preserving navigational rights to maintain ongoing trade with other non-participants or with the belligerents. The freedom of navigation has been modified to account for belligerent strategies engaged in economic warfare as well as neutral state interests in conducting trade in the face of the ongoing conflict.

As a general matter, enemy and neutral merchant vessels are exempted from attack during a time of armed conflict.212 Enemy merchant vessels may be attacked if they are military objectives, meaning ‘by their nature, location, purpose or use [they] make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’.213 A belligerent commander may subject enemy merchant ships to visit and search, which may result in the seizure of the vessel as prize,214 and possibly its destruction.215 Consistent with these principles, the United States asserted a belligerent right of boarding, seizing, disabling or destroying maritime vessels considered a threat to coalition naval forces at the outset of the 2003 war in Iraq.216

Enemy vessels, merchant or otherwise, may be captured when outside neutral waters.217 Enemy ships exempted from capture have typically included hospital ships, coastal fishing boats, and ships in ‘petty local navigation’.218 The San Remo Manual also exempts the following enemy vessels from seizure: vessels granted safe conduct by the belligerents; vessels transporting cultural property or civilian

211 San Remo Manual para 9. See also Helsinki Principles para 1.2.
214 ‘Prize’ is a technical term applicable to those ships or goods which may legitimately be seized and condemned to the use of the captor because they are intended for or may be used on behalf of the adverse party’s war effort.’ Green, The Contemporary Law of Armed Conflict 192.
215 Ibid 163; O’Connell, The International Law of the Sea vol II, 1114–16. For the treatment of crews and passengers on captured vessels, see ibid 1117.
216 Valencia, The Proliferation Security Initiative 34.
218 O’Connell, The International Law of the Sea 1119–24. Articles 3 and 4 of Hague Convention XI exempted from capture vessels used exclusively for fishing along the coast or small boats employed in local trade, as well as vessels charged with religious, scientific or philanthropic missions.
passengers; vessels engaged in religious, non-military scientific or philanthropic missions; pollution-response vessels; surrendered vessels; life rafts and life boats.219

The laws of neutrality are intended to provide protection to non-participants in an armed conflict and allow for their continued peaceful use of the oceans. Belligerents are obliged to exercise due regard to the uses of the sea by neutral states.220 There are limited circumstances under which neutral vessels may become subject to attack or capture, including if they make an effective contribution to the enemy’s military action.221 A warship may exercise the right of visit and search of a merchant vessel flying a neutral flag if it is suspected that the vessel in fact belongs to the enemy, or if the vessel is outside neutral waters and subject to capture.222 The right to search and visit neutral merchant vessels is premised on the need to prevent the possible passage of military contraband to the enemy.223 Given that interference with neutral shipping may constitute a use of force, the extent of interference allowed depends on the defensive necessity of the belligerent.224

In response to the belligerent right to visit, search and possibly seize and destroy merchant vessels, the doctrine of convoy is intended to make neutral merchant ships immune from such visits when those ships travel under convoy of accompanying neutral warships.225 A belligerent may still request the neutral warship to specify the type and destination of the cargo carried under convoy.226 Both the belligerent right of visit and search, as well as the doctrine of convoy, were acknowledged by the United States, Italy, the Netherlands, France, and the Soviet Union during the Iran–Iraq Tanker War.227 The use of convoys during the Iran–Iraq conflict has led to the acceptance of the principle that a neutral warship may lawfully escort merchant vessels flagged to another neutral state.228

A complicating factor with modern shipping practice is that the use of flags of convenience might result in vessels taking cover as neutral vessels even though the
owners or operators of the vessel are nationals of the enemy state. Flying the flag of a neutral state is only *prima facie* evidence of neutral nationality.\(^{229}\) An enemy merchant vessel may feign civilian or neutral status,\(^{230}\) and as such, belligerents may be more inclined to interfere with neutral shipping in order to verify the nationality of merchant vessels. Even if a vessel is lawfully flagged to a neutral state, a flag of convenience will not provide complete protection during times of armed conflict. Under the laws of prize, a court will look to the real ownership of a vessel rather than any ostensible nationality intended to grant neutral status.\(^ {231}\) Registration, ownership, charter, or other criteria may be used to determine enemy character.\(^{232}\) It may seem unfortunate that this established practice in prize courts has not been extended to law enforcement operations in times of peace. There has instead been resistance to any thorough examination of the ‘genuine link’ of a vessel to the state in which it is registered.

Neutral shipping may continue between neutral states, and trade with belligerents is also permissible provided the neutral ships do not trade in contraband. Contraband is defined as ‘goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict’.\(^{233}\) A distinction had previously been drawn between absolute contraband (goods essential for war) and conditional contraband (goods destined for the administration or the armed forces of the enemy).\(^{234}\) A critical difficulty has been determining what goods or materials fit within this category and allows for virtually anything to be considered as useful for military purposes.\(^{235}\) A listing of exempt goods or of contraband may be drawn up by the belligerents.\(^{236}\) To prevent the broad interpretation of contraband applying to virtually all goods shipped by neutrals, a system of navicerts was developed to allow cargos free passage through contraband control and thereby minimize interference with neutral shipping.\(^{237}\) Contraband goods are liable for capture if their destination is territory belonging to or occupied by the enemy.\(^{238}\)

While the right of search and visit, as well as the confiscation of contraband, may hold some appeal to navies that are seeking to respond to the threat posed by

\(^{229}\) San Remo Manual para 113.
\(^{230}\) San Remo Manual para 109 (only prohibiting military and auxiliary vessels from doing so).
\(^{231}\) O’Connell, *The International Law of the Sea* vol II, 1113.
\(^{232}\) San Remo Manual para 117.
\(^{233}\) San Remo Manual para 148. See also Van Dyke, ‘The Disappearing Right’ 114 (using the definition of contraband as ‘those goods or materials, such as ammunition, that are directly related to warfighting, or that are war-sustaining, such as oil, electronic components, and industrial raw materials’); Helsinki Principles para 5.2.3 (defining contraband as ‘goods ultimately destined to the enemy of a belligerent which are designed for the use of war fighting and other goods useful for the war effort of the enemy’).
\(^{235}\) Van Dyke, ‘The Disappearing Right’ 114.
\(^{236}\) See, eg, Commander’s Handbook para 7.4.1.
\(^{237}\) O’Connell, *The International Law of the Sea* vol II, 1148. See also San Remo Manual para 124; Commander’s Handbook para 7.4.2; Helsinki Principles para 5.2.6; Bothe, ‘The Law of Neutrality’ 596.
\(^{238}\) Commander’s Handbook para 7.4.1.2.
transnational crime, terrorist activity, and the proliferation of WMD, it must be recalled that these rules are applicable during times of armed conflict and are therefore not usually available to address modern maritime security threats. One counter-argument here is that terrorists may be viewed as insurgents who are seeking independence from a particular state. Insurgents may conduct hostilities lawfully against the constituent government, even though the group does not have ‘warships’, which are usually defined as belonging to a state. The belligerent state may seek to visit and search merchant vessels with cargo that is ‘ultimately destined’ for the insurgents. Although the laws of naval warfare refer to cargo going to ‘territory under enemy control’, if the insurgents do not in fact control territory, a purposive interpretation, as suggested by Guilfoyle, would still allow for contraband enforcement if it is ascertainable that the shipment is destined for the insurgents. From this perspective, there is some utility in establishing, or accepting, that terrorists constitute insurgents in terms of creating lawful bases for interdictions and confiscation of weapons and other supplies.

(3) Blockades

Naval blockades, as a mode of economic warfare, have been accepted generally as a legitimate military tactic. Blockades are intended to isolate the enemy by excluding all maritime commerce from its ports—not only depriving the enemy of its supply of goods, weapons, and war-related material that would support and further the war effort, but also causing broader economic damage. As such, blockades allow for greater interference with merchant shipping, both neutral and enemy, than may have otherwise been permissible. Traditionally, blockades would involve a ‘close-in, static line of warships cordonning off the ports or coasts of an enemy’. The development of modern naval warfare, including the use of

240 Natalino Ronzitti, ‘The Law of the Sea and the Use of Force Against Terrorist Activities’ in Natalino Ronzitti (ed), Maritime Terrorism and International Law (Martinus Nijhoff, Dordrecht 1990) 1, 4 (dismissing the interpretative argument about the ownership of warships as ‘too formalistic to be accepted’).
242 Guilfoyle, ‘The Proliferation Security Initiative’ 746. Following this argument, Israel’s interception of the MV Mavi Marmara on 31 May 2010 could potentially be justified as a lawful interception of contraband to insurgents, provided it is accepted that the laws of armed conflict apply on a prima facie basis; Hamas are regarded as ‘insurgents’ rather than terrorists; and the shipment only contained contraband goods.
244 O’Connell notes that in denying ingress and egress to and from ports, the practical effect of a blockade was to override the law of contraband. O’Connell, The International Law of the Sea vol II, 1150.
245 Leckow, ‘The Iran-Iraq Conflict’ 631.
submarines, the greater range of missiles, and the use of mines caused a shift to 'long-distance' blockades.247

One of the most notorious blockades was the so-called ‘quarantine’ of Cuba by the United States. In 1962, the US President sought to prevent Soviet deployment of offensive nuclear weapons in Cuba and announced the interdiction of the delivery of offensive weapons and associated material in two overlapping zones extending 500 miles from Havana and from the eastern end of Cuba. The proclamation declared:

Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment, and stores and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subjected to being taken into custody. Any vessel or craft which is believed en route to Cuba and may be carrying prohibited material or may itself constitute such material shall, wherever possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails or refuses to obey such directions. All vessels or craft taken into custody shall be sent into a port of the United States for appropriate disposition.

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.248

There has been considerable debate as to the legal basis of this blockade, particularly whether it could be based on a recommendation of the Organization of American States or whether it was a lawful act of self-defence.249 The legality of the blockade depends on the acceptance of either of these arguments. Notable for current purposes is that the characteristics of the blockade drew on traditional wartime blockades and the law of contraband, and have ongoing relevance: formal notification; a geographically defined area; embargo of certain (not all) items; enforcement through visit, search, and diversion rather than destruction.250

The San Remo Manual has adopted the requirements of formal notification, which is to include details of the commencement, duration, location, and extent of the blockade, and allows for enforcement through a combination of legitimate methods and means of warfare.251 The blockade must be effective; applied

247 Robertson, ‘Interdiction of Iraqi Maritime Commerce’ 290. See also Morabito, ‘Maritime Interdiction’ 304. Their continued use is anticipated, as seen in the San Remo Manual para 96.
250 See Robertson, ‘Interdiction’ 292; Morabito, ‘Maritime Interdiction’ 305.
251 San Remo Manual paras 93, 94 and 97. These criteria are replicated in the Commander’s Handbook para 7.7.2. See also Helsinki Principles para 5.2.10.
impartially to vessels of all states; and not bar access to the ports and coasts of neutral states. Limitations on the use of blockades include prohibiting their use if the sole purpose is to starve the civilian population and permitting the passage of medical supplies. The criteria for establishing blockades are intended to balance the belligerent’s efforts for controlling sea areas with the right of neutral states to continue trading with as little interference from belligerents as possible.

Blockades are now authorized by the UN Security Council as a tool of coercion, and most particularly as a means of enforcing sanctions regimes imposed under Chapter VII of the UN Charter. Following Iraq’s invasion of Kuwait in 1990, the United States authorized the interdiction of ships carrying products and commodities to and from Iraq and Kuwait before the Security Council adopted a resolution to that effect. While there has been discussion as to the legality of this action by the United States in terms of the over-riding authority of the Security Council, the announced interdiction was consistent with the post-World War II precedents of naval blockades. Blockades utilized outside of times of armed conflict or without Security Council authorization are otherwise viewed as violations of the prohibition on the use of force.

