

Compiled and edited by Francois Vreÿ and Carina Bruwer

Lecture Series
on Maritime Security
Governance Off Africa



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Maritime Crime
Programme

Lecture Series on Maritime Security Governance Off Africa

Jointly presented by the United Nations Office on Drugs and Crime (Global Maritime Crime Programme, Kenya) and the Security Institute for Governance and Leadership in Africa (SIGLA) of Stellenbosch University.

Wallenberg Conference Centre
Stellenbosch Institute for Advanced Studies
Stellenbosch, South Africa
5-8 September 2017

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ISBN 978-0-620-77776-6
ISBN 978-0-620-77777-3 (e-book)

Design and production by AFRICAN SUN MeDIA.



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Acknowledgements

South African Indian Ocean Rim Association Academic Group (SA IORAG) Steering Committee consisting of the Department of Science and Technology, Department of International Relations and Cooperation, Department of Higher Education and Training, National Research Foundation, South African Environmental Observation Network and the Human Sciences Research Council.

Mr Stuart Freedman, photographs from his album on shipping in Durban harbour.

Mr Andries Fokkens and Ms Marion Prins, Faculty Manager's Office, Faculty of Military Science, for administration and logistics.



Introduction

This publication is informed by the respective lectures from UNODC and SIGLA personnel and serves as a knowledge product on some best practices. It stems from co-operation between two partner institutions located in Africa that share a common interest in safe, secure, clean and productive African oceans.

UNODC's Global Maritime Crime Programme is delivered by a team of professional UN staff from their offices around the world. With a strong pedigree in providing effective support to member states tackling maritime crime, the Programme staff are experts in maritime law and maritime law enforcement techniques. This expertise is maintained through regular training, for which UNODC partners with a number of internationally regarded academic institutions. SIGLA is one of these and in 2018 the Programme's annual Training and Planning Week was held in Stellenbosch. The Training element of the week was delivered jointly with SIGLA academics, allowing an exchange of experience and expertise between those who work primarily on the academic side and those who work primarily on the operational side.

We hope that you find this publication useful.

Alan Cole

Head, Global Maritime Crime Programme
United Nations Office on Drugs and Crime

Sigla is proud to partner in this lecture series with the UNODC (Kenya) on maritime security governance off the African coast and to promote knowledge on this important security domain. The event in Stellenbosch over the period 4-8 September 2017 served as a platform to bring practitioners and academics together in a common setting. UNODC and NMIOTC (NATO Maritime Interdiction and Training Center) in Crete, agents from the Naval Criminal Intelligence Service (NCIS USA) and academics from SIGLA (Stellenbosch University) participated in the event. SIGLA's focus on maritime security governance and UNODC's interest in mitigating maritime crime off the African coast portray a mutual interest which culminated in this first joint lecture series where participants could exchange ideas and knowledge on a common focus area to combat threats at sea off Africa.

Francois Vreÿ

Research Co-ordinator, SIGLA



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The maritime crime of piracy

Pernille Rasmussen

Introduction

Piracy is one of the oldest trades dating back to before the birth of Christ. Contemporary piracy has been most notable off the coast of Somalia, but it has also taken place in many other world regions.



Source: International Maritime Bureau: Map of piracy incidents in 2016.

Piracy in the United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS is the primary international instrument addressing piracy and codifying the elements necessary to suppress the crime. Piracy is one of the few forms of maritime crime that are specifically addressed in UNCLOS. In almost all respects, the UNCLOS articles on piracy codify previously agreed-upon treaty provisions and reflect customary international law. UNCLOS recognizes the definitions and authorizations related to piracy, as well as calling for cooperation among states in the suppression of piracy. UNCLOS refers to both vessels and aircrafts involved in pirate acts, but for the purpose of this article reference is only made to vessels. UNCLOS Articles 100 – 107 and 110 applicable to piracy are briefly discussed below:

Article 101: Definition of piracy

UNCLOS defines piracy as any of the following acts:

- a) *any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*
 - i. *on the high seas, against another ship or aircraft, or against persons or property on board such ships or aircraft;*
 - ii. *against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;*
- b) *any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*
- c) *any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).*

Article 100: Duty to cooperate in the repression of piracy

All states SHALL cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Unlike many international instruments calling for voluntary cooperation, UNCLOS places a duty upon states to cooperate. The European Union's naval force, Atalanta, NATO's naval force, Operation Ocean Shield, and the Combined Maritime Forces (CMF) are examples of such cooperation.

Article 102: Piracy by warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in Article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

According to this article, this form of piracy would only be possible if the crew of a government vessel has mutinied. A government ship/authorized vessel is not able to commit acts of piracy, because it is an authorized vessel and therefore does not meet the definition as per article 101. However, if there is a mutiny crew on board a vessel, the vessel can be considered a pirate vessel. This means that despite a ship being authorized, if the crew is regarded as mutinies and they commit acts of piracy, the ship will no longer be representative of its state and can be regarded as a private ship and a pirate vessel.

Article 103: Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

A pirate ship is a vessel used by pirates to travel to and from another place or vessel where acts of piracy occur. This definition includes a vessel where suspects are suspected of attempt to commit piracy and a vessel under pirate control. If pirates subsequently leave such a vessel, the vessel will no longer be under pirate control and no longer regarded as a pirate vessel.

Article 104: Retention or loss of nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

This depends on the vessel's flag state, which is the state under which nationality the vessel is registered. A flag state can decide to take nationality away from a vessel after it has become a pirate vessel. A vessel is generally protected by its flag state, but if it loses its nationality, such as in the event of piracy, it will also lose the protection of the flag state and the suspected pirates can be prosecuted for their acts.

Article 105: Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

In terms of this article, only authorized vessels may seize a pirate vessel. Authorized vessels are representative of the state and include warships and maritime police or any type of maritime law enforcement agency. Examples of authorized vessels include patrolling naval operations such as Atalanta and Operation Ocean Shield, as well as Puntland's maritime police force.



Source: European Union Naval Force, Somalia

Article 106: Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

This article allows for compensation to be claimed by a seized vessel's flag state where a vessel was seized on suspicion of piracy without adequate grounds.

Article 107: Ships and aircraft which are entitled to seize on account of piracy

Seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

This article again emphasizes that only authorized vessels may seize vessels involved in piracy acts.

Article 110: Right of visit

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

This article allows for the boarding of a suspected pirate vessel and describes the procedure to be followed once a boarding has taken place, including verifying the vessel's flag and conducting a search on board the vessel.

The elements of piracy as a maritime crime under Article 101 of UNCLOS

Understanding the elements of the crime of piracy are important as these elements, reflected in the definition of piracy in Article 101, must be present in order to act against a vessel suspected of engaging in piracy, as well as what must be proven in a subsequent trial.

Element 1: Illegal acts of violence or detention

Article 101 (a) "illegal acts of violence or detention, or any act of depredation"

The illegality of acts of violence or detention is important to take note of. Some acts of violence are in fact lawful, such as self-defence or acts by an authorized vessel. If the act of violence or detention is lawful in accordance with the flag state's applicable law on either the alleged pirate vessel or the alleged victim vessel, then it cannot be defined as piratical.

An act of piracy may also not necessarily involve violence, but the term 'violence' is broad enough to include any illegal act of force, and thus it does not have to be of a particular severity or result in a particular level of physical injury or damage. An example of this would be if pirates board a ship and refrain from using physical force, but still detain the crew members unwillingly.

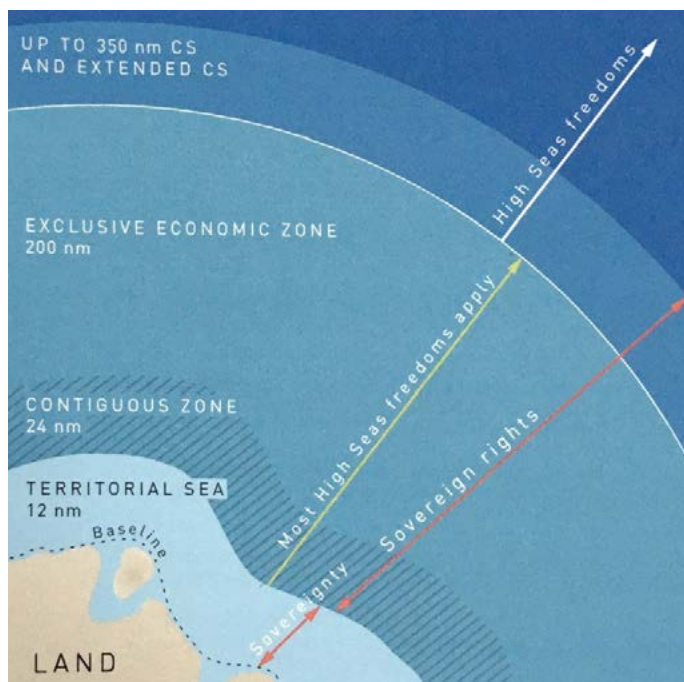
Acts of depredation would include plunder, robbery and damage caused. If pirates steal cargo or any other items on board a ship and then abandon the ship, the act still amounts to piracy.

Element 2: Private ends, by crew or passengers

Article 101 (a) “committed for private ends by the crew or the passengers of a private ship”

The ‘crew or passengers’ of a private ship means that pirates must be people who are on board or who have come from a private ship.

With regards to committing the crime for private ends, the distinction must be made between private ends versus state ends. If the ends are authorized by the state, the acts cannot amount to piracy. There are two possible interpretations of the meaning of ‘private ends’. The first is that these ends are not sanctioned or ordered by the state, the second is that these ends are motivated by financial gain, indicating that piracy cannot be committed if actions are politically motivated. The definition of ‘private ends’ will depend on the manner in which the national jurisdiction prosecuting the alleged pirates determines the issue.



Source: UNODC Global Maritime Crime Programme

Element 3: High seas or outside the jurisdiction of any state (see above diagram)

Article 101 (a) piratical acts must take place (i) “on the high seas” and (ii) “outside the jurisdiction of any State”

The requirement that piracy must take place on the high seas, often also referred to as ‘international waters’, can be cause for confusion and is often misinterpreted. Piracy is not strictly limited to the high seas in terms of UNCLOS. This is because Article 58(2) also includes a state’s Exclusive Economic Zone (EEZ) and contiguous zone as territories where piracy can be committed. States have limited jurisdiction in their EEZ and contiguous zone.

Element 4: Against another ship or property

Article 101(ii) the act of piracy must be directed “against another ship or aircraft, or against persons or property on board such ship or aircraft.”

The two ship rule: this elements means that there must be two vessels involved in the act of piracy – the pirate vessel and the victim vessel.

Element 5: Voluntary participation

Article 101(b) “any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.”

Acts of piracy must be voluntary. Demonstrating that an accused voluntarily participated in the operation of a pirate ship may include evidence that the suspect possessed the knowledge that a) the vessel has been used to commit an act of piracy and remains under the control of the persons who committed those acts and b) that it is intended by the person in dominant control of it to be used for the purpose of committing an act of piracy. This means that a pirate does not have to be one of the pirate crew members on board a vessel and committing acts of violence or detaining crew members. Voluntary participation would therefore extend to anyone supporting acts of piracy, such as the pirates’ cook, deckhands and supporting members on land. ‘Voluntary’ therefore refers only to the fact that the person is aware that they are supporting the act of piracy.

Element 6: Inciting or intentionally facilitating

Article 101(c) “any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

The offence of inciting or voluntarily facilitating relates to inciting or facilitating an actual pirate attack and/or inciting or facilitating a pirate vessel with pirates on board to go to sea with the intention of seeking an opportunity to commit an act of piracy. This provision would include pirate kingpins who never set foot on a vessel or go to sea. Such a person can therefore also be prosecuted for piracy. Because such a person would have to be apprehended on land, international law would dictate how he or she can be apprehended and extradited if necessary.

Incorporating piracy offenses into national legislation

International law must be reflected in national criminal legislation or penal codes if states are to establish jurisdiction over the crime of piracy. There is no single correct way to incorporate piracy offences into national law and this is left to each state to decide at their discretion. The incorporation of piracy offences into national law may also require some ancillary legislative reform, such as additional legislation that specifically extends the jurisdiction of police and courts to the high seas. Incorporating piracy into national laws may therefore require the enactment of more than one piece of legislation. Without the necessary domestic legal framework, pirates cannot be prosecuted.

UNCLOS does not stipulate penalties for piracy and it is left to each state's discretion to set the relevant penalties.

Examples of national legislation incorporating piracy as a crime:

- 4.1 **Australia:** Australia's national laws reflect the definition of piracy as in Article 101 of UNCLOS. Australia has the additional requirement of obtaining the attorney general's consent to prosecute piracy.
- 4.2 **Canada:** Canada's national laws refer to the "law of the nation" which refers to the definition of piracy according to Article 101 of UNCLOS. Canada has also criminalized the act of piracy in their territorial waters.
- 4.3 **Kenya:** Prior to law reforms, Kenya's penal code defined piracy, but lacked supporting legislation to conduct pirate prosecutions. This means that if navies apprehended suspected pirates and handed them over to Kenya, they were arrested by Kenyan police and kept in custody. But when the matters reached trial, Kenya's legislation was inadequate to prosecute the suspected pirates and judges would rule that they did not have the authority to prosecute crimes that took place on the high seas. This changed in 2009 when Kenya introduced the Merchant Shipping Act which incorporated piracy and is supported by ancillary legislation. This has resulted in many successful pirate prosecutions.





Reference list

United Nations General Assembly. 1982. *United Nations Convention on the Law of the Sea*. Vienna: United Nations.

Global Maritime Crime Programme. 2017. *Maritime Crime: A manual for criminal justice practitioners*. Vienna: United Nations Office on Drugs and Crime.



NO SMOKING

SAFETY FIRST

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POLICE

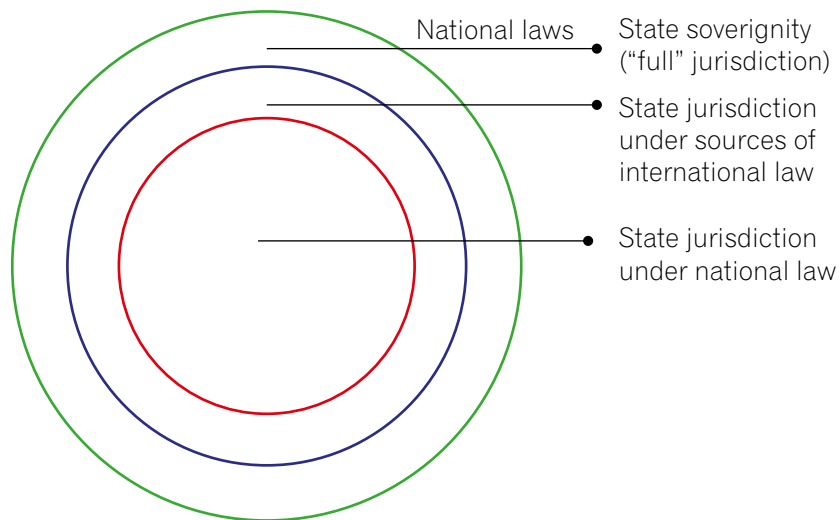
Maritime law enforcement

Adrien Parrin

Which maritime law is being enforced at sea?

States are in fact enforcing their national laws when they exercise their right to enforce the law at sea. This is because international law has to be incorporated into national legislation before states can exercise their rights in terms of international law.

Which maritime law is being enforced?



1.1 International law

In the above image, the outside circle represents state sovereignty and the state having full jurisdiction over any matters. The second circle represents the state's rights under international law. International law reduces state sovereignty by means of treaties, customary law and other sources. In terms of international law, states are therefore not free to do as they please. For example, a state would be prevented from arresting a vessel on the high seas for regular criminal offences because its sovereignty is limited by sources of international law, such as the United Nations Convention on the Law of the Sea (UNCLOS).

National law

The third, central circle represents the state's jurisdiction under national law. State jurisdiction in terms of national law does not have to be less than the state's jurisdiction in terms of international law, which results from a state's failure to align their national laws with international law. Anything authorized by international law should be incorporated into a state's national laws. For example, international law permits states to capture pirates on the high seas and prosecute them, national legislation should therefore also reflect this.

When can a state enforce the law at sea?

PHASE 1: Once a coastal state has identified a vessel of possibly being involved in suspicious activity and wishes to intervene, the following considerations apply:

Is the vessel involved in either piracy, slave trade or unauthorized broadcasting?

