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THE HIGH SEAS

David Attard and Patricia Mallia

9.1 Introduction

The high seas are characterized by the principles of free use for all States, and the concomitant principle of flag State exclusivity. The freedoms of the high seas date back to the origins of the law of the sea and are based on the Grotian doctrine of *mare liberum*, where the seas beyond the recognized belt of sovereignty constituting the territorial sea were known as the high seas wherein the freedoms of the high seas were enjoyed by all States.¹

9.2 Definitional Points

The first codification of the high seas freedoms is found in the Convention on the High Seas 1958 (HSC)² which states in its Preamble that, at least as far as the parties were concerned, the provisions constituted a codification of the law relating to the high seas and that the provisions were 'generally declaratory of established principles of international law.' Under Article 1 HSC, all parts of the sea that were not included in the territorial sea or in the internal waters of a State were considered to form part of the high seas. Article 86 of the United Nations Convention on the Law of the Sea (UNCLOS)³ contains no such geographical definition of the high seas but states that the provisions of the high seas regime apply to all parts of the sea that are not included in the exclusive economic zone (EEZ), territorial sea, internal waters or archipelagic waters of an archipelagic

¹ H Grotius, *The Free Sea* (D Armitage (ed.), Liberty Fund, Ind., 2004).

² Convention on the High Seas (Geneva, 29 Apr. 1958, entered into force 30 Sept. 1962) 450 UNTS 11 (HSC).

³ United Nations Convention on the Law of the Sea (Montego Bay, opened for signature 10 Dec. 1982, entered into force 16 Nov. 1994) 1833 UNTS 3 (UNCLOS).

State. With the advent of the EEZ, the concept of the high seas needed to be modified in the sense that, while there was the need to differentiate between the high seas and the new *sui generis* zone, it also had to be possible to ensure that the relevant provisions of the high seas regime would apply to the EEZ.⁴ Therefore, it is the high seas *regime* which applies to those areas falling outside these zones. The application of the high seas freedoms is no longer dependent on a definite geographic region but rather, it applies to those parts of the sea not included in the other maritime zones.⁵ This change in emphasis echoed the focus in the Convention on establishing functional regimes for various maritime areas.⁶

The high seas forms part of the so-called 'areas beyond national jurisdiction', comprising also the International Seabed Area (ISA) and the superjacent airspace. The general understanding regarding the legal concept of the high seas may be stated with reference to Churchill and Lowe where it is noted that the high seas includes not only the water column but also the superjacent airspace. It extends to the seabed and subsoil subject to the provisions of the UNCLOS in the case of the 'outer' continental shelf beyond the EEZ, and to those in Part XI of the Convention regarding the mechanism establishing the Common Heritage of Mankind.⁷

Insofar as concerns the regime established in Part XI UNCLOS, the Area is defined in Article 1(1) UNCLOS as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, that is, beyond the limits of the juridical Continental Shelf. It is in this geographical space that the doctrine of the Common Heritage of Mankind applies as per Article 136 UNCLOS.⁸ This core provision of Part XI grants the classification of Common Heritage of Mankind to the Area and its resources. There is no limitation to be found here, to the mineral resources, as per definition in Article 133(a) UNCLOS according to which 'resources' are all solid, liquid, or gaseous mineral resources *in situ* in the Area at or beneath the

⁴ See further DJ Attard, *The Exclusive Economic Zone in International Law* (Oxford University Press, 1987).

⁵ Note however that certain zones are not subject to all freedoms: thus, in relation to the right at customary international law of establishing an exclusive fishery zone, while this zone remains part of the high seas, the freedom of fishing will not apply therein.

⁶ MH Nordquist et al. (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1995) vol. III, 69.

⁷ R Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press, 1998) 204.

⁸ This provision is granted a status superior to treaty law (but short of *jus cogens* status) through Art. 311(6) UNCLOS which prohibits amendments or any agreements in derogation of the basic principle of CHM. UNCLOS III conferees adopted the current Art. 311(6) after having refused a proposal by Chile to label CHM as a peremptory norm (Informal Proposal by Chile UN Doc A/CONF.62, GP 9, 5 Aug. 1980). See further R Wolfrum, 'Common Interests in the Ocean' (2011) *Science Diplomacy* 281–5; CH Allen, 'Protecting the Oceanic Gardens of Eden: International Law Issues in Deep-Sea Vent Resource Conservation and Management' (2000–2001) 13 *Geo Intl Envtl L Rev* 633–4.

seabed, including polymetallic nodules.⁹ Article 135 provides that Part XI is not to affect the legal status of the waters superjacent to the Area.¹⁰

9.3 Characteristics of the High Seas Regime

Articles 88 and 89 UNCLOS indicate that the high seas are to be reserved for peaceful purposes¹¹ and no State may validly purport to subject any part of the high seas to its sovereignty.¹² This provision reflects the idea that the high seas and its freedoms are to be enjoyed by all States and no action is permitted which would lead to a curtailment of the exercise of these freedoms. This legal basis has led to two significant considerations relevant for the purposes of further discussion: no State has the right to prevent ships of other States from using the high seas for any lawful purpose; and, apart from a few exceptional cases, no State may exercise jurisdiction over foreign ships on the high seas, as will be further discussed.

9.3.1 Peaceful purposes

Article 88 UNCLOS, providing that the high seas are to be reserved for peaceful purposes, is supplemented by further provisions in the Convention such as Article 246 which provides that marine scientific research is to be conducted exclusively for peaceful purposes. More generally, Article 301 provides for the general obligation of peaceful purposes with respect to the exercise of any rights and duties under the UNCLOS. Using terminology reminiscent of the general prohibition of the use of force enunciated in Article 2(4) of the Charter of the United Nations, Article 301 states that, in the exercise of rights and duties under the UNCLOS, the State parties are to 'refrain from any threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the principle of international law embodied in the Charter of the United Nations'. While there is no comprehensive definition of 'peaceful purposes' in the UNCLOS, the Convention itself may have given an answer in Article 301, as mentioned. Its terms indicate that military activities consistent with the principles of international law embodied in the United Nations Charter, especially in Article 2(4) and Article 51, are not prohibited.¹³

⁹ UNCLOS, Art. 133(a).

¹⁰ The same is provided with respect to the waters above the continental shelf, in UNCLOS, Art. 78(1).

¹¹ See also UNCLOS, Arts 58(1), 141, 246, and 301.

¹² UNCLOS, Arts 88 and 89.

¹³ Report of the Secretary General, 'The Naval Arms Race' (1986), UN Doc A/40/535, para 188.

Insofar as concerns the ISA, Article 141 provides that the ISA shall be open to use exclusively for peaceful purposes by all States.¹⁴ While the 'peaceful purposes' formula is applied both under Articles 88 and 141 to the high seas and the ISA, Article 141 uses the term '*exclusively*' when expressing the peaceful purposes formula. No such specification is made in Article 88 where the word '*reserved*' is used with respect to the water column of the high seas. This distinction has led some to suggest that certain military uses may be justified within the high seas but not in the ISA. This raises the question of a possible demilitarization of the international seabed.¹⁵ Still, however, the better view would be that the peaceful purposes obligation in Article 14 is not to be understood in the sense of a complete demilitarization of the Area. Indeed, the second section of Article 141 UNCLOS, by prohibiting any form of discrimination between coastal and landlocked States in respect of peaceful uses of the Area, suggests that the entire Article primarily refers to access to the resources of the deep seabed and not its demilitarization. The assumption is supported by the legislative history of the provision, which reflects the intention to emphasize the status of the Area as internationalized territory.¹⁶

Later, the freedom of navigation will be discussed, as a cardinal freedom of the high seas. A few words should be devoted at this stage to the freedom of navigation of warships in the light of Article 88. Warships, defined in Article 29 UNCLOS, also enjoy the freedom of navigation in the high seas. Where the right to exercise military manoeuvres in the high seas is concerned, it would seem that this is allowable with limitations of the due regard rules¹⁷ and the fact that such manoeuvres should not lead to the appropriation of the high seas.

9.3.2 Non-appropriation

The non-appropriation principle is closely linked to the freedoms of the high seas, with Article 89 being interpreted as the counterpart to this principle. It is only through the principle of non-appropriation that the freedoms of the high seas can be enjoyed by all States. Article 89 provides that no State may validly purport to subject any part of the high seas to its sovereignty.

The ISA is also characterized by the principle of non-appropriation.¹⁸ However, here there is a slight difference in the treatment of non-appropriation as compared

¹⁴ Note also UNGA Res 2479 (XXV), 'Declaration of Principles governing the Seabed and Ocean Floor and the Subsoil thereof beyond the Limits of National Jurisdiction' para 8.

¹⁵ See in this regard T Treves, 'Military Installations, Structures and Devices on the Seabed' (Oct. 1980) 74(4) *AJIL* 808–57.

¹⁶ See further R Wolfrum, 'Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being' (1981) 24 *German Yearbook of International Law* 200 ff.; M Lodge, 'The Common Heritage of Mankind' (2012) 27 *IJMCL* 735–6.

¹⁷ UNCLOS, Art. 87(2).

¹⁸ UNCLOS, Art. 137 provides a detailed description of the application of non-appropriation in this area.

to the high seas regime in that, while no State is allowed to claim sovereignty over the Area, the right of the resources in the Area are vested in mankind as a whole on whose behalf the Authority shall act.¹⁹

9.4 The Freedoms of the High Seas

The emerging 'definition' of the high seas, found in Article 86 UNCLOS draws attention to the unity of the oceans. In view of the fact that the interplay between the high seas and the EEZ while they are functionally different maritime zones, that they constitute a 'single physical continuum' made possible the preservation of the high seas freedoms within the EEZ, as evidenced by Articles 86 and 58.²⁰ This unity is also apparent through Article 87, delineating the non-exhaustive list of freedoms of the high seas. These freedoms are not stipulated as being absolute; rather, the cross-references to other parts of the Convention indicate that the freedoms coexist with obligations.²¹

The UNCLOS follows the approach adopted in Article 2 HSC by providing a list of the more important freedoms. Article 87(1) UNCLOS mentions the freedom to construct artificial islands and other installations (subject to the application of Part VI) and the freedom to carry out marine scientific research (subject to Parts VI and XIII), in addition to the four traditions; freedoms of navigation, over-flight, fishing, and the laying of submarine cables and pipelines.²²

The fact that the list in Article 87 is not exhaustive raises the problem of having to determine whether a particular activity not mentioned in the list is in fact a freedom of the high seas. It is not difficult to see that the exercise of new freedoms may be claimed in this regard. In principle, an activity which is compatible with the status of the high seas—in that it involves no claim to appropriation of the high seas—and which involves no unreasonable interference with the rights of other States or the international seabed should be admitted unless prohibited by a specific rule of provision in the UNCLOS.

Precisely because the high seas freedoms are open to all States, whether coastal or landlocked, the freedoms cannot be absolute. To this end, Article 87 states that the

¹⁹ UNCLOS, Art. 137(2).

²⁰ Nordquist et al. (n 6) vol. III, 33.

²¹ Note also the 'due regard' requirement in Art. 87(2) UNCLOS which further serves to highlight the fact that the freedoms are exercised on the basis of equality and that no State can claim a pre-eminent position in this regard. See nn 23 and 24.

²² The freedom to carry out scientific research and the freedom to construct artificial islands and other installations did not feature in the 1958 regime.

freedoms of the high seas are to be exercised in accordance with the conditions laid down by the UNCLOS and by other rules of international law.