Currently challenging the parameters of the use of blockades is Israel’s blockade of the Gaza Strip. Israel initiated the blockade in 2007 when Hamas took power in Gaza. An initial question is whether the law of armed conflict is even applicable. If Hamas are considered as terrorists rather than insurgents, then Israel’s actions against vessels proceeding to Gaza must be gauged as law enforcement activities. As such, Israel’s actions in stopping and boarding vessels must be assessed against the right of coastal states to enforce laws in recognized maritime zones, as discussed in Chapter 3. A blockade would not be permissible in this context. Israel’s application and enforcement of a blockade could only be accepted as lawful if the law of armed conflict applies, and the criteria for establishing the blockade were met.

Blockades are undoubtedly a lawful tool for naval warfare, provided the various criteria for their use are met. What have been more controversial are instances when states have sought to use blockades in situations that were not considered to be

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252 San Remo Manual paras 95, 100 and 99, respectively.
254 Commander’s Handbook para 7.7.5.
260 This point is controversial and a full discussion is beyond the scope of this book.
261 See above nn 252–4 and accompanying text. Israel’s boarding of the *MV Mavi Marmara*, which was seeking to breach the blockade for delivery of humanitarian goods to Gaza, may be questioned as to whether the extent of force used was a proportionate response in the conduct of the boarding.
armed conflict, nor were they authorized by the Security Council. Instead, blockades are recognized under the Definition of Aggression as a violation of the prohibition on the use of force and consequently could not be considered as a lawful military use of the oceans. The availability of blockades as a tool to enhance maritime security is therefore limited.

(4) Security/exclusion zones

Exclusion zones are used during times of armed conflict or have been declared in the face of possible armed conflict. Fenrick has described exclusion zones as follows:

An exclusion zone, also referred to as a military area, barred area, war zone, or operational zone, is an area of water and superjacent air space in which a party to an armed conflict purports to exercise control and to which it denies access to ships and aircraft without permission. It thus interferes with the normal rights of passage and overflight of ships and aircraft of non-parties. Unauthorized ships or aircraft entering the zone do so at the risk of facing sanctions, often including being attacked by missiles, aircraft, submarines, or surface warships, or of running into minefields.

Japan first created such a zone for defensive purposes during the 1905 Russo-Japanese war, and there were subsequent proclamations of war zones during World War I and II. At the outbreak of World War II, the United States and other American countries issued the Declaration of Panama, whereby a zone was created 300 miles seaward from the coast in which belligerents were required to ‘refrain from committing hostile acts within a reasonable distance’ from the coast. However, it was recognized by the American states as well as the belligerents that such a zone would only be respected if there was mutual assent. Saudi Arabia also established a zone to protect neutral shipping in the Persian Gulf during the Iran–Iraq war in 1984.

A prominent example of a security zone being established during an armed conflict was in 1982 during the Falkland/Malvinas war. The United Kingdom first proclaimed a Maritime Exclusion Zone, extending 200 miles from the Islands in which any Argentine warships or naval auxiliaries would be regarded as hostile warships or naval auxiliaries.

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262 These zones are distinct to ‘defence bubbles’ or other warning zones that are established around warships or naval units. See Heintschel von Heinegg, ‘Current Legal Issues’ 213.

263 Military zones have been established by China, North Korea and South Korea, usually when hostilities were occurring or in the face of threats. See also Frederick C. Leiner, ‘Maritime Security Zones: Prohibited Yet Perpetuated’ (1983–1984) 24 Virginia JIL 967, 967.

264 Fenrick, ‘The Exclusion Zone’ 92.


267 Ibid 979.

268 Fenrick, ‘The Exclusion Zone’ 118.

269 For description of use of security zones during Falklands/Malvinas war, see Reuland, ‘Interference with Non-National Ships’ 1216.
and liable to attack.\textsuperscript{270} This zone was then converted to a Total Exclusion Zone, applying to all ships and aircrafts, both military and civil, operating in support of Argentina.\textsuperscript{271} This exclusion zone was different to a blockade as it did not seek to exclude shipping from enemy ports but affected the rights of neutral shipping in the area.\textsuperscript{272} In practice, Britain sought to apply the measures primarily against military craft and allowed enemy merchant ships to enter the zone with Britain’s consent.\textsuperscript{273} Unauthorized Argentinean vessels were compelled to leave the area, rather than being directly attacked.\textsuperscript{274}

The validity of the use of a ‘zone’ was undermined by the sinking of the Argentine warship, the \textit{Admiral Belgrano}, outside the declared 200 mile zone.\textsuperscript{275} Moreover, the purported entitlement of the United Kingdom to target all civil and military ships within the zone was problematic. The use of zones to permit the attack of any vessel found therein (‘free-fire’ zones) is unlawful.\textsuperscript{276} This use of zones by Iran and Iraq during the Tanker War, as well as Britain’s Total Exclusive Zone, has been soundly criticized.\textsuperscript{277}

As the use of exclusion zones during armed conflict has not been formally regulated under treaty, the San Remo Manual has sought to balance the competing interests in their use through the following requirements:

(a) the same body of law applies both inside and outside the zone;
(b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;
(c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
(d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:
    (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
    (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and

\textsuperscript{270} O’Connell, \textit{The International Law of the Sea} vol II, 1111.
\textsuperscript{271} Ibid. O’Connell further notes that the Total Exclusion Zone was changed to a 150-mile Protection Zone following the close of the hostilities, which applied in the same way as the Maritime Exclusion Zone.
\textsuperscript{272} See Robertson, ‘Interdiction of Iraqi Maritime Commerce’ n 37.
\textsuperscript{273} Leckow, ‘The Iran-Iraq Conflict’ 634.
\textsuperscript{274} Ibid.
\textsuperscript{275} See Politakis, ‘Waging War at Sea’ 141–7. Van Dyke has also noted that claiming a 200-mile zone at a point where some coastal states were seeking to establish 200-mile EEZs was concerning, as it associated security interests with the economic interests at stake. Van Dyke, ‘The Disappearing Right’ 116.
\textsuperscript{276} Heintschel von Heinegg, ‘Current Legal Issues’ 215. See also Commander’s Handbook para 7.9.
\textsuperscript{277} Heintschel von Heinegg, ‘Current Legal Issues’ 217; Leckow, ‘The Iran-Iraq Conflict’ 637–40 (assessing the Iran and Iraq exclusion zones).
(e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.\textsuperscript{278}

The interference with the freedom of navigation is evident. Nonetheless, these criteria are intended to prevent unreasonable interference with neutral commerce but also to improve protection of neutral shipping from collateral damage and incidental injury.\textsuperscript{279}

As discussed in Chapter 2, the controversy with exclusion zones is not only the parameters of their use during armed conflict as a question of the law of naval warfare, but also in relation to the purported use of such zones during times of peace. Some states have sought to utilize exclusion zones as a means of controlling navigation within a defined distance from their coast, but have usually been criticized by other states for doing so.\textsuperscript{280} Nonetheless, exclusion zones represent another example of where states have sought to rely on the laws of naval warfare to justify steps they consider desirable to enhance maritime security. These efforts reflect this ‘blurring’ between the law of naval warfare and peacetime uses of the oceans.

(5) Conclusion

This overview of some of the key principles of the law of naval warfare has highlighted two main areas. First, what rules are likely to be relevant when a maritime security threat is realized and leads to a situation of armed conflict, including when terrorists may be classed as insurgents, or when the Security Council authorizes an enforcement action. Second, it may also be seen that reliance on the law of naval warfare to improve maritime security, such as through the use of blockades, exclusion zones, or interdictions of contraband, still requires that a range of criteria are met for their lawful use, even if the question of whether there is an armed conflict or not could be put aside. The outstanding question, addressed below, is to what extent, if any, the law of naval warfare should be brought to bear in addressing maritime security.

E. Emerging Trends and Conclusion

The range of maritime security threats confronting states today raises complex legal issues, starting with the most fundamental question as to what law applies when seeking to respond to a particular threat. Law enforcement powers are

\textsuperscript{278} San Remo Manual para 106. See also Helsinki Principles para 3.3; Fenrick, ‘The Exclusion Zone’ 124–5 (proposing legal standards for belligerent use of exclusion zones).

\textsuperscript{279} See Commander’s Handbook para 7.9. See also Leckow, ‘The Iran-Iraq Conflict’ 635 (noting that exclusion zones can only be justified in limited circumstances so there is minimal inconvenience to neutral shipping).

predominantly at issue, but when states have sought to utilize additional tools (such as security zones or blockades), or exercise greater powers than is normally granted in particular maritime zones (most notably powers of interdiction), then recourse is made to the right of self-defence and the law of naval warfare. This approach may be justified because ‘in the present world of complex interdependencies . . . [s]trict adherence to the dichotomy between war and peace would be ineffective and counterproductive for establishing peace and security’.281 The so-called ‘war on terror’ following the September 11 attacks has both highlighted and contributed to the increasing obfuscation between law enforcement, Security Council action, the right of self-defence, and the law of naval warfare. The Obama Administration’s embrace of the notion of ‘hybrid warfare’ will no doubt perpetuate this difficulty.282

The increasing grey area between armed conflict and law enforcement activities may be seen in Heintschel von Heinegg’s assessment of the legality of maritime interdictions on the high seas in Operation Enduring Freedom.283 Operation Enduring Freedom entailed a variety of measures undertaken by naval forces in the waters off the Horn of Africa and around the Arab peninsula. By reference to Security Council Resolutions 1368 and 1373, which confirmed the inherent right of self-defence in their preambular paragraphs, Heintschel von Heinegg has argued that interdictions were permissible not only because of the need to implement the prohibitions set forth in the resolutions but also because of an entitlement of states to act in collective self-defence. Since the right of self-defence was involved, the criteria for operations were to be drawn from the law of naval warfare and the law of neutrality. Yet he considers that these bodies of law were applicable even though he also acknowledged that no international or internal armed conflict strictu sensu existed.284 Guilfoyle has also proposed that the applicable law is that of international armed conflict if the ‘war on terror’ is viewed as a continuing self-defensive conflict with al Qaeda (‘an armed band’).285 Yet international terrorism has more traditionally been viewed through the lens of law enforcement powers rather than as a question of armed conflict. It would seem that Security Council involvement was determinative here for state decision-making on what responses could lawfully be pursued.

The use of arguments based on self-defence to respond to international terrorism has been complicated by the focus in the Oil Platforms decision that any right to act


284 Ibid 260.

in self-defence is an objective assessment, rather than one taken from the view of the victim state.\textsuperscript{286} The United States had argued before the ICJ that account should be taken of a state’s contemporaneous assessment of the threat posed in assessing whether it had lawfully exercised its right of self-defence.\textsuperscript{287} The reality of policy making is such that a range of goals and priorities must be assessed and balanced, the connection of issues analysed, and account taken of the fact that the information available at the time may be ambivalent.\textsuperscript{288} A further element in this decision-making, in light of the ICJ’s judgment in \textit{Oil Platforms}, is that the right of self-defence is not one to be asserted precipitously.

If one accepts that there is a fundamental policy in international law that resort to the use of force is to be minimized to promote public order then it would seem that responses to maritime security threats should be tailored accordingly. This approach would mean that it is not appropriate for states to extend the law of naval warfare into times of peace and thereby justify interdictions, blockades, or security zones by reference to the maritime security threat faced. As discussed in this chapter, there are limits as to what is viewed as an armed attack justifying the right of self-defence and there is a preference for explicit Security Council authorization to allow for interferences with the freedom of navigation. Some responses to maritime security threats may be better characterized as lawful proportionate counter-measures.\textsuperscript{289} For maritime security there needs to be ‘acceptable methods of crisis management that fall short of actual hostilities.’\textsuperscript{290}

A preferable way forward is to reconsider the law enforcement powers of coastal states and port states to respond to maritime security threats posed by vessels in their waters. The existing powers may be understood as taking into account the shared interest in enhancing maritime security and interpreted accordingly. For example, as discussed in Chapter 3, while no explicit enforcement powers are accorded in UNCLOS to states bordering straits, such authority could be implied to provide greater authority to the prescriptive powers that are granted to the littoral states. It is also preferable to work towards greater opportunities for interdictions of foreign flagged vessels on the high seas in response to maritime security threats without seeking to extend or contort the right of self-defence. These opportunities should be recognized under treaties that do not excessively emphasize the exclusive authority of the flag state over its vessels. When the laborious process of treaty

\textsuperscript{286} The ICJ held that ‘the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”’. \textit{Oil Platforms}, 196 para 73.