If a vessel is suspected of being involved in one of these three crimes, the coastal state has the right to visit the suspect vessel. This is authorized by UNCLOS.

Article 110 of UNCLOS: the Right of Visit

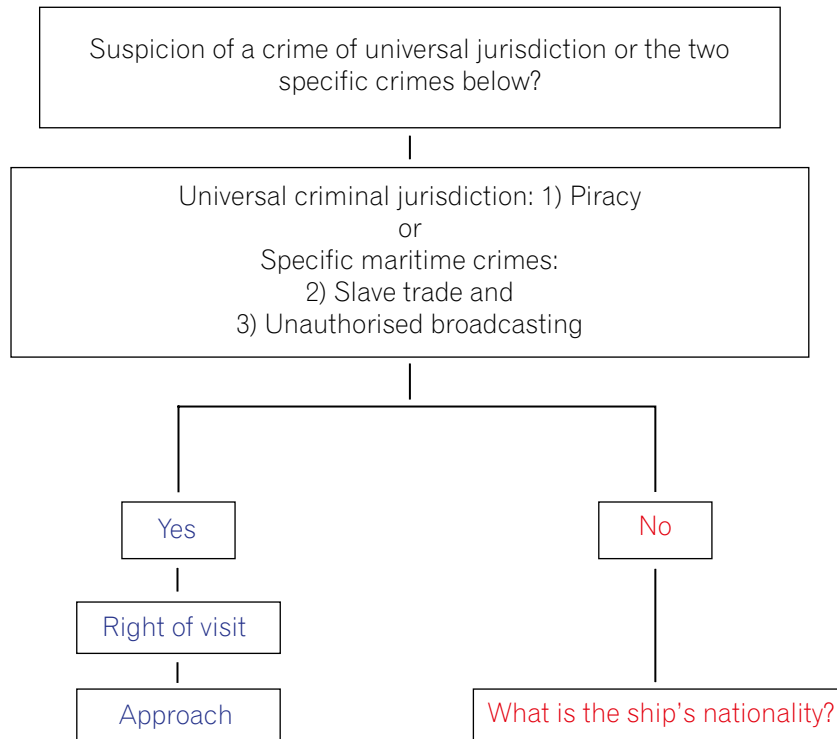
"..[A] warship which encounters on the high seas a foreign ship...is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting...;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship."

But this right of visit is subject to four conditions in terms of Article 110:

- **Where:** in the coastal state's territorial jurisdiction or on the high seas.
- **Who:** "from any other duly authorized ships... clearly marked and identifiable as being on government service". This means that the vessel being used to visit the suspect vessel has to be a government vessel.
- **How:** "send a boat under the command of an officer to the suspected ship." A suspect vessel therefore cannot simply be boarded directly from the government vessel, a smaller ship must be dispatched to conduct the boarding.

- **Why:** because there are “reasonable grounds” to suspect the involvement of the ship in the listed activities.



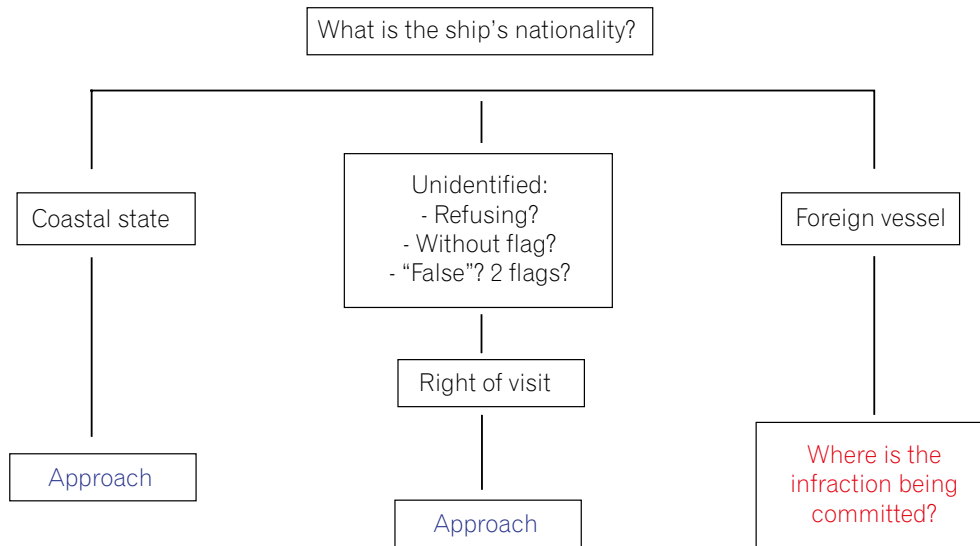
What is the ship's nationality?

The nationality of the vessel is the nationality of its flag state and where the vessel has been registered.

Nationality same as coastal state: If the flag state of the suspect vessel is the same as the coastal state wishing to intervene, the coastal state has full jurisdiction over the suspect vessel.

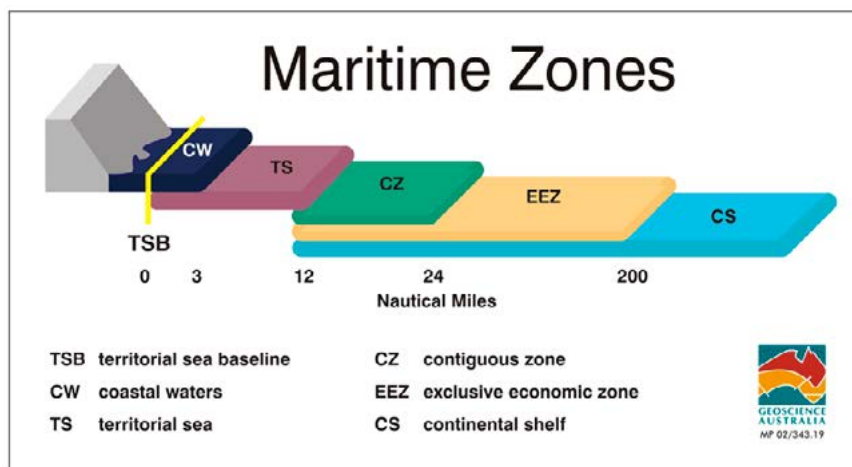
Vessel has no flag, is showing a false flag but in fact flying the same flag as the coastal state, is refusing to show its flag or has two flags: Article 110 of UNCLOS again applies, as these grounds provide a right to visit the suspect vessel.

Foreign vessel flying another flag than coastal state: If the suspect vessel is foreign, you have to ask a third question, where was the infraction committed?



In the case of a foreign vessel, where is the infraction committed?

The maritime zone in which the infraction is committed will determine if the coastal state has jurisdiction over the foreign vessel. Maritime zones are divided into internal waters, territorial sea, contiguous zone, exclusive economic zone (EEZ) and the continental shelf. The coastal state has full jurisdiction over its internal waters, but from there, jurisdiction is reduced step by step as the maritime zones move further offshore. The maritime zones are as follows:



Source: Geoscience Australia

High seas

The coastal state has the right to visit a suspect vessel if the conditions in Article 110 of UNCLOS are met. Therefore, if the vessel is engaged in piracy, the slave trade or unauthorized broadcasting or if the vessel is not flying a flag, refusing to show its flag or flying a false flag and is in fact of the same nationality as the coastal state, the coastal state has the right of visit. The coastal state will also have the right of visit when a crime of universal jurisdiction has been committed, which can only be piracy and is covered in Article 110 of UNCLOS.

Exclusive Economic Zone (EEZ)

Coastal states have jurisdiction over the same crimes as on the high seas, as well as overall resource related offences committed within its EEZ. An example of this would be fisheries crime.

Contiguous zone

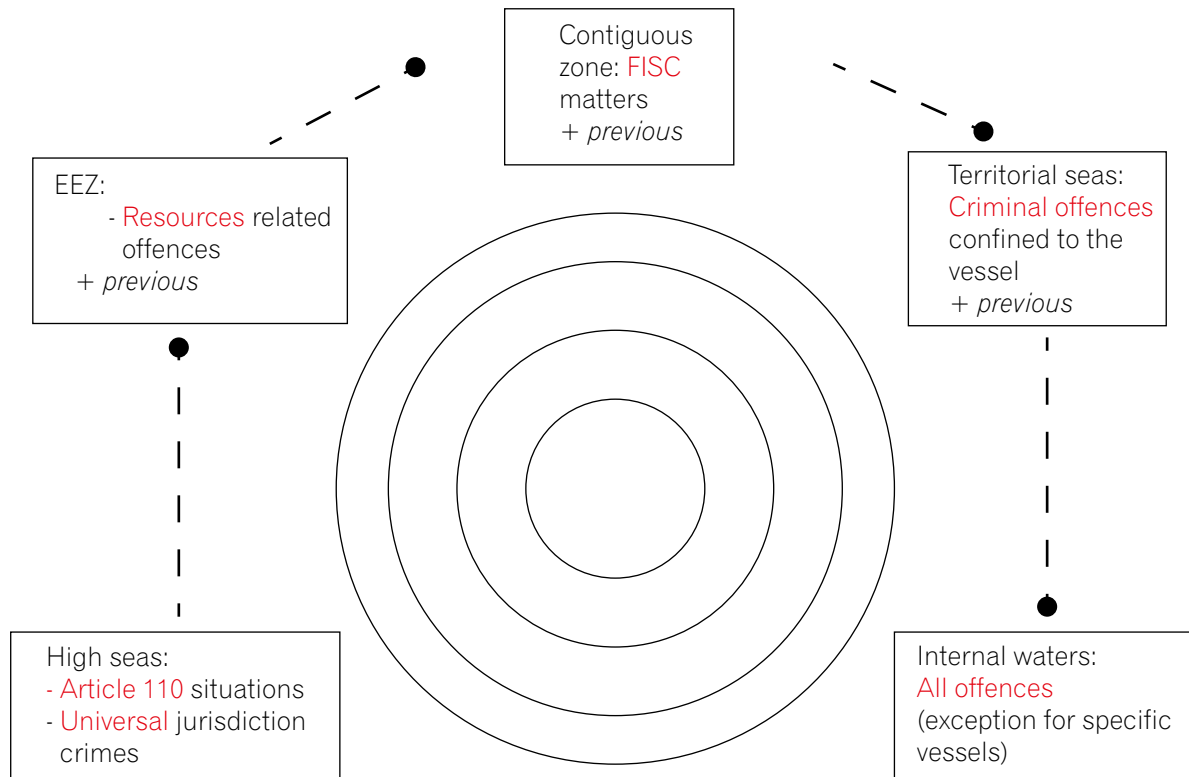
Coastal states have jurisdiction over the same crimes as on the high seas and EEZ, as well as fiscal-, immigration-, sanitary- and customs crimes (FISC crimes) committed in their contiguous zone.

Territorial seas

Coastal states have jurisdiction over the same crimes as on the high seas, the EEZ and contiguous zone, as well as over criminal offences confined to the suspect vessel.

Internal waters

Coastal states have jurisdiction over the same crimes as on the high seas, the EEZ, contiguous zone and territorial waters, as well as any other offences committed. States can therefore exercise their full jurisdiction in their internal waters. There are however exceptions to this, such as military ships that are afforded immunity.



Infraction committed within a maritime zone under the coastal state's jurisdiction

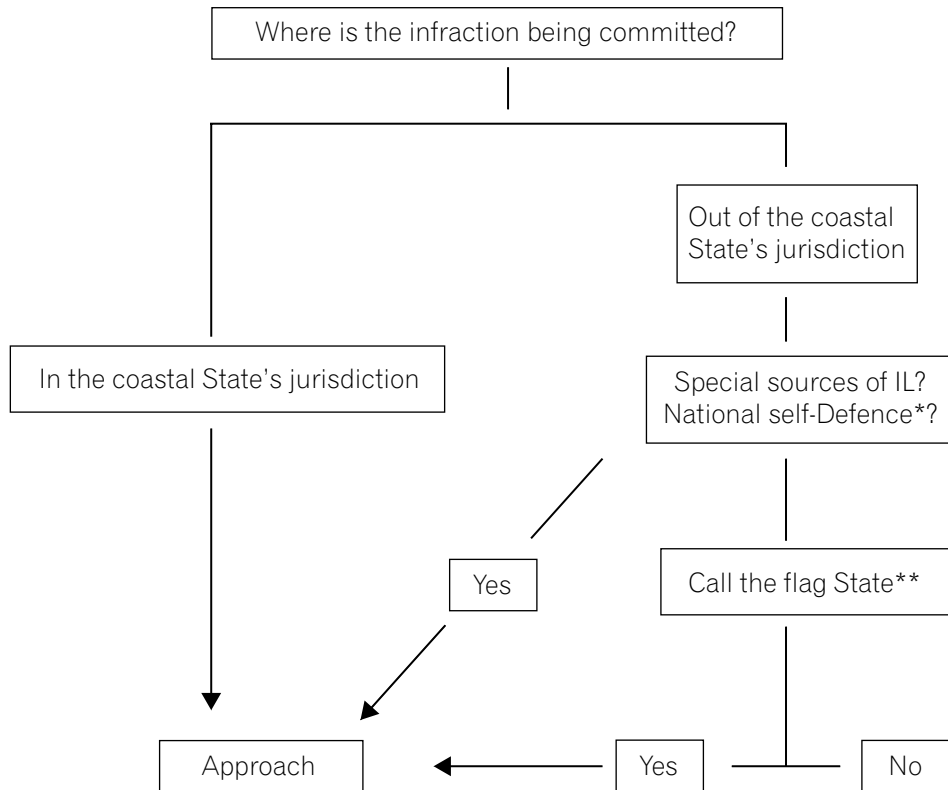
The coastal state will have the right to approach the suspect vessel.

Infraction committed outside of a maritime zone under the coastal state's jurisdiction

In order for a state to intervene in offences being committed outside of the coastal state's jurisdiction, it has to be specifically authorized. For a coastal state to exercise jurisdiction over such a vessel, it has to be authorized by:

- Treaties between states: this will only apply between the parties to the treaty.
- UN Security Council resolutions: One such resolution authorizes vessels to engage in hot pursuit within the territorial waters of Somalia. There is also a resolution authorizing states to board a suspect vessel in the Mediterranean if this is done *bona fide*.

- Self-defence: a state can claim jurisdiction over an offence if the state is acting in national self-defence. This right ensues from general international law and has not been applied specifically to maritime crimes yet.



- Flag state consent: If none of the above options apply, the coastal state can request the flag state's consent to board its vessel. In several countries, the master of the vessel can himself allow the law enforcement agency to visit the ship. But if he cannot give this authorization, a state has to request this authorization directly from the flag state. This is a more formal request and will be done through diplomatic channels. If the flag state refuses to authorize the boarding of its vessel, the coastal state has no other options available and has to let the vessel continue on its journey.

Constructive presence

This is the right of a coastal state to extend its jurisdiction to just beyond its EEZ. Although there is no primary source of international law supporting the theory of constructive presence, there is international case law on the matter and it is being applied in practice. Constructive presence theory is applied in two situations:

Motherships: Constructive presence can be applied where a mothership has two or three vessels that leave the mothership and enter the territory of the coastal state, the coastal state will have jurisdiction over the mothership despite the fact that the mothership itself never enters the territory of the coastal state. This applies to all maritime zones of the coastal state.

Fishing apparatus: Constructive presence would apply to fishing vessels where a mothership is located just outside of a state's EEZ, but which has smaller vessels entering and leaving the EEZ. It also applies where fishing vessels deploy fishing apparatus in the state's EEZ. Even if the vessel leaves the area upon the approach of the law enforcement vessel, the coastal state and their law enforcement vessel would have jurisdiction over the vessel.

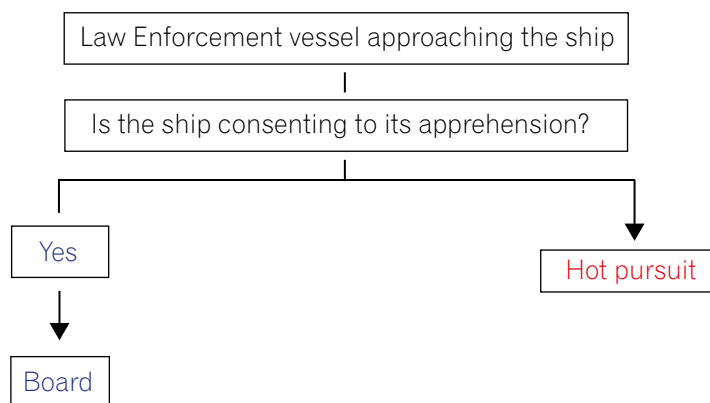
Legal apprehension

Phase 2: Legal apprehension

Once the law enforcement vessel has verified that they have a legal basis to establish jurisdiction over the suspect vessel, the suspect vessel can be approached and apprehended. The apprehension of the ship must be legal. Upon approaching the vessel, the coastal state needs to establish if the suspect vessel has consented to its apprehension/boarding.