Furthermore, UNCLOS produces the mechanism which allows for a balance between the exercise of the freedoms of the high seas with the exercise of the rights of other States and also, the rights of the international community as a whole. This mechanism is reproduced in Article 87(2) and framed as the 'due regard' principle. It provides that the freedoms must be exercised with due regard²³ for the interests of other States in their exercise of the freedoms of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area (i.e. the seabed and ocean floor beyond the limits of national jurisdiction).²⁴ Article 87(2) should be read in conjunction with the over-arching Article 300 which deals with the exercise of good faith and a non-abuse of freedoms under the UNCLOS.²⁵

The 'due regard' obligation has been described as a component part of the principle of good faith which directs that rights are to be exercised in a reasonable manner.²⁶ In the words of Churchill and Lowe:

The requirement of 'due regard' seems to require that where there is a potential conflict between two uses of the high seas, there should be a case-by-case weighing of the actual interests involved in the circumstances in question, in order to determine which use is the more reasonable in that particular case.²⁷

It is with regard to such conflicting uses that the principle of 'due regard' affects the burden of proof. That is, in the event of a dispute, the presumption should be in favour of the exercise of the freedom within the high seas. It would be the task of the objector to the exercise of a particular freedom to argue that the due regard rule is not being honoured. The *Nuclear Tests Cases*,²⁸ although never determined on its merits owing to a French declaration that it was to cease testing (thus rendering moot the case before the International Court of Justice), offered an illustration of

²³ The HSC used the terminology 'reasonable regard'. However, the change in terminology is not considered to have changed the substance or definition of the obligation.

²⁴ The 'due regard rule' is found throughout the Convention and is pivotal in the task of balancing conflicting rights. The duty to pay due regard to the rights of other States is a well recognized legal formula and with respect to the high seas; the words 'due regard' affect the burden of proof. That is, in the event of a dispute, the presumption should be in favour of the exercise of the freedom within the high seas. It would be the task of the objector to the exercise of a particular freedom to argue that the due regard rule is not being honoured.

²⁵ See also UNCLOS, Art. 56(2) which establishes the due regard rule when balancing EEZ rights with the rights of other States and UNCLOS, Art. 58(3) which uses the due regard rule with respect to balancing EEZ rights with the freedoms of navigation and communication allowed in the EEZ.

²⁶ D Anderson, 'Freedoms of the High Seas in the Modern Law of the Sea' in D Freestone, R Barnes, and D Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006) 323.

²⁷ Churchill and Lowe (n 7) 207.

²⁸ *Nuclear Tests Cases* [1974] ICJ Rep 253.

this point. The possibility of atmospheric nuclear weapons testing in the Pacific as part of the free use of the high seas was juxtaposed against the right 'said to be derived from the character of the high seas as *res communis* and possessed by Australia in common with all other maritime States, to have the freedoms of the high seas respected by France; and, in particular, to require her to refrain from (a) interference with the ships and aircraft on the high seas and in the superjacent air space, and (b) the pollution of the high seas by radioactive fall-out.'²⁹

The due regard principle thus envisages striking a balance between the various freedoms and also, between a particular freedom and concomitant obligations, in the UNCLOS or another agreement, as will be noted. In this way, the freedom of laying submarine cables and pipelines—otherwise known as the freedom of communication—is made subject to Part VI, namely, the Continental Shelf regime. It is therefore, also subject to the rules found in Article 79 UNCLOS which Article is imported into the EEZ regime by Article 56(3) UNCLOS.³⁰ The freedom to construct artificial islands and other installations permitted under international law is subjected to the operation of Part VI wherein the coastal State is given the exclusive right to construct, authorize, and regulate the construction, operation, and use of these structures.³¹

The freedom of fishing is subject in Article 87(e) to the conditions laid down in section 2 of Part VII which in essence contains rules with regard to the conservation and management of living resources of the high seas. The general right of all States for their nationals to engage in fishing on the high seas, enunciated in Article 116, is made subject to various limitations, for example, general treaty obligations such as the Straddling Fish Stocks Agreement³² and notions of conservation of fisheries. Furthermore, particular provisions in the EEZ regime protect the rights, duties, and interests of the coastal State. Here, a significant inter-relationship is noted in the provisions relating to the EEZ which require that the interests of the coastal State are protected, especially with regard to particular stocks that breed in the EEZ, such as those which breed in the EEZ but which occur also on the high seas; highly migratory species, anadromous stocks, and catadromous species.³³

²⁹ *Nuclear Tests Cases* [1974] ICJ Rep 253, para 101(3).

³⁰ It is interesting that while submarine cables and pipelines are listed together, Art. 79(3) UNCLOS indicates that coastal State consent is only necessary for the delineation of the course for the laying of pipelines, and not cables.

³¹ Particularly, Art. 80(7) UNCLOS provides that '[a]rtificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation'. See also UNCLOS, Art. 60 which applies to the Continental Shelf regime by virtue of Art. 80.

³² Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 Aug. 1995, entered into force 11 Dec. 2001) 2167 UNTS 88.

³³ See UNCLOS, Arts 63(2), 64, 66, and 67. Insofar as the protection of marine mammals is concerned, Art. 65 reflects the controversial nature of this stock and allows a higher level of

There is, therefore, an inter-relationship between the freedom of fishing on the high seas and the control of these stocks on the EEZ. Article 87(1)(f) similarly subjects the freedom of scientific research on the high seas to Part VI (on the continental shelf) and to Part XIII (relating to the general rules on marine scientific research).

These considerations relating to the exercise of the high seas freedoms are important, especially considering that some of the freedoms mentioned in this sub-Article are subjected to other parts of the Convention dealing with regimes in which coastal States have a limited amount of jurisdiction or control. This leads to the possibility of conflicting uses of the high seas. Therefore, apart from the conflicting uses which may arise from the concomitant use of the high seas freedoms, there is also the very real situation where the exercise of the freedoms of the high seas must be balanced with the exercise of coastal State jurisdiction in certain overlapping zones such as the EEZ or continental shelf. In this case, the high seas freedom is to be subjected to coastal State jurisdiction. In 1958, there was already an awareness of the need to create a coexistence between the freedoms of the seas and the new regimes;³⁴ the contiguous zone and the continental shelf were seen as two regimes that interfered with the exercise of high seas freedoms but it was also recognized that the status of the waters remained high seas. Where the introduction of the EEZ is concerned, the same approach must be taken; however, the overwhelming rights of an economic nature that the coastal State enjoys in the EEZ involve a greater degree of interference with the high seas freedoms than in the continental shelf or the contiguous zone.

9.4.1 Highlighting the freedom of navigation

Under the UNCLOS, the freedom of navigation³⁵ applies to the State and not to the vessel; in this way, it is the State, whether coastal or landlocked, that has the right to sail ships flying its flag on the high seas, as per the terms of Article 90 UNCLOS. This is important because ultimately, it is the State that grants its vessels this right and it is the flag State that remains liable for the actions of the vessel registered under its flag.

Article 91(1) provides that the ship is considered as appertaining to the State whose flag it flies; that is, the ship is considered to have the nationality of its flag

protection within the EEZ. This competence is unusually extended beyond the EEZ to the high seas under UNCLOS, Art. 120.

³⁴ See e.g. HSC, Art. 2 which provides that '[f]reedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law.'

³⁵ Insofar as the freedom of overflight is concerned, this is recognized in Art. 87(1)(b) UNCLOS. However, the actual juridical content of this particular freedom is left to be elaborated elsewhere in other relevant international conventions.

State. Article 92 UNCLOS³⁶ establishes that a ship is to fly under the flag of one State only and that, subject to any exceptions in the UNCLOS or other international treaties, such ship is subject to the flag State's exclusive jurisdiction when exercising such freedom on the high seas.³⁷ This rule was inserted as an adjunct to the principle of freedom of the sea due to the recognition that 'the absence of any authority over ships sailing the high seas would lead to chaos'.³⁸

Furthermore, a ship is not to change its flag during a voyage or while in a port of call, except in the case of a real transfer of ownership or change of registry. In order to ensure that a ship is only registered in one State, Article 92(2) continues by stating that a ship which sails under two flags may be assimilated to a ship without nationality, and therefore, would be unable to invoke either nationality in its protection.³⁹

The freedom of navigation is intimately linked to the question of the granting of nationality to ships. The matter is largely left by the Convention to be regulated by the domestic law of the State. Article 91, a codification of a well-established rule of international law,⁴⁰ grants the coastal State discretion to establish conditions with regard to three related issues: the grant of its nationality to ships, the registration of ships in its territory, and the right to fly its flag. A connection is thereby established between the registration of a ship and its nationality: 'nationality' signifies the legal connection between a ship and the flag State; 'registration' in a State gives the vessel the right to fly the flag of that State since it refers to the administrative mechanism by which a State confers its nationality upon a vessel; the documentation required to be issued under Article 91(2) evidences the ship's national character.⁴¹ Thus, a consequence of registration and nationality, once granted, is the right of the ship to fly the flag of the State. In this way, ships have the nationality of the State whose flag they are entitled to fly.⁴² This link is of major

³⁶ This article is reiterated in the United Nations Convention on Conditions for Registration of Ships (Geneva, 7 Feb. 1986, not in force) 26 ILM 1236, (UNCTAD Convention) Art. 4.

³⁷ This principle was noted in the *Lotus* case [1920] PCIJ Rep Ser. A, No. 10, at 25, where it was stated that vessels on the high seas are subject to no authority save for the State whose flag they fly.

³⁸ Report of the International Law Commission covering the work of its Eighth Session, UN Doc A/3159, Art. 30 *Commentary*, para (1) [1956] II YBILC 253, 279.

³⁹ Nordquist et al. (n 6) vol. III, 125, 127 adds that this may be extended, by assimilation to a ship which hides its identity and also, to a ship that flies a flag to which it is not entitled under Art. 91.

⁴⁰ *M/V 'Saiga' (No. 2) (St Vincent and the Grenadines v Guinea)*, Judgment, 1 July 1999, [1999] ITLOS Rep 10, para 63. In this regard, see Ph Gautier, 'The Flag State in the Jurisprudence of the International Tribunal of the Law of the Sea' in E Franckx (ed.), *Contemporary Regulation of Marine Living Resources and Pollution* (Maklu Publishers, 2007) 147–71.

⁴¹ These three factors—(1) the granting of nationality by the flag State; (2) the registration of the vessel; and (3) the flying of the flag State's flag as of right—have been described as being comparable to a mental element, a material element, and a symbolic element, respectively. See *The Grand Prince (Belize v France)*, 21 Mar. 2001, Judge Laing (Separate Opinion).

⁴² Not all States adopt an extension of the active nationality principle with respect to their vessels. For example, Art. 4 of the Italian Navigation Code provides that 'Italian vessels on the high seas and

significance due to the fact that 'it is the principal factor for maintaining discipline in all aspects of maritime navigation, for the attribution of the responsibility of a State in cases of violations of applicable rules by ships of its nationality, and for the exercise of flag State jurisdiction and control generally.'⁴³

9.4.2 The genuine link

The granting of nationality is a matter of domestic law and it is up to every State to issue the necessary documentation certifying the right of the ship to fly the flag of that State (i.e. evidencing proof of nationality). To this end, the UNCLOS requires the existence of a 'genuine link' between the flag State and its ships. No further specification is given in this regard.

The International Law Commission (ILC) had urged that the granting of nationality to a ship could not be a mere administrative formality since jurisdiction and control over vessels could only be effectively exercised in the case of a true link establishing such control and jurisdiction.⁴⁴ However, attempts to give this doctrine precise definition have not met with success.⁴⁵

In a bid to give substance to the notion of the genuine link, the United Nations Convention on Conditions for Registration of Ships⁴⁶ attempted to introduce a regulatory framework which would supplement the provisions in the Law of the Sea Conventions of 1958 and 1982, wherein Article 1 lays out the aim of, inter alia, 'strengthening the genuine link between a State and ships flying its flag'. However, even if the Convention does come into force⁴⁷ it is unlikely that its provisions on corporate ownership of vessels will be effective in addressing the complex methods that are used today to hide the beneficial ownership of vessels.⁴⁸

aircraft in airspace not subject to the sovereignty of a State are considered to be *Italian territory*' (emphasis added). In point of fact, this does not necessarily embody the principle of flag State exclusivity although the effect of the provision leads to this. More specifically, it claims that the vessel constitutes the 'territory' of Italy. Italian vessels are therefore regarded as an extension of Italian territory.