\textsuperscript{288} See Kaye, ‘Adjudicating Self-Defense’ 155. See further ibid 161 (commenting on the range of judgments that must be made in response to a threat).

\textsuperscript{289} This middle ground is reflected in Jessup’s acknowledgement of a ‘state of intermediacy’: ‘[T]here may be developing a state of intermediacy between peace and war, characterized by a condition of hostility between opposing parties, arising from divisions too deep rooted to be capable of solution, but accompanied by an absence of intention or decision to go to war.’ Phillip Jessup, cited in W. Friedmann, \textit{The Changing Structure of International Law} (Stevens and Sons, London 1964) 271.

\textsuperscript{290} Morabito, ‘Maritime Interdiction’ 302 (referring to this need in the face of ‘proliferation of the sophisticated destructive technology available to all’ states).
negotiations hampers a need to respond promptly to a particular maritime security threat, explicit authorization from the Security Council could instead be sought.

It seems that any proposal to enhance maritime security will have its drawbacks and its opponents. An incremental change in perspective is proposed here in relation to law enforcement powers rather than relying on expansive interpretations of the law on the use of force and the law of armed conflict. The latter raises legal conundra that extend well beyond questions of maritime security. It should be recalled that issues of maritime security are not limited to the military interests of a state but extend to criminal, environmental, economic, and social concerns. The jurisdictional powers of states are critical in this regard and the ability to enforce relevant laws is what seems most likely to enhance maritime security. If so much was broadly recognized, then a better outcome for the maritime security of all states may thereby be achieved.

A. Introduction

In defending his position on the legality of hydrogen bomb tests on the high seas, McDougal asserted:

... the international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.¹

Though written in 1955 as part of a discourse on the validity of nuclear weapons tests at sea, this description of the law of the sea and its evolving nature remains pertinent today, especially when considering the current demands of maritime security.

McDougal’s view stands in the face of strong resistance to shift the balance of interests that was established when UNCLOS was adopted in 1982.² While such resistance is understandable, especially by those who were involved in crafting the legal regime enshrined in UNCLOS, it would surely not be the case that rigid adherence to the ‘package deal’ is essential and that the stasis of UNCLOS was

² This resistance is reflected in, for example, states’ comments when UN Security Council resolution 1816 was adopted to the effect that the resolution could not alter customary international law; the carefully tailored consent regime for boarding under the 2005 SUA Protocol; protests about compulsory pilotage in the Torres Strait, an international strait subject to transit passage; and asserting rights over intelligence gathering in another state’s EEZ.
fundamental almost 30 years later. This concept of the ‘package deal’ should not stand in the way of progress, but should only mean that there is a need for caution, and a preference for evolution over revolution. This concluding chapter draws together the diverse ways that international law now serves to promote, to varying degrees, maritime security and considers how the law of the sea might further evolve to better achieve maritime security.

The first part of this chapter brings together the range of laws that apply in relation to the different maritime security threats that were identified in the Introduction to this book. In doing so, it is possible to highlight the varying sources of international law on which law enforcement officials, naval officers, other government officials, shipping operators and other members of the maritime industry will draw in responding to or seeking to prevent these maritime security threats. This part concludes by highlighting what future maritime security threats may yet challenge existing legal structures. Secondly, this chapter will recall how military interests that largely pertain to national security remain a fundamental dimension to efforts to improve maritime security. In doing so, the analysis seeks to acknowledge that any understanding of maritime security and the law of the sea must account for these exclusive interests. The final part of the chapter examines how maritime security has influenced the law of the sea as a general matter, moving the analysis beyond identification of new or revised rules in response to particular concerns. It is argued that further incremental change in the law of the sea is warranted and is consistent with a common interest in enhancing maritime security.

B. Laws Relating to Maritime Security Threats

At the outset of this book, the meaning of ‘maritime security’ was considered and the following definition posited: ‘the protection of a state’s land and maritime territory, infrastructure, economy, environment and society from certain harmful acts occurring at sea’. The harmful acts considered were those identified by the UN Secretary-General in his 2008 report on the Oceans and the Law of the Sea,3 as these maritime security threats reflected those most commonly addressed as such by governments, by international organizations and in the academic literature. This part of the chapter organizes the various sources of international law that pertain to each of these maritime security threats and highlights some of the remaining gaps, inconsistencies, and ambiguities.

1) Piracy and armed robbery

Acts of piracy concern ‘illegal acts of violence or detention, or any act of depredation, committed for private ends’ by crew or passengers on one ship against another

3 UN Report of the Secretary-General, ‘Oceans and the Law of the Sea’ (10 March 2008) UN Doc A/63/63. As previously noted, the definition of maritime security was not revisited in the Secretary-General’s 2009 Report to the General Assembly.
ship in areas outside the sovereignty of a state, whereas armed robbery refers to the same acts but in maritime zones under the sovereignty of the coastal state. Piracy and armed robbery expose seafarers to personal physical harm, as well as disrupting navigation and causing financial loss to ship owners and insurance companies, and ultimately consumers and producers of the goods on board. International concern over piracy has been manifest in the collective responses to piracy off Somalia. Modern piracy has become increasingly sophisticated, with suspicions of links to terrorist groups arising, and the use of ‘phantom ships’ evolving.

There has been considerable academic commentary on the definition of piracy in order to understand its precise scope. The elements of piracy most commonly identified are those set out in Article 101 of UNCLOS: (a) illegal acts of violence, (b) on the high seas, (c) for private (typically financial) ends, and (d) between two vessels. The elements for armed robbery are the same, except that it does not occur on the high seas but within the territorial sea, archipelagic waters, or internal waters of a state.

When piratical acts occur within the territorial sea of a state, it falls to that coastal state to take the necessary steps to suppress these acts and enforce national laws prohibiting such conduct. Coastal states are obliged to alert shipping of any known danger to navigation within its waters, and arguably may be held responsible for a failure to protect international shipping.

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4 UNCSOL art 101(a) refers to: ‘any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State. . . .’

5 The IMO has referred to ‘armed robbery against ships’ as ‘any unlawful act of violence or detention, or threat thereof, other than an act of “piracy”, directed against a ship or against persons of property on board such ship, within a State’s jurisdiction over such offences’. IMO, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, IMO Resolution A.922 (22) (2001).


8 ‘Phantom ships’ involve pirates repainting, renaming and reregistering a hijacked vessel. This new certificate of registration is then used to acquire business from a trader or shipping agent and once the goods are loaded, the pirates sail to a different port and sell the cargo. Scott Davidson, ‘International Law and the Suppression of Maritime Violence’ in Richard Burchill, Nigel D. White and Justin Morris (eds), International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey (CUP, Cambridge 2005) 265, 269. See also William Langewiesche, The Outlaw Sea: Chaos and Crime on the World’s Oceans (Grant Books, London 2004) 46–83 (describing the case of the Alondra Rainbow).


10 UNCSOL art 24(2). See also Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4.

11 This suggestion has been made in the context of states bordering straits. See Tammy M. Sittnick, ‘State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take Additional Steps to Secure the Strait’ (2005) 14 Pacific Rim Law and Policy Journal 743.
Foreign warships or government vessels have no policing powers within the territorial sea or internal waters of another state, absent the coastal state’s consent. This lack of power is underlined by the limitations that inhere to the right of innocent passage.\textsuperscript{12} Foreign vessels are prohibited from conducting a range of military activities, as well as ‘any other activity not having a direct bearing on passage’.\textsuperscript{13} Moreover, the termination of the right of hot pursuit as soon as the pursued vessel enters the territorial sea of its own or a third state reinforces the lack of policing powers of other states in the territorial sea, even if pirates, the enemies of all human kind, are being pursued.\textsuperscript{14}

Despite concerns about the extent of piratical acts (armed robbery) occurring in areas under coastal state sovereignty, there has been little willingness to move away from a position that prioritizes the legal rights of the coastal state. So much has been evident in Indonesia and Malaysia’s responses to piracy in the Straits of Malacca and surrounding areas.\textsuperscript{15} The Security Council has authorized states to enter the territorial sea of Somalia in pursuit of pirates, but the Security Council resolutions were predicated on the consent of the transitional government of Somalia.\textsuperscript{16} Equally, the 2009 Code of Conduct,\textsuperscript{17} which was adopted in Djibouti, still requires coastal state consent for the continuation of hot pursuit\textsuperscript{18} and to respond to armed robbery.\textsuperscript{19} While the need for collective and cooperative action has thus been recognized through Security Council resolutions and the 2009 Code of Conduct, it is apparent that responses to armed robbery remain a matter of exclusive competence for the relevant coastal states.

One deviation from this position may be seen in relation to the willingness of states to share information about armed robbery and piracy. Recent multilateral agreements directed at addressing the problem of armed robbery and piracy in particular geographic regions have made information sharing a centerpiece of their efforts. ReCAAP,\textsuperscript{20} with its Information Sharing Centre in Singapore, and the 2009 Code of Conduct, which anticipates the establishment of three information exchange centers,\textsuperscript{21} highlight the need for concerned states to coordinate their responses when news or data concerning planned piracy operations or piratical attacks emerge. It is notable that there has been greater readiness to put information sharing mechanisms in place than to otherwise adjust rules concerning enforcement authority over armed robbery.

\textsuperscript{12} As clear from the definition of innocent passage in art 18 of UNCLOS.
\textsuperscript{13} UNCLOS art 19(2).
\textsuperscript{14} UNCLOS art 111(3).
\textsuperscript{15} As discussed in Chapter 3, Part D.
\textsuperscript{17} Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (29 January 2009), IMO Doc C 120/14 (3 April 2009) [‘2009 Code of Conduct’].
\textsuperscript{18} Ibid art 4(5).
\textsuperscript{19} Ibid art 5(2).
\textsuperscript{20} Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (2004) 2398 UNTS 199.
\textsuperscript{21} 2009 Code of Conduct art 8(1).
Outside the territorial sea and other waters subject to coastal state sovereignty, the situation is different. The right of states to respond to piracy is the most accepted basis of intervention against foreign flagged vessels on the high seas. The right of visit enables warships and other duly authorized vessels or aircraft to board a ship that is reasonably suspected of being engaged in piracy, and universal jurisdiction is allocated for the enforcement of prescriptions against piracy.

Suppressing piracy is so entrenched in the law of the sea that analogies to piracy have been drawn in an effort to secure greater law enforcement powers in relation to other maritime security threats, most notably in relation to terrorism, and, albeit to a lesser extent, in responding to environmental protestors at sea. These analogies have largely been resisted because of the preference accorded to upholding exclusive flag state control over vessels on the high seas and minimizing coastal state law enforcement powers in the EEZ. When considering the narrow definition of piracy coupled with the wide powers to respond to piracy, it may be seen that a small door may be opened to a large room for action. The greatest challenge lies in getting through the door in the first instance.

(2) Terrorism

While the definition of terrorism has never been free from controversy, the 1988 SUA Convention took an important step in identifying the following as offences, when an individual unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
(g) injures or kills any person, in connection with the commission or the attempted commission of any of the [above] offences.