Vessel's flag state has consented to apprehension: Boarding can take place.

Vessel's flag state has not consented to apprehension: Exercise hot pursuit.



Article 111 of UNCLOS: Hot Pursuit

Hot pursuit is the right for the coastal state to pursue a vessel that has violated its laws and regulations or is suspected to have done so, even as the vessel exits the territorial jurisdiction of the coastal state.

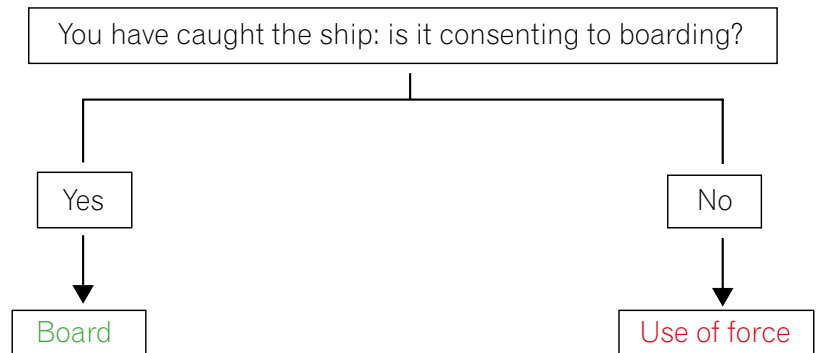
Article 111 provides 5 conditions to hot pursuit:

- The pursuing state must have “good reason to believe” that the ship has violated applicable laws and regulations in its territorial waters and EEZ. For acts committed in the contiguous zone, an actual violation is required.
- The pursuit must be uninterrupted. If the pursuit is stopped at any point, it may not commence again. However, where more than one vessel is engaged in hot pursuit, the vessels are able to substitute one another.
- Auditory and visual signals requesting the vessel to stop must be given before the pursuit begins.
- Pursuit must be interrupted as the ship enters the foreign territorial seas. Once the suspect vessel enters its own territorial waters, hot pursuit has to stop.
- The right of hot pursuit must be exercised by a government vessel.

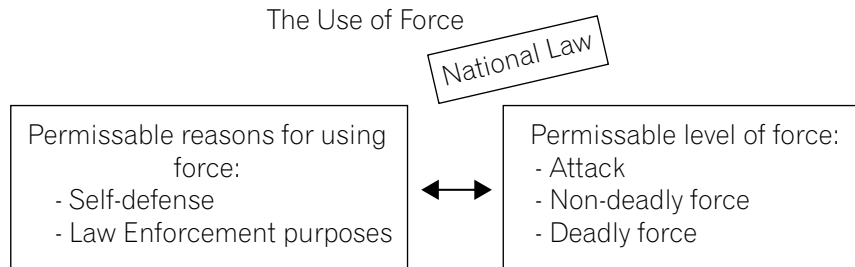
Rights and obligations after suspect vessel is apprehended

Vessel consents to boarding:
Continue to board.

Vessel does not consent to
boarding: Respect the principles of
the use of force.



There is no international legal framework on the use of force at sea. The coastal state therefore must rely on their national legislation regulating the use of force. There are two principles applicable to the use of force, the reasons for the use of force and the level of force used. The use of force is justified if for self-defence and law enforcement purposes. The level of force used must not exceed the minimum force reasonably necessary in the circumstances.



Law enforcement agency's powers on board suspect vessel

The powers of law enforcement agencies after boarding the suspect vessel depend on the reason why the ship was boarded.

If the initial approach was based on other legal grounds than the right to visit: This would apply if the suspect vessel was boarded on national legal grounds. In this case, the law enforcement agency would have all powers as stipulated in national legislation.

If the initial approach was based on UNCLOS Article 110 right to visit: Different authorizations apply, depending on the crime being committed:

Unauthorized broadcasting:

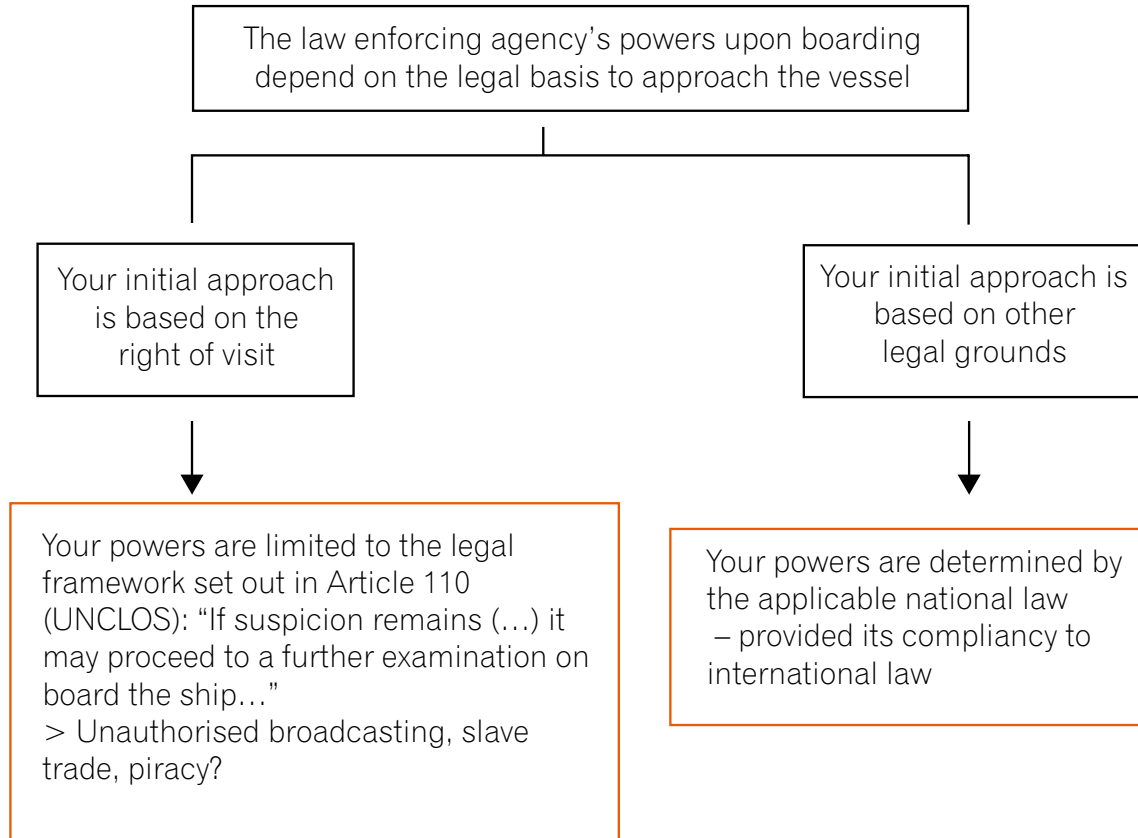
UNCLOS Article 109(3): "Any person engaged in unauthorized broadcasting may be prosecuted before the court of a) the flag State of the ship; b) the State of registry of the installation; c) the State of which the person is a national; d) any State where the transmissions can be received; e) any State where authorized radio communication is suffering interference."

Slave trade:

UNCLOS is silent on the powers and jurisdiction to be exercised by a law enforcement agency which has boarded a ship engaged in the slave trade. Depending on the states involved, different conventions will apply and such boardings would have to be decided on a case by case bases. National judges would have to interpret international laws and how they apply to their own state.

Piracy:

UNCLOS Article 101 defines piracy as a crime of universal jurisdiction. Any state which national laws criminalize the offence of piracy can therefore prosecute acts of piracy.



Reference list:

Global Maritime Crime Programme. 2017. *Maritime Crime: A manual for criminal justice practitioners*. Vienna: United Nations Office on Drugs and Crime.

United Nations General Assembly. 1982. *United Nations Convention on the Law of the Sea*. Vienna: United Nations.



Fisheries crime

Julie Hoy-Carrasco

What is Illegal, Unreported and Unregulated (IUU) fishing?

Fishing is *illegal* when it is done in contravention of laws and regulations of a state and/ or conservation and management measures. Fishing is *unreported* when the catch is not reported or is reported incorrectly. Fishing that is *unregulated* means that it is done without informing Regional Fisheries Management Organizations (RFMO) or in contravention of conservation responsibilities. IUU fishing is generally addressed with administrative penalties, while other criminal liability is ignored.

Why is IUU fishing on the rise?

As fishing is on the rise globally, so is IUU fishing. This has been attributed to the global fishing fleet being at overcapacity due to the highly profitable nature of the industry. Fish is a valuable commodity and as global populations grow, so does the demand for fish. Fish is the only remaining animal to be hunted commercially. Overfishing has led to diminished fish stocks which means that there is now less product and more demand. This is exacerbated by new, highly efficient fishing techniques such as Fish Aggregating Devices (FADs). This technique of fishing around an item floating in the water which attracts fish has always been used by fisherman. But the development of FADs, which are buoys that transmit signals, allow the fishing industry to vacuum up fish at a scale never before seen. These factors cumulatively increase competition for waning fish stocks and drive the fishing industry to engage in illegal activities. Once a fishing vessel is engaged in illegal activities related to IUU fishing, it is likely that they will engage in other forms of crime, including transnational organized crime (TOC). IUU fishing, in this way, can be seen as a gateway crime to TOC.

Other crimes related to fisheries

There are various ancillary crimes to fisheries crimes such as whitewashing of illegal catch with legal catch, thereby making it very difficult to identify an illegal catch. This can be done through transshipments at sea. Fisheries crime often also has elements of forged licenses, tax evasion, bribery, fishing vessels absconding penalties and engaging in pollution to cut costs.

Transnational organized crimes related to fisheries

One of the ways to optimize profits in the fishing industry can be through different forms of labour exploitation. This includes having crew on board fishing vessels, working extremely long hours under terrible conditions. In some cases, crew are in effect trafficked into the fishing industry and forced to work on board ships for very long periods without being paid. This practice is often seen in Asia and has been termed as a form of modern day slavery.

Fishing vessels have also been used to smuggle drugs and arms and are often involved in money laundering and large scale corruption. There are discussions on whether large scale IUU fishing should be considered a form of serious TOC¹, which the United Nations Office on Drugs and Crime (UNODC) is part of.

Enabling practices for fisheries crime

There are a number of conditions and practices that enable the fishing industry to engage in both IUU fishing and other forms of crime. One important condition that enables widespread illicit activity to go on unimpeded is the anonymity of the oceans and issues related to jurisdiction at sea which restrict the reach of law enforcement. Different forms of manipulation of vessel identify, such as the use of flags of convenience and manipulation of vessel IDs, also make tracking vessels involved in illegal activity very difficult. Certain business practices also make it hard to determine the identities of the beneficial owners of fishing companies engaged in illegal activities. This includes very complex company set-ups with multiple shell companies and anonymous P.O. addresses, often registered in tax havens.

Another method of covering up illegal practices is the manipulation of tracking systems such as Automatic Identification System (AIS) and Vessel Monitoring Signals (VMS). Once engaged in IUU fishing or an illegal transshipment at sea for example, a vessel will switch off transponders in order to be 'dark' on Maritime Domain Awareness (MDA) maps.

Transshipment at sea is another facilitating practice for crime. Transshipments allow for the transfer of any illegal goods, including illegally caught fish, arms, drugs or people, between vessels at sea, making these illegal activities very hard to monitor. They also allow vessels to stay at sea for very long periods to avoid the scrutiny of port authorities. This has been seen with fishing vessels that use forced labour. Use of 'ports of convenience', which accept landing of catch regardless of whether it is illegal, also enable the crime.

1 Haenlein, C. *Below the surface: How Illegal, Unreported and Unregulated fishing threatens our security*. RUSI Occasional Papers. Available: <https://rusi.org/publication/occasional-papers/below-surface-how-illegal-unreported-and-unregulated-fishing-threatens> [accessed 20 September 2017]

Finally, because fisheries crime are primarily dealt with by administrative penalties, which are not proportionate to potential gain, these penalties form part of the business model of fishing companies engaged in IUU fishing and other crime.

Economic implications for affected African states

Many low income states, especially small island developing states (SIDS) rely heavily on the ocean or 'blue' economy. This includes employment in the fishing industry, artisanal fishers and also marine environments that attract tourism. All of these sectors are affected by illegal fishing and the damage it causes to the economy and the environment. States in regions affected by IUU fishing often also have very few resources to carry out conventional maritime law enforcement to patrol their oceans. An example of this is the Seychelles, which is one of the smallest nations in the world, but which has an exceptionally large exclusive economic zone (EEZ) to patrol and protect. TOC committed within the fishing industry also has societal spill-over effects. An example of this is the increased drug use among youth in Seychelles which is a transit country for smuggled drugs. Drug dependency is having a crippling effect on the Seychelles which has one of the highest incarceration rates in the world due to drug abuse.

Efforts to counter IUU fishing

A new tool to obstruct IUU fishing operations, without incurring the crippling expenses of conventional maritime law enforcement patrols, are the Port State Measures which have been developed by the Food and Agriculture Organization (FAO). This agreement requires states to cooperate on preventing illegally caught fish to be landed and reach markets. Measures to be taken include denying port access to vessels that fish illegally and forcing such vessels to stay at sea, which incur high fuel costs and prevent catch to be landed and sold. In some situations, port authorities may allow suspected vessels to enter ports in order to act on intelligence received on the vessels from member states or through INTERPOL Purple Notices. Although still in its early stages of implementation, the PSMA has a lot of potential to break the business model of IUU fishing operators.

UNODC has advocated the "multi-door approach" to prosecution of fisheries crime. This approach seeks to move away from merely applying administrative penalties against fishing companies. Instead, legal action targeting all other crimes happening alongside IUU must also be explored in order to turn the current condition of high profit/low risk for IUU fishing vessels to one of high risk/low profit. This means that, even if a catch cannot be proved to be illegally caught, investigations may uncover non-compliance with the International Convention for the Safety of Life at Sea of 1974 (SOLAS) regulations, fraudulent documents,

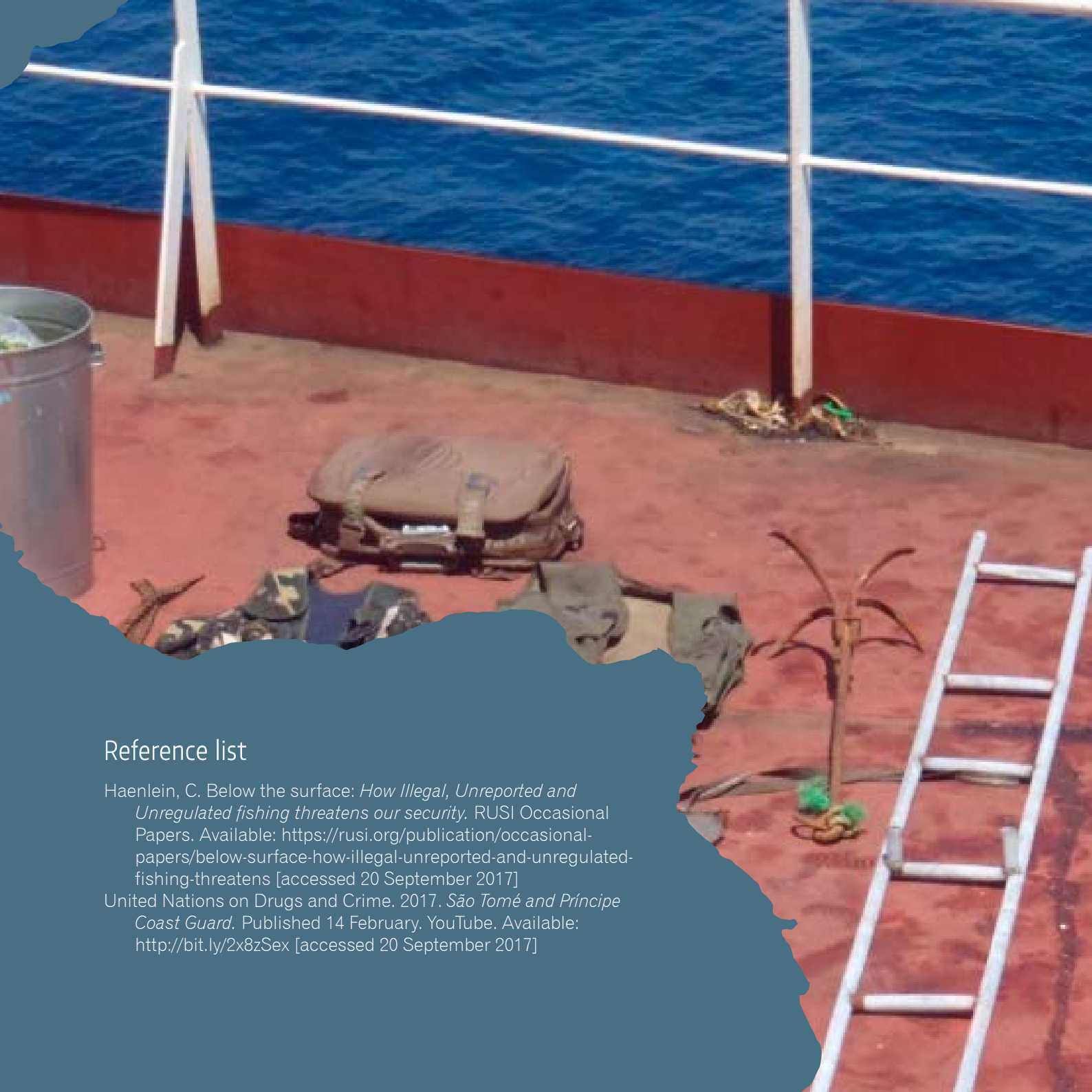
irregularities in tax payments, etc. Such proceedings would hold the vessels back, thereby increasing the expense of non-compliance.

