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Course Material

P.G. DIPLOMA (ADVANCED MARITIME LAWS)

1.1.3. Maritime Security and Law of the Sea

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MARITIME SECURITY, PASSAGE AND MILITARY ACTIVITIES

MODULE-I: MARITIME SECURITY, PASSAGE AND MILITARY ACTIVITIES

Introduction: The oceans and seas cover over seventy percent of the earth's surface area. Since time immemorial man has used the oceans for the purpose of trading. The world economy relies on global trade achieved through trade and its transport by sea. Shipping has now secured a place as one of the world's most international industries. Safety of life at sea has long been considered a paramount consideration in the application of the law of the sea. Over the years a body of laws has developed concerned with regulating maritime security- indeed this field of law has developed into a major branch of International law.

Whilst there are a number of sources of maritime security law, the primary source today is the International Maritime Organization. At present it is the major institutionalized source of maritime security rules. Indeed, it has become, in the post 9/11 New York years, the major forum for the promulgation of international maritime rules regulating maritime security.

I. What is maritime security? It must be observed that a challenge exists in defining the term "maritime security." This is due to the diverse nature of the field which encompasses many different subject areas. The term "maritime security" is now generally accepted and widely used by the international community. Despite this fact, there still exists no universal legal definition for the term under international law. In fact, IMO also fails to provide its own specific definition of maritime security.

However within the IMO context a distinction is made between the terms "maritime security" and "maritime safety." These IMO responsibilities, i.e. maritime security and maritime safety, are considered to be complimentary regimes essentially serving the same aim which is to ensure the protection of ships, passengers, crew, cargo and the marine environment. However despite sharing a common goal, the two regimes have distinguishing features; whereas maritime safety is primarily concerned with providing a defense against accidents at sea, maritime security deals with providing a defense against willful and unlawful acts against ships. Therefore, the distinction between the two terms lies in the willfulness of the act performed. Klein observes that the distinction between the two terms has often been blurred. This is especially true considering the fact that the same word has often used to describe both "safety" and "security" in other languages, notably French and Spanish.[1]

A well-established definition of maritime security is provided by Hawkes who describes maritime security as:

"those measures employed by owners, operators, and administrators of vessels, port facilities, offshore installations, and other marine organizations or establishments to protect against threats, seizure, sabotage, piracy, pilferage, annoyance or surprise."[2]

From an analysis of this definition, one may conclude that implementing a successful maritime security regime requires a combined effort of action from different international,

[1] Natalie Klein, Maritime Security and the Law of the Sea (Oxford University Press 2011) 8.
[2] Kenneth Hawkes, Maritime Security (Cornell Maritime Press 1989) 9.

public and private entities, all of whom would benefit from improving international maritime security.

In the absence of an internationally-recognized definition, maritime security has been defined differently according to the context and the way it is being used. Klein confirms this fact as she suggests that the term is hardly ever defined in a categorical manner, but tends to have a more “context specific meaning.” For example, from a military point of view, maritime security is concerned with protecting a State’s freedom from any threats to national interest. On the other hand, for shipping operators, maritime security is more focused on the safety and security of maritime transport, where operators wish to ensure a safe journey for cargo and crew free from any kind of criminal activity.[3]

In light of the above, it may be said that an act against maritime security is one which uses the sea or ships in a manner that is unlawful, with the result that it threatens the security of a coastal state or vessels, persons, property or the marine environment. However as is seen in this study threats against maritime security are ever evolving, and consequently a precise definition would have to take into account the changing circumstances of international life. In this regard therefore, it is extremely useful to pay particular attention to the analysis of the UN Secretary General in his 2008 Report on the Oceans and the Law of the Sea. In this Report Mr. Ban Ki-Moon also confirms the “context-specific meaning” of the term “maritime security”:

“There is no universally accepted definition of the term "maritime security." Much like the concept of ‘national security,’ it may differ in meaning, depending on the context and the users.”[4]

However in the same Report, he recognizes the following seven important threats to maritime security;

1. Piracy and armed robbery against ships;

2. Terrorist acts involving shipping, offshore installations and other maritime interests;

3. Illicit trafficking in arms and weapons of mass destruction;

4. Illicit traffic in narcotic drugs and psychotropic substances;

5. Smuggling and trafficking of persons by sea;

6. Illegal, unreported and unregulated fishing; and

7. Intentional and unlawful damage to the marine environment.

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[3] Natalie Klein, Joanna Mossop and Donald Rothwell (eds), Maritime Securin, International Law and Policy Perspectives from Australia and New Zealand (Routledge 2010) 5.

[4] Secretary-General of the United Nations, Report of the Secretary General on Oceans and the Law of the Sea, 10 March 2008, UN Doc. A/63/63, para.39.

One may note that the list of threats provided above in the 2008 Report embraces various concerns presented by different maritime stake holders including shipping operators, law enforcement officials and even maritime security analysts.

II. The Maritime Security regime

1. Suppression of Unlawful Acts: The Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) Convention and Protocol was designed to fill voids in international law necessary to combat other threats to human life and security of navigation and commerce at sea not fully prescribed under UNCLOS. It requires states to pass legislation making unlawful piratical and terrorist acts against navigation serious criminal offenses under their national laws. The SUA framework came in two waves.

(1) SUA Framework 1988: First are the 1988 Convention and Protocol. Under this legislation, states have an obligation to establish jurisdiction to extradite or prosecute violators even if the alleged offenses were committed outside their physical territory.

Unlike the UNCLOS definition of piracy, which only applies on the high seas and therefore only allows security responses on the high seas, the SUA framework criminalizes piracy-like offenses against vessels which have journeyed out of the territorial sea or are scheduled to transit beyond the territorial sea. Yet a major gap in the 1988 SUA framework is that it only granted flag states the necessary jurisdiction to respond to threats against vessels that flew their particular flag.

(2) SUA Framework 2005: In 2005 the 1988 SUA Convention and Protocol were amended to become the 2005 SUA Convention and the 2005 SUA Protocol. The 2005 SUA framework contains three new categories of offenses.

i. Using a ship as a weapon or as a means for committing terrorist acts.

ii. Proliferation of weapons of mass destruction (WMD) on the high seas.

iii. Transporting a person alleged to have committed an offense under other UN anti-terrorism conventions.

In addition, the 2005 SUA framework broadened state jurisdiction to include not only the flag state but also third states. Thus, the SUA frameworks further the extent of criminalizing acts against navigation beyond UNCLOS, increasing states' legal latitude to prevent attacks and pursue violators in maritime zones shore side of the High Seas. Examining the SUA framework from the broadest perspective, it is evident that it provides an agreement condemning maritime threats, acknowledging that countermeasures must be taken in shoreward maritime zones, including but not exclusively limited to private ship borne responses to threat mitigation. Standards and guidelines for private responses have been created via the necessary channels in IMO such as SOLAS, described below, as well as in soft law implemented by the industry.

2. SOLAS: The Safety of Life at Sea (SOLAS) Convention, first developed to increase safety aboard ocean-going vessels after the *Titanic* disaster, has grown since 1914 into the most thorough of all marine safety conventions. Its main purpose is to establish minimum standards for the construction, equipment and operation of ships, compatible with their safety. It is enforced by flag states and port state control measures.

Many coastal states have taken additional steps to clarify the relationship between Master and privately contracted armed security personnel (PCASP), amending national legislation to reaffirm the Master's overall authority to authorize PCASP targeting, deployment and target engagement (specifically, weapons discharge of any-kind). In an effort to resolve this dispute, the largest international shipping association, the Baltic International Maritime Council (BIMCO), has released a commercial contract template, GUARDCON, which establishes this clear line of superiority with the ship's Master remaining in command at all times.

Despite the superiority of the Master being reaffirmed in SOLAS, by flag states, and even in many industry contracts between PCASP and ship owners/operators, many security providers affirm that in certain grave life-or-death situations, they would disobey a Master's call to stand down under their individual right to self-defense should they believe their life or the life of crew-members to be in danger. SOLAS allows port states to prevent ships from sailing when serious deficiencies are found that may pose a danger to persons, property, or the environment. This can be extended to implementation of maritime security procedures within SOLAS and its family of regulations (ISPS, ISM, etc.) if PCASP, their behavior, or their equipment seems to be substandard and as a result poses a danger to those aboard the vessel or the general public.

3. The International Maritime Organization: The International Maritime Organization (IMO) is the principal international organization dealing with maritime affairs. The fascinating history of IMO began after World War II. In 1946 the United Maritime Consultative Council was set up to tackle any difficulties that may have arisen in the effort to resume regular peacetime activities, and also to encourage maritime trade as one of such activities. During this time the establishment of a permanent Inter Governmental Organization in the field of shipping was becoming a clear necessity. UMCC member States recommended the United Nations Economic and Social Council to convene a conference, whose aim would be to set up an Intergovernmental Maritime Consultative Organization (IMCO).

The recommendation also included a draft convention which would establish such an international body as a specialized agency of the UN. Governments were then invited to attend the UN Maritime Conference in Geneva in February 1948 in order to evaluate the establishment of such a body within the UN's framework. This was no easy task; in fact the Conference was concluded after seventeen days of intensive debate. Finally, 6 March 1948 marked the adoption of the Convention on the International-Governmental Maritime Consultative Organization which formally established IMCO. By the mid-1970s the Organization was no longer merely consultative and this was a main reason for the IMCO later being renamed the International Maritime Organization in May 1982.

The Organization focused its attention on matters such as maritime traffic. In the year 1972, the Convention on International Regulations for Preventing Collisions at Sea[5] (COLREGs) which aimed at improving navigational safety and also concerned the organization of traffic separation schemes for vessels was adopted.

IMO's role in Maritime Security: Despite there being no mention of maritime security as a function in IMO's formal mandate, IMO has always had a responsibility to ensure that transport and travel by sea is as safe as possible. In light of the recent terrorist activities around the world, IMO has had to take action to combat unlawful acts which threaten the safety of international shipping. The Organization now describes maritime security as an intricate part of its responsibilities. IMO has played an important role in building a multi-faceted regime to ensure the safety and security of shipping, and also the prevention of marine pollution from ships. In particular over the years IMO has worked towards providing a source of international rules regulating maritime security.

IMO facilitates this by helping Member States enhance their maritime security, focusing on what the civil maritime stakeholders, which includes both the shipping and port sectors, can do to protect themselves and to assist governments to protect global maritime trade. IMO responds to maritime security threats in two ways: by developing appropriate regulations and guidance through its Maritime Safety Committee and Facilitation Committee; and through capacity-building work. IMO's multi-donor International Maritime Security Trust Fund supports global, regional and national projects around the world which enhance the capacity of countries to deal with security threats, while specific trust funds support work in the Gulf of Guinea and in the western Indian Ocean.

International Ship and Port Facility Security Code (ISPS Code: The cornerstone of IMO regulations to address maritime security is the International Convention for the Safety of Life at Sea (SOLAS) chapter XI-2 Special Measures to enhance maritime security, which makes mandatory the International Ship and Port Facility Security Code (ISPS Code). The ISPS code contains detailed security-related requirements for Governments, port authorities and shipping companies in a mandatory section (Part A), together with a series of guidelines about how to meet these requirements in a second, non-mandatory section (Part B).

Cyber security: A ship's onboard information technology and operational technology systems can be hacked just as easily as systems ashore. Such security breaches have the potential to do considerable harm to the safety and security of ships, ports, marine facilities and other elements of the maritime transportation system, IMO has taken the initiative to raise awareness across the industry on how to tackle risks by promoting a maritime cyber risk management approach. The overall goal is to support safe and secure shipping, which is operationally resilient to cyber risks.

Piracy and armed robbery against ships: IMO has been addressing maritime piracy for some time. A series of measures, developed in co-operation with Member States and the shipping industry, have helped significantly reduce piracy in the hot spots of the world. In the late 1990s and the early 2000s the focus was on the South China Sea and the Straits of

[5] The Convention on International Regulations for Preventing Collisions at Sea, London, 20 October 1972.

Malacca and Singapore; and since 2005, IMO has addressed piracy off the coast of Somalia, in the Gulf of Aden and the wider Indian Ocean. IMO is currently implementing a strategy for enhancing maritime security in West and Central Africa.

IMO has issued a range of guidance aimed at addressing maritime security concerns. For piracy and armed robbery against ships, this includes Guidance to Governments, shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships; investigation of offences and the use of armed personnel. Regionally focused Best Management Practices, developed by international shipping industry bodies, have also been disseminated by IMO.

Capacity building - Djibouti Code of Conduct and Jeddah Amendment: Capacity building- Djibouti Code of Conduct and Jeddah Amendment In 2009, the IMO-convened Djibouti meeting adopted the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (The Djibouti Code of Conduct), to address the then-growing problem of piracy off the coast of Somalia. The IMO Djibouti Code Trust Fund funded numerous projects, coordinated by IMO, to improve regional capacity to counter-piracy by developing enhanced regional cooperation and coordination, based on the four pillars of legislation, training, capacity building, and information sharing. In 2017, signatories to the Code adopted the “Jeddah Amendment to the Djibouti Code of Conduct 2017” to broaden the Code’s scope to cover other illicit maritime activities, including human trafficking and illegal, unreported and unregulated (IUU) fishing.

Capacity building - Gulf of Guinea: A Code of Conduct concerning the repression of piracy, armed robbery against ships, and illicit maritime activity in west and central Africa was adopted formally in Yaoundé in June 2013 by Heads of State or their representatives from 25 West and Central African countries. IMO’s strategy and initiatives are for enhancing maritime security and supporting development of a vibrant, sustainable maritime sector in West and Central Africa aims to ensure successful implementation of the Code of Conduct. IMO assists Member Countries in revising national legislation to criminalize piracy, attacks against ships, and other illicit maritime activities; coordinating structures and procedures; and having in place well-trained operational, technical and logistical personnel.

Arms on board ships: IMO does not take a position on the carriage of arms on board ships - it is the responsibility of individual flag States to determine if the use of privately contracted armed security personnel is appropriate and legal. IMO has issued guidance to flag, port and coastal States; and to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area, as well as guidance to those private maritime security companies.

Stowaways: Through the Convention on Facilitation of International Maritime Traffic (FAL Convention), IMO has issued standards and recommended practices for addressing the problem of stowaways, associated guidance and is working with a number of countries to help address the problem. IMO strongly encourages Member States to fully implement the special measures to enhance maritime security contained in SOLAS chapter XI-2 and the ISPS Code, which also contain clear specifications on access control and security measures for port facilities and ships.

Unsafe mixed migration by sea: IMO has called for greater focus to be placed on addressing unsafe migration by sea through more safe and regular migration pathways, so that fewer lives are lost due to large numbers of people setting out to cross the sea in overcrowded and unseaworthy vessels. IMO has coordinated input from relevant international organizations and the shipping industry to the Global Compact on Migration, a UN Member State-led process that emanated from the 19 September 2016 New York Declaration for Refugees and Migrants approved by Heads of State during the UN General Assembly. This two-year long process is expected to culminate in the adoption of the GCM at an intergovernmental conference on international migration in 2018.

Counter terrorism: IMO participates in the work of UN Security Council Counter Terrorism Committee's Executive Directorate and the UN General Assembly's Counter Terrorism Implementation Task Force, through country assessment visits, capacity building coordination, and exchange of policy developments with other UN and partner entities involved in Border Management and Law Enforcement.

IMO's SUA Treaties, adopted in 1988 and revised in 2005, aim to provide the international legal framework to ensure that appropriate action is taken against persons committing unlawful acts against ships (and fixed platforms on the continental shelf). These unlawful acts listed in the treaties include the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.

Law of the Sea Convention: The LOSC is the foremost international legal instrument for realizing collaborative approaches to maritime security.[6] Maritime security supports an international order that is maintained through rule of law, and relies upon clear regulation of, and adherence to, the principles of both customary and formal international law, judicial decisions, other protocols, customs, and legal scholarship. Balancing issues of state sovereignty and collective interest, the Convention supports broad issues of security explicitly and implicitly, prescribing specific enforcement and jurisdiction requirements for states. The Convention provides a legal framework through which states organize their military and law enforcement assets to spread safety and security through international networks and coalitions.

The Convention specifically identifies only certain types of transnational crime that affect maritime security, but there are many varieties and combinations of criminal activity that affect security and safety from the high seas to internal waters. The Convention provides a strong framework and multilateral efforts to deter and defeat criminal activity in all maritime zones will result in a more secure, safer operating environment for all.

The U.S. Navy defines maritime security as "tasks and operations conducted to protect U.S. sovereignty and maritime resources, support free and open seaborne commerce, and to counter maritime- related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction, and illegal seaborne immigration." The United Nations acknowledges no settled definition of maritime security, but instead defines the concept in

[6] James Kraska, "Grasping 'The Influence of Law on Sea Power,'" SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 20, 2009).

terms of threats and illicit activities that pose a risk to peace and order. The *Oceans and the Law of the Sea* report, distributed annually by the UN Secretary-General, identifies, *inter alia*, illicit trafficking of arms and weapons of mass destruction, illicit traffic of narcotics and psychotropic substances, and smuggling and trafficking of persons by sea as threats to shipping companies, militaries, and law enforcement.

These threats to maritime security are catalysts for action and change, informing the development of the Convention with regard to jurisdiction and operations. "The law of the sea," states Klein, "has a vital role to play in improving maritime security…the law is one of many factors taken into account in devising new policies." Provisions in the LOSC that are enumerated in the following paragraphs, address issues of maritime security. These provisions are not exclusive in nature, and are intended not just to frame the rules of interdiction in the various maritime zones, but also to add descriptive and normative elements to the law.

Maritime Security Roles of the Navy and Coast Guard under the Convention: Military forces operating in international waters fall under multiple legal regimes. Because there is no single unit responsible for guaranteeing maritime security, the Navy, operating in conjunction with the U.S. Coast Guard, enforces both international and U.S. law. U.S. Navy Regulations state, "At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized." Despite this hierarchy, domestic and international law commonly complement each other. For example, Article 98 of the Convention and U.S. Navy Regulation 0925 emphasize safety of life at sea, and direct the commander of a naval vessel to render assistance and give the commander the right of assistance. These provisions are an important aspect of maritime security, if for no other reason than to afford naval ships the right of approach.

The laws regarding maritime security operations are premised on the notion of universality of crime, that illicit activity conducted on the high seas is contrary to good order and the innate freedom of the seas under international law. Notably, if reasonable suspicion of specific illicit activity, as enumerated in Article 110 of the Convention, is acted upon through a boarding, but the suspicions are unfounded and no illegal activity is discovered, the ship visited is entitled to compensation for any loss or damage. Therefore, decisions made by the commander may result in substantial repercussions if proper judgment is not exercised in boarding operations. The criteria articulated in the LOSC are relatively broad in scope; therefore, the particular rights of any vessel depend on the specific circumstances and activity at issue. Articles 95 and 96 provide immunity to warships from jurisdiction of any State other than the flagged State, and to civilian ships used in government non-commercial service; therefore, adjudications of claims are held by international courts or tribunals.

Related to the right of visit are the rules for the use of force. Naval commanders always retain the inherent right and obligation of self-defense. Hostile acts against U.S. ships, U.S. forces, or in certain circumstances, U.S. citizens and property, can be responded to in a manner that removes or eliminates the threat. Article 25 of the Convention is the primary reference to the degree of force that can be used in enforcement measures, but its language refers only to the coastal state's rights, not rights on the high seas.

Varieties of Transnational Crime in the Maritime Domain: Maritime trafficking routes closely follow commercial shipping lanes, and the modalities and technologies employed by criminals are often more advanced than those used in legal trade. The vast expanses of ocean, the complexity of the maritime transportation system, the immense volume of cargo transferred at each port, and the limited capacity for inspections of cargo creates opportunity for criminals. Commercial trade in the maritime domain follows a reasonably defined set of "oceanic roads" based on currents and weather. Because of the reliability of shipping and mass amounts of cargo moved, traffickers utilize the commercial shipping industry with great effect. Shipping and sea lanes offer anonymity for criminals; criminal activity can be hidden behind legitimate industry, appearing to be licit. Criminal activity, especially illicit trade in narcotics, humans, and weapons, has become so extensive that States and corporations may be implicated in the criminal enterprise. Individuals involved may be of different nationalities, vessels may be flagged to different States, multiple vessels may be used in the network, the vessels may transit the waters of various States and call at different ports before reaching a final destination. Despite the abundance of laws designed to combat illicit trafficking and an apparent impetus to stop specific types of crime, governments remain only marginally successful in preventing the global flow of illegal goods due to the overwhelming volume and complexity of the markets for illicit trade. Working in tandem, the Navy and Coast Guard disrupt the illicit supply chain and criminal enterprises when engaged in maritime security operations; cooperation and collaboration between military forces and law enforcement organizations that possess the capacity and power to support the rule of law are the best solution to countering transnational crime at sea.

Furthermore, as the high seas fall outside the jurisdiction of a single State, and are collectively policed by all States through international law, a collaborative approach must be taken to address crime occurring at sea or crime carried out through use of the maritime domain. Piracy and the illicit trafficking of narcotics, humans, and weapons comprise the main varieties of transnational crime addressed in the Convention. Article 110 discusses the customary rule that warships may exercise "approach and visit" on the high seas of any ship that is suspected of piracy, human trafficking, unauthorized broadcasting; is without nationality; or, "though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship." Article 111 addresses the right of hot pursuit, allowing warships of one State to follow a ship through the different maritime zones if that ship is suspected of illegal activity. Articles related to specific types of crime are included in the following paragraphs.

Narcotics Trafficking: Article 108 requires member States to cooperate and empowers them to offer assistance in the suppression of drug trafficking, specifically addressing other-state flagged vessels. Traditionally, drug traffickers used overland routes, but in the last twenty years, they have shifted transportation west into the Pacific Ocean and east into the Atlantic Ocean. The majority of this trafficking has traditionally been in the littoral regions, and often within territorial waters, but advanced technologies, complex methodologies, and larger ships have allowed traffickers to move further to sea into "blue water" areas, outside the 12-nautical mile mark and often further than the 200-mile EEZ of any country. This shifting between domains and geographic areas has been described colloquially as "squeezing a balloon," reflecting shifts in supply and demand for different illicit goods.

Reflecting the fact that the U.S. is the world's largest consumer of illegal drugs, the source and transit zones between Latin America and the U.S. border are highly patrolled. Navy ships, operating with a Coast Guard law enforcement detachment (LEDET) on board, operate under a strict regimen of control that corresponds with domestic law, complies with the Convention, and reflects bilateral agreements the U.S. has with most Latin American states.

Piracy and Armed Robbery at Sea: One of the most ancient and persistent forms of maritime crime, piracy is subject to rigorous treatment under maritime security law, and the provisions in the LOSC derive directly from customary international law. Article 101 defines piracy as "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or private aircraft…on the high seas against another ship or aircraft…outside the jurisdiction of any State." The latter portion of the definition is important: piracy is a variety of transnational crime conducted by non-state actors in international waters. Article 105 of the LOSC grants *every* State the authority to seize any vessel or aircraft and associated property and arrest any persons engaged in piracy. Domestic courts of the State conducting the seizure may prosecute the pirates under domestic law and determine what to do with the vessels; however, to date the courts remain inadequate or unsupported in many places.

Piracy became a security issue of international concern in the last fifteen years, primarily in the Horn of Africa, Gulf of Aden, and the Red Sea; however, since the establishment of Combined Task Force-151(CTF-151), focused on counter-piracy, and Combined Task Force-150 (CTF-150), focused on maritime security, piracy in that region has waned. Supported by several U.N. Security Council Resolutions, these task forces "engage with regional and other partners to build capacity and improve relevant capabilities to protect global maritime commerce and secure freedom of navigation."[16] Recently, attacks emanating from Yemen on commercial and government vessels may evidence a new paradigm in piracy, one that draws on sophisticated tactics and new technology. The attacks on commercial and military vessels employed underwater autonomous vehicles, advanced surface-to-surface missiles, and small boat swarming tactics. Refined methods by pirates may present a greater challenge to maritime security that will require changes to current anti-piracy measures in the region.

Views on piracy are shaded by incomplete data. First, in the Pacific-Asia region, actual acts of piracy are most likely underreported and, of those that are reported, many are of such small scale that they cloud the true volume of major piracy events. Second, like the analogy of the "squeezed balloon" in narcotics trafficking, as piracy has been relatively contained in eastern Africa, it has increased in western Africa, specifically in the Gulf of Guinea. This may be linked to increased trafficking in narcotics from Latin America, illegal fishing, or human trafficking, but is in any event a reminder that piracy remains a persistent and widespread challenge to maritime security. However, recent activity in Somalia and Yemen may foreshadow a resurgence of piracy in the region, bolstered by advanced small arms and light weapons, access to ship monitoring and tracking devices, and use of unmanned systems and long range communications.

The LOSC alone cannot sufficiently address the prosecution of pirates once captured. The IMO has urged all coastal states to take all necessary and appropriate measures to prevent and combat piracy…through regional co-operation, and to investigate incidents of piracy in order to prosecute perpetrators in accordance with international law. A 2010 report by the UN Secretary General outlines two significant actions to bring pirates to justice under international law. First, domestic or state courts should be empowered to prosecute pirates. Second, international or regional courts should supplement domestic courts with investigation and prosecution through specialized piracy courts. However, so long as many coastal states in Africa and elsewhere lack the resources, experience, and political will to sustain effective prosecution and punishment of captured pirates, these goals will not be met and the best efforts of increased maritime security measures will be undermined.

Slavery, Human Trafficking, and Illegal Migration: Slavery and human trafficking are two other long-standing challenges to maritime security. Under the law, people being trafficked at sea fall into one of two types of human cargo depending on the intent and type of activity they are engaged in: migrants (asylum seekers or those attempting to bypass immigration laws) and victims of trafficking (kidnapped individuals or those coerced or exploited). The U.N. Office on Drugs and Crime (UNODC) provides the following clarifications:

Consent**:** Migrant smuggling, while often undertaken in dangerous or degrading conditions, involves consent. Trafficking victims, on the other hand, have either never consented or if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive action of the traffickers.

Exploitation**:** Migrant smuggling ends with the migrants' arrival at their destination, whereas trafficking involves the ongoing exploitation of the victim.

Transnationality**:** Smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims are taken to another state or moved within a state's borders.

Source of profits**:** In smuggling cases profits are derived from the transportation of facilitation of the illegal entry or stay of a person into another county, while in trafficking cases profits are derived from exploitation.

Article 99 of the Convention addresses the slave trade and grants freedom to all slaves on the high seas, but makes no distinction between those being trafficked and those being smuggled; therefore, in the maritime domain a legal reference to slavery connotes both trafficking and smuggling. Furthermore, the language makes it clear that a visiting vessel on the high seas only has the responsibility to report slavery to authorities of the trafficking vessel's flag state. While these distinctions are important, the issues of territoriality and jurisdiction that they present hamper response and risk human life.

Human trafficking is widespread, and "interlinked transnational gangs traffic by land and by sea an estimated four million people every year as 'human cargo.' It has been estimated that the annual earnings from this trafficking have reached between $5 billion and $7 billion." This multi-billion-dollar industry has a collective effect on almost every state. The Syrian civil war has resulted in the movement of four million externally displaced people, with approximately one million of those seeking asylum in Europe.[21] Due to strict border controls in surrounding states, many of the refugees have fled by boat, using trafficking routes to Greece, Italy, and North Africa. The U.N. High Commissioner for Refugees (UNHCR) found that a total of 65.3 million people were forcibly displaced from their homes by the end of 2015, compared to 59.5 million just a year earlier, many of these traveling by sea. Realistic extrapolations may assume that these numbers will increase with conflicts involving coastal or maritime states, such as those in Syria and parts of Africa.

The Institute for Foreign Policy Analysis notes that the challenge of human trafficking lies both in the volume of displaced people and the incapacity of authorities to deal with the problem. This issue is particularly challenging for "law enforcement authorities to manage as it requires an additional set of capabilities and initiatives that go beyond those found in the standard toolkits of local police and border guards." The UNHCR has established offices worldwide, and serves as a bridge between local and regional law enforcement and the international organizations that provide guidance on handling human trafficking at sea.

Small Arms and Weapons of Mass Destruction (WMD): The 2015 *Small Arms Survey* estimates that the global trade in illicit small weapons is close to $2 billion per year, adding to the global market upwards of eight million small arms designed for use by individuals or small groups. Like the illicit drug trade, the market for illegal small arms and light weapons manipulates security weaknesses within the commercial shipping industry, especially container ships. Unlike the drug trade, weapons trafficking is more consolidated and varied. It also brings in significantly less revenue for traffickers than a shipment of cocaine.

Following 9/11, the proliferation of WMD became a major concern for governments around the world. The abundance of high-capacity freighters, containerization, and a black market for fissile material gave rise to a new regime of international law that addressed gaps in maritime security. The Proliferation Security Initiative (and attendant Container Security Initiative) parallels the Convention with the main purpose of interdicting precursor materials, weapons, and delivery systems at any given point in the transportation system. The PSI has been adopted by most signatories of the Convention and has been successful in preventing the proliferation of WMD.

The maritime industry has invested heavily in maritime security measures. The international community has focused heavily on combating trafficking in drugs, weapons, and humans, but the simple calculus of cost/benefit ratios spurs private sector innovation. The U.S. led the world in post-9/11 maritime security measures that became the worldwide standard. Most of this technology focused on detecting WMD and precursor materials. The advent of new technologies employable in the maritime domain, including those focused on detecting WMD and precursor materials, has already created capacity for persistent, reliable intelligence and information. Coupled with existing information sharing systems, like the Automatic Identification System (AIS), the Maritime Safety and Security Information System, and Shipboard AIS and Radar Contact Reporting (SARC-R), use of underwater autonomous vehicles, seabed sensors, and swarming micro-drones may give maritime law enforcement more capacity to gather, interpret, and share information relating to illicit activity in the maritime domain.

The Convention specifically identifies only certain types of transnational crime that affect maritime security, but there are many varieties and combinations of criminal activity that affect security and safety from the high seas to internal waters. Domestic laws must be symbiotic with international law, and cooperative partnerships between States, law enforcement, and militaries to combat illicit activity must transcend the morass of politics that often plague more restrictive legal regimes. Information and intelligence sharing, novel TTPs (tactics, techniques, and procedures), and unconventional employment of existing technologies may assist navies and coast guards in ensuring freedom of the seas. In closing, the Convention provides a strong framework and multilateral efforts to deter and defeat criminal activity in all maritime zones will result in a more secure, safer operating environment for all. However, the recurrent difficulty in successfully prosecuting and punishing wrongdoers, whether engaged in piracy or human trafficking, is a reminder that much remains to be done.

The tenth anniversary of 26/11 is an apt occasion to review the state of India's coastal security preparedness. In the aftermath of the attacks on Mumbai, the government made concerted efforts to improve coastal security infrastructure and law enforcement. In a radical overhaul of the coastal defence apparatus, a three-tier security grid was installed with the Indian Navy, the coast guard, and the marine police jointly patrolling India's near-seas. An existing Coastal Security Scheme (originally instituted in 2005) was accelerated, with greater fund allocations for coastal infrastructure, including police stations and radar stations along India's coastline. The enterprise included measures to improve 'surveillance and domain awareness,' through the installation of radar stations and identification systems), and the enhancement of coordination through Joint Operation Centres (JOCs).

A decade later, coastal preparedness is better than earlier, but the overall picture remains less than satisfactory. While the state of inter-agency coordination has improved, state governments continue to be indifferent to needs of coastal security, and the state-police still reluctant to shoulder responsibility. The real problem, observers point out, are systemic flaws in the policing apparatus. From low numbers of marine police stations, to the underutilization of patrol boats for coastal tasks, absence of shore-based infrastructure, through to manpower shortages and unspent funds, coastal managers are yet to resolve many structural issues plaguing the system.

III. Maritime Security and Right of Innocent Passage: UNCLOS and customary international law recognize three important navigational regimes which are vital for the maintenance of maritime security;

1) Innocent passage which applies in the territorial sea and archipelagic waters;

2) Transit passage which applies to straits used for international navigation; and

3) Archipelagic sea lanes passage which applies to archipelagic waters.

Each of these regimes attempts to strike a balance between two important competing interests. On the one hand, there exist the interests of coastal States that wish to extend their maritime jurisdiction, not just for economic but also for security reasons; and on the other hand, the interests of States who strive far as possible to maintain freedom of navigation and over flight. There may be certain situations where this delicate balance is upset, as in the case of the passage of foreign warships and their security ramifications when passing through the territorial sea of another State.

A coastal State or archipelagic State is interested in protecting its own national interests and sovereignty and will attempt to prevent foreign vessels from causing any prejudice to its security. In this sense, such States may be justified in placing certain limitations on the navigational rights of foreign vessels. Conversely, as correctly pointed out by Bateman, major maritime States might view these restrictions as having a negative impact on their own maritime security, in particular their naval mobility and defense operations.

Right of Transit Passage: Most coastal States had extended their territorial seas to twelve nautical miles, while a few claimed maritime jurisdictions up to 200 nautical miles. Consequently, many of the world's straits-which are of vital importance to international navigation and trade-would form part of the territorial sea and are therefore subject to the sovereignty of coastal States concerned. In order to avoid restricting the freedom of navigation in these areas, UNCLOS provides that in straits used for international navigation, the sovereignty of the coastal State is preserved, subject to the right of transit passage.

This right grants foreign vessels freedom of navigation solely for the purpose of continuous and expeditious transit of the strait. Moreover, bordering straits may not impede or suspend such transit passage as in the case of innocent passage. However, the limitation placed on the sovereignty of bordering States is balanced with the obligation of foreign vessels exercising the right of transit passage to respect *inter alia* the security interests of bordering strait States. Therefore, foreign vessels are to refrain from any use of threat or force in any manner in violation of the principles of international law found in the UN Charter.

Maritime Security and Military Activities: Maritime security is both multi-dimensional and multifaceted. It involves both military and non-military issues. These include naval threats and challenges (military security issues), arms trafficking and narco terrorism as well as piracy (non-military security issues) along with shipping, fishing, seabed minerals and offshore oil and natural gas resources, vulnerability of sea lanes of communications (SLOCs) and illegal immigration. Moreover maritime security also includes environmental protection, nuclear issues, ballistic missile defense and maritime management as the seas are indivisible.

Furthermore, a general but well-structured definition of terrorism is contained in the International Convention for the Suppression of the Financing of Terrorism: "Any act intended to cause death or serious bodily injury to a civilian, or any other person not taking part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do so or to abstain from doing any act."

From a maritime context, these definitions could be applied to acts of piracy; acts of violence of a general nature not necessarily confined to piracy against a ship, its crew or passengers;

acts using a ship as a weapon of destruction against navigational and public safety; acts of sabotage using the high seas or territorial waters of a nation to support and sustain terrorism; using the sea as a platform to launch attacks against States, persons or property; and transport of weapons over the seas for terrorism purposes.

Whilst the 1982 United Nations Convention on the Law of the Sea is concerned with maritime security law, the Convention has had problems coping with contemporary maritime security threats such as terrorism or the proliferation of weapons of mass destruction. Moreover, the Convention also fails to adequately deal with certain maritime security threats that have come to the forefront in the last 30 years, such as crimes against the safety of navigation.

The first modern act of modern maritime terrorism: On January 22, 1961, the Portuguese cruise ship SANTA MARIA was captured by a Portuguese rebel group in the Caribbean Sea off the coast of Venezuela. The goal of the rebels was to protest the brutal dictatorship of Portugal's Antonio Salazar. Sadly, the SANTA MARIA's third mate was killed when the cruise ship was overrun. After the SANTA MARIA was surrounded by vessels of the U.S. Navy and the events became headline news around the world, the rebels surrendered on February 2, 1961, and were granted political asylum in Brazil. If we accept the definition of terrorism as premeditated, "politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine [state] agents,"[7] then this was probably the first modem act of maritime terrorism.

Maritime Security: An Indian Perspective: The maritime security has assumed a new dimension in the post-9/11 era with the rapid rise in international terrorism. Sea routes are being increasingly used by the terrorist to escape high vigilance on land and penetrate countries like India with long and often not so well-protected coastlines.

The Mumbai attacks of 26/11/2008 brought home the point as to how vulnerable India is to terrorism emanating from the sea. Ten terrorists undertook an audacious journey through sea from Karachi in Pakistan to Mumbai with full backing of Pakistan's ISI. The whole of India was badly shaken by the sheer tenacity of the attacks on the heart of the economic capital of India. Merchant ships of different countries including India have also been increasingly facing pirate attacks over the last few years. It would be a big headache for India and the world if there was to be collusion between the terrorist organizations and the Pirates from Somalia and other African countries. India has probably not been able to strengthen its naval capabilities in sync with ever rising threats and challenges to her security and safety. Many of the projects aimed at indigenously building shipping and weapon systems are not bearing fruit due to a variety of reasons.

Several terrorist organizations in and around the Indian Ocean are known to possess merchant fleets of various types. The former Liberation Tigers of Tamil Eelam (LTTE), for example, had an entire flotilla engaged in dubious maritime trade. Most of these are

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[7] Raphael Perl, Terrorism, the Future, and U.S. Foreign Policy, Congressional Research Service Issue Brief for Congress, Order Code IB95112, at 4 (Apr. 11, 2003), available at

http://www.fas.org/irp/crs/IB95112.pdf (last visited May 13, 2005).

registered under flag of convenience (FOC) countries known as "pan-ho-lib," i.e. Panama, Honduras and Liberia (, and are difficult to track as they routinely change names and registry. Since the checks and balances introduced by these registries are undeniably inadequate, there is no guarantee as to the type of crew or the type of cargo that these ships carry. Such ships are considered the safest bet for carrying out terrorist-related activities.

The Mumbai attacks exposed the weakness of our coastal security apparatus. The fact that the terrorists could sail through such a long distance unchallenged by either the Coast-Guard or the Indian Navy, points to the gravity of the task of protecting such a long coastline which also houses many of India‘s prime defense installations. The attacks highlighted gaps in coastal surveillance, stressing India‘s inability to effectively monitor her long coastline—a condition that is common to many littoral states in both the developing and the developed world. Although Indian security agencies had prior information of a possible terrorist landing near Mumbai by sea, whatever measures were taken proved insufficient to monitor maritime traffic in and around Mumbai. This failure would seem to reflect the coast guard's shortage of equipment for coastal surveillance: fewer than 100 boats for more than 5,000 miles of shoreline and minimal aviation assets.

Are we well-prepared to deal with the challenges in sync with the ever rising security threats facing the country from various quarters? India has primarily depended on Russia or former Soviet Republic for the supply of weapon systems and technology specially for its navy. The Russian Submarines have been involved in a number of accidents in the past including the infamous sinking and destruction of her nuclear submarine Kurskin August 2000.

India has during last two years faced a number of major and minor accidents involving the Russian-supplied submarines and its own shipbuilding facilities. Most serious of these was the destruction of India‘s frontline submarine INS Sindhurakshak on 14 August 2013. Eighteen crew members on board - three officers and 15 sailors - were killed when blasts ripped through the torpedo compartment of the INS Sindhurakshak while the submarine was berthed in Mumbai harbor. Apart from this, 8 other minor accidents took place involving the naval ships and shipping facilities, in which 2 other navy personnel lost their lives and many others were injured. India‘s operational capabilities suffered a big jolt as a result of these accidents.

India being such a vast country with such a long coastline needs a credible maritime strategy to deal with the ever-rising challenges to her national security and defense. Though naval expansion in the form of new ships and weapon systems of various kinds does require a lot of spending through budgetary allocations, a strong government committed to the progress of the country can make arrangements by removing bureaucratic hurdles and by collaborating with countries that have similar goals and aims in the Indian Ocean region. India also needs to define its foreign policy goals regarding the Indian Ocean region and work towards bridging the trust deficit that has plagued the countries in this region impeding all round progress. Such a policy has the potential to ameliorate the lives of millions of people living in poverty.

Passage of Warships

Right of innocent passage: Conceptual discussion: The right of innocent passage has been recognized at a universal scale.[8] The right is in the context of territorial waters of a State. The distinction between the internal waters and the territorial water needs to be established. The internal waters of a State constitute "the landward side of the baseline of the territorial sea form part of the internal waters of the State."[9] The definition of the right of innocent passage is to be found in Article 18 of the United Nations Convention on the Law of the Sea, 1982 which stipulates that:

"Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility".[10]

Conditions to enjoy the right of innocent passage: The Convention imposes certain conditions on the passage, namely that it has to be continuous and expeditious, the underwater vehicles must navigate on the surface and show their flag and the activity carried on by the vessel should not be prohibited by the UNCLOS.

Continuity: Due speed is expected from foreign vessels entering the territorial sea of a State, always in accordance with the capacity of the vessel and the navigational conditions and regulations. The condition of the continuity of the navigational route of the vessel may be overridden only in the case that "anchoring or stopping are incidental to ordinary navigation" as well as when *force majeure* has rendered anchoring or stopping necessary and imperative for the safety of the crew on board.

Underwater vehicles must navigate on the surface and show their flag: Another condition upon which the right of innocent passage lies relates to underwater vehicles and submarines. These vehicles are expected to navigate on the surface and to show their flag according to Article 20. Submerged navigation is considered to be suspicious taking into account the purpose of the submarines to navigate without being detected and collect intelligence; hence the purpose of non-innocence is lost. However, not complying with this prerequisite will not instantly give rise to the use of force from the part of the coastal State. What is expected to be attempted first is to force the submarine to leave the foreign sovereign territory.