22 UNCLOS art 110.
23 UNCLOS art 105.
24 See Chapter 4, Part B.
25 See Chapter 3, Part I.
In addition, the 2005 SUA Protocol provides that a maritime terrorist offence occurs when a person unlawfully and intentionally commits certain acts and the purpose of the act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act. The identified acts in this context include using against or on a ship or discharging from a ship any explosive, radioactive material, biological, chemical or nuclear weapon, or other hazardous or noxious substances, in a manner that causes or is likely to cause death or serious injury or damage; uses a ship in a manner that causes death or serious injury or damage, or threatens to do one of these acts. Finally, the transport of an offender with the intention to assist that person in evading criminal prosecution for a terrorist act (as defined under other counter-terrorism treaties) is also an act of maritime terrorism under the 2005 SUA Protocol. Persons also commit maritime terrorism offences when they attempt, participate, organize, or direct others, or contribute to the principal offences set forth in the 1988 SUA Convention or the 2005 SUA Protocol.

The risk of a terrorist attack against offshore installations has already been demonstrated with the attempting bombing of the Khawr al Amaya oil loading terminal in Iraq in 2004. This possibility had already been foreseen by states and was therefore addressed in a protocol to the 1988 SUA Convention. Under the Protocol to the 1988 SUA Convention, states may exercise jurisdiction over individuals who commit offences against fixed platforms, such as seizing or exercising control by force, acts of violence against a person on a fixed platform, destroying or damaging a fixed platform, placing a device or substance on the fixed platform that is likely to endanger its safety, and injuring or killing a person in connection with the commission of any such acts. The offences against fixed platforms over which states may exercise jurisdiction were also expanded in 2005.

There is now an extensive body of law available to respond to terrorist threats involving shipping, offshore installations and other maritime interests. Within ports, the ISPS Code provides a tool for states to assess the risk that a visiting ship may pose to a particular port and provide a means to allow for preventive measures against security threats. The critical gap here is that the ISPS Code applies to passenger and cargo ships of at least 500 gross registered tonnage, and so does not assist in identifying the risks posed by smaller vessels, especially as those craft have been used in terrorist attacks against vessels and ports so far. Moreover,
when a state identifies that a particular vessel bound by the ISPS Code does constitute a risk there is no additional authority under that regulation to arrest the vessel. States are not precluded from relying on other applicable sources of law, and national laws relevant to the operation of a port may come into play. Certainly if a ship is engaged in mining or bombing a port then the right of self-defence would likely arise.\(^{34}\) This right does not help when there is a suspicion of a vessel posing such a threat before the actual attack occurs or is imminent.

Further preventive tools available to protect ports from terrorism are available under the WCO Framework of Standards, as well as for states participating in the CSI. These mechanisms allow for greater knowledge about what is being shipped between states, and allows for the inspection of cargo considered to be high risk. The LRIT Regulation may also be used to track a particular vessel, and this information may then supplement other intelligence as to the intent and/or the cargo on board a vessel. Improvements for port security against terrorist attack may also be seen through the Revised Seafarers Identification Convention, which creates uniformity in the information available about persons engaged in international shipping who are entering a state’s territory. All of these threads of information improve the knowledge of a state as to who and what is being shipped where. The ability to gain intelligence about a vessel suspected of being engaged in terrorism is vital for a port or coastal state since inspections of vessels are more practical in port than at sea. While these legal rules have been put in place, there is still work to be done in implementing these new systems fully and globally. The need for cooperation among states remains even with these laws in place.

Even if a vessel does not call at port, a coastal state may have an interest in preventing the passage of a vessel suspected of terrorist activities through its territorial sea. If those activities are in violation of the right of innocent passage, the coastal state may then take the ‘necessary steps’ to ‘prevent’ that passage.\(^{35}\) Those steps are then in addition to the express law enforcement powers set out in Article 27 of UNCLOS. The national laws of coastal states, particularly since the adoption of Security Council Resolution 1373,\(^{36}\) may provide a state with authority to exercise criminal jurisdiction over a vessel if the terrorist act has occurred or is occurring while the vessel is in the territorial sea of the coastal state.\(^{37}\)

Two key responses outside the territorial sea of any state to enhance maritime security against the threat of terrorism have been the improved monitoring of vessels and permitting a right of visit against vessels reasonably suspected of having committed a terrorist offence. Consistent with maritime domain awareness policies, the use of AIS on vessels and, more importantly given its greater range, the implementation of the LRIT Regulation will provide states with means to track

\(^{34}\) The US attacks on Nicaraguan ports was characterized as an unlawful use of force by the ICJ in Nicaragua, but the posture of the case did not require the Court to determine if they were armed attacks giving Nicaragua a right to act in self-defence. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14 ['Nicaragua [1986]'] 118, para 227.

\(^{35}\) UNCLOS art 25(1).

\(^{36}\) This resolution required states to adopt laws criminalizing and otherwise regulating an array of terrorist activities. UNSC Res 1373 (28 September 2001) UN Doc S/RES/1371.

\(^{37}\) UNCLOS art 27(1) and art 27(5).
the voyage of particular vessels. Some states may take the view that intelligence gathering within the EEZ of a particular state may also enhance knowledge as to possible terrorist activity. The latter activity has proven controversial in practice because intelligence gathering in another state’s EEZ most commonly relates to garnering information for national defence purposes. If undertaken to improve law enforcement efforts against terrorists, this monitoring, when coupled with other sources of information, may boost the ability of states to assess when a vessel should be reasonably suspected of involvement in terrorist activity. The accrual of this information then facilitates decisions regarding the boarding and inspection of a vessel.

Under Article 110 of UNCLOS, the right of visit of a vessel suspected of terrorism is not permitted in the absence of the flag state’s consent. This position changes somewhat for states party to the 2005 SUA Protocol when those states consent in advance to ship-boarding under the terms of that treaty. The 2005 SUA Protocol does not create a right of visit for states parties by virtue of the agreement itself, but still requires a separate manifestation of flag state consent. Although this obligation is a weakness in the 2005 SUA Protocol, the establishment of a mechanism for seeking permission to board a ship and the identified parameters for such an operation will hopefully make consent more likely to be forthcoming compared to an ad hoc request for permission in the absence of such a detailed framework.

A more critical source of rights for intervention to respond to international terrorism concerns may come from the UN Security Council, which has set forth prescriptions for all states to prevent their nationals or their territories being used to support terrorist activities. The Security Council has expressly authorized maritime interdictions in some Chapter VII resolutions, most commonly in relation to the imposition of embargoes. While not explicitly sanctioning maritime interdictions to enforce the terms of its resolutions addressing international terrorism, Security Council Resolutions 1368 and 1373 of 2001 both recognized and reaffirmed the inherent right of self-defence in reference to the September 11 terrorist attacks. Ensuing interdictions of vessels searching for Osama bin Laden and al Qaeda members could then be understood as lawful pursuant to this right of self-defence. Almost 10 years after those events, it is less likely that a state could lawfully interdict a foreign flagged vessel outside the territorial sea on a reasonable suspicion of terrorism acting on the basis of the right of self-defence unless the threatened terrorist attack was imminent.

38 UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, paras 1 and 2. See also UNSC Res 1526 (30 January 2004) UN Doc S/RES/1526 and UNSC Res 1735 (22 December 2006) UN Doc S/RES/1735 (both requiring states to prevent the use of their vessels for shipment of arms and related material to certain individuals, groups and entities).

39 See discussion in Chapter 6, Part C(3)(a).

40 See further Chapter 6, Part C(3)(d).
(3) Trafficking in WMD

The UN Secretary-General identified the illicit trafficking of arms and WMD as a major maritime security threat. This precise activity is complicated by the fact that WMD and its related material extend to ‘dual-use’ items and it may not always be clear to what use certain material will be put. Whether trafficking of arms is lawful or not may also be difficult to discern, as the ultimate recipient of the shipment may be determinative in this regard. For example, the shipment of Scud missiles aboard the *M/V So San* had to be allowed following its interdiction since there was no prohibition on Yemen taking delivery of such weapons from North Korea.\(^\text{41}\) Israel, on the other hand, considered that it acted consistently with the right of self-defence in interdicting the *Karin-A*, which was alleged to be carrying weapons destined for the Palestinian Authority.\(^\text{42}\) It is the illicit trafficking of WMD and related material, rather than the shipment of conventional arms,\(^\text{43}\) that has prompted the most legal developments to improve maritime security.

As a general matter, the proliferation of WMD is subject to a complex legal and political regime.\(^\text{44}\) The legal avenues available to respond to illicit trafficking in WMD at sea are similar to those available to respond to maritime terrorism. The linkages reflect the fact that the possible acquisition and use of WMD and related material by terrorists has been a particular cause for concern. Thus, the ISPS Code, the WCO Framework of Standards, the LRIT Regulation, and the Revised Seafarers Identification Convention all support state efforts to assess what is being shipped where and by whom.

Responding to the illicit trafficking in WMD and related materials through the territorial sea of a state raises questions as to the characterization of innocent passage and the law enforcement powers of coastal states. These issues have been assessed by commentators in response to the PSI stipulation that participants will stop and search vessels in their territorial sea.\(^\text{45}\) While not free from controversy, there is an arguable basis that the illicit trafficking of WMD and related material through the territorial sea of a state is not consistent with the right of innocent passage because that activity is inherently prejudicial to the peace, good order or security of the coastal state, contrary to article 19(1) under UNCLOS, or, depending on the intelligence available, may be


\(^{42}\) Ibid 533.

\(^{43}\) There is no global treaty specifically regulating trafficking of small arms by sea. There are however treaties addressing small arms manufacturing and trafficking more generally. See UN Report of the Secretary-General, ‘Oceans and the Law of the Sea’ (10 March 2008) UN Doc A/63/63, para 75.


\(^{45}\) See discussion in Chapter 4, Part F(3)(a)(ii).
viewed as a threat of force, contrary to article 19(2) under UNCLOS. Enforcement then raises issues as discussed above in relation to terrorism.

The illicit trafficking of WMD and related materials beyond the territorial sea may fall within the terms of the 2005 SUA Protocol, if intended for use in a terrorist offence, and thereby allow for the boarding, inspection, and arrest of a vessel. Interdictions against foreign flagged vessels reasonably suspected of illicit trafficking of WMD and related material is not otherwise permitted on the high seas. Although the Security Council debated whether to accord such authority to states, it was not ultimately granted in Resolution 1540.46

Reliance on the right of self-defence has been asserted as a basis to interdict vessels suspected of shipping WMD and related material to terrorists.47 However, depending on this right would be questionable in the absence of information that the WMD were about to be used in an armed attack and intervention was thus allowed as an anticipatory right of self-defence. The current legal framework does not allow for preventive measures against the proliferation of WMD and related measures in the absence of Security Council authorization or flag state consent. Participants in the PSI have not gone so far as to assert that a right of visit exists against foreign flagged vessels on the high seas, despite concerns that this authority was sought as a development of customary international law.48 Such a customary law right cannot yet be said to exist. This complete reliance on flag state control may rightly be considered as undesirable in efforts to establish an effective body of international law to promote maritime security.

The United States has instead concluded a web of bilateral ship-boarding agreements with states holding the largest registries so as to provide a treaty basis for the right of visit of vessels reasonably suspected of being engaged in illicit trafficking of WMD and related material.49 As bilateral treaties, the extent any third state could rely on the principles contained therein is of course restricted.50 In the absence of any customary international law right of interdiction or Security Council authorization currently in place, these bilateral agreements may be considered as the clearest example of what legal action could be taken in the future to respond to the threat of illicit WMD trafficking.