The EU has introduced a card system which restricts access to EU markets for states that fail to meet their responsibilities to counter IUU fishing through yellow and red cards. This has also driven state action to counter IUU fishing in their maritime domains.

Finally, technological innovations are being employed to increase Maritime Domain Awareness. Some tools, such as Sea Vision and Eyes on the Sea, rely on vessels adhering to AIS and VMS requirements. Other tools, such as real-time satellite images, can identify vessels engaged in illicit activity even if non-compliant, or 'dark'. The UNODC Global Maritime Crime Programme offers support to maritime law enforcement authorities to apply new technology to conventional maritime law enforcement operations in order to carry out targeted inspections of vessels suspected of engaging in illicit activity, for example through illegal transshipments at sea.²

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2 United Nations on Drugs and Crime. 2017. *São Tomé and Príncipe Coast Guard*. Published 14 February. YouTube. Available: <http://bit.ly/2x8zSex> [accessed 20 September 2017.]



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United Nations on Drugs and Crime. 2017. *São Tomé and Príncipe Coast Guard*. Published 14 February. YouTube. Available: <http://bit.ly/2x8zSex> [accessed 20 September 2017]



Which law applies at sea?

Kazuyo Mitsuhashi

Why is it important for the law to apply at sea?

70% of the earth's surface is covered by the ocean and such a large lawless space is against the interest of states. A system of applicable laws has therefore emerged to ensure accountability for proscribed conduct, regardless of whether it takes place on land or at sea. State interests often interact at sea, requiring rules to resolve issues occurring at sea. An example of such conflicting interests would be where ships of different states collide or a national from one state harms a national from another state aboard a ship. States also have different rights, powers, and obligations in various zones of the sea and rules are necessary in order to allocate and describe these rights, powers and obligations. The use of the sea also includes shared resources and it is important for states to know how these interests and rights are to be used and managed.

International legal regimes that apply at sea

There are two major legal regimes that apply to the sea, namely treaties and customary international law. Treaties can be further divided into treaties applicable only to the sea and treaties applicable to matters that are not specifically of a maritime nature, but which can apply both at sea and on land.

Treaties specific to the sea

The first set of treaties applicable to the sea are those treaties specifically designed for the sea. This includes the following conventions:

- The United Nations Convention on the Law of the Sea of 1982 (UNCLOS)
- The Convention on the Suppression of Unlawful Acts at Sea of 1988 (SUA Convention and Protocols)
- The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 2000
- The International Convention for the Safety of Life at Sea of 1974 (SOLAS)
- The International Convention on Maritime Search and Rescue of 1979
- The International Convention on Salvage of 1989

Of the above-named treaties, the primary treaty regulating maritime matters is UNCLOS. UNCLOS is the oldest maritime legal system and specifically provides for the overall legal framework on maritime affairs. It is considered to be the constitution of maritime law.

Treaties applicable to land and sea

There are also treaties not aimed exclusively at issues of a maritime nature, but which still apply at sea. These include:

- The United Nations Convention against Transnational Organized Crime of 2000 (UNTOC)
- The Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973, amended in 1979 (CITES)
- The United Nations Convention against Illicit Traffic in Narcotic Drug and Psychotropic Substances of 1988 (Vienna Convention)

Customary International Law

The second legal regime applicable to the sea is customary international law. There is again a distinction between customary international law that is specifically aimed to apply at sea and customary international law that is not specifically maritime in nature but which also applies to the sea. There is also a third category of customary international law and that is the decisions of tribunals and international courts and how they interpret maritime law.

Implementing international law at sea

International law is implemented in the following two ways: by a state entering into a treaty and by a state incorporating the provisions of the treaty into their national laws.

Entering into a treaty

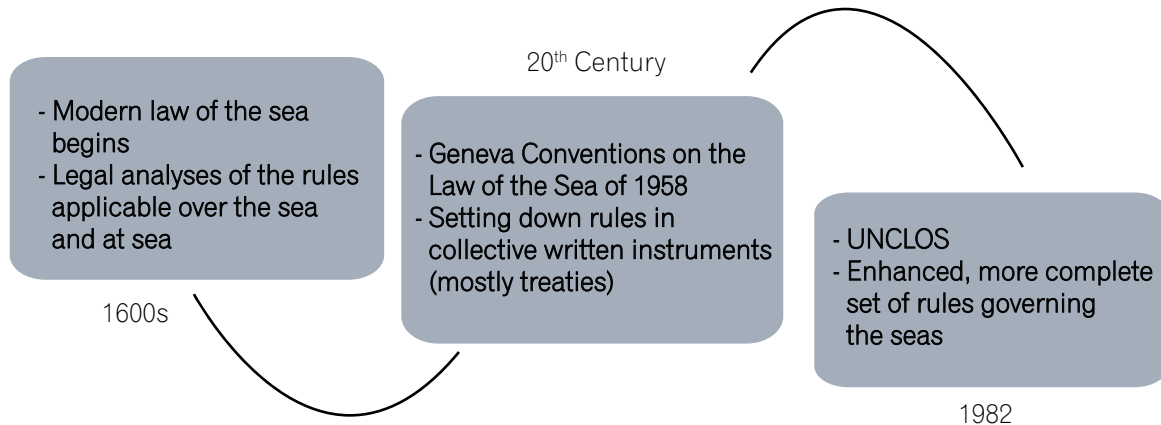
When a state enters into a treaty, it indicates to other states that it intends to act in accordance with the rules of that treaty. Therefore, by signing a treaty, the state agrees to 'borrow' the rules of the treaty, which are then to be incorporated into the state's national legislation.

Implementation in national law

In order to implement the international law to which a state has entered into by means of signing a treaty, it must be incorporated into a state's national law. By implementing international law by means of incorporating international law provisions into national law, that state's legal system can pursue maritime law enforcement and prosecutions based on the provisions of their national laws.

The United Nations Convention on the Law of the Sea (UNCLOS)

Background to UNCLOS



Discussions on the law of the sea began in the 17th century. During this time, maritime law was mostly common law activities and was not yet codified into written law. Then came a significant turning point, intellectuals began engaging in discussions and analysing maritime law. It was during this time that Hugo Grotius first wrote about the freedom of the seas.

Maritime law was first codified in the 1958 Geneva Conventions on the Law of the Sea, which was the predecessor of UNCLOS. There were four Geneva Conventions on the law of the Sea, namely:

- The Convention on Territorial Sea and Contiguous Zone
- The Convention on the High Seas
- The Convention on Fishing and Conservation of the Living Resource of the High Seas
- The Convention on the Continental Shelf

Having four Conventions was a weakness of the Geneva Conventions, because states could choose to ratify and be bound by all, some or only one of the Conventions.

To overcome this weakness of only partial commitment by states, UNCLOS came into effect in 1982, becoming the first single, large treaty codifying all maritime law into one single treaty. This meant that signatories agreed to be bound by all its operative provisions. It was therefore designed to be a package deal. Other strengths of UNCLOS include the inclusive nature of the process of creating UNCLOS. It was the first large multilateral treaty negotiated by consensus. UNCLOS has also established a balance between the rights of flag states and coastal states and the rights and freedom of navigation. But this comprehensive nature of UNCLOS is also one of its challenges – the fact that it is a lengthy document with a primarily universal focus and therefore perhaps lacking provisions applicable to unique, regional challenges.

Which issues are addressed in UNCLOS?

UNCLOS contains provisions on delimitation of the seas, rights and obligations of states, piracy, rules related to boarding and pursuing vessels and the exploitation of resources.

Which issues are not addressed in UNCLOS?

Armed conflict at sea

Despite not addressing armed conflicts at sea, many aspects of UNCLOS, such as the regime of maritime zones and certain passage and transit regimes, are considered to overlay the rules on armed conflicts at sea and are fundamental to where and how those rules are applied.

Briefly noted issues

These are also matters which are only briefly mentioned in UNCLOS, but which have required further negotiations and agreements on implementation before they can be given detailed effect. Therefore, in order to ensure that there are laws in place to sufficiently address such issues, regional or bilateral agreements can be entered into. One example is the special implementing arrangement that relates to straddling fish stocks.

Convention on the Suppression of Unlawful Acts at Sea (SUA Convention and protocols) of 1988

The SUA Convention is concerned primarily with specific types of dangers to ships and navigation and establishes an 'extradite or prosecute' regime for offenders apprehended by ratifying states. The Convention therefore gives more specific definitions of which kinds of acts are unlawful at sea.

The Convention came about in 1988 due to violent acts against people aboard ships, as well as the destruction of ships and navigation tools. The Convention therefore mostly covered such forms of violence at sea. The act is accompanied by three Protocols:

- a) The 1988 Protocol dealing with fixed platforms; and
- b) The 2005 Protocols on vessels and fixed platforms.

The 2005 Protocols added additional elements to be covered by the Convention. This included the criminalization of the transport of terrorists and biological, chemical and nuclear weapons. The 2005 Protocols also facilitate cooperation between states and provide a comprehensive framework for boarding suspect vessels. The 2005 Protocol therefore expanded the activities covered by the SUA Conventions.

To understand which specific set of obligations applies between any two state parties to the Convention and its protocols, it is essential to know which treaties each of those states have ratified. For example, if state A has ratified only the 1988 Convention and Protocol, but State B has also ratified the 2005 Protocols, it will generally be the 1988 set of legal obligations that applies between them. If both states have ratified the 2005 Protocols, that set of obligations will apply.

Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 2000

This convention has a more regional focus than UNCLOS. It is applicable to fisheries and is therefore one of the treaties directly related to the maritime law regime and was established to ensure sustainable fishing activities in the Western and Central Pacific region.

Although UNCLOS established and codified the basic set of fisheries arrangements applicable between states, it has remained necessary for groups of states in particular regions to develop more precise rules and regulatory regimes to govern fish stocks that migrate between their exclusive economic zones (EEZ) and in areas between those zones. The Convention was negotiated under the umbrella of the general provisions and regime established in UNCLOS and the additional, more detailed, 1995 Agreement for the Implementation

of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. This agreement was negotiated to add detail to this particular element of the UNCLOS fisheries regime.

Conventions applicable to maritime Search and Rescue

International Convention for the Safety of Life at Sea of 1974 (SOLAS)

The SOLAS Convention was the first international legal instrument to call for the establishment of global maritime search and rescue services. It codified the generally accepted practice of a duty to assist those in distress at sea. The Convention was significant because it changed the legal system which relied on an individual responsibility of offering assistance to those distressed at sea, to include also a state responsibility.

The master of a ship has a duty to render assistance to any person in distress at sea and to take them to an area of safety. Ships and aircraft may be called upon in a variety of ways to support, conduct or coordinate search and rescue operations in the maritime environment. Activities to assist can include towing distressed vessels, providing medical assistance, assisting in firefighting operations, providing food and supplies and rescuing survivors.

International Convention on Salvage of 1989

This Convention limits the powers under the SOLAS Convention, in that it stipulates that every master is bound, in so far as he is able to do so without serious danger to his own vessel and persons thereon, to render assistance to any person in danger of being lost at sea. The master of a ship must therefore ensure the safety of his own vessel before offering assistance, thereby balancing the safety of his own vessel and crew with that of those in distress.

Other international law applicable to maritime crimes

Bilateral agreements

Bilateral agreements are entered into between two states that wish to formalize arrangements for dealing with maritime issues of common concern in a coordinated way. The only parties bound by such an agreement are the signatory states. Bilateral agreements supplement UNCLOS by agreeing to provisions applicable to two states' individual situation.

Regional initiatives

Regional initiatives are undertaken where states within a particular region formalize arrangements for dealing with maritime issues in a way that is particularly useful for, and sensitive to, the peculiarities of that region.

United Nations Convention against Transnational Organized Crime of 2000 (UNTOC)

UNTOC provides additional support to UNCLOS in two ways; it provides for mutual legal assistance in cases of piracy and secondly, it has a Protocol dedicated to the smuggling of migrants by sea.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES)

CITES regulates trade in three categories of species of fauna and flora and has implications for conduct at sea in at least two ways. The first is by regulating the trade in certain listed species that are found in the sea and the second is the regulation of trade by sea. CITES therefore offers protection to ocean based creatures, as well as to regulate maritime trade through the oceans.

The United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention)

The Vienna Convention calls for cooperation to suppress illicit trafficking by sea. States having reasonable grounds to suspect that a vessel is involved in illicit drug trafficking can request the assistance of another state to assist in suppressing the use of that vessel for that purpose. This is given effect by requesting a confirmation of registry from a vessel's flag state and if confirmed, to request authorization to take appropriate measures against the suspected drug trafficking vessel. This would include boarding the vessel, searching the vessel and if evidence of involvement in illicit traffic is found, to take appropriate action with respect to the vessel, persons and cargo on board.

Arms trafficking: Nairobi Protocol for the Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and Horn of Africa of 2004 (Nairobi Protocol)

The Nairobi Protocol is an East African regional initiative following the adaptation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects.

Human rights obligations at sea

Human rights standards, as well as humane and fair treatment considerations, also apply in the maritime environment. The International Tribunal for the Law of the Sea (ITLOS) has reaffirmed on many occasions “that the considerations of humanity must apply in the law of the sea as they do in other areas of international law.”

Decisions of International Tribunals and other international commissions

International courts have the necessary jurisdiction to interpret and enforce maritime law. Examples of this include the International Court of Justice (ICJ) resolving disputes related to maritime boundary delimitation in accordance with UNCLOS, as well as ITLOS playing a significant role in interpreting a wide range of UNCLOS provisions.

Conclusion

UNCLOS provides the foundation of maritime law. Other conventions on maritime matters provide further details such as criminalization of certain activities, safety at sea and provisions applicable to fisheries. In addition, a range of other conventions covering issues applicable to land and sea, including human rights, wildlife crimes and the smuggling of migrants, contribute to the legal framework at sea.



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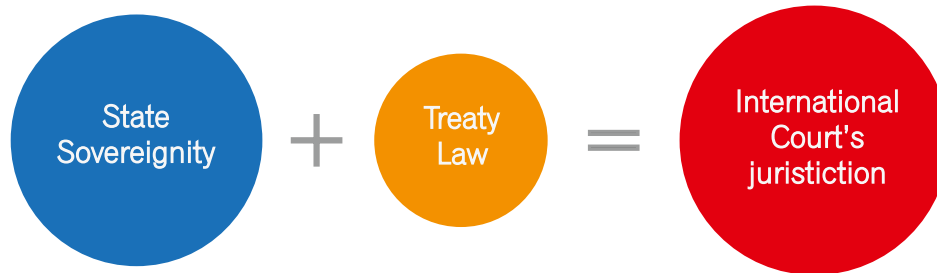
Conflict resolution: the age of international courts?