Activity should not be prohibited by the UNCLOS: If the foreign vessel is indulged in an activity which is prohibited under the UNCLOS, then such a vessel cannot demand a right of innocent passage and the coastal state has the right to deny innocent passage to such vessels. For instance, the use of any kind of weapons is strictly prohibited and will remove the right

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[8] Shabtai Rosenne, League of Nations Conference for the Codification of International Law, vol 4 (Oceana Publications 1975) 1412.

[9] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16November 1994) 1833 UNTS 3 (UNCLOS) article 8(1).

[10] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16November 1994) 1833 UNTS 3 (UNCLOS) article 18(1).

of the vessels to innocent passage. Article 19 paragraph 2 of UNCLOS enumerates some of the activities which shall be considered to fall outside the scope of the concept of innocent passage. This enumeration is only an indication and thus not exhaustive. This is derived from the wording of the last provision of the article which refers to "any other activity not having a direct bearing on passage" which leaves space for acts being subject to subjective interpretation.

However, it is presumed that in cases where the coastal State has doubts regarding the passage of a foreign vessel it shall provide the vessel with the benefit of the doubt and hence a presumption of innocence, by giving it the possibility to make clear what its real intentions are. In this way, unnecessary actions can be avoided. The coastal state can suspend the right of innocent passage to foreign vessels. Suspension though shall not be discriminatory against foreign ships and shall only be enforced for the sake of the security of the coastal State. Fishing activities, research and survey activities, polluting activities, spying activities are all included in the prohibitive list of UNCLOS. It is estimated that the violation of the scope of Article 19 will *ipso facto* deprive a passage of its innocent character contrary to the violation of the law of the coastal State.

Is the right to innocent passage absolute in nature? Notably, not all parts of the territorial sea may be used for the purposes of innocent passage. The coastal State retains the right to request from foreign vessels to navigate through designated areas (sea lanes and traffic separation schemes). Hence the right is not absolute. When designating the specific areas, the coastal State shall show due respect to the IMO recommendations, the density of the traffic as well as the characteristics of particular ships and channels.

One of the purposes of the UN is "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace." UNCLOS could not deviate from the foundational principle of the UN and accordingly provide that innocent passage shall mean the passage which is "not prejudicial to the peace, good order or security of the coastal State." However, anything that might deem to endanger the peace and security of the coastal State will be conceived as a hostile activity and will not fall under the concept of "innocent passage".

Passage of Warships: Conceptual discussion: The definition of warships is to be found in Article 29 defines a warship as "a ship belonging to the armed forces of a state bearing the external marks, distinguishing such ships of its nationality, under the command of an officer…"

Following this definition, any vessels belonging to rebel movements and used for warfare are not considered warships. UNCLOS also secures the immunity of warships but it is quite unclear as to the actions that a coastal State can take against warships which do not comply with its rules and regulations.

Do warships enjoy the right of innocent passage? The international literature is divided on the issue. No explicit, express reference is made in UNCLOS stating that warships fall under the category of those vessels which enjoy the right of innocent passage. Likewise, no explicit provision excludes them from exercising this right. It can be presumed that warships were intended to fall under Article 17 since no distinction was made by the drafters. The view that since conventional law does not regulate this strongly debated issue, customary international law applies is the most commonly accepted in state practice. Jessup also supported that "as a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law."

Moreover, it is accepted so far that submarines, which are obliged to navigate on the surface as a prerequisite, are for military services hence they can benefit from the right of innocent passage. Some states have officially declared that warships indeed enjoy the right of innocent passage such as the United States and the Russian Federation through a bilateral 1989 Uniform Interpretation of Norms of International Law Governing Innocent Passage, as would make sense since both constitute the two biggest naval powers in the world. However, undoubtedly the absence of conclusive conventional provisions has led to different interpretations with regards to the innocent passage of warships.

Why are commentators against the right of innocent passage for warships? Several commentators have been against this privilege for warships due to the simple fact that warships have on board several weapon mechanisms. This is their equipment and "unlike the situation of merchant vessels, in the case of warships there is no commercial interest involved and there may be danger at times to the nation whose waters are being used."

Military Activities beyond the Territorial Sea

Military activities in the Exclusive Economic Zone: As defined by the Treaty, the EEZ "is an area beyond and adjacent to the territorial sea," which "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." It is not a part of the high seas, although high-seas like freedom exist there with respect to navigation. EEZ claims extract approximately 30 to 36 per cent of the world's oceans from waters traditionally considered high seas.

Today, military activities by foreign nations in the Exclusive Economic Zones of other nations are becoming more and more frequent for a number of reasons: the accelerating pace of globalization; the tremendous increase in world trade; the rise in the size and quality of the navies of many nations; and technological advances that allow navies to exploit oceanic areas.

Are military activities permitted in the Exclusive Economic Zone? Along with this increase in military activity has come increasing contention over the scope of rights to military activities within the EEZ. Whether and to what extent high seas freedoms of navigation and associated uses exist for warships and aircraft in the EEZ has been the subject of a fair amount of discussion in academic literature. Some have argued that it is vague, ambiguous and difficult to conclusively determine just what the UNCLOS means with respect to naval activities in the EEZ. According to one commentator, "The uncertainty [in the Convention] is nowhere so striking as in the area of military uses of the EEZ."[11]

Article 58 states, in part, that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." Article 88 of the Convention states: "The high seas shall be reserved for peaceful purposes." Thus, the interplay of these two Articles reserves the exclusive economic zone, like the high seas, for peaceful purposes. The question then becomes: Does the reservation of the *sui genris* exclusive economic zone for peaceful purposes prohibit previously lawful naval maneuvers and operations in these waters? As to this question, the Convention is silent.

Although it is clear that maritime powers intended and some say it was the "general understanding" of the Convention to permit, as a matter of right, military uses in the exclusive economic zone. But some coastal States persistently objected to that view. Brazil, for example, like the United States, was part of the Casteneda-Vindenes Group. In a declaration made upon signing the Convention, Brazil insisted that "the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent of the coastal State." Recent Brazilian domestic law implements this view.

Furthermore, these dissenters can argue that the issue of military uses was never formally discussed at the Conference, despite efforts of a number of countries to bring it to the surface. Indeed, it was the United States which foreclosed explicit discussions on "any specific limitation on military activities," arguing that "such a complex task could quickly bring to an end current efforts to negotiate a law of the sea convention." While contending that the term "peaceful purposes" did not preclude military activities generally, the United States suggested "limitations on military activities would require the negotiation of a detailed arms control agreement." The apparent exclusion of the subject from formal negotiations, combined with the "remarkable" silence of the Convention "on legal questions connected with military uses" ' (a silence that might logically follow from exclusion of the subject in negotiations), render suspect, to some, the conclusion that military uses were intended to be permitted under the Convention regime.

Contentions of the commentators in support of the military activities in the Exclusive Economic Zone: Article 56 of UNCLOS specifically limits coastal State sovereign rights in the EEZ to the seabed, its subsoil and the waters superjacent to the seabed, with one exception—the coastal State also has exclusive rights over the production of energy from the winds. It is pertinent to note here that the coastal State has sovereign rights over the seabed and subsoil but not on the sea itself. Consequently, argument may be formulated that since coastal state do not exercise any sovereign rights over the sea beyond the territorial limits, therefore it cannot regulate or restrict the military activities in the Exclusive Economic Zone.

[11] Boleslaw A. Boczek, Peacetime Military Activities in the Exclusive Economic Zone of Third Countries, 19 OCEAN DEV. & INT'L. L. 445, 458 (1988);

It is also important to recognize that UNCLOS does place some restraints on military activities at sea. However, none of these limitations apply in the EEZ. Article 19 of the Convention restricts certain military activities in foreign territorial seas for ships engaged in innocent passage, such as threat or use of force, use of weapons, intelligence gathering, acts of propaganda, launching and landing of aircraft and other military devices, military surveys and intentionally interfering with communication systems. Article 52 applies the same limitations to archipelagic waters. Submarines and other underwater vehicles engaged in innocent passage in foreign territorial seas and archipelagic waters must navigate on the surface and show their flag. Articles 39 and 54 prohibit the threat or use of force when ships are engaged in transit passage or Archipelagic Sea Lanes Passage (ASLP), and Articles 40 and 54 prohibit survey activities for ships engaged in transit passage or ASLP. Similar restrictions are not found in Part V of UNCLOS and therefore do not apply to warships, military aircraft and other sovereign immune ships and aircraft operating in or over the EEZ.

Within the EEZ, all States enjoy high seas freedoms of "navigation and overflight . . . laying of submarine cables and pipelines and other internationally lawful uses of the seas related to those freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and which are compatible with the other provisions of the Convention."

These "other internationally lawful uses of the seas" may be undertaken without coastal State notice or consent and include a broad range of military activities such as: intelligence, surveillance and reconnaissance (ISR) operations; military marine data collection and naval oceanographic surveys; war games and military exercises; bunkering and underway replenishment; testing and use of weapons; aircraft carrier flight operations and submarine operations; acoustic and sonar operations; naval control and protection of shipping; establishment and maintenance of military-related artificial installations; ballistic missile defense operations and ballistic missile test support; maritime interdiction operations (e.g., visit, board, search and seizure); conventional and ballistic missile testing; belligerent rights in naval warfare (e.g., right of visit and search); strategic arms control verification; maritime security operations (e.g., counter-terrorism and counter-proliferation); and sea control.

Contentions of the commentators against the military activities in the Exclusive Economic Zone: Some commentators opine that the Convention explicitly limits warship operation in the EEZ by the obligation to have due regard to the rights and duties of the coastal State. In its EEZ, the coastal State has certain "sovereign rights" with respect to natural resources, and "jurisdiction" over the establishment and use of artificial islands, installations and structures, over marine scientific research, and over the protection and preservation of the marine environment." These provisions might preclude naval activities that potentially interfere with or harm these coastal State interests. A frequently cited example is that of a weapons exercise, test or placement, such as the use of mines that might potentially harm a natural resource.

One commentator has stated that the Convention may justify a coastal State in "prohibiting a military activity which caused ecological harm."

State Practice: A small number of strategically placed countries interpret the UNCLOS to prohibit naval activities and maneuvers in the EEZ without their prior permission. Eighteen States purport to regulate or prohibit foreign military activities in the EEZ. These States include: Bangladesh, Brazil, Burma (Myanmar), Cape Verde, China, India, Indonesia, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Philippines, Portugal, Thailand, and Uruguay. Additionally, even though Article 3 of the Convention limits the breadth of the territorial sea to 12 nm, seven coastal States—Benin (200 nm), the Congo (200 nm), Ecuador (200 nm), Liberia (200 nm), Peru (200 nm), Somalia (200 nm) and Togo (30 nm)—claim a territorial sea in excess of 12 nm that also purports to deny or restrict foreign-flagged military activities. Others, such as Thailand, Italy, Germany, the Netherlands, the United Kingdom, and the United States, disagree.

The United States interpretation of the Convention is this: "All States continue to enjoy in the EEZ, traditional high seas freedoms of navigation and over-flight and tie laying of submarine cables and pipe- lines, and other internationally lawful uses of the sea related to those freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone."[12]

Internationally lawful uses of the sea related to high seas freedoms of navigation and over flight historically included military operations. The vast weight of authority confirms that this is the proper interpretation. Under this light, the Commander's Handbook states that "Warships and military aircraft enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, in and over the EEZ."

The United States view of the law is not universally accepted. Uruguay, for example, takes the position that the Convention does not explicitly permit the same range of uses associated with warship operation in the EEZ as are permitted on the high seas. Brazil has enacted domestic legislation that states: "In the exclusive economic zone, military maneuvers, in particular those involving the use of weapons or explosives, may only be carried out by other States with the consent of the Brazilian Government." Furthermore, Iran flatly prohibited "foreign military activities and practices" within its EEZ. Similarly, India, Malaysia, and Pakistan have all made claims that would restrict naval activities in their EEZs without prior permission.

What kind of constraints States put on foreign military activities in the Exclusive Economic Zone? Coastal State constraints on foreign military activities in the EEZ vary from State-to-State and include:

- restrictions on "non-peaceful uses" of the EEZ without consent, such as weapons exercises;
- limitations on military marine data collection (military surveys) and hydrographic surveys without prior notice and/or consent;

[12] Warren Christopher, United States of America Statement in Right of Reply (Mar. 8, 1983) 17 THIRD CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 244, U.N. Sales No. E.83.V.3 (1984) reprinted in ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M/MCWP5-2.1/COMDTPUB 5800.1) at 1- 25, 1-27 to 1-28 (1997).

- requirements for prior notice and/or consent for transits by nuclear-powered vessels or ships carrying hazardous and dangerous goods, such as oil, chemicals, noxious liquids, and radioactive material;
- limiting warship transits to innocent passage;
- prohibitions on ISR operations (intelligence collection) and photography;
- requiring warships to place weapons in an inoperative position prior to entering the contiguous zone;
- restrictions on navigation and over flight through the EEZ;
- prohibitions on conducting flight operations (launching and recovery of aircraft) in the contiguous zone;
- requiring submarines to navigate on the surface and show their flag in the contiguous zone;
- requirements for prior permission for warships to enter the contiguous zone or EEZ;
- asserting security jurisdiction in the contiguous zone or EEZ;
- application of domestic environmental laws and regulations; and
- requirements that military and other State aircraft file flight plans prior to transiting the EEZ.

States that purport to limit military marine data collection (surveillance operations and oceanographic surveys) in the EEZ argue that such operations are akin to MSR and are therefore subject to coastal State control. That argument is clearly flawed. Although UNCLOS does not define MSR or hydrographic surveys, the Convention clearly differentiates between MSR, surveys, and military activities in various articles. Hence, intention of the drafters could be discerned regarding differentiation between military marine data collection and MSR.

Do military activities in the Exclusive Economic Zone violate the "Peaceful Purpose" provisions of the UNCLOS? A corollary argument made be some States, including China, is that military activities are inconsistent with the peaceful purposes provision of UNCLOS. Again, this position is not supported by State practice, a plain reading of UNCLOS or other applicable international instruments. Article 301 of the Convention calls on States to "refrain from any threat or use of force against the territorial integrity or political independence of any State …"

The language is identical to text in Article 2(4) of the UN Charter on the prohibition of armed aggression in the relations among States. UNCLOS, however, makes a clear distinction between "threat or use of force" on the one hand, and other military-related activities, on the other. Article 19(2)(a) repeats the language of Article 301, prohibiting ships in innocent passage from engaging in "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State." The remaining subparagraphs of Article 19(2) restrict other military activities in the territorial sea: (b) any exercise or practice with weapons of any kind; (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State; (d) any act of propaganda aimed at affecting the defense or security of the coastal State; (e) the launching, landing or taking on board of any aircraft; (f) the launching, landing or taking on board of any military device; (j) the carrying out of research or survey activities; k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State.

The distinction in Article 19 between "threat or use of force" from other types of military activities clearly demonstrates that UNCLOS does not automatically equate use of force with these other military acts.

The "peaceful purposes" language originally was derived from the text of UN General Assembly Resolution 2749 (1970), which declared that the sea-bed beyond the limits of national jurisdiction was reserved exclusively for peaceful purposes. A group of developing nations proposed that the original version of Article 301 be included in Article 88, which provides that "the high seas shall be reserved for peaceful purposes." That proposal was not adopted, however, and the text was reintroduced separately as a new article. An effort to include the new Article 301 in the EEZ section of the Convention (Part V) was also defeated "by maritime States on the ground that security matters should not be considered within the EEZ regime."

As the negotiations of the Convention continued, some developing States took the position that the text of Articles 88 and 301 would prohibit all military activities in the oceans. Ecuador, for example, argued that "the use of the ocean space for exclusively peaceful purposes must mean complete demilitarization and the exclusion from it of all military activities." Maritime States opposed such a strict interpretation of the "peaceful purposes" language, asserting that the test of whether an activity was considered "peaceful" was determined by the UN Charter and other obligations of international law. It is logical to interpret the "peaceful purposes" clauses as prohibiting only those activities which are not consistent with the UN Charter. It may be concluded accordingly that the peaceful purposes…clauses in Articles 88 and 301 do not prohibit all military activities on the high seas and in EEZs, but only those that threaten or use force in a manner inconsistent with the UN Charter.[13]

Thus, the determination of whether an activity is "peaceful" is made under Article 2(4) of the UN Charter. Successive U.S. administrations have maintained the position that the "peaceful purposes" provisions can only be read in conjunction with the general body of international law, including Article 2(4) and the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter. To accept that all military activities are, by their nature, inconsistent with the "peaceful purposes," would mean that nations could not operate military vessels or aircraft, not just in the EEZ, but also the high seas. Such a conclusion, however, is at odds with decisions of the UN Security Council, which indicate that "military activities consistent with the principles of international law embodied in Article 2(4) and Article 51 of the Charter of the United Nations…are not prohibited by the Convention on the Law of the Sea." The International Court of Justice has similarly ruled that naval maneuvers conducted by the United States from 1982 to 1985 off the coast of Nicaragua during the U.S.-backed counter-revolution against the Sandinista government did not constitute a threat or use of force against Nicaragua.

Also, the Security Council has likewise determined that peacetime intelligence collection is not considered a "threat or use of force against the sovereignty, territorial integrity or

[13] Moritaka Hayashi, Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms, 29 MARINE POLICY 123–37 (2005).

political independence of the coastal state…in violation of the Charter of the United Nations." Following the shoot down of an American U-2 spy plane near Sverdlovsk in1960, an effort by the Soviet Union to have a Security Council resolution adopted that would have labelled the U-2 flights as "acts of aggression" under the Charter failed by a vote of 7 to 2 (with 2 abstentions), thereby confirming that peacetime intelligence collection is consistent with the UN Charter.64 The San Remo Manual on the Law of Armed Conflicts at Sea similarly rejects the interpretation that all military activities are inconsistent with the "peaceful purposes" provisions of the Convention. According to the Manual, armed conflict at sea can take place on the high seas, as well as in the EEZ of a neutral State. The only limitation is that belligerents must "have due regard for the resource rights and duties of the coastal State" in the EEZ.

What are the remedies available to the coastal State if it is of the view that the foreign vessel is carrying out a non-peaceful activity or a prohibited activity? Even if the coastal State is of the opinion that the foreign vessel in its territorial waters is carrying out a non-peaceful activity or a prohibited activity under the UNCLOS, it does not ipso facto gives it the right to use force against the vessel. The only explicit action is to "require it to leave its territorial waters". It should be noted that the responsibility of the flag state for the reimbursement of any damage caused by the non-compliance is also unambiguous under UNCLOS.

E. North Korea's Military Zone: North Korea has one of the most expansive and illegal claims in the EEZ. On August 1, 1977, North Korea announced that it was establishing a "military zone"—"50 miles from the starting line of the territorial waters in the East Sea and to the boundary line of the economic sea zone in the West Sea." The zone was purportedly established to safeguard the North Korean EEZ and defend the "nation's interests and sovereignty." Foreign military ships and aircraft are prohibited from entering the zone, and "civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval." Civilian ships and aircraft that have been granted access to the zone may not, however, engage in "acts for military purposes or acts infringing upon the economic interests." Taking photographs and collecting marine data is also strictly prohibited.

In effect, North Korea treats the waters and airspace contained within the military zone as internal waters and national airspace, respectively. Such a claim is clearly inconsistent with UNCLOS, Parts II (territorial sea and contiguous zone), III (EEZ), and VII (high seas), as well as the Chicago Convention, Articles 1–3 and 9.

Military activities on the high seas: According to Article 88 of the UNCLOS, the high seas shall be reserved for peaceful purposes. Additionally, Article 301 provides that States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations. The question is often raised as to whether such provisions limit military activities on the high seas.

It is important to understand as to whether and to what extent the provisions of the UNCLOS, and in particular Article 88, restrict military activities on the high seas. The "peaceful purposes" provision has also been used in other multinational treaties. Based upon those multilateral treaties, the position is often put forward that the peaceful use clause in the LOS Convention has to be understood generally as a prohibition of any military activity. The terms “peaceful use” or “for peaceful purposes” as used in international conventions are, in general, highly ambiguous, leaving aside for the moment the fact that Article 301 of the UNCLOS has to be regarded as an attempt to clarify the meaning of this clause.

The peaceful use clause may be interpreted as a prohibition of any military activities, or of only aggressive activities in the sense of Article 2, paragraph 4, of the United Nations Charter. A clear interpretation of this term in the former sense is found, for example, in the Antarctic Treaty. It preserves a non-militarized status of Antarctica by prescribing in Article I that the continent be used for peaceful purposes only. This general clause is further specified by the Article's prohibition (the list not being exhaustive) of “any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.” As an exemption from the general provision, the Article allows the use of military personnel and equipment “for scientific research or for any other peaceful purpose.” This exemption proves that the peaceful purposes clause in the Antarctic Treaty has to be understood as excluding all military activities.

Having referred to those international treaties using the phrase “peaceful” in the sense of nonmilitary, one should mention the Outer Space Treaty as a counter-example, one where the same clause has been used in the meaning of “non-aggressive.” This interpretation, however, is not undisputed. There is a clear difference of opinion among states regarding the correct interpretation of the term “peaceful” as used in Article IV of the Outer Space Treaty. Some refer it to have the same meaning as “non-aggressive” and some refer it to have the same meaning as “non-military.” Hence, the way the peaceful use clause is used in other international treaties does not give a clear answer as to its meaning under the UNCLOS.

Therefore, full clarity on the exact content of the peaceful use clause can be achieved by evaluating the impact of Article 301 of the UNCLOS on the interpretation of Article 88. The legislative history of Article 301 again casts very little light on the intentions of its drafters. Article 301 is clearly modeled along the lines of Article 2, paragraph 4 of the UN Charter. Apart from differences that are clearly of a drafting nature, one distinction has to be stated. Instead of the term “or in any manner inconsistent with the purposes of the United Nations,” Article 301 uses the phrase "or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.” This difference highlights that Article 301 refers not only to Chapter I of the UN Charter (Purposes and Principles) but to other parts too, such as Chapter VII, which includes Article 51 (right of self-defense).

In conclusion, Article 88, considered in the light of Article 301, does not impose any obligations upon States exceeding those of Article 2, paragraph 4, of the UN Charter.

Legality of establishment of marine exclusion zones: Whether a party to a conflict may establish maritime zones of war or zones of exclusion from which shipping is totally or partially excluded, thus limiting freedom of navigation and over flight.

Some instances of establishment of marine exclusion zones on high seas:

- The system of maritime exclusion zones was first introduced in the Russo-Japanese War by Japan, in an effort to control the navigation of neutral Powers in specified areas.
- In the First World War, the United Kingdom proclaimed the North Sea to be a military area within which exceptional measures would be taken.
- In the Second World War, the United Kingdom declared exclusion zones, which were affected by means of mine fields.
- In 1915 Germany declared that all maritime spaces surrounding the British Isles constituted a war zone in which any enemy merchant vessel would be sunk by submarines, even if it was not possible to save the crew or passengers. The exclusion zones declared by Germany were of a different nature; in these all shipping would be attacked on sight. The International Military Tribunal of Nuremberg declared the establishment of the latter zones to constitute a war crime.
- More recent examples of the establishment of war zones were the two proclamations of the United Kingdom in 1982 establishing a "maritime exclusion zone" around the Falkland Islands, which had been occupied by Argentine forces.

It is worth considering whether the UNCLOS limits the establishment of exclusion zones beyond existing restrictions recognized under the international law of war.

Pursuant to Article 88, paragraph 1, of the UNCLOS, the ships of all States (not only of States Parties) enjoy the right of freedom of navigation. However, the right to freedom of navigation is not unrestricted. It is to be used with due regard to the interests of other States in their exercise of the freedom of the high seas, which includes respect for military activities. Even in times of war, the freedom of navigation cannot be regarded as suspended between States which are not parties to the conflict. Accordingly, the establishment of exclusion zones is restricted. The freedom of navigation requires that limitations imposed upon shipping by the establishment of exclusion zones-and the same applies to over flight-have to be kept to the minimum necessary. Neither the limitations imposed upon shipping in these zones (nor their duration) nor the rights of military ships therein may exceed what is strictly necessary (principle of necessity and proportionality) for the protection of the security of the party to the conflict having established the zone. In consequence thereof, the range of military activities is limited, and they may not be directed indiscriminately against military and nonmilitary targets. Only under such preconditions and with proper notification may one characterize marine exclusion zones as a valid limitation on the freedom of navigation and over flight.

Legality of emplacing of sea mines: Mines have frequently been used as a means of sea warfare, and although they are considered indispensable, attempts have been made to restrict their use. In this respect, one should refer to the 1907 Hague Convention on Mine Warfare at Sea (which, however, has not entered into force).

The **International Court of Justice** has dealt with the emplacement of sea mines twice. In the ***Corfu Channel*** Case, it stated:

"The obligation incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefields exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."

In the **Nicaragua** Case, it argued along the same lines:

"In peacetime for one State to lay mines in the internal or territorial waters of another is an unlawful act; but in addition, if a State lays mines in any waters whatever in which the vessels of another States have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907."

The State emplacing sea mines is faced with obligations to safeguard the interests and rights of third States, was confirmed by Judge Schwebel in his Dissenting Opinion in the **Nicaragua** Case.[14] The interests and rights of third States in the maintenance of the freedom of navigation have to be balanced against the security interests of the belligerent parties. The principle of the freedom of navigation requires that the emplacement of minefields meets the conditions of the principles of necessity and proportionality. Minefields must not amount to a blockage of navigation to and from ports of nonbelligerent States, the national occupation of areas of the sea, or the unnecessary abolishment of the freedom of navigation for ships of non-belligerent States.

Generally speaking, States emplacing minefields are under an obligation to take every precaution to secure the safety of shipping of nonbelligerent States. Only to the extent that the emplacement of mines leaves room for a safe passage of ships of nonbelligerent States, the minefields are appropriately published, and the fields are kept under permanent surveillance and meet the applicable international rules on marine warfare may the resulting restrictions on the freedom of navigation be justified. Sea mines may result in a negative change of the marine environment to the extent that they constitute a hindrance to marine activities in the respective area. In this context, note should be taken of the fact that Article 192 of the UNCLOS obliges all States to protect and to preserve the marine environment. Might this obligate States concerned to remove sea mines? This possibility deserves further consideration.

Legality of nuclear tests: The question of the legality of the nuclear tests on the high seas is now decades old. At the very outset two questions emerge. First, are nuclear tests explosions on the high seas illegal? Second, if so, what amount of international liability attaches to a

[14] 1986 I.C.J. 266, 368.

state engaging in such nuclear experimentation? This question of legality of nuclear tests on the high seas arose when the America tested hydrogen bombs in the “Pacific Proving Grounds.” Two schools of thought emerged. It was argued by some that the test explosions were contrary to the laws of humanity and to the law of nations. Others, however, sought to justify the tests as necessary steps in the defense of the “free world.” This question was also referred to the International Court of Justice in the Nuclear Tests Cases. The complaint was made by Australia, New Zealand and the Republic of Fiji, against France, for the latter's nuclear testing over the Pacific Ocean.

Specifically, the legality of nuclear test explosions on the high seas turns upon three principal issues: (1) whether such testing may be deemed in violation of the freedom of the high seas; (2) whether the proven adverse ecological effects of such testing render it violative of international customary and conventional anti-pollution law; and (3) whether such testing is currently proscribed by multilateral nonproliferation treaties and other legal instruments for international disarmament.

Article 2 of the 1958 Convention made “the high seas open to all nations” and declared that “no state may validly purport to subject any part of them to its sovereignty.” The high seas freedoms, enjoyment of which is made expressly subject to conventional and other rules of international law, comprise, inter alia: freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom of overflight.

Nuclear test explosions on the high seas violate the doctrine of the freedom of the high seas, inasmuch as they interfere with two of its most crucial incidents: the freedoms of navigation and of fishing.

Furthermore, article 2 of the 1958 Convention makes it clear that any other right within its scope “shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas.” As nuclear test explosions can only proceed safely after excluding totally other users of the seas, they can hardly be accorded the character of reasonable use.

MODULE-II

LAW ENFORCEMENT ACTIVITIES

MODULE-II - LAW ENFORCEMENT ACTIVITIES

International law today generally recognizes three board divisions of the waters of the earth, *i.e.,* inland waters, territorial waters, and the high seas. The inland waters of a nation "comprise all the water areas, salt and fresh, which lie within the base line of territorial waters." The main feature of all inland waters is that, legally, the nation owning them has the same sovereignty over them that it has over land areas within its borders. The only limits on the rights of the "owning" nation are those that it voluntarily surrenders by treaty or other agreement, and these treaty limits are in fact manifestations of sovereign rights.

The territorial waters of a state extend outward from the limits of the inland water/shore line of a coastal state. As will be seen in later sections, the extent of the territorial waters varies from nation to nation, but no nation claims less than three nautical miles. Generally, a coastal nation possesses the same sovereign rights in territorial waters that it has in its inland waters, the main difference being that territorial waters are subject to a right of free and innocent passage by merchant vessels of other nations. Ships passing through this belt must conform to the laws and regulations of the state claiming the waters and are within that nation's jurisdiction, but nevertheless they do have the right to pass.

The term high seas comprise all the waters of the earth beyond the limits of territorial waters. With the exception of certain rules and laws established by international agreement, the high seas are completely free of any form of control, and international law recognizes no rights of any particular nation in the high seas. All vessels, both commercial and military, have a right to use the high seas and are subject only to the jurisdiction and laws of the nation of that vessel's nationality.

The Geneva Conventions on Territorial Sea and Contiguous Zone, Continental Shelf and High Sea, and the United Nations Conventions on the law of the sea which was adopted on 29 April 1958 and 10 December 1982 respectively, were recognized as universal legal documents on the seas. The Conventions contain provisions on the recognition of maritime zones such as internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, and archipelagic waters, which shall be established by coastal states. The Conventions also state the rights and obligations of the states on managing and governing their activities including protection and preservation natural resources in the zones. Furthermore, the states enjoy their rights in the Area and high sea which are beyond their national jurisdiction, for the purpose of exploitation and exploration.

Ports and Inland Waters

Ports

Provisions in UNCLOS, 1982 concerning Ports: Article 11 of the UNCLOS, 1982 stipulates that, "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works."

Article 131 of the UNCLOS, 1982 stipulates that, "Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports."

There is a presumption that all ports' used for international trade are open to all merchant vessels, but this is a practice only, based upon convenience and commercial interest; it is not a legal obligation. Ports are situated in a state's internal waters, which form part of its territory, and which consequently are subject to the state's territorial sovereignty. Limitations to sovereignty cannot be presumed and there is no evidence of any limitations in state practice in relation to sovereignty over ports. Pursuant to this sovereignty, states have absolute control over access to their ports. The only exception is for vessels in distress, which have a right to take refuge in the nearest port. The right to designate only certain ports as being open is not questioned, nor is the right to impose conditions upon entry.

Moreover, fishing vessels are not included in the presumption that ports are open to trade and they are specifically exempted from the freedom of access to ports stipulated in certain bilateral and multilateral conventions. Indeed, the existence of these conventions in themselves is an indication that there is no general right of free access in customary international law. In state practice, there are numerous instances of ports being closed without protest.

There is a possibility that a prohibition on entry into ports for the purposes of transshipment might be contrary to Article V of the GATT, but the closure of ports even to transshipment could fall under the general exception in Article XX (g), if the purpose of the closure was to promote the conservation of exhaustible natural resources. This would include the closure of ports to vessels that are undermining the effectiveness of measures for fisheries conservation.

The Sovereign Right of Coastal States to Deny Access to their Ports in International Law

General Principles: Coastal states have a sovereign right to grant or to deny access to their ports to any foreign vessels. This right is an attribute of the territorial sovereignty of states over their internal waters. Under international law, internal waters are assimilated to the territory of the state and ports are included in internal waters. In its judgment in the Military and Paramilitary Activities in ***Nicaragua case***, the International Court of Justice noted that "The basic legal concept of state sovereignty in customary international law ...extends to the territorial waters and territorial sea of every state. It is also by virtue of its sovereignty that the coastal state may regulate access to its ports."

While it is true that in practice most ports are open to foreign merchant vessels, the freedom of entry is only a presumption, subject to the coastal state's decision to close its ports for whatever reason and to whichever vessels it chooses. Coastal states generally maintain open ports for their own convenience, because they have an interest in international trade and commerce. There is no evidence that states believe they are under an obligation to keep their ports open to foreign vessels. On the contrary, many states have national legislation permitting them to regulate access to their ports and even to deny it. Furthermore, states have entered into bilateral and multilateral treaties undertaking to open their ports to the ships of the other parties, which presupposes a lack of free access in customary international law. Finally, in practice, states do occasionally close their ports to foreign vessels, for a variety of reasons.

Because internal waters are assimilated to state territory, and because they are governed by national law, their regime is not fully covered by international law, apart from the issues of delimitation and access to internal waters through the territorial sea. Yet the provisions of the 1982 United Nations Convention on the Law of the Sea ("the 1982 Convention") do shed some indirect light on the customary law relating to access to ports. With some exceptions, most of the provisions of the 1982 Convention are accepted by states as reflecting the general international law of the sea. This is especially the case where the provisions of the 1982 Convention are identical or similar to those of the 1958 Geneva Conventions on the Law of the Sea.

In the 1982 Convention the sovereignty of the coastal state over its land territory and coastal waters is confirmed in Article 2(4). Under Article 8, waters on the landward side of the baselines used to measure the extent of the territorial sea are recognized as constituting the internal waters of the state; while under Article 11 the outermost harbour works are regarded as forming part of the coast. Therefore, ports are included within the internal waters of the coastal state and are subject to the full scope of its territorial sovereignty.

In Article 25, the 1982 Convention confirms the right of the coastal state to regulate access to its internal waters, including its ports, by stipulating in relation to innocent passage in the territorial sea that: “In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal state also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.”

Presumably, if the ship does not meet the required conditions, it may be refused permission to enter. In Part XII on the marine environment, the possibility of a coastal state placing conditions upon entry and even denying entry into its ports is noted in Article 211(3), which reads:

“States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters ... shall give due publicity to such requirements and shall communicate them to the competent international organization.”

The legislative history of Article 255 provides strong confirmation of the opinio juris of states that there is no right of entry into ports. In the discussions relating to measures of assistance to research vessels, delegations evinced firm opposition to the proposal by the Soviet Union to include an obligation on coastal states to simplify the formalities of entry for research vessels into ports and internal waters. This proposal appeared to take for granted a freedom of to require the conclusion of bilateral, regional or multilateral agreements for entry. Ultimately, the Conference adopted the following text:

“States shall endeavor to adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research conducted in accordance with this convention beyond their territorial sea and, as appropriate, to facilitate, subject to the provisions of their laws and regulations ...access to their harbors ...for marine scientific research vessels. Clearly, the implication behind this text is that vessels have no absolute right of entry into ports.

Other Conventions: In 1923, a number of states adopted the Convention on the Regime of Maritime Ports, which in the annexed Statute provides for equal treatment, on a basis of reciprocity, to the vessels of states parties entering the ports of other parties, with exceptions in the event of an emergency. Warships and fishing vessels and their catches are specifically excluded from the rights granted by the Statute. In the multitude of bilateral treaties of "Friendship, Commerce and Navigation" popular until the post-war period, it was usual to include a provision on the reciprocal free right of access to the ports of either party by the merchant vessels of the other. Warships and fishing vessels were excluded from such provisions. In addition to the 1923 Statute and to the friendship treaties, several special agreements have been concluded by the USA and Germany to grant a right of access to various ports for their nuclear-powered ships. The very existence of these agreements granting a free right of access confirms that states believe that no such right exists in customary international law. Moreover, the specific exclusion of fishing vessels demonstrates that such vessels have always been subjected to special rules, even where other vessels are freely accorded access to ports.

Further, the existence of a right of coastal states to exclude foreign vessels from their waters is stated or implied in a number of maritime conventions addressing safety, pollution prevention and liability. For example, the safety certificates and provides that port authorities may withhold permission to dock if a ship does not comply. In the 1971 amendments to the 1954 Convention for the Prevention of Pollution of the Sea by Oil, Article VI (4) declares that a party that has clear grounds for believing that a tanker does not comply with the required specifications may deny it access to its ports or to its territorial waters. Similarly, the 1973/78 International Convention for the Prevention of Pollution from Ships recognizes that a state may deny such access for non-compliance with its provisions.

The Convention on the Liability of the Operators of Nuclear Ships provides that nothing in the Convention affects any right of a party under international law to deny nuclear ships access to its waters and harbors. In Article 5(2) of the 1985 Roratonga South Pacific Zone Treaty, the parties affirm that: "each Party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits of foreign ships ...to its ports." Finally, the Wellington Convention for the Prohibition of Fishing with Long Driftnets provides that parties may restrict access to their ports and facilities for drift-net fishing vessels.

State Practice: In practice, states deny access to their ports by foreign vessels for a variety of reasons, including illegal overfishing. States regularly provide in their national laws for requirements and conditions that have to be met by foreign ships before they are granted access to internal waters. Furthermore, some states have legislation permitting their authorities to deny access for any reason, while others require special permits for access by non-merchant vessels. Canada regulates entry into internal waters in the Canada Shipping Act and Arctic Waters Pollution Prevention Act.

While there is not a great deal of published material on state practice relating to access to ports, virtually all of it indicates that states consider that they have a right to deny access at will. Ports have been closed for various reasons related to the protection of public health and safety: to ships carrying explosives; to ships carrying passengers with contagious diseases; to ships carrying dangerous cargoes, such as hazardous wastes; for general coastal pollution protection; to substandard ships; and to ships presenting hazards to maritime navigation. For example, in 1971 the Dutch tanker Stella Marls was denied access to a number of European ports because it was carrying a load of toxic substances. For environmental reasons, in 1980 a Greek tanker was not allowed access to a port in the Shetland Islands.8 A European Community Directive regulates the entry into Community ports of oil, gas and chemical tankers. Foreign nuclear ships are prohibited by the legislation of a number of countries from entering their ports. In a well-known incident in 1985, New Zealand refused to allow an American nuclear ship into its ports. In 1985, Panama refused entry to a British ship carrying radioactive material. More recently, several countries banned a Japanese ship carrying nuclear material from even entering their territorial waters.

France: Ports may be closed for state security and have also been closed for political reasons. For example, up to 1923, France denied access to all ports except three to vessels of the USSR. In 1934, a memo from the legal service of the French stated that the government could close its ports to the vessels of foreign insurgents.

In 1947, France closed Tunisian ports to an Egyptian vessel carrying foodstuffs sent by the Red Crescent Society because the objective of the gift was to cause a political incident. In 1980, the French port of Sate was closed to an Italian cargo ship carrying Italian wine for fear of an incident involving French wine-makers protesting imports of foreign wine. In 1981, 1984, and 1985, France closed its ports to USSR passenger and cargo vessels for security reasons. The 1981 closure to Soviet cruise boats was also in part in retaliation to a similar closure of Soviet ports to French cruise ships.

The United States: Generally, the USA takes the view that it has complete authority to grant or to deny access to its ports. This position has been set forth in a number of judicial decisions, in several laws, and in actual denial of access on a number of occasions. In the most recent court decision, ***Khedivial Line SAE v Seafarers International Union,*** the court remarked that: "Plaintiff concedes that there is no treaty between the USA and the United Arab Republic granting the latter's vessels free access to US ports. Plaintiff has presented no precedents or arguments to show ...that the law of nations accords an unrestricted right of access to harbors by vessels of all nations." The USA controls access by means of the US Ports and Waterways Safety Act of 1972 and the Regulations for Entry in Deepwater Ports, made under the 1974 Deepwater Ports Act.

In s.19(c) of the latter, the USA has denied access to its ports in the absence of an agreement:

"Except in a situation involving force majeure, a licensee of a deepwater port shall not permit a vessel, registered in or flying the flag of a foreign state, to call at, or otherwise utilize a deepwater port licensed under this Act, unless (1) the foreign state involved, by specific agreement with the USA, has agreed to recognize the jurisdiction of the USA over the vessel and its personnel ... while the vessel is in the safety zone."

Moreover, in the High Seas Driftnet Fisheries Enforcement Act of 1992, the United States has denied port access to vessels engaged in drift-net fishing on the high seas, as well as to foreign and domestic fishing vessels conducting fishing operations in the Central Bering Sea, except where such operations are in accordance with an international agreement.

The United Kingdom: In Britain, state practice goes back to the year 1236, when King Henry ordered that no foreigner could enter England without a license from the king and that anyone attempting to land at Dover without such a license should be turned back. In 1912 the Law Officers of the Crown were of the opinion that "a sovereign state has complete control over its ports and harbors and ... it may either exclude foreign vessels altogether from entering them for the purposes of trade, or may admit them on such terms and conditions as it may chose."

In 1928 a British Interdepartmental Committee reported that "the closing of a port on the national territory is a legitimate exercise of the sovereignty of the state." For example, in 1972, British authorities refused entry into the port of Hong Kong to a fleet of Soviet whaling vessels.

In 1986, Syria responded to the severance of diplomatic relations by Britain by closing its ports to British vessels, the British government did not protest, but merely advised its ships to avoid Syrian ports.

Other Countries: In 1968, Japan refused to let a Chinese ship dock at Yokohama, for fear of political agitation. In 1986, Belgium refused to allow British ferries to dock at the port of Zeebrugge.