It should finally be noted that in addressing illicit trafficking of WMD at sea, one barrier to action is that vessels carrying WMD and related material may well be

46 See Chapter 6, Part C(3)(c).
49 See Chapter 4, Part E(2).
50 This is the position under the principle of pacta tertii. However, there is some scope for third states gaining rights under the treaties with Liberia, Panama, Mongolia and the Marshall Islands. See Chapter 4, Part E(2)(c).
subject to sovereign immunity. This immunity applies to vessels in port as well as at sea. Sovereign immunity may be over-ridden by a decision of the UN Security Council. The Security Council has not taken such a step thus far, even in the face of the possible import and export of WMD and related materials to and from North Korea. The Security Council instead called upon states to inspect vessels on the high seas ‘with the consent of the flag State’ if there were reasonable grounds to believe that the vessel was carrying prohibited cargo. If the flag state did not consent, then it was required to direct the vessel to proceed to an appropriate and convenient port for inspection by local authorities. As the sovereign immunity of warships and other government vessels on non-commercial service is routinely upheld in the formulation of new agreements addressing maritime security, it would seem Security Council action under Chapter VII would be the only way to overcome this legal limitation. Whether the permanent members of the Security Council would ever be willing to take this step remains open to doubt.

(4) Drug trafficking

The illicit trafficking of narcotic drugs and psychotropic substances has been recognized as a maritime security threat given the prevalent use of shipping for the transportation of drugs from their site of production to place of sale. Concerns about drug trafficking have escalated in recent years as the operations have grown in size, complexity, and organization, and because the illicit trade in drugs is reportedly being used as a revenue-raising enterprise for terrorist organizations.

The legal authority of the coastal state to prescribe and enforce laws against drug trafficking in areas under its sovereignty is beyond doubt. A coastal state may exercise criminal jurisdiction on board a foreign ship ‘if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances’. Either receiving or making delivery of drugs is likely to constitute a violation of a coastal state’s customs laws and thereby render the passage of the vessel non-innocent. An infringement of customs laws further warrants coastal states to exercise the necessary control in its contiguous zone to prevent infringement of those laws as well as punish infringement that occurred within the coastal state’s territory or territorial sea.

51 UNCLOS arts 32, 95, and 96.
52 Under art 103 of the UN Charter, obligations under the Charter, which includes the decisions of the Security Council that are binding by virtue of art 25, prevail over other international obligations.
54 Ibid para 13.
55 UN Report of the Secretary-General, ‘Oceans and the Law of the Sea’ (10 March 2008) UN Doc A/63/63, para 82 (referring to ‘approximately seventy per cent of the total quantity of drugs seized is confiscated either during or after transportation by sea’).
57 UNCLOS art 27(1)(d).
58 UNCLOS art 19(2)(g).
59 UNCLOS art 33.
The clear authority of the coastal state over drug trafficking in waters subject to its sovereignty is important for addressing this maritime security threat, particularly if the coastal state concerned is the destination point of the drugs and the negative consequences of the drug trade and drug consumption are experienced within that state. The difficulty for states seeking to address this maritime security threat is that not all coastal states have the resources or the political will to suppress illicit drug trafficking in their waters. The more sophisticated drug trafficking operations are likely to be aware of these limitations as well as the legal restrictions preventing a state from exercising policing powers in the territorial sea of another state, and they will plan their journeys accordingly.

The shared interest in combating the international drug trade has resulted in some willingness among coastal states to authorize other states to continue hot pursuits into their territorial sea, or to permit them to undertake other law enforcement activities (apart from random patrols). The 2003 Caribbean Agreement has been highlighted in this regard.60 In addition, states have entered into ‘shiprider’ agreements whereby law enforcement officials of one state embarked on the vessel of another state grant permission to the latter state’s officials to conduct law enforcement activities in the former state’s waters when necessary. These encroachments on coastal state sovereignty have only been accepted by some states when sufficient account has been taken of their ongoing sovereign rights in the areas in question. The 2003 Caribbean Agreement stands as a useful multilateral precedent for further developments in this regard.

Outside the territorial sea, the 1988 Vienna Convention allows for the interdiction of a ship suspected of illicit trafficking by a state other than the flag state.61 Although there is no general grant of authority for the right to visit foreign vessels suspected of involvement in drug trafficking, Article 17 sets up a procedure whereby a state party may request permission to board a vessel of another state party when the ship is outside the territorial sea of any state.62 The 1988 Vienna Convention also acknowledges existing agreements dealing with drug trafficking at sea and provides a framework for future agreements. The United States has been particularly active in concluding bilateral agreements in the Caribbean, Central, and South America,63 and has also done so with the United Kingdom.64 These treaties have typically granted permission to the states parties to board each other’s

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62 1988 Vienna Convention art 17(3).
vessels, and/or have allowed for the use of shipriders. The 1995 European Agreement follows the precedent of the 1988 Vienna Convention in only allowing boardings of another state’s vessels if consent is obtained from the flag state. The web of treaties creating mechanisms for conducting a right of visit against foreign flagged vessels on the high seas reflects the view of states that there is a common interest in taking steps to repress the illicit drug trade. However, respect for exclusive flag state jurisdiction remains a hurdle in these efforts.

(5) People smuggling and trafficking

People smuggling, which entails the entry of asylum seekers or persons seeking to enter a country illegally, constitutes a maritime security threat in light of the frequent use of unseaworthy vessels, the inhumane conditions on board, the risk of the smugglers abandoning their vessel at sea, and the challenges faced by those required to conduct rescues at sea. In addition, states may be concerned about the identity of those arriving and their possible criminal motives. People trafficking may have different goals or criminal intent to people smuggling but the risks posed at sea are the same. Similar to drug trafficking, the consequences of these transnational crimes within the territory of a state, particularly for ‘point of entry’ states seeking to curb illegal migration, provide further impetus to confront the aspects of these crimes that occur at sea.

The legal authority of the coastal state to confront people smuggling and trafficking is not quite as clear cut as for drug trafficking. The loading or unloading of a person contrary to the immigration laws of a coastal state is an activity that renders passage non-innocent. A coastal state will be able to exercise criminal jurisdiction against a foreign flagged vessel in its territorial sea if the transport of illegal immigrants is a crime the consequences of which extend to the coastal state or is a crime that disturbs the peace of the country or the good order of the territorial sea. It is likely that people smuggling would fall within these categories on the basis that illegal immigration is generally recognized as having a range of consequences within the state and trafficked persons, by definition, are commonly exploited upon arrival in the destination state. It could further be argued that, even if the vessel is just transiting the territorial sea, the very transport of illegal immigrants may disturb the good order of the territorial sea if the vessel is unseaworthy or the conditions of transport are otherwise such that a rescue of those on board may be necessary. Similar to drug trafficking, the infringement of immigration laws also provides the coastal state with authority to exercise the necessary control to prevent and punish the infringement of those laws within the contiguous zone.

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67 UNCLOS art 19(2)(g).
68 UNCLOS art 27(1).
69 UNCLOS art 33(1).
On the high seas, state responses to people smuggling and trafficking should be informed by obligations under international human rights law, international refugee law, particularly the principle of non-refoulement, as well as requirements responding to persons in distress at sea. The Australian response to the M/V *Tampa* showcased the difficulties of applying these principles in the maritime context. During that incident, the Norwegian vessel was threatened with people-smuggling charges if it offloaded rescued asylum seekers in Australia, and Australia subsequently closed its territorial sea to the vessel. Outside the territorial sea, it is argued that states that board vessels should respect and conform to the principle of non-refoulement, particularly if the protection of human beings is to be the centrepiece of approaches to people smuggling and trafficking.

The IMO has proposed Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea. These measures cover both preventive measures as well as steps that states could take to repress people smuggling and trafficking. Although strictly non-binding, these Measures include a recommendation that states request authorization from the flag state ‘to take appropriate measures in regard to that ship’. The 2000 Migrant Protocol then provides a legal mechanism upon which states parties may rely to obtain consent to undertake a boarding of a foreign flagged ship reasonably suspected of being engaged in migrant smuggling. Similar to the 1988 Vienna Convention, being party to the 2000 Migrant Protocol does not constitute consent in its own right for boarding a foreign flagged vessel, but the procedure for doing so has been established along with a requirement to designate national authorities responsible for granting any necessary authority. The ‘point of entry’ states are otherwise pursuing bilateral or regional agreements or arrangements with states that are either source or transit states.

(6) IUU fishing

There has been debate as to whether IUU fishing should be regarded as a maritime security threat. In light of the involvement of organized crime networks in IUU

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70 Barnes has pointed to some of the gaps and ambiguities in this regard. See Richard Barnes, ‘Refugee Law at Sea’ (2004) 53 *ICLQ* 47, 64, 67, and 70.


72 Ibid 121. The *MV Tampa* ultimately entered the territorial sea in distress. See ibid 123–4.


75 Ibid Recommendation 12.


78 See Chapter 1, text to nn 42 and 43.
fishing, the fierceness with which some states have sought to protect their fish resources, and the economic, social and environmental consequences faced by communities in the face of depleted fish stocks, there is a strong case to argue that IUU fishing does threaten the maritime security of a state. Such an approach is consistent with the broad understanding of human security that focuses on the security needs of individuals. Countering IUU fishing is an important law enforcement activity, and challenge, for many coastal states. But IUU fishing is also a global problem when account is taken of the economic importance of the exploitation of different highly migratory species and straddling stocks and the transnational character of IUU fishing (entailing vessels flagged to one state, with owners and crew of varied nationalities, and with the vessels fishing in waters and stopping in ports of diverse states).

Responses to IUU fishing predominantly concern the allocation of competences to prevent the activity, as well as the physical resources required for adequate policing. The laws developed to address this maritime security threat have been hindered by the use of flags of convenience and the concomitant failure of some flag states to monitor and police their vessels. Recent legal developments to improve the likelihood of enforcement of international or coastal state standards on the total allowable catch have sought to overcome dependence on flag state control over fishing vessels. RFMOs have particularly taken steps to redress IUU fishing over stocks or areas subject to RFMO jurisdiction.

One of the key steps forward to counter the problem of flags of convenience has been the recognition of port state jurisdiction whereby the port state exercises authority over a vessel for acts that have occurred on the high seas. The 2009 Port State Measures Agreement is a prominent development in this regard, as it enables port states to seek information from foreign flagged vessels seeking entry to their ports regarding their catch as well as their fishing and transshipment authorizations. A port state must deny entry when there is ‘sufficient proof that a vessel seeking entry... has engaged in IUU fishing or fishing related activities in support of such fishing,’ and port services must also be denied if the port state has ‘reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing.

80 Evoking characterizes of ‘war’ by media and academic commentators. See Chapter 6, Part B.
81 In this regard, it may be noted that Somali piracy has been justified as unemployed fishermen have sought alternative sources of income following the over-exploitation of Somalia’s fisheries by foreign fishing vessels. Ranee Khooshie Lal Panjabi, ‘The Pirates of Somalia: Opportunistic Predators or Environmental Prey?’ (2010) 34 William and Mary Environmental Law and Policy Review 377, 433–6.
84 2009 Port State Measures Agreement art 9(4).
or fishing related activities in support of such fishing’. The enforcement powers that otherwise accrue to the port state are limited to conducting inspections, as the flag state then has the onus to take any necessary enforcement action.

Coastal state authority over IUU fishing in the territorial sea is manifest in the inclusion of fishing as an activity negating the innocence of passage, and the allocation of criminal jurisdiction because of the disturbance of the good order of the territorial sea engendered by IUU fishing. These rights are in any event to be considered in conjunction with the sovereign rights of the coastal state in conserving, managing, and exploiting the living resources located within the EEZ. Unlike the maritime security threats considered above, the coastal state is accorded explicit authority to enforce its laws relating to fisheries in the EEZ. These enforcement powers extend to boarding, inspection, arrest, and judicial proceedings against the vessels concerned. A fishing vessel’s rights of navigation are protected by the requirement that arrested vessels and their crews are to be promptly released upon posting of a reasonable bond or other security, as well as by a procedure before ITLOS to secure coastal state adherence to this obligation. While the ability of coastal states to police the potentially large expanse of EEZ to which they are entitled may jeopardize responses to IUU fishing, the allocation of competences to prescribe and enforce fisheries law is mostly sufficient to meet coastal state needs in this regard.