Giuseppe Sernia

State choice

The majority of state disputes in international law are law of the sea cases. In fact, the majority of international public law cases are disputes regarding the law of the sea. The first two cases of the Permanent Court of Arbitration (PCA) regarded the law of the sea, the first case of the Permanent Court on International Justice (PCIJ) regarded the law of the sea, as well as the first case of the International Court of Justice (ICJ).

A citizen is subject to national and international courts and can only exercise choice when choosing a legal representative, or within a limited set of options offered by the legal system, but a state can choose and appoint an international court to resolve a dispute. A state can therefore create its own legal system and choose to be bound by it. The state is therefore not subject to a court, but is in fact the body giving jurisdiction to the international court if it chooses to do so. The basis for the establishment of jurisdiction is permanent and special agreements by states, which are the instruments provided for by international treaties to provide jurisdiction to an international court. This choice which states can exercise is historical and has its roots in state sovereignty, as was illustrated in the Lotus case.



Lotus: Turkey v France, PCIJ, 1927

The importance of this case is the judicial endorsement by the court of the prevalence of state sovereignty. The case laid down the *Lotus Principle*, the foundation of international law that provides that states are free to do as they please, provided their actions are not explicitly prohibited.

The French master of the Lotus collided with a Turkish vessel in international waters, sinking the Turkish vessel and killing eight people on board. The ships were respectively flagged under France and Turkey. When the French vessel reached Turkey the French master was prosecuted and found guilty of a collision event in international waters. A dispute then arose as to which state had the right to prosecute. The PCIJ decided that both states had concurrent jurisdiction over the matter and that Turkey therefore did have jurisdiction to adjudicate the matter.¹ The court also declared that restrictions upon the independence of states cannot be presumed. Under international public law, there is therefore no limitation on a state's power to exercise jurisdiction, unless this power is limited by a source of treaty or customary law. Examples of such treaties are the UN Charter of 1946 which provides for the ICJ and UNCLOS which provides for the International Tribunal for the Law of the Sea (ITLOS).

The legal position was eventually clarified by Article 11 of the Convention on the High Seas of 1958, which stipulates that the flag state of the colliding vessel will have jurisdiction to adjudicate incidents of navigation, such as a colliding event. This was therefore contrary to the Lotus decision. Article 11 of the Convention of the High Seas is now Article 97 of UNCLOS.

Enrica Lexie: Italy v India, PCA, 2015

In this case Italy relied initially on Article 97 of UNCLOS in order to allow them to establish jurisdiction over two of their nationals involved in an incident at sea. The two Italians were military armed guards detached by the Italian government who allegedly shot and killed two Indian fishermen on board an Indian flagged vessel. The shots were allegedly fired from the Italian flagged vessel, the Enrica Lexie.² Italy relied on Article 97 of UNCLOS because they considered the incident to be an incident of navigation and that the two marines were under Italy's sovereignty while on the Italian vessel. However, the two Italian guards were arrested and initially tried by India. The Indian court in this matter chose to rely on the principle established in the Lotus case, instead of Article 97 of UNCLOS. The Enrica Lexie case is currently being considered by an arbitration court.

Following the decision in the Lotus case, states were concerned that their nationals and shipmasters could be arrested and prosecuted anywhere in the world. It was therefore preferred that Article 97 applies rather than the decision in the Lotus case.

1 Lawschool briefcase. 2013. *The S.S. Lotus Case*. Published 31 December. Available: <http://www.lawschoolcasebriefs.net/2013/12/the-ss-lotus-case-brief-summary-france.html> [accessed 15 September 2017]

2 Permanent Court of Arbitration. 2015. Enrica Lexie Case. Available: <https://pcacases.com/web/view/117> [accessed 15 September 2017]

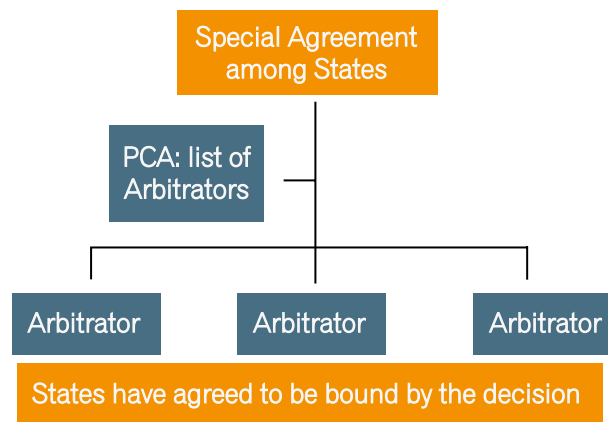
The International Courts

Permanent Court of Arbitration (PCA)

The PCA was established in 1899 by means of The Hague Convention on the Pacific Settlement of International Disputes. It was the judicial body of the League of Nations. The PCA is in fact not a court, but a regulation or a procedure created to resolve disputes. This is because the establishment of a court would have been considered as an infringement or threat to state sovereignty. The PCA was the first permanent body to adjudicate inter-state conflict resolution and its first two cases were disputes on the law of the sea. A special list of arbitrators is held by agencies, such as the FAO for matters related to fishing. The arbitration special courts are provided for in Article 287 and annex VIII of UNCLOS.

Arbitrators are appointed, they then supervise the procedure and reach an award. States can approach the PCA to resolve a dispute if they have concluded a special agreement to do so. For example, prior to the creation of UNCLOS, if Italy wanted to resolve a dispute with France on a maritime border and wished to use the PCA as dispute resolution mechanism, Italy must have concluded a special agreement with France to do so. The special agreement therefore established the jurisdiction of the PCA and the arbitration mechanism then gave effect to the special agreement. The entire procedure for choosing between the Arbitration court/ special court, ITLOS or ICJ in law of the sea disputes, is regulated by Article 287 of UNCLOS.

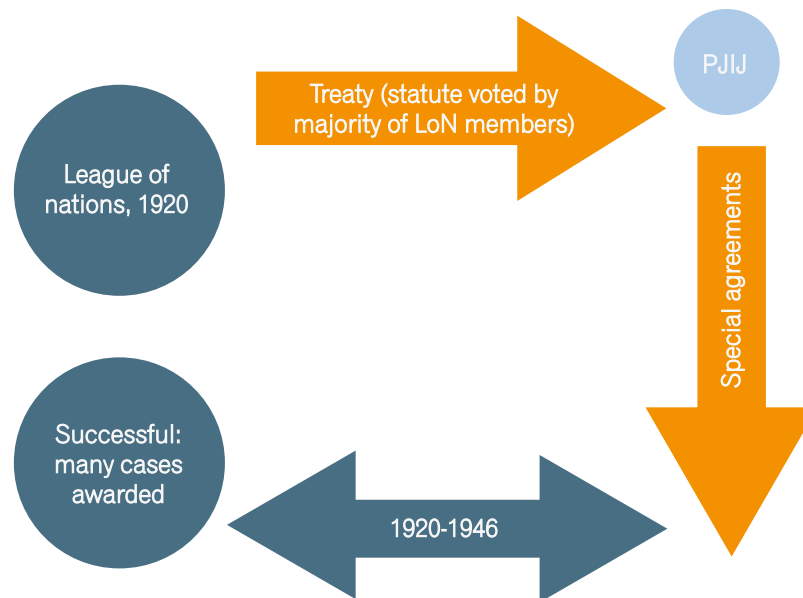
The PCA operates through a special agreement, when a procedure like Article 287 of UNCLOS is not set in advance. States are bound by the outcome of an arbitration, but there is, however, no enforcement mechanism. The cases of the *Enrica Lexie* and the *South China Sea* used the PCA as dispute resolution mechanism following the procedure set out in Article 287 of UNCLOS.



Permanent Court of International Justice (PCIJ)

The predecessor of the International Court of Justice (ICJ), the PCIJ was established by the League of Nations in 1920 due to the need for a permanent body to address inter-state conflicts after World War I. The League of Nations appointed the PCIJ with a specific treaty. Where the PCA was only a procedure, the PCIJ was a court with permanent judges, permanently presiding over matters brought in front of the court. The PCIJ's first case was also on the law of the sea and it is the PCIJ which presided over the Lotus case in 1926.

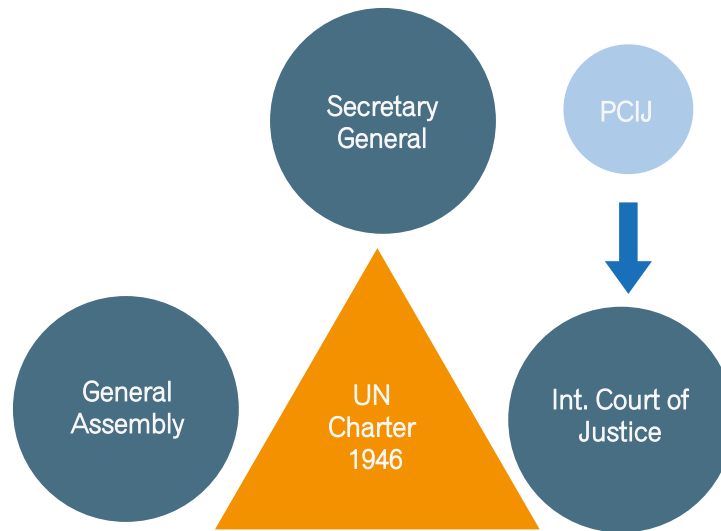
The court's jurisdiction is also established by special agreement between states. Until 1930, the court was considered to be a remarkable success and had an important caseload. After WWII ended, the court was replaced by the International Court of Justice.



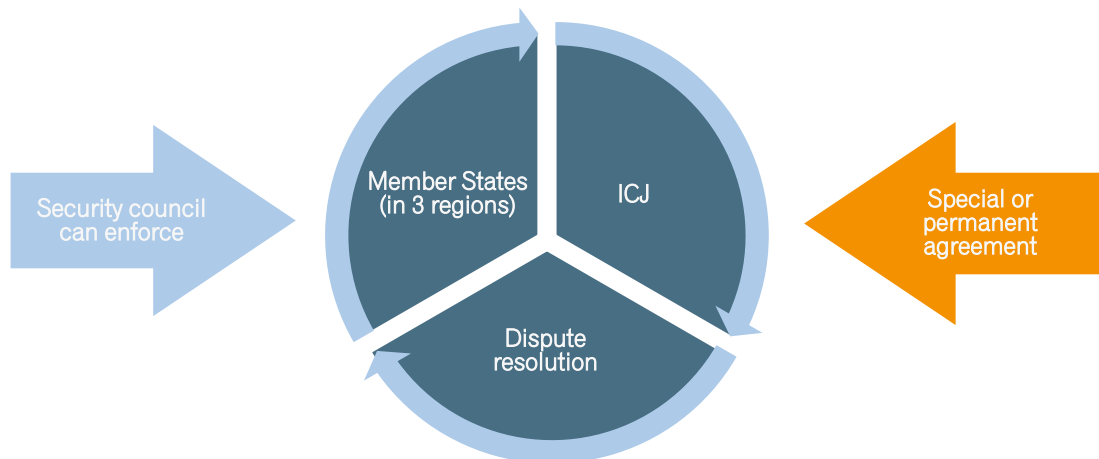
International Court of Justice (ICJ)

The ICJ was created in 1946 under the United Nations Charter. The court's first case in 1946 regarded the law of the sea when it settled a dispute on the Corfu Channel and innocent passage. The ICJ adjudicates state level disputes.

The below image illustrates the Montesquieu structure of the United Nations. The ICJ is the judicial body of this structure.



Members are appointed to the ICJ from three regions, each region appoints its own members. These regions represent three world regions and the judges are therefore considered to be representative of the entire world. The court's jurisdiction is established by either a permanent or special agreement. A permanent agreement is an agreement on a permanent basis. It is uncertain how states can enforce the decisions of the ICJ. This can perhaps be done by the Security Council, but this has not yet happened and there is no other enforcement mechanism.



International Tribunal for the Law of the Sea (ITLOS)

UNCLOS has provisions applicable to sanctions and enforcement mechanisms in terms of the Convention. ITLOS was established by UNCLOS and its statute can be found in Annex VI of UNCLOS. ITLOS can adjudicate matters between states, but it also has a chamber which can adjudicate matters between a juridical person and a state.

Art. 33 of Annex VI to UNCLOS: Binding power of ITLOS

Article 33 provides for the structure, function and binding power of ITLOS. Decisions of ITLOS are binding to all parties. ITLOS does not require a special agreement by states and its decisions can therefore be binding without the will of the state to be bound by its decisions, provided the State is signatory to UNCLOS and the procedure set in Article 287 is applicable. The main exception to this is if a state is not a signatory to UNCLOS or has chosen a different Court under Article 287 of UNCLOS. It is the responsibility of the state against which the tribunal has ruled to enforce the decision. This is a weakness of ITLOS, because if a state does not wish to enforce the decision of the court they cannot be forced to do so.

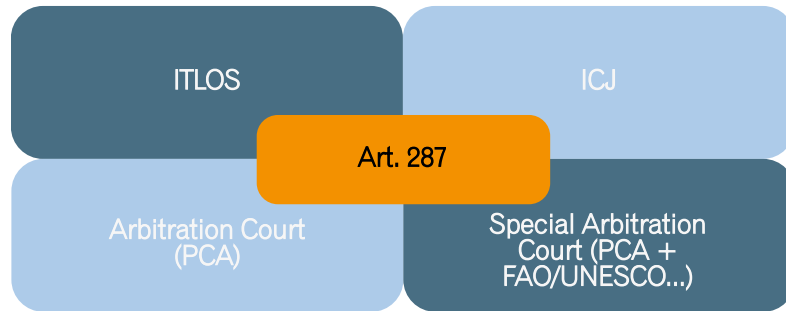
Art. 39 Annex VI to UNCLOS: Decisions of Seabed Dispute Resolution Chamber (SBDRC)

In terms of article 158 of UNCLOS, a non-state actor or juridical person can institute a case against a state and the decision by the SBDRC of ITLOS can then be directly executed by the legal system of the country against which the tribunal has ruled. This means that a court in that country can enforce ITLOS's SBDRC decision. This is different from the rest of ITLOS which can only adjudicate state- state matters. The SBDRC's jurisdiction is however limited to seabed outside of the continental shelf. This chamber is an important enforcement mechanism of international law because it is binding on states.

The strength of ITLOS

Seizing ITLOS' jurisdiction is an automatic mechanism under Article 287 of UNCLOS and therefore does not require a special or permanent agreement from states for the Tribunal to establish jurisdiction over a matter. This distinguishes ITLOS from the ICJ, which requires a special or permanent agreement to establish jurisdiction. A party can therefore approach ITLOS as long as the other party has agreed to ITLOS's jurisdiction under Article 287 of UNCLOS and the decision of ITLOS is therefore binding on such a party even without the current will of the state, as long as the states have both chosen ITLOS under art. 287 of UNCLOS. With the SBDRC also extending jurisdiction to juridical persons, UNCLOS has one of the most efficient dispute resolution mechanisms in place today.

How to choose between ICJ, PCA, and ITLOS?



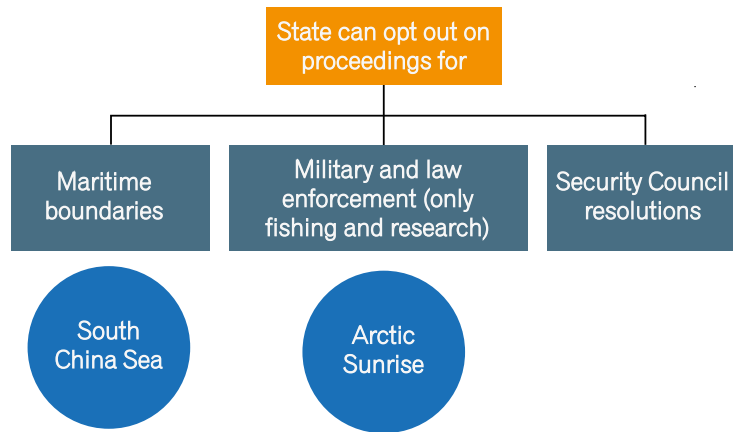
Article 287 of UNCLOS: Choice of procedure

When a state signs UNCLOS they must declare which dispute resolution mechanism they wish to apply to them. Where a state fails to declare a chosen dispute resolution mechanism, the matter will automatically go to the PCA. If the state which is being sued has not declared a chosen mechanism or has declared another mechanism from the state wishing to resolve the dispute, the matter will also be heard by the PCA. In theory Article 287 provides a perfect mechanism and a matter can be adjudicated as long as the dispute is of a maritime nature.