Recently, in order to deter the devastation of the cod stocks in the Barents Sea "loophole", Norway has proposed closing the ports of the European Union to the catches of vessels overfishing in the Barents Sea. In Chile, under Law No. 19,079 of 1991, amending the general law on fisheries and agriculture, the Chilean authorities have the power to prohibit or regulate the unloading of fish or fish products harvested contrary to conservation measures established for straddling stocks and to prohibit the docking and the provision of port services in Chilean ports of vessels which are suspected on reasonable grounds of engaging in fishing that has had a negative effect on the resources of the Chilean EEZ or their exploitation by Chilean vessels. Canada has at various times closed its ports to fishing vessels of the Soviet Union, the European Community, France, and other states engaged in overfishing.

The Views of Legal Writers: Virtually all recent writers, and most of the older ones, affirm that, in the exercise of their sovereignty, states have the right to grant or deny access to their ports, subject only to conventional obligations and to an exception for vessels in distress. Incidentally, all writers agree on the latter exception, which by its very existence would appear to confirm the general rule; since there would be no need for such an exception if there were a general right of free entry. It is also clear that there are special rules for warships and fishing vessels, which are not included in any right of free entry that may be granted by the coastal state to foreign merchant ships.

Furthermore, there is general agreement that states have the right to designate only certain ports as being open and that they may regulate access to them through their internal law. These rules imply that there is no obligation upon states to open their ports to commercial traffic. If only some ports are open then clearly any port may be opened or closed at will, subject only to a possible obligation of courtesy to give reasonable notice. And if ports may be regulated, it is only logical to assume that they may be closed to vessels that do not meet the requirements of national law. Among the many authors writing in English who consider that states have the right to deny entry to their ports are McDougal and Burke, D. P. O'Connell, Ian Brownlie, Hydeman and Berman, H. W. Briggs, R. R. Churchill and A. V. Lowe, George Kasoulides, the authors of the Encyclopedia of International Law, the English version of the book by Dupuy and Vignes, etc.

Following an exhaustive review of all the evidence, A. V. Lowe argues convincingly that:

“A coastal state may close its ports to foreign shipping whenever it chooses, subject only to any rights of entry granted under treaty.”

V.D. Degan concurs and emphasizes that fishing boats are subject to special rules even when the ports of a state are generally open to commercial traffic:

“The general practice of the free access of merchant ships of almost all nations to almost all commercial ports is based upon convenience and economic interest, and in the absence of treaty provisions, it is not based upon any sense of legal obligation...a coastal state can impose special regulations with regard to fishing boats and privately owned pleasure and racing yachts and boats. For this reason, they form separate categories.” Thus, it is clear that the vast majority of jurists believe that there is no right of free access to foreign ports and that, conversely, coastal states have a right to deny entry to their ports at will.

Arguments against the Right of States to Deny Access to their Ports

Writers who Favor Freedom of Entry into Ports for all Foreign Merchant Vessels: Despite the evidence outlined above, in the past, some writers, such as Charles Rousseau, John Colombos and Albert de La Pradelle, have contended that all merchant vessels enjoy a right of free access to foreign ports. Generally, this opinion is based upon the following points: the provisions of the 1923 Geneva Convention and Statute on the International Regime of Maritime Ports; a dictum in the award in the Aramco Arbitration stating that there is free access to ports; the existence of numerous bilateral treaties granting reciprocal freedom of access to ports; the freedom of navigation; the alleged duty to promote free trade and international communication, as well as the provisions of Article V of the General Agreement on Tariffs and Trade; and the fact that in practice most ports are open to all foreign ships.

As will be demonstrated in this Part, there is no validity to any of these arguments. It should be noted that even the authors who are in favor of a freedom of access do not believe that such a freedom does, or should, extend to fishing vessels. Moreover, the views of these writers are riddled with inconsistencies. If states may place conditions upon entry, then surely they may bar ships that do not meet those conditions; if states can designate only certain ports as being open, then they may close any port at will; and if free entry were the rule, there would be no need for an exception for ships in distress.

The 1923 Convention and Statute on the International Regime of Maritime Ports: The 1923 Convention on the International Regime of Maritime Ports and its accompanying Statute are the main "authority" used by those authors seeking to establish that there is a general right of free entry into ports. Yet, it is no authority at all in relation to the vessels of most countries. It is a cardinal principle of international law that treaties are binding only on the parties. As affirmed by the International Court of Justice in the **North Sea Continental Shelf Cases**, treaties can nevertheless express the relevant rules of general international law, if they codify existing law or generate state practice and opinio juris that culminates in the creation of a new custom. However, the latter process can only take place under certain conditions, conditions not met in the instant case.

First, as pointed out by Gidel in 1932, the Statute did not codify existing law, nor did it represent the customary law in effect at the time he was writing, a decade after the conclusion of the Convention. Second, according to the conditions stipulated by the International Court of Justice, for a convention to represent customary international law it should have been accepted by the majority of states, and the state practice which it has generated, including that of those states whose interests are specially affected, should be both extensive and virtually uniform in the sense of the provision invoked. Yet, the 1923 Convention has only 40 parties, a very small minority of existing states. In recent years, a number of states have acceded to the Convention, 56 an act that would be pointless if they believed the Convention to represent the customary international law on the subject.

Furthermore the parties do not include many of the states whose interests are specially affected, such as the USA, Japan and the Russian Federation (all major maritime states), or most of the developing countries. Moreover, there is no evidence of widespread and uniform practice indicating that the preponderance of states believe that they have a legal obligation to keep their ports open to all comers. Indeed, the three previously mentioned major maritime states have all in practice asserted the right to close their ports.

An examination of the provisions of the Statute reveal that they do not declare a general right of free access to ports and that they do not meet the criterion set forth by the ICJ of being of a such a nature that they may be transformed into customary obligations. Articles 2 to 7 of the Statute provide only for equality of treatment on a most-favored nation or national treatment basis, and Article 16, upon which some writers rely to establish a right to access, sets forth only the exceptions permitted when ports are closed in cases of emergency. Significantly, the rights are available only on a reciprocal basis and may be suspended in the event of non-compliance by another party. Finally, there are certain reservations and exceptions. France expressly reserved the right to suspend the benefit of equality of treatment in the event of non-reciprocity.

The Aramco Award: Some authors promoting a right of free access to ports rely upon a dictum in the **Aramco Arbitration** of 1958. The dispute centred on a claim of breach of contract by the Aramco Company against the government of Saudi Arabia for granting the exclusive right to transport oil from the kingdom to the Satco company, in alleged violation of a clause in the concession agreement giving such a right to Aramco. The text of the arbitrator's statement on access is the following:

"According to a great principle of public international law, the ports of every state must be open to foreign merchant vessels and can only be closed when the vital interests of the state so require."

Strictly speaking, this sentence is obiter, as the case was decided upon an interpretation of the concession agreement. Furthermore, even counsel for Aramco impliedly recognized that there was no general right of access to foreign ports. In the course of argument, he contrasted "the full and unrestricted sovereignty" of the Saudi king over his ports “which form part of Saudi Arabian territory”, with his more limited sovereignty over the territorial sea. Most importantly, the authorities cited by the Tribunal do not support its pronouncement. While this sentence appears to declare a right of free entry, there is overwhelming evidence that Guggenheim considered that no such right existed. Perhaps Guggenheim miswrote or was simply not clearly expressing his thoughts, as both Gidel and Ralston, which he cited in support of his view, believed that the coastal state had a right to close its ports to foreign vessels.

In his The Law and Procedure of International Tribunals, Ralston comments upon the Orinoco Arbitration and the Poggioli case, both of which support the right of coastal states to exclude foreign vessels from their ports.

Inland Waters: The article 5 of 1958 Geneva Convention and the article 8 and 47 of 1982 United Nations Convention provide that Internal Waters are waters on the landward side of normal baseline, straight baseline and archipelagic baseline from which the territorial sea is measured. Based on the foregoing provision, the Internal Waters are waters on the landward side of the normal baseline which is low water line along the coast as mark on large scale charts officially recognized by the coastal state; waters on the landward side of straight baselines accepted to calculate the breadth of the territorial sea; waters of bays to which the breadth of the entry does not exceed 24 miles; waters considered to be historic gulfs, bays, inlets, and strait even if the breadth of entry exceed 24 miles; waters of ports limited by a line passing through the most extended port installations seaward; waters of the deeply indented and enclosed by the territory of single state; waters in the case of islands situated on atolls or of islands having fringing reefs; mouth of river; waters of which is considered highly unstable; and archipelagic waters which is closed by closing line. The said provisions of the Convention and the geographical nature of the coastline allow the coastal states to establish their internal water according to the circumstances of their own coastline. In some case, however, the establishment of internal water of states is considered not appropriate with international laws and regulations.

The coastal state exercises full sovereignty over its internal waters, and foreign ships while in this water, is to observe the laws and regulations of this state as its land territory. The regime of the maritime port is usually established under maritime regulations. However, the development of economic requires the coastal state to establish the best conditions port and also to adopt laws and regulations aimed at facilitating the procedure involved in the entry and stay of foreign merchant vessels. Foreign merchant vessels and all its crewmembers are fully subject to the criminal, civil and administrative jurisdiction of the coastal state. The 1982 United Nations Convention contains an article on the duty of state to adopt reasonable standard, rules and procedures to assist marine research and, when necessary, to facilitate entry into their ports of marine research vessels.

Territorial Seas: The Territorial Sea is an area extending from internal waters to the seaward side. The coastal state enjoys its sovereignty over the area subject to the right of the ships of other states to engage in innocent passage. According to the 1958 Convention, the breath of territorial sea has not been stated how far from the baseline it is measured, but it could be inferred from the breadth of the contiguous zone which was established in article

24, paragraph 2 that the territorial sea cannot exceed 12 nautical miles from the baseline. It means that the territorial sea and contiguous zone under this convention are the same area. However, article 3 of 1982 United Nations Convention clearly defined, every state has the rights to establish the breadth of its territorial sea up to the limit not exceeding 12 nautical miles, measured from baseline determined in accordance with the convention, and the outer limit of the territorial sea is the line every point of which is at the distance from the nearest point of the baseline equal to the breadth of the territorial sea13. According to article 12 of the 1982 United Nations Convention, the territorial sea can be extended beyond 12 nautical miles. Roadsteads, which are normally used for the loading and unloading and anchoring of ships and would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in territorial sea.

The territorial sea could, nevertheless, be less than 12 nautical miles in the situation of the two states have opposite or adjacent coasts. The article 15 of 1982 United Nations Convention provided that, where the coasts of the two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary to extend its territorial sea beyond the meridian line every point of which is equidistant from the nearest points on the baseline from which the breadth of the territorial sea is measured. Moreover, states sometimes do not have their territorial sea in case the low water line is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island. In practical, this provision has not applied to any coastal states. All coastal states have their territorial sea.

The Convention requires the coastal states to adopt laws and regulations which comply with the international rules in the purpose of ensuring the innocent passage of foreign vessels, with respect the followings:

• Safety of navigation;
• The protection of navigation and facilities
• The regulation the maritime traffic;
• The protection of cable and pipeline;
• The conservation of living resource
• The prevention of infringement of fisheries law and regulation of coastal state;
• The maritime scientific research and hydrographic survey;
• The prevention of infringement of the customs, fiscal, immigration, or sanitary law.

In addition, having regard the safety of navigation, the coastal states may establish sea lands and traffic separation schemes in its territorial sea to ensure the safety of navigation especially, tankers, nuclear power ship and ships caring nuclear or other inherently dangerous or noxious substances or materials (article 22 of UNCLOS, 1982).

Besides the above necessity, the coastal states have their rights to prevent passage in which engage in the any of the following activities as stated in article 19 of UNCLOS, 1982:

- any threat or use of force against the sovereignty, territorial integrity of political independence of the coastal state or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

- any exercise or practice with weapons of any kind;
- any act of propaganda aimed at affecting the defense or security of the coastal state;
- the launching, landing or taking on board of any aircraft;
- the launching, landing or taking on board of any military device;
- the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state;
- any act of willful and serious pollution contrary to this convention;
- any fishing activities;
- the carrying out of research or survey activities
- any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state;
- any other activity not having a direct bearing on passage.

The article 27 and 28 of UNCLOS, 1982 also provides the coastal states with criminal and civil jurisdiction on board a foreign ship in cases:

- The sequences of the crime extend to the coastal states;
- There are request for assistance from Master of the ship or from a diplomatic agent of the flag state or consular officer of the flag state;
- Suppression of illicit traffic in narcotic drugs or psychotropic substances;
- Foreign ship lying in the territorial sea or passing through the territorial sea after leaving internal water.

Relating to the warship which does not comply with law and regulations of the coastal state concerning the passage through the territorial sea and disregard any compliance therewith which is made of it, the coastal state may require that warship to leave the territorial sea immediately (article 30 of 1982 Convention). The case of innocent passage of warship through the territory of the coastal state has been discussed during the establishment of international convention on Law of the sea but there was no consensus. The maritime power claimed innocent passage for warships, whereas the others, particular the developing ones, emphasized that the importance of their coastal security necessitated imposing conditions on the passage of warships through its territorial sea. The differences caused the Convention on Law of the Sea has no provision on allowing or denying warships a rights of innocent passage. As practice, some coastal states require the warships to give prior notification for innocent passage of warships through their territorial sea. For example, China and Vietnam require foreign vessels for military use to obtain prior permission before they transit through the Chinese territorial sea. The requirement of China was stipulated in Law on Maritime Traffic Safety, entered into force in January 1984, which reads "…No military vessels of foreign nationality may enter the territorial sea of People's republic of China without being authorized by the Government thereof."

Several important justifications exist to support the extension of the State's sovereignty outside the boundaries of its land territory. First, the security of the State is essential. Coastal States have historically demanded exclusive possession of their shores and ports. Therefore, protection of the coastal State's seaward approaches is also necessary. Second, the State must be able to regulate all ships entering, leaving, and anchoring in its territorial sea. This justification is based on commercial, fiscal, and political interests. Without the ability to supervise the activities surrounding the deepwater port, an important aspect of the State's economy, the "ingress of oil" will function with little or no regulation. Further, ships failing to exercise voluntary precautions may inflict serious harm upon adjacent property and people from the discharge of wastes. Enforcement of environmental standards and customs laws may prove futile without territorial jurisdiction.

Territorial Jurisdiction over coastal waters: In 1967, Egypt closed the Straits of Tiran to shipping to and from Israel, an action which helped precipitate a war; in 1968, the U.S.S. *Pueblo,* a United States Naval vessel, was seized by the naval forces of North Korea; in *1969,* a Peruvian gunboat seized one United States flag fishing vessel and fired on others; again in *1969,* a Soviet fishing fleet was warned to remain more than twelve miles off the east coast of the United States.

These four seemingly unrelated incidents, and others like them, all have at least one factor in common-all involve questions of claims to territorial jurisdiction over coastal waters. The concept of territorial waters is one of the most well established in international law today, and yet no other concept is so widely disputed or has so many conflicting interpretations applied to it. Despite many attempts at settlement, no really acceptable definition or limit to national claims over coastal waters has ever been reached. The questions of what areas of the sea were in fact subject to national control and just what controls could be imposed continued to be in debate. Ultimately, two general practices developed which later coalesced and developed into the modern territorial sea.

The Canon-Shot Rule: For many years the popularly accepted theory was that of the Dutch jurist Bynkershoek concerning the extent of territorial seas. Bynkershoek, in Den Domino Maris Dissertatio, reasoned that a state's dominion of the sea "ends where the power of arms ends." Thus, it was reasoned that, since the shore-based cannon of the period had a range of approximately one marine league (three nautical miles). This was the maximum breadth of the sea that could be claimed by any nation. It was long assumed, therefore, that this "cannon-shot rule" was the rule establishing the territorial sea. As practiced by most nations, the cannon-shot rule was a matter of actual control as opposed to theoretical legal control. The cannon-shot rule, as it existed in the seventeenth- and eighteenth century practice…merely provided that, for the purpose of preserving the neutrality of the coastal state, the range of guns actually stationed on the shore were under the protection of the coastal state.

Thus, a nation effectively claimed only those areas of the sea that could actually be "occupied" by gunfire of shore batteries. Further, the idea that the cannon-shot rule gave a definite measurement of a marine league cannot be supported when one considers the ballistics of Seventeenth and Eighteenth Century artillery. The maximum range of the most powerful gun of the age was barely half of that distance, and the effective range rarely exceeded more than half a mile under the best of conditions, a fact not improved upon until late in the Nineteenth Century.

In reality, the cannon-shot rule was much more limited in scope than being an attempt to exercise full jurisdiction over a portion of the sea as if it were within the territorial boundaries of a particular nation. Its use did not, a least formally, give rise to attempts to control navigation of either commercial or war vessels through coastal waters, but was applied to the limited purpose of protecting neutrality in time of war by providing areas of "protection" for the ships of all belligerents, and then only when that protection could be enforced by cannon situated on the shore. The importance of the cannon-shot rule is that it helped establish in the body of International law the legal proposition that in order to preserve certain national rights and interests, nations could exercise a measure of control over certain areas of coastal waters. Further, its acceptance encouraged the development of more comprehensive rules and controls as time passed.

Scandinavian Practice: At the time that the cannon-shot rule was being developed and practiced in most maritime nations, the Scandinavian countries of Denmark-Norway and Sweden were announcing and practicing a much broader and more comprehensive claim of territorial sovereignty over the seas. These nations seem to have been the first to establish a uniform belt of defined measure, running the entire length of the coast as a territorial sea. Denmark-Norway at one time claimed a large part of the North Atlantic Ocean as a private territorial sea-an integral part of the national domain.

In the face of pressure and opposition from other nations, particularly Great Britain and Holland, Denmark retreated on this claim at various times to claims of limited jurisdiction, varying from a distance of two to four Norwegian leagues (six nautical miles), depending on the type of claim asserted. Jurisdictional claims as to fishing rights were asserted (and disputed) up to four Norwegian leagues from the Danish coast and in 1736 a decree was issued denying the right of any foreign vessel to approach to within four leagues of Greenland for the purpose of establishing a trade monopoly. During the Seven Years War, the Danes claimed a neutrality zone of "one ordinary sea league" (then four nautical miles), such zone to consist of a uniform belt along the coast. Several warring nations attempted to have Denmark accept the more limited cannon-shot rule, then in practice in most of Europe, but did not push their efforts for fear that Denmark would enter the war. The four nautical mile neutrality zone remained in force, therefore, but only for the limited purpose of neutrality. Finally, about 1811, formal claims of full territorial sovereignty were applied to this same zone, to give Denmark a four mile territorial sea which exists to this day. Swedish practice seemingly paralleled Danish practice during this period of time. Sweden was the first nation to establish a territorial claim to the seas approximating the modern territorial sea.

Just what effect the practice of the Scandinavian nations had on the development of the territorial sea of today is impossible to tell. It is logical to assume, however, that the effect was considerable. In the late Eighteenth and early Nineteenth Centuries, the cannon-shot rule was obviously inadequate to meet the needs of the nations which had previously practiced it. As more and more attention was given the claim to sovereign rights in coastal waters, it can be assumed that the various coastal nations looked to the long standing practice of Denmark and Sweden in formulating their own claims.

Legal Rights in the Territorial Sea: The entire concept of the territorial sea is built on the idea that a coastal nation, for various reasons, is entitled to certain special rights in an area of the seas off of its shores. Today, all countries recognize at least a three nautical mile limit, though many claims go beyond this distance.

1. **The Extent of Jurisdiction:** Two schools of thought existed at the beginning of the Twentieth Century as to the nature of the relationship of the coastal state with its adjacent seas. One, the more widely accepted, held that the relationship is that of actual ownership, or the *dominium* theory of ancient times. The other school, basing its assertions on the idea that the territorial sea remained essentially a part of the high seas, claimed that the coastal belt was subject only to certain limited and well defined rights in the shore state. By the end of the first quarter of the Twentieth Century, the *dominium* theory was the accepted norm.

In 1930, the first international conference on the territorial sea was convened by the League of Nations in an attempt to settle many of the disputes relating to the territorial sea. While generally unsuccessful in handling the major problems, one fact was made clear-almost all nations were in agreement that the territorial sea forms a part of the actual territory of the claiming coastal state.

The position taken at the 1930 conference was firmly established and reaffirmed at the Geneva Conference on the Territorial Seas and Contiguous Zones. Article 1 of the Convention, adopted by 86 nations, provides that "the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."

Commenting on this Article, the International Law Commission stated that "the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over the other parts of its territory." Thus, as applied today, the theory of the territorial sea is based entirely on the ancient *dominium* concept of territorial ownership by the claiming state. Like all rules of law, however, there are exceptions to the rule of absolute dominion, and the rights of the coastal state, as will be seen below, are subject to and limited to some extent by other norms of international law and convention.

Today, with the growth of the ability to develop its resources, national rights in the seabed underlying territorial waters have come into question. It is generally agreed today that such areas of the seabed, just as the airspace above territorial waters, constitute part of the claiming nation's territory.

The Convention on the Territorial Seas and the Contiguous Zones clearly recognized that a nation has territorial rights in that portion of the seabed underlying its territorial sea and has full rights to control and development.

2. **Types of Jurisdiction Exercised:** Generally, the rights of nations and the types of controls exercised over territorial waters have been divided into four broad categories:

(1) Jurisdiction over foreign vessels, both merchant ships and ships of war;
(2) Police, customs, and revenue functions;
(3) Fishery rights; and
(4) The establishment of defense and security zones.

In each of these categories, the statements given above relating to the nature of sovereign control and dominion of a nation in its territorial sea apply, with one exception, that of the right of innocent passage. The major point of dispute relating to the breadth of the territorial sea and the contiguous zones arise from interests in each category, and, as will be seen in the next section, such interests are inherent in the varying claims laid to territorial waters.

3. **Jurisdiction over Foreign Vessels and the Right to Innocent Passage:** A coastal state, being sovereign, has legislative power over its territorial sea and may prescribe rules and regulations governing the activities of any vessel within that portion of the sea. In addition to specific rules and regulations relating to such matters as rules of the road, pilotage, and similar navigation and sailing requirements, foreign vessels are subject to the criminal and civil laws of the state into whose waters they enter.

The rule commonly applied by the United States and Great Britain was clearly stated by the United States in ***Cunard S. S. Co. v. Mellon*** that:

"A merchant ship of one country voluntarily entering the territorial limits of another, subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence just as with other objects within those limits. Of course, the local sovereign may out of consideration of public policy choose to forego the exertion of his jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in his discretion."

France and a number of other nations, on the other hand, tend to adhere to a rather strict observance of the concept of the law of the flag, a rule whereby all questions relating to a vessel's internal and other affairs not affecting the interests of the territorial sea state are left to the authorities of the flag state. In practice, there is little difference in the outcomes of the two procedures. British and United States courts will assert jurisdiction, but will decline to render a decision on the basis of international comity and usage, deferring to the courts of the flag state.

In the alternative, these courts will render a decision, but will apply the law of the flag state themselves. In cases which affect its own citizens or interests, the nation claiming the area of the sea in which the event took place will usually take full jurisdiction. There are no firm rules in such cases, however, and ultimately the decision as to whether or not to take jurisdiction is up to the authorities particularly concerned. What has been stated in the above paragraph applies equally to both persons and property and to the vessel itself. There is one major exception to the general rule that a nation has absolute jurisdiction and control over its territorial waters and vessels therein, that exception being the international rule of innocent passage.

The rule grew out of the concessions granted by nations claiming territorial seas in the past century in order to justify its right to control areas of the high seas. Basically, it provides that foreign vessels have a right of innocent passage in those areas of the sea normally used for the movement of seaborne commerce even though such areas are claimed as territorial seas by another nation. The passage includes the right to free and innocent movement, and the right to stop and weigh anchor so long as the stopping is incident to the normal conduct of navigation. Foreign vessels have the further right to enter territorial waters when compelled to do so by weather or other hazards of the sea. A nation claiming the territorial waters subject to innocent passage is not entitled under international law to levy tolls or duties for that passage beyond payment for special services rendered to the passing vessel. Even while in territorial waters on the basis of innocent passage, however, a merchant vessel must observe the laws, rules, and regulations of the nation claiming those waters. In time of war or other national emergency, a nation is generally recognized to have the right to limit or deny completely passage of merchant ships through portions of its territorial waters if reasonable grounds for such limits exist.

Whether or not warships have a right of innocent passage is still an open question. Unlike the situation of merchant vessels, there is no commercial interest involved and there may be danger at times to the nation whose waters are being used. International conferences and conventions have recognized the *principle* of innocent passage, but have refused to grant an absolute right. At best, the right of passage for a warship is granted only subject to special rules and regulations of the nation whose waters are being used. The requirements for the passage of warships vary from nation to nation. Some require at least notification of the intended passage while others require not only notice, but also actual authorization.

International law does attempt to distinguish between passage through a territorial straight connecting two portions of the high seas and passage through the territorial waters of a nation which do not form part of a strait. Where the strait in question opens on the unenclosed high seas on both sides an absolute right of free passage is normally recognized for warships in peacetime. In the few cases where the strait opens into an “enclosed” sea, such as the Black Sea, international agreement usually limits the number of warships which can pass through the straits, except for those nations which have coasts on the enclosed sea.

Unlike merchant ships, warships and other ships of state in foreign territorial waters do not become subject to the jurisdiction of the coastal state. This result is based on the theory that the warship forms a part of the territory of the nation whose flag it flies. While normally bound to follow rules of navigation and sailing, the warship cannot be seized or interfered with in any manner by judicial proceeding.

The United States Supreme Court in ***The Schooner Exchange v. McFaddon*** was faced with the problem of determining the ownership of a vessel which had been illegally seized when used as a merchant vessel by her American owners and converted into a warship by her French captors. Chief Justice Marshall, in refusing to permit the seizure of the vessel by a United States admiralty court stated:

“It seems to the Court to be a principle of public law that national ships of war, entering the port of a friendly Power open for their reception, are to be considered as exempted by the consent of that Power from its jurisdiction.”

The general rule seems to be that by admitting a foreign warship to its territorial waters, either impliedly or specifically, a nation waives any claim to jurisdiction. If a breach of a nation’s laws is committed by a foreign warship, the only recourse, apparently, is to lodge a complaint with the nation owning that ship. As stated by the Institute of International Law in 1928, “warships cannot form the subject of seizure…by any legal means whatsoever, or by any judicial procedure, [however, they must respect and obey] the local laws and regulations…relating to navigation, anchorage and sanitary police.”

On February 1, 1993, the RCCL-owned cruise ship *Nordic Empress* was found discharging oil in violation of the International Convention for the Prevention of Pollution from Ships by a U.S. Coast Guard aircraft equipped with special infra-red radar.' What makes this situation unique from all other violations charged against the company is that the discharge occurred in the territorial sea of the Bahamas, not the United States.

Ordinarily, the United States would have no jurisdiction to prosecute such a crime. To overcome this limitation, however, the United States charged the company solely with a violation of the False Statements Act, to wit, presenting a falsified “Oil Record Book” to Coast Guard officials when the vessel made port in Miami. The court in ***United States v. Royal Caribbean Cruises, Ltd.*** rebuffed all arguments that the United States lacked jurisdiction over this offense, allowing the prosecution to go forward, and ultimately prompting the settlement.

4. **Unilateral Extension of Territorial Seas Contrary to International Law:** Authoritative rejection of the concept of unilateral declaration of extension of the territorial seas by nation-states was made by the International Court of Justice in the ***Norwegian Fisheries Case****:*

“The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.”

Nation-states claiming a competence to make unilateral determination of extensions of territorial seas are attempting to determine not only their own interests but also the interests of other states. They invade the historic rights of other states by unilateral extension of their claims. The plea of sovereignty cannot of itself give a country any right to appropriate waters which are not, according to law, its territorial waters any more than the plea of sovereignty can give a country a right to land which is not already its territory.

Straits and Contiguous Zone: In accordance with 1982 United Nations Convention on law of the sea, the coastal states have the rights to establish their contiguous zone which is adjacent to the territorial sea. The article 33 of 1982 Convention provides that the contiguous zone may not extend beyond 24 nautical miles from baseline from which the territorial sea is measured. The establishment of contiguous zone aimed at preventing violation of laws and regulations within its territory. The article 33 paragraphs 1 of the 1982 Convention states that in contiguous zone, the coastal state may exercise the control necessary to: a Prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea; b Punish infringement of the above laws and regulations committed within its territory or territorial sea.

Based on the spirit of the above article, a coastal state has its rights in a contiguous zone to defend its interests by stopping foreign ship supposed to be an offender in order to search, inspect or punish the offenders against its laws and regulations. In addition, in case the suspect foreign ships have intention to evade the responsibility and leave the contiguous zone, the coastal state has the rights to pursuit beyond the limit of contiguous zone.

The article 111 of 1982 Convention stipulated that pursuit must be commenced when the foreign ship or one of its boats is within the internal water, territorial sea or contiguous zone of the pursuing states, and may be only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. In the establishment of the contiguous zone, the coastal state has to take into account the fact of the sea areas, which are, in some case, bordered, by two or more states whose breadth does not exceed twice the breadth of the territorial sea. The Strait of Malacca, for example, used for international navigation is less than 24 nautical miles wide. In this case the bordering states have to undertake their agreement in the delimitation of maritime boundary and to cooperate in the establishment of international sea route pass.

In the contiguous zone, a coastal state "may exercise the control necessary to... prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea." This zone extends from three miles to a maximum of twenty-four miles. As in the territorial sea, regulation in this zone is limited by the right of innocent passage. Coastal states' powers within the contiguous zone are more limited than in the territorial sea. These limited powers include the power to control and prevent infringement of the coastal states "sanitary laws." This phrase is not defined by UNCLOS III; therefore, it may be interpreted either broadly or narrowly. The broad definition of sanitation is the "formulation and application of measures designed to protect public health." This definition is consistent with the breadth of police powers exercised by a state of the United States.

These broad powers allow the state to promulgate laws and regulations to protect the health, safety, and welfare of its citizens. However, the narrow definition of sanitation is the "disposal of sewage." This definition limits coastal states to controlling waste disposal in the contiguous zone.

Origin and Legal Essence of the Contiguous Zone: Strictly defined control rights exercised by the coastal state in the high seas zone contiguous to its territorial sea have been recognized in international practice for more than two centuries. In protecting not only their economic but also their immigration and sanitary interests, and guided by security reasons, states had to establish zones in which they could exercise certain powers with respect to foreign vessels to prevent infringement of, and punish offenses against, their respective internal laws and regulations.

The first state that set a precedent for extending its competence beyond the territorial sea was Great Britain, which enacted the so-called Hovering Acts, allowing capture and control of foreign vessels engaged in contraband. A 1736 Act placed under British jurisdiction vessels engaged in contraband and hovering within a zone of 5 miles. A 1764 Act extended this zone to 6 miles. In 1802 a customs and excise zone was extended to 15 miles. Great Britain later abandoned this practice, and the 1876 Customs Consolidation Act restricted the application of all customs and revenue regulations to the limit of the territorial sea. Having thus waived its claim to a contiguous zone, Great Britain has consistently maintained that under international law no state can claim customs control over any foreign ship on the high seas unless a relevant international treaty with the state concerned has been concluded.

A first unsuccessful attempt at the codification of norms related to the contiguous zone was undertaken at the Hague Conference in 1930. Particularly strong opposition against the right of establishing contiguous zones was mounted by Great Britain, which maintained that such a right would be dangerous and of no avail; dangerous, because in the British view it would inevitably lead to the extension of the territorial sea, which Britain strongly opposed, and of no avail, because the existing rules of international law were sufficient for the regulation of questions pertinent to customs control or the protection of living resources. The British viewpoint was supported by a number of other states, among them the United States, Spain, Japan, and the Netherlands. But the majority of states, i.e., Poland, Belgium, France, and Germany, were in favor of establishing contiguous zones.

It was the Geneva Conference of 1958 that first accomplished the codification of norms with respect to the contiguous zone. The draft prepared by the Commission of International Law envisaged that a 12-mile zone be established to prevent and punish infringement of customs, fiscal, and sanitary regulations of the coastal state. At the same time the Commission failed to recognize the right to establish zones for the protection of security on the ground that the term "security," in view of its exceptional vagueness, opens the way to abuses, and that the granting of such right is not necessary since securing compliance with customs and sanitary regulations of the coastal state would be in the majority of cases quite sufficient to guarantee its security. The commission also disregarded the right of the coastal state to establish the exclusiveness of fishing in the zone, as well as the right to protect its living resources, since it was of the opinion that protective measures applied to a relatively narrow area of the zone would be of insignificant value, whereas in the zone, which is a part of the high seas, the corresponding high seas regulations concerning protection of the living resources should be applied.

At the Conference, Poland submitted a proposal envisaging the possibility of establishing a contiguous zone for the purposes of security. It was adopted, but failed to receive the required majority of votes at the plenary session. The Conference also rejected Yugoslavian, Mexican, Indian, and Canadian proposals concerning the right of establishing a contiguous zone for the purpose of fishing. However, a proposal by Ceylon envisaging control of immigration was adopted.

Finally, Article 24 of the Convention concerning a zone contiguous to the territorial sea is worded as follows:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial is measured.

However, in comparison with common international practice, the said article, although sanctioning in treaty law the very institution of contiguous zone, has at the same time restrictively formulated the catalogue of rights of the coastal state, since it does not stipulate that zones for the purpose of security or exclusive fishing may be established.

In the doctrine, two schools of interpretation of the rights of the coastal state may be discerned.

One, represented first of all by G. Fitzmaurice, not only questions the right of establishing security and exclusive fishing zones, but interprets very narrowly the character and scope of the rights of the coastal state, since it has control rather than jurisdiction. However, the opposite opinion prevailed, namely the one that indicated that there were no grounds for such a narrow interpretation of the rights of the coastal state, since it undertakes not only preventive actions, but has the right to punish infringement of its regulations, and also enjoys the right of hot pursuit if its customs, fiscal, immigration, or sanitary regulations have been violated.

What, then, is the real meaning of the contiguous zone under the Geneva law?

First, that being adjacent to the territorial sea, it remains a part of the high seas where the principle of the freedom of the seas is in force. Second, that whereas the state exercises exclusive and full sovereignty over the territorial sea, restricted only by the right of innocent passage, the contiguous zone is subordinated only to a clearly limited jurisdiction of the state, consisting in the exercise of control over vessels, aimed at preventing infringement of its customs, fiscal, immigration, or sanitary regulations, with the exclusion of the seabed, subsoil, and air space over the zone. Third, that the contiguous zone is bound with the territorial sea not only by possessing a common baseline, but also by the provision that it may not extend beyond 12 nautical miles. The breadth of the territorial sea defines the breadth of the zone. If the maximum breadth of the territorial sea is fixed at 12 nautical miles, the contiguous zone may not be established.

As Zaorski rightly points out, the zone is to ensure to the coastal state the possibility of verifying, in situations when the breadth of the territorial sea is narrower than 12 nautical miles, whether the passage of foreign vessels has an innocent character.

Fourth, that whereas every state possesses a territorial sea, so to say automatically under international law, the contiguous zone must be established as a result of a relevant act of the coastal state.

Concept of Contiguous Zone: In the 1960 Convention on the Law of the Sea, because the majority of states favored adopting provisions concerning the contiguous zone, the Composite Negotiating Text, prepared by G. Pohl for the Geneva session, contained an expedient formulation. It was reiterated without major changes and amendments in subsequent mutations of the texts worked out at the Conference and were finally included in the new Convention as Article 33. It states as follows:

(1) In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal state may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea

(b) Punish infringement of the above laws and regulations committed within its territory or territorial sea.

(2) The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Changes in the concept of the contiguous zone: What is the difference between Article 33 of the Convention on the Law of the Sea and Article 24 of the 1958 Convention? Leaving aside small editorial emendations such as the use of a wider formulation “laws and regulations” instead of only “regulations”, and the introduction of “baseline” in the plural, comparative analysis discloses three essential differences. One, Article 33 does not stipulate that the contiguous zone constitutes a part of the high seas. At the same time no additional qualification has been introduced, since - theoretically - there are a few options possible. For the coastal state may establish an economic zone, a zone of exclusive fishing or of fishing protection, or may desist from establishing any zone, and then the high seas area beyond the limits of territorial waters retains its former status. Two, the UN Convention on the Law of the Sea establishes as the farthest permissible limit of the zone, not 12 but 24 nautical miles from the baselines of the territorial sea, and three, Article 33 of this Convention lacks paragraph 3 of Article 24 of the Geneva Convention, dealing with the delimitation of zones between the states whose coasts are opposite or adjacent to each other.

The scope of control exercised in the contiguous zone is identical in both conventions. It encompasses preventing and punishing infringements of customs, fiscal, immigration, and sanitary laws and regulations of the coastal state within its territory or territorial sea. The earlier problem of providing for exclusive fishing zones has become immaterial since the coastal state has acquired the right of establishing an exclusive economic zone.

Criminal Jurisdiction in the Contiguous Zone: The issue of criminal jurisdiction in the event of an incident that occurred in international waters is a classical topic of international maritime law. Since the **Lotus case**, States have for a long time tried to tackle the issue in such a way as to guarantee their rights of sovereignty over non-governmental ships flying their flag.

Against the above background, a recent case decided by the Indian Supreme Court prompts some perplexity. In particular, doubts arise as to the interpretation and application of the UNCLOS provision pertinent to the coastal state criminal jurisdiction over incidents that occurred in international waters. In fact, in this case two Italian marines have been implicated by a coastal state court in the killing of two Indian fishermen in the Indian contiguous zone during counter piracy operations.

First and foremost, the Supreme Court addressed the issue of the locus commissi delicti. Since the incident occurred at 20.5 nautical miles off the coast of Kerala, under the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act (so-called Maritime Zones Act, ‘MZA’) and UNCLOS it was found to fall within the contiguous zone. Neither the claimant nor the respondent challenged this allegation.

Accordingly, one may consider that the relevant UNCLOS provisions confer exclusive jurisdiction over the incident to the Italian authorities. Nonetheless, the Court provided a different interpretation of the law of the sea in this matter. Inexplicably, the Court stated that:

"The incident took place within the Contiguous Zone over which, both under the provisions of the Maritime Zones Act, 1976, and UNCLOS 1982, India is entitled to exercise rights of sovereignty. However, as decided by this Court in the ***Aban Loyd Chiles Offshore Ltd. Case****, Sub-section (4) of Section 7 only provides for the Union of India to have sovereign rights limited to exploration, exploitation, conservation and management of the natural resources, both living and non-living [...] in the Exclusive Economic Zone."*

As such, the Indian court maintained that India was entitled to exercise its jurisdiction over the case. International legal literature deems that a contextual interpretation of Articles 33 and 55 UNCLOS 10 provide that the contiguous zone is part of the EEZ.

In the EEZ, States have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent the seabed and of the seabed and its subsoil." As the contiguous zone is part of the EEZ, within 24 nautical miles off the coast a State also has a right of control so as to prevent and punish "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea". It could arguably be said that the "right of control" is a sovereign right and not a right of sovereignty as one exercised on the territorial waters by the coastal State.

The incident did not fall within the scope of Articles 33 and 56 UNCLOS, the relevant provision on jurisdiction should have been found under Part VII of the Convention as provided by Article 58(2). In particular, Articles 94 (i)(b), 94(7) and 97 UNCLOS provide relevant rules which recognize the exclusive jurisdiction of the flag State. The Court's misinterpretation of EEZ regulation is further worsened by the fact that the Court did not consider the Indian reservation to Part V UNCLOS, which provides that:

"The Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State."

India could have invoked the abovementioned reservation as a ground for asserting an Italian international wrongful act. As such, India could have suspended Article 97 UNCLOS as a countermeasure, neglecting Italian exclusive jurisdiction or, at least, countering its claim until the trial. In fact, the reservation could be pleaded as long as some uncertainty remained on the title upon which the marines were acting in the Indian contiguous zone. If they were acting as private contractors, the reservation would apply. Otherwise, if they were acting as part of counter piracy operations authorized by UN Security Council Resolution S/RES/18 97 (2009), the reservation could not apply due to Article 103 of the UN Charter, which provides that obligations arising directly or indirectly from the Charter shall prevail over any other international agreement.

In the light of the above, it is possible to at least maintain that the Supreme Court mistook the UNCLOS provision concerning the territorial waters, the contiguous zone and the EEZ, in spite of the plain text of the Convention. This misunderstanding weakens the whole reasoning of the decision, as it excludes the applicability of high sea regulation. As mentioned above, Article 97 of UNC LOS, entitled *"Penal jurisdiction in matters of collision or any other incident of navigation"*, would have been a relevant ground to base the Italian jurisdiction in this case, as the claimant maintained, against the Lotus principle that the respondent considered to be good law.

The principle requires a brief analysis. The so-called Lotus principle was stated by the Permanent Court of International Justice (PCIJ) in 1928 in the Lotus case, which involved the collision of a French steamship, the Lotus, and a Turkish vessel, the Boz-Kourt, in the high seas off the coast of Turkey. As the Turkish authorities arrested and prosecuted the French Master of the Lotus, France lodged a claim before the PCIJ stating that Turkey had breached article 15 of the Convention of Lausanne respecting Conditions of Residence and Business and Jurisdiction of 24 July 1924. The Court ruled that Turkey had not acted in conflict with the relevant rules of international law, stating that:

"Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."

The aforementioned reasoning, also known as in dubio pro libertate, was the cornerstone of international law until recently, when the cooperation principle stepped forward; in particular, it was the leading case that the International Law Commission considered in drafting article 35 of the 1958 Geneva Convention on the High Sea and Article 97 UNCLOS.