The greater challenge to deal with IUU fishing under international law has concerned the conservation and management of highly migratory species and straddling stocks. While coastal states may be able to take action against IUU fishing that occurs within their EEZ, and in hot pursuit of vessels that flee their EEZ, conservation and management efforts are hampered when fishing of these species occurs on the high seas. Under Article 18 of the 1995 Fish Stocks Agreement, states parties are only to authorize their own vessels to fish on the high seas where those states are able to exercise effectively their responsibilities.

85 The exception being if the vessel can establish it was acting consistently with relevant conservation and management measures. 2009 Port State Measures Agreement art 11(1)(e).
86 2009 Port State Measures Agreement art 13 and Annex B.
87 2009 Port State Measures Agreement art 20.
88 UNCLOS art 19(2)(i).
89 UNCLOS art 27(1)(b). IUU fishing may also be a crime with consequences that extend to the coastal state given the likely dependence of a state on the exploitation of its local fisheries. UNCLOS art 27(1)(a).
90 UNCLOS art 73. The enforcement of laws relating to piracy and other offences occurring in the EEZ is otherwise predicated on the application of principles related to the high seas by virtue of art 58(2) of UNCLOS. Typically, the international conventions addressing the maritime security threats considered here have referred to ‘international waters’ or to waters outside the territorial sea or outside areas subject to coastal state sovereignty, and not drawn any distinction between the EEZ and the high seas.
91 UNCLOS art 73(1).
92 UNCLOS art 73(2).
93 UNCLOS art 292.
94 See UNCLOS art 111.
95 States do, however, owe duties of conservation in relation to the living resources of the high seas. UNCLOS arts 116–120.
There remains an emphasis, and hence dependence, on the flag state taking the steps necessary to ensure that vessels flagged to them conform to measures intended to conserve the living resources of the high seas.

High seas fishing activities may constitute IUU fishing if the high seas areas or stocks in question are regulated by RFMOs. For enforcement, the 1995 Fish Stocks Agreement anticipates states undertaking inspections of vessels within high seas areas covered by a subregional or regional fisheries management organization or arrangement, irrespective of whether the flag state of those vessels is a member of the organization or arrangement. When there are clear grounds for believing that a vessel has engaged in activity contrary to applicable conservation and management measures, the inspecting state must promptly notify the flag state. If the flag state does not act, and there are clear grounds for believing that a ‘serious violation’ has been committed, the inspectors may remain on board the vessel and secure evidence, which may include requiring the vessel proceeding to the nearest appropriate port. At each stage, the flag state’s authority to conduct enforcement action holds sway over the actions of the inspecting state. While the development of a right of inspection on the high seas in relation to IUU fishing is an important development in the law of the sea, it is of course only applicable against states party to the 1995 Fish Stocks Agreement.

To overcome this weakness, RFMOs have sought to develop various techniques to improve the enforcement of the conservation and management measures to which the members have agreed. As international organizations, the RFMOs provide a forum for exchange of scientific information on conservation and management, in addition to reporting on fishing activities by the RFMO members through monitoring and inspections. RFMOs have also sought to combat IUU fishing through the implementation of catch documentation schemes in order to track landings of fish and the trade flow of particular species. RFMOs have also compiled lists of vessels that are suspected of IUU fishing as a way of increasing scrutiny of those vessels and potentially shaming the flag states into action.

The legal framework for IUU fishing has thus sought to move away from dependence on and respect for the exclusive jurisdiction of the flag state and instead emphasizes cooperative endeavours and a reallocation of competences that provides greater authority to port states and ‘inspecting states’. As this reallocation is dependent on participation in the relevant treaty regimes, a risk of inconsistent enforcement jurisdiction may arise. Moreover, whether a state is a member of an
RFMO or party to a particular treaty may encourage further registry or port shopping as those involved in IUU fishing seek to avoid regulation and policing. Recognizing the common interest in quelling IUU fishing should mean states will continue to implement mechanisms and join treaty regimes to improve responses to this maritime security threat.

(7) Intentional and unlawful damage to the environment

While environmental harm to a maritime area may have severe social, economic, and political consequences for the adjacent communities and persons or industries otherwise dependent on that marine area, it is intentional damage rather than accidental damage that was identified as a maritime security threat by the UN Secretary-General. Intentional and unlawful damage to the environment may result from a flagrant violation of international environmental law,\textsuperscript{103} or reflect a particular form of maritime terrorism,\textsuperscript{104} as opposed to an accident causing damage to the environment. Irrespective of intent, severe pollution of the marine environment may have serious consequences for not only the coastal state, but also neighbouring and regional states, and states that have vessels traversing or nationals relying on the area in question. Consideration of environmental damage as a maritime security threat should therefore account for unintentional harm if there is a risk of severe pollution. While a precise benchmark in this regard may be difficult to articulate, what is important here is discerning the allocation of competences to minimize environmental damage and thereby improve maritime security.

Similarly to IUU fishing, there has been a move towards granting greater powers to port states and coastal states in response to the inadequate control exerted by some flag states, particularly those states offering flags of convenience. Like IUU fishing again, these developments have continued to account for the traditional deference accorded to flag state jurisdiction even while developing alternative avenues of authority. Thus, port states may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from a vessel that has voluntarily entered the port when the discharge is in violation of international standards, and has occurred outside the internal waters, territorial sea and EEZ of that port state.\textsuperscript{105} Port states may also engage in enforcement activities consistent with a series of regional memoranda of understanding on port state control.\textsuperscript{106}

For intentional damage to the marine environment in areas under coastal state sovereignty, the coastal state would be able to treat the offending vessel as in

\textsuperscript{103} Not every breach of environmental law will necessarily constitute a threat to maritime security, but breaches of a particular scale may do so. See UN Report of the Secretary-General, 'Oceans and the Law of the Sea' (10 March 2008) UN Doc A/63/63, para 108.
\textsuperscript{104} Certainly the 2005 SUA Protocol considers that ‘serious injury or damage’ includes ‘substantial damage to the environment’. 2005 SUA Protocol art 2, amending art 1 of the 1988 SUA Convention.
\textsuperscript{105} UNCLOS art 218(1).
violation of the right of innocent passage,107 and there would be an arguable basis to exercise criminal jurisdiction in accordance with Article 27 of UNCLOS.108 The enforcement powers of the coastal state have been confirmed under Article 220 of UNCLOS, which permits various enforcement activities by the coastal state against vessels navigating in the territorial sea in response to vessel-source pollution that occurs in the territorial sea or the EEZ of that state.109 The coastal state also has authority in the EEZ to respond to maritime casualties as well as enforcement authority in relation to a variety of sources of marine pollution.110 The parameters of these enforcement powers have been closely delineated with the intention of ensuring that the freedom of navigation is still protected in the face of increasing coastal state rights within the EEZ.

On the high seas, states do not currently have authority to enforce prescriptions concerning the protection and preservation of the marine environment against foreign flagged vessels in that maritime area,111 unless it is pursuant to the right of hot pursuit from a state’s EEZ.112 Intentional damage to the environment that falls within the offences listed in the 1988 SUA Convention and 2005 SUA Protocol may trigger the right of visit. Otherwise, marine pollution on the high seas must be policed by the flag states concerned, or investigations may be undertaken by a port state when the vessel arrives at that state’s port. It would seem that there has been insufficient concern regarding damage to the marine environment outside national jurisdiction to warrant any reallocation of policing powers on the high seas at this point.

(8) Expanding categories of maritime security threats

Although the threats addressed above are those most commonly recognized as challenging maritime security, it is inevitable that new threats will emerge as societal interests evolve, economic demands change, political preferences shift, and, indeed, the very nature of the globe alters through environmental and scientific forces. Climate change is already affecting the marine environment and will require shifts in the application and understanding of the law of the sea.113

\[\text{footnotes}
107 UNCLOS art 19(2)(h).
108 UNCLOS art 27(1)(a) and art 27(1)(b).
109 See UNCLOS art 220.
110 See Chapter 3, Part F(2).
111 Arguments may be advanced that a customary international law rule is developing based on the implementation principles in the World Charter for Nature, which was adopted by the General Assembly in 1982. World Charter for Nature (28 October 1982), GA Res 3777, UN Doc A/37/51. It is an argument that is unlikely to succeed at present when considered against the firm position of non-intervention on the high seas in deference to high seas freedoms unless it is clear that the flag state has consented.
112 UNCLOS art 111.
Rising sea levels will alter the position of baselines and basepoints from which maritime zones are measured and may require the adjustment of international maritime boundaries. That altering the size of a state’s maritime domain has significant political repercussions cannot be gainsaid. Increasing temperatures will affect marine biodiversity, prompting new challenges for the conservation and management of marine species. Further impacts of climate change include ocean acidification and erosion. These challenges may prompt greater emphasis on marine environmental security than exists at present.

The melting of the polar caps presents, among many things, legal challenges. In the Arctic, the opening of the North West Passage has warranted examination of the pertinent legal regimes in association with the security implications that result from this environmental change. While Antarctica has been successfully governed through the Antarctic Treaty system for many years, a risk always exists that the insatiable demand for resources will jeopardize this cooperative regime. Australia’s purported maritime zones off the claimed Australian Antarctic Territory may come under international scrutiny in Australia’s international litigation against Japan over Japan’s scientific whaling programme in the area. In these circumstances, it is undesirable that special interests would trump the common interest in promoting order in the oceans.

The deep seabed and deep sea resources present further possibilities for interstate dispute and hence considerations that maritime security is once more at stake. The importance of submarine cables to international communication may warrant further review of states’ competences to prescribe and enforce laws relating to the maintenance and protection of cables lying across the ocean’s floor. As exploitation of the deep seabed advances, the legal regime set forth in Part XI of UNCLOS and the 1994 Agreement may require adjustment in the face of technological developments and changing resource needs. Disputes over bioprospecting activities are already emerging and present questions as to whether marine scientific research or

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114 See UN Report of the Secretary-General (29 August 2008) UN Doc A/63/63/Add.1, paras 259–60.
118 See discussion in Chapter 3, Part G(2) and Part G(4).
120 A key example here is the sustainable exploitation of genetic resources from areas beyond national jurisdiction. An array of issues on marine genetic resources has been explored in vol 24, issue 2 of the International Journal of Marine and Coastal Law (2009).
exploitation of the oceans is involved. The tasks for the law of the sea have by no means ended in relation to promoting maritime security, as the existing rules need to be applied and interpreted against new situations or new demands.

C. Military Interests and Maritime Security

The maritime security threats addressed above do not directly highlight the military interests that remain at issue when questions of maritime security are concerned. Maritime security may still be understood as the core national defence of a state, and so challenges to the placement of maritime boundaries or the assertions of sovereignty in disputed maritime areas may be critical dimensions of a state’s military interest in maritime security. Ongoing clashes between North and South Korea, including the May 2010 finding that North Korea torpedoed a South Korean naval vessel, underline the military dimension to maritime security.

Military interests are intimately involved in enhancing maritime security in a myriad of ways. The enforcement of a state’s laws that address a particular maritime security threat may be undertaken by the naval forces of a particular state. Whether the actions of naval vessels amount to an unlawful threat or use of force may then be at issue in law enforcement operations. There is, though, wide recognition that some amount of force may be appropriate in the context of law enforcement. Certainly when the Security Council has acted against piracy or confirmed the right of self-defence, the world’s navies have most commonly responded pursuant to these decisions. The right of visit is one granted to warships, as well as duly authorized government ships or aircraft. From a different perspective, a state’s military forces are engaged in addressing maritime security threats because these threats are those most likely to impinge on a state’s national security, as well as a state’s interest in maintaining regional or global security. Military interests therefore are engaged in addressing maritime security threats.