However, in the *Max Plant* case, the ICJ said that this mechanism for choosing a court is like a “paper umbrella in the rain”. This is because states can still enter into a parallel agreement where they agree to a completely different dispute resolution mechanism which is not binding. Such an agreement must have been entered into before the dispute arose.

Article 298 of UNCLOS: Opting out of conciliation procedures

Any signatory to UNCLOS can opt out of dispute resolution procedures under certain circumstances. States can opt out of proceedings if the dispute concerns maritime boundaries, military and law enforcement activities and where a matter is the subject of a Security Council Resolution. States can however only opt out of resolving a dispute concerning military and law enforcement activities where these activities apply to fisheries and scientific research.



The following two cases are examples of states opting out in terms of Article 298 of UNCLOS:

Arctic Sunrise: Netherlands v Russia, PCA, 2013



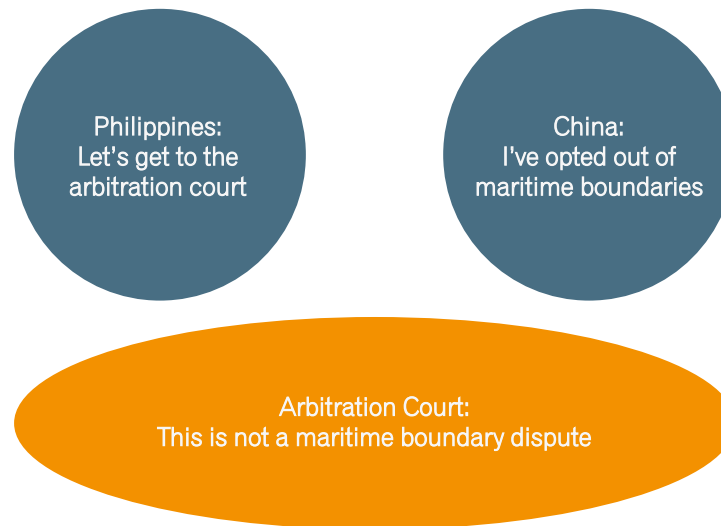
This case was first heard by ITLOS to rule on provisional measures and then went to the PCA. Russia engaged in hot pursuit of a Greenpeace vessel flagged to the Netherlands and then arrested the crew and seized the vessel. The hot pursuit was however interrupted and therefore the entire procedure and what followed was unlawful. The Netherlands disputed the arrest and asked ITLOS for prompt release. Russia failed to appear in front of the court, arguing that they had opted out of dispute resolution mechanisms relating to law enforcement activities. The PCA however ruled that opting out was only possible in the case

of fisheries and research activities, which was not applicable in this case. Russia was ordered to pay 6 million USD to the Netherlands, which the Netherlands wishes to pay to Greenpeace. However, the PCA has no enforcement mechanism and Russia is yet to pay.

South China Sea, Republic of Philippines v. The People's Republic of China, PCA, 2013

The Philippines approached the PCA to resolve a dispute regarding China's claim to the Spratly Islands within the Philippine's EEZ. China had claimed ownership of the islands, which would entitle them to claim 200 nautical miles of EEZ around the islands. The court found that China had no claim to EEZ because these islands were inhabitable, despite China building certain structures on them. China also claimed that they were entitled to historic rights in the South China Sea because they have fished there for many years. The court also ruled against this claim.

China claimed that they opted out from maritime boundaries and that the decision of the PCA therefore did not apply to them. The PCA however argued that the matter was one of a land dispute and a historical claim over maritime space and not one of maritime boundaries with the Philippines. Despite the PCA ruling against China, China does not recognize the decision and is not enforcing it.³ Again, there is no enforcement mechanism to enforce the court's decision.



³ Permanent Court of Arbitration. 2016. *Press Release: The South China Sea arbitration*. Published 12 July. Available: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf> [15 September 2017]

Conclusion and challenges

The international courts with jurisdiction to adjudicate matters on the law of the sea therefore have the power to take judicial decision, preserve rights and to rule on provisional measures. ITLOS can, for example, also order prompt release.

According to UNCLOS Article 292: *“the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea”*. There is however no enforcement measure to enforce a decision of prompt release.

This is the also biggest challenge of the international courts, that there is no enforcement mechanism at state level to enforce the decisions of the international courts.



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Alignment of South African Law with International Law to combat crime at sea

Dr Phillip Jacobs

International law sets out the broad measures envisaged in terms of international cooperation to combat crimes of international or transnational nature. While international law criminalising certain conduct serves as a model, the actual source of criminal prohibitions on individuals is national law.¹

“It is of course true that those crimes which are regulated or created by international law are of concern to the international community; they are usually ones which threaten international interests or fundamental values. But there can be a risk in defining international criminal law in this manner, as it implies a level of coherence in the international criminalization process which may not exist.”²

This quote is simply to recall that there is a difference between crime of transnational nature and which are of concern to the international community and is addressed by means of international instruments, but are not in terms of International Law on the same level as crimes against humanity, war crimes and genocide, which are truly regarded as “international crimes”. Enforcement of transnational crime is subject to national jurisdictions.

Relationship between International Law and national (domestic) laws

For crime to be prosecuted in any national jurisdiction, the necessary legal framework needs to be established. In other words, the crimes may be described in international law, but if national legislation is not aligned to the International Law, it cannot be enforced.

International law obligations can be found both in international instruments as well as binding Resolutions by the United Nations Security Council under Chapter 7 of the United Nations Charter.

1 Cryer R; Freeman H; Robinson D and Wilmshurst E. 2010. “Introduction to International Criminal Law and Procedure.”. 2nd Edition. Cambridge University Press. Page 6.

2 *Ibid*, page 7.

Crime committed at sea or transgressions of maritime law

Piracy and ship hijacking, smuggling of all kinds, cargo broaching, terrorism, stowing away, trafficking of people, drugs and weapons, poaching of fish and maritime pollution are regarded as the most common maritime crimes. ³

Piracy

The relevant provisions in International Law can be found in Articles 101, 103, 107 and 111 of the *United National Convention on the Law of the Sea (UNCLOS)*. South African law had been aligned to these provisions through the *Defence Act, 2001 (Act No. 42 of 2001)* which provides in sections 25 to 29 for the definition of piracy, the seizure of a pirate ship or aircraft; the right of visit on high seas by warships of the SA Defence Force; hot pursuit of ships; warships or military aircraft of Defence Force to render assistance and cooperation with foreign states.

There may be shortcomings should an arrest of a pirate be performed by a foreign vessel and the procedures laid down in the *Extradition Act 1998*, are not followed.

Terrorism

The International Law related to terrorism can be found in 16 international instruments, of which the following are directly relevant in relation to crime committed at sea:

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988
Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988

The international law requirements pertaining to terrorism were incorporated into South African law by the *Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act 33 of 2004)*. The Act also effected amendments to other related legislation to address counter-terrorism. The Act is the subject of a Constitutional challenge presently being presided over by the Constitutional Court (Okah

³ Maritime Studies South Africa. "Transgressions of Maritime Law". Internet: <http://maritimesa.org/grade-10/transgressions-of-maritime-law/> Accessed: 14 August 2017

matter), and will be heard on 28 November 2017.⁴ Issues that are constitutionally challenged are the extra-territorial jurisdiction in the Act, as well as the alleged status of the perpetrator as part of a “liberation movement”.

Only the requirements in the *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005*, still needs to be addressed, which will be done through a Bill which is being developed at present and will be finalised after the finalisation of the Okah matter.

Non-Proliferation of Weapons of Mass Destruction (WMD)

The following international instruments relate to the Non-Proliferation of WMD:

Treaty on the Non-Proliferation of Nuclear Weapons, 1968.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1992.

Missile Technology Control Regime.

United Nations Arms Trade Treaty.

The *Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993)* aligned South African law with International Law to combat the non-proliferation of WMD, defined in the Act as follows:

“weapon of mass destruction” means any weapon designed to kill, harm or infect people, animals or plants through the effects of a nuclear explosion or the toxic properties of a chemical warfare agent or the infectious or toxic properties of a biological warfare agent, and includes a delivery system exclusively designed, adapted or intended to deliver such weapons”.

Major challenges are posed in terms of international law by dual-use items as well as the fact that the transfer of WMD is prohibited, but not the “transport” thereof.

UN Security Council Resolution 1373/2001 noted the close relationship between international terrorism and the illegal movement of nuclear, chemical and biological materials. Resolution 1540 followed, prohibiting state actors to provide support to non-state actors to develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.

⁴ *Okah v S and Others* (19/2014) [2016] ZASCA 155; [2016] 4 All SA 775 (SCA); 2017 (1) SACR 1 (SCA). On appeal to the Constitutional Court in case number *S and Another v Okah* CCT315/16.

There are problems related to the unilateral enforcement of Resolution 1540, especially the lack of legal certainty of the right to interdict and board vessels on the high seas.

Illegal Fisheries

The following international and regional instruments regulate illegal fisheries:

Articles 56, 73 111 of *UNCLOS*.

The *United Nations Food and Agricultural Organisation Port State Management Agreement* (South Africa acceded to it on 16 February 2016).

The African Charter on Maritime Security, Safety and Development.

Southern African Development Community (SADC) Protocol on Fisheries and two related Protocols.

The Marine Living Resources Act, 1998 (Act No. 18 of 1998), was adopted to align South African law with the requirements of the relevant international law obligations.

Section 3 applies

- (a) to all persons, whether or not South African persons, and to all fishing vessels and aircraft, including foreign fishing vessels and aircraft, on, in or in the airspace above South African waters;
- (b) to fishing activities carried out by means of local fishing vessels or South African aircraft in, on, or in the airspace above waters outside South African waters, including waters under the particular jurisdiction of another state; and Port Edward Islands.

The Act shall have extraterritorial application and shall not apply in respect of fish found in water which does not at any time form part of the sea.

The Act regulates small scale fishing, commercial fishing and recreational fishing, local fishing licences, foreign fishing licences and high seas fishing licences for local vessels.

Section 52 of the Act regulates powers of fishery control officers beyond South African waters (in line with article 111 of *UNCLOS*), section 53 with seizure of vessels and section 70 with jurisdiction of South African Courts.

National Ports Act 12 of 2005

The Act provides for the establishment of the National Ports Authority and the Ports Regulator and for the administration of certain ports by the National Ports Authority; and to provide for matters connected therewith.

Organised crime

The following international instruments reflect international law obligations in this regard:

United Nations Convention against Transnational Organized Crime.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.

South African law had been aligned with the said international instruments through the:

Prevention of Organised Crime Act, 1998 Act No. 121 of 1998.

Financial Intelligence Centre Act, 2001 (Act 38 of 2001).

Financial Intelligence Centre Amendment Act, 2017 (Act No. 1 of 2017).

Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013).

Firearms Control Act, 2000 (Act No. 60 of 2000).

Drugs

The following international instruments regulates to drugs in terms of International Law:

Single Convention on Narcotic Drugs of 1961.

Convention on Psychotropic Substances of 1971.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

Article 108 of the UNCLOS.

South African Law had been aligned with International Law through the *Drugs and Drug Trafficking Act, 1992 (Act No. 40 of 1992).*

Conventional Arms Control

International Law principles are captured in respect of Conventional Arms Control by the:

International Arms Trade Treaty, 2013.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997.

South African Law had been aligned with the above through the:

National Conventional Arms Control Act, 2002 (Act No. 41 of 2002).

The Firearms Control Act, 2000 (Act No. 60 of 2000), the Explosives Act, 1969 (Act No. 26 of 1969) and the Tear-gas Act, 1964 (Act No. 16 of 1964), are also relevant.

Maritime pollution

The *International Convention for the Prevention of Pollution from Ships, 1973*, forms part of International Law on this topic.

The *Prevention of Pollution from Ships Act, 1986 (Act No. 2 of 1986)* has aligned South African Law with International Law in this regard.

Corruption

The international instruments pertaining to corruption are the:

United National Convention against Corruption, 2003.

The African Union Convention on Preventing and Combating Corruption, 2003.

SADC Protocol against Corruption, 2001.

The *Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)*, aligns South African Law to the International Law requirements regarding corruption.

Organised Crime

International instruments pertaining to transnational organised crime are the:

United Nations Convention against Transnational Organized Crime with the following supplementary protocols:

- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.*
- *Protocol against the Smuggling of Migrants by Land, Sea and Air.*
- *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their parts and Components and Ammunition.*

A comprehensive set of legislation had been adopted in South Africa to align the law with the above instruments:

Prevention of Organised Crime Act, 1998 (Act No.121 of 1998).

Financial Intelligence Centre Act, 2001 (Act 38 of 2001).

Financial Intelligence Centre Amendment Act, 2017 (Act No. 1 of 2017).

Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013).

Firearms Control Act, 2000 (Act No. 60 of 2000).

Conclusion

Both the international and regional legal frameworks are extensive. South Africa is a State Party to abovementioned international instruments and the legislation in South Africa are generally aligned to international law or busy attending to some developments in International Law or as a result of national jurisprudence.

Gaps in the present legislative framework, have been identified as gaps that are experienced universally (see the issues about jurisdiction in respect of drugs, small arms and light weapons seized on the high seas and where no country has jurisdiction to prosecute in that regard). This is as a result thereof that these crimes in terms of international law are not on the same level as genocide, war crime, crimes against humanity in terms of universal jurisdiction or terrorism in terms of a more limited type of universal jurisdiction.



The African Court: a solution to maritime crime?

Colonel Pieter Brits

Introduction

Despite recent events that put the spotlight on Africa and its troubled relationship with the ICC (International Criminal Court), the idea of an African Court to try crimes under international law is not new. Guinea already proposed the establishment of an African human rights court to try violations of human rights as well as crimes under international law, back in 1983, during the drafting of the African Charter on Human and Peoples' rights (Africa Charter).¹ However at the time the OAU opted for a Commission on Human and Peoples' Rights, rather than a court, to give effect to the rights and freedoms recognised and guaranteed in the African Charter.²

African Court on Human and Peoples' Rights (ACHPR)

In June 1998 the Organisation of African Unity (OAU) adopted a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (ACHPR),³ to strengthen the protective mandate of the African Commission on Human and Peoples' Rights, as principal supervisory organ of the African Charter.

The Protocol came into operation nearly six years later on 25 January 2004, after being ratified by 15 States.⁴ By July 2017, only 30 of the 54 African Union (AU) States ratified the Protocol.⁵ While the slow ratification rate may be interpreted as indicative of a reluctance by African States to submit themselves to an African Court, it should be pointed out that 34 African States ratified the Rome Treaty on the International Criminal Court (ICC), 26 of them doing so within the first five years since adoption of the Treaty.⁶

1 Amnesty International, "Malabo Protocol: Legal and institutional implications of the merged and expanded African Court", *Amnesty International*, 2016, pp. 1-68, p. 7.

2 www.achpr.org

3 The text of the Protocol on the African Court on Human and Peoples' Rights is available at <http://www.achpr.org/instruments/court-establishment/#1>, accessed on 19 August 2017.

4 <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court>, p. 1, accessed on 19 August 2017

5 <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court>, p. 1, accessed on 19 August 2017.

6 https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx, p.1, accessed on 19 August 2017.

The Court has contentious and advisory jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter, this Protocol and any other relevant Human Rights instrument, ratified by the States concerned.⁷

Cases may be submitted to the Court by the African Commission on Human and Peoples' Rights, a State party which had lodged a complaint, a State party against which a complaint has been lodged, a State party whose citizen is a victim of human rights violations and African Intergovernmental organisations.⁸ Non-Government organisations (NGO's) and individuals will only be allowed to submit cases in exceptional circumstances. While NGO's need accreditation within the African Commission on Human and Peoples' Rights, both NGO's and individuals will only be able to proceed if the State against whom the action is, has signed and deposited a special declaration accepting the competence of the Court to hear the case.⁹ This requirement was met with severe criticism.¹⁰ It is doubtful whether a State with a dubious human rights record would subject itself to the jurisdiction of a court to be held accountable.¹¹ By July 2017, only 8 of the 30 State parties to the Protocol deposited declarations recognising the competence of the court to receive cases from NGO's and individuals.¹² A further challenge is that the court, which has complimentary jurisdiction with the Commission on Human and Peoples' Rights, must itself choose to exercise its discretion to hear the case.¹³ In practice it means that the Court will only take on a case once the Commission has considered the matter and has prepared a report or taken a decision.¹⁴

Despite the fact that the court does not have any criminal jurisdiction and only State parties can be held accountable, the Court as at March 2017, had received 124 applications and finalized 32 cases.¹⁵

7 Protocol of the African Court on Human and Peoples' Rights, Articles 2(1) and 4(1).

8 Protocol of the African Court on Human and Peoples' Rights, Article 5(1).

9 Protocol of the African Court on Human and Peoples' Rights, Article 5(3) read with Article 34(6).

10 Juma, D., "Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper", *Essex Human Rights Review*, Vol. 4 No. 2, September 2007, pp. 1-21, on p. 3-6 discusses "the paradox of restrictive access to the African Court".