While the Court rejected the Lotus argument, stating that it had "to some extent, been watered down by Article 97 of UNCLOS, 1982" it agreed with the respondent that "article 97 of UNCLOS [...] dealt with the collision of shipping vessels and was unconnected with any crime involving homicide and therefore "an incident of navigation as intended in the aforesaid Article, cannot [...] involve a criminal act in whatever circumstances". As such, the Court ruled that "the expression 'incident of navigation' in Article 97 cannot be extended to a criminal act, involving the killing of two Indian fishermen on board an Indian fishing vessel". This reasoning is not convincing for a number of reasons.

The "incident of navigation" formula appears only in Articles 94(7), 97 and 221 UNCLOS. In particular, a contextual reading of Articles 94(7) and 221 qualifies an "incident of navigation" as a specific kind of marine casualty, which is a serious incident occurring at sea which could possibly result in injuries or loss of life, analogous but separated from collision. The mentioned interpretation is grounded on Article 94(7), which provides that:

"Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment."

Be this as it may, the circumstances of the case were easily subsumable under Article 97 UNCLOS, which is a lex specialis provision with regard to “penal jurisdiction in matters of collision or any other incident of navigation”. Therefore, the Court’s above-mentioned statement on the inapplicability of the notion of “incident of navigation” to homicide appears to have no grounds in the UNCLOS. Indeed, such an interpretation conflicts with the principle of effective interpretation ut res magis valeat quam pereat, according to which:

“Interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”

The Indian Court could have found other ways to exclude Article 97 UNCLOS. First of all, they could have maintained their mistaken argument, according to which India can exercise rights of sovereignty over the contiguous zone. As Article 97 provides that its territorial scope is only the high seas, the Court could have stated that the relevant provision under a teleological approach was Article 27 UNCLOS. Alternately, the Supreme Court could have argued that the use of the word "incident" in Article 97 excludes malicious crimes from its scope of application. Yet the judges did not follow either of these approaches.

Therefore, the circumstances of the case clearly fall within the scope of application of Article 97. As both Italy and India are member States of UNCLOS, the latter should have recognized Italian exclusive jurisdiction on the matter, invoking its right to cooperation in the conduct of any inquiry under Article 94(7) UNCLOS.

Straits: One of the most striking illustrations of the burdens which an extension of the territorial sea from three to six miles (or to twelve miles) would place upon the freedom of the seas is the fact that of more than 100 important international straits which are now high seas, more than fifty would be reduced to territorial seas if the six-mile rule replaced the three-mile rule, and all would become territorial waters under a twelve-mile rule. For example, it has been pointed out in the case of the Straits of Gibraltar that if the territorial sea is extended to six miles, the entire strait will become a territorial sea with no area of high seas remaining.

While it can be argued that all states will still have the right of innocent passage through such international straits from one part of the high seas to another under the ***Corfu Channel Case***, and under provisions of the Convention on the Territorial Sea and the Contiguous Zone, the fact remains that the right of innocent passage is often viewed as a limited right subject to the “laws and regulations enacted by the coastal state” and subject in special circumstances to temporary suspension. Moreover, one of the greatest burdens which the transformation of high seas into territorial seas in more than 100 international straits would impose upon all states of the world, coastal and non-coastal, is to preclude the right to fly over the areas. Airspace over the territorial sea does not afford the right of “innocent passage,” meaning that states which now fly over the high seas of these international straits would be burdened by having to request permission of the coastal states to do so, or fly more circuitous, and therefore more costly, routes.

The Development of A Straits Regime: With the gradual encroachment of coastal state jurisdiction over waters adjacent to the coastline, the right of passage by shipping through narrow stretches of waters such as straits became increasingly important. The debate over the status of certain straits in the law of the sea paralleled the debate which took place over the freedom of the seas. Maritime states argued that they were entitled to retain the freedom of the seas so that their merchant ships could freely trade without navigational restrictions being imposed upon them. Coastal states argued that they were entitled to exercise some offshore jurisdiction over their immediately adjacent waters for the purpose of security and enforcement of certain laws. This debate became acute in the case of straits, which were seen as “choke points”; passage through which ships relied upon to gain safe and speedy access to important maritime routes. If, as a consequence of extending an adjacent territorial sea, coastal states could exercise complete jurisdiction over straits, there would be a considerable impact on the traditional high seas freedom of navigation which previously existed in straits' waters. Eventually a compromise came in the development of the right of “innocent passage” by ships through the territorial sea of coastal states. Such passage was not to be refused as long as it was “innocent.” Also, specific navigation regimes which sought to balance navigation rights with those of the adjacent strait state were negotiated for some straits.

The Corfu Channel Case: Despite various attempts at codifying the law on straits no satisfactory resolution was reached with the result that customary international law dominated. In 1949 customary international law on passage through straits was tested before the International Court of Justice ("ICJ") in the Corfu Channel Case. Asked to determine whether British warships had a right of “innocent passage” through the North Corfu Channel controlled by Albania, the ICJ discussed the general principles that applied with respect to passage by ships through straits. The Court was prepared to uphold the right of innocent passage through "straits used for international navigation.

In this particular instance, the decisive factors were the geographical criterion that the strait connect two parts of the high seas and the functional criterion that the strait be used for international navigation. As to the volume of international shipping which passed through the strait, the Court's only comment in response to the detailed figures presented to it on this point was that the Corfu Channel “has nevertheless been a useful route for international maritime traffic.” Subsidiary matters of importance were the Strait's existence as a frontier between Albania and Greece that it was wholly within the territorial waters of those States, and its significance to Greece as a route to the port of Corfu. The decision by the ICJ clarified the existing customary international law on passage by shipping through straits. While specifically dealing with warships, Corfu Channel does conclusively establish the right of innocent passage by all shipping through straits used for international navigation.

The 1958 Convention on the Territorial Sea and Contiguous Zone : The 1958 Geneva Conference on the Law of the Sea agreed upon the Convention on the Territorial Sea and Contiguous Zone (the the territorial sea. The Convention, which recognized for the first time in a major multilateral treaty that the sovereignty of states extended over the territorial sea, also specifically recognized the right of innocent passage. Article 14 of the Convention recognized that the ships of all States could enjoy the right of “innocent passage” through the territorial sea, such passage being defined to mean:

“Navigation through the territorial sea, is for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.” Passage that was "innocent" was interpreted to mean one

that was not “prejudicial to the peace, good order or security of the coastal State.” Yet, Article 16(3) provided that a coastal state could temporarily suspend innocent passage “if such suspension is essential for the protection of its security.” “International straits” were the only exception to this rule with Article 16(4) providing for a non-suspendable right of innocent passage through the territorial sea of an international strait which was used for international navigation and met certain geographic criteria.

Despite the effort in the 1958 Geneva Convention to create a regime of innocent passage in the territorial sea, it left many questions regarding straits unanswered. The most important of these was what exactly was an "international strait"? The only reference in the Convention was that there be passage by ships from one maritime zone to another. Whether this referred to an application of the Corfu Channel test, or meant that it was necessary to ascertain whether international shipping regularly used the strait was uncertain. It was because of this and other uncertainties in the TSCZ concerning straits that customary international law on passage by shipping through straits continued to develop. Consequently, when the Third United Nations Conference on the Law of the Sea convened in 1973 passage through straits was one of the important items on the agenda.

1982 UNCLOS: When the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") was eventually concluded, there was for the first time multilateral agreement on a territorial sea extending out to at least 12 nautical miles from the baselines of the coastal state. As noted above, a major consequence of this recognition of a 12 mile territorial sea was that a much greater number of straits would now potentially be subject to overlapping territorial sea claims by strait states.

The Conference was therefore forced to deal with the right of passage through territorial seas in straits in much greater detail than in the TSCZ. What resulted was the codification of a more detailed regime of innocent passage through the territorial sea than had existed in the TSCZ and the creation of a new regime of transit passage through international straits. Consistent with the importance attached to the new regime by the Conference, a whole Part of UNCLOS, Part III, is devoted to “Straits used for International Navigation.” It is made clear in the Convention, though, that this new regime does not affect the legal status of the waters within straits or the exercise by coastal states bordering straits of their sovereignty or jurisdiction over the waters, seabed or subsoil.

Part III of UNCLOS recognizes four types of passage through International straits. They are:

1) the right of “transit passage” through straits used for "International navigation" which connect one part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone;
2) “Innocent passage” through straits used for international navigation formed by the mainland and an island of the state bordering the strait where there exists to seaward a route through the high seas or an exclusive economic zone of similar convenience;
3) normal freedoms of navigation and overflight as prescribed in UNCLOS in straits used for international navigation through which there exists a high seas or exclusive economic zone corridor; and

4) the legal regime in straits created by previously negotiated longstanding international conventions regarding passage by shipping through those straits, which conventions are not affected by Part III.

The most important impact of these provisions is the creation of the new "transit passage" regime which is defined in Article 38(2) as being:

"The freedom of navigation and over flight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."

Other provisions dealing with transit passage outline the duties of ships and aircraft during transit passage, the designation of sea lanes and traffic separation schemes by the coastal state, and the applicability of transit passage laws adopted by coastal states bordering straits. UNCLOS also ensures that transit passage will be unimpeded and provides in Article 44 that:

"States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or over flight within or over the strait of which they have knowledge. There shall be no suspension of transit passage."

It can therefore be seen that the regime of passage through straits by international shipping has expanded considerably from a single rule of customary international law to a very detailed series of rules which apply to differing geographical circumstances affecting international straits. It should not be thought that the new regime of transit passage was a codification of existing international law. It was rather a progressive development in the law of the sea designed to deal with the consequences of an expanded territorial sea, with, as one commentator argued, a "new, unique and strange principle that is not reflective of customary law." UNCLOS created a new straits regime.

The UNCLOS exceptions to transit passage: It should be recalled, though, that there are exceptions to the application of the transit passage regime. Under Article 38(1), an exception to the transit passage regime exists if the strait is formed by an island of a State bordering that strait and its mainland, and "there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics." In these cases passage through the strait is governed by a regime of non-suspendable innocent passage rather than transit passage.

Continental Shelf: The concept of the establishment of the continental shelf in the international law of the sea is a result of the activities of exploitation natural resources in the seabed of the developed countries. For the purpose of preventing the danger of the division of the continental shelf, the International Law Commission was tasked to prepare the draft in the purpose of controlling such exploration and exploitation. As a result of the work of Commission and the discussion at the conference, the Convention on the Continental Shelf was adopted in 1958 in Geneva and get into force in 1964. The coastal states are given the sovereign rights to explore and exploit the natural resources of the seabed and subsoil in the submarine area adjacent to the mainland or islands, but outside the area of territorial sea, to a depth of 200 meters, or beyond that limit, to a point where the exploitation of such resource become impossible. In accordance with the 1958 Convention, the outer limit of the continental shelf is not defined precisely. It depends on the rate of scientific and technological progress in the exploitation of resource in seabed and ocean floor. The definition of continental shelf in the convention is far from adequate.

There are three distinct problems inherent in any discussion of the continental shelf. The first concerns the seas above the continental shelf, the second concerns the continental shelf itself, and the third pertains to sedentary fisheries.

As Gutteridge noted : *"The definition is bound to result in uncertainty; and may lead to disputes between states in cases where the same continental shelf is adjacent to the territories of opposite or adjacent states, or, at the least to difficulties in fixing by agreement the boundaries of such shelves."*

Moreover, exploitability is a subjective criterion. It may well be asked, how is to be determined that a particular submarine area beyond the depth of 200 meters admits of exploitation. At the third United Nations Convention on the Law of the Sea, the long discussion of the opposite positions on the delimitation of the outer limits of the continental shelf came closer together through the a reasonable compromise which was proposed that the coastal state have the rights to extend its jurisdiction over the continental shelf beyond the exclusive economic zone on the condition that parts of the benefits derive from the exploitation of mineral resources beyond the 200 nautical miles be shared with the international community.

According to the article 76 (1) of 1982 United Nations Convention, the continental shelf of a coastal state comprises the seabed and subsoil thereof extending beyond its territorial sea throughout the natural prolongation of it land territory up to the outer edge of the continental margin or to a distance of 200 nautical miles from the baseline from which the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. Where the outer edge of the continental shelf margin extends beyond 200 nautical miles from baseline, the outer boundary of its shelf is to be delimited by the coastal state by either of the outermost fixed points at each of which the thickness of sedimentary rock is at least 1 percent of the shortest distance form such point to the foot of the continental slope, or the fixed point not more than 60 nautical miles from foot of the continental slope, and to define these points by coordinate of longitude and latitude. However, according to the article 76(5), if the underwater edge extends more than 200 nautical miles from coastline the outer limit may not exceed 350 nautical miles from baselines of territorial water or 100 nautical miles from 2,500 meters isobaths (line connecting depth of 2,500 meters). On the submarine ridge, other than submarine elevation that are natural components of the continental margin, such as its plateau, rise, caps, blank and spurs, only 350 miles applies (article 76). The information on the limits of the continental shelf where it extends beyond 200 nautical miles is to be submitted to the Commission on the Limits of Continental Shelf composed of experts in geology, geophysics and hydrographic, which is formed by coastal state to the convention.

The Commission may issue recommendation to coastal state on the delimitation of the outer boundary of continental shelf, and the limits established by a state on the basis of these recommendations shall be final and binding. Any exploitation of non-living resources of the continental shelf beyond 200 nautical miles from the baseline is subject to make payment or contribution in kind through the Authority in order to distribute them, on a basis of equitable sharing criteria, to the State Parties to this Convention (article 82). However, the action of the Commission shall not prejudice matters relating to the delimitation of boundaries between the States with opposite or adjacent coasts.

The Commission must, therefore, avoid dealing with submissions that may prejudice matters relating to the delimitation of boundaries between States. In accordance with the rule of procedure of the Commission, there are some clauses dealing with disputes that may arise in connection with the establishment of outer limits of the continental shelf, such as in case where a land or maritime dispute exists, the Commission shall not examine and qualify a submission made by any of the states concerned in the dispute. However, the Commission may examine one or more submission in the areas under dispute with prior consent given by all States that are parties to such a dispute.

Under the 1982 Convention, the coastal state exercises sovereign rights over the continental shelf in the exploration and exploitation of its natural resources. The coastal state has exclusive rights in the sense that the other states may not explore or exploit in the continental shelf unless there is express consent of the coastal state.

In addition, the rights of coastal state over the continental shelf do not depend on occupation, effective or notional, or any express proclamation (article 77). However, this provision indicates that the exercise of rights of the coastal state over the continental shelf shall not infringe on freedom of navigation, or on other rights and freedom of foreign states. As for the rights to lay submarine cables and pipelines of the other states, the coastal states are entitled the rights to establish conditions for cables and pipelines entering its territory or territorial sea, or its jurisdiction over the construction of those cables and pipelines (article 79). The Convention acknowledges that, in case this conditions or regulations are not respected, the coastal state may refuse to allow the laying underwater cables and pipelines.

The Convention allows the coastal state to process exclusive rights to permit and regulate all types of drilling on its continental shelf, and to take some measures to prevent, reduce and control marine pollution (article 81). The dumping on the continental shelf of wastes or debris of destroyed ships, aircrafts or others structures is possible with the consent of the coastal state. So, the laws and regulations of the coastal state limit the exercises of rights of the other states on the continental shelf. Besides the above precise limitation of and the increase the rights of the coastal state over the continental shelf, the convention contains articles on the settlement of disputes over the delimitation of continental shelf between states with opposite or adjacent coastlines. The article 83 provides that the limitation of the continental shelf between states with opposite or adjacent coastlines shall be effected by a agreement on the basis of international law as referred to the article 38 of the statute of International Court of Justice, in order to achieve an equitable solution. In case there is no agreement can be reached within a reasonable period of time, the states concerned to resort to the procedures provide for in Part XV of this convention.

Exclusive Economic Zone: The concept of the Exclusive Economic Zone is the most important pillars of the United Nations Convention on the Law of the Sea. The Convention contains the articles on legal regime of the Exclusive Economic Zone; the limitation of the Zone, the sovereign rights of the coastal state to manage the zone in good faith; the regard for the economic interests of the third states; regulations of the certain activities in the zone, such as marine scientific research, protection and preservation of the marine environment, and the establishment and use of artificial islands; freedom of navigation and over flight; the freedom to lay submarine cables and pipelines; military and strategic use of zone; and the means of settlement of disputes.

As with the development of other norms relating to State interaction in ocean space, the concept of the exclusive economic zone reflects the "interplay of economic, political and strategic interests which characterizes the problems of the law of the sea in the twentieth century."[15]

In accordance with the article 57 of 1982 Convention on law of the sea, the Exclusive Economic Zone is an area adjacent to the territorial sea and it shall not extend beyond 200 nautical miles from baseline where the territorial sea is measured. The Convention gives the coastal states the sovereign rights over natural resources and control of resources related to activities in the zone, and preserves for the other states the freedom of navigation, over flight and the laying submarine cables and pipelines. The coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone (article 56).

Moreover, the coastal state has exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installation and structures; and has jurisdiction over such artificial islands, installation and structures. The coastal state has broad regulatory and management power to conserve and utilize the living resources on the Exclusive Economic Zone. With respect to the conservation, the coastal state has to design some measures to ensure that the populations of harvested species are maintained or restored at a levels which can produce the maximum sustainable yield as qualified by relevant environmental and economic factors (article 61). With regard the utilization, the coastal state has the obligation to promote the objective of optimum utilization of the living resources. The coastal state is obliged to determine its capacity to harvest the living resources. If the coastal state does not have capacity to harvest the entire allowable catch, it could, by agreement, give access to the other states to the surplus of the allowable catch (article 62). The land locked states and geographically disadvantaged states are given the rights to participate, on an equitable basis, in the exploration of an appropriate part of surplus of the living resources in conformity with the regulations and management laws designed by the coastal state.

They also have the rights to overflight, lay submarines cables and pipelines and other internationally lawful uses of the seas on the zone (article 58). The convention also has articles on the conservation of the Stocks such as, straddling stocks, anadromous stocks, catadromous species, sedentary species, and highly migratory species. With respect to the marine mammals, the coastal states and other organizations have the rights to prohibit, limit, or regulate the exploitation of this species more strictly. In exercising its sovereign rights and in ensuring the sustainable conservation of living resources, the coastal state is empowered to take some measures of law enforcement such as boarding, inspection, arrest and judicial proceedings over the foreign fishing vessels (article 73).

[15] D.W. BOWETT, LAW OF THE SEA 1 (1967).

As the other zones, Convention on the Law of the Sea establishes the articles on the delimitation of the Exclusive Economic Zone between the states with opposite or adjacent coastlines. According to the article 74, the delimitation of the Exclusive Economic Zone between the states with opposite or adjacent coastlines shall be effected by agreement on the basis of international law. In case there is no agreement, the states concerned could follow the procedure provided in Part XV. With regard the fisheries disputes concerning the interpretation and application of the convention, the states concerned are to be settled by a binding form of disputes settlements (article 273).

The EEZ is an area extending from twelve miles to a maximum of two hundred miles from the coastline. In this zone, a coastal state has sovereign rights of exploration, exploitation, conservation, and management of natural resources. These include living and non-living resources of the sea-bed, subsoil, and superjacent waters, e.g., oil, gas, and fisheries. In addition, a coastal state has sovereign rights regarding the exploitation and exploration of energy production by water, currents and wind.' Within the EEZ, a coastal state has limited jurisdiction concerning the performance of marine scientific research, the protection and preservation of the marine environment, and the use of artificial islands and structures. A coastal state has the exclusive right to construct, authorize and regulate the construction and use of such offshore structures. A coastal state cannot require special design or construction standards for vessels operating within the state's EEZ.

The Evolution of the Eez: In 1958, the United Nations recognized the need for international rules to define coastal states' territorial boundaries. The first United Nations Conference on the Law of the Sea (UNCLOS I) convened in Geneva to meet that need. Participants in the conference focused on four topics:

(1) the territorial sea and the contiguous zone; (2) the high seas; (3) the continental shelf; and (4) fishing and conservation of the living resources of the High Seas.

Two years later, the Second United Nations Conference on the Law of the Sea (UNCLOS II) again sought to determine the breadth of both the territorial sea and the contiguous zone. The participants also discussed the establishment of a six-mile zone beyond the territorial sea wherein a coastal state would have exclusive control over fishing. The proposal failed only by a one-vote margin, despite strong opposition to the proposal by major fishing states desiring a minimum twelve-mile territorial sea. Countries such as Chile, Ecuador, and Peru desired two hundred mile territorial seas. Like UNCLOS I, UNCLOS II adjourned with little progress made.

Following UNCLOS II, Dr. Arvid Pardo, the Head of the Permanent Mission of Malta to the United Nations, introduced an agenda to the United Nations calling for a declaration and treaty regarding the purposes and uses of the seabed, ocean floor, and natural resources located therein. This agenda resulted in the passage of the "Pardo Resolution," which established an ad hoc committee to study the uses of the sea bed and ocean floor. This committee grew into a standing committee, which became the preparatory Committee for the 1975 United Nations Convention on the Law of the Sea (UNCLOS III).

Unlike UNCLOS I and UNCLOS II, UNCLOS III saw a compromise begin to emerge at the first two sessions. An informal consensus among the delegates arose that included the following:

(1) twelve-mile territorial seas; (2) two hundred mile economic zones; (3) coastal states' rights to the continental margin beyond two hundred miles; and (4) a new concept for measuring the baseline from which islands would measure their territorial boundaries. Even with this growing consensus, a majority decision could not be reached, and the first two sessions of the convention were dismissed with little progress towards an international treaty. Delegates began to fear that failure to reach an international agreement would result in coastal states taking unilateral actions that would disrupt the work of the convention. The final text of UNCLOS III emerged in the eighth session of the convention.

On April 30, 1982, UNCLOS III was adopted. The United States and three other Western European countries voted against the measure because of concerns about deep-sea mining provisions. Eastern European countries abstained from the voting for the same reason. The treaty was opened for signature on December 10, 1982, but the United States, Great Britain, Italy, Luxembourg, and West Germany refused to sign because of the deep-sea mining provisions. Although adopted in 1982, UNCLOS III was not ratified until February 18, 1994. It was on this date the requisite number of countries (sixty one), none of them industrialized, ratified UNCLOS III. Subsequently, according to the terms of UNCLOS III, the treaty became effective on November 16, 1994, and the provisions establishing both the reach of the EEZ and the activities that may be regulated in the EEZ became binding on the countries that ratified the treaty.

Despite the United States' disagreement with the convention, in 1983, President Reagan issued Proclamation 5030 establishing an EEZ for the United States, which mirrored the zone described in UNCLOS III. Thus, the fear of the UNCLOS III delegates-unilateral action by nation states without a binding agreement-was realized. Like the convention, Proclamation 5030 created an EEZ extending two hundred miles in which the United States had sovereign rights over exploitation matters, such as fisheries and deep-sea mining. In addition, the United States claimed jurisdiction over all matters concerning the protection and preservation of the marine environment in this zone. In 1988, the United States again took unilateral action to extend its sovereign rights. President Reagan extended the breadth of the territorial sea from three miles to twelve miles. President Reagan's justification for this extension was national security. This extension was significant because it raised questions about the reach of a state of the United States' sovereignty in the area between the old three-mile territorial sea and the new twelve-mile territorial sea.

Types of Jurisdiction Claimed or Recognized in the 200 Mile Zone: Despite the clear agreement that some jurisdictional zone roughly equivalent to the EEZ is permitted by international law, no clear consensus has arisen from actual state practice regarding the exact limits of jurisdiction a coastal state may exercise in this zone. This section discusses the various rights and duties that may emerge as the international law regime of the EEZ. In particular, the regime set out in the LOS Convention will be reviewed. The rights and duties the Convention would place on states acting in the EEZ are compared to present international law, including state practice. State practice as demonstrated by domestic laws and public statements of officials will be considered relevant if it concerns the ocean area adjacent to the coastline but seaward of the 12-nautical-mile limit regardless of the term which the coastal state uses to identify the area (e.g., fishery zone, patrimonial sea, territorial sea, EEZ, continental shelf). While the title given to the area may help to characterize the claims made to the area, the important issue is really the juridical content of the rights that a coastal state may exercise in the zone. Unfortunately, information on state activities in these zones is difficult to obtain. One source of evidence is the text of domestic laws setting out coastal states' offshore claims. A considerable number of those claims have been scrutinized for that purpose.

There is reason to believe, however, that the texts may not always reflect the actual behavior of nations in the oceans. For example, a large number of states which claimed an EEZ during the Law of the Sea negotiations may have done so to influence the course of the negotiations. They may have had no real intention to carry out all the claims made in their domestic laws. Unfortunately, direct information about how these claims have been actually enforced has not been obtained. A number of states have refined their claims through domestic regulations and bilateral agreements. These materials are also not readily available but can be important to a full understanding of national behavior. Access to these data would require a very large effort that has not yet been undertaken by any person or organization. Accordingly, by necessity the analysis below relies primarily on textual claims of jurisdiction. To the extent that actual practice is unknown by the international community it is difficult to give that practice a juridical effect if it conflicts with publicized claims.

High Seas: Article 1 of the 1958 Convention on the High Seas states: "The term high seas mean all parts of the sea that are not included in the territorial sea or in the internal waters of a State." High Seas are the seawater beyond the limit of the national jurisdictions and excluded from the state sovereignty. It is not included in the territorial sea, contiguous zone, exclusive economic zone, and archipelagic water. The high sea is open to all states, whether coastal or land locked states and is an area reserved for peaceful purpose. All states have freedom to conduct all types of activities with due regard for the interests of the other states. Moreover, all states have duty to conserve and manage the living resources in the zone, and to combat and prevent the international transnational crimes at sea.

In accordance with article 87 of the 1982 United Nations Convention, the freedom of the high seas consists of:

(1) Freedom of navigation;
(2) Freedom of overflight;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to construct artificial islands and other installations permitted under international law;
(5) Freedom of fishing; and
(6) Freedom of scientific research.

The freedom of navigation is the most important for all merchant and naval vessels. They have the rights to sail ships flying their flag in the high sea and participate in navigation by granting its nationality to vessels which are registered in their territory and which fly their flag. Warships in accordance with this Convention have on the high seas completely immunity from jurisdiction of any state other than the flag state. At the meantime, the Convention requires the flag state to exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (article 94). In doing so, every state shall take some measures, which conform with generally accepted international regulations and practice, to ensure the international order or safety at sea, such as maintain the registration of ship; construction, equipment and seaworthiness of ships; manning of ships, labor conditions and the training of crews; the use of signals, the maintenance of communications and the prevention of collisions.

Furthermore, the Convention calls for the cooperation of all states for the purpose of conservation and management the living resources. The states have to take some measures to manage the resources such as, the establishment of sub regional or regional fisheries organizations, provide information on the fishing statistic, the effect of harvested species. In addition, the states have duty to cooperate in combating against piracy, trafficking in illegal narcotic drugs or psychotropic substances, and also against the unauthorized broadcasting from the high sea (article 99, 100, 108 and 109).

Maritime Law Enforcement: A question that surfaced in past generations whether human rights apply on the water-is no longer the salient issue. Rather, courts, governments, and deployed naval forces are now confronting the issue of harmonizing human rights with the inherent challenges of high seas maritime law enforcement interdictions. It is an urgent issue today not just because of increased judicial attention or because certain terms that have no uniformly, internationally accepted definition are populating bilateral and multinational documents. It is an urgent issue because no consistent approach to harmonizing human rights obligations with operational exigencies necessary in maritime law enforcement exists.

Medvedyev v. France, a European Court of Human Rights case, highlights the struggle of balancing human rights obligations with maritime law enforcement operations. To combat illicit high seas activity, maritime law enforcement could employ multiple distinct, intersecting, and complementary lines of effort: Action prior to an interdiction, right of approach/boarding, detention, and the assertion of jurisdiction. Acquiring information that supports situational awareness prior to a boarding is a key enabler of effective maritime law enforcement. Such capabilities may include “radar, photo, audio and video monitoring…that supports the interception of radio and cellular phone communications, maybe e-mails.”

A maritime interdiction is fundamentally different from operations on land and includes unique environmental factors-such as unpredictable weather and sea state conditions-as well as other distinctive operational considerations. “Weather is more punishing on the open water because it comes from above and below,” according to a mariner, adding that severe weather on the high seas is similar to “experiencing an earthquake and a hurricane at the same time.” Issues for a boarding officer operating in this challenging environment could include safely inspecting containers on a moving platform, ensuring connectivity while on a vessel of interest, as well as inspecting the ship's crew, its cargo, and potentially, the vessel itself. Interdictions present yet another layer of complexity if cargo, such as cocaine, is jettisoned, or if the vessel is scuttled or intentionally set on fire. Though uncommon, maritime law enforcement officers have been killed and seriously injured during boardings."

Other maritime law enforcement challenges include the frequent lack of back-up support and the ability of suspect vessels to evade detection because of their profile, low radar signature, or nighttime operations. Even after addressing operational (and potentially significant logistical, materiel, and medical) issues, legal considerations include: Resolving jurisdictional issues; ensuring an evidentiary chain of custody on a platform that may not have a secure storage space; obtaining witness statements and conducting other aspects of an investigation, possibly while underway; and determining whether to arrest or detain a suspect. Authorities must also identify the port to take suspects to, ensure prosecutorial interest (possibly while underway), and confirm the venue for prosecution. Judicial recognition of the unique maritime operating environment and its distinctive response spectrum is crucial to effective maritime law enforcement and legal accountability.

A. Applicable Human Rights Law: Human rights law does not reside in one document but, rather, is drawn from multiple accords, regional and international instruments, judicial rulings, and national policy. "Soft law" adds yet another layer of complexity to developing human rights norms." This Part addresses institutions-primarily regional tribunals- and human rights provisions most operative in maritime law enforcement operations and discusses the United Nations (U.N.) system of protection of human rights. Identifying human rights obligations across an intricate array of instruments, multinational tribunals, and institutions represents the starting point for assessing how those obligations intersect with maritime law enforcement operations.

The U.N. Human Rights Council, along with its Universal Period Review process and various committees (e.g., the Human Rights Committee) that supervise numerous conventions are a relatively recent development. A 2006 U.N. General Assembly Resolution acknowledged and recognized "that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being [and] that development, peace and security and human rights are interlinked and mutually reinforcing.

Authorities on human rights obligations include the Universal Declaration of Human Rights (UDHR), the Convention Relating to the Status of Refugees, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT), among others. Other relevant instruments include the European Convention on Human Rights (ECHR), the American Convention on Human Rights (Pact of San Jose), the Africa Charter on Human and Peoples' Rights (Banjul Charter), the Arab Charter on Human Rights," and the ASEAN Human Rights Declaration.

In addition to multinational tribunals, domestic courts are also addressing human rights in prosecutions resulting from maritime law enforcement interdictions. Key considerations in judicial rulings in the maritime law environment include determining extraterritorial jurisdiction and interpreting, among others terms, deprivation of liberty, due process, promptness, wholly exceptional circumstances, humane treatment, right to life, and non-refoulement.

The current legal and judicial landscape, which includes multiple conventions and court rulings, represents a broad and uneven array of authorities that impose varying human rights considerations in maritime law enforcement in drug trafficking, piracy, maritime migration, and fisheries enforcement.

B. Drug Trafficking: Several cases have examined human rights in the context of maritime law enforcement operations that successfully interdicted drug traffickers. The most prominent case is **Medvedyev v. France**, where the European Court of Human Rights addressed human rights following a French court's conviction for drug trafficking. The Court ruled on two issues: The right to liberty and security, and promptness. Medvedvev involved crew members acting as traffickers plying the high seas on a Cambodian-flagged merchant ship (Winner) with the "intention of transferring [contraband] to speedboats off the Canary Islands for subsequent delivery to the coasts of Europe." Responding to a French request, Cambodia authorized French authorities "to intercept, inspect and take legal action" against Winner."' Because Cambodia was not a party to the Vienna Drug Convention," the French court correctly treated their consent as an ad hoc agreement."" French authorities subsequently interdicted Winner on the high seas, seized 100 kilograms of cocaine, and detained the crew (characterized as a "de facto restriction" on their movement) during their thirteen day voyage to Brest, France. "Because of its poor state of repair and the weather conditions, the ship was incapable of speeds faster than five knots."

A French court found the six suspects guilty of drug smuggling. The convicted traffickers then brought proceedings before the European Court of Human Rights challenging the legality of their detention at sea and the delay involved in bringing them before a court under ECHR articles 5(1) (the right to liberty and security) and 5(3) (the right to be brought promptly before a judge or other authorized officer).

The European Court of Human Rights first addressed whether Cambodia's diplomatic note provided France with authorization to intercept, inspect, and take legal action. The Court held that "the fate of the crew was not covered sufficiently clearly by the note and so it is not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a 'clearly defined law' within the meaning of the Court's case-law." Legal commentators have appropriately characterized this portion of the ruling as astonishing and inconsistent with the internationally recognized practice that a flag state may waive jurisdiction to enable a State conducting the interdiction to apply its laws to the vessel. The ruling on ECHR 5(1)'s right to liberty and security inexplicably dismissed bilateral diplomacy, and instead, appeared to recognize only treaty-level obligations to "prevent the application of foreign law from being arbitrary."

A number of judges dissenting from the ECHR 5(1) holding sagely remarked, "[w]hen there is sufficient concurring evidence to suspect that a ship on the high seas, thousands of miles from the State thus authorized to board it, is engaged in international trafficking to which all countries want to put a stop, it is without a doubt legitimate not to place as narrow an interpretation on the legal basis as one would inside the territory of the State concerned."

Further, Medvedyev explicitly noted "the fight against drug trafficking on the high seas… undoubtedly presents special problems." However, because the court misinterpreted the legal ability of a flag state to waive jurisdiction under international law, its authoritative force is diminished.

Rigopoulos v. Spain is another European Court of Human Rights case that involved a challenge of promptness in a maritime law enforcement counter-drug trafficking operation. In this case, decided approximately eleven years before Medvedyev, a Spanish customs vessel interdiction of drug traffickers on the high seas led to a sixteen-day, 3000-nautical mile transit to Las Palmas (Grand Canary).

C. Fisheries Enforcement: The fishing industry is lucrative, multifaceted, and vulnerable to abuses. Areas examined include those with express guidance that are nevertheless not always followed (imprisonment of fishermen and use of force), areas that pose enforcement and oversight challenges (illegal work conditions), and areas without any express guidance (vessel destruction as enforcement action).

Article 73(3) of the LOS Convention provides: "Coastal State penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment." Despite this provision, a wide variety of measures have been enacted by coastal States to enforce their laws and regulations relating to fishing in the exclusive economic zone. Some of those measures continue to provide for imprisonment for violations of these laws and regulations despite the prohibition in article 73. Those provisions thus are not consistent with article 73.

A separate LOS Convention provision provides that "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security." Some coastal States authorize imprisonment for fisheries violations if a bond or administrative penalty is not paid or authorize imprisonment for resisting arrest. An NGO study lamented that fishermen were being detained for as long as three years by India and Pakistan. “The practice of apprehending each other's fishermen, along with their boats, has been followed by Pakistani and Indian forces since the time of the partition” However, as “there is no consolidated information about detained fishermen because it is not updated regularly,” the Asian Human Rights Commission recommended that “there should be a record somewhere, which consists of all the names of all the detained fishermen with their particulars including date of arrest & release and the address of the jail.”

Case Laws: “It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil.”[16] In **Regina v. Sattler**,[17] this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea.

In **Dobree v. Napier**,[18] the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the

[16] Regina v. Lesley.
[17] Dears. & Bell's C. C., 525.
[18] 2 Bing. N. C., 781.

seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen.

In **John Anderson's**[19] case, it was held that, an offense committed on an American merchant vessel on the high seas is exclusively within the jurisdiction of the courts of the United States, whatever is the nationality of the accused.

In **United States v. May**[20] the court determined that, since charts found in the deckhouse projected a track leading to the United States, there was enough evidence to extend jurisdiction over a vessel found 135 miles off the Texas coast."°

In **United States v. Egan** the court invoked the protective principle to convict foreign crewmembers of a stateless drug smuggling vessel picked up thirty miles off the Long Island coast.

In **United States v. Ricardo**, despite a lack of evidence of intent to distribute, the Fifth Circuit found that five Colombian crewmen could be prosecuted for having been on board a stateless vessel bearing illicit drugs that had been seized 150 miles from the U.S. coast. The Fifth Circuit did not require any overt or alleged act or effect in the United States to allow conviction.

In **United States v. Angola**, the Court convicted crewmen from a stateless vessel found 350 miles from U.S. waters without any showing of intent to enter the United States. The protective principle was invoked by Judge Spellman.

In **United States v. James-Robinson** the crewmen of a stateless vessel seized 400 miles from the U.S. coast were found to be not prosecutable since there was an insufficient nexus to the United States to warrant an extension of extraterritorial jurisdiction.

General Principles

A. Prohibition on Claims: The fundamental principle of high seas law regarding national claims is stated in Article 2 of the High Seas Convention: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." Articles 87 and 89 of the 1982 Convention repeat this principle. The U.N. General Assembly's Declaration of Principles regarding the seabed beyond the limits of national jurisdiction states: "The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof."

Article 137 of the 1982 Convention states with respect to the same area: "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized." The United States Deep Seabed Hard Mineral Resources Act, asserting "high seas freedom to engage in exploration for, and commercial recovery of, hard mineral resources of the deep

[19] 1 Wharton's Digest, 123, 125.
[20] 470 F. Supp. 384 (S.D. Tex. 1979).

seabed," expressly affirms that by enactment of the Act the United States "does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or ownership of, any areas or resources in the deep seabed."

From these texts we can articulate an important but not explicit commonality, one subject to erosion, and fragile if not identified and preserved. Even those who reject the broad principle that the seabed has the status of high seas in fact accept one of its most important implications, namely the prohibition on national claims. Those who reject the broad principle that all states are bound by Part XI of the 1982 Convention as customary international law nonetheless accept the prohibition on claims if only by virtue of their position that the area has the status of high seas. This point of agreement is not as obvious as it seems, and may in fact erode unless the existence of such agreement is emphasized. A number of commentators have on occasion confused the position that the area is high seas with the position that no law, or at least no traditional law, applies. If the area is high seas, no part of it may be subjected to national claims. If no law applies, then those who reject Part XI of the Convention may contend that states are theoretically free to make pre-emptive claims on the grounds that such claims are not prohibited by international law.

In this regard, it is important to recognize what is, and is not, in dispute with respect to the legislation and agreements of the United States and certain other states with respect to deep seabed mining.

The United States statute prohibits the issuance of authorizations to mine by the United States if the area proposed is already subject to a previous authorization issued by a reciprocating state. The Provisional Understanding Regarding Deep Seabed Mining agreed by several Western states in essence implements this reciprocating state system. In the words of the statute, the United States thereby "exercises its jurisdiction over United States citizens and vessels, and foreign persons and vessels otherwise subject to its jurisdiction." The reciprocating states are doing the same. No pre-emptive claim is made as against the world; what is asserted is a universal right to mine and a right of each state to prevent its nationals from mining.

Some may wish to argue that the universal right to mine may be exercised only in conformity with the provisions of the 1982 Convention. They may also wish to argue that while no pre-emptive claims are asserted as against the world, the legislation and agreements may create a political situation in which any global agreement would have to respect the essence of existing authorizations as a condition of acceptance. Be that as it may, there is no basis at present for asserting that any state is violating the "no-claims" principle in letter or in spirit.

It is in the interests of all states to emphasize the universal agreement on this point, if only to prevent far-fetched interpretations of the due regard principle. While high seas law does not permit a pre-emptive claim as against non-consenting states of an exclusive right to mine a site measuring thousands of square miles for several decades, all states are required to have due regard to the exercise of the rights and freedoms of other states, including deep seabed mining.

Apart from the question of the lawfulness of the mining, there is no doubt that unreasonable physical interference with a mining ship or installation would be prohibited. Some have sought to go further, however, and convert the venerable “reasonable regard” or “due regard” principle into the functional equivalent of a pre-emptive claim. They argue that mining in an area already staked out by someone else violates the “due regard” obligation.

There is no precedent for such extended application of the principle with respect to fisheries or even nuclear tests. It is contradicted by the limited and unobjectionable safety zone provisions of the Continental Shelf Convention and the 1982 Convention, which deal with installations that may be used to exploit resources located well beyond the safety zones. The very states that advocates of such a position seek to benefit would presumably shudder at the notion of such a broad extension of the -reasonable regard principle with respect to the waters of the high seas or the exclusive economic zone, or even non-resource uses of the seabed.

The key point is that the “reasonable regard” or “due regard” principle must be read in conjunction with the “no claims” and universal use principles. Accordingly, whatever the position of states regarding the appropriate system for mining the deep sea beds, it is not in their interests to loosen the restraints of the “no claims” principle on those who take a different view of the regulation of mining. Both the high seas and the Part XI advocates must be encouraged to live with the restraints as well as the benefits of their position.

The Universal Use Principle: Article 2 of the Convention on High Seas states that the “high seas are open to all nations.” It goes on to state that freedom of the high seas “is exercised under the conditions laid down by these articles and by the other rules of international law.” Article 87 of the United Nations Convention on the Law of the Sea provides, “The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.”