⁴³ Nordquist et al. (n 6) vol. III, 104.

⁴⁴ ILC Report to UNGA covering the work of its Eighth Session, Art. 29 *Commentary*, para (3), 279.

⁴⁵ Attempts to draw parallels to the genuine link that must exist between persons and their State of nationality, as in the *Nottebohm* case [1955] ICJ Rep 4, is not particularly helpful. Cf. MS McDougal, WT Burke, and IA Vlasic, 'The Maintenance of Public Order at Sea and the Nationality of Ships' (1960) 54(1) *AJIL* 25, for more on this issue.

⁴⁶ UNCTAD Convention.

⁴⁷ UNCTAD Convention, Art. 19(1) provides that the convention is to enter into force 12 months after the date on which no fewer than 40 States, the combined tonnage of which amounts to at least 25 per cent of the world tonnage, have become parties to the Convention. To date, there are 14 signatories and 11 parties to the Convention.

⁴⁸ See further P Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff, 2010) 73–4.

Taking a look back through history, to the regime prior to that established in 1958, the traditional position held that each State had the sovereign right to grant its nationality to ships and such attribution of national character was held to be conclusive as to the status of the vessel. In this light, the introduction of the genuine link requirement in the HSC was seen by some as an attempt to limit the exclusive right of States to ascribe their national character to ships by means of 'new and ill-defined criteria which would confer upon States a unilateral competence to question, and even deny, each other's ascription of nationality.'⁴⁹ Since, as was suggested earlier, the exercise of effective jurisdiction was seen as a major element contributing to the exercise of the genuine link, it was thought that States could deny such ascription of nationality if there was no genuine link or if there was no effective control over the vessel.

François's Report on the High Seas⁵⁰ delivered to the ILC appears to be one of the earliest documents in which the idea of limited State competence in this respect was to be found. This was further elaborated upon in his Second Report⁵¹ by means of certain requirements which, it was felt, had to be fulfilled for the purposes of recognition of a vessel's national character by other States.⁵² This formulation—based on considerations of ownership of the vessel—persisted, with minor changes, until the ILC's 8th Session in 1956 where this scheme was replaced by the requirement that 'for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship'.⁵³ Interestingly, this requirement of the genuine link specifically for the purposes of recognition of the national character of a ship was omitted in the final text of the HSC, seeming to negate the possibility that a State could deny recognition of national character to a vessel in the case of the lack of a genuine link. Indeed, a 'possible rule to the effect that State A could determine unilaterally that there was no "genuine link" between a ship and State B and then

⁴⁹ McDougal et al. (n 45) 28.

⁵⁰ UN Doc A/CN.4/17, 1950, in [1950] II *YBILC* 36, 38. Note that reference to supplementary sources such as the ILC's work and the proceedings of the 1958 conference are necessary and authorized by Art. 32 of the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969; entered into force on 27 Jan. 1980) (1980) 1155 UNTS 331.

⁵¹ UN Doc A/CN.4/42, 1951, in [1951] II *YBILC* 75, 76.

⁵² '1. More than one-half of the vessel should be owned by:

- (a) Nationals or persons domiciled in the territory of the State to whom the flag belongs;
- (b) A partnership or commandite company in which more than half the partners with personal liability are nationals or person established in the territory of the State to whom the flag belongs;
- (c) A national joint-stock company which has its head office in the territory of the State to whom the flag belongs.

2. The captain should possess the nationality of the State to whom the flag belongs.'

⁵³ ILC Report to UNGA covering the work of its Eighth Session, final draft Art. 29, 260. Also issued as Official Records of the General Assembly, Eleventh Session, Supplement No. 9. (The requirement to exercise effective control had not yet been inserted at this stage.)

treat the ship as being stateless would have been open to abuse and even a recipe for chaos on the high seas'.⁵⁴

Under the 1958 regime the requirement of the genuine link was firmly linked to the ability of the flag State to 'effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag'. In this way, the terminology employed seemed to indicate that the capacity to exercise such jurisdiction was to be interpreted as one of the requirements necessary for a genuine link to exist. In the UNCLOS, the requirement to exercise effective jurisdiction and control was transposed to Article 94, providing for flag State obligations. The importance of the capacity of the flag State to exercise effective jurisdiction over ships is further amplified in Article 94(6) UNCLOS which stipulates that, upon receipt of a report that the flag State has not effectively exercised such control, the flag State is to investigate the matter and take any necessary action to remedy the situation. If the flag State is not in a position to exercise its jurisdiction and control in such circumstances, this may have implications as to whether a genuine link exists between the State and the ship. Indeed, the precise relationship between the capacity to exercise jurisdiction and the concept of the genuine link is unclear—is this capacity a prerequisite for the genuine link to exist, or is it merely evidence that a genuine link exists?

The International Court of Justice was given the opportunity to define the concept of the genuine link in the *Constitution of IMCO Case*⁵⁵ wherein, when considering the membership requirements for the composition of the Maritime Safety Committee, it was called to determine whether the Assembly, when considering which were the 'largest ship-owning nations' (no fewer than eight of which were to be elected to the Committee), had the discretion to consider other factors apart from the fact that such countries were those with the greatest registered tonnage. In their pleadings, several States, such as the Netherlands, Norway, and the United Kingdom spoke of the relation between the vessel and its states of registry, thus advancing arguments based on the genuine link. In this way, it was argued that the Assembly could refuse membership to Liberia and Panama because their tonnage figures included foreign-owned vessels. However, this was not held to be a relevant consideration; the determination of the largest ship-owning nations was held to depend solely upon the tonnage registered in the countries in question and any further examination of the contention based on a genuine link was held to be irrelevant. Here, the genuine link requirement seemed to be based on registration alone. This seems to be the approach taken by the International Tribunal for the Law of the Sea (ITLOS), as will be discussed.

⁵⁴ Anderson (n 26) 336.

⁵⁵ Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation [1960] ICJ Rep 150, 171.

Although the concept of the genuine link eludes widespread definition, it seems safe to say that the genuine link was devised for the purposes of identification of the national character of a ship, especially considering that the reference appears in the UNCLOS in the context of an Article headed 'Nationality of Ships'.⁵⁶ However, this cannot automatically mean that a State can withhold recognition of a vessel's national character in the event of the absence of a genuine link. Still, it is to be noted that the possibility of non-recognition owing to a lack of a genuine link was suggested by Advocate General Mischo in *ex p Factortame*⁵⁷ and was central to Guinea's defence in the *M/S 'Saiga'* case.⁵⁸ The consequences of an alleged lack of a genuine link between the vessel and its State of registration will doubtless fall to be considered by the ITLOS in the *M/V 'Virginia G'* case (*Guinea-Bissau v Panama*). The Panamanian registered oil tanker had been arrested by authorities of Guinea-Bissau on 21 August 2009 while it was carrying out refuelling operations for fishing vessels in Guinea-Bissau's EEZ. Panama instituted proceedings for reparation for the damages caused to the *Virginia* during the 14 months of its detention. However, Guinea-Bissau filed a counter-memorial alleging that

Panama violated art. 91 of the Convention by granting its nationality to a ship without any genuine link to Panama, which facilitated the practice of illegal actions of bunkering without permission in the EEZ of Guinea-Bissau by the vessel *Virginia G*.⁵⁹

Guinea-Bissau therefore claimed all damages and costs caused by the *Virginia G* to Guinea-Bissau, which resulted from granting of the flag of convenience to the ship by Panama from Panama.⁶⁰ On this reading, the approach seems to be that Guinea-Bissau felt entitled to arrest the vessel due to the lack of a genuine link and indeed, that Panama breached the UNCLOS because of this lack of a genuine link. However, reference to Judge ad hoc Treves's dissenting opinion draws attention to the gravity of challenging a State's sovereign right to grant nationality to vessels. In his own words, '[t]o challenge the exercise of the sovereign right of Panama to grant its flag to a vessel because such a vessel has allegedly caused damage and losses to the challenging State is in my view disproportionate and devoid of direct connection with Panama's claims.'⁶¹ It remains to be seen what approach the ITLOS will take. However, it has hitherto taken the position that

⁵⁶ This view is not, however, universally accepted. See e.g. Advocate General Tesauro in *Commission v Hellenic Republic* [1997] ECR I-6725, para 13 of his opinion.

⁵⁷ Case C-221/89 *R v Secretary of State for Transport ex p Factortame* [1991] ECR I-3905.

⁵⁸ *M/V Saiga (No. 2)*, Judgment, 1 July 1999. (Discussion follows in Section 9.4.2(a).)

⁵⁹ Counter-Memorial of Guinea-Bissau, 28 May 2012, para 257: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/pleadings/4_Counter_Memorial_of_the_Republic_of_Guinea_Bissau.pdf> accessed 19 June 2014.

⁶⁰ Counter-Memorial of Guinea-Bissau, 28 May 2012, para 260.

⁶¹ Dissenting Opinion of Judge ad hoc Treves, para 5, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/C19_Ord_02.11.2012_DissOp.Treves_rev.pdf> accessed 13 May 2014.

registration is sufficient to establish the genuine link, thus, deferring to State sovereignty in the matter.

It will be recalled that an early draft of Article 91(2) was that 'for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship'.⁶² The removal of this phrase could lead to the conclusion that the possibility of denying recognition to vessels without a genuine link to their flag State was thereby removed. However, it is not tenable to maintain that no consequences follow a lack of a genuine link. Indeed, following the basic maxim of treaty interpretation that provisions are to be interpreted so as to be effective and have meaning and purpose, some consequences must necessarily follow from the lack of a genuine link.⁶³ If, for the sake of argument, nationality could be ignored in the absence of a genuine link, would this render the vessel stateless? If so, the provisions of the UNCLOS regarding jurisdiction over stateless vessels, previously referred to, would come into operation. However, would the vessel be stateless vis-à-vis the international community or, as Judge Treves seems to indicate in his dissenting opinion in the *'Virginia'* case, would only the State which has suffered damages owing to the lack of a genuine link be entitled to exercise jurisdiction over the vessel?

Oxman and Bantz refer to various Articles in international instruments to evidence 'an emerging tendency to link the enjoyment of rights to the performance of related duties'.⁶⁴ Following this line of reasoning, one could conclude that the failure of a flag State to comply with its duty to ensure a genuine link between itself and its ships would deny that State the right to exercise rights in respect of such ships, including the right of diplomatic protection, for example.⁶⁵ This view is supported through reference to Article 94 which, focusing as it does on the necessity of exercising effective control and jurisdiction over ships, is held to be a central element in the genuine link concept. This reasoning was also argued before the International Tribunal for the Law of the Sea.

⁶² ILC Report to UNGA covering the work of its Eighth Session, final draft Art. 29, 260. Also issued as Official Records of the General Assembly, Eleventh Session, Supplement No. 9.

⁶³ I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984) 121.

⁶⁴ BH Oxman and V Bantz, '*The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment (ITLOS Case No. 2)' (2000) 94 *AJIL* 140-50; Cf. UNCLOS, Art. 228; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, adopted 4 Dec. 1995, entered into force 11 Dec. 2001) 2167 UNTS 88 (FSA); International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984, as amended 7 July 1995) 1361 UNTS 190.