11 Du Plessis, M., "Implications of the AU decision to give the African Court jurisdiction over international crimes", *Institute for Security Studies*, Paper 235, June 2012, pp. 1-15, p. 2.

12 African Court on Human and Peoples' Rights, official website, <http://www.african-court.org/en/index.php/12-homepage/1-welcome-to-the-african-court>, p.1, accessed on 19 August 2017.

13 Protocol of the African Court on Human and Peoples' Rights, Articles 6 and 8.

14 Du Plessis, p. 2. Juma, p. 7.

15 African Court on Human and Peoples' Rights, official website, <http://www.african-court.org/en/index.php/12-homepage/1-welcome-to-the-african-court>, p. 1, accessed on 19 August 2017. By July 2017 the Court had 92 pending cases and four requests for advisory opinions.

The Court of Justice of the African Union (ACJ)

On 11 July 2000 the OAU adopted the Constitutive Act of the AU to replace the Charter of the OAU.¹⁶ The Act which entered into force on 26 May 2006 provides for an African Court of Justice¹⁷ (ACJ) to act as principal judicial organ of the AU, to settle disputes over the interpretation of AU treaties.¹⁸ A Protocol on the ACJ was adopted on 1 July 2003 and although the Protocol entered into force on 11 February 2009,¹⁹ the ACJ was “stillborn”²⁰ as the AU decided that it should be merged with the ACHPR to form a new court: the African Court of Justice and Human Rights (ACJHR).²¹ The merger took place on 1 July 2008 with the adoption of the Protocol on the Statute of the ACJHR.²²

The African Court of Justice and Human Rights (ACJHR)

The newly formed ACJHR incorporates the already established ACHPR and has two Sections: a General Affairs Section that can hear all cases submitted except those on human and peoples’ rights issues which will be the domain of the Human Rights Section.²³ It will have original jurisdiction over human rights and

16 At its Thirty-sixth Ordinary Session held in Lome, Togo.

17 Constitutive Act of the African Union, 11 July 2000, Article 18, available at <http://www1.uneca.org/Portals/ngm/Documents/Conventions%20and%20Resolutions/constitution.pdf>, accessed on 20 August 2017.

18 Protocol of the Court of Justice of the African Union, 1 July 2003, Article 2(2), available at <http://www.peaceau.org/uploads/protocol-court-of-justice-of-the-au-en.pdf>, accessed on 20 August 2017 read with Article 26 of the Constitutive Act of the AU.

19 After receiving 15 ratifications. By June 2017 the Protocol was ratified by 18 AU States. A list of States that ratified the Protocol is available at the AU website at https://au.int/sites/default/files/treaties/7784-sl-protocol_of_the_court_of_justice_of_the_african_union_1.pdf, accessed on 20 August 2017.

20 Term used by Abraham, G., “Africa’s Evolving Continental Court Structures: At the Crossroads?”, South African Institute of International Affairs, Occasional Paper 209, January 2015, pp. 1-24, p. 6. Also see Du Plessis, M., and Stone, L., “A court not found?”, *African Human Rights Law Journal*, Vol 7, 2007, pp. 522-544, p. 538.

21 Decision on the Merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, Assembly/AU/Dec.83(V). 5 July 2005.

22 Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, available at <http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf>, accessed on 20 August 2017. The founding document consists of two documents, the Protocol itself and its Annex the Statute of the ACJHR, which concentrates on procedural aspects.

23 Protocol on the Statute of the African Court of Justice and Human Rights, Article 17.

other civil matters within the AU,²⁴ and appellate jurisdiction in the enforcement of the provisions of the AU Staff Rules and Regulations.²⁵

Although a new court was created, the challenges remain exactly the same.²⁶ Like the ACHPR, the Protocol on the new merged court requires 15 ratifications to come into operation. While it took the ACHPR six years to obtain the required number, the ACJHR only succeeded in obtaining six ratifications from its inception in 2008 up to August 2017, the last one in February 2014²⁷ Like its predecessor the ACJHR only allows individuals and NGO's with observer status to approach it directly if the respondent State deposited a declaration submitting itself to the Court's jurisdiction.²⁸ The combined effect of the low rate of ratification and the strict conditions set for individuals and NGO's to directly approach the court is bound to have the same effect as in the case of the ACHPR, where jurisdiction is excluded in the majority of cases: either because the States involved have not ratified the Protocol, or did not deposit the required declaration to allow individuals and NGO's to approach the court directly or the NGO making the application did not have the necessary observer status.²⁹ Similarly the Protocol on the ACJHR makes no provision for criminal or individual accountability.

It is important to note that until the required number of ratifications is reached, the ACHPR created by the OAU limps along.

The Malabo Protocol

In February 2009 the AU Assembly took the first official step towards expanding its jurisdiction to include criminal liability, when it requested the AU Commission on Human and People's Rights to, in consultation with the ACHPR, investigate the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.³⁰ The result was the adoption of the Protocol

24 Protocol on the Statute of the African Court of Justice and Human Rights, Article 28.

25 Akuffo, S.A.B., "Report of the African Court on Human and People's Rights on the relevant aspects regarding the judiciary in the protection of human rights in Africa", at the *First Summit of Constitutional, Regional and Supreme Court Justices*, 8-9 November 2012, Mexico City, Mexico, pp. 1-10, p. 9. Available at http://en.african-court.org/images/Other%20Reports/Report_of_the_African_Court_on_Human_and_Peoples_Rights_in_the_Protection_of_Human_Rights_in_Africa_final.pdf, accessed on 21 August 2017.

26 Akuffo, p. 8.

27 On 23 February 2014 Liberia became the sixth state to ratify the Protocol. The ratification was deposited on 7 March 2017.

28 Protocol on the Statute of the African Court of Justice and Human Rights, Article 30(f) read with Article 8(3).

29 Akuffo, p. 8.

30 Assembly/AU/Dec.213(XII). Amnesty International, p. 9.

on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) on 27 June 2014.³¹

The Protocol, with a number of firsts, represents ground breaking legal development. Not only does it extend State liability of the hitherto ACJHR to include individual criminal liability,³² it also provides for corporate criminal liability.³³ While virtually no other international criminal law courts have jurisdiction over corporate entities, this development should be seen against the historically devastating impact of corporate malfeasance on the Continent.³⁴

Creating the first ever regional criminal court,³⁵ the Protocol went beyond the limited scope of the ICC. While reaffirming jurisdiction over the existing international crimes,³⁶ it expands criminal liability to a number of well-known transnational crimes, including trafficking in drugs, humans and hazardous waste, piracy, terrorism, mercenarism and corruption.³⁷ Demonstrating the advantage of a regional approach the Protocol introduces the crime of unconstitutional change of government.³⁸ Similarly regional courts may be in a better position to respond to international crimes because of their ability to develop context specific remedies and procedures.³⁹ Regional criminal courts should not be seen as an alternative to the IC, but rather as intermediary, able to provide redress where the domestic institution fails or is itself in violation of the norm, and the international system alone is unable to carry out any redress.⁴⁰

Despite the positive aspects, the Malabo Protocol is not above criticism. Some of the most severe criticism were aimed against Article 46A bis that gives heads of state and other senior state officials immunity from investigation and prosecution by the African Court during their time in office.⁴¹ While the motivation may have been the prevention of further destabilisation by the removal sitting heads of state, it can also serve as

31 Abass, A., "Historical and Political Background of the Malabo Protocol", *The African Criminal Court*, Eds. Werle G. and Vormbaum M., Asser Press, The Hague, 2017, pp.11-28, pp. 11-13. The text of the Malabo Protocol is available at https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf, accessed on 25 August 2017.

32 Amended Statute of the African Court of Justice and Human Rights, Articles 46B.

33 Amended Statute of the African Court of Justice and Human Rights, Articles 46C.

34 Sirleaf, M., "The African Justice Cascade and the Malabo Protocol", *The International Journal of Transitional Justice*, Vol 11, Issue 1, 1 March 2017, pp. 71 -91, p. 76-77.

35 Sirleaf, p. 71.

36 The ICC covers genocide, war crimes, crimes against humanity and aggression.

37 Amended Statute of the African Court of Justice and Human Rights, Articles 28A.

38 Amended Statute of the African Court of Justice and Human Rights, Articles 28E.

39 Sirleaf, p. 87.

40 Sirleaf, p. 87.

41 Kenians for Peace with Truth and Justice, (KPTJ), "Seeking Justice or Shielding Suspects?: An analysis of the Malabo Protocol on the African Court", 23 November 2016, pp. 1-24, pp. 14-15. Available at <http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf> accessed 29 August 2017.

a motivation for heads of state to cement their positions in order to avoid accountability.⁴² The term 'senior state official' is also not defined by the Protocol.

Otieno raises the interesting question whether a protocol which has not been ratified can be amended, and the effect thereof on states that ratified before the amendments were made.⁴³ Another major concern is the additional costs attached to the adding of a third chamber to the ACJHR.⁴⁴ While several other concerns can be raised, like the inadequate number of judges, the political climate in which the ACJHR would operate, and its relationship towards national and international courts, nothing will come of the whole exercise if the political will to make it work is absent.

Conclusion

The question is whether the African Court can serve as alternative to control piracy and other transnational crimes? In theory the Malabo Protocol displays exciting progress.

A quick oversight of the current African Justice cascade may reveal a different picture. Until replaced, the ACHPR, created by the OAU, is currently still the only African Court in operation. Despite reasonable success with the number of cases completed and cases under consideration, it should be kept in mind that the court is limited to human rights violations, does not have any criminal jurisdiction, and only state parties can be held liable. There is no provision for individual liability.

The merged ACJHR which is to replace the ACHPR, also failed to provide for criminal or individual jurisdiction. The Malabo Protocol, in an attempt to rectify these shortcomings, extended the ACJHR's jurisdiction to include criminal as well as individual liability and even corporate liability.

The bottom line however remains ratification. Despite being signed by 30 states, only six of the required 15 states, deposited ratification documents for the ACJHR since 2008. Since adoption in June 2014, the Malabo protocol has been signed by 9 states, the last in February 2016, but ratified by none. In the words of Abass: "African states are notoriously quick to adopt treaties, but excruciatingly slow to ratify them."⁴⁵

42 Ibid.

43 Otieno, M., "The merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we finding African solution to African problems or creating African problems without solutions?", SSRN paper, 3 June 2014, pp. 1-18, p. available at <http://ssrn.com/abstract=2445344> accessed 29 August 2017.

44 KPTJ, p. 17.

45 Abass, A, "The Proposed International Criminal Jurisdiction for the African Court: Some problematic Aspects" Netherlands international Law Review, 2013, pp. 27-50, p. 37.

This implies that currently there is still no criminal jurisdiction. Even if or rather when 15 ratifications is reached, it still means that at least 39 African states remain not subject to the protocol. However one should not let the slow ratification process deter from the good work by those responsible for the Malabo Protocol. The Protocol may still have an important role to play in future whether directly or indirectly due to its influence on international law development. In the interim the most effective answer to the threat of transnational crimes still lies with states taking responsibility aligning domestic legislation with international law.

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Searching for and collecting evidence at sea

Prof Henri Fouché¹

Introduction

The recovery of physical evidence during the investigation of a crime scene and the descriptive information derived from the crime scene make the difference between success and failure when a case is brought to trial. With the expanded capabilities of modern forensic science, particular attention must be given at the crime scene to locating, recovering and documenting evidence that will be examined by experts in a crime laboratory and used for the furtherance of justice (FBI, 2001)

The principles of investigation are the same for maritime crime as for terrestrial crime, the difference being the unique challenges present when conducting an investigation and collecting evidence of a crime committed at sea.

Challenges previously encountered by an evidence collection team on a VLCC at sea include, amongst others, the challenge in establishing a command centre on the vessel, which is in effect the crime scene; access to equipment and the availability thereof being hampered due to the location of the crime scene; equipment and substances packed by a team at 3400 metres above sea level rendered ineffective by the much higher humidity at sea level; team members' performance not being optimal due to some instances of motion sickness, which had not been anticipated beforehand; the vessel's crew members having to stay aboard and not being able to be removed out of the crime scene during processing and interviews as would normally be the procedure at a terrestrial crime scene; contamination at the scene being maximised because space and movement is limited at a maritime crime scene with a narrow time window to process a crime scene which is already contaminated (Fouche & Meyer,2001:43).

For safety and to keep costs low boarding at sea and or at night should be avoided if possible. A harbour operation is easier, safer and cheaper. A designated port and area within the port should be identified to process vessels declared crime scenes. This may, however, not always be feasible, especially where ships may be too large to be accommodated by local facilities.

¹ Images courtesy of Prof Henri Fouché who made his photos available for this publication.

Prerequisites for successful prosecution

Investigators need to have knowledge of the elements of the crimes they are investigating, to successfully prove a case in the court of the jurisdiction in which the case is likely to be prosecuted. Some of the crimes likely to be encountered are a common occurrence throughout the world although the statutory modifications as to exceptions, degrees or lesser or included offences within each crime may vary with each country (Pena, 2000:2).

Examples are Murder and Robbery. The elements of the crime of murder generally consist of the unlawful killing of a human being by another with malice aforethought or premeditated design and Robbery, the elements of which generally consist of the illegal taking of personal property in the possession of another from his person or immediate presence by means of force or fear (Pena, 2000:2).

Maritime crime is generally defined by international legislation and convention and prosecuted under the domestic law of the country in which the proceedings are conducted.

Examples are Piracy, defined in article 101 of the United Nations Convention on the Law of the Sea and the hijacking of a ship, defined under maritime crime in article 3 of the Convention for the Suppression of Unlawful Acts against Maritime Navigation. These crimes may be incorporated into different Acts in each country, albeit, the elements to prove for successful prosecution will remain the same.

Team members should be provided with timely information of the extraordinary nature of the crime scene for example whether the vessel was used as a mother ship and the nature of the crimes that can be expected to be encountered at the scene. This is necessary to establish the desired outcomes which are not only to identify and link the perpetrators to the crime scene by way of trace elements, but to connect them to the elements of the crimes committed. Team members should also be aware of their rights and powers at the crime scene (for example if necessary, can a door be broken down). In this regard prior contact with probable prosecuting authorities to ensure successful prosecution in instances where legal proceedings need to be instituted in countries other than those where the investigators are based is advantageous.

(Fouche & Meyer,2001:46)

Planning and support for a major evidence collection operations at sea

Experience has revealed that a well-trained team, coordinated and equipped properly, can be of great advantage in effectively recovering evidence, especially when large crime scenes are encountered or when there are multiple scenes in a given case (FBI,2001) Team members need to select operators on specific

competencies and experience. Apart from possible training requirements the deployment of non-experienced police officers as part of an evidence collection response team should be avoided. The size of response teams are restricted by safety requirements and logistics on board a vessel at sea or at anchor. Suitable attire should be provided to team members who should also be issued with the correct personal protective clothing.



To enhance the achievability of an evidence collection operation at sea by an evidence response team it is necessary to enjoy the full commitment and support of the local authorities and the full commitment and support of the industry. Communication with local authorities needs to be initiated as early as possible and should be as clear as possible. Direct and continuous contact with ownership is also essential.

The logistic of boarding a vessel must be negotiated during the planning phase and needs to be planned in full cooperation with the local industry (ship agents/owners) for the necessary permission to board and agreement of the time required for the crime scene investigation, agreement on the size of the team and assistance required from the vessels crew to facilitate boarding and disembarking (gangway, rope, basket), transfer of equipment, use of ship's facilities, electricity, room for command centre, toilets, elevators etc. Task teams should be self-reliant in terms of logistics such as food and water. The team leader should ideally have access to sufficient readily available funds to deal with contingencies which may arise such as the need to hire a helicopter or civilian boats to assist with transporting large amounts of evidence.