The Declaration of Principles Regarding the Seabed beyond National Jurisdiction states, “the area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international regime to be established.” With respect to the same area, article 141 of the United Nations Convention on the Law of the Sea provides, “The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part.” Part XI of the 1982 Convention contains substantial restrictions on use of the seabed beyond coastal state jurisdiction, but these relate only to “activities in the Area.” The term “activities in the Area” is defined by Article 1 to mean “all activities of exploration for, and exploitation of, the resources of the Area." Article 133 defines “resources” to mean “all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the sea-bed, including polymetallic nodules.”

Accordingly, the effect of Part XI with respect to activities other than exploration and exploitation of mineral resources is the same as the effect of the high seas regime. The area is open to use by all states. Moreover, nothing in the specific provisions of Part XI regarding exploration and exploitation of mineral resources contradicts the universal use principle. The Convention expressly contemplates access by all, with discrimination prohibited. Article 150 (g) indeed goes beyond this to encourage “the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area.”

The idea that universal use of an area is subject to generally agreed regulation is no stranger to the high seas regime. Article 10 of the High Seas Convention requires states to conform to generally accepted international standards regarding safety measures and labor conditions. Article 94 of the United Nations Convention on the Law of the Sea elaborates on this duty at great length. The same idea forms the cornerstone of Part XII of the 1982 Convention regarding protection of the marine environment. The example of high seas fisheries is particularly instructive in this regard. The right to fish on the high seas is expressly subject to conservation rules, including the duty to cooperate with other states in the adoption of conservation measures. Accordingly, the principle of international regulation of the exploration and exploitation of seabed resources is not unique to Part XI of the 1982 Convention, but emerges from high seas law as well.

Questions of course remain regarding the scope of participation in regulation. Regulation of high seas fishing is generally entrusted to user states, although the basic duties are set forth in global conventions on the law of the sea. Environmental protection at sea is frequently addressed on a global basis, as evidenced not only by Part XII of the 1982 Convention and various environmental treaties, but by the establishment of the U.N. Environment Programme and the expanded composition of the Marine Environment Protection Committee of the International Maritime Organization as compared with its Maritime Safety Committee. At the same time, regional regulation is also extensive.

Under high seas law, an exclusive right to mine a large area for an extended period can be established only with the consent of other states. As U.S. law and the negotiations among the Western states participating in mining arrangements with each other clearly reveal, that consent is necessarily conditioned on agreed understandings regarding the size of mine sites, the duration of the rights, the means of acquiring priority, and associated environmental and other conditions.

An examination of those conditions will reveal striking similarities among national laws on deep seabed mining, the Provisional Understanding reached among Western states, and Annex III of the 1982 Convention. It of course comes as no surprise to discover that the essence of the problem regarding Part XI of the 1982 Convention concerns the object, nature and administration of some of the mining regulations. Resolution of those difficulties does not appear imminent. However difficult and important these issues may be, they nevertheless do not entail rejection of either the universal use principle or the agreed regulation principle by either side.

The Reasonable Regard Principle: If everyone has the right to use an area for the same or different purposes, it is clear that the right to use must be conditioned by a duty to respect others' right to use the same area. Article 2 of the Convention on the High Seas provides that high seas freedoms “shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.” Needless to say, if one regards deep seabed mining as a freedom of the high seas, this principle protects mining activities from interference and at the same time limits mining activities that may interfere with other uses, including other mining activities.

Article 87 of the 1982 Convention repeats this principle, expressly including deep seabed mining:

“These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”

With particular regard to deep seabed mining, article 147 provides:

1. Activities in the Area shall be carried out with reasonable regard for other activities in the marine environment.

3. Other activities in the marine environment shall be conducted with reasonable regard for activities in the Area.38

Once again, the dispute over high seas status is of no relevance. The reasonable regard or due regard principle apply under either view.

The Peaceful Purposes Principle: Article 88 of the UNCLOS, 1982 states that, “The high seas shall be reserved for peaceful purposes.” Article 141 declares that the seabed beyond national jurisdiction is open to use “exclusively for peaceful purposes.”

Marine Scientific Research: Article 87 of the 1982 Convention expressly identifies scientific research as one of the freedoms of the high seas, subject to the provisions of Part XIII of the Convention dealing with marine scientific research in more detail. Article 240, which applies to all areas, provides, “All States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention.”

With reference to the sea beds beyond national jurisdiction, Article 143 provides, "States Parties may carry out marine scientific research in the Area," and Article 256 provides, “All States, irrespective of their geographical location, and competent international organizations have the right, in conformity with the provisions of Part XI, to conduct marine scientific research in the Area.”

Article 143 is the only provision that specifically enumerates requirements for marine scientific research on the seabed beyond national jurisdiction. Its first and third paragraphs essentially summarize and cross-reference the requirements applicable to all marine scientific research under Part XIII. Its second paragraph deals with research conducted by the Seabed Authority itself.

Once again, assuming general acceptance of the provisions of the Convention apart from Part XI, it is clear that the debate over high seas status is irrelevant to the issue of the right to conduct marine scientific research.

The Common Heritage Principle” The Declaration of Principles adopted by the U.N. General Assembly states, “The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.”

Article 136 of the 1982 Convention declares, “The Area and its resources are the common heritage of mankind.” No similar provision appears in the 1958 Conventions on the Law of the Sea or elsewhere in the 1982 Convention. The debate over the deep sea beds is sometimes presented as a conflict between "high seas" and “common heritage.” It should be clear from all the materials previously analyzed that this is misleading. The common heritage principle, as incorporated into Part XI of the 1982 Convention, exists alongside a significant number of other principles elaborated in Part XI that have their origin in high seas law.

It is argued that the common heritage principle requires more elaborate institutional and substantive restraints on the “universal use” principle than have been customary on the high seas. Be that as it may, the very idea of negotiated restraints on the exercise of high seas freedoms is not alien to high seas law and tradition; quite to the contrary, it is an integral part of the system. One simply cannot imagine multiple and potentially conflicting uses of the high seas without agreement on ground rules. It is difficult to imagine the absence of organizations such as IMO and ICAO devoted to the continual elaboration and administration of such ground rules with respect to particular uses. Protection of the marine environment in an area open to use by all requires agreement on environmental restraints by all users, and mechanisms for enforcing and updating those restraints.

In truth, there is nothing in the common heritage principle that is inconsistent with high seas law. States may accept any substantive or institutional restraints on their high seas freedoms that they believe suitable. Certainly in spirit, high seas law is far closer to the idea of a common heritage of mankind than to appropriation by coastal or other states. The key question is whether the restraints of Part XI that are not generally accepted may be imposed on non-parties. The argument that they may not be so imposed is not peculiar to high seas law, but rather derives from international law more generally. That argument is wholly independent of positions regarding the common heritage principle, and indeed may even be supported by the principle. There is ample support in municipal law for the premise that those with coequal rights in a thing cannot be deprived of those rights without consent.

MODULE-III

MARITIME CRIMES & PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

MODULE-III - MARITIME CRIMES & PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

Initial Response to Maritime Terrorism: 1988 SUA Convention and Weapons of Mass Destruction Proliferation

Terrorism - Defined

A. United Nations Resolutions: The nations of the world first attempted to define terrorism during a series of conferences which came to be known as the International Conferences for the Unification of Penal Law.' This grew out of the work by Quintilliano Saladana who, while at the Hague Academy in 1925, introduced the category of "international crime" and included in it crimes against the rights of people and crimes committed against heads of foreign states or their diplomatic representatives.' Many attempts, such as the first five conventions, were made to reach an international agreement on terrorism, but all failed. This failure was a result of the inability of states to agree on a definition of “political crime” and to determine what exactly constituted a “terrorist” act As a result of the assassinations of King Alexander I of Yugoslavia, French Foreign Minister Louis Barthou and Austrian Chancellor Dr. Dollfuss, the sixth convention of the series was held.' During this Sixth Convention in Copenhagen in 1935, a definition of terrorism was drafted which defined terrorist acts as “willful acts directed against the life, physical integrity, health or freedom” of various officials, “causing a disaster” by “impeding” or “interrupting” transport or utility services, “willful destruction of ... public buildings,” “willful use of explosives in a public place,” or “any other willful act which endangers human lives and the community,” where any of the acts “has endangered the community or created a state of terror calculated to cause a change in or impediment to the operation of the public authorities or to disturb international relations.”

The series of conventions culminated with the League of Nations Convention for the Prevention and Punishment of Terrorism which, in order to suppress terrorism, adopted the definition of an act of terrorism as “criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public.”

In the late 1960s and early 1970s, the international concerns about terrorism began to re-emerge. In 1972, the United States submitted a draft (the United States 1972 Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism) to the Sixth Committee of the U.N. General Assembly. This draft did not use the word "terrorism" in the operative content of the body, but instead substituted "offense of international significance. Partly as a result of this, the U.N. established an Ad Hoc Committee on International Terrorism. This Committee created three Sub-Committees, only one of which was designated to devise- an operative definition of "terrorism."

This group was unable to reach a unanimous legal definition of terrorism, but did propose examples of what should be included in a definition of "international terrorism. These included:

(1) Acts of violence and other repressive acts by colonial, racist, and alien regimes against peoples struggling for their liberation...;

(2) Toleration or assistance by a State to the organizations of the remnants of fascist or mercenary groups whose terrorist activity is directed against other sovereign countries;

(3) Acts of violence committed by individuals or groups of individuals which endanger or take innocent human lives or jeopardize fundamental freedoms. This should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle;

(4) Acts of violence committed by individuals or groups of individuals for private gain, the effects of which are not confined to one state.

Soon thereafter, a variety of other definitions of terrorism were proposed and adopted by various regional and international organizations. However, it was not until the mid-1980s that a more significant and thoughtful approach to defining "terrorism" began to emerge. In 1985, Minister Doudou Thiam, Special Rapporteur for the International Law Commission in Draft Code of Offenses Against Peace and Security of Mankind, referred to the definition provided by the 1937 Convention in his report to the U.N. In his report the following year - the Report of the International Law Commission on the Work of its 38th Session – Thiam incorporated a definition almost verbatim from the 1937 Convention. The working definition which developed was that the action - the actus reas - must be a punishable offense, which is directed against a state or its population, and intended or calculated - the mens rea - to create a state of fear or "terror" in the minds of individuals or the general public.

However, it was on December 9, 1985, that the United Nations finally, and for the first time, adopted a resolution condemning all acts of terrorism as "criminal" acts. During the debate, fifty-seven countries participated by speaking out on the subject of terrorism prevention. Israel said, "No cause could justify acts of terrorism or serve as a pretext for states to escape obligations under international law." International terrorism was aimed at destroying the rule of lav. Belgium, on behalf of the European Community, Spain and Portugal stated, "The prevention and punishment of criminal acts should be ensured, and the taking of hostages and other crimes must no longer be treated as acts whose political character protected their perpetrators from extradition or prosecution." Sweden, on behalf of the Nordic countries, said, "The legitimacy of a cause such as the struggle for self-determination and independence, did not in itself legitimize the use of certain forms of violence, especially violence against innocent persons. There must be no safe haven for terrorists."

The resolution also asked "all states to take appropriate measures at the national level with a view to the speedy and final elimination' of the problem, such as the harmonization of domestic legislation with existing international obligations, and the prevention of the preparation and organization in their respective territories of acts directed against other states." States were also encouraged to "refrain from organizing, instigating, assisting or participating in terrorist acts in other states, or acquiescing in activities within their territory directed towards the commission of such acts." They were further urged to cooperate by exchanging relevant information in combating terrorism.

The world had officially accepted terrorism, not as an expression of political ideologies, but as a crime. Although the exact crimes which would be considered terrorist acts were not designated, due to previously accepted conventions some acts were known to be criminal without this newest U.N. Resolution. These conventions include: The Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention); Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention);' International Convention Against the Taking of Hostages; Vienna Convention on Diplomatic Relations; Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; and the Final Act on the Conference on Security and Cooperation in Europe Done at Helsinki. Regardless of these definitions, there is still confusion with respect to defining who is a terrorist and what terrorism is.

B. Domestic Statutes: One of the United States' first attempts of to define international terrorism was in the 1978 bill "Act to Combat International Terrorism." The bill divided the definition into five components. The bill was never enacted, however, because Congress chose instead to enact the 1978 Foreign Intelligence Surveillance Act.

The first component defines "international terrorism" as any act which is designated as an offense under three existing international conventions: the Convention for the Suppression of Unlawful Seizure of Aircraft (which sets forth as an offense the unlawful seizure of aircraft); the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (which lists offenses as acts of violence on board aircraft in-flight, damage or sabotage to aircraft in service or air navigation facilities or the communication of false information likely to endanger the safety of aircraft in flight); and the Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (which lists offenses such as the murder, kidnap or attack of internationally protected persons, or violent attacks on their official premises, private accommodations or means for transportation).

The second component added to the definition "any other unlawful act which results in the death, bodily harm, or forcible deprivation of liberty to any person, or in the violent destruction of property, or an attempt or credible threat to commit any such act." The third component identified the locations which would be considered international for purposes of the act.

For this, the bill provided four tests, one of which had to be satisfied.

The location would be considered international if the act occurred:

(1) outside the territory of a state of which the alleged offender is a national;

(2) outside the territory of the state against which the act is directed;

(3) within the territory of the state against which the act is directed and the alleged offender knows or has reason to know that a person against whom the act is directed is not a national of that state; or

(4) within the territory of any state when found to have been supported by a foreign state, irrespective of the nationality of the alleged offender

The -fourth component required that the act has as its motive or goal the intent or threat to damage the interests of a state or international organization, or the intent to obtain concessions from a state or international organization.

The fifth and final component excluded acts committed in the course of military or paramilitary operations directed essentially against military forces or targets of a state or organized armed group. This exclusion was due to the fact that these acts are encompassed in the body of international law relating to international armed conflict, which can be found in the Geneva Conventions of 1949 and the Protocol Additions to the Conventions completed in July 1977.

In the same year, Congress passed the first statute defining international terrorism in the Foreign Intelligence Surveillance Act of 1978. This Act provided that international terrorism means activities that:

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

A number of other acts were subsequently introduced that further refined the definition. These include: the Report prepared for the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, State-Sponsored Terrorism the Anti-terrorism Act of 1985, the International Terrorism Deterrence Act of 1985, the Antiterrorism Act of 1986, and the Antiterrorism Act of 1986.

C. Challenges to the Official Definitions: Because an act that one state considers terrorism, another may consider as a valid exercise of resistance, it is difficult to prepare effective legal principles to deter terrorism. Demonstrating the problem is the notion that "one man's terrorist is another man's freedom fighter. As suggested by one author, the difference between terrorists and freedom fighters is that terrorists kill innocent civilians, while freedom fighters save lives and fight at the risk of their own lives “until liberty wins the day.” The main difficulty lies in the fact that each time an incident occurs; the international community cannot consistently interpret whether the act was a terrorist attack or a legitimate act of a freedom fighter. The United Nations has not alleviated the definitional problems involved. In fact, the U.N. has granted a limited amount of legitimacy to groups who are responsible for acts that have been labeled “terrorism.”

In December 1973, the U.N. passed Resolution 3103 which granted legitimacy to conflicts involving the struggle of people against colonial and racist regimes by labeling them as “armed conflicts.” One year later, the U.N. adopted a Definition of Aggression, which justified terrorist activities when terrorism is waged on behalf of self-determination movements or directed against colonial and racist regimes. Many groups have tried to fall into the U.N. definitions by claiming that their actions are legal expressions of their rights. According to political philosopher Frantz Fanon, “national liberation, national renaissance, the restoration of nationhood to the people... is always a violent phenomenon.” Additionally political scientist Rupert Emerson claims “self-determination when self-exercised involves revolution.” Due to this uncertainty, many groups are waging destruction upon sovereign nations and claiming, and thereby receiving impunity, that they are engaged in a legitimate and legal war and that they are only fighting for their freedom.

The variety of classifications used, resolutions adopted, and laws enacted only increase the difficulty in differentiating between a terrorist act and a legal and legitimate act of a freedom fighter. With the old order crumbling and the superpowers reshuffled, the U.N. is taking on a renewed role and has broken free from the shackles of Cold War politics. The time is long overdue for the world body to invalidate the definitions of terrorism it has espoused in the past and provide one certain and final definition that can be held up as a model to the world. The definition should be clear, yet flexible enough to provide for any unforeseeable changes in tactics by terrorist groups. The definition should list all of the known types of acts which are unquestionably terroristic. This new definition would allow countries, new and old, to take measures to prevent and punish terrorism in such a way that all countries will agree that the acts committed were terroristic and the people responsible for them should be held accountable in a court of law.

Piracy: A Maritime Terrorism: In the past, piracy was one of the most concrete dangers, besides natural dangers, for ships in navigation. Nowadays it has been aligned with potential terrorist attacks. The greater sophistication of destructive technology available to terrorists makes shipping on the high seas an enticing target. Moreover, the likelihood for worldwide media coverage of an incident makes maritime terrorism an even more attractive prospect. The incidence of maritime piracy is growing everywhere in the world, afflicting ships in coastal states' waters, in the high seas, and sometimes even in harbors. It is not a rhetorical misconception to say that piracy today is often a fully integrated business in which ships and cargoes are stolen to order, repackaged and recalculated into legitimate trade. A successful hijack of a ship or of a cargo is worth a great deal of money.

Even though pirates are considered by customary international law as hostis humani generis - enemies of the human race – “touched” by universal jurisdiction (like terrorists), only municipal courts may be used to exercise jurisdiction over piratical crimes. Beginning in the 70’s the IMO investigated how to fight piracy. It ended up with The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Mari- time Navigation and the annexed Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome Convention). This was the answer for piratical acts, not for maritime terrorism.

More specifically, the main purpose of this Convention is to ensure that appropriate judicial actions are taken against persons committing unlawful acts against ships, which includes the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to destroy or damage it. Furthermore, the Rome Convention obliges contracting Governments either to extradite or prosecute alleged offenders.

The 1988 SUA Convention: The International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, together with its Protocol on the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, was concluded after an international conference from 1-10 March 1988 at the FAO Headquarters in Rome. It is the most recent of the now quite numerous counter-terrorist conventions which include the 1967 ICAO Tokyo Convention, the 1970 ICAO Hague Convention, the 1971 ICAO Montreal Convention, the 1973 UN Protection of Diplomatic Persons Convention, the 1979 UN Hostages Convention, the 1980 IAEA Convention on Physical Protection of Nuclear Material, and the 1987 Protocol to the Montreal Convention. This, however, is the first such convention to relate to ships and other vessels at sea.

The event which stimulated the drafting of this Convention was the seizure by a terrorist group in October 1985 of the cruise liner SS Achille Lauro. This incident demonstrated an obvious lacuna in the network of international conventions aimed at preventing the escape from justice of fugitive terrorists. The issues raised by the Achille Lauro affair were considered by the UN General Assembly, as well as by the IMO Assembly, in late 1985. In 1986 the IMO Marine Safety Committee prepared a number of precautionary measures aimed at protecting ships, passengers and crews from the dangers of terrorist incidents following which the IMO Council also considered the matter. At the 57th Session of the Council the Governments of Austria, Italy and Egypt (the last two of which had been directly involved in the Achille Lauro affair) proposed the development of an international treaty aimed at the suppression of terrorist acts related to marine navigation, analogous to the ICAO Conventions which relate to the safety of navigation by air.

The IMO Council agreed unanimously that the preparation of such a convention was a priority, and established an ad hoc Preparatory Committee on the Suppression of Unlawful Acts against the Safety of Maritime Navigation to prepare a draft convention accordingly. The Committee met to consider the draft convention in March and May 1987, deciding at that time also to recommend a draft protocol extending to unlawful acts against fixed platforms, such as oil rigs. Drafts of the proposed convention and its protocol were considered by the IMO Council at its 58th Session. Council decided to refer the drafts to the Legal Committee which held an extraordinary session in October 1987, and to convene an international diplomatic conference to adopt a convention in March 1988. It was this conference, held at the FAO Headquarters, which approved and adopted the final texts.

The general approach of the 1988 Convention: The 1988 Convention and its Protocol are clearly modelled on the ICAO Conventions related to terrorist offences against air traffic. Prior to the ICAO Conventions, hijackers and others who committed offences while aircraft were "in flight" were often able to escape trial through lack of proper extradition arrangements, or because the legal system of the state which had custody of an offender could not exercise criminal jurisdiction, either because the offence itself (e.g. hijacking) was not an offence under its law, or its legal system did not claim jurisdiction over offences committed outside its territory (e.g. on a foreign registered aircraft in flight over another state or over the high seas). The three ICAO Conventions as well as subsequent counter-terrorist conventions were consequently aimed at ensuring a “no hiding-place” approach. It is this approach which has been followed by the new 1988 Convention. It seeks to establish the general principle of “extradite or try”. In other words, if an offender who has committed one of the listed offences comes within the jurisdiction of a contracting state, then that state must either extradite the fugitive to any other contracting state which so requests, or failing extradition try the fugitive itself. In order to ensure that fugitives do not escape trial through so-called “technicalities”, it lists clearly the offences which are included within the ambit of the Convention (Article 3) and requires contracting states to ensure that these are criminal and extraditable offences under their law (Articles 6 and 11). As well as requiring contracting states to co-operate in preventive measures and the exchange of counter-terrorist information (Articles 13 and 14), it also imposes obligations on contracting states to change their laws as necessary to ensure that their own legal systems give them jurisdiction to try offenders who commit any of the listed offences in the circumstances envisaged (Article 7). In this way it aims to change, for contracting states, one of the basic precepts of maritime jurisdiction, which is generally that of exclusive flag state jurisdiction over acts committed on vessels outside the territorial sea.

The listed offences: Article 3 of the 1988 Convention lists the offences which are covered by the treaty regime. Although these offences will in most cases already be offences against the law of the flag state, the scheme of the Convention is to oblige contracting states to treat them as “grave” offences, to lift them from the exclusive jurisdiction of the flag state (which prevented them being amenable to extradition or jurisdiction by other states), and allow them to be tried in any other contracting state. The law of piracy does, of course, similarly confer extended jurisdiction on states other than the flag state, but given the restrictive definition of piracy in the 1958 Geneva Convention which is reproduced in the 1982 LOSC, piracy will seldom be applicable.

In summary, the offences so listed include: seizing or exercising control over a ship by force or intimidation; performing acts of violence, likely to endanger the safe navigation of a ship, against any person on board; destroying a ship or causing damage to it or its cargo in a manner which is likely to endanger its safe navigation; placing a device or substance likely to destroy or damage a ship or its cargo which might or does endanger its safe navigation; destroying, seriously damaging or interfering with navigational facilities, if this is likely to endanger safe navigation; communicating known false information which endangers safe navigation; injuring or killing any person in the commission or attempted commission of any of the six previous offences. Abetting or being an accomplice to any of the above together with attempts which similarly endanger safe navigation, are also covered, as well as threats to commit the acts set out in Article 3(1) (b) and (c).

The scope of the Convention: In formal terms the legal scope of the Convention is limited to application among contracting parties, for many of the provisions are considerably in excess of existing customary law. Thus, the regime created by the Convention will only apply to contracting states inter se. It is noticeable, however, that a distinct pattern of practice is being created by the counter-terrorist conventions-particularly in the matter of criminal jurisdictional claims. Thus the impact of the Convention on the development of customary international law, and thus indirectly on non-parties, may be of significance if only in the long term.

In compliance with the general international law of sovereign immunity, the Convention does not apply to warships, or to state-owned or operated ships used for naval auxiliary, customs or police purposes. Nor, somewhat obscurely, does it apply to laid-up vessels or those withdrawn from navigation. In geographical terms, the scope of the Convention is governed by Articles 4 and 5. The basic rule is in Article 4(1): that the Conventi6n will only apply if a ship is navigating in waters beyond what it terms the "outer limit of the territorial sea of a single state, or the lateral limits of its territorial sea with adjacent states", or if its schedule includes navigation in such waters. The reason for this restriction is presumably that a voyage exclusively within the internal or territorial waters of the flag state is not an international voyage and will therefore be governed by the national law of the flag state, which will then of course also be the state possessing territorial jurisdiction. However, listed terrorist offences may well be committed on such voyages, and part of the object of the Convention would be defeated if fugitive offenders responsible for such crimes were not susceptible to trial or extradition.

Therefore, Article 4(2) also applies the Convention to situations where fugitives responsible (or alleged to be responsible) for such offences are found in the territory of another contracting state.

Jurisdictional obligations: Under both international customary and treaty law, a ship is deemed to have the nationality of the state under the flag of which it sails. Both the 1958 Geneva Convention on the High Seas and the 1982 Law of the Sea Convention contain identical provisions to the effect that the state of registration must exercise its jurisdiction over ships flying its flag, and that on the high seas that ship is subject to its exclusive jurisdiction "save in exceptional cases expressly provided for in international treaties or in these articles". The 1988 Convention makes considerable inroads into this exclusive flag-state jurisdiction, but is surely defensible both on the basis that suppression of terrorism is indeed an exceptional case, and that the provisions of the 1988 Convention itself constitutes the express provision of international treaty law which both the 1958 and the 1982 Conventions require.

In order to appreciate the exact extent of the changes in traditional jurisdictional rules which the 1988 Convention proposes it is worth recalling briefly the five main grounds under which international law recognizes that criminal jurisdiction may be exercised over individuals. The two primary grounds are: territorial jurisdiction where the offence is committed on the territory of the state claiming jurisdiction, and personal jurisdiction--exercised on the basis of the nationality of the offender. In addition, criminal jurisdiction is often claimed by states according to three extra-territorial principles: the protective principle-where national interests are injured by the offence; the universality principle-where jurisdiction is based simply on custody; and the still controversial passive personality principle-where jurisdiction is claimed on the basis of the nationality of the victim of the offence.

Article 6 of the 1988 Convention takes advantage of many of these grounds and imposes an obligation on all contracting states to ensure that their laws allow them to exercise criminal jurisdiction over the listed offences in a number of new ways. Traditional flag-state jurisdiction can be seen in Article 6(1)(a), but 6(1)(b) gives the coastal state unequivocal territorial jurisdiction when the offence is committed within its internal or territorial waters. Article 6(1)(c) ensures personal jurisdiction when the offence is committed by a national, no matter where, and Article 6(4) makes obligatory the universal principle-that any state having custody of an alleged offender which does not extradite, must ensure that its legal system allows it to try that offender. In addition, a contracting state may, if it wishes, establish jurisdiction in three more situations: when the offence is committed by a stateless person habitually resident in that state-a modified form of personality jurisdiction; when a national of that state is a victim-the passive personality principle; and when the offence is committed to attempt to force that state to do or abstain from doing something- a form of protective jurisdiction. If these complex and extensive claims are not enough, then Article 6(5) of the Convention, in a provision similar to the majority of other counter-terrorist conventions, specifically recognizes jurisdiction based on other grounds utilized by the national law of contracting parties.

The draft Convention had also contained a controversial proposal whereby states were also asked to consider claiming jurisdiction over offences when: “(d) the demise-charterer in possession of the ship concerned in the offence is a national of that State and has its principal place of business in that State.” Such a claim based simply on the nationality and/or the place of business of the demise charterer- would be a highly tenuous jurisdictional link. A ship subject to a demise charter does not always acquire a new flag state-this depends on the applicable legal system, hence the state claiming under this proposed head might be competing with the flag state for jurisdiction. The IMO Council had specifically asked the Legal Committee to consider this proposition which it did at length. In the Legal Committee, those in favor argued that any increase in the numbers of jurisdictions available was desirable; that it was better to have overlaps in jurisdiction than loopholes; that in cases where ships navigated in areas at a great distance from the flag state (e.g. open registry vessels) there might be stronger motives for the state of the demise charterer to prosecute an offence than for the flag state; and that there were precedents in air law (in the Hague and Montreal Conventions) for such jurisdiction.

Those against argued that there were no real precedents-as the air-law analogy was false; that where the flag changed with the demise charter the provision was unnecessary and where the flag did not change it was both undesirable that there should be competing jurisdictions and possible contrary to articles 91 and 92 of the LOSC; and that in any event there was no need explicitly to include such a provision, for if states wished to claim, it unilaterally then Article 6(4) empowered them to do so. The provision, however, had always been controversial and was dropped from the text at the diplomatic conference.

It is important to bear in mind that the extensions of jurisdiction, to be recognized inter se by the Contracting Parties to the Convention, are intended simply to provide a basis for trial or extradition of fugitive offenders apprehended by another contracting state in circumstances already permissible under international law.

Article 9 makes clear that they are not intended to justify the stopping and boarding of vessels, and the apprehension of individuals, in circumstances which would traditionally be contrary to international law e.g. on the high seas or in the EEZ of another state or on a ship exercising the right of innocent passage.

Duties of the holding state: Article 7 lays down basic procedures which must be followed by a contracting state which has an alleged offender within its territory. It is obliged to take "such measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted". This will usually be custody, but the formulation permits bail and its equivalent.

The state must commence immediate inquiries into the case, and the prisoner (bailee) must be given access to the representative of the state of which he is a nation or (if a stateless person) habitual resident. States are obliged to ensure that local laws do not interfere with the above rights. They are also under an obligation to notify states which have claimed jurisdiction over the alleged offender, in accordance with Article 6(1)40 and at its discretion “other interested states”, that the prisoner is in their custody, and why. After the, inquiry into the case is completed, the holding state must report its findings “promptly” to these other states whether or not it intends itself to exercise jurisdiction.

This will enable the other states with an interest to consider whether they wish to institute extradition proceedings, but the provision seems to contemplate the apparently rather bizarre situation of an inquiry into the case disclosing a case against the offender, but the holding state declaring that it does not intend to try him. However, bearing in mind the pressures that can be brought against states by terrorist groups; this may not be such an unusual situation as it appears. Of course, if the initial inquiry does not reveal a prima facie case then the common law systems (which at present require such a case against a prisoner before extradition takes place) will not be able to contemplate extradition.

A further issue, which was raised in the Legal Committee, was the question of excluding offenders apprehended under this Convention from the so-called “political defense” to extradition. It has been seen widely as a problem in the development of effective networks of extradition that certain fugitives have been able to escape extradition (although not necessarily prosecution, given the aut dedere aut judicare obligation of Art 6) by claiming that their offence was a political offence or one committed for political motives. National legal systems provide widely different interpretations of these terms, and the response of some regional treaties, notably the European Convention on the Suppression of Terrorism, has been to exclude such protection for designated offences in extradition proceedings between contracting states. However, the negotiators of the 1988 Convention felt this exclusion to be inappropriate to a global convention and the level of co-operation which presently existed among national legal systems."

Measures to Fight Piracy: In November 1983 the IMO Assembly adopted a Resolution urging contracting governments to take: “all measures necessary to prevent and suppress acts of piracy and armed robbery from ships in or adjacent to their waters, including strengthening of security measures.” In April 1984, the MSC established “Piracy and armed robbery against ships” as a separate item in its working program.

Pursuant to the Achille Lauro episode, in 1985, the IMO adopted Assembly Resolution A.545 (13): “Measures to prevent acts of piracy and armed robbery against ships.”

The same year, IMO's 14th Assembly adopted Resolution A.584 (14) on: "Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews." This Resolution notes: "...with great concern the danger to passengers and crews resulting from the increasing number of incidents involving piracy, armed robbery and other unlawful acts against or on board ships, including small craft, both at anchor and under way."

In 1986 the MSC issued a Circular 15 on measures to prevent unlawful acts against passengers and crews on board ships. It stated that governments, port authorities, administrations, ship owners, shipmasters and crews should take appropriate measures to prevent unlawful acts that may threaten passengers and crews.

Customary international law, accordingly, authorizes any State to try acts of piracy juris gentium. However, a problem arises because many criminal codes do not themselves define the act, but merely provide for jurisdiction over those committing piracy "as defined by the laws of nations." This throws the burden upon national judges to decide and interpret the internationally oriented definition of the offence. In a nutshell, the task of applying the international law of piracy is left to municipal legal systems. Previously the single States exercised jurisdiction over pirates. Now their domestic courts interpret rules of international law outlawing piracy, as well.

It seems clear, in fact, that municipal legislation is the true core of the problem and that much of the weakness of anti-piracy responses may be traced to the lack of attention paid to domestic piracy law.

However, more generally, a substantive meaning of piracy in contemporary international law is unsettled. Not only does an international maritime peacekeeping force not exist, but there is also no international tribunal with jurisdiction to try and punish pirates.

Despite the indefinite content of the international law of piracy, most commentators believe that piracy does have meaning today in international law, at least in a "classical" sense, encompassing acts of depredation committed by a private ship against another ship on the high seas for private, commercial gain. For those commentators, the international law of piracy should apply to the acts of individuals and not just to the acts of States.

Measures To Fight Maritime Terrorism: To define and to better understand maritime terrorism it is fundamental to discuss terrorism tout court. According to a 1984 United States Department of State definition:

"Terrorism is a premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine State agents, usually intended to influence an audience".

The international community has historically enjoyed only mixed success in codifying general principles prohibiting terrorism as a crime under the law of nations.

However, it is important to remember some of the attempts:

The League of Nations Convention for the Prevention and Punishment of Terrorism in 1937; followed by the Tokyo, Hague and Montreal Conventions between 1963 and 1971, which were all attempts by the United Nations to condemn and dissuade the hijacking of commercial aircraft. In 1971, the Organization of American States concluded the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance. In December 1973, the International Law Commission (ILC) drafted a second instrument, the United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents. It is important also to remember the two U.N. International Conventions (1997-1999), the Suppression of Terrorist Bombings and Financing of Terrorism. Nonetheless, the most salient international attempt to define terrorist acts and jurisdictional rights came in 1979, with the promulgation of the United Nations International Convention against the Taking of Hostages.

No explicit lucid universal agreement exists which prohibits terrorism. Attaining such an authoritative agreement has been precluded by the failure of the international community to concur on a precise definition for terrorism, particularly when consideration is given to the legal status of violent acts committed by national liberation movements in their struggles of self-determination. Condemnation of terrorism is purposely balanced by the reaffirmation of the "inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination...Thus, the international community is often quick to condemn international terrorist activities as unlawful transnational violence, but States are unable, as ever, to agree on what constitutes a terrorist act. Governments are fond of integrating definitions of terrorism within their own particular political philosophies and national interests. Tension is evident in the international community between the condemnation of terrorism as an international political crime and the preservation of rights of people to self-determination and independence.

In the publicity surrounding the Achille Lauro episode, the confusion of maritime terrorism with the traditional international crime of piracy also became widespread.

Three main difficulties arise in applying modem definitions of piracy to acts of maritime terrorism. First, there is the need to ascertain whether the event occurred on the high seas or in a place beyond the jurisdiction of any State.

Second, there is the requirement that pirates/sea-hijackers must have attacked the ship from another private vessel.

Third, the motivation for the attack must have been for “private ends.”

The recognition of maritime terrorism as a distinct international offence is a relatively recent development. Maritime terrorism may simply be defined as the systematic use or threat to use acts of violence against international shipping and maritime services by an individual or group to induce fear and intimidation on a civilian population in order to achieve political ambitions or objectives.

An anti-terrorist Convention, ideally, should accomplish four major objectives. First, it should reaffirm that Governments are obligated to refrain at all times from encouraging or supporting guerrilla activities in another State. Second, the Convention should prohibit specified terrorist acts that disrupt world order and clearly identify the international ingredient which brings those acts under the jurisdiction of international law. Third, the exemplar Convention should oblige States to extradite or punish offenders. Fourth, the ideal Convention must re-emphasize the international community's abhorrence of State-sponsored terrorism.

However, because maritime security is an integral part of IMO’s responsibilities, in December 1985 the United Nations General Assembly called upon IMO: “To study the problem of terrorism aboard or against ships with a view to making recommendation on appropriate measures.”

The work on revision of the 1988 Rome Convention was followed in 2001 by the adoption of Assembly Resolution A.924 (22), which called for a “review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships. In 2002 The IMO Legal Committee “held a preliminary exchange of views regarding the text of draft proposed amendments” to the Rome Convention. In 2003, the IMO Legal Committee continued to work on proposed amendments to the Rome Convention. The amendments would significantly broaden the range of offenses included in the convention and make it more relevant to modem conditions. In 2004, The IMO Legal Committee continued revising the Rome Convention, taking into consideration other conventions and protocols related to terrorism.

Most delegations expressed support for the revision and strengthening of the Rome Convention in order to provide a response to the increasing risks posed to maritime navigation by terrorism.

The mandatory security measures, entered into force on 1st July 2004, included a number of amendments to the 1974 Safety of Life at Sea Convention (SOLAS), the most far-reaching of which enshrined the new International Ship and Port Facility Security Code (ISPS Code).

Furthermore, a comprehensive security regime for international shipping entered into force on 1st July 2004, and, as agreed at the IMO's Legal Committee at its 89th session, a diplomatic conference to adopt amendments to the 1988 Rome Convention was held in October 2005.

The main purpose of the forthcoming Convention is to ensure that appropriate action is taken against alleged terrorists committing unlawful acts against ships. These acts include the seizure of ships by force, acts of violence against persons on board, and the placing of devices on board a ship that are likely to destroy or damage it. The Convention obliges contracting governments to either extradite or prosecute alleged offenders.

The Rome Convention amendments will complement the ISPS Code by providing a legal basis for the arrest, detention and extradition of terrorists in the unfortunate event that a terrorist attack against shipping nevertheless occurs.

Moreover the proposed amendments to the 1988 Rome Convention include a substantial broadening of the range of offences included in Article 3 and the introduction of provisions for boarding vessels suspected of being involved in terrorist activities in Article 8.

Extradition and Prosecution Under The Rome Convention: One of the main peculiarities and most precious goals embedded into the Rome Convention, as aforementioned, is the obligation of contracting Governments to either extradite or prosecute alleged offenders.

However, the most fundamental defect of the Rome Convention is that it does not really impose a strict obligation to extradite the alleged offender from the State party in whose territory he or she is found. In the absence of specific extradition treaties in force between the requesting and requested States, the latter "may at its option" consider the Convention as a legal basis for extradition.

At this stage, certainly, deficiencies in the Rome Convention are affecting the performance of law and policy on jurisdiction, extradition, and suppression of terrorism and piracy.

A reasonable argument can be made that any refusal or failure to prosecute or extradite an alleged terrorist entails unacceptable tolerance of or assistance to the offender by a Government. Refusal by States to cooperate in the arrest, extradition, trial, and punishment of persons guilty of international crimes undermines the purposes of generally recognized norms of international law. Such a policy, unmistakably, contradicts obligations under international law either to furnish legal redress for victims of international crimes or to punish the perpetrators when found within a State's territory. The Rome Convention should work to minimize these possibilities among States parties.

In addition, the Rome Convention defines an impermissible offence as being committed by natural persons. It does not deal with offences that might be committed by Governments or State-sponsored terrorism.

Also problematic is the situation when an offence is committed by a national of a State that is not party to the Rome Convention in the coastal waters of a State that has not ratified that instrument. The legal solution to such a dilemma would be to make maritime terrorism subject to universal jurisdiction under contemporary customary international law.

All acts of maritime terrorism should be prohibited, without exception whatsoever, because they run contrary to the fundamental human rights of life, liberty and security.

Accepting the assumption that international maritime terrorists, like pirates, are hostes humani generis, enemies of the human race, then universal jurisdiction becomes a legally viable option. This lacuna left in the Rome Convention could be filled by customary international law, pending its ratification through State practice.

Furthermore, on a broader scale, the Rome Convention does not preclude the possibility that a State party may refuse to extradite on grounds of the political offence exception.

The fundamental problem rests in the question of what constitutes a political offence. For the Rome Convention the notion of the political offence could take on particular significance when placed within the context of national liberation movements committing acts of violence against maritime navigation purportedly to further their struggle for self-determination against racist, colonial or oppressive regimes.

Traditionally, international law has approved Governments' refusal to extradite a fugitive accused of committing political crimes. Modem extradition treaties specifically exempt political offences from being extraditable offences.

Even so, no generally recognized rule exists today in international law that prohibits the extradition of political offenders. Non-extradition of the political offender is a domestic practice and prerogative, not an international right or duty.

Moreover, the Rome Convention concentrates mainly on jurisdiction, extradition and punishment of alleged offenders after they have committed acts against the safety of maritime navigation. Such a Convention offers little directly aimed at prevention, deterrence or suppression of those activities before they occur.

Main Drawbacks Of The Rome Convention: Two major issues are left outside the scope of the Rome Convention. The first one concerns the question of what kind of self-help measures, and by whom, may be adopted in cases of seizures of vessels on the high seas. The second issue concerns the duty to punish.

The first issue concerns the legality of self-help measures to free a ship from terrorists. This does not appear to have even been addressed in the course of pre-drafting negotiations.

Its solution is thus left to customary rules of international law. According to these rules, if the ship is navigating or laying in the high seas then only the flag State shall be entitled to use military coercion by virtue of the exclusive jurisdiction guaranteed to this State by international law.

The second issue concerns the duty to punish. Here the Convention does not explicitly express a complete jurisdictional overview made of three phases: prosecution, trial, and punishment. Rather it confines itself to requiring the State in whose territory the offender is found "to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State." The Rome Convention also requires that, in carrying out such criminal proceedings, the national authorities "shall take their decision in the same manner as in the case of any other offence of a grave nature."

Interaction Outside Territorial Seas

I. The Reservation Of The High Seas For Peaceful Purpose: It is clearly provided in the UN Convention on the Law of the Sea that: "The high seas shall be reserved for peaceful purposes." However, it is the meaning of "the reservation for peaceful purposes" that is worthy of study. It is stated in the preamble of the Convention that "recognizing the desirability of establishing through this Convention, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources..."