⁶⁵ See Oxman and Bantz (n 64) 149.

(a) *The ITLOS judgments*

(i) **Jurisdiction and the genuine link** An explanation of the concept of the genuine link was considered in 1999 by the ITLOS in its judgment in the *M/V 'Saiga' (No. 2)* case⁶⁶ regarding the arrest of the *M/V Saiga* following its bunkering activities in Guinea's EEZ. Guinea argued that it was not bound to recognize the Vincentian nationality of the *Saiga* since there was no genuine link between St Vincent and the Grenadines and the vessel. It submitted that

[W]ithout a genuine link between St Vincent and the Grenadines and the *M/V Saiga*, St Vincent and the Grenadines' claim concerning a violation of its right of navigation and the status of the ship is not admissible before the Tribunal vis-à-vis Guinea, because Guinea is not bound to recognise the Vincentian nationality of the *M/V Saiga*, which forms a prerequisite for the mentioned claim in international law.

It further stated that a State is unable to fulfil its obligations as a flag State according to the Convention unless it exercises prescriptive and enforcement jurisdiction over the owner and/or the operators of the vessel. In default of such capacity to exercise jurisdiction Guinea argued that there would not exist a genuine link between the *Saiga* and St Vincent and the Grenadines and that it therefore did not have to recognize the claims of St Vincent and the Grenadines in regard to the vessel.⁶⁷

Guinea's contention required the Tribunal to determine whether the absence of a genuine link between a flag State and its vessel entitles another State to refuse to recognize the nationality of the ship.⁶⁸ After noting that Articles 91, 92, and 94 UNCLOS fail to provide an answer, ITLOS looked into the drafting history of the Article and found that Article 29 of the Draft Articles on the Law of the Sea (adopted by the ILC in 1956) introduced the notion of the genuine link as a criterion both for the attribution of nationality *and* for the recognition by other States of such nationality. This latter point however, was not reproduced in Article 5 HSC, nor in Article 91 UNCLOS. The inference that the lack of a genuine link therefore did not permit a lack of recognition of such nationality was further strengthened by Article 94(6) UNCLOS which represents the only provision dealing with the situation of a failure by the flag State to fulfil its obligations under the Convention. In such a scenario, where another State has 'clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised', that State may report the fact to the flag State which must then investigate the matter and, if appropriate, take any necessary action to remedy the situation.

⁶⁶ *M/V Saiga (No. 2)*, Judgment, 1 July 1999.

⁶⁷ *M/V Saiga (No. 2)*, Judgment, 1 July 1999, paras 75–76.

⁶⁸ Following its determination on this question, ITLOS did not consider the second question regarding whether or not there existed a genuine link in the case at hand.

Therefore, while the tribunal seemed to agree with Guinea that the exercise of prescriptive and enforcement jurisdiction evidences a genuine link, it did not admit of a denial of recognition on the basis of the lack of such genuine link:⁶⁹

[T]he purpose of the provisions of the convention on the need for a genuine link between a ship and its flag is to secure a more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.⁷⁰

(ii) **The significance of registration** The most typical way for a State to provide that a ship may be granted its nationality is via registration,⁷¹ and this is an issue which the tribunal consistently analyses—even *ex officio*—in order to determine whether or not it has jurisdiction to entertain the application. The implication is that lack of registration may lead to the ITLOS failing to entertain the claim of the so-called flag State. The dissenting opinion of Judge Ndaiye in the *M/V 'Saiga'* (No. 2) case points in this direction, namely, that the claim should have been held to be inadmissible since the *Saiga* was not duly registered and should therefore have been characterized as a ship without nationality when it was arrested.⁷² Furthermore, denying nationality to the *Saiga*, he maintained, would not have meant that the vessel would be completely without protection since the right to protect a ship might extend to the State whose nationals own the ship. However, while a number of the separate opinions held that the *Saiga* was not validly registered at the relevant time, it was thought that the ITLOS should take jurisdiction nonetheless, especially in view of the fact that this would not harm Guinea, the Respondent State, in any way.⁷³ Judge Nelson observed that while there had been some irregularity in the case of registration of the *Saiga*, to treat ships in such circumstances as having no nationality and therefore, as being Stateless, would have disturbing ramifications on the maintenance of order over the oceans, and possibly also on private maritime law.

It seemed therefore that the Tribunal generally took the position that irregularities in registration were not sufficient to deny national character to a vessel. The purpose of the provisions on the genuine link is to secure a more effective

⁶⁹ However, in this case the tribunal was almost certainly influenced by Guinea's failure to raise its contention at an earlier stage of the proceedings.

⁷⁰ *M/V Saiga* (No. 2), Judgment, 1 July 1999, para 83. The Tribunal also referred to the 1986 UNCTAD Convention, the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, in order to support this contention. See paras 84–85.

⁷¹ See *M/V Saiga* (No. 2), Vice-President Wolfrum's Separate Opinion, para 20.

⁷² See *M/V Saiga* (No. 2), Judge Ndaiye's Dissenting Opinion, para 1. Reference to Art. 292(2) UNCLOS to the effect that an application for prompt release of a vessel upon the posting of a reasonable bond or other financial security may only be made 'by or on behalf of the flag State'.

⁷³ See *M/V Saiga* (No. 2), Separate Opinions of Judges Mensah and Vice-President Wolfrum.

implementation of the duties of the flag State and not to establish criteria to which the validity of a ship's registration may be challenged by other States.⁷⁴ However, a consideration in the Separate Opinions was that no harm was done to the respondent State by the ITLOS taking jurisdiction.

The Tribunal seems to have been ready to go further in *The Grand Prince*.⁷⁵ Here, it declined jurisdiction as it was not satisfied that Belize was the flag State of the vessel on the date of filing of the application for prompt release (although it was on the date of the arrest of the vessel by French authorities). Judge Wolfrum, in his Separate Opinion, stressed the significance of registration thus:

The registration of ships has to be seen in close connection with the jurisdictional powers which flag States have over ships flying their flag and their obligation concerning the implementation of rules of international law in respect of those ships. It is one of the established principles of the international law of the sea that, except under particular circumstances, on the high seas ships are under the jurisdiction and control only of their flag States, i.e. the States whose flag they are entitled to fly. The subjection of the high seas to the rule of international law is organised and implemented by means of a permanent legal relationship between ships flying a particular flag and the State whose flag they fly. This link not only enables, but in fact, obliges States to implement and enforce international as well as their national law governing the utilization of the high seas. The Convention upholds this principle. Article 94 of the Convention establishes certain duties of the flag State. Apart from that, Article 91 paragraph 1, third sentence, of the Convention states that there must be a genuine link between the flag State and the ship. This means the registration cannot be reduced to a mere fiction and serve just one purpose, namely to open the possibility to initiate proceedings under Article 292 of the Convention on the Law of the Sea. This would render registration devoid of substance—an empty shell.⁷⁶

According to Judge Wolfrum therefore, registration—the administrative act which evidences the nationality of the vessel—must have 'substance'; it must reflect the actual control that the flag State is able to enforce over its ships. Still however, the question of the effect of lack of registration remains, as does the precise nature of the relationship between registration and nationality of a vessel. The approach hitherto followed by ITLOS seems to be correct. Registration remains the main, if not sole, indicator of nationality. Indeed, lack of registration could render the vessel devoid of nationality. A consideration of the status of ships too small to register may help to bolster this argument. Article 94(2) UNCLOS provides that one of the duties of the flag State is to 'maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size'.

⁷⁴ *M/V Saiga (No. 2)*, Judgment, 1 July 1999, para 42.

⁷⁵ *The Grand Prince (Belize v France)*, Application for Prompt Release, Judgment, 20 Apr. 2001.

⁷⁶ *The Grand Prince*, Declaration of Judge Wolfrum, para 3.

Such unregistered vessels are not permitted to leave the territorial seas of the State in which they are berthed. The reason for this could well be that beyond this zone, the territorial jurisdiction of the State ceases and the State would thereby have no further means of control over these unregistered—and therefore, stateless—vessels. This line of argumentation, if correct, strengthens the link—made amply clear in the UNCLOS—between nationality and registration, showing registration—and the right to fly the flag of the State—to be the formal evidence of nationality.

9.5 The Duties of the Flag State

Article 94 is the central provision relating to the duties of the flag State, which appears in the UNCLOS as an expanded version of the 1958 requirement that the flag State ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag’ (i.e. the closing portion of Article 5(1) HSC). Article 94(1) begins with the same duty and then goes on to specify in detail the areas in which such jurisdiction must be exercised. While Article 92(1) grants exclusive jurisdiction to the flag State, Article 94(1) imposes the obligation to effectively exercise that jurisdiction. Anderson notes that the idea behind expanding the flag State’s duties was that, since these duties must subsist on a continuing basis and not only at the time of registration, the aim was to make flag State jurisdiction function more effectively.⁷⁷ Consequently, the UNCLOS contains two new Articles widening the 1958 obligation found in Article 5 to the effect that the flag State was to exercise effective jurisdiction and control in administrative, technical, and social matters over ships flying its flag.

Given the importance of the flag in determining nationality, there is the duty to maintain a register which contains the details of the vessel entitled to fly the flag, with exception being made for small vessels (discussed in Section 9.4.2(a)). Furthermore, in a bid to achieve an effective standard of enforcement, the flag State is also required to ensure that its domestic law grants the courts jurisdiction to enforce the standards and rules with respect to social, administrative, and technical matters in order therefore, to render such matters domestically enforceable. To this end, the State is not only able to enforce its jurisdiction against the ship but also against the master, officers, and crew of the vessel.

It seems that the main focus of Article 94 is directed towards guaranteeing the safety of vessels.⁷⁸ Again, Article 94(3) aims to ensure that the domestic law is in place to enforce measures regarding the building and manning of ships, regular

⁷⁷ Anderson (n 26) 334.

⁷⁸ Further duties relating to maritime safety appear under the duty relating to pollution control. See UNCLOS, Arts 192, 194, 211, 217, 218, 228, and 232.

inspections, education of staff, human capacity to implement international regulations with respect to safety and environment, and the maintenance of radio communication. With respect to the safety of vessels, the flag State must not only ensure that the domestic legislation is in place, but also that it harmonizes with generally accepted international standards.⁷⁹

Article 94(6)(7) also attempts to address a lack of enforcement on the part of the flag State. It explains that if any State feels that effective jurisdiction is not being implemented over a ship then that State may report the matter to the flag State which is required to investigate and take the necessary remedial action, which may include the establishment of an inquiry with respect to marine casualties or incidents of navigation. However, there is no further action which may be taken by a State other than the flag State, in the case of inaction by the flag State.

Primacy is given to flag State jurisdiction even in the case of collisions or navigational incidents. While the exercise of criminal jurisdiction with respect to any penal or disciplinary responsibility of the master or official is given to the flag State or the State of which such person is a national, no arrest or detention of the ship may be ordered by any authorities other than those of the flag State. In the event where the accused is found guilty, it is the State that has issued the seafarer's documentation that is to decide whether or not to withdraw such certificates (Article 97 UNCLOS). Insofar as search and rescue services are concerned, Article 98 imposes a duty on the flag State to ensure that the master of any ship flying its flag renders assistance to persons found at sea in danger of being lost, to proceed with all speed to rescue persons in distress and to render help after collisions.

Indeed, the practical ramifications of the relationship between the flag State and its vessels go beyond notions of definition to the responsibility of the flag State vis-à-vis its vessels. This was made amply clear in the recent request for an Advisory Opinion from the Sub-Regional Fisheries Commission in Senegal received by the ITLOS on 28 March 2013 regarding the obligations of the flag State in cases of illegal, unreported, and unregulated fishing activities.⁸⁰

9.6 Jurisdiction over the High Seas

It has been noted that the zone of high seas is characterized by the principle of free use, with the exclusivity of flag State jurisdiction appearing as a necessary

⁷⁹ UNCLOS, Art. 94(5).