Bear in mind that when handovers, crew changes and technical equipment checks take place at the same time as the boarding by the response team the availability of victims and the scene contamination will be influenced as these activities enjoy top priority and delays are costly to owners. A balance needs to be achieved and maintained by the response team and crew to accommodate all the reasonable demands for rapid completion while at the same time making allowance for the maintenance of a high standard of CSI

Communication

Communication before, during and after the operation is crucial. Before the operation between the owners, ships agents, the master of the ship and the team leader(as much information as possible should be made available regarding the alleged offences, the method of operation of the perpetrators, the composition of the crew in order to arrange interpreters, the estimated time of arrival, and all information which would assist with the investigation), during the operation between team members themselves and with the ships management and after the operation between the parties responsible for the preparation of the case for prosecution and the prosecuting authority of the state in which the trial is to take place(with regard to availability of witnesses and evidence and admissibility of evidence)(Fouche & Meyer,2001:49)

The team leader for the operation needs to have a point of contact at the ownership level. Representative agencies are not always well informed and may lack the information requested, such as a blueprint of the

ship, crew list, information for coordination of boarding with ownership boarding to avoid contamination and possible victim conditioning.

A pre-boarding meeting(s) needs to be held with the local agents and an agenda for matters to be discussed could include:

- Crew needs including medical doctors and trauma counsellors
- Availability of interpreters
- Injuries
- Official crime report
- Logistics of boarding
- Constant update of ships position
- Crew list
- Presence of security cameras on board
- Customs/immigration clearance
- Possible interviews
- Expected duration of the CSI
- Ship damages
- Stolen goods/properties
- Presence of families/relatives
- Handling of press
- One spokesperson/ liaison with media to pre-empt and avoid leaks to the press – rumours of injuries to crew could lead to owners being inundated with enquiries from family/relatives.
- Transport of technical equipment

Condition of evidence

Loss of evidence can result from incriminating evidence being discarded by being thrown overboard (by perpetrators or even inadvertently by crew members or first responders who may not be aware of the potential evidential value for prosecution).

Moisture can affect and degrade some evidence such as fingerprints and DNA, particularly on the decks where it may come into contact with seawater. If the vessel has been cleaned before the team is given access collecting evidence will be challenging.

Challenges encountered in this regard by an evidence collection team on a VLCC at sea include, amongst others:

- Limited space being available to transport equipment to the scene.
- Marking the position of exhibits for capturing found difficult due to the continuous motion of the vessel.
- The equipment taken aboard was more suitable for processing terrestrial scenes (cameras and reagents were affected by moisture and weather changes. Reagents not properly packed were affected by moisture due to humidity. Lenses became covered in moisture and no lens cleaning tissues were available.)
- Processing was interrupted and had to be stopped when the vessel was affected by rough weather.
- Time for processing was much too short and members had to rush processing increasing the possibility of evidence being overlooked. In many cases collection was limited to merely " bagging and tagging" and documentation.
- Large quantities of evidence could not be processed and had to be left behind (equipment, bedding, clothing, empty containers, etc. dumped by perpetrators) due to lack of time and space on the police boats.
(Fouche & Meyer,2001:46)

Interviews

The IMO Code of Practice for the investigation of crimes of piracy and armed robbery against ships points out that investigators should be aware that the witnesses they are dealing with are likely to be exceptionally distressed, particularly if they have been subjected to violence, been held hostage for long periods and been in fear of death. The code emphasises that investigators should take cognisance of such factors and consequently the need to deal emphatically and patiently with such witnesses if they are to elicit all the relevant facts during interviewing (Fouche & Meyer,2001:49).It will always be useful to have an updated photo album of suspects available for perusal and possible identification by victim during the interviews.

Prosecution

A Troika approach using the investigator, prosecutor from the flag state/prosecuting country and intelligence in a combined effort is recommended when conducting the investigation of the crime scene of maritime piracy. The IMO Code of Practice points out those investigators should be aware that the laws governing offences committed at sea may allow for legal proceedings in countries other than those where the investigation was conducted. The chain of command for forensic reporting and chain of custody needs to be established and rigorously maintained as the entire case might be leaving the jurisdiction of the local authority. The most proper handling of both the investigation as well as the forensic part is therefore vital.

Ship owners need to lay a criminal charge in the flag state against the perpetrators to enable Interpol to issue red notices for arrest and extradition to the prosecuting state (for an Interpol red notice to be issued there needs to be a valid arrest warrant in the country requesting extradition) (Fouche & Meyer,2001:49). Ship owners may be reluctant to initiate charges as they fear this may cause undue disruption to their commercial operations. In such an event ship owners need to be advised on the necessity for laying a charge and be strongly urged to do so.

Conclusion

Thorough preparation and planning, communication between the relevant role players before, during and after the operation, coupled with attention to detail will contribute in no small measure to achieving the goal of successful prosecution.

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Maritime security governance off Africa: where to assist?

Prof Francois Vreÿ

Background

Africa's seas keep world attention focused on the dangers that threaten the use of the oceans. Piracy off Somalia channeled significant international political attention and resources to secure ocean off the Horn of Africa. In a way, events in the Gulf of Guinea off West/Central Africa and off North Africa are sustaining the drive to secure Africa's maritime waters. Although much of the debate and resources focused on combatting piracy, the presence of other threats alongside piracy drew its own collection of interests from state and non-state actors and their respective agencies.

One important facet of the anti-piracy wave that gripped international attention, was the land-sea interface. A second aspect highlighted the question of how to respond to piracy and its underlying conditions or drivers. It is the latter understanding of best responses to piracy from a more critical understanding, but also the insecurities that piracy fosters that elevated cooperation and awareness to promote maritime security governance. The former implies that matters on land do stimulate insecurity off the coast, the latter that responses must be collaborative and more than anti-piracy. In turn, both rely upon indicators of what threats and vulnerabilities are at hand, and how best to respond.

On ocean governance

At the state level governance refers to a government's ability to make and enforce rules and to deliver services regardless of whether the government is democratic or not.¹ The same skill to make and enforce rules applies to extend governance at sea as maritime security ultimately serves to underpin good ocean governance. Ocean governance entails that those who use the sea abide by the rules, laws, conventions and protocols that regulate who uses the oceans and how they use it. All of this gets directed at how behaviour gets articulated, allocation of resources, and power is exercised.² States remain prominent actors and one important facet is how oceans governance ties in with government decisions and policies for good governance practices with a deliberate effort to cover the widest possible spectrum of ocean use.³

1 Fukuyama, F. 2013. What is governance? Center for Global Development. Working Paper 314. 3.

2 Chang, Y-C. 2012. Ocean governance. A way forward. Springer: Dordrecht et al. 4.

3 Chang, Y-C. 2012. Ocean governance. A way forward. Springer: Dordrecht et al. 55-56.

Ocean governance also stems from a renewed understanding of what advantages oceans hold and that as an environment, it is under pressure. The importance of oceans as a whole and it being sustained by governance practices that strive to integrate rules, resources and behaviour towards a common goal of sustainability and responsible use. Ocean governance envisages a global condition of good order at sea with sustainability and responsibility at its heart – a condition requiring a footing in security and rule of law.

Maritime security governance is one important pillar for overall ocean governance aimed at clean, healthy, biologically diverse and productive seas for future generations.⁴ This relation is perhaps obvious, but also uncertain if one wants to frame what constitutes the building blocks of maritime security. Two examples suffice (table below) with Bueger, whose views are more critical and futures oriented, and flagging relational outcomes connected to development, security and human security. Till, in turn is more practical and ties actor-cooperation to outcomes in a more input-output model to ensure general good order at sea as the outcome.

Defining maritime security

Bueger (Marine Policy, 2015: 5) ⁵	Till (2013: 283) ⁶
<p>Maritime security stands central to several concepts.</p> <p>This relationship extends to:</p> <ul style="list-style-type: none"> • bringing about safety in the marine environment, • support to the blue economy to foster economic development, • enhance national security through seapower and • human security by injecting resilience into the oceans domain to promote the security and interests of people 	<p>Actions performed by military units in partnership with other government departments, agencies and international partners in the maritime environment to:</p> <ul style="list-style-type: none"> • counter illegal activity and • support freedom of the seas in order to • protect national and international interests.

In spite of the critique on maritime security and its uncertainties, Till argues that good order at sea goes a long way to ensure the safe and secured use of the oceans as a flow and stock resource for political, economic,

4 World Wildlife Fund, 2016. Succeeding in oceans governance, WWF Position Paper September 2016. 2

5 Bueger, C. & Edmunds, T. Beyond sea blindness: A new agenda for maritime security studies International Affairs, Forthcoming 2017.

6 Till, G. Seapower in the twenty first century, Routledge: London, 2013. 238.

environmental and social purposes.⁷ Good order at sea rests upon a number of constituent elements tied to safe and secure settings to extract living and non-living resources, use of maritime transport lanes, protect the ocean as an environment and ensuring jurisdiction over ocean territories.⁸ Such arguments about maritime security, ocean governance, the blue economy, human security and good order at sea supposes a central governance theme based upon how efficiently actors extend their duties and responsibilities over ocean territories to promote safety and security and cooperate in doing this.⁹

The governance – maritime security nexus

In step with Bueger and Till's views, Bateman outlines maritime security governance in its widest form as a way to accommodate the ever-increasing ambit of non-traditional security threats that now operate at sea.¹⁰

Governance implies national, regional as well as global governance and a responsibility to be extended over land as well as the ocean. Although governance is more easily understood as how well governments extend service delivery to their societies in a responsible way to meet their expectations,¹¹ and though not the focus of this discussion, ocean spaces beyond the territorial sovereignty of individual governments must not be ignored. Maritime security governance entails more detailed aspects related to actions by states, their agencies and actors below and above the state to uphold good order, maritime awareness and coordinated responses based upon cooperation.¹² Multi-actor responses and cooperation gained much scrutiny as governance of Africa's maritime domain drew growing attention in the literature, as well as by way of international responses to events off the African coast.

Governance on land extends to how political, economic and social aspects of authority serve the interests of society and functions as catalysts for order or disorder. Maritime security governance functions in a similar fashion but not in an isolated manner as disorder on land spills off shore and interferes with ways and means to extend maritime security governance over littoral waters.¹³ In kind, the effects of threats at sea spread back onto land. If maritime border disputes, criminality at sea, terrorism and even marine-based environmental and food security vulnerabilities cannot be contained through security governance, maritime and landward insecurities become mutually reinforcing.

7 Till, 2013 284.

8 Till, 2013 284.

9 Bateman, S. 2016. Maritime security governance in the Indian Ocean region, *Journal of the Indian Ocean Region*, 12(1). 8.

10 Bateman, 2016: 6.

11 Rotberg, R. (ed). 2013. *On governance: What it is, what it measures, and its policy uses*. CIGI: Waterloo. 7.

12 Bateman 2016: 7.

13 Bell, C. Lawellin, B. 2017. *Stable seas: Somali waters*. Research Publication of the One Earth Foundation. 5. <http://oefresearch.org/publications/stable-seas-somali-waters>

Governance as the extension of rule, responsibilities and services by responsible actors such as governments in combination with a growing range of other agencies thus plays a role on land as well as at sea.¹⁴ In this vein one can map governance on land (coastal states in particular) by way of selected stability indicators and concepts of which the Africa focused Governance Index of the Mo Ibrahim Foundation is a prime example. In contrast, indicators for maritime security governance indexes are weakly developed, scattered and uncollated, but not totally absent.

Governance indexes

Governance indexes contribute to decision-making by framing whether those who govern meet the expectations of their citizens¹⁵ and this 'meeting expectations' has a growing footprint in how the blue economy serves the delivery of essential public goods. As on land, the blue economy connection is influenced by the levels of maritime security at sea. The maritime governance debate closely resembles those about landward governance and in particular the emphasis upon security and rule of law as first deliverables.

Security and rule of law, an enabling political, social, and economic environment, and human development are important pillars for maritime governance, and maritime security governance in particular. When measured, security and rule of law, as well as the enabling environment work collectively to promote human development by knowing what is at hand, to direct influence, as well as resources and to change where governance is weak or absent. By 2017, the hubs of weak or absence of maritime security governance off East, West, and North Africa are general knowledge and have become maritime landscapes off Africa requiring actions vested in governance, and less description or explanation.

The maritime constituency served is somewhat different from its landward counterpart as it first entails those living or working on and being dependent upon the seas in some way, but eventually its effect reverts back to landward societies – whether coastal or landlocked. More indirectly the governance factor relates to how deeply societies on land have become dependent upon the ocean as a provider of employment, food, commercial goods, mineral resources, energy, climate security, and recreation – all public goods or sub goods. All of the former are reliant upon security and rule of law by enforcing national and international rules and legislation to deter or punish transgressors at sea.¹⁶

14 Paulo, JPB. 2013. African approaches to maritime security: Southern Africa. FES: Maputo. 10.

15 Rotberg, 2013. 14-15. Citizens also have legitimate expectations that the maritime domain receives its due share of good governance given the role that the ocean plays in the lives of citizens through employment, recreation, food and energy security, and environmental / climate stability.

16 Rotberg, 2013. 15.

Towards a maritime security governance index

Maritime security is about co-operation – first at the national level and thereafter further afield. When underpinned by rule of law, both levels of cooperation foster amicable conditions for other goods and services originating from the sea. As a governance output, maritime security also relies upon a network of international protocols and other indicators that collectively regulate behaviour on and towards the ocean, and towards national waters in particular. Coastal states thus have a rather extensive set of landward and maritime governance sectors and indicators to heed – both as inputs, as well as by way of outputs and these inputs/outputs are illustrated by the outlines of Bueger and Till presented in Table 1. The question that now arises is one of selecting, ordering and collating indicators of maritime security governance off Africa.

This leads on to the difficulties associated with indexes and indicators: How to compile variables and indicators that measure inputs and outputs related to maritime security governance that can serve as a decision-making instrument for governments and other decision-makers. The latter relates to judgements on performance and progress and ultimately where interventions are required to stimulate better governance.¹⁷ Indicators are building blocks of the concepts that serve as descriptions of the state of governance. In this vein the Mo Ibrahim Foundation (MIF) for example employs indicators to measure concepts of rule of law, accountability, personal safety and national security for the rule of law and safety governance category alongside four other categories of governance for African countries. Keeping in step with the methodology employed by the MIF, a suggested maritime governance index can serve a maritime purpose alongside landward indices such as the MIF and others on landward state fragility.

The following suggestion on a maritime security index (in the table that follows) for African coastal states address the national and if extrapolated also regional levels of maritime security governance. The index draws upon the Mo Ibrahim Governance index, as well as the work of Rotberg (2013), Till (2013) and Bueger (2015) about indexes, governance and maritime security to compile a broad set of categories for which selected indicators are offered. The set of measures ties in with the landward index, rule of law, maritime stock/flow profile, threat profile and enforcement/prevention agencies. The sets of indicators related to the composite measures have been selected from the expanding literature on what comprises and what to do about the threats and vulnerabilities off the African coast. Fundamental to the index is merging civil-military contributions as African countries are obliged to draw upon the collective capabilities to overcome limited resources and to employ existing, but uncollated information indexes to the maximum.

17 Rotberg, 2013. 94

Proposed maritime security index for African countries

Indicators	Composite measures
Regional governance index Littoral governance index Littoral fragility index Incidents at sea index	Indexes: Landward catalysts
Integrated legislation International codes & regimes Codes of conduct Maritime policy environment UNCLOS signatory	Legislative: Rule of Law
Maritime resources profile Living, non-living Maritime resource dependency Shipping lanes/volumes Choke points	Stock/Flow: Maritime importance
Maritime zone claims Maritime boundary disputes Maritime crime profile(s) (Traditional, GOAS, Non-traditional threats) Domestic/Neighbouring spill-overs Terrorism and insurgency	Threats: Need for security governance
Government/naval maritime institutions Civilian maritime security institutions Regional maritime arrangements Maritime safety services Hydrographic surveys S&R Services	Safety Institutions: Prevention/Containment
Acquisitions Standing navies/coast guards International naval assistance Maritime policing agencies Naval/maritime exercises Private maritime security actors International cooperation	Prevention through enforcement

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Acknowledgement

SA IORAG Steering Committee consisting of the Department of Science and Technology, Department of International Relations and Cooperation, Department of Higher Education and Training, National Research Foundation, South African Environmental Observation Network and the Human Sciences Research Council.

ISBN 978-0-620-77776-6



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