Originally, this is a self-explanatory concept, but today states have quite different understandings to this notion. Generally speaking, peace is the most lasting, sincere, and honest ambition of mankind. Peace means an opportunity to live. In ancient words: "At present, it is political peace and there were no weapons and armors in the world"; "If there were the voice of peace, there would reproduce great wealth." Also, the Antarctic Treaty provides that "the Antarctica shall be used for peaceful purposes only." These shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

The promotion of "peaceful uses of the seas and oceans" has been recognized as one of the purposes of the legal order for the oceans established through the Convention.

The general principle established in article 88 of the Convention is: "The high seas shall be reserved for peaceful purposes." This reflects the subject of the Convention in the Preamble of the Convention. The principle, i.e., peaceful uses of the seas, could also be found in article 301, part X and part XIII of the Convention. According to article 58(2) of the Convention, articles 88-115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part. Thus, the exclusive economic zones shall also be reserved for peaceful purposes. It did not exclude the coastal state from taking such measures as may be necessary in accordance with article 73 of the Convention to ensure compliance with the laws and regulations adopted in conformity with this Convention.

Article 88 of the Convention does not tell the meaning of "peaceful purposes." And, the Convention had not yet explicitly forbidden military activities on the high seas. Generally speaking, the Convention does not exclude any particular military activity at high seas that is consistent with the Charter of the United Nations and other principles of international law. The UN Secretary General conclusively pointed out in a long report in 1985, that the UNCLOS could not forbid any particular military activity at sea which is consistent with the principles of international law embodied in the Charter of the United Nations, particularly article 2(4) and article 51. However, many states explained the "peaceful uses" as forbidding all military activities, because any activity threatening the sovereignty of coastal states in the territorial sea and EEZs shall be prohibited. The President Hamilton Shirley Amerasinghe addressed the fourth session of the third UN Conference on the Law of the Sea that the reservation of the seas for peaceful purposes cannot be isolated from the negotiations on disarmament, non-thermonuclear and demilitarization in other occasions. Some coastal states such as Bangladesh, Brazil, Cape Verde, Malaysia, India, Pakistan, and Uruguay contend that the Convention shall not permit other states to carry out military activities or even use of explosive materials in or over their EEZ without their consent. The government of Brazil also contended that article 301 of the Convention prohibits other states from carrying out military activities in its EEZ as the evidence of international law. Some other states held that the "peaceful uses" as to prohibit all military activities with aggressive aims, but not forbidding other military activities at all.

At the same time, they insist that there may need to be a distinction between "peaceful use" and "peaceful purpose" Usually the "peaceful purpose" means non-aggression. The American navy and air force still persist in their ways to cruise and patrol at high seas and in the EEZs of other states. In particular, since the "9/11 event," the United States raised objections against "peaceful purposes" on the grounds of the war against terrorism. The Americans argued that technology has dramatically changed the art of warfare and intelligence gathering.

There has been vast improvement in the range and accuracy of both weaponry and intelligence collection so that, in the age of Aegis, satellites, aircraft carriers, missiles, over-the-horizon weaponry and intelligence collection, extending restrictions in the EEZs is largely ineffective and irrelevant. Nevertheless, there are still some distinct advantages in being able to operate in and over foreign EEZs, such as showing the flag or testing the response of coastal states, and thus maritime powers will resist any restrictions on such activities.

Other states held that testing whether an activity is peaceful, the only way is to identify whether the activity is the duty performed in conformity with the principles of international law and the Charter of the United Nations.

Ii. Interference With Ships On The High Seas: By customary international law the high seas are free to the shipping of all States. This freedom was jealously maintained during the nineteenth century and any unlawful interference with shipping was strongly deprecated. The occasions when warships may interfere with merchant vessels registered in a different State are few, and supposedly well-established. The policing of the high seas is accepted as minimal. It is to ensure this minimal order that all ships must fly the flag prescribed by the State in which they are registered and the registration papers must comply with the law of that State. Further the conduct of a ship while sailing on the high seas must be peaceful and she must not carry on activities interfering with other merchant vessels. A merchant vessel must keep to the laws and regulations relating to customs, health and fishing of any State through whose waters she sails.

Breach of these general rules may lead to capture of ships on the high seas by warships (and possibly aircraft).

A. The Right of Approach: Early writers' intent on the use of the seas for shipping and commerce of all States preferred narrow limits for the exercise of the right to approach. Moore describes such a right as follows:

"Ships of war sailing under the authority of their government, instructed to arrest pirates and other public offenders, may approach vessels at sea to ascertain their character."

Oppenheim is even more specific:

"It is a universally recognized customary rule of International Law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag. But such vessels must be suspicious. Since a suspicious vessel may still be a pirate although she shows a flag she may further be stopped and visited for the purpose of inspecting her papers and thereby verifying her flag."

The right of approach to foreign vessels on the high seas must be distinguished from the wider right of men-of-war to approach merchant vessels of their own flag State on the open seas. Every nation having vessels on the high seas has the power to regulate them and also to seize them in accordance with its own municipal law.

B. The Right of Visit and Search in Time of Peace - Self-defense: The distinction between the rules governing the right of approach as laid down in the Geneva Convention and the right of visit and search in time of war was emphasized by the recent seizure of the West Breeze.

On February 23, 1961, this ship, a British merchant vessel, was sailing towards Casablanca. The French Government suspected that she carried arms and contraband for Algerian rebels and invited the British authorities to order her to call at a British port instead. Her Majesty's Government replied that they had no such powers. Consequently a French warship stopped the West Breeze on the high seas and ordered her to sail to Mers el Kebir where she was searched for arms and war materials, but none were found. Later she was allowed to continue her journey. The justification for the seizure would be presumably that France had established a 32-mile zone off the coast of Algeria for security purposes.

The legality of this search may be questioned as there is much evidence to show that the right of visit and search is a belligerent claim and cannot be exercised in time of peace. The Algerian rebels were unrecognized even as insurgents both by the United Kingdom and by France. Apart from the limitation that the right of visit and search can only be used in time of war, the extent of interference permissible in the two rights varies.

The right of visit and search gives a warship power to search the ship thoroughly and, if necessary, detain her in a convenient port for this purpose.

The right of approach is, on the other hand, a right to see the ship's papers in order to verify the nationality of the ship, the commission of the captain and the purpose of the voyage. In order to distinguish the right of approach from the right of visit and search, several writers find the term “verification of flag” preferable.

The right of approach is a relatively old one and became crystallized in America at the latest by the beginning of the nineteenth century. The main authority cited to show the limits of such a right is The Marianna Flora, an early American case. According to the practice then prevalent, Story J. said-" Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority.

This right was eventually accepted by the British Government in a statement made by Lord Lyndhurst in 1858. This statement was cited in the **Fur Seal Arbitration** for the purpose of showing that the British Government had abandoned its alleged claim to exercise a right of visit and search in time of peace and had accepted the French and American points of view limiting peace-time rights on the high seas to the right of approach.

C. Customary Claims to a Wider Right of Approach in Time of Peace: British writers and some American writers suggest that warships are entitled to exercise a right of visit and search in self-defence on the high seas. The most extreme statement is made by Pitt-Cobbett when he says "the right of self-defence, as recognized by the law of nations, will confer on a State, in a case where its safety is threatened, a self-protective jurisdiction which will entitle it to visit and arrest a vessel on the high seas and to send her in for adjudication." There is scant authority for such an assertion. The main authorities are the Virginius (1878) and Mary Lowell (1879). Neither is conclusive.

The Virginius, an American merchant vessel, was captured on the high seas by a Spanish warship. She had a cargo of arms and ammunitions destined for Cuban insurgents. She was taken to Havana on a charge of piracy where, after a summary trial, some fifty-three members of the crew and passengers, American, Spanish and British subjects were executed. A British warship arriving in Cuba demanded a proper trial of the British captives on the grounds that "no pretence of the imminent necessity for self-defence existed" subsequent to the capture of the ship. Later the British Government demanded and obtained reparation. On the main question between the United States and Spain a protocol was agreed on November 29, 1873, to the effect that Spain should restore the vessel and survivors, and salutes the American flag unless it was proved that the Virginius was not entitled to fly an American flag.

The Attorney-General for the United States reported that the ship had been registered fraudulently, the true owner being a Cuban, but, nevertheless, a mere violation of the municipal laws of the United States did not give Spain a right to capture the vessel. In the end a compromise was reached whereby the salute was dispensed with and the ship and crew returned.

The Mary Lowell was a similar case. She was an American ship sailing from New York to Vera Cruz with a cargo of arms destined for the Cuban rebels. She was captured off the Bahamas by the Andeluza, a Spanish warship, and taken to Havana where the ship and cargo were condemned as a lawful prize. Under an arbitral agreement of February 11-12, 1871, Spain and the United States agreed to present the case to a mixed commission. The umpire, Baron Blanc, dismissed the claim of the United States.

Even assuming the seizure on the high seas to be unlawful by International Law, he nevertheless held that the fact that the arms were destined for Cuban rebels and that the ship was willfully or negligently allowed to fall into the hands of the rebels or persons promoting the insurrection, was sufficient to deprive the claimants of the right of protection of the United States flag. The claimants were therefore estopped from asserting any of the privileges of lawful intercourse in times of peace and any title to individual benefit of indemnity as against the acts of the Spanish authorities done in self-defence.

It is suggested that self-preservation or necessity is a generic term for self-defence and is thus distinguishable from self-help. Consequently, in order to justify a seizure such as in the above incidents, it must be proved that the necessity of self-defence was instant, overwhelming, leaving no possible alternative action and no moment for deliberation. Further the act must not be unreasonable or excessive.

Iii. Crimes Committed On High Seas

A. Piracy: A lively debate has also resurfaced in the literature as to whether political protestors can ever be considered "pirates". This was particularly prompted by the holding in *Cetacean Research Institute v. Sea Shepherd Conservation Society*[21] that violent actions on the high seas directed from one vessel against another can constitute piracy irrespective of motive.

At the beginning of the twenty-first century piracy is best considered a national law crime for which international law provides a permissive rule of jurisdiction. Certainly, the response to Somali piracy has been one of prosecution before national courts under modern statutory enactments. There has been no serious attempt to establish an international piracy tribunal. There has been some judicial interest at the national level in enquiring into the meaning of piracy at international law if only to examine the compatibility of national laws and prosecutions with the provisions of UNCLOS.

However, it appears generally accepted that the function of the international law of piracy is now to permit prosecutions by forum States lacking any conventional nexus to the crime rather than to directly criminalize conduct under international law in the manner of, for example, war crimes. Historically, the picture is much more confused. Many treatments of the subject tend to conflate very distinct historical époques and practices without appreciating that the concept of piracy may have different meanings in different times or places. For example, while Cicero is often quoted for the proposition that "pirates are the enemy of all mankind" it is quite clear that in ancient Rome piracy was not a crime per se. It was, rather, a special branch of the laws of war.

Similarly, the meaning of piracy in the 17th, 18th and 19th centuries was bound up in very different ways with the laws of war. Broadly, the question was one of state sanction. At a time before States generally had large standing navies, it was convenient for major powers to have a body of licensed privateers that they could incorporate into navies in times of war. Thus, a privateer was a state-licensed actor. It was a defense to a charge of robbery on the high seas (piracy) that one held a valid commission from a State (*see*, for example, ***US v. Hutchings***[22] and ***US v. Klintock***[23]).

Customary International Law: Although piracy is the oldest and perhaps only crime over which universal jurisdiction was generally recognized under customary international law, there was no authoritative definition of piracy under customary law. It was not settled, for example, whether animus furandi, intent to rob, was a necessary element, whether acts by insurgents seeking to overthrow their government should be exempt, as were acts by state vessels or could be on the same ship. Brierly stated: "There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority."

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[21] United States Court of Appeals for the Ninth Circuit, No. 12-35266, Amended Opinion of May 24, 2013, 107 AJIL 666 (2013).
[22] Brunner, Col. Cas. 489; 2 Wheeler, Cr. Cas. 543 (Circuit Court of Virginia, 1817).
[23] 18 U.S. 144 (1820), available at http://supreme.justia.com/cases/federal/us/18/144/case.html.

Courts in the United States and Britain and a number of prominent publicists took the position that any unauthorized act of violence committed on the high seas is piracy. Thus, Oppenheim's International Law, edited by Sir Hersch Lauterpacht, stated:

Piracy, in its original and strict meaning, is every unauthorized act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (animo furandi). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered by this narrow definition, and yet they are treated in practice as though they were cases of piracy.

Thus, if the members of the crew revolt and convert the ship, and the goods thereon, to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Again, if unauthorized acts of violence, such as murder of persons on board the attacked vessel, or destruction of goods thereon, are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical.

Therefore several writers, correctly, it is believed, oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder. However, no unanimity exists among them concerning a fit definition of piracy, and the matter is therefore very controversial. If a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as *every unauthorized act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.*

In a landmark English decision, In re Piracy *Jure Gentium*, the court endorsed as the "nearest to accuracy" Kenny's definition “where he says piracy is any armed violence at sea which not a lawful act of war is.”

Although piracy was frequently defined as “robbery at sea,” both U.S. and English courts have held that actual robbery is not an essential element.

Provisions on Piracy under the Geneva and UN Conventions

Attacks with a Political Purpose: “For Private Ends.”

Both the 1958 Geneva Convention on the High Seas (Geneva Convention), to which the United States is a party, and the 1982 United Nations Convention on the Law of the Sea (UN Convention), to which the United States is not a party, have provisions on piracy. Article 15 of the former and Article 101 of the latter provide:

Piracy consists of any of the following acts:

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

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(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) of this article.

J. P. A. Francois, the special rapporteur for the International Law Commission, which drafted the Geneva Convention, stated that in preparing the articles on piracy, he had relied heavily on the Draft Convention on Piracy prepared by the Harvard Research in International Law and the Comment to the Draft (Comment) by Professor Bingham, the reporter. Article 3 of the Harvard draft provides in part:

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air.

The term "for private ends" is not defined in the Geneva Convention on the High Seas or in the Harvard Draft Convention on Piracy, nor can its meaning be determined unequivocally in either of these documents. It is arguable, however, on the basis of the travaux preparatoires at "for private ends" was used in the Harvard draft to exclude acts by unrecognized insurgents who limited their attacks to the state from which they were seeking independence, and was used in the Geneva Convention for that purpose and also to exclude attacks by state ships, and that neither the Harvard draft nor the Geneva Convention was intended to exclude all attacks that were animated by a political motive.

It is clear that “for private ends” was not used either in the Harvard draft or in the Geneva Convention to limit piracy to acts done with intent to rob (animus furandi), notwithstanding the body of opinion that such intent was a necessary element of piracy. Professor Bingham stated in the Comment:

“Acts done with other purposes than robbery also are put under the common jurisdiction, although the typical piracy is usually defined as robbery on the high seas; for there is no good reason why one who does an act with intent to kill, wound, rape, enslave or imprison, or to steal or maliciously destroy property, which would be piracy if done to rob, should not be subjected to more probable retribution through the common jurisdiction of all states, instead of to a lesser chance of apprehension and punishment by a single state (or one of two or three states) which may not have the present force, or opportunity or interest to serve the cause of security and order in the locality.”

Article 14 of the Geneva Convention provides: “All States shall cooperate to the fullest possible extent in the repression of piracy…” The commentary to the International Law Commission's draft Article 38, which became Article 14 of the Geneva Convention, states: “Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law.” Johnson interpreted this to mean that a state that failed to discharge the duty is liable for "the payment of reparation to other States whose shipping was molested by the pirates in question."

It might be argued that if and to the extent that the "private ends" language is interpreted as narrowing the definition of piracy under customary international law, that narrowing only applies insofar as the Convention imposes a duty on states to exercise jurisdiction but does not preclude the exercise of jurisdiction in other situations to the extent permitted by customary international law. This result, however, does not appear to have been the intent of the authors of the Harvard draft or of the International Law Commission.

B. Illicit Traffic In Narcotic Drugs: While the 1958 Convention on the High Seas contained no provision on illicit traffic in narcotic drugs, the 1958 Convention on the Territorial Sea and the Contiguous Zone had a limited provision on the subject in Article 19, which read as follows:

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

(a) If the consequences of the crime extend to the coastal State; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or

(d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

2. The above provisions do not affect the right of the coastal State-to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

This convention thus authorized the coastal states to arrest any person or to conduct any investigation on board a foreign ship passing through their territorial sea, if it is necessary for “the suppression of illicit traffic in narcotic drugs,” subject to conditions specified in paragraphs 3 and 5, and paying "due regard to the interests of navigation" (paragraph 4).

This provision can be traced to a more limited suggestion of the International Law Commission, that was due to an initiative of the Government of Israel which called to the attention of the Commission the fact that its draft on the regime of the territorial sea contained no mention of the right of the coastal state to take steps to suppress illicit traffic in narcotic drugs.

In 1956, at the last session of the Commission devoted to the law of the sea, Professor Francois, the Rapporteur of the Commission on the regime of the territorial sea, was asked whether a reference on this subject should be added in the text of the article relating to the arrest on board a foreign vessel in the territorial sea. He replied that the paragraph allowing coastal state action if the consequences of a criminal act extended beyond the vessel would almost always apply to the illicit traffic in narcotic drugs.

The final report of the Commission added a sentence in the commentary to Article 20, stating that an “arrest for the purposes of suppressing illicit traffic in narcotic drugs may be justifiable, if the condition in sub-paragraph (a) is fulfilled,” i.e., if “the consequences of the crime extend beyond the ship.”

At the 1958 Conference on the Law of the Sea the issue was revived by Pakistan, which proposed the addition of a sub-paragraph in Article 20, which would allow the coastal state, in certain specified circumstances, to arrest a person on board a foreign ship passing through the territorial sea, “if it is necessary for the suppression of illicit traffic in narcotic drugs.”

The First Committee of the Conference adopted this proposal by 33 votes to 8, with 30 abstentions, after a short discussion. On the one hand, it was argued by the representative of Turkey that this proposal dealt with an issue of such importance that the proposal should be broadened; it should not be limited to the territorial sea as the question of illicit traffic in narcotic drugs was of universal concern. On the other hand, some delegates thought that this addition was not necessary, as it was covered by other subparagraphs of Article 20, relating to the right of arrest if “the consequence of the crime extend beyond the ship,” or “the crime is of a kind to disturb the peace of the country or the good order of the territorial sea.”

Article 20 of the Territorial Sea Convention with only minor drafting changes became Article 27 of the 1982 Law of the Sea Convention. In particular, the provision relating to narcotic drugs was changed slightly, allowing arrest of any person on board or an investigation, if “such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.”

Although the 1958 Convention on the High Seas contained no provision on narcotic drugs, a basic provision on the subject was included in Article 108 of the 1982 Convention on the Law of the Sea. No complementary provision was included, however, in Article 110 relating to the right of visit.

This is especially surprising in view of the fact that the other new 1982 version, the one relating to unauthorized broadcasting-discussed above-is followed up by listing that activity as one of those justifying boarding a suspected vessel. In addition, Article 109, paragraph 4, makes clear that any one of the states specified in that article "may, in conformity with article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus." There are no parallel provisions with respect to illicit traffic in narcotic drugs.

C. Illegal Fishing: Within the framework of international laws, issues of illegal fishing are set out in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU). The membership in IPOA is voluntary, however country members of FAO/Food and Agriculture Organization (including Indonesia) are encouraged to take part and carry out its provisions which are contained in the National Plan of Action (NPOA).

IPOA IUU provides a definition on illegal fishing as activities which are:

(1) Conducted by any vessel, whether foreign or national vessels, of any country (therefore it also applies to vessels from non-member countries of FAO) which:

a. Conducts activities in the territorial waters under the jurisdiction of a country;

b. Such activities are conducted without permission from the relevant country;

c. In violation of the local laws and regulations.

(2) Conducted by vessels sailing using the flag of country members of regional organizations on conservation and management of fishing concerned, which are:

a. In violation of provisions on conservation and management determined by the organization to which the country is engaged, or

b. In violation of international laws.

(3) In violation of national laws and international obligations, including obligations of country members of the organization on regional fishing management to the organization.

Aside from IPOA IUU, the apparatus of international laws relevant to fisheries regulations and which contain prevention of illegal fishing are:

1) Agreement to Promote Compliance with International Conversation and Management Measures by Fishing Vessels on the High Seas (1993 FAO Compliance Agreement);

2) Agreement for the Implementation of the Provisions of the 1982 UNCLOS (United Nations Convention on the Law of the Sea), Relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks 1995 (UNIA 1995);

3) Code of Conduct for Responsible Fisheries (CCRF).

1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?

The International Tribunal for the Law of the Sea delivered its Advisory Opinion on the Request submitted to the Tribunal by the Sub-Regional Fisheries Commission (SRFC) under article 138 of the Rules of the Tribunal.

The flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations enacted by the SRFC Member States concerning marine living resources within their exclusive economic zones for purposes of conservation and management of these resources.

The flag State is under an obligation, in light of the provisions of article 58, paragraph3, article 62, paragraph 4, and article 192 of the Convention, to take the necessary measures to ensure that vessels flying its flag are not engaged in IUU fishing activities as defined in the MCA Convention within the exclusive economic zones of the SRFC Member States.

The flag State, in fulfillment of its obligation to effectively exercise jurisdiction and control in administrative matters under article 94 of the Convention, has the obligation to adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the exclusive economic zones of the SRFC Member States which undermine the flag State's responsibility under article 192 of the Convention for protecting and preserving the marine environment and conserving the marine living resources which are an integral element of the marine environment.

The foregoing obligations are obligations of “due diligence”.

The flag State and the SRFC Member States are under an obligation to cooperate in cases related to IUU fishing by vessels of the flag State in the exclusive economic zones of the SRFC Member States concerned.

The flag State, in cases where it receives a report from an SRFC Member State alleging that a vessel or vessels flying its flag have been involved in IUU fishing within the exclusive economic zone of that SRFC Member State, has the obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation, and to inform the SRFC Member State of that action.

2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?

The liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not per se attributable to the flag State.

The liability of the flag State arises from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.

The SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach, attributable to the flag State, of its international obligations, referred to in the reply to the first question. The flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States.

3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?

The question only relates to those international organizations, referred to in articles 305, paragraph 1(f), and 306 of the Convention, and Annex IX to the Convention, to which their member States, which are parties to the Convention, have transferred competence over matters governed by it; in the present case the matter in question is fisheries. At present, the only such international organization is the European Union to which the member States, which are parties to the Convention, have transferred competence with regard to “the conservation and management of sea fishing resources”.

In cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.

Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its "due diligence" obligations, the SFRC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.

The SRFC Member States may, pursuant to article 6, paragraph 2, of Annex IX to the Convention, request an international organization or its member States which are parties to the Convention for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned must provide this information. Failure to do so within a reasonable time or the provision of contradictory information results in joint and several liabilities of the international organization and the member States concerned.

Iv. Recent Incidents

1. Indo-Pak: In an anti-smuggling operation, the Indian Coast Guard seized a drug-laden Pakistani vessel "Al Madina" off the Jakhau coast in Gujarat, official sources said Tuesday. A total of 194 packets, suspected to be containing Rs 500 crore worth of narcotics, were seized.

Acting on intelligence input that a Pakistani fishing boat was waiting near International Maritime Boundary Line to deliver narcotics off Jakhau coast, the Indian Coast Guard dispatched a ship and two fast interceptor boats to apprehend the suspected vessel, said an official statement.

The Coast Guard chased the Pakistani boat and succeeded in boarding it despite rough sea conditions. Meanwhile, the crew of the vessel flung the bags containing the suspicious material into the sea. The boarding party of the Coast Guard ship took the Pakistani crew into custody and managed to retrieve seven bags from water.

Preliminary testing on one of packets using a drug detection kit revealed that it would be containing narcotics substance that would be valued anywhere between Rs 400-500 crore.

The vessel was apprehended following a tip-off by DRI and other intelligence agencies. The seized vessel is being taken to Jakhau or any other Coast Guard station for further investigations. This is the second such seizure on the Gujarat coast in last three months. Earlier in March 2019, 100 kilogram of heroine was seized in a joint operation by Coast Guard and Anti-Terrorist Squad, Ahmedabad.

In a similar operation in July 2017, the Coast Guard had seized one of the largest drug haul ever off Gujarat. The seized Panama-registered vessel was carrying 1,500 kilograms of heroin valued at Rs 3,500 crore.

2. Russia – Ukraine: The three ships were sailing off the coast of Crimea, which was annexed by Russia in 2014, when they were seized. Russia opened fire, before its special forces stormed the vessels. Between three and six Ukrainians were injured.

Ukraine said it was a Russian "act of aggression". Moscow said the ships had illegally entered its waters.

3. U.S. – Iran: On January 12, 2016, two United States Navy riverine command boats were seized by Iran's Islamic Revolutionary Guard Corps(IRGC) Navy after they entered Iranian territorial waters near Iran's Farsi Island in the Persian Gulf. Initially, the U.S. military claimed the sailors inadvertently entered Iranian waters owing to mechanical failure, but it was later reported that they entered Iranian waters because of navigational errors.

The IRGC stated that they released the sailors after their investigation concluded the "illegal entry into Iranian water was not the result of a purposeful act."

At first it was suggested that a mechanical failure in at least one of the boats led them to the Iranian waters, then it was verified that both boats returned to base under their own power.

However, American military officials could not explain how they had lost contact with both of the boats.

The U.S. secretary of state, John Kerry, called the Iranian foreign minister Mohammad Javad Zarif within five minutes. His call was followed by multiple other phone calls between the two ministers. The sailors had a brief verbal exchange with the Iranian military and were released, unharmed, 15 hours later.

4. India – Sri Lanka: On February 10, 2014, Indian Coast Guard has arrested 25Sri Lankan fishermen on charges of trespassing and illegal fishing in Indian waters. The fishermen were illegally fishing in five boats in Indian waters 48 nautical miles east of Velankanni when they were arrested last night.

V. How Foreign Vessels Exploit Indian Fishing Laws? Foreign vessels are illegally fishing in Indian waters and not only causing huge losses to the country's exchequer but also affecting the living of domestic fishermen. In its report 'Licensed to Loot' released on March 13, the non-profit organization Greenpeace, claimed that several vessels of foreign origin are misusing the Letter of Permit (LoP) scheme of the Indian government to exploit lucrative Indian fish resources.

Under the Indian Exclusive Economic Zone (EEZ), only registered Indian fishing vessels can operate. But the LoP scheme of Department of Fisheries allows Indian fishing firms to buy technologically advanced foreign vessels. Under the scheme, the permission for a foreign vessel to operate in Indian EEZ is issued once it surrenders its registration in the country of origin and 10 per cent of its cost is paid by the Indian firm to the original firm. The vessel is supposed to employ 25 per cent Indian crew. Within three years, the Indian firm is supposed to completely own the vessel and the majority of the crew has to be Indian. Currently, 79 vessels are operational under the scheme in Indian EEZ.

Rules flouted: Dual registration is illegal as per the guidelines of LoP scheme. The Greenpeace report highlights that to circumvent this rule the original vessel owner registers their vessels to a shell company in a country where dual registration is allowed. This new registration is then surrendered to the Indian Mercantile Marine Department to obtain clearance to fish under the LoP scheme. "Since the LoP rules specify that proof must be furnished and at least 10 per cent of the value of the vessel be paid by the buyers to the sellers, the vessels are also allegedly undervalued," the report adds.

The report also blames the authorities for ineffective monitoring, control and surveillance of such vessels. The LoP guidelines require all vessels registered under the scheme to send their positions on voyage reports to the nearest Coast Guard office regularly. They are also required to submit their reports to the Fisheries Survey of India. However, in both the cases it was found that the reports were not submitted.

The report also points out that to maximise timeout at sea and reduce the fuel cost these vessels off-load their catches to another ship at instead of landing them at the Indian port. The process called trans-shipment is illegal in some regions. However, in India there is no restriction on trans-shipment from LoP vessels. "Since such vessels retain their original registration, they are essentially Taiwanese vessels taking one of the most sought after fish species from the Indian EEZ and exporting it to lucrative markets in Japan without the Indian government earning anything in exchange. These catchers are treated as Taiwanese catches since they trans-ship at high seas and there is no real way of verifying the amount and variety of fish being imported," states the report.

Meanwhile, Tarun Shridhar, joint secretary in the Department of Fisheries, says the report is not completely based on facts. "The licences under the LoP scheme have been issued to around 80 vessels but currently only 19 are operational. We have got specific complaints about the dual registration of a few vessels and have asked the Director General of Shipping and Coast Guards to investigate in the issue." He adds, if the violations are found, serious actions will be taken against those vessels.

India remains empty-handed: The economic losses caused by this are huge, estimates the report. Indian EEZ sustains one of the last healthy Tuna populations in the world. According to the industry estimates a Tuna long liner LoP vessel catches 200 to 250 tonnes of the fish in one season. The total annual catch of one such vessel thus comes to around Rs 630 crore. In return, the public exchequer receives a miniscule proportion through deposition fee of Rs 10,000 and some taxes levied on the catch. Besides, due to over exploitation of Indian waters by the LoP vessels, the catches of local fishing communities are constantly declining.

Indian Fishing communities for long have been demanding the LoP scheme to be scrapped. "The scheme has yielded very little either in terms of revenue, employment generation or the actual development of an indigenous deep sea fishing industry," said V Vivekanandan, advisor, National Fishworkers Forum and South Indian Federation of Fishermen Societies. It instead causes deterioration of fish population levels and local marine ecosystems, he added.

VI. List Of Indian Navy Joint Exercises And Their Significance For Defence And Maritime Security: India is continuing to strengthen its military diplomacy as it seeks to entrench its role as a regional net security provider. The Indian Navy engages in a number of bilateral exercises with other countries and also provides humanitarian assistance to countries. This will bolster India's role as regional security provider.

Indian warships also offered humanitarian assistance to Mozambique, which was ravaged by Cyclone Idai, according to people familiar with the developments. Three Indian naval ships were among the first responders, arriving in the central Mozambican port city of Beira and taking part in relief operations. A fourth Indian Navy ship, INS Magar, which reached Beira on 13 April, delivered 250 tonnes of rice and 500kg of epidemic medicines.

The presence of Indian Navy ships underlines "India's vision of Security and Growth for All in the Region (SAGAR) and assures order in the maritime domain besides solidarity with friendly countries."

Even Indian Army is planning to hold joint exercise with the Indian Coast Guard. Due to the induction of the Air Cushion Vehicles and since Indian Coast Guard have expertise in it; there will be joint training and ultimately joint exercise along with coast guards on how to operate these Air Cushion Vehicles inland and along the coastal area.

It is noteworthy that Indian Coast Guard along with Indian Navy is responsible for maintaining maritime surveillance and enduring that our Exclusive Economic zone is monitored effectively. For this reason, they undergo various joint exercises with the navies of other countries.

1. Sahyog Kaijin with Japan: Japanese Coast Guard ship Echigo along with its integral helicopter has participated. It involved Indian coast guard ships like Samudra Pahre.

In 2018, the Coast Guards of India and Japan conducted a joint exercise in the Bay of Bengal to "gauge inter-operability" where a series of activities, including scenarios of hijacking and rescue were performed.

The aim of the exercise was to engage with each other in case of any contingency and fine tune our strategy so that we can keep larger maritime frontiers safe.

While the threat of piracy, especially from Somalian pirates, had reduced it cannot be said with certainty that threats don't exist, and therefore the need for such initiatives arose where one side can learn from the other. The exercise helped in the expanding relationship between India and Japan, especially between the Coast Guards of the two countries.

JCG Ship Echigo participated in the joint exercise and the two Coast Guards did simulated situations of hijack of a merchant vessel by 'pirates' and its subsequent rescue, cross deck landing of helicopters, search and rescue demonstration and external fire-fighting.

The exercises focused towards acquainting the Coast Guards with each other's capabilities and strengthening their working level relationship, besides consolidating joint operating procedures. The exercise was also aimed at fine-tuning the coordination between the forces.

2. Malabar with United States of America and Japan: Exercise Malabar is a trilateral naval exercise involving the United States, Japan and India as permanent partners. Originally begun in 1992 as a bilateral exercise between India and the United States, Japan became a permanent partner in 2015. Past non-permanent participants are Australia and Singapore. The annual Malabar series began in 1992 and includes diverse activities, ranging from fighter combat operations from aircraft carriers through Maritime Interdiction Operations Exercises.

Three exercises were conducted before 1998, when the Americans suspended exercises after India tested nuclear weapons. However, the United States renewed military contacts following the September 11 attacks when India joined President George W Bush’s campaign against international terrorism.

In 2002, the exercises comprised basic passing maneuvers among naval vessels, anti-submarine exercises and replenishment-at-sea drills.

In 2005, Malabar featured the participation of the aircraft carriers USS Nimitz (CVN-68) and INS Viraat. During a month of operations, U.S. and Indian forces collaborated on a wide variety of tasks ranging from a joint diving salvage operation to a 24-hour 'war at sea' simulation that saw the two forces engage in mock combat.

In 2006, the addition of the U.S. Coast Guard Cutter Midgett (WHEC 726) and an Indian Coast Guard Patrol Ship allowed for the exchange of Coast Guard practices between nations in maritime law enforcement, anti-piracy operations, pollution control, search and rescue, and VBSS support. During the second phase, BOXESG pulled into several Indian ports, including Mumbai and Goa.

In 2007, besides interception and dissimilar air combat exercises, it featured surface and anti-submarine warfare, maritime interdiction and visit, board, search, and seizure operations to counter piracy and other non-state acts at sea.

The purpose of Malabar 2008 was to promote increase inter-operability between the United States and India, with a special emphasis on maritime interdiction, including counter-piracy and counter-terrorism operation.

Rear Admiral Anil Chopra, Flag Officer Commanding, Western Fleet (FOCWF), noted:

"This greatly enhances our two navies' interoperability, which is very important to humanitarian assistance and disaster relief missions, as well as issues of maritime security and piracy."

Malabar 2011 was designed to advance United States-Indian coordination and operational capacity. Exercise events included liaison officer professional exchanges and embarks; communications exercises; surface action group exercise operations; formation maneuvering; helicopter cross deck evolutions; underway replenishments; humanitarian assistance and disaster relief; gunnery exercises; visit, board, search and seizure; maritime strike; air defense; screen exercise and anti-submarine warfare.

3. Varuna with France: The annually held Varuna naval exercise is an integral part of France–India strategic relationship in the 21st century and consists of naval cooperation drills between the French Navy and the Indian Navy.

The joint-exercises are held either in the Indian Ocean or Mediterranean sea with the aim of improving Indo-French coordination on capabilities like cross-deck operations, replenishment at sea, minesweeping, anti-submarine warfare and information sharing. It was first started in 1983.

2015 Varuna exercises were focused on theatre-level Indo-French military cooperation in aero-naval and anti-submarine warfare. A French battle-group led by French aircraft carrier Charles de Gaulle (R91) and carrying aero-naval version of Rafale aircraft was operated alongside the Western Naval Command.

The latest edition of Varuna exercise took place on 1 May 2019 to 10 May 2019 at Goa coast. It was the largest ever joint exercise undertaken by the two navies yet, and represents the climax of the strengthened maritime co-operation between India and France.

The harbour and sea phases of the exercise from May 1 to May 6 and from May 7 to May 10, respectively, were aimed at honing skills for naval operations across a broad spectrum, with increased focus on tactical scenarios.

Armed forces of both countries have achieved a high level of inter-operability with each other through regular defence exercises. Exercise Varuna has grown in scale, scope and complexity over the years, underscoring the shared interest and commitment of both nations in promoting maritime security.

4. Konkan with United Kingdom: The KONKAN series of exercises commenced in 2004, and since then has grown in scale. KONKAN-2018 was conducted from November 28 to December 6 off Goa with units participating from both navies. The harbour phase was scheduled from November 28 to November 30, followed by the sea phase from 2-6 December.

Naval cooperation between India and the United Kingdom is based on the long term strategic relationship between both countries. Both Navies have, over the years, undertaken bilateral activities such as training exchanges and technical cooperation. The Bilateral KONKAN exercise provides a platform to periodically exercise at sea and in harbour, so as to build interoperability and share best practices.

The Royal Navy was represented by HMS Dragon, a Type 45 Class Destroyer equipped with an integral Wildcat helicopter. The Indian Navy will field INS Kolkata, the first ship of latest Kolkata class destroyers, equipped with integral Seaking and a submarine. In addition, maritime patrol aircraft, Dornier will also participate in the exercise.

The thrust of the exercise this year would be on Anti-Air warfare, Anti-Surface Warfare, Anti-Submarine Warfare, Visit Board Search and Seizure (VBSS) and seamanship evolutions. Besides exercises at sea, KONKAN-2018 also encompasses professional interactions and sports fixtures.

The exercise is aimed at deriving mutual benefit from each others' experiences and is indicative of the continuing cooperation between the two countries. The inter-operability achieved over the years as a result of such exercises has proved to be operationally beneficial to both navies. The naval cooperation is a tangible symbol of the commitment of both nations in ensuring a positive climate at sea for enhancing strategic stability and promoting economic prosperity.

5. SLINEX with Sri Lanka: SLINEX exercise started in 2005 was previously held once in two years and now it has been converted to annual event from 2018 onwards. Converting it into annual event signifies desire of both countries to enhance co-operation in maritime domain and further strengthen mutual trust and interoperability between two navies.

In 2018, the exercise was conducted in two phases, namely Harbour and Sea Phase. These exercises involved joint training, exchange of expertise, helicopter and maritime patrol aircraft operations, search and rescue, and maneuvers at sea. The exercise also involved sports fixtures and cultural events to provide opportunity for personnel from both navies to learn from each other and to build individual bonds of friendship and camaraderie.

India and Sri Lanka conducted their bilateral naval exercise off Lanka's Trincomalee focusing on anti-piracy exercises, gun firings, cross-deck helicopter operations and anti-surface operations.

The scope of exercise was significantly increased this year, as it saw participation of three ships, two maritime patrol aircraft and one helicopter participating from Indian side. In addition, Sri Lanka Air Force personnel also participated in the exercise for first time.

The benefits of operational interactions under the aegis of SLINEX are clearly visible as both the Navies today have an improved and steadfast understanding. SLINEX will further enhance the capability of the two navies to work together at sea and contribute towards maritime security in the region.

6. CORPAT with Indonesia: The close defence relations between India and Indonesia have been growing steadily with regular joint activities and exchanges of personnel between the Armed Forces of the two countries. Under the broad ambit of this strategic partnership, Indonesian Navy (TNI AL) and the Indian Navy have been carrying out coordinated patrolling twice a year since 2002 near the International Maritime Boundary Line to keep this part of the Indian Ocean region safe and secure for commercial shipping and international trade.

Apart from securing the trade sea route, the Coordinated Patrol also serves to enhance mutual understanding and inter–operability between the two navies. The CORPAT thus reflects the shared concerns between the two countries for a peaceful Indian Ocean for the benefit of international community.

The CORPAT has also strengthened understanding and interoperability between the navies, instituting measures to prosecute vessels engaged in unlawful activities and conducting Search and Rescue as well as pollution control.

In 2017, the visiting crew was engaged in interactions at various strata, including sports fixtures, ship visits, professional interactions and visits to places of historical and tourist interests. It was the 29th Edition of the exercise. The bilateral exercise aimed to enhance mutual understanding and inter–operability between the two navies.

In the latest edition, the ship and aircraft from both the countries would undertake patrolling on the respective sides of 236 nautical miles long International Maritime Boundary line. The patrolling would be conducted in three phases from 22-31 March 2019.

The IND-INDO CORPAT Series of bilateral seek to underscore India's peaceful presence and solidarity with friendly Maritime neighbor countries to ensure good order in the maritime domain, consolidate interoperability and strengthen existing bonds of friendship between India and Indonesia.

Indian Naval assets have been increasingly deployed in the recent times to address the maritime concerns on the region. In addition, as part of the Indian Government's vision of SAGAR (Security and Growth for All in the Region), the Indian Navy has also been involved in assisting countries in the Indian Ocean Region with EEZ Surveillance, Search and Rescue, and other capacity-building and capability-enhancement activities. The 33rd IND-INDO CORPAT, also coinciding with 70 years of India-Indonesia diplomatic ties, contributed towards the Indian Navy's efforts to consolidate inter-operability and forge strong bonds of friendship across the seas.

7. Ausindex with Australia: In 2017, the exercise aimed at increasing inter-operability and is in consonance with the growing cooperation between the two countries.

The exercise, in its third installment in 2019, was conducted in the Bay of Bengal and focused on anti-submarine warfare. It was Australia's largest defense force deployment for an exercise in Indian waters, with over 1,000 Australian personnel taking part, comprising naval, army, and air force assets. The AUSINDEX exercise is a prominent display of the increased defense collaboration between the two countries, continuing to implement and enhance the Framework for Security Cooperation developed by Canberra and New Delhi in 2014. The joint drill involved exercises in all three dimensions with focus on Anti-Submarine Warfare.

The scale of AUSINDEX exercise is an indication that the defense relationship between India and Australia is steadily being consolidated, and the strengthening of this bilateral architecture may in fact need to be an essential precursor to the further coordination and integration with the other two powers, should it ever come to fruition.

The bilateral maritime exercise is aimed to strengthen mutual cooperation and enhance interoperability between the Royal Australia Navy and Indian Navy by providing opportunities for interaction and exchange of professional views between the personnel of the two navies.