Yet military interests extend beyond the identified threats discussed above. This part of the chapter seeks to highlight that the national security of a state is another dimension of maritime security for which account needs to be taken in the law of the sea. The need for naval vessels and aircrafts to traverse the oceans with minimal

interference from littoral states received early recognition in the law of the sea and continual protection was sought as coastal states claimed greater expanses of ocean areas to be subject to their sovereignty, including important shipping channels and straits. While coastal state powers have been augmented because of the broader breadth of territorial sea and because of the subjective element of decision-making allowed to the coastal state, the rights of passage of warships through maritime areas subject to coastal state sovereignty have been maintained. The ongoing viability of this regime is consistent with a state’s military interests for the enhancement of national security.

The military activities of navies beyond the territorial sea have come under greater scrutiny, partially because of the potential interference with the coastal state’s competing interests in the EEZ as well as concerns about the intelligence being gathered about the coastal state’s maritime domain as well as terrestrial defences. While opinions across the spectrum may be identified as to the permissibility of a state conducting a variety of military activities in another state’s EEZ, the moderate position appears to be one that allows the less aggressive forms of military activities provided there is no undue interference with the economic and environmental interests of the coastal state.125

Intelligence gathering in another state’s EEZ remains a highly controversial matter in light of the advances in electronic and intelligence warfare. The present legal position supports the continuation of such activities, unless it is established that they fail to show due regard to the rights of the coastal state or are of such a character as to amount to a threat or use of force in violation of Article 2(4) of the UN Charter. In the face of such activities by third states, coastal states have increased the means by which they can gather information about what and who are in their adjacent maritime zones. Indeed, under the LRIT Regulation, coastal states may be able to obtain information about vessels up to 1,000 nautical miles from their shore. Accruing intelligence has become an increasingly important dimension to protecting a state’s maritime security as a broad matter, as well as supporting specific national military interests.

Beyond the EEZ, the question of weapons tests, and more specifically nuclear weapons tests, has posed considerable controversy as to their legality under the law of the sea. It was in the context of supporting the legality of the United States’ initial nuclear tests on the high seas that Myres McDougal espoused a test of reasonableness in examining the assertion of exclusive claims against the freedom of the high seas.126 While reasonableness remains the benchmark for assessing competing uses of the high seas,127 this standard has been increasingly challenged in the course of weapons tests and particularly in relation to the establishment of warning

125 See Moritaka Hayashi, ‘Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms’ (2005) 29 Marine Policy 123, 129.
127 UNCLOS art 87(2) (referring to due regard, which is a small shift in language from the ‘reasonable regard’ requirement as included the 1958 High Seas Convention).
or exclusion zones for such testing.\textsuperscript{128} The national interest in improving a state’s defensive capacity has further provoked claims to security zones outside of times of armed conflict.\textsuperscript{129} Such zones would clearly benefit the national security of a state but generally constitute a further assertion of coastal state rights that has not been recognized within the law of the sea.\textsuperscript{130} These special interests may be seen as ‘expand[ing] beyond need and disregard[ing] their impact upon others,’ and should not be accepted as a result.\textsuperscript{131}

The interface of military interests with maritime security has become particularly pronounced since September 11 because of increasingly reliance on the \textit{jus ad bellum} and the \textit{jus in bello} to justify responses to maritime security threats. As discussed in Chapter 6, the ICJ has drawn a line between acts that are prohibited threats or uses of force and those that are armed attacks giving rise to the right of self-defence.\textsuperscript{132} The maritime security threats discussed will infrequently amount to an armed attack warranting action in self-defence. A further line is drawn between threats or uses of force on the one hand and proportionate counter-measures on the other.\textsuperscript{133} The latter would allow, for example, for warships to undertake passage in a manner inconsistent with coastal state rights in response to what is perceived as unlawful assertions of sovereignty or jurisdiction over a particular maritime area.

The array of military interests that form part of a state’s concerns about maritime security reflect the ongoing existence of exclusive uses and claims in relation to maritime security and the law of the sea. When these exclusive interests do not deprive other states of inclusive claims to ocean space and use, then it could be said that there is a common benefit in accepting these claims to exclusivity.\textsuperscript{134} The assertion of a state’s exclusive military interests (whether through the manner in which passage is conducted, or in gathering intelligence in the EEZ of another state, or enforcing a security zone against another state’s vessels) is not a completely arbitrary matter, as any such decisions will ultimately be tested by reference to the international community.\textsuperscript{135} The common interest that is shared by states in enhancing maritime security thus ultimately entails some continuing exclusive interests as well as recognition of inclusive interests in responding to maritime security threats. How this common interest has impacted on the law of the sea and how it should impact on the law of the sea is next addressed.

\textsuperscript{129} See Chapter 2, Part C(3).
\textsuperscript{132} See Chapter 6, Part C(1).
\textsuperscript{135} Ibid 750.

The international law responses to maritime security threats that have been examined in this book have shown that there is willingness among states to cooperate in developing new rules and revising old rules in support of their common interest. In particular, international terrorism and the proliferation of WMD have served as a fillip to developing the law of the sea to respond to maritime security concerns. The many bilateral, regional, and multilateral agreements and arrangements that have been adopted in the last 10 years are evidence that states are recognizing that there is an inclusive interest when it comes to matters of maritime security. Becker has similarly remarked on this shift:

...the rise of inclusive jurisdiction has not come without the wide participation and deliberation of interested and concerned parties. In each case, the methods by which exclusive jurisdiction was made inclusive—in light of the realization that underlying interests had become inclusive—was measured and limited to the particular policy problem at hand.\textsuperscript{136}

He correctly observes that the changes have been fragmented as efforts have been centred on specific threats.\textsuperscript{137} This final part of the chapter seeks to consider the totality of developments in improving maritime security vis-à-vis the traditional law of the sea.

The synopsis of the international laws relating to maritime security provided in the first part of this chapter has brought into relief certain enduring features of the law of the sea: coastal state sovereignty over the territorial sea; the freedom of navigation in the EEZ and on the high seas; and the exclusive jurisdiction of the flag state over its vessels. It then becomes notable that the efforts to improve the laws relating to maritime security have sought to move away from these tenets in various ways. Examples in this regard include agreements that allow for shipriders or other law enforcement activities in the territorial sea of a state; increasing the opportunities for states to exercise enforcement jurisdiction against foreign flagged vessels on the high seas; and creating authority for port states to respond to unlawful acts occurring outside that state’s jurisdiction. Becker has particularly noted the changing status of exclusive flag state jurisdiction, remarking that it ‘has been


\textsuperscript{137} The 2008 CARICOM Agreement stands as a contrast in as much as it is one agreement providing law enforcement powers to states parties to address a broad range of maritime security threats. As previously noted in Chapter 1, the 2008 CARICOM Agreement refers to activities ‘likely to compromise the security of a State Party or the Region if it involves’ trafficking in drugs, arms or people, terrorism, smuggling, illegal immigration, serious marine pollution, injury to off-shore installations, piracy, hijacking and other serious crimes, and ‘a threat to national security’. 2008 CARICOM Maritime and Airspace Security Co-operation Agreement <http://www.caricomlaw.org/docs/CARICOM%20Maritime%20and%20Airspace%20Security%20Co-operation%20Agreement.pdf> art I(2).
substantially eroded . . . , leading to a variety of different types of concurrent jurisdiction and inclusive competence to maintain public order at sea.\textsuperscript{138} On each occasion, any shift away from the fundamental tenets of the law of the sea has still required certain protections to be included for the existing interests. Alternatively, restrictions have been incorporated as to the extent that competences could be allocated to different states.

The overall impact that maritime security has made on the law of the sea may thus be discerned in five ways:

\textit{First}, the common interest in maritime security has allowed for greater cooperative initiatives across a range of issue areas, demonstrating that security may reflect an inclusive claim, as well as an exclusive claim, to ocean space and use. \textit{Second}, new or revised rules have been required to reflect this inclusivity and these rules have promoted inclusive interests at the expense of exclusive interests, such as sovereignty over the territorial sea and exclusive flag state authority on the high seas. There has been a reallocation, including a sharing, of competences among states, most commonly via treaty but also via Security Council action as well as, though not always as clearly, through political endeavours. \textit{Third}, traditional military interests relating to passage, the conduct of military activities, including intelligence gathering, in another state’s EEZ, and the use of force and the law of naval warfare have largely remained unaffected by the broader developments in maritime security. While modern, peacetime, maritime security concerns have prompted reliance on rules relating to the use of force and the law of naval warfare, these efforts have rightly been resisted. \textit{Fourth}, the UN Security Council has recognized the significance of certain maritime security threats to international peace and security and is thus positioned to make an important contribution to the improvement of maritime security in the exercise of its Chapter VII powers. The authority of the Security Council provides one avenue to trump existing law of the sea principles, including the sovereign immunity of vessels. \textit{Finally}, there has still been a limit on the extent of change in the law of the sea, even in the face of the inclusive interests at stake, because of the endurance of states’ sovereign interests over their maritime domain and over their vessels. This resistance to change has been strong. It has undermined the role that international law could play in promoting maritime security, including in the decisions of the Security Council.

In light of this current situation, what does maritime security hold for the future of the law of the sea? Or perhaps the more meaningful question is what does the law of the sea hold for the future of maritime security?

Maritime security concerns will continue to present new challenges to the interpretation and application of the law of the sea. One point to be acknowledged is that it is the potential increase in law enforcement powers in response to maritime security threats that has particularly witnessed the tussle between the recognized need for improved powers and concerns about the effect these powers would have on existing sovereign interests. McDougal and Burke questioned whether it was entirely appropriate to exclude enforcement jurisdiction once prescriptions that received wide support had been established:

It would seem entirely reasonable that states otherwise authorized to enforce certain prescriptions ought also to be authorized to take the necessary measures of control for making that enforcement effective. In particular, permissible measures ought to be considered to include the right to board a vessel and, if required, to conduct an examination of its papers, cargo, and crew. This procedure should be authorized only where it is reasonably necessary for implementation of particular prescriptions. The primary determinants of reasonableness in assessing the lawfulness of the measures taken would appear to relate both to the apparent grounds for taking any enforcement action, i.e. the reasons for the suspicions of the vessel concerned, and to the possibilities in alternative practicable methods for enforcement causing less interference with navigation.139

The control mechanism at work here is if the prescription in question is not a reasonable one then the maintenance of public order requires that enforcement of that prescription should not be tolerated.140 This position clearly goes beyond what has been considered acceptable to states in the law of the sea developments to improve maritime security. A smaller step in this direction may still be warranted, however.

The law of the sea has a vital role to play in improving maritime security. In this regard, it is important to acknowledge that the law is one of many factors taken into account in devising new policies. Political imperatives, as well as economic, ecological, and social needs, must be considered in conjunction with the relevant laws. As perceptions of maritime security shift, then in terms of what maritime security holds for the future of the law of the sea, it is clear that further development of the law in this area is in order. Existing gaps and ambiguities will need to be addressed and recognition of new maritime security threats may require responses beyond what has currently been accepted in the law of the sea.

The law of the sea is undoubtedly evolving as different approaches are adopted to minimize and avert the risks posed by maritime security threats. Yet further change

139 McDougal and Burke, The Public Order of the Oceans 885–6.
140 ‘Responsibility should of course be imposed for visit and search if a state seeks to enforce a prescription unreasonable in itself. No matter how fair and discriminating the procedures of enforcement they must be regarded as contaminated by the unreasonableness of the substantive regulations concerned, if public order is to be maintained in a relatively unorganized arena.’ McDougal and Burke, The Public Order of the Oceans 886.
is warranted to improve maritime security, and such change could be achieved in the law of the sea if the inclusive interests of states were granted greater recognition when opportunities to revise or adopt new rules are available. It is not proposed here that there needs to be a complete abandonment of flag state control over vessels—obviously such an extreme position would rightly draw charges of promoting complete anarchy and power politics on the oceans. Nor would it be realistic, or desirable, to suggest that coastal state sovereignty over the territorial sea should cease to be recognized.