⁸⁰ See Request for Advisory Opinion, with as annex the Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC), <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf> accessed 13 May 2014, and Order of 24 May 2013, 2013/2, <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/C21_Ord_2013-2_24.05_E.pdf> accessed 13 May 2014.

corollary.⁸¹ Of course, other States can legislate (using the same principles of prescriptive jurisdiction as delineated) vis-à-vis persons on board the vessel. As far as individuals on board the ship are concerned, the principle of exclusivity of flag State jurisdiction—outlined in Article 92(1)—does not exclude the right of a State to punish one of its own nationals for a criminal offence previously committed on a foreign ship, once that national is present within its jurisdiction. Furthermore, according to Article 97, in respect of collisions or other navigational incidents, penal or disciplinary proceedings against the master or the crew aboard the ship may be instituted before the courts of the flag State *or* the State of which the person is a national.⁸² Insofar as enforcement jurisdiction is concerned however, it is only the flag State that may arrest or detain the vessel under Article 97(3). Indeed, the doctrine of flag State exclusivity is central to the operation of the high seas regime.

It will be recalled that Article 94 UNCLOS follows Article 92(1) in providing that the flag State is to exercise jurisdiction and control in respect of all administrative, technical, and social matters. In this way, it is up to the flag State alone to arrest, detain, requisition the ship, or conduct investigations aboard it, and prescribe requirements with respect to its equipment, manning, and operation. The fact that some States lack the resources or the will to do so poses grave problems. In the event of flag State inaction, certain vessels may escape jurisdiction entirely unless subsequently putting into the port of an affected State since it is only in a limited set of circumstances where the UNCLOS provides for a role for non-flag State actors, thus allowing other States to share in enforcement, and sometime, legislative jurisdiction.⁸³

These instances are found in a set of provisions beginning with the suppression of the slave trade. Article 99 directs every State to take ‘effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.’ In support of this general prohibition, Article 110(1)(b) allows for the right of visit by any warship, if carried out according to the conditions specified therein,⁸⁴ and the right of hot pursuit is also given, under Article 111 (discussed in Section 9.6.1). However, no power is given

⁸¹ While the high seas and the EEZ are functionally different maritime zones, what is being discussed within the context of the high seas also applies to the EEZ, by virtue of the interplay between Arts 86 and 58 UNCLOS.

⁸² The reference to the master indicates that the provision only applies to merchant vessels. By necessary extension this provision also applies to *all* persons—whether on the ship legally or not, for example stowaways. Cf. Nordquist et al. (n 6) vol. III, 146.

⁸³ See AM Syrigos, ‘Developments on the Interdiction of Vessels on the High Seas’ in A Stati, M Gavouneli, and N Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea* (Martinus Nijhoff, 2006) 149–201.

⁸⁴ UNCLOS, Art. 110 indicates that the right of visit consists in boarding (para 1) and inspection (para 2) of the ship.

to non-flag States to seize or arrest persons on board.⁸⁵ Today, the crime of trafficking in individuals, as a form of modern slavery, may arguably be interpreted as falling to be regulated by this article. Whatever the case may be, the enforcement capabilities provided by this article are weak and, therefore, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁸⁶ represents a worthy effort at filling in the lacuna left in the UNCLOS.

Article 100 provides for general cooperation of all States in the suppression of the international crime of piracy which occurs on the high seas or in any other place outside the jurisdiction of any State. In such cases, States other than the flag State are granted the right of visit and the right of hot pursuit against any pirate vessel;⁸⁷ enforcement jurisdiction in this case is based on the universality principle.

This being said, the definition of piracy *jure gentium* in the UNCLOS is not without its problems. It will be apparent that the description of the offence requires the act to be committed on the high seas or outside the jurisdiction of any State.⁸⁸ The ILC believed that where the attack takes place within the territorial sea of a State, the general rule should be applied that it is a matter for the affected State to take the necessary measures for the repression of acts within its territory.⁸⁹ This effectively limits the exercise of jurisdiction by non-flag States to attacks occurring in the high seas or the EEZ⁹⁰ since islands constituting *terra nullius* and unoccupied territories are no longer of relevance. In addition to this, 'acts committed on board a ship by the crew of passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.'⁹¹ This is clearly laid out in Article 101(a)(i) which indicates that on the high seas, attacks against *another* ship or aircraft are necessary in order to be classified as piracy. However, an apparent exception appears in Article 101(a)(ii) which states that attacks against a ship or aircraft in a place outside the jurisdiction of any State fall within the definition of piracy. This may indicate the possibility of a one-ship attack classifying as piracy. However, bearing in mind that the phrase 'outside the jurisdiction of any State' is of scarce significance today, it seems that

⁸⁵ This is different to the situations in piracy (Art. 105) and unauthorized broadcasting (Art. 109 (4)) where powers of seizure and arrest are given to non-flag States. Of course, if the apprehension of a slave vessel takes place on the high seas following an uninterrupted pursuit from the territorial sea of a coastal State, the vessel may be detained and arrested.

⁸⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo, 15 Nov. 2000, entered in force 29 Sept. 2003) 40 ILM 335 (Trafficking Protocol).

⁸⁷ See UNCLOS, Arts 110 and 111.

⁸⁸ By the phrase 'outside the jurisdiction of any State' (in UNCLOS, Arts 100, 101(1)(a)(ii), and 105) the ILC had chiefly in mind 'acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shore of an unoccupied territory'. Cf. ILC Report to UNGA covering the work of its Eighth Session, Art. 39 *Commentary* para (4), 282.

⁸⁹ ILC Report to UNGA covering the work of its Eighth Session, para (1)(iv), 282.

⁹⁰ The piracy provisions apply to the EEZ by virtue of UNCLOS, Art. 58(2).

⁹¹ ILC Report to UNGA covering the work of its Eighth Session, para (1)(vi), 282.

this second limb of Article 101(a) is largely redundant. Another drawback under the UNCLOS regime is that in limiting the definition to private motivations, the Convention excludes the possibility of politically motivated acts classifying as piracy.

In view of the fact that many acts of maritime violence risk remaining unprosecuted owing to the fact that they do not amount to the international crime of piracy allowing universal jurisdiction, the international community has taken steps to ensure that these acts do fall under a jurisdictional regime nonetheless. Although primacy is still given to the flag State, an increasing amount of cooperation is encouraged, as is evidenced by instruments such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)⁹² and the mechanisms put into place by the International Maritime Organization (IMO) and United Nations Security Council (UNSC), as will be discussed.

Another instance where jurisdiction may be exercised by non-flag States is in the case of unauthorized broadcasting from the high seas.⁹³ Here, Article 109(3) contains a list of States allowed to visit the offending vessel and subsequently prosecute the offenders.⁹⁴ Therefore, in contrast to the case of piracy, it is only the specifically affected States that may take action to repress this crime. However, the action allowed is the same: seizure, arrest, and prosecution are permitted aside from the right of boarding the vessel provided in Article 110. In both these cases, non-flag States are given legislative and enforcement jurisdiction.

A more limited measure of control is accorded to non-flag States in the suppression of illicit traffic in narcotic drugs and psychotropic substances. Article 108 obligates States to cooperate in their suppression, but falls short of providing any enforcement mechanism to complement this obligation. This cooperative exercise does not empower any State to interfere with a foreign vessel on the high seas, even if involved in drug trafficking, unless the flag State grants its consent. Furthermore, a request for cooperation should come from the flag State rather than any other State, which may in fact be more directly involved and could be suffering the effects of the trafficking. The fact that no right of visit is provided for in Article 110

⁹² Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 Mar. 1988, entered into force 1 Mar. 1992) 1678 UNTS 221 (SUA Convention).

⁹³ This is defined in UNCLOS, Art. 109(2) as meaning 'the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls'. In this era of satellite and internet, its relevance becomes questionable.

⁹⁴ These are: the flag State of the ship; the State of registry of the installation; the State of which the person is a national; any State where the transmissions can be received; and any State where authorized radio communication is suffering interference. This list of States—embodying as it does any State that may be adversely affected by such offences—is a common feature in many conventions aimed at widening the jurisdictional net in the case of serious offences such as drug trafficking and acts against the safety of maritime navigation.

is surprising and renders the UNCLOS regime ineffective, to say the least. This *lacuna* has been filled through the conclusion of various multilateral and bilateral treaties providing for intervention in such cases. Prominent in the multilateral framework is the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988),⁹⁵ Article 17 of which provides for the illicit traffic of drugs at sea.⁹⁶ The Council of Europe Agreement on Illicit Traffic by Sea, which implements Article 17 of the 1988 Convention (1995), is also significant.⁹⁷ As a regional agreement it supplements Article 17 of the 1988 Convention and thus enhances the effectiveness of its provisions.⁹⁸

Important bilateral instruments include the Anglo-American Exchange of Notes concerning Cooperation in the Suppression of the Unlawful Importation of Narcotic Drugs,⁹⁹ the Ship Rider Agreements between the US and certain Caribbean States, and, most recently, the Regional Maritime Counterdrug Agreement opened for signature at Costa Rica on 10 April 2003. These maritime counterdrug agreements recognize that international cooperation is critical to the successful suppression of drug smuggling at sea. They provide a framework of prompt and effective law enforcement action with full respect for national sovereignty and territorial integrity, accounting for the varying operations capabilities of individual nations.¹⁰⁰

Two areas providing for intervention by non-flag States are found in Article 110(1)(d) and (e) regulating the right of visit, namely, where the ship is without nationality¹⁰¹ and in cases where, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.¹⁰² In this case, while a warship may visit and board a stateless ship on the high seas, in the case of

⁹⁵ Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988, entered into force 11 Nov. 1990) UN Doc E/CONF.82/15; 28 ILM 493 (Vienna Drugs Convention).

⁹⁶ However, boarding a vessel still requires the consent of the flag State in the absence of a right of visit. See *R v Charrington and ors*, unreported, discussed in (2000) 49 ICLQ 477.

⁹⁷ Agreement on Illicit Traffic by Sea, implementing Art. 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 31 Jan. 1995, ETS No. 156.

⁹⁸ See Vienna Drugs Convention, Preamble.

⁹⁹ Narcotic Drugs: Interdiction of Vessels, done 13 Nov. 1981, USA-UK, 33 UST 4224, TIAS 10296; Cmd. 8470.

¹⁰⁰ Cf. Statement of Rear Admiral ER Ruita, US Coast Guard, on Maritime Bilateral Counterdrug Agreements before the Sub-Committee on Criminal justice, Drug policy, and Human Resources, Committee on Government Reform, US House of Representatives, 13 May 1999.

¹⁰¹ See UNCLOS, Art. 92(2). While a warship may visit and board a stateless ship on the high seas, in the case of the exercise of jurisdiction over a stateless ship, the general view is that there must exist some form of jurisdictional nexus in order for a State to apply its laws to such a vessel and enforce its laws against it. An illustration of this jurisdiction nexus is found in the UNCLOS provisions relating to unauthorized broadcasting.

¹⁰² In such a case, if it is found that the ship is flying that State's flag without the authority to do so, the ship may be seized and escorted to port for punishment, as this would amount to the exercise of flag State jurisdiction.

the exercise of jurisdiction over a stateless ship, it is usually understood that some form of jurisdictional nexus must still exist in order for a State to apply its laws to such a vessel and enforce its laws against it. However, various laws do not adopt this interpretation. For example, in the US law relating to the prevention of manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels, a ship without nationality is defined as being subject to the jurisdiction of the USA.¹⁰³ To this end, in *USA v Marino-Garcia*¹⁰⁴ it was held that the federal Government has criminal jurisdiction over all stateless vessels on the high seas engaged in the distribution of controlled substances. Similarly, *USA v Tinoco* dealt with this issue, where the vessel in question was assimilated to a stateless vessel and hence, subject to US jurisdiction.¹⁰⁵ Such extensive interpretations by States could be a reflection of the failure of the present framework to protect States.