8. SIMBEX with Singapore: Singapore India Maritime Bilateral Exercise (SIMBEX) is an annual bilateral naval exercise conducted by the Indian Navy and the Republic of Singapore Navy (RSN).

The bilateral exercise SIMBEX was started in 1993 has grown in tactical and operational complexities and progressed from a basic Anti-Submarine exercise to more complex maritime exercise such as advanced air defence operations, anti-air, surface weapon firings and tactical exercises.

The exercise has been held annually since 1994. Over the years, SIMBEX has progressed beyond its original emphasis on anti-submarine warfare to include elements of maritime security, anti-air and anti-surface warfare.

In 2019, the Harbour Phase, conducted from May 16 to 18, not only included a series of planning meetings but also simulated tactical exercises and interactions between professional subject matter experts in various domains of Maritime Operations. The four-day naval exercise will include various maritime combat drills such as advanced aerial tracking, coordinated targeting tactical exercises and weapon firing on aerial and surface targets. The interactions helped the crews of both sides to perform their tasks at sea in better unison, more efficiently and with full regard to safety compliance.

In addition to IN Ships Kolkata and Shakti, Long Range Maritime Patrol Aircraft P8I will also participate in the exercise along with Republic of Singapore Navy (RSN) Ships steadfast and valiant, maritime patrol aircraft Fokker-50 and F-16 fighter aircraft.

The Indian Government and the Indian Navy remain committed to peace, prosperity and security of the Maritime Commons and endeavor to build lasting bilateral and multi-lateral partnerships in pursuance of this shared vision.

Over the years SIMBEX has stood the test of time in demonstrating the nation's commitment to enhance maritime cooperation between the two navies and to bolster bonds of friendship between two countries. Indian Navy deployed its finest assets for SIMBEX – 19 with an aim to strengthen mutual trust, enhance interoperability and build greater synergy to address common maritime concerns among both navies.

9. Indra Navy: Indra Navy is a bilateral maritime exercise between the Indian and Russian Navy and epitomizes the strong long term strategic relationship between the two countries. Initiated in 2003, the exercise has matured over the years with increasing scope, complexity of operations and level of participation. The exercise involves live firing drills, as well as air defence and anti submarine operations. Additionally, counter piracy, terrorism and drug smuggling operations are carried out.

In 2018, the exercise included multiple components, including visit, board, search, and seize drills, underway replenishment at sea drills, and anti-submarine warfare drills. The two navies also conducted live-firings against aerial targets.

The tenth edition of INDRA NAVY maritime exercise between India and Russia was conducted off Visakhapatnam coast, Andhra Pradesh from December 9 – 16, 2018. The aim of this exercise was to increase interoperability amongst the two navies, develop common understanding and procedures for maritime security operations. Thrust of the exercises at sea was on Anti-Submarine Warfare (ASW), air defence drills, surface firings, Visit Board Search and Seizure (VBSS) operations and tactical procedures.

The exercise was another milestone in strengthening maritime security cooperation between the two navies and will serve to reinforce the long-standing bond of friendship between the countries. It helped strengthen mutual confidence and inter-operability and also enable sharing of best practices between both the navies.

Proliferation Security Initiative: Maritime trade facilitates the carriage of almost 92 per cent of world trade through international shipping.' Though shipping is largely considered to be safe, efficient and environment-friendly, the twenty-first century has witnessed an acceleration in the number of unlawful activities at sea in a variety of forms including piracy, drug trafficking, illegal fishing and degradation of the environment, indicating a serious gap in the effectiveness of the prescriptive norms of the United Nations Convention on the Law of the Sea (UNCLOS), 1982. The attacks on the USS Coleman in 2000 and the French tanker MT Limburg in 2002 demonstrated that international terrorist organizations are capable of carrying out acts of terrorism at sea. Three essential elements of maritime transport that have been exposed to various non-traditional threats such as terrorism are containers, ships and seafarers.

Until recently, the concept of maritime security had received scant attention from the international community as well as the International Maritime Organization (IMO), except for the adoption of the 1988 Convention on Suppression of Unlawful Activities against the

Safety of Maritime Navigation (SUA) regime. Although most of the maritime security initiatives adopted after the incidents of 11 September 2001 are unilateral initiatives adopted by the United States to secure its interests, the fact that the United States has a share of almost 20 per cent of total world trade means that these measures can have a huge impact on global maritime trade. Thus, these initiatives have forced industries involved in maritime trade to change their focus towards security.

Among these initiatives, the Proliferation Security Initiative (PSI) has been supported by more than 95 countries as of May 2009, according to the US Department of State. Further, the PSI has been endorsed in the Report of the UN Secretary-General and in UN Security Council resolutions adopted under Chapter VII of the UN Charter.

The PSI is essentially a political understanding between the United States and its like-minded allies, under which these countries have accorded themselves the power to board vehicles and craft and interdict any shipment of weapons of mass destruction (WMD), WMD delivery systems and related materials by land, sea or air either under the authority of their national laws or under international law. The decision by some States to interdict, with the consent of the flag State, the shipment on the high seas which is suspected of carrying WMD to proliferating States or non-State entities, has significant implications for maritime trade. While the two major Asian powers-China and India-have not joined the PSI, the growing naval and civilian nuclear cooperation between India and the United States creates the possibility of greater coordination between these two countries for facilitating the implementation of the PSI in the South Asian region.

The PSI was announced by the US President in Poland in 2003 to combat the threat posed by the global proliferation of WIMD. It calls for the interdiction of illegal and dangerous cargo on the ground, in the air and at sea, in the course of its passage to and from countries of proliferation concern. Details of the PSI were announced as Statements of Interdiction Principles (SIPs) in September 2003. Ten countries- Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain and the United Kingdom- signed onto the PSI as core members by adopting the SIPs. Thereafter, Canada, the Czech Republic, Denmark, Norway, Russia, Singapore and Turkey also publicly joined the PSI. Moreover, many countries have extended varying degrees of support to the PSI without formally joining it. Thus, more than 95 States representing the majority of the world's maritime fleet have been supportive of the PSI.

The SIP provides the objective of the PSI and the means for achieving this objective. The interdiction principles exhort States to take effective measures to strengthen their domestic laws to support the interdiction efforts. These SIPs are meant...to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council.

The objective of the PSI as stated in the SIPs suggests that the PSI participants intend this initiative to be an enforcement mechanism for the existing web of treaties and international agreements to limit the spread of nuclear, biological and chemical weapons.

The United States has described the initiative as just a political commitment rather than a legally binding instrument. However, the wordings of the principles suggest that the PSI is intended to be an embryo of a new legal regime. According to Lobsinger, by authorizing PSI-participating States to counter the proliferation of WMD delivery systems in addition to WMD, the PSI laid down the foundation for the Security Council Resolution 1540 which prohibits all Member States from assisting non-State actors from acquiring or developing WMD delivery systems or WMD. Nevertheless, a PSI interdiction at sea has to derive legal authority from the terms of the UNCLOS, which has been signed and ratified by most of the PSI participant countries. Even States like the US-the pioneer of the PSI-have accepted the customary status of the UNCLOS.

Objective and scope of the PSI: According to the SIPs, the objective of the PSI is to impede and stop shipments of WMD, WMD delivery systems, and related materials flowing to and from States and non-State actors of proliferation concern. It emphasizes that the interdictions would be consistent with national legal authorities and relevant international laws and frameworks, including the resolutions of the UN Security Council. The SIPs identify four practical ways of pursuing these objectives:

(1) by undertaking effective measures, either alone or in concert with other States, for interdicting the transfer or transport of WMD or related materials;

(2) by adopting streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity;

(3) by reviewing and working to strengthen the relevant national and international legal authorities where necessary to accomplish these objectives; and

(4) by taking specific actions in support of interdiction efforts regarding cargoes of WMD and related materials including preventive measures to thwart WMD transport, vessel boarding, search and seizure.

The Purpose of the PSI: The PSI aims to complement existing international arms control treaties and arrangements by creating a loose partnership of countries which are committed to non-proliferation of WMD to better combat the increasingly serious problem of the proliferation of WMD and their delivery systems and related materials. Therefore, the PSI is "an activity, not an organization, and as such consists of an ad hoc coalition of States rather than a formal membership."

The Practice of the PSI: The eleven original participating States of PSI are Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. Canada, Demark, Norway and Singapore joined the PSI in December 2003. The Czech Republic and Russia joined in the first half of 2004, with New Zealand, Greece, and Thailand joining in 2005. The US signed bilateral boarding agreements with flag-of-convenience States, namely, Belize (August 2005), Croatia (June 2005), Cyprus (July 2005), Liberia (February 2004), Marshall Islands (August 2004), and Panama (May 2004), all of which later became partners of the PSI.

The PSI has now won the support of nearly eighty States. PSI participants have held round-table conferences in Madrid, Brisbane, Paris, London, Lisbon, and Krakow, among others. In these conferences, participants restated their determination to prevent the proliferation of WMD and related technologies. PSI participants agreed to exchange information on nonproliferation, further improve their own legal systems as well as promised to take diverse measures for interdiction.8 At the High Level Political Meeting (Warsaw, Poland June 2006), PSI participants agreed to intensify the interdiction of financial transactions between proliferators and suppliers, and concentrate on combating black market networks and illegitimate businesses enmeshed in the illicit trade in WMD.

Since September 2003, PSI participants have organized a series of military exercises on the Western Pacific and the Mediterranean Sea to simulate the interdiction, boarding, and inspection of vessels, aircraft and vehicles suspected of carrying WMD or their components by combining military measures with measures in the area of intelligence and law enforcement. For example, from September 10 to 13 of 2003, a joint military exercise entitled “Pacific Guardian” between the US, Australia, France, and Japan was launched on the Coral Sea of Australia. “Pacific Guardian” was the first military exercise to launch under the banner of the PSI.

Another example worth mentioning is that, in late September 2003, intelligence information provided by the UK and the US indicated that a German cargo ship called “the BBC China” was being used to provide Libya with nuclear technology.

The vessel was subsequently interdicted and brought to an Italian port. After inspection, a centrifugal accelerator used to produce high-enriched uranium was found onboard. This successful interdiction prompted Libyan leaders to announce the abandonment of Libya's WMD program and accept international inspection.

The Legal Basis for the PSI

PSI participants have been exploring the legal basis for the PSI through the following five aspects:

A. The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation: Concern for maritime terrorism in the wake of 9/11 prompted the International Maritime Organization to adopt the Protocol of 2005 to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter “the Protocol of 2005”). This protocol represented an effort to make necessary modifications to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. As stipulated in Article 3 of the Protocol of 2005, any person commits an offence if that person unlawfully and intentionally:

(a) uses a ship as a weapon or a means of terrorist attack; (b) uses a ship to transport terrorists or related materials aimed at supporting WMD. Article 11 of the Protocol of 2005 stipulates that State Parties shall comply with the principle of "prosecution or extradition" when curbing crimes against the safety of maritime navigation. In other words, if a State Party fails to extradite the criminal, it has the obligation to submit the case to its own competent authority for prosecution without delay, following the procedures stipulated in its domestic laws. Therefore, the Protocol of 2005 has further expanded the legal basis in international law for the stop and punishment of a person or entity that is involved in activities related to WMD.

B. Resolutions 1540 (2004), 1673 (2006), and 1810 (2008) of the United Nations Security Council: In April 2004, the United Nations Security Council adopted Resolution 1540 (2004). The resolution imposes the following obligations:

a. All States ought to refrain from using any means to support non-State actors developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems;
b. All States ought to adopt and implement appropriate and effective legislation to prevent the non-State actors from manufacturing, acquiring, possessing, developing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems, especially for the purpose of terrorism; and
c. All States ought to take concerted efforts to establish controls over nuclear, chemical or biological weapons and their delivery systems as well as the related materials, equipment and technology to prevent illicit trafficking. In addition, the resolution calls for a committee to be established under the Security Council to supervise the implementation of the resolution in the next two years and that all States represent a first report on their implementation to the committee no later than six months. In April of 2006, Resolution 1673 (2006) was adopted by the Security Council at its 5429th Meeting.

The resolution restated that the proliferation of nuclear, chemical, and biological weapons as well as their delivery systems constituted a threat to international peace and security, and stressed all decisions and requirements stipulated in Resolution 1540 (2004) of the Security Council as well as the importance of full implementation by each signatory to the Resolution.

Resolution 1810 (2008) was adopted by the Security Council on 25 April 2008 at its 5877th Meeting. The Resolution: (a) reaffirms the decisions and requirements made in its Resolutions 1540 (2004) and 1673 (2006); (b) states the Security Council's determination to take appropriate and effective initiatives to, in compliance with its primary duty stipulated in the Charter of the United Nations, combat the threat to international peace and security posed by the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery; (c) points out that international cooperation between States, in accordance with international law, is required to counter the illicit trafficking by non-State actors in nuclear, chemical and biological weapons, their means of delivery, and related materials; and (d) recognizes the need to enhance coordination of efforts on national, regional, sub-regional and international levels, as appropriate, in order to strengthen a global response to this serious challenge and threat to international security.

It has been restated in all three resolutions of the Security Council that the proliferation of WMD and related items has constituted a "threat to international peace and security". The Security Council also requires all States to "enhance coordination of efforts" to prevent the proliferation of WMD." Thus, PSI participants regard the PSI as one of the many examples of "coordination of efforts". However, none of the three resolutions explicitly authorizes interdiction by a State in line with the PSI.

C. The 1992 Security Council Presidential Statement: During a January 1992 Security Council meeting at the level of Heads of State and Government, the Council president issued a note which pointed out: "the members of the Council underline the need for all Member States to fulfill their obligations in relation to arms control and disarmament." The proliferation of all weapons of mass destruction constitutes a threat to international peace and security. The members of the Council commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end.

Though the 2003 Statement of Interdiction Principles released by the White House claimed that: "It (the PSI) is consistent with and a step in the implementation of the UN Security Council Presidential Statement of January 1992", is the presidential statement did not authorize any specific member to conduct interdictions aimed at any other member by land, water, or air.

D. The Right to Collective Self-defense: The PSI participants deem the PSI as a collective response to international terrorism, which is consistent with the right to collective self-defense stipulated in Article 51 of the Charter of the United Nations. They point out that the right to collective self-defense can be exercised in the case of terrorist attacks such as the 9/11 incident and the 2004 Madrid train bombings. The uncertain nature of terrorist attacks creates an incentive for PSI participants to establish a wide network in the hopes of successfully preventing terrorism. And the PSI is designed to take pre-emptive action to prevent further attacks. According to a 1985 report of the UN Secretary-General, the United Nations Convention on the Law of the Sea (UNCLOS) does not prohibit "military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, Paragraph 4, and Article 51." The report goes on to state that "in the exercise of the right of collective self-defense it is clear that parties to these security arrangements may use force upon the high seas, within the limits prescribed by international law, to protect their armed forces, public vessels, or aircraft."

However, Article 51 of the Charter of the United Nations requires that an armed attack against a Member State to occur before action can be taken in collective self-defense. Therefore, PSI participants' view, that the PSI is an initiative consistent with the right to self-defense stipulated in Article 51 of the United Nations Charter, is too broad an interpretation of Article 51 to be a convincing legal basis for the PSI and remains a controversial issue among the international community.

E. Treaty on the Non-Proliferation of Nuclear Weapons (NPT): The NPT, which entered into force in 1970, underpins the modern multilateral non-proliferation system. According to Article 3 of the NPT, each non-nuclear weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices." It goes on to state that "each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon

State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article." PSI participants consider the NPT as one of the legal basis of the PSI.

There are no explicit stipulations in either the NPT, the Protocol of 2005, the 1992 Presidential Statement of the Security Council, or the Resolutions 1540 (2004), 1673 (2006), and 1810 (2008) of the United Nations Security Council, which authorize the interdiction by PSI participants of WMD and other related items. To put it another way, the PSI has not been authorized by the Security Council of United Nations, nor has been stipulated in any international convention as an obligation. This is the fundamental reason why there has been so much controversy regarding the PSI since its establishment and why some States harbor doubts towards its purpose. Nevertheless, preventing the proliferation of WMD is surely a goal shared by the NPT, the Protocol of 2005, the 1992 Presidential Statement of the Security Council, and the Resolution 1540 (2004) of the United Nations Security Council and other legal instruments.

Implications of the PSI on the Development of the International Law: Due to the controversial nature of the PSI's legal foundations in the international community, activities organized by the PSI have profound implications for the development of contemporary international law.

A. The PSI Violates the Right of Innocent Passage: The right of innocent passage allows freedom to a vessel to pass through the territorial waters of another State so long as it is not prejudicial to the peace, good order or security of the coastal State. Article 17 of the UNCLOS stipulates, “Ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”

Article 19 of the UNCLOS further elaborates: “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State”, and specifies 12 situations where passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State.

Some coastal States maintain that the passage of the vessels carrying WMD is non-innocent because it jeopardizes the security of coastal States. However, this point of view does not hold water. First, the transportation of WMD does not fit neatly within any of the 12 exceptions listed in Article 19 of the UNCLOS. Second, it is difficult for coastal States to prove that the shipment of WMD constitutes a use of force or even threat of force against their sovereignty, territorial integrity or political independence. Third, the coastal State cannot rely on the possibility that the WMD will be used at some time in the future to conclude that the transport constitutes the threat of force or the use of force by the means of violating the principles of international law reflected in the Charter of the United Nations.

Therefore, a ship transporting WMD has the right of innocent passage through the territorial sea as long as the transport of WMD does not fit within the 12 situations specified in the UNCLOS where passage of a foreign ship would be considered prejudicial to the peace, good order or security of the coastal State.

Furthermore, Article 23 of the UNCLOS stipulates that, "foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements." Thus, ships carrying nuclear materials enjoy the right of innocent passage through the territorial sea of any other State as long as they do not violate the stipulations of international agreements.

Thus, it can be seen that the interdiction by PSI participants of ships carrying WMD within their terrestrial sea violates the right of innocent passage of other States.

B. The PSI Violates the Principle of Free Navigation on the High Seas: Freedom of navigation is one of the most important parts of the principle of freedom of the high seas, which itself is a long established rule in international law.

The former has been stipulated in Article 90 and Article 96 of the UNCLOS. Article 90 of the UNCLOS stipulates: "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas", and in Article 96, "ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."

Constraints on the freedom of navigation on the high seas are stipulated in Article 108 and Article 110 of the UNCLOS. As is stipulated in Article 108 of the UNCLOS, "all States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions", and in Article 110, a warship is not justified in boarding a foreign ship unless there is reasonable ground for suspecting that "the ship is engaged in piracy", "the ship is engaged in the slave trade", "the ship is engaged in unauthorized broadcasting", "the ship is without nationality"; or "though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship". It can be observed that the vessels carrying WMD do not fall under the scope of ships that a foreign warship is justified in boarding and inspecting. Therefore, interception by the PSI participants on the high seas violates the principle of free navigation on the high seas. In addition, Article 58 of the UNCLOS stipulates that all States, whether coastal or land-locked, enjoy the freedom of navigation and overflight in the exclusive economic zone. Therefore, the interdiction by PSI participants in the exclusive economic zone violates other States' freedom of navigation.

C. The PSI Violates Basic Principles of International Law

1. The PSI Violates the Principle that both the Threat and the Use of Force are prohibited: The principle that both the threat and the use of force are prohibited means that all States in their international relations must not resort to the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The threat and use of force should never be the solution to international disputes. Article 2(4) of the Charter of the United Nations states that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." Therefore, the PSI, which allows military interdiction of the delivery vehicles suspected of loading WMD, obviously violates the non-use or threat of force principle.

2. The PSI Violates the Principle of Sovereign Equality: The principle of sovereign equality means that all States, regardless of their size, strength, or their differences in politics, economy, social system and development level, are equal and independent members of the international community with equal legal status. It is both one of the key principles of traditional international law and a fundamental principle of contemporary international law. The principle of sovereign equality has been listed as one of the top principles in documents issued by the United Nations and various other regional organizations in respect of basic principles on international relationships. During its early years, the PSI claimed that it did not target any particular nation, but in fact it was aimed specifically at certain States such as North Korea and Iran. The PSI, which claims certain States as being involved in proliferation and allows interdiction of their delivery vehicles, is a violation of the principle of sovereign equality as well as a discrimination against these countries.

Prospects of the PSI

1. The PSI Reflects to Some Extent the Consensus of the International Community on Nonproliferation: The PSI, as a loose non-treaty based mechanism, is a tool for nonproliferation. Nowadays, non-proliferation has become a consensus of the international community.

First, both the presidential statement and related resolutions of the Security Council conclude that proliferation of WMD threatens international peace and security. Preventing the proliferation of WMD and their delivery systems will help maintain world peace and international security in the common interest of the international community. Second, no State dares to claim in public that it is going to be involved in proliferation activities, and even States such as North Korea and Iran have committed themselves to nonproliferation of WMD. Finally, the fact that the number of PSI participants has increased from eleven to roughly eighty and that even Russia has joined the PSI indicates that an increasing number of countries believe and expect that the PSI will play a greater role in nonproliferation. In fact, at the 2006 G8 Summit in St. Petersburg, the US and Russia announced the Global Initiative to Combat Nuclear Terrorism that is similar to the PSI to further detect and secure nuclear materials inside the borders of member States.

2. The Legal Basis of the PSI Needs to Be Improved: As mentioned above, much controversy remains in regard to the legal basis of the PSI because no relevant international legal document expressively authorizes PSI participants to conduct interdictions. The implementation of the PSI has huge implications for the development of contemporary international law, the most noteworthy of which is that it poses challenges to the law of the sea. As some scholars have said, "the United Nations Convention on the Law of the Sea is an underlying legal barrier to the implementation of the PSI." Over the next few years, the question of how to promote the development of the legal mechanism of nonproliferation and further improve the legal basis of the PSI will become the key to gaining support and participation from more States.

The PSI and India: Although India has been participating in ubiquitous bilateral and multilateral maritime exercises, it has neither become a member of the PSI nor ratified the 2005 SUA Protocol. The main reasons for the reluctance on India's part could be briefly surmised as follows:

(a) The political nature, US domination and wide scope of the PSI, encompassing preventive and interdicting measures against WMD proliferation, delivery systems and related materials via land, sea and air.

(b) India being a country that has always stood for the rights of all States to use nuclear energy for peaceful purposes and development might find the use of inclusive words such as “related materials” in the PSI SIPs and “any source material” or “fissionable material” under Article 3 (1) (b) (iii) of the 2005 SUA Protocol as violative of their right to transport and use nuclear energy for peaceful purposes as well as affecting dual-use commerce. This is a justifiable concern as the future of energy needs lies mostly in nuclear energy.

(c) Being a non-NPT nuclear weapon State, India strongly disagrees with the discriminatory stance perpetrated under Article 3 (2) of the 2005 SUA Protocol, which allows NPT parties to transport the materials mentioned in Article 3 (1) (b) (iii), while restricting transport of the same by others including countries such as India that do not have any record of WMD proliferation.

(d) The repeated attempt by the United States to achieve India's participation in the PSI using means like the Hyde Act, that purports to lift the nuclear embargo on India, is seen as an infringement of India's independent foreign policy.

(e) India is yet to be convinced of the legitimacy of the PSI under general international law and under the UNCLOS.

MODULE-IV

INTELLIGENCE GATHERING & INFORMATION SHARING

MODULE-IV -INTELLIGENCE GATHERING & INFORMATION SHARING

Maritime domain area awareness

A. Maritime Domain Awareness as a Form of Intelligence: The first step in considering the role of intelligence in maritime security law enforcement operations is, obviously enough, to consider what is meant by intelligence. Here, Colby's observations remain helpful:

"There are no limits to the types and sources of information which may be useful. The processing of intelligence refers to the treatment accorded the raw data which has been collected. It generally includes appraisal of the relevance of the information, as well as editing and cataloguing in forms useful to decision-makers. These tasks vary enormously in complexity, depending in large measure on the amount and quality of data requested and actually collected."[24]

One topic considered in passing in this article will be the sharing of information between intelligence and law enforcement agencies. However, while such information may-and sometimes does-play a role in real cases where maritime law enforcement action is taken, it is obviously not the only or even necessarily the best source of actionable intelligence in maritime law enforcement. A critical concept remains maritime domain awareness (MDA). The International Maritime Organization (IMO) definition of MDA is "the effective understanding of any activity associated with the maritime environment that could impact upon…security, safety, economy or the environment."

This definition appears to draw heavily on the wording of the 2004 U.S. Maritime Security Policy directive. While MDA is originally a U.S. concept, Australia, Canada, the European Union and the Philippines (among others) all have MDA policies." MDA is basically about knowing who is doing what, where. A simple example is provided by Seychelles efforts to secure their exclusive economic zone (EEZ) (formidably large compared to their land territory) against piracy. By fitting all Seychellois fishing vessels with automatic identification systems, and improving radar coverage across their EEZ, the Seychellois Coast Guard was able to identify vessels in its EEZ that were not Seychellois fishing vessels and send one of its limited number of cutters to investigate and verify that the vessel was not a threat. However, MDA is not always this simple.

B. Maritime Domain Awareness and International Law: While MDA is a simple enough concept, delivering it in a manner consistent with international law is not free from difficulty. First, there may be questions regarding the intelligence uses to which information gathered in maritime law enforcement operations may be put. Second, States may desire information about vessels transiting off their coasts that they have no obvious power to demand under the UN Convention on the Law of the Sea (UNCLOS) absent further international cooperative mechanisms being established.

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[24] Jonathan E. Colby, The Devloping International Law on Gathering and Sharing Security Intelligence, 1 YALE STUDIES IN WORLD PUBLIC ORDER 49, 53 (1974) (quoted in NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 211 (2012)).

As a key example of the latter, in 2004 Australia declared its intention to create a 1,000 nautical mile (nm) "Maritime Information Zone" within which it proposed that any passing vessel would be "required to provide details of cargo, destination, crew, port of call, [and] likely arrival [time] at port." The Australian Prime Minister was further reported as saying the Defence Force "will be able to intercept and board ships and do 'whatever it takes' to get the information they need."" Though clearly able to make the provision of such information a condition of entry for vessels intending to enter an Australian port, Australia had no obvious authority to demand such information from vessels merely transiting within 1,000 nm, let alone intercept them using defense personnel to demand information. In addition, the Australian government declared an intention "to identify all vessels, other than day recreational boats" upon their entry to its EEZ." Within months protests from Indonesia and New Zealand saw Australia rebrand its initiative the "Australian Maritime Information System" and stress that information would be sought from shipping on "a wholly voluntary basis" underpinned by "cooperative international arrangements.""

Unsurprisingly, Australia was already actively involved in efforts to establish a cooperative international system for greater exchange of shipping information at the IMO. In 2006 after four years of work, and in an initiative largely spearheaded by the United States and the United Kingdom, the IMO Maritime Safety Committee reached agreement on a long-range identification and tracking (LRIT) system, to be implemented as Regulation 19-1 of the International Convention for the Safety of Life at Sea (SOLAS). Its implementation under SOLAS obviously has the effect of making it binding on SOLAS State parties through the tacit acceptance procedure. The regulation entered into force in July 2009. The LRIT system's essential features are as follows:

- Vessels covered by the regulation must automatically transmit every six hours the ship's identity, position (expressed in latitude and longitude) and "the date and time of the position provided;
- all covered vessels "must transmit ... LRIT data to the data centre nominated by its flag State" and the LRIT regulations "allow flag States to receive LRIT information from ships flying their flag" wherever they are worldwide and
- contracting SOLAS governments must "elect either to create a National LRIT Data Centre, or participate in a Regional or Cooperative [LRIT] Data Centre."

LRIT Data Centres may request information of each other through the International Data Exchange. Using this mechanism, port States are "entitled to receive [LRIT] information about ships which have indicated their intention to enter a port facility . . . or a place under the jurisdiction of that [State], irrespective of where such ships [are] . . . provided they are not located" within another SOLAS party's internal waters. Correspondingly, a coastal State is "entitled to receive [LRIT] information about ships…navigating within... 1,000 nautical miles of its coast provided such ships are not located" within another SOLAS party's internal waters.

Thus, despite the skepticism with which the Australian Maritime Information.

Zone proposal was initially received; the final LRIT system strongly resembles what Australia had proposed. Nor was Australia alone in seeking information about vessels transiting waters off its coasts. During IMO negotiations in 2005, the United States suggested coastal States should be able to request LRIT information about vessels within 2,000 nm of their coasts. The following year, Norway suggested 1,200 nm. As at 9 March 2012, 97 out of 161 parties to the International Convention for the Safety of Life at Sea were part of the system and 66 data centres for long-range identification and tracking of ships were connected to the Exchange.

Nonetheless, as an MDA tool the LRIT system is far from perfect. It contains rather "pedantic" restrictions on the ability to request information about ships present within another State party's baselines. More problematically it permits flag States to opt out entirely from providing information where requests are made on security grounds." Another weakness of the system is that it applies only to passenger ships, cargo ships of at least 300 gross tons and mobile offshore drilling units." It therefore does not apply to cargo ships under 300 tons nor to fishing vessels or small privately-owned recreational craft. It is precisely such small vessels that pose the greater security threat: *"While safety, security, and stewardship regimes are increasingly being developed for larger vessels on the sea, many smaller vessels, including most fishing vessels, tugs, and recreational vessels, are not covered by these regimes and remain largely anonymous."*

As the U.S. Department of Homeland Security has noted, “Small vessels are. . . readily vulnerable to potential exploitation by terrorists, smugglers of weapons of mass destruction (WMDs), narcotics, aliens, and other contraband, and other criminals.” Small vessels have also been successfully employed overseas by terrorists to deliver Waterborne Improvised Explosive Devices (WBIEDs). Further, the scale of the challenge posed by small boats is immense, as the United States alone has “nearly 13 million registered ... recreational vessels, 82,000fishingvessels, and 100,000 other commercial small vessels.” LRIT information will thus be of no use in relation to the frequent use of small boats for smuggling (especially of drugs and migrants) and the increasing use of fishing vessels in transnational organized criminal activity. Terrorist organizations may also use small boats in attacks on land targets, as was the case for some of the terrorists involved in the 2008 Mumbai attacks.

Intelligence Gathering as a Military Activity: States routinely engage in intelligence activities, as generally understood to mean gathering information for national security, military, or police purposes, often in a covert manner and with questionable effectiveness of legislative attention and control. Yet even acts that receive legislative approval may be unlawful. In international relations certain rules and restrictions cannot be set aside. Even if governments tend to portray situations as emergencies and emphasize the need to take extralegal measures in “ticking time-bomb” scenarios, serious breaches of law must have legal consequences in the interest of public welfare and the protection of individual victims.

Military intelligence is a military discipline that uses information collection and analysis approaches to provide guidance and direction to assist commanders in their decisions. This aim is achieved by providing an assessment of data from a range of sources, directed towards the commanders' mission requirements or responding to questions as part of operational or campaign planning. To provide an analysis, the commander's information requirements are first identified, which are then incorporated into intelligence collection, analysis, and dissemination.

Intelligence activities are conducted at all levels, from tactical to strategic, in peacetime, the period of transition to war, and during a war itself. Most governments maintain a military intelligence capability to provide analytical and information collection personnel in both specialist units and from other arms and services. The military and civilian intelligence capabilities collaborate to inform the spectrum of political and military activities.

I. Intelligence Gathering In International Law: As Jonathan Colby wrote in 1974, "There are no limits to the types and sources of information which may be useful. The processing of intelligence refers to the treatment accorded the raw data which has been collected. It generally includes appraisal of the relevance of the information, as well as editing and cataloguing in forms useful to decision-makers. These tasks vary enormously in complexity, depending in large measure on the amount and quality of data requested and actually collected."[25]

The task of intelligence gathering is particularly challenging in the marine environment, not only due to the vastness of the oceans, but also because of the diverse legal nature of the maritime zones. As for the methods employed, they vary, inevitably following relevant technological advancements. In an earlier era, Roach and Smith noted, "military surveys can include oceanographic, marine geological, geophysical, chemical, biological and acoustic data. Equipment used can include fathometers, swath bottom mappers, side scan sonars, bottom grab and coring systems, current meters and profilers." Today, they may involve surface vessels and submarines, as well as remotely operated vehicles, autonomous underwater vehicles (AUVs), seabed landers and even satellites and other earth observation systems, such as radars.

With respect to the legal regime governing intelligence gathering, Natalie Klein rightly posits, *"Laws relating to the collection and dissemination of information as a matter of international law come from a range of sources and this remains true in the law of the sea more specifically."*[26] *Indeed, as Dieter Fleck has written, "intelligence activities as such may not be wrongful under present international law, but the wrongfulness may derive from additional conditions, such as illegal intervention, breach of foreign sovereignty, or common crimes committed in the course of espionage acts."*[27]

Under the law of the sea, intelligence gathering may violate coastal State rights over the territorial sea, since it is presumed to be non-innocent passage as set forth in Article 19(2)(c)." However, intelligence gathering within the EEZ may qualify as a legal activity under the freedom of the high seas preserved in Article 87. The lawfulness of the act will depend on the nature of the intelligence gathering itself and the context in which it takes place. When it comes to where States are permitted to engage in intelligence gathering, the

[25] Jonathan E. Colby, The Developing International Law on Gathering and Sharing Security Intelligence, 1 YALE STUDIES IN WORLD PUBLIC ORDER 49, 53 (1974).
[26] NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 211 (2011).
[27] Dieter Fleck, Individual and State Responsibility for Intelligence Gathering, 28 MICHIGAN JOURNAL OF INTERNATIONAL LAW 687, 707 (2007).

most controversial maritime zone is the EEZ, as demonstrated by the considerable legal literature addressing this topic.

Further, many of the international incidents concerning intelligence gathering, such as those involving the USNS Impeccable and a U.S. Navy EP-3 aircraft, had occurred in the EEZ.

It is true that some intelligence gathering activities bear a close resemblance to marine scientific research (MSR), which is largely regulated by the Law of the Sea Convention, even though it does not define MSR. As Sam Bateman notes,

"There is a tendency in practice to use the term "marine scientific research" loosely when referring to all kinds of data collection (research) conducted at sea. However, not all data collection conducted at sea necessarily comes within the scope of the marine scientific research regime established by Part XIII of UNCLOS.[28]

Bateman persuasively argues that a distinction should be made between marine scientific research and hydrographic survey and military survey activities. Major maritime powers, such as the United States and Australia, adhere to this distinction, while the United Kingdom astutely posits that: *"while the means of data collection used in MDG [military data gathering] may sometimes be the same as that used in Marine Scientific Research (MSR), information from such activities, regardless of the security classification, is intended primarily for military use and is not released to the scientific community."*

Ii. When Is Intelligence Gathering Illegal? No general norm exists in international law expressly prohibiting or limiting acts of intelligence gathering. On the contrary, even in the case of espionage-a "consciously deceitful collection of information, ordered by a government.., accomplished by humans unauthorized by the target to do the collection" 2-spies receive a certain minimum protection under the law of armed conflict. The 1907 Hague Regulations Respecting the Laws and Customs of War on Land confirm that the employment of measures necessary for obtaining information about the enemy is generally permissible. Belligerent espionage is not a violation of the laws of war. For purposes of national punishment, a person can only be considered a spy "when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party."

The Regulations expressly require trials before punishment, and they even exclude criminal prosecution for previous acts of espionage of spies who, after rejoining the army to which they belong, are subsequently captured by the enemy. The 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) reaffirms these principles and extends them to residents of occupied territory. Yet acts of intelligence gathering committed by civilians in an armed conflict during a concrete and coordinated military operation would not be protected by the laws of war and would be objects of legitimate attack, if these civilians' actions amounted to direct participation in hostilities. This applies, for instance, to transmission of tactical intelligence to attacking forces or instruction and assistance given to troops with regard to the

[28] Sam Bateman, Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research, 29 MARINE POLICY 163, 164 (2005).

execution of a concrete military operation. Conversely, activities that may support the conduct of hostilities but fall short of participation in a concrete and coordinated military operation would not deprive these civilians of legal protection against attack.

The late Richard Baxter provides the classical answer to the question of whether espionage is legally, or at least morally or politically, prohibited. He states there is “virtual unanimity of opinion that while the morality of espionage may vary from case to case, some, and probably all, spies in an armed conflict do not violate international law. A distinction may, of course, be made with respect to espionage other than in time of war, for such conduct is of doubtful compatibility with the requirements of law governing the peaceful intercourse of states.” The fact that no explicit treaty norms address peacetime espionage is paradoxical in light of the enormous amount of intelligence activities and their relevance for international relations between states. The question of the legality of peacetime espionage has no easy answer. In the recent past, many arguments for the legality of certain acts of intelligence gathering arose in the context of East-West confrontation during the Cold War, for instance outside an armed conflict when peaceful cooperation was largely unrealistic. Today, such arguments are not altogether unattractive. Yet in the present world of complex interdependencies, another approach should be taken. Strict adherence to the dichotomy between war and peace would be ineffective and counterproductive for establishing peace and security. Also, the revolution in the transparent flow of information during recent decades has diminished the relevance of covert action and clandestine methods to the security intelligence function. Secret sources today are in constant competition with publicly available information, and they are often less reliable.

The need to improve the effectiveness of intelligence gathering given existing terrorist threats has led to increased international cooperation under increasingly transparent procedures." At the same time, the need to augment professional support for better intelligence evaluation is evident.

Where states have restructured national intelligence services in the course of such activities, the transparency requirements of national courts raise difficult questions.

Seen in this context, covert operations might pose more problems than solutions. Furthermore, intelligence operations have revealed new areas in which the law appears inadequate. Activities that fall within the category of "information warfare"-such as spreading false information or even sabotaging computer networks-are one example. Some even claim such activities change the rules governing military operations in armed conflict and also affect international relations in peacetime.

The International Court of Justice (ICJ) has not taken a position on the issue of peacetime espionage, although it has had the opportunity to do so on a few occasions. In the ***Teheran Hostages case*** the Iranian Foreign Minister referred to alleged espionage and interference in Iran by the United States in its embassy in Teheran. The Court did not accept this as a justification for Iran's conduct, and thus it failed as a defense to the United States' claims “because diplomatic law itself provides the necessary means of defense against, and sanction for, illicit activities by members of diplomatic or consular missions.” As the Court explained, "means" under diplomatic law could include "that a diplomatic agent caught in the act of committing an assault or other offence" may, “on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime." Problematic for Iran was that it "did not ... employ the remedies placed at its disposal by diplomatic law."

In the **Nicaragua case**, close logistics, intelligence, and material support by the United States to the contras was central to the Nicaraguan claims. The Court drew attention to the Friendly Relations Declaration, which mandates that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife of another State. It even emphasized the importance of this declaration and the fact that the United States actively supported its development and adoption. The judgment of the Court, however, concentrated on the threat or use of force as well as on violations of international humanitarian law, and it did not endorse Nicaragua's view of subversive activities by the United States as indirect means of coercion and intimidation.

Legal scholars often take a fatalist position on the phenomenon of intelligence gathering. They mostly conclude that covert action must be taken for granted. Some even try to deny state responsibility in this context, relying on the fact that spies are not official agents of states for the purpose of international relations, and indeed, if they are caught abroad, the capturing state can severely punish and expel them. This denial of state responsibility may meet realistic expectations in an imperfect world, as a spy is concealing his or her activity as an agent of a state.

Yet peacetime rules of international law may be seen as including an implicit prohibition on subversive activities, as reflected in the Friendly Relations Declaration. Such an understanding may be based on the principle of nonintervention in the political independence of any other state and its internal affairs, which includes a prohibition on "indirect or subversive intervention involving secret activity," if "a jungle world which places a premium on skills in subversion, infiltration, espionage, guerrilla warfare, nibbling aggression, and other forms of intervention" is to be avoided.

The illegality of covert action may also have other bases, such as unauthorized entry into a foreign state's airspace or territory, illegal exercise of jurisdiction on foreign territory, attempts to destabilize the government of another state," and common crimes, such as bribery, blackmail, unlawful entry into residences, or a breach of data protection laws committed in the course of such acts. Such activities can never be justified under customary law because they are gross violations of commonly accepted legal principles. The fact that they are committed through clandestine action offers a strong argument against the existence of any alleged *opinio juris* covering such conduct in international relations between states. Hence it is unacceptable to conclude, as many have, that legal arguments can neither condemn nor justify covert action in peacetime. The opposite is true, and among the various legal disciplines involved in any thorough assessment, international law has an important role to play.

As many covert acts have a human rights dimension, they may be illegal under the 1966 International Covenant on Civil and Political Rights or regional human rights conventions. Intelligence agencies do not take this aspect seriously enough. They often consider it sufficient to balance human rights violations against the positive intelligence their agents supply or will likely supply. Yet human rights instruments are of particular political and forensic significance. Extraordinary rendition for human intelligence gathering is a case in point, as the forced transfer of people for the purpose of conducting interrogation has often proven counterproductive and it frequently raises the concerns of human rights bodies, civil society, states, and international organizations. It must also be considered that intelligence objectives do not justify the derogation of human rights. While it may be doubtful whether states involved in espionage activities themselves could convincingly support a legal prohibition on espionage by other states under the equitable principle of "clean hands," the situation is different in the case of human rights violations. Here, the owner of the right is not the state but the individual victim, and the state has an obligation to protect its citizens.