The shift proposed is more subtle; a suggestion for less emphasis on flag state authority or coastal state sovereignty when there is a common interest that could be better served if there were a broader allocation of competences between interested parties. Exclusive interests would continue to co-exist with inclusive interests in deriving legal rules and regimes intended to promote maritime security. But more emphasis on the inclusive interests would permit, for example, boardings of foreign flagged vessels on the high seas once a treaty to that effect was adopted rather than requiring an additional consent in addition to the treaty itself. More weight on inclusive interests would allow, by way of further example, a port state to continue with enforcement proceedings rather than allowing the flag state’s jurisdiction to trump the port state. Just a shift in emphasis may be enough to produce law that will more effectively promote maritime security in the common interest. These sorts of small changes should be the future promise of the law of the sea for the enhancement of maritime security.
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Index

24 Hour Rule 164, 167
Achille Lauro 148, 151
aircraft 9, 27, 31, 33, 34, 40, 43, 60, 75, 80, 111, 114, 117–19, 131, 200, 216–18, 222, 224, 249, 295–96
see also overflight
archipelagic sea lanes 37–38
closure of 40
archipelagic sea lanes passage 34
scope of application 29
suspension or denial of 40
armed attack 263–68
by non-state actors 268
armed robbery 8, 9, 10, 81–82, 120–21, 302–05
information sharing 242–44
artificial islands, installations and structures 102–104
asylum seekers, see people smuggling
Australia Group 155
Australian Maritime Identification System 225–27
Australian Maritime Identification Zone 21, 59, 219, 227
Automatic Identification System (AIS) 228
Bali Process 127, 248–49
BBC China 202–03
biometric information 237
blockade 264, 292–95
authorized by the Security Council 277–80
Cuba ‘quarantine’ 293
Gaza Strip 294
requirements of 293–94
cannon-shot rule 24, 27
catch documentation schemes 73, 140, 252, 317
climate change 319–20
Cod Wars 261
Container Security Initiative 163–67, 240
contiguous zone 87–88
weapons of mass destruction 202
continental shelf, enforcement jurisdiction 98–100
contraband 291
convoy 264, 265, 290
Copenhagen School 4
counter-measures 32, 267–68, 270, 284, 299
counter-proliferation 149–150, 156
creeping jurisdiction 3, 7, 60
CSI, see Container Security Initiative
C-TPAT 164, 167
Declaration on Friendly Relations 269
Definition of Aggression 264, 266, 268, 295
drug-trafficking 79–81, 85, 87, 108, 130–37, 311–13
information sharing 249–50
due regard 3, 220, 226, 287, 290
in the EEZ 49, 50, 53, 56, 58
in the territorial sea 36
on the continental shelf 101
on the high seas 45, 54, 57, 58
economic sanctions 276–80
EEZ
enforcement jurisdiction 88–89
enforcement jurisdiction and fishing 90–93
enforcement jurisdiction and marine pollution 93–96
intelligence gathering 217–21
pollution in 77
environmental activists 57, 141–42, 261, 305
exclusion zones 58–59, 102, 264, 295–97, 323
during Falkland/Malvinas War 295–96
requirements of 296–97
exclusion zones, see also security zones
Eyes in the Sky programme 86
fishing, information sharing 250–54
fixed platforms, see artificial islands, installations and structures
flags of convenience 15, 64, 70, 73–74, 96, 104, 107, 128, 141, 265, 290–91, 315
freedom of the high seas, see mare liberum
genuine link 106
hot pursuit 91, 92, 102, 109–114
commencement of 110
involving third states 111–12, 134
mother ships 112–13
termination of 111, 112
human security 6, 315
human trafficking, see people smuggling
hydrographic surveys 221–23
identification zones, see information zones
immunity, see warships, sovereign immunity
IMO, see International Maritime Organisation
information sharing
confidentiality 230, 231, 243, 244, 248, 252, 253
drug-trafficking 249–50
fishing 250–54
people smuggling 248–49
information gathering (cont.)
piracy and armed robbery 242–44
safeguards 237, 238
terrorism 245–48
trade in fish 252–53
vessel lists 253
weapons of mass destruction 245–48
information zones 59–60
innocent passage 9, 30–32
and criminal jurisdiction 75–77
intelligence gathering 216
Proliferation Security Initiative 200–01
scope of application 28–29
suspension or denial of 39, 102
violation by warship 35–36
insurgents 292
intelligence gathering 215
in the EEZ 217–21
in the territorial sea and straits 216–17
innocent passage 216
surveys, see military surveys, hydrographic surveys
transit passage 217
internal waters 65, 68, 77, 81
International Labour Organization 235, 237
International Maritime Organization 8, 37, 59, 93, 94, 102, 124–25, 151, 157, 159, 170, 228, 229, 233, 234, 235, 242, 314
international waters 169
ISPS Code 158–62
compliance with 161–62
enforcement under 160–61
information requirements of 160, 239–40
operation of 159–60, 161
scope of 158–59
IUU fishing 72–73, 91, 93, 97, 140, 252–54, 314–18
as maritime security threat 10–11, 91, 314–15
jurisdiction
bases of 62–63
universal 62, 118
law of naval warfare
codification of 285–86
exclusion zones 295–97
merchant vessel 289–92
neutrality, see neutrality
right of visit 290
Long Range Identification and Tracking (LRIT) Regulation 60, 229–34
enforcement 233
limitations 233–34
operation of 230–233
purpose of 229
scope of 229–30
Malacca Straits 26, 85–86, 242, 304
mare liberum 2–3, 12–16, 105, 137, 203
marine pollution
from seabed 100
in EEZ 93–96
in straits 84–85
vessel-source 69–70, 77, 95–96
marine scientific research 99–100, 221
maritime casualties 93, 94–95
maritime domain awareness 60, 213–14, 250
definition of 213
maritime security
definition 2, 8–11
future threats to 319–321
threats to 9–11
maritime terrorism 8, 53, 68, 83, 87, 305–08
analogies to piracy 119–20, 147
definition of 148, 171, 305–06
incidents of 148
information sharing 245–48
offences 172–73, 152–53
master’s consent 130, 160–62, 274
McDougal and Burke 3, 16, 32, 326
migrant smuggling, see people smuggling
military activities 43–44
as freedom of the high seas 45, 47–48
in the EEZ 46–47, 48–50, 52–53
military interests 1, 5, 6, 17, 18, 24, 33, 212, 257–59, 300, 321–23, 325
military surveys 221–23
Missile Technology Control Regime 155
mother ships 112–13, 125
neutrality 287–88, 289, 290–91
non-intervention 32, 267, 268, 269
non-proliferation 149, 155–56
non-refoulement 123, 314
nuclear powered vessels 41, 52
Nuclear Suppliers Group 155
nuclear weapon free zones 51–52
nuclear weapons tests, see weapons tests, high seas
open registries, see flags of convenience
overflight 3, 14, 34, 40, 50, 51, 55, 60, 88, 218, 223, 224
peaceful purposes 22, 50–53, 56, 258, 260
people smuggling 85, 87, 123–27, 313–14
information sharing 248–49
obligations under refugee law 123–24
people trafficking, see people smuggling
phantom ships 303
pipelines, see submarine cables and pipelines
piracy 81–83, 85, 302–05
analogies to terrorism 119–20, 147
definition of 118–19
definition of 302–03
information sharing 242–44
off Somalia 82–83, 121, 280–82
Security Council 82
Index

pollution, see marine pollution
port states 64, 96
  and fishing 71–73
  and pollution 69–71
ports 65–73, 157
  access to 66, 72–73
  application of local laws 68
  closing of 67
  Proliferation Security Initiative 199–200
  security at 157–162
ports of convenience 73–74
prize 265, 289, 291
Proliferation Security Initiative 193–207
  consistency with international law 199–203, 209–10
  contiguous zone 202
  definition 193–94
  influencing international law 203–07
  information sharing 247–48
  innocent passage 200–01
  ports and internal waters 199–200
  right of visit 195, 204, 282
  self-defence 274
  territorial sea 200–02
prompt release of vessels 91–92
PSI, see Proliferation Security Initiative
Rainbow Warrior 68
ReCAAP Information Sharing Centre 242–43
Regional Maritime Security Initiative 86
  right of visit 89, 101, 114–143
    compensation 116, 126–27, 183, 189
    consent of master 130
    drug-trafficking 130–137
    fishing 137–141
    general requirements 114–18
    importation of liquor 115
    people smuggling 123–27
    piracy 118–21
  Proliferation Security Initiative 195, 204
    safeguards 126, 132, 134, 175, 181–83, 186, 188–89
    self-defence 273–74, 275, 283
    slavery 122
    terrorism 173–84
    terrorists 274, 283
    unauthorized broadcasting 127–30
    use of force 116–17, 139, 182, 188
    weapons of mass destruction 184–85, 173–84, 187–89, 202–03, 282
RMSI, see Regional Maritime Security Initiative
SAFE Port Act 164
seafarers identification 235–239
seapower 8, 44
Security Council, piracy 82
Security Council Resolution 1540 185, 205, 245, 282–83
security zones 58–60
weapons tests, see weapons tests, security zones
self-defence 94, 117, 270
  anticipatory right of 271
  armed attack 263, 264–68
  doctrine of pre-emption and 271–72
  necessity 272
  proportionality 272
  right of visit 273–74, 275, 283
  role of Security Council 275
  terrorists 272, 274
  weapons of mass destruction and 271–72, 274
ship-boarding, see right of visit
shipping containers 163–64
ship-rider agreements 83, 121, 134, 136, 185
Singapore Straits 85–86, 242
slavery 122
So San 107–108, 194–95
stateless vessels 107–08, 136
straits
  internationalization of 85
  transit passage in, see transit passage
submarine cables and pipelines 100–101, 115
submarines 42–43
Tampa 123, 314
Tanker War 264, 290, 296
territorial sea
  and armed robbery 81–82
  and drug-trafficking 79–81
  and piracy 81–83
  and terrorism 83
  breadth 27
  exercise of criminal jurisdiction 75–84
  fishing in 78
  innocent passage in, see innocent passage
  pollution in, see Proliferation Security Initiative
  terrorism, see maritime terrorism
  threat of force, see use of force, threat of
  Torrey Canyon 94
traffic separation schemes 36, 37, 38
transit passage 12, 86
  enforcement jurisdiction 84–85
  intelligence gathering 217
  normal mode 33–34, 43
  scope of application 29
  suspension or denial of 39
  violation by warship 37
  warships 33–34
Turbot War 261
unauthorized broadcasting 127–30
universal jurisdiction, see jurisdiction, universal
  use of force 262
  in enforcement activities 99, 116–117, 260–61
  threat of 10, 31, 51, 262–63
vessel monitoring systems 140, 227–28

war zones, see exclusion zones

warships 24
  passage of 25–26
  prior notification or authorization for
    passage 38–39, 41
  sovereign immunity 35, 36–37, 52, 59,
    64–65, 77, 199, 207, 209
  transit passage 33–34
  violation of innocent passage 35–36
  violation of transit passage 37

WCO, see World Customs Organization

weapons of mass destruction 309–11
  as maritime security threat 149, 150
  dual use of 156, 187
  information sharing 245–48
  offences relating to 172–73, 187
  right of visit 184–85, 173–84, 187–89, 202–03

weapons tests
  EEZ 49
  high seas 54–56, 279
  security zones 56–57, 58

Whale War 261

WMD, see weapons of mass destruction

World Customs Organization 167

World Customs Organization Framework of
  Standards 167–68, 240

Zangger Committee 155