The general rule remains that of non-intervention, subject to acts of interference derived from a treaty. The right of visit therefore emerges as a limited right of warships (and military aircraft) to interfere with the freedom of navigation of other vessels.¹⁰⁶ Furthermore, this right is only exercisable against merchant or non-governmental vessels. Indeed, Article 95 grants warships complete immunity from the jurisdiction of any State other than the flag State;¹⁰⁷ and Article 96 continues by stating that 'ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State'.¹⁰⁸

The right of visit is a narrowly construed power limited to ascertain the existence of a reasonable suspicion that a vessel is engaged in one of the activities mentioned in Article 110. Indeed, although the non-flag State may act in such cases and within the parameters established by the Convention, it may not always be immediately apparent that the vessel is indeed engaged in one of those offences. Therefore, the Convention provides an intermediary position wherein this suspicion may be verified. In the case that such suspicion should prove to be unfounded and provided that the ship boarded has not committed any act justifying such suspicions, Article 110(3) provides for compensation for any loss or damage caused to the vessel.¹⁰⁹

¹⁰³ Title 46 USC app. s 1903 (c)(1)(A).

¹⁰⁴ *USA v Marino-Garcia* (1982) 679 F.2d 1373.

¹⁰⁵ *USA v Tinoco* (4 Sept. 2002), No. 01-11012.

¹⁰⁶ The warship must fall under the definition provided in Art. 29 UNCLOS. However, it should be noted that Art. 110(5) applies the right of visit with respect to any other duly authorized ship or aircraft clearly marked and identifiable as being on government service.

¹⁰⁷ Warships are also given immunity within the territorial sea (and possibly internal waters) of a State (UNCLOS, Art. 32) and in the EEZ (UNCLOS, Art. 58(2) incorporates Art. 95 into the EEZ regime).

¹⁰⁸ The reference to non-commercial service reflects the restricted doctrine of State immunity, drawing a distinction between acts *jure gestionis* and acts *jure imperii*.

¹⁰⁹ Another area where intervention is permitted by the UNCLOS is in the case of major pollution incidents as under Art. 221.

9.6.1 Hot pursuit and constructive presence—extending jurisdiction over the high seas

(a) *Hot pursuit*

The right of hot pursuit, recognized in customary international law and codified in the 1958 HSC and the 1982 UNCLOS¹¹⁰ allows the coastal State to pursue vessels which have violated its laws within internal waters or territorial sea to pursue that vessel and arrest it on the high seas. This exception to the exclusivity of flag State jurisdiction when a vessel sails the high seas was recognized as a principle of the law of nations, by the Supreme Court of Canada in *The North*,¹¹¹ and later, in the *I'm Alone* case.¹¹² The right was also recognized as established by the ILC in its Report to the General Assembly.¹¹³ Its recent application has been noted in the mechanism adopted to combat armed robbery off the coast of Somalia, and also in the bilateral Ship Rider Agreements with the USA, which concluded with various Caribbean States, as will be discussed.

Essentially, hot pursuit enables a coastal State to exercise its enforcement powers far beyond its territorial sea by maintaining an uninterrupted and continuous chase of a vessel that has violated its laws and has managed to escape. In this way, the doctrine renders possible a wider scope for the enforcement of a coastal State's laws in areas which would otherwise have been outside its jurisdiction. Indeed, the justification of such extension of jurisdiction outside the traditional zones of control is that the hot pursuit is in essence, a continuation of a validly commenced act of jurisdiction. The provisions of the UNCLOS, and the HSC before it, attempt to reflect this balance.

The UNCLOS provides that hot pursuit must begin when the authorities of the coastal State have good reason to believe that a vessel has violated the laws of that State.¹¹⁴ Such pursuit must begin in the zone where the vessel violated the applicable coastal State law. Therefore, in the case of violations of rules in internal waters and the territorial sea, this would mean up to the end of the territorial sea under Article 111(1); the pursuit must commence at the latest, in the territorial sea limitation. For violations of customs, fiscal, sanitary, and immigration law (that is, violations of the interests for the protection of which the contiguous zone was established), the violations reflect violations to the contiguous zone regime (under Article 33 UNCLOS) and hot pursuit with respect to these violations would have to commence any place up to the outer limit of the contiguous zone, normally,

¹¹⁰ See HSC, Art. 23 and UNCLOS, Art. 111.

¹¹¹ *The North*, (1905) 11 Ex. Rep (Canada) 141.

¹¹² *I'm Alone (Canada v USA)* (1935) 3 RIAA 1609.

¹¹³ ILC Report to UNGA covering the work of its Eighth Session, 285.

¹¹⁴ See *M/V Saiga (No. 2)*, Judgment, 1 July 1999, where the existence of a mere suspicion that a foreign vessel has violated a coastal State's law is not sufficient to effect a valid hot pursuit.

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¹¹² *I'm Alone (Canada v USA)* (1935) 3 RIAA 1609.

¹¹³ ILC Report to UNGA covering the work of its Eighth Session, 285.

¹¹⁴ See *M/V Saiga (No. 2)*, Judgment, 1 July 1999, where the existence of a mere suspicion that a foreign vessel has violated a coastal State's law is not sufficient to effect a valid hot pursuit.

24 miles. Similar provision is made with respect to violations with respect to the continental shelf (Article 111(2)) and also the EEZ, if claimed. In this case, pursuit must commence within the 200-mile limit for the EEZ and within the continental shelf limit in terms of Article 76 in the case of violations of the laws promulgated with respect to the continental shelf.

It is notable that the UNCLOS does not limit itself to any predefined set of offences,¹¹⁵ allowing even trivial offences to trigger hot pursuit, although the principle of comity could well advise against the exercise of hot pursuit in such cases.

Hot pursuit may only be conducted by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect (Article 111(5)). Pursuit by an aircraft may be taken over by a warship, as acknowledged in Article 111(6)(b). Presumably, even though not expressly stated in the text of the Convention, one warship may take over from another.¹¹⁶

Article 111(4) determines when hot pursuit commences. First, the determination of the location of the offending vessel is necessary: the pursuing ship must have satisfied itself by such practicable means as may be available that the ship pursued, or one of its boats or other craft working as a team and using the ship pursued as a mother ship, is within the limits of the territorial sea, or as the case may be within the contiguous zone, or the EEZ, or above the continental shelf. Furthermore, before hot pursuit may be commenced, a clear visual or auditory signal must be given.¹¹⁷ This enables some extent of physical proximity, ensuring that the pursuing vessel is at a distance which enables the pursued vessel to see or hear the signal. This requirement is, however, being interpreted rather widely, as is demonstrated by a willingness of certain courts to admit that the order to stop may be given via radio.¹¹⁸

Hot pursuit ceases in two instances: if the pursuit is interrupted, thus losing its continuous and uninterrupted character, as explained in Article 111(1). Alternatively, should the pursued vessel enter the territorial sea of the flag State or another State, as envisaged in Article 111(3), the hot pursuit must end as, otherwise, the

¹¹⁵ See *The North*, (1905) 11 Ex. Rep (Canada) 141, where a breach of a local regulation, in this case, the licensing of a fishing vessel, was held to be sufficient for the right of hot pursuit to be commenced.

¹¹⁶ As occurred in the *I'm Alone* (1935) 3 RIIA 1609 case, where the *Dexter* continued the pursuit commenced by the *Wolcott* on account of the latter's gun being jammed, thereby rendering it unable to force the pursued ship to stop.

¹¹⁷ Although it is not necessary that the ship or aircraft giving the order to stop be in or above the territorial sea or contiguous zone when giving such order.

¹¹⁸ It has sometimes been held that the signal requirement may even be done away with in certain circumstances; see *The Newton Bay*, 36 F.2d 729 (2d Cir 1929); *R v Mills and ors.* (1995) unreported, Croydon Crown Court, Judge Devonshire; *R v Sunila and Soleyman* 28 DLR (4th) 450 (1986).

sovereignty of the State would be violated. If after entering the territorial seas, the vessel subsequently re-enters the high seas it is very unlikely that any continuation of the pursuit would be held to be lawful as the jurisdictional link that had existed would have been discontinued. Furthermore, this would not amount to the exercise of a continuous and uninterrupted pursuit, and in view of the exceptional nature of the right of hot pursuit, such action would arguably be unlawful.¹¹⁹ Of course, should the pursuit be momentarily interrupted, such as in the case where the pursued vessel is lost sight of for a very short time, this would not be deemed to terminate the hot pursuit.¹²⁰

Attempts at extending coastal State jurisdiction could also lie in the hot pursuit of vessels for prior offences having been committed. The Conventions are silent as to whether hot pursuit is available for prior offences, and therefore, the question of whether the coastal State has the right to undertake hot pursuit against a vessel which has sailed into the high seas in order to avoid arrest for prior violations remains. It is arguable that should the vessel later enter into the coastal State's waters again, there would not seem to be any prohibition to repeat the pursuit of the vessel in respect of the previous violation, since Article 111 contains no temporal restriction. However, the requirement of continuous and uninterrupted pursuit, based as it is on the exceptional nature of the right of hot pursuit would seem to render such approach unreasonable.¹²¹

With regard to the measures which may be employed in effecting the arrest of the vessel, both the 1958 and 1982 Conventions are silent on the matter. The position under customary law is perhaps best described in the *I'm Alone* case where it was held that the pursuing vessel might use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing, and bringing into port the suspected vessel. If in the process, sinking should occur incidentally as a result of the exercise of necessary and reasonable force, the pursuing vessel might be entirely blameless so that in enforcement and the use of force with respect to the right of hot pursuit, the main test is 'necessary and reasonable force.'¹²² This was also determined in the *Red Crusader* inquiry¹²³ where a British fishing vessel attempted to escape as members of a Danish investigation boarding party had boarded the trawler and the master attempted to escape with the boarding party and all. In retaliation, the Danish patrol vessel opened fire and the question was whether the opening of fire was justified. A Commission of Inquiry concluded that

¹¹⁹ *M/V Saiga (No. 2)*, Judgment, 1 July 1999.

¹²⁰ Compare *The North*, (1905) 11 Ex. Rep (Canada) 141, and the *I'm Alone* (1935) 3 RIAA 1609 cases, as mentioned.

¹²¹ See RC Reuland, 'The Customary Right of Hot Pursuit onto the High Seas: Annotations to Art. 111 of the Law of the Sea Convention' (1993) 33 *Va J Int'l L* 570.

¹²² In this case, the Commission held that the deliberate act of sinking the *I'm Alone* was not justified and, therefore, unlawful.

¹²³ *Red Crusader*, (1962) 35 ILR 485.

although the attempt to escape may have justified some counteraction by the patrol boat in order to enforce the arrest, opening fire exceeded the legitimate use of armed force since it constituted firing without warning and created a danger to human life on board the *Red Crusader* without proven necessity. Furthermore, the force employed in stopping and arresting the *M/V 'Saiga'*¹²⁴ was held to be excessive by the ITLOS. In this case it was held that the Guinean officers showed no concern for the safety of the vessel and persons on board and used excessive force which endangered human life. The Tribunal stated that 'international law, which is applicable by virtue of article 293 of the Convention, requires 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'.

Lastly, Article 111(8) provides that if a ship has been stopped or arrested in circumstances that do not justify the exercise of the right of hot pursuit, then the ship is to be compensated for any loss or damage that may have been sustained. This would also be the case where the use of force is held to be excessive or unjustified.

(b) Constructive presence

Under customary international law, there also exists a right to arrest foreign ships which use their boats to commit offences within the territorial sea while themselves remaining on the high seas. In such a case, the mother ship may be pursued and arrested on the high seas without it ever having left the high seas. The ship, in such cases, is deemed to be constructively present in the territorial sea within which the other boats are operating. *Gilmore*, citing *Lord McNair*, writes that 'when a foreign ship outside territorial waters sends boats into territorial waters which commit offences there, the mother ship renders herself liable to seizure by reason of these vicarious operations.'¹²⁵

This right is also implicitly recognized in the 1958 and 1982 Conventions (extended to apply also with regard to the contiguous zone, the EEZ, and the continental shelf), through the use of phrases such as 'the foreign ship or one of its boats' and 'the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship'.¹²⁶ This right further allows for an effective administration of justice with respect to the laws and regulations of the coastal State. The terms of the Convention admit both of the doctrine of simple constructive presence (i.e. where a ship actually uses its own boats and send them to shore) *and* that of extensive constructive presence (i.e. where other boats are

¹²⁴ *M/V Saiga (No. 2)*, Judgment, 1 July 1999.

¹²⁵ WC Gilmore, 'Hot Pursuit and Constructive Presence in Canadian Law Enforcement: A Case Note' (1988) 12 *Marine Policy* 109. This leads Gilmore to conclude that this right is similar to the jurisdiction principle of 'objective territorial jurisdiction'.

¹²⁶ See HSC, Art. 23(1) and (3) and UNCLOS, Art. 111(1) and (4).

used which come out of the coastal State by pre-arrangement). While this latter variant of the doctrine is also recognized in the UNCLOS, it is well capable of being extended beyond the limits originally intended by the drafters of the 1958 and possibly, the 1982 Conventions. This demonstrates a trend in an attempt to further extend coastal State jurisdiction upon the high seas.

This is illustrated in *R v Sunila and Soleyman* (1986).¹²⁷ A Canadian fishing vessel, the *Lady Sharell*, had transferred to a ship registered in Honduras, the *Ernestina*, 26,722 pounds of cannabis resin in the Canadian territorial sea. Following the exchange, the *Lady Sharell* proceeded to a Canadian port and was arrested following the unloading of her cargo. After the offence of illegal importation had been completed, the *Ernestina*, which had sailed onto the high seas, was stopped and boarded, the persons on board arrested, and the vessel escorted into the Halifax port. The defendants argued that their arrest constituted a violation of the principle of exclusivity of flag State jurisdiction while on the high seas and that the seizure was not justified by the doctrine of hot pursuit. Following a judgment against them by the Supreme Court of Nova Scotia, Trial Division, the defendants appealed to the Appeal Division of the Supreme Court of Nova Scotia, arguing that the conditions for a valid hot pursuit required by customary law (stated to be reflected in Article 23 of the 1958 Convention on the High Seas, to which neither Honduras nor Canada was party) had not been complied with. The Appeal Court, however, agreed to the application of the legal fiction of constructive presence where the *Ernestina* was the mother ship, with Hart JA, stating that 'international law has always recognised the right of a State to pursue and arrest a foreign ship on the high seas, and to return the ship to its ports to answer charges committed by the ship and her crew within the State's territorial waters. The right is not based upon international treaty but upon the ancient principles of the law of nations adopted as part of the common law of England, which became the law of Canada.'¹²⁸

While this case may be seen as a legitimate extension of Article 111(4) UNCLOS due to the fact that there was some collusion between the vessels to be arguably operating as a team, the position taken a few years later in *R v Mills and ors*.¹²⁹ is much harder to justify and may appear to be an illicit curtailment of the freedom of navigation on the high seas. Here, a vessel registered in St Vincent, the *Poseidon*,

¹²⁷ *R v Sunila and Soleyman* (1986) 28 DLR (4th) 450.

¹²⁸ See Gilmore (n 125) 110, who holds it is arguable that, at customary international law as existed in 1958, only the doctrine of simple constructive presence was established and that any further extension of the right in the convention represented progressive development of the law. Gilmore therefore questions the readiness with which the Court overlooked such fact. Should the case arise today however, it seems that the position in 1958 would be rather irrelevant as it is arguable that the position at customary law today is reflected in the 1982 UNCLOS, which embodies the doctrines of simple and extensive constructive presence.

¹²⁹ *R v Mills and ors* (1995).

transferred a cargo of cannabis worth £24 million, on the high seas, to a British trawler, the *Devlan*, which had put out from Cork in Ireland, met the *Poseidon* in international waters southwest of Ireland and subsequently sailed into a British port, with the *Poseidon* sailing back into international waters. After the arrest of the *Devlan* on its putting into port, the UK asserted the right of hot pursuit against the *Poseidon*, which was apprehended in the high seas off Portugal. There could be no argument that the vessels actually worked as a team. Furthermore, nor had the British trawler put out from and returned to a British port, thus falling out of the traditional scenario where the boats would be despatched from the mother ship or sail out to meet the mother ship. The *Poseidon* had never left the high seas and therefore there could be no hot pursuit out of the UK territorial sea. The Court, however, held that there was the constructive presence of the *Poseidon* within the UK under the *Sunila* interpretation—even though the *Devlan* did not go back to Ireland. This was in stark contrast to the situation in *R v Sunila and Soleyman*, where the daughter ship had sailed out of the ports of the pursuing State and subsequently returned to such shores. The Court in *R v Mills* held, however, that the port of departure is insignificant since the policy consideration behind the doctrine of constructive presence is the prevention of the commission of crimes within the territorial sea (in this case) of the State exercising the right of hot pursuit. This extended interpretation of ‘extensive constructive presence’ seems to point in the direction that any vessel which colludes with a ship on the high seas, which latter ship commits an illegal act within the jurisdiction of a State, may be subject to arrest by that State on the high seas. This sits uneasily with the word of caution used in the *M/V ‘Saiga’*¹³⁰ advocating a strict interpretation of Article 111 however; it demonstrates a willingness to further impinge on the freedoms of the seas in cases of coastal State protection.¹³¹

9.6.2 The UNCLOS and contemporary challenges

The liberal interpretations being given to the doctrine of hot pursuit, and more particularly, to that of constructive presence, demonstrate a shifting of the balance in favour of coastal State interests to the detriment of the freedom of navigation. Further examples of jurisdiction over high seas offences exist in treaty practice, wherein interference with foreign shipping is justified as being exercised pursuant to issues of security and vital interests. Such instances represent a growing trend to permit intervention on the high seas in the interests of coastal State enforcement. Multilateral treaty frameworks regulating non-flag State intervention have become common in the field of maritime security.

¹³⁰ *M/V Saiga (No. 2)*, Judgment, 1 July 1999, paras 146–52.

¹³¹ For other cases on constructive presences, see also *The Araunah* (1888) Moore, 824 *Int. Arb.* 133; *The Tenyu Maru* (1910) 4 *Alaska* 129; and *The Grace and Ruby* (1922) 283 *Fed* 475.

Maritime migrant smuggling is one such example. The Migrant Smuggling Protocol¹³² supplementing the UN Convention against Transnational Organized Crime¹³³ fills in the *lacuna* left by the lack of regulation of the crime in the UNCLOS by providing for inter-State cooperation in repressing this type of organized crime. The Smuggling Protocol aims to fight the crime of migrant smuggling by creating a framework for legal and judicial cooperation while at the same time ensuring the protection of victims and respect for their inherent rights.¹³⁴ The underlying arrangements depart from the understanding that no action can be taken on the high seas without the authorization of the flag State. What the Protocol does, however, is to work within this general principle to establish a cooperative mechanism surrounding the flag State's consent, as laid out in the general rubric of permissible action at sea in Article 8.¹³⁵

A similar approach is noted in the fight against maritime drug trafficking. Aside from this 1988 Drugs Convention, a number of regional and bilateral arrangements permit non-flag State intervention. The Agreement concerning cooperation in suppressing illicit maritime and air trafficking in narcotics and psychotropic substances in the Caribbean Area (known as the 'Aruba Agreement'), opened for signature at Costa Rica on 10 April 2003,¹³⁶ represents further evidence of a willingness on the part of States to increase action, inter alia, on the high seas in the cause of safeguarding maritime security. By virtue of Article 7 of the Agreement, each State party undertakes to establish the capability at any time, inter alia, to respond to requests for verification of nationality;¹³⁷ authorize the boarding and searching of suspect vessels; and authorize the entry into its waters and air space of law enforcement vessels in support of law enforcement operations of the other parties. Furthermore, Article 9 gives each party the power in its discretion to grant permission (which may be subject to conditions) to designated law enforcement officials of another party to embark on its law enforcement vessels. On similar lines, the so-called bilateral 'Ship Rider Agreements' which the USA has concluded with a number of Caribbean States also provide for a mechanism for authorization and deemed authorization in the case of requests for the verification of registry and

¹³² Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo, 15 Nov. 2000, entered into force 28 Jan. 2004) 40 ILM 384 (Protocol against the Smuggling of Migrants).

¹³³ United Nations Convention on Transnational Organised Crime (Palermo, 15 Nov. 2000, entered into force 29 Sept. 2000) (2001) 40 ILM 335.

¹³⁴ The section relating to migrant smuggling by sea is essentially based upon Art. 17 of the Vienna Drugs Convention.

¹³⁵ The origins of the text of this article can be found in Art. 17 of the Vienna Drugs Convention and para 11 of the IMO Interim Measures (MSC/Circ.896, Annex).

¹³⁶ Aruba Agreement noted in CND Res.43/5 and E/CN.7/2003/8. This Agreement has still to be ratified by the requisite minimum five States to enter into force.

¹³⁷ Note Aruba Agreement, Art. 6(4) stating that requests for verification of nationality are to be responded to as soon as possible and in any event no later than 4 hours after the request is made.

boarding of vessels seawards of the territorial sea¹³⁸ in an attempt to make territorial boundaries transparent to law enforcement. It is noteworthy that, apart from aiming to supplement the security forces of States which may not have sufficient resources to fight narcotics trafficking effectively, these agreements also aim to overcome any obstacles which may exist in the general international law regime.¹³⁹ Another example of non-flag State permissible intervention at sea is the Proliferation Security Initiative (PSI), announced in Kraków, Poland, by President Bush on 31 May 2003, which, in a bid to fight the threat presented by weapons of mass destruction provides for the interdiction of vessels on the high seas.¹⁴⁰

A final maritime crime to be considered is armed robbery against ships. The UNCLOS contemplates universal jurisdiction for the crime of piracy *jure gentium*, a crime of such gravity that it is included among the few classical examples of norms possessing *jus cogens* status. However, as is the case in other contemporary threats to maritime security such as maritime migrant smuggling, this Constitution of the Oceans fails to provide for similar, equally grave attacks on ships, thus creating a serious jurisdictional *lacuna*.

The international community has, however, stepped in to fill this gap in an impressive cooperative effort consisting in the conclusion of treaties and other instruments, and most recently in a series of UNSC resolutions to combat the situation off the coast of Somalia, borrowing concepts from other regimes successful in the fight against drug smuggling for example, and thus demonstrating the effectiveness of international law to meet current security threats with goodwill on the part of the States concerned.

This unprecedented concerted action on the part of the international community was spurred on by the IMO Resolution A.1002(25) on Piracy and Armed Robbery

¹³⁸ These also deal with authorization to US vessels to enter the territorial sea of a State party.

¹³⁹ See further Mallia (n 48) 145–52.

¹⁴⁰ The PSI has been described as an illustration of a unilateral initiative, followed by a ‘coalition of the willing’, as a means to bypass lengthy negotiations during which preferred goals are watered down. According to this pattern, arrangements are assembled initially through a series of bilateral contacts, rather than through a truly multilateral negotiation process, thereby marginalizing any opposition that may arise. See T Findlay, ‘Weapons of Mass Destruction’ in E Newman, R Thakur, and J Tirman (eds), *Multilateralism Under Challenge? Power, International Order and Structural Change* (United Nations University Press, 2006) 216–17. For more information, see R Chesney, ‘The Proliferation Security Initiative and WMD: Interdiction on the High Seas’ (2003) 13 *National Security Review* 1; Benjamin Friedman Bipartisan Security Group, ‘The Proliferation Security Initiative: The Legal Challenge’ (Policy Brief) (Washington, DC, Sept. 2003); M Byers, ‘Policing the High Seas: the Proliferation Security Initiative’ (2004) 98 *AJIL* 526–45; Freestone et al. (n 26) 356–61; and the US Department of State ‘Proliferation Security Initiative’, <<http://www.state.gov/t/isn/c10390.htm>> accessed 13 May 2014. See, most recently, the Washington Declaration for PSI 5th Anniversary Senior-Level Meeting (28 May 2008) Media Note. See US Department of State, Treaties and Agreements, <<http://www.state.gov/t/isn/trty/index.htm>> accessed 13 May 2014, for texts of the agreements.

against Ships in Waters off the Coast of Somalia,¹⁴¹ requested the Transitional Federal Government of Somalia to advise, inter alia, the Security Council that it 'consents to warships . . . operating in the Indian Ocean, entering its territorial sea when engaging in operations against pirates or suspected pirates and armed robbers endangering the safety of life at sea'.¹⁴² This possibility materialized through the Security Council's Resolution 1816 of 2 June 2008. While relevant provisions of international law regarding piracy were reaffirmed, together with the sovereignty, territorial integrity, political independence, and unity of Somalia, an unprecedented step was taken with regard to the combating of piracy and armed robbery within territorial waters. With the consent of the Transitional Federal Government transmitted to the Secretary-General, States' vessels are permitted to enter the country's territorial waters and to use all necessary means to repress acts of piracy and armed robbery at sea, in a manner consistent with the international law of the sea.¹⁴³ It was stressed that this solution only applied in the case of Somalia and in no way was to be interpreted as creating customary international law.¹⁴⁴ The 2008 authorizations have been renewed for periods of 6 months and later 12 months and have most recently been renewed by Resolution 2077 (2012).¹⁴⁵

Significant in these resolutions (commencing from Resolution 1846)¹⁴⁶ is the reference to the SUA Convention¹⁴⁷ which provides for the parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force of threat thereof or any other form of intimidation. States parties to the SUA Convention are urged to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build a judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.¹⁴⁸

Modelled on the aviation security framework, the SUA Convention seeks to ensure the prosecution and punishment of any person who unlawfully and

¹⁴¹ IMO Res A.1002(25) on Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia, adopted on 29 Nov. 2007 at the 25th IMO Assembly, revoking Res A.979(24).

¹⁴² IMO Res A.1002(25), para 6.3.

¹⁴³ UNSC Res 1816 (2008) para 7.

¹⁴⁴ Latest reiteration in UNSC Res 2020 (2011) para 10.

¹⁴⁵ UNSC Res 2077 (2012). Additionally, it made reference to UNSC Res 2015 (2011) and the need for the Security Council to continue its consideration of the settling up of specialized anti-piracy courts in Somalia and other States in the region. See UNSC Res 2077 (2012) para 19.

¹⁴⁶ UNSC Res 1846 (2008) para 15.

¹⁴⁷ SUA Convention.

¹⁴⁸ Regarding the issue of prosecution with regard to piracy offences, see the Address by President Jesus to the UN General Assembly on 5 Dec. 2008 wherein he states that, in highlighting various aspects of the jurisdiction of ITLOS, the Tribunal itself could give an advisory opinion if an agreement related to the purposes of the Convention so provided. This, he stated, could prove to be a useful tool to States as the international community faces new challenges in ocean activities, such as piracy and armed robbery.

intentionally commits one of the offences listed in Article 3 of the Convention, all of which have one common element: all endanger or potentially endanger the safe navigation of ships.¹⁴⁹ While breaking new ground in the fight against maritime terrorism, a major shortcoming in the original instrument was that it only provided for a mechanism by which to prosecute and punish offenders *ex post facto*; any form of policing jurisdiction which would allow the stopping, boarding, inspection, and detention of the vessel was disregarded. Following the attacks of September 2001, renewed attention was given to the prevention of terrorism. To this end, the IMO adopted Resolution 924(22) calls for a review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships.¹⁵⁰ The SUA Convention was therefore reviewed within the Legal Committee with a view to tailoring its provisions to current exigencies which culminated in the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.¹⁵¹

Apart from widening the list of applicable offences, the most crucial amendment relates to the possibility of boarding by non-flag States. Article 7 of the Protocol introduces Article 8*bis* to the original Convention directed at permitting the boarding of ships in the event that the vessel is suspected of being involved in a terrorist incident, either as a perpetrator or as a victim. This relates to ships located seaward of the territorial sea and is a striking example of a treaty exception to the principle of flag State exclusivity over the high seas.¹⁵² The boarding provisions continue to give due respect to the principle of flag State exclusivity of jurisdiction and do not alter existing international law in this respect. Indeed, a central principle upon which the boarding provision is based is that boarding is expressly authorized by the flag State, thus, once again, maintaining the authority of the flag State.¹⁵³ However, 'the procedures eliminate the need to negotiate time consuming *ad hoc* boarding arrangements when facing the immediacy of ongoing criminal activity.'¹⁵⁴

To further this end, a tacit authorization procedure is provided for in Article 8*bis* (5)(d) wherein, upon or after depositing its instrument of ratification, acceptance, approval, or accession, a State may notify the Secretary-General that, insofar as

¹⁴⁹ As a result of the 2005 amendments, the list of offences has now increased to such an extent that they do not all necessarily relate to the inherent safety of the ship itself. Note, e.g., that transportation of an alleged offender is an offence under the Convention. See Arts 3*bis*, 3*ter*, and 3*quarter* of the SUA Convention.

¹⁵⁰ Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships, adopted 22 Jan. 2002.

¹⁵¹ LEG/CONF.15/21, 1 Nov. 2005 and LEG/CONF.15/22, 1 Nov. 2001, respectively.

¹⁵² This new power is based on the boarding provisions in the Vienna Drugs Convention and the Protocol against the Smuggling of Migrants.

¹⁵³ See LEG/CONF.15/15, 22 Sept. 2005, Submitted by the United States, para 5.

¹⁵⁴ LEG.CONF.15/15, 22 Sept. 2005, Submitted by the United States, para 22.

concerns ships registered in that State, the requesting party is granted such authorization if there is no response from the first party within four hours from the acknowledgement of receipt of request to confirm nationality.¹⁵⁵ Furthermore, upon or after depositing its instrument of acceptance, a general authorization may be given by the requested State with respect to ships flying its flag or displaying marks of its registry.¹⁵⁶

In the light of contemporary challenges, it is not difficult to perceive a conflict between the exclusivity of flag State jurisdiction and the increasing levels of control coastal States seek to exercise over the oceans. Grounds of encroaching jurisdiction is also presented as necessary in the current environment of maritime security threats in order to safeguard against cases of inaction by recalcitrant flag States. It is tempting to seek a solution whereby in the absence of a genuine link the flag State is denied its privilege of being the exclusive actor vis-à-vis that ship. Attractive though this option may be at first sight, one must not forget the role of the principle of flag State exclusivity in maintaining public order on the high seas. Indeed, such an approach has failed to take root in State practice.

In fact, a common thread running through all these initiatives is that international cooperation to meet contemporary maritime threats focuses on the possibility of non-flag State intervention. However, at the same time, these mechanisms remain entrenched in the traditional international law principle of flag State exclusivity of jurisdiction on the high seas and, to this end, are directed at obtaining the flag State's authorization to board vessels outside territorial waters. In this way, the cooperative model evident in a number of treaty frameworks, some of which have been reviewed, seeks to fill in the lacuna left by the UNCLOS without challenging the fundamental principle upon which it is based.¹⁵⁷

9.7 The Future of the High Seas

The UNCLOS was created as, and indeed remains, a veritable Constitution of the Oceans. However, the high seas are presented with challenges of a type that could

¹⁵⁵ Note in this regard that the shipping community had reservations with regard to the tacit authorization procedure regarding potential problems arising due to different time zones, different public holidays, and how to inform the master of a ship that receipt of a request for nationality has been acknowledged, which were among the practical difficulties raised. See LEG 88/3/3, 19 March 2004, paras 4, 9; LEG 88/13, 18 May 2004, Report of the Legal Committee on the Work of it, Eighty-Eighth Session, para 73.

¹⁵⁶ 2005 Protocol to SUA Convention, Art. 8*bis*(5)(e). These notifications may be withdrawn at any time.

¹⁵⁷ A number of these Conventions create a mechanism for authorization and deemed authorization in the case of requests for verification of registry and boarding of vessels seawards of the territorial sea. See further Mallia (n 48) 141–60.

not have been foreseen at the time that the UNCLOS was being drafted. Mention has been made of a number of maritime security threats which, although not regulated, need to be combated within a legal framework. This legal framework has been through a number of multilateral and even bilateral initiatives imposing measures which limit the freedoms of the high seas, most especially, the freedom of navigation. All of them currently operate within the current legal framework, the trademark of the high seas jurisdictional regime, that of the primacy, indeed, the exclusivity of the flag State over the high seas.

There are, however, other challenges of equally pressing urgency which must be addressed by the international community without undue delay. The status of genetic resources in the water column is one such example—of supreme significance in that it affects the rights of future generations and indeed, the core fundamentals of human existence. The relationship between the water column of the high seas and the international seabed area has resurfaced in recent discussions on the status of the living resources of the deep seabed: whether they are regulated by the high seas regime and are subject to the high seas freedoms or whether they fall to be regulated by Part XI relating to the Area or, indeed, if they are presently unregulated by the UNCLOS. Geographically, the high seas and the Area together with their various resources, both living and non-living, overlap. However, the legal regimes applicable to them are separate and distinct.

The UNCLOS does not deal specifically with genetic resources, addressing only natural resources and distinguishing between living resources and non-living resources. Regulation of genetic resources is crucial, and strong arguments may be made for admitting them as part of the Common Heritage of Mankind:

genetic resources are a resource frontier of this century and their exploitation is critical for economic development and our sustainable futures . . . But they are also a fragile resource that needs to be properly conserved across the globe. Genetic resources hold the myriad solutions to nature's problems and once extinguished will be incredibly difficult, if not impossible, to recreate or re-conceive.¹⁵⁸

A lacuna therefore exists with regard to the status of the genetic resources lying on the deep seabed beyond the limits of national jurisdiction, and also in the water column of the high seas. Discussions are currently being held regarding the future of these precious resources within the context of debate regarding the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction (Ad Hoc Working Group).¹⁵⁹

¹⁵⁸ C Lawson, *Regulating Genetic Resources: Access and Benefit Sharing in International Law* (Edward Elgar, 2012) 1.

¹⁵⁹ This Working Group was established by the UNGA according to para 73 of UNGA Res 59/24 (2004).

The possibility of a Framework Convention supplementing the UNCLOS and providing for a new regime for marine biodiversity and genetic resources beyond national jurisdiction presents itself as the most attractive solution and may indeed provide a way forward in future regulation of hitherto unregulated issues within the UNCLOS.