Special treaty regimes may contain specific restrictions for intelligence gathering. In this context, disputed commitments on the use of outer space for exclusively peaceful purposes, different interpretations of the exact meaning of innocent passage through the territorial sea of a foreign coastal state, and certain voluntary restrictions as part of regional confidence and security building measures could provide elements for further legal development. Where such specific restrictions apply, they may be of continued relevance in the event of an armed conflict.

In this respect, the current work of the International Law Commission can be expected to offer new insight and widely acceptable results, so that Articles 24 and 29 through 31 of the Hague Regulations and Article 46 of Additional Protocol II may not be the last word for regulating relevant activities in armed conflicts. This is of practical significance for the application of human rights obligations of a state conducting military operations in situations where it exercises jurisdiction. It is particularly relevant for peace operations that include elements of peace enforcement and must apply international humanitarian law.

Iii. Intelligence Gathering In The Exclusive Economic Zone: One of the most controversial questions arising from the adoption of the United Nations Convention on the Law of the Sea' is whether the coastal State can control the gathering of intelligence by other States within its exclusive economic zone. Many scholars have attempted to answer this question.[29] Currently, the majority position is that "such intelligence-gathering activities by foreign States in the coastal State's EEZ are exercises of the freedom of navigation and are not subject to the coastal State's jurisdiction."' However, in the absence of an authoritative judicial ruling on the matter, and with numerous States, including China,' fervently challenging this position, this issue remains very much contested.

Equally important is the question of whether a coastal State may interfere with the navigational and overflight rights of other States in the EEZ in the course of intelligence gathering for maritime security purposes. As Klein observes, "a critical element to protecting

[29] See, e.g., Mark J. Valencia, Introduction: Military and Intelligence Gathering Activities in the Exclusive Economic Zones: Consensus and Disagreement II, 29 MARINE POLICY 97 (2005); Moritaka Hayashi, Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms, 29 MARINE POLICY 123 (2005); Stuart Kaye, Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from beyond the Littoral, 24 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 93 (2005); Jon M. Van Dyke, Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country, 28 MARINE POLICY 29 (2004); Desmond Ball, Intelligence Collection Operations and EEZs: The Implications of New Technology, 32 MARINE POLICY 67 (2008).

maritime security is ensuring that states have the necessary information at their disposal to take preventative or responsive action."[30] Threats to maritime security include a host of activities pertaining not only to national security, but, increasingly, also to transnational organized crime at sea. In that regard, it is sufficient to note that the UN Secretary-General in his 2008 Report on Oceans and the Law of the Sea identified seven specific "threats to maritime security," all of which may involve criminal organizations.

Therefore, it comes as no surprise that the need for intelligence gathering beyond the littoral ranks high in the maritime security policy of many coastal States. To this end, the United States indicates MDA should include the institution of worldwide standards for broadcasts of vessel position and identification and automated tools to discern patterns of suspicious behavior and potential security threats.

Other States and regional organizations have developed their own strategies in handling information on maritime security. Australia and New Zealand, in light of the large expanses of their EEZs and search and rescue regions, have adopted similar MDA policies. Further, on December 14, 2004, Australian Prime Minister John Howard promulgated the Maritime Identification Zone (MIZ) as part of Australia's effort to strengthen its offshore maritime security." The creation of this zone, which extended one thousand nautical miles from Australia's coastline, was to enable Australian authorities to identify vessels, including their crew, cargo and journey, seeking to enter Australian ports. The air defense identification zones, maintained by the United States and other nations, serve a similar purpose. In the U.S. example, this zone can extend three hundred miles out to sea in some places and requires both civilian and military aircraft to identify themselves and to follow the directions of U.S. authorities.

Iv. Intelligence Gathering By Coastal States: The importance of intelligence gathering is evident in both law enforcement efforts and military operations, and recent developments to enhancing maritime security is replete with mechanisms of information gathering and sharing. Maritime domain awareness policies, the designation of maritime or aerial identification zones and the use of satellite systems to track and monitor vessels share the same purpose-to increase awareness of the marine environment and any activity therein that may amount to a threat to the security of the coastal State. This is especially true for coastal States operating in their EEZs given the economic considerations and contiguity with the territorial sea. As such, this chapter examines unilateral and multilateral efforts to improve the collection of information in relation to the movement of ships. In particular, it focuses on maritime identification zones, such as the Australian Maritime Identification System and various satellite-based tracking systems.

A. Maritime Identification Zones: As stated above, several States have promulgated maritime or aerial identification zones to improve intelligence gathering concerning the movement of vessels or aircraft for maritime security purposes. Examples include the Air Identification Zone (ADIZ) of the United States established in 1950; the Japanese ADIZ promulgated in 1969 and of course, the East China Sea Air Defense Identification Zone established by China in 2013. However, the most infamous and the identification zone that will serve as the focus of our analysis is the Australian Maritime Identification Zone (MIZ)

[30] NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 211 (2011).

promulgated on December 14, 2004 by Prime Minister John Howard, as part of Australia's effort to strengthen its offshore maritime security. The MIZ, extending one thousand nautical miles from Australia's coastline, was established to identify vessels, including their crew, cargo and journey, seeking to enter Australian ports. The provision of this information was viewed as a means of enhancing the effectiveness of civil and military maritime surveillance, particularly in protecting offshore oil and gas facilities in the Australian EEZ.

It was no surprise that Australia's claim to such interdiction authority raised serious concerns as to the legality of the MIZ under international law. Eventually, Australia reformulated the MIZ into the Australian Maritime Identification System (AMIS). Under the AMIS, ships would be requested to provide information on a voluntary basis and the new system would be based on cooperative international arrangements, particularly with neighboring States. It must be noted, however, that Australian maritime control initiatives did not stop with AMIS, but revived in 2013 with Operation Sovereign Borders, which targets the influx of migrants by sea through various measures, including interdiction operations based, apparently at least in part, on intelligence.

As far as the legality of these measures in the EEZ is concerned, there is no reference in the Law of the Sea Convention to maritime identification zones. Under the Convention, coastal States may establish a contiguous zone extending up to twenty-four nautical miles from its baselines in which they may exercise the control of vessels necessary to prevent violations of certain laws and regulations.

In the EEZ, arguably, any identification process by the coastal State should be linked with the exercise of its sovereign rights and jurisdiction over the conservation of living resources, the protection of offshore platforms and the marine environment. Interestingly, in relation to the protection of the marine environment, Article 220(3) provides that

"[w]here there are clear grounds for believing that a vessel navigating in the exclusive economic zone ... has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred."

Thus, it specifies the information that may be requested, and in Article 220(4), requires States to adopt laws and regulations and take other measures so vessels flying their flag comply with requests for this information. While this provision is limited in its application to conduct impacting the marine environment, any request of information that is linked with the exercise of sovereign rights and jurisdiction of the coastal State over its natural resources in the EEZ would be consistent with the rebuttable presumption in favor of the coastal State discussed above, and would meet the due regard obligation set forth in Article 56(2).

Moreover, in examining the legality of such intelligence activities in the EEZ, recourse may be had to other applicable rules of international law.

First, the coastal State, in this case Australia, is entitled to request information from vessels seeking to enter its ports under customary international law and under the authority of the 2004 amendments to the International Convention for the Safety of Life at Sea (SOLAS) and the International Security and Port Security Code (ISPS Code).

Second, information could also be requested for vessels in the EEZ under the customary right of approach."

Since "other pertinent rules of international law" apply to the EEZ pursuant to Article 58(2), it is arguable that the customary right of all States to enquire about the identity of foreign-flagged vessels on the high seas equally applies thereto and may be exercised not only by Australian warships, but also by those of other States.

Indeed, even though the international law of the sea does not permit interference with the navigation of foreign-flagged vessels on the high seas except in exceptional circumstances, the same does not hold true for other monitoring measures. For example, according to Oppenheim's International Law, "it is a universally recognized customary rule of international law that warships of all nations, in order to maintain the safety of the high seas, have the power to require suspicious private vessels on the high seas to show their flag." This right of approach, or reconnaissance, is limited to verifying the ship's right to fly its flag." This, an approaching warship may request an encountered vessel to show its colors, which are prima facie evidence of its nationality. It is submitted here that the customary right of approach in principle, has remained intact in the twenty-first century, albeit its implementation has been significantly modified due to technological changes.

It follows from the foregoing that the mere request of information by Australia or any other State establishing similar identification zones would not be in dissonance with international law. On the contrary, it may be founded on more than one legal basis. What would clearly be in dissonance is any interdiction operation based solely on the denial of the requested vessel to provide the relevant information. As Natalie Klein rightly observes,

"There is no exception to flag State authority on the high seas that would permit the right of visit to enforce a coastal State requirement to provide information in pursuit of that State's maritime security policies."

The sole exception to this rule appears to be if the vessel has failed to provide information concerning marine pollution in the EEZ, as found in Article 220(5). Of course, if there are other suspicions regarding the vessel, for example, that it may be engaging in illegal fishing activities or that it is without nationality, the coastal State may use other legal bases to intercept the vessel.

In sum, even though maritime identification zones are not provided for in the Law of the Sea Convention, the coastal State may request information from foreign vessels in its EEZ under certain circumstances and in relation to certain activities. Such information would be confined to the identity of the vessel, its next port of call and its activities that may be related to the suspicious conduct in question. Any further enforcement measures must be specifically warranted by the Convention, since the mere refusal to provide this information does not trigger these measures.

B. Earth Observation Systems: It is an increasingly common practice of coastal States to employ earth observation systems, including satellites, radars or drones, to monitor vessels and their activities in an effort to prevent threats to maritime security. Such monitoring and surveillance measures are a key part of intelligence gathering in the EEZ. Examples include the automatic identification system (AIS) and the long-range identification and tracking (LRIT) system established by the International Maritime Organization (IMO) and the European Border Surveillance System (EUROSUR) established by the European Union (EU).

The IMO adopted AIS in 2000 as part of a revised Chapter V of SOLAS. It requires ships to carry AIS capable of providing information about the vessel, such as identity, location, course and speed, to other vessels and coastal authorities. The regulation requires AIS to be fitted aboard all ships of three hundred gross tonnages and upwards engaged on international voyages, cargo ships of five hundred gross tonnages and upwards not engaged on international voyages and all passenger ships, irrespective of size.

The IMO further revised SOLAS to increase the tools available to States to learn about vessels in the surrounding waters by adopting Regulation 19-1 in 2006. Regulation 19-1, which entered into force in July 2009, requires ships to transmit information automatically, through a satellite-based system, disclosing the identity of the ship, its position and the date and time of the position." This information is to be received for "security and other purposes as agreed" by the IMO," such as marine environment protection.

Similar to AIS, it applies to vessels engaged on international voyages and encompasses passenger ships, cargo ships of three hundred gross tonnage and upwards and mobile offshore drilling units.'

In addition to AIS and the LRIT system, there are vessel monitoring systems (VMS) that have been developed and installed by some States and shipping companies. These systems are used in marine accident investigations, search and rescue, safety of navigation and pollution prevention. The type of information collected may include the course of the vessel, its speed, draft, and estimated time of arrival and departure from various positions. The use of VMS has also become an important means of deriving information about the location of fishing vessels, to which LRIT regulations do not usually apply because of their smaller size. Accordingly, many regional fisheries management organizations have introduced VMS as a means of enhancing surveillance and enforcement.

In 2013, the European Council adopted a regulation establishing EUROSUR. Its aim is to reinforce control of the external borders of the EU States. In particular, EUROSUR establishes a mechanism for member States' authorities carrying out border surveillance activities to share operational information and to cooperate with each other and with other EU agencies, such as the European Border and Coast Guard Agency (formerly known as FRONTEX). Its objectives are reduction of the number of irregular migrants entering the EU undetected and enhanced internal security by preventing cross-border crime, such as trafficking in human beings and narcotics smuggling. Clearly, the surveillance of maritime borders is facilitated by the use of modern technologies such as satellites.

In discussing whether the Russian authorities fulfilled the requirement of sending "a visual or auditory signal to stop" to the Greenpeace vessel, **Arctic Sunrise**, as dictated by the right of hot pursuit under Article 111, the tribunal stated,

"Given the large areas that now must be policed by coastal States and the availability of more reliable advanced technology (sea-bed sensors, satellite surveillance, over-the-horizon radar, unmanned aerial vehicles), it would not make sense to limit valid orders to stop to those given by an enforcement craft within the proximity required for an audio or visual signal that makes no use of radio communication."

Such an evolutionary interpretation of the Convention's hot pursuit provisions is certainly welcome, as it takes into account contemporary technological advancements and the practice of States. However, no broader conclusions can be drawn from this finding. The tribunal alluded to satellites, along with other devices, such as radars and UAVs, solely to substantiate its argument that in the twenty-first century, law enforcement agencies may also lawfully use radio communication in lieu of "a visual or auditory signal" under Article 111.

The question in the context of our inquiry, however, is broader than the use of such systems in the course of hot pursuit and concerns the legality of such methods for intelligence gathering in the EEZ. Evidently, to the extent that these measures are incorporated in treaties like SOLAS, there is no doubt that they are part of the "pertinent rules of international law" that apply to the EEZ under Article 58(2). But even besides the authority provided by SOLAS, it stands to reason that the use of earth observation systems, including radars, satellites and drones, by the coastal State in its EEZ would comply with the international law of the sea, either pursuant to Articles 56 and 59 or under the customary right of approach.

Specifically, as long as coastal States police their EEZ to safeguard their exercise of sovereign rights therein or to protect the marine environment, these acts would clearly accord with the rebuttable presumption in favor of the coastal State. Even if we have recourse to the abstract formula of Article 59, it is submitted that "equity" and the "importance of the interests involved to the parties" would considerably favor the coastal State.

On the other hand, as permitted under the customary right of approach, every State, including the coastal State, may request some basic information regarding the vessels exercising the freedom of navigation. States can do this by sending their warships and other duly authorized vessels to approach the vessel concerned or through observation systems, like AIS and vessel monitoring systems (VMS). As stated above, the intention of the right of approach has traditionally been to inquire the identity of vessels on the high seas. In modern times, there is no need to approach the vessel physically to complete this act, as States can achieve the same result by using earth observation systems. The rationale, however, remains the same.

That said, it is one thing to request information on the flag, the name or the course of the vessel concerned and another to interfere with its navigation, board and search it. For the latter actions, there must be another legal basis found in the provisions of the Convention concerning the EEZ or the high seas by reference to Article 58(2), as well as the default rule of the consent of the flag State.

A further, extremely relevant question concerns the level of information that coastal States may request in the exercise of the right of approach, either in its traditional form or in its contemporary manifestations. Certainly, earth observation systems have limits on what they can actually see and discern.

Nonetheless, it is the present author's view that the intelligence that may be collected or requested is confined to that information needed for the "*police generale*" of the EEZ. This data may include the vessel's nationality and documentation number, its current position and its course, as well as the next port of call, especially if they are fishing vessels and are bound to a port of the coastal State. However, any further information concerning the internal matters of the vessel, including information relating to its crew and cargo, falls within the remit of flag-State jurisdiction and may not be requested solely under the right of approach. Such a request would undermine the freedom of navigation safeguarded in Article 58, as well as shift the presumption from favoring the coastal State to favoring other States and their *jus communicationis*, as discussed in Part III.

Therefore, it can be inferred that the use of earth observation systems, with their advantages and inherent limitations, will increase and will inevitably challenge the traditional contours of policing of the seas, including the EEZ. It rests upon State practice and future judicial opinions to discern how to accommodate such advancements with the legal regime of the EEZ and the freedom of navigation of other States.

V. Intelligence Gathering By Other States In The Eez: It is a truism that most scholarly writings have been devoted not to whether the coastal State may engage in intelligence gathering in the EEZ, but the inverse question: whether other States may engage in intelligence gathering in a foreign EEZ. Several recent incidents in various EEZs, political tension in contested areas such as Southeast Asia and the importance that naval powers ascribe to military intelligence gathering have all fueled this debate.

In particular, questions arise as to the contours of the rights of coastal States and the freedom of navigation enjoyed by other States. As Natalie Klein observes,

"the lack of legal clarity has become especially problematic as technological advances have not only improved the range and accuracy of both weaponry and intelligence collection, but also changed the very art of both warfare and intelligence gathering."

In this regard, Hayashi describes potential intelligence activities as follows:

"Other signals intelligence activities intercept naval radar and emitters, thus enabling the location, identification and tracking of surface ships as well as the planning and preparation of electronic or missile attacks against them. These activities appear to involve far greater interference with the communication and defense systems of the targeted coastal State than any traditional passive intelligence gathering activities conducted from outside national territory."

The law of the sea does not provide a straightforward answer concerning the permissibility of intelligence gathering activities in the EEZ. While Article 19(2)(c) defines intelligence gathering in the territorial sea as non-innocent passage, there is no corresponding provision in the Convention that addresses intelligence gathering in the EEZ. Hence, a contrano, one can presume that since this activity is not prohibited, it is permitted. Indeed, the preponderant view is that intelligence gathering is one of the "other internationally lawful uses of the sea" related to the freedoms set forth in Article 58. For example, Hayashi notes, “traditionally, intelligence gathering activities have been regarded as part of the exercise of freedom of the high seas and therefore, through Article 58(1), is lawful in the EEZ as well.”

Assuming that intelligence gathering is associated with the freedom of navigation enjoyed by other States in foreign EEZs, the rebuttable presumption would favor its permissibility. However, as discussed in the previous Part, this is just a rebuttable presumption, which is subject to the legal regime of the EEZ, the Convention, and other pertinent rules of international law.

In turn, this point raises the question of when the presumption may be rebutted or qualified.

It is obvious that the gathering and sharing of intelligence would be unlawful if it interfered with the exercise of the coastal State's sovereign rights and jurisdiction. This outcome would be evident where information gathering undermined the existing sovereign rights of coastal States. More broadly, it could be argued that any intelligence gathering, having as its purpose the economic benefit of other States would violate the due regard requirement in Article 58(3), at least as that requirement has been construed in the Chagos Marine Protected Area and the South China Sea arbitrations.

An example of such intelligence gathering would be the incidental-and perhaps intentional-collection of information related to the natural resources of the EEZ, such as a survey involving the acquisition of seismic data that could be used to locate oil and gas exploratory wells. Such an acquisition could occur in the course of a marine scientific research project that had already received the requisite consent by the coastal State under Article 246(2). Here, the collection of such information would amount to an unjustifiable interference with the sovereign rights of the coastal State under Article 77, as preserved under Article 246(7), as well as under Article 56 in conjunction with Article 58(3).

A second example in which military intelligence gathering by third States in the EEZ would not be permitted is when such activities constituted unlawful conduct as "the threat or use of force" contrary to Article 2(4) of the UN Charter, and, more particularly, to Article 301 of the Law of the Sea Convention. As Article 301 states:

“In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”

This provision echoes, but is not identical to Article 2(4) of the UN Charter. Nonetheless, Article 2(4) may serve as the interpretative yardstick for incidents falling within the scope of Article 301.

It is true that international courts and tribunals have been very reluctant to find a "threat or use of force." An arbitration tribunal did make such a finding in a 2007 award arising from a dispute between Guyana and Suriname. Here, sailors on two Surinamese gunboats asked the operators of a Guyanese-licensed drilling rig in a contested maritime area to leave the rig within twelve hours. The tribunal concluded these activities amounted to an illegal threat of the use of force, rather than a law enforcement activity. In general, to constitute a threat of the use of force, the act in question must involve a considerable degree of coercion against the coastal State.

Thus, the act of intelligence gathering, without any further activities, would fall short of reaching the threshold of either Article 301 or Article 2(4). The act would need to be accompanied by other coercive measures to substantiate impermissible intelligence gathering. As an example, Bateman suggests that *"typically this would be the case if the research or data collection were being undertaken to support contingency plans for military operations against the coastal State."*

As such, it is evident that the threshold for establishing such a violation is particularly high.

Another instance in which intelligence gathering by other States within the EEZ would violate the law of the sea is when that State's activities amount to an abuse of right, in this case the right of navigation and the associated right to collect information in a foreign EEZ Article 300 of the Convention addresses good faith and abuse of right, stating: *"States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."*

According to the Virginia Commentary, "it would appear that the parameters of the notion as enunciated in Article 300 and applicable to the whole Convention…concern the unnecessary or arbitrary exercise of rights, jurisdiction and freedoms or the misuse of powers by such a State Party."

Having assumed that intelligence gathering is a freedom reserved under Article 58(1), it may still result in abusive conduct, such as when it is conducted arbitrarily or unaligned with a purpose associated with the jus communications. That said, abuse of right has proven a very elusive concept, scarcely referred to in international case law, and very difficult to substantiate in practice.

In sum, notwithstanding that some scholars disagree, intelligence gathering in foreign EEZs is a lawful use of the seas associated with the freedoms reserved for other States in coastal State EEZs. While this presumption is rebuttable, few examples arise that do not favor this presumption, and for those that do, it is often the underlying conduct, rather than the intelligence gathering itself that violates the law of the sea and international law generally.

VI. Intelligence Collection and Visit, Board, Search and Seizure (VBSS) Operations

A. VBSS Operations on the High Seas: Useful law enforcement intelligence can be gathered in the course of a VBSS operation." In particular, boarding a vessel suspected of one crime may reveal evidence of another crime. Thus, it was not uncommon for counter piracy patrols off Somalia during VBSS operations to find that hidden below decks aboard suspect vessels was not a crew of pirates, but a human cargo of irregular migrants seeking to be smuggled into Yemen.co The frustrating result was that migrant smugglers were often let go because the counter piracy missions lacked a mandate to deal with migrant smuggling off the African coast, even though some of the same navies were engaged in interdicting migrant smugglers in the Mediterranean."

While this was ultimately a problem of mandate, not legal authority, it does raise the broader question of whether there are distinct legal limitations on what naval forces and maritime agencies can do with information gathered in the course of VBSS operations. Unsurprisingly, the issue turns on the zone in which one operates. The high seas are for present purposes the most pertinent case (though other zones are discussed briefly below).

In respect of the high seas, a controversy is provided by the extent of authority conferred under UNCLOS Article 110, which governs the conduct of VBSS operations in cases of reasonable suspicion that a vessel is engaged in piracy, the slave trade, unauthorized broadcasting or is without nationality.

Such an operation is intended to be conducted in sequence. Under Article 110(3), a warship may *"send a boat under the command of an officer to the suspected ship." The boarding party is to first inspect the ship's documents to "verify the ship's right to fly its flag." Then, "if suspicion remains ... it may proceed to a further examination on board the ship, which must be carried out with all possible consideration." The question that arises is whether the information found in the course of such an "examination"* is limited by the original purposes of the boarding.

The conventional view is that at least some forms of wider use are prohibited. 62 The foundational text relied upon to posit this view is normally the commentaries of the International Law Commission to the 1956 draft Articles on the Law of the Sea. With regard to the equivalent provision to Article 110, the Commission stated:

If the examination of the merchant ship's papers does not allay the suspicions [giving rise to the rights of boarding], a further examination may be made on board the ship. Such examination must in no circumstances be used for purposes other than those which warranted stopping the vessel. Hence the boarding party must be under the command of an officer responsible for the conduct of his men.

The same point is made in the highly regarded Virginia Commentary, which tracks closely to the language used by the Commission:

"If suspicion remains after examination of the ship's papers, the boarding party may proceed to a further examination on board the ship. Such further examination is not to be used for purposes other than those which warranted stopping the ship, and is to be carried out with all possible consideration."

Given that international lawyers normally take the pronouncements of the International Law Commission as authoritative, how is this limitation to be construed?

Wendel suggests a potentially broad construction. Consider the interception of a vessel that displayed no flag or identifying markings. These facts could justify boarding and inspection on grounds of suspected statelessness. Wendel argues, however, that the right to verify nationality in such cases cannot justify inspection of the hold or cargo, as the only relevant material will be the vessel's papers. If the papers resolve the issue, no further search should occur.

This, in Wendel's view, raises questions regarding the legality of continuing to conduct a search of the hold in cases such as the So San incident in which a vessel suspected of conveying Scud missiles from North Korea to Yemen bore no external markings of nationality, but attempted to claim Cambodian nationality verbally." Setting aside the fact that the So San interdiction occurred with the consent of the ostensible flag State (which had authority under international law to authorize the search), Wendel's general point is not unfair. We must return, however, to the text of Article 110(2), which states that "if suspicion remains after the documents have been checked; [the boarding State] may proceed to a further examination." The right of "further examination" appears to be a general one. Even if narrowly construed by reference to the original suspicion, where inadequate papers have been presented and the relevant suspicion is one of statelessness, inspection of the hold may reveal information such as a main beam number capable of assisting in the vessel's identification.'

To some, however, all of this is beside the point. The question at hand is not whether a VBSS operation can be conducted on a pretext (i.e., statelessness) in order to conduct a search with an ulterior motive. This would be open to an allegation of abuse of right (UNCLOS Article 300). Rather, the question is what can one do with information uncovered in the course of a legitimate VBSS operation that might be generally relevant to broader questions of maritime security, or indeed that might provide evidence of specific criminal conduct, going beyond the original suspicions giving rise to a right of boarding.

Indeed, at least one treaty concerning maritime security, the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, imposes such a duty on a boarding State granted flag State permission to board and inspect a vessel at sea.

The Protocol details a range of terrorism offenses, suspicion of which might justify boarding and inspection of a vessel. Generally such a boarding by a "requesting party" may only follow a request for and receipt of flag State consent, unless the flag State has waived that requirement under the treaty.

For VBSS operations the Protocol provides:

"When evidence of conduct [prescribed under the Protocol] is found as the result of any boarding…the flag State may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State. The requesting Party shall promptly inform the flag State of the results of a boarding, search, and detention conducted pursuant to this article. The requesting Part shall also promptly inform the flag State of the discovery of evidence of illegal conduct that is not subject to this Convention."

Admittedly, other than this text there seems to be relatively little positive law dealing with the question of whether wider use can be made of evidence of other illegal conduct discovered aboard. One could attempt to invoke the so-called Lotus presumption in support of the conclusion that wider use is permitted in order to argue that anything not expressly prohibited is, in fact, permitted. The proposition, as usually stated, is too broad to be meaningfully applied and presumes international law to consist largely of prohibitions rather than positive or facilitative rules. The better question is whether there any identifiable obligations of international law that would be breached if one were to make wider use of information found during a VBSS operation. It is submitted that such obligations are in practice rather hard to find. One could attempt to argue that wider use of information discovered somehow violates the principle of exclusive jurisdiction of the flag State, but one would have to state the principle at a very high level of generality for that result to follow.

As it has been argued elsewhere," the regulatory jurisdiction (i.e., prescriptive jurisdiction) is by no means completely exclusive and other States remain free to attach consequences to the actions of, for example, their nationals aboard foreign vessels on the high seas. At best, the principle of "exclusive" flag State jurisdiction confers prima fade immunity from physical interference on the high seas (enforcement jurisdiction) subject to exceptions provided by UNCLOS, other treaties or flag State consent. The rule of exclusive flag State jurisdiction is thus heavily qualified, and is by its very nature derogable.

This does not seem compatible with the idea that it contains by necessary inference an otherwise unstated blanket prohibition against wider use of information discovered aboard a vessel on the high seas subject to a legal VBSS operation. Indeed, one might argue that positive obligations upon States to cooperate to suppress various illicit activities at sea mitigates in favor of the sharing of information where possible. Such obligations of cooperation exist with regard to, inter alia, piracy," maritime drug smuggling, or unauthorized high seas radio broadcasting,"' the enforcement of internationally agreed fisheries conservation measures and the prevention of migrant smuggling by sea.

B. VBSS in Waters under National Jurisdiction: There are numerous good studies of the practical limitations international law may place upon VBSS operations in waters under national jurisdiction.

The territorial sea of up to 12 nm is plainly a zone of sovereign jurisdiction over which coastal States have law enforcement jurisdiction, subject to innocent passage. What this means in practice has been debated. Some see innocent passage as conferring an absolute immunity from VBSS, unless non-innocence" is made out on one of the specified grounds. Others have long pointed to the ambiguity of UNCLOS and the Geneva Convention on the Territorial Sea on this point. Both conventions proclaim that a coastal State "should not" exercise criminal jurisdiction over "a foreign ship passing through the territorial sea" unless one of the categories of non-innocent passage are made out.

Views differed as to whether that practice evidenced a restriction on powers of enforcement in the territorial sea (i.e., a limitation upon sovereignty) or simply evidenced comity (i.e., plenary sovereignty, usually exercised with restraint)." The debate is far from resolved, but the only clear prohibitions on law enforcement in the territorial sea concern sovereign immune vessels and crimes "committed before the ship entered the territorial sea" where the vessel in question is simply passing through the territorial sea without entering internal waters.

Conversely, the extent of law enforcement power in the contiguous zone may provide less authority than commonly thought to conduct VBSS operations.

Within a contiguous zone (extending up to a further 12 nm seaward from the territorial sea), "states have limited powers" under UNCLOS Article 33 to enforce "customs, fiscal, sanitary and immigration laws." UNCLOS allows coastal States only to exercise "control" (not sovereignty or jurisdiction) either to prevent infringement of the specified laws within the State's territory or territorial sea or to punish acts already committed within its territory or territorial sea." Shearer argues that the connotations of control limit preventive enforcement action to "inspections and warnings," rather than arresting vessels. Some authorities, and in particular U.S. commentators, treat Article 33 as allowing plenary criminal law enforcement for violations of the specified subject matters up to the outer limit of the zone.

This approach fails to give separate meanings to “prevent” and “punish.” The power to "punish" is conditioned upon criminal acts having occurred within a State's territory or territorial sea." By analogy with the doctrine of hot pursuit, this appears to be an express extension of an otherwise impermissible jurisdiction. The condition limiting the exercise of jurisdiction to "'punish" would be redundant if relevant criminal laws were continuously enforceable up to the outer limit of the zone. The claim, for example, that "if the U.S. Intelligence Community levies terrorism threat reporting [i.e., the vessel is allegedly carrying terrorism-related material or personnel] against a ship anywhere within 24 nautical miles of the United States coast, it would be subject to United States jurisdiction is absurd unless the facts of the case disclose a close link to a customs or immigration violation that has actually occurred. If such a violation is merely threatened, permissible measures may be constrained to visit and inspection.

Finally, in the 200 nm EEZ, coastal States enjoy a limited bundle of sovereign rights and subject matter jurisdiction. They have “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living…and with regard to other activities for the economic exploitation and exploration of the zone.”

Under this jurisdiction, the coastal State may also conduct activities pertaining to "artificial islands, installations and structures," marine scientific research and "the protection and preservation of the marine environment." In exercising its sovereign rights the coastal State may "take such measures, including boarding, inspection, arrest and judicial proceedings" as are necessary to enforce its laws with respect to those rights." Curiously, there are no express enforcement provisions in UNCLOS regarding "artificial structures and marine scientific research," but it is not questioned that, for example, a State's criminal law may in principle extend to vessels that violate laws applicable in a safety zone around an artificial structure. In protecting the marine environment, the coastal State enjoys power to regulate dumping under Article 211(5), to conduct boarding and inspection of vessels causing or threatening "significant pollution of the marine environment" and to arrest and institute proceedings against vessels in pollution incidents that on "clear objective evidence" have caused "major damage or threat of major damage" under Articles 220(5) and 220(6).

As regards both the contiguous zone and EEZ, it would be an abuse of right to use such a power of inspection intentionally to gain intelligence not related to the subject matters over which rights or jurisdiction have been granted to a coastal State; however, wider use of any information discovered in the course of such a boarding should be permitted for the reasons discussed above in relation to the high seas. Thus, it is hard to see what significant restrictions international law might place upon the use a coastal State could make of law enforcement intelligence gleaned through a lawful VBSS operation in waters under national jurisdiction. One question might be whether VBSS operations can be conducted in international straits subject to the regime of transit passage, under which vessels enjoying such a right “shall not be impeded.” There is, however, not space to consider this point further in the present article.

Monitoring the movement of ships and seafarers: In the framework of the International Convention of Safety of Life At Sea (SOLAS 1974), the International Maritime Organization (IMO) has introduced the Long-Range Identification and Tracking system (LRIT) which aims to obtain ship identity and location information in sufficient time to evaluate the security risk posed by a ship off its coast and to respond, if necessary, to mitigate risks. Apart from maritime security LRIT covers search and rescue, safety, and protection of the marine environment and is mandatory for all passenger ships, high speed craft, mobile offshore drilling units and cargo ships of over 300 gross tonnes. Every 6 hours ships are required to issue reports, which are received by satellites, and securely transferred to data centres which manage LRIT information on behalf of flag States.

There are a wide variety of vessel tracking systems including Vessel Monitoring Systems (VMS), Automatic Identification Systems (AISs) and LRIT which are designed to provide information about the ship to other ships and to coastal authorities automatically. This information should include the ship's identity, type, position, course, speed, navigational status and other safety-related information. These systems however require active cooperation of the vessels. Because VMS cannot be used to monitor vessels that do not have VMS on board or whose system is switched off or malfunctioning, the EU JRC and EU Fisheries Council have promoted the use of remote sensing as an additional control tool. Consequently a number of space-based satellite earth observation technologies are emerging which address communication and global positioning for ship traffic surveillance and the identification of security threats. Since these satellite technologies do not depend on the willingness of ships to cooperate, remote sensing overcomes the lack of independence of transponders and complements active detection systems with passive measurements for non-cooperating ships.

A. Surveillance systems: A range of different surveillance techniques are typically used under this heading including visual sightings, still cameras, closed circuit television (CCTV), radar and infrared imaging. While the main limitation of such systems lies in the limited information that can be provided, they nevertheless play an important role in building up a maritime picture: (a) in cases where data is not provided under a reporting regime (whether deliberately or not); (b) in respect of (typically smaller) vessels that are not subject to a reporting regime; and (c) due to their immediacy and, in some cases, greater accuracy.

Military surveillance systems: The gathering of surveillance data is inherent to the role of Europe’s navies for defence purposes, which since 2001, includes defence against terrorism. Assessing what surveillance data is actually collected is a difficult task: the data itself is usually classified as is information about acquisition mechanisms. Nevertheless it is possible to surmise that maritime surveillance data is gathered through: (a) physical observation from military vessels and aircraft; (b) unmanned vehicles and drones; (c) remote sensing; (d) coastal radars; and (e) underwater sensors. As will be seen below Europe's navies typically also make use of civilian monitoring and surveillance data.

Sistema Integrado de Vigilancia Exterior (SIVE): SIVE is a Spanish coastal surveillance system operated by the Guardia Civile. Originally designed to focus on small vessels carrying illegal immigrants it is used to detect, identify and intercept a range of illegal activities around Spain's maritime frontiers. It is based on a network of fixed stations and mobile units that make use of still cameras, CCTV, radar and infra-red sensors. The data (video images, radar tracks and infra-red images) are transferred by secure internet to provincial control centres. There is no specific legal basis for SIVE – it derives from the basic mandate of the Guardia Civile. At present the data is used only by the Guardia Civile.

Vessel traffic services (VTS): VTS are shore based-systems which range from the provision of information messages to the extensive management of maritime traffic. There are two basic types of VTS: (a) port VTS which are concerned primarily with traffic management in/around a port; and (b) coastal VTS which deal with traffic passing through a specific area. Usually, on entering a VTS area the master of a ship must first report to the authority responsible for the VTS. He must then monitor a specific radio frequency for navigational or other warnings. The activities of a ship within a VTS area are, however, usually monitored by the VTS authority using radar, AIS and in some cases radio direction finders (RDF) and remote video cameras. In terms of international law the legal regime for VTS is contained in Regulation 12 of SOLAS supplemented by guidelines adopted pursuant to IMO Resolution A. 857(20) of 27 November 1997. At EC level, VTS is addressed in Articles 8 and 9(3) of the VTM Directive. The guidelines state that the purpose of VTS is to improve the safety and efficiency of navigation, safety at sea and the protection of the marine environment, offshore installations etc from possible adverse effects of maritime traffic.

CleanSeaNet: CleanSeaNet is a satellite-based monitoring system for marine oil spill detection and surveillance in European waters provided by the European Maritime Safety Agency (EMSA). EMSA obtains radar satellite images from a commercial satellite provider in response to requests from Member States.

B. Reporting regimes: Because reporting regimes impose a legal reporting obligation it is relatively easy to determine what legal rules apply as evidently this must be specified in law.

Vessel monitoring system (VMS): In connection with the implementation of the common fisheries policy each Member State is required pursuant to the Control Regulation (EC) 1489/97 and the VMS Regulation (EC) 2244/2003 to establish a VMS whereby data relating to the identification, position, speed and course of its fishing vessels above 15 metres in length can be transmitted at all times by satellite to a fisheries monitoring centre (FMC). These data include three unique identification numbers: (a) the Community Fleet Register number of each vessel which in turn correlates with details contained in the national fishing boat registers that must be maintained by each Member State; (b) a national register number; and (c) the external or side number of the vessel. In addition, for most vessels, the radio call sign number will be unique. This data is collected to ensure the effective monitoring of the activities of fishing vessels. Each flag Member State is entitled to receive VMS data through its FMC. In addition a coastal Member State is entitled to receive data from the flag State FMC in respect of a foreign fishing vessel in its waters. The European Commission is also entitled to obtain remote on-line access on specific request. Practice as regards sharing of VMS data at national level beyond the FMC varies among Member States.

Automatic Identification System (AIS): AIS are a ship-born mechanism that automatically provides for the exchange of data between ships as well as coastal stations. This data includes: (a) fixed data such as the unique maritime mobile service identity (MMSI), call sign and name, IMO number and details of the ship; (b) automatically generated dynamic navigational data including details of the ship's position, course and speed over ground and navigational status; and (c) manually entered voyage data. The rate of data exchange increases as a ship gains speed. The fitting of AIS is mandatory for all vessels of 300 gross tonnages and above on international voyages, cargo ships of 500 gross tonnages and above and passenger ships irrespective of size. Warships and government owned vessels are exempt. The basic obligation to fit and use AIS is imposed by Regulation 19 of Chapter 19 of the International Convention for the Safety of Life at Sea (SOLAS).

Furthermore, the Vessel Traffic Monitoring Directive 2002/59/EC (the 'VTM Directive') requires any ship calling at the port of a Member State to be fitted with AIS. The purposes of AIS include promoting the safety of navigation, collision avoidance, enabling coastal States to obtain information about ships and their cargoes and as a VTS tool. Implicit in the structure of AIS is that other vessels within transmission range are entitled to AIS data as are the monitoring stations of coastal States. Furthermore the VTM Directive provides for the exchange of AIS data between Member States. In addition, because AIS is transmitted un-encrypted over open frequencies, there is nothing to prevent anyone with suitable equipment from receiving it.

Long Range identification and Tracking of Ships (LRIT): LRIT is a new long-range vessel monitoring system which also requires the periodic transmission of the name and course of vessels. However the data is transmitted only at six hourly intervals and the transmissions take place by satellite meaning that LRIT is a closed system. The legal basis for LRIT is contained in Regulation 19-1 of Chapter V of SOLAS which provides that the following, providing they are parties to SOLAS, are entitled to LRIT data: (a) the flag State at all times; (b) a port State where a ship has indicated its intention to enter a port in that State; and (c) a coastal State in respect of a ship within 1,000 nm of its coast (unless the ship is in the waters of its flag State). LRIT is not yet fully operational.

C. Indian Coastal and Maritime Security: India's long coastline presents a variety of security challenges including illegal landing of arms and explosives at isolated spots on the coast, infiltration/ex-filtration of anti-national elements, use of the sea and off shore islands for criminal activities, and smuggling of consumer and intermediate goods through sea routes. Absence of physical barriers on the coast and presence of vital industrial and defence installations near the coast also enhance the vulnerability of the coasts to illegal cross-border activities. In addition, the Indian Ocean Region is of strategic importance to India's security. A substantial part of India's external trade and energy supplies pass through this region. The security of India's island territories, in particular, the Andaman and Nicobar Islands, remains an important priority. Drug trafficking, sea-piracy and other clandestine activities such as gun running are emerging as new challenges to security management in the Indian Ocean region.

India's coastline and island territories: India has a coastline of 7,517 km, of which the mainland accounts for 5,422 km. The Lakshadweep coast extends for 132 km and the Andaman and Nicobar Islands have a coastline of 1,962 km. The Indian coastline is distributed among nine coastal states and four UTs, and almost the entire coast of India falls within the tropics. The nine coastal states are Gujarat, Maharashtra, Goa, Karnataka, Kerala, Tamil Nadu, Andhra Pradesh, Odisha and West Bengal. India also has large coastal wetlands, which cover an area of over 41,401 km², which is 27.13% of the total area covered by wetlands in India. India's inland wetlands, on the other hand, cover 1,05,649 km². Most cargo ships that sail between East Asia, America, Europe and Africa pass through Indian territorial waters.

According to the Ministry of Shipping (MoS), around 95% of India's trade by volume and 70% by value is done through maritime transport. Special economic zones (SEZs) are being developed in close proximity to several ports, thereby providing a logistical advantage to industries within these zones. The government has announced plans to develop 14 coastal economic zones (CEZs) in a phased manner for port-led development in all of the nine maritime states. According to the Maritime Zone Act, 1976, the maritime zones of India are divided into five Coast Guard regions, with the Indian Coast Guard (ICG) responsible for the enforcement of maritime zones.

The five regions are North-West, West, East, North-East and Andaman and Nicobar, with the respective regional headquarters located at Gandhinagar, Mumbai, Chennai, Kolkata and Port Blair. The regions are further divided into twelve Coast Guard 'districts', one each for the nine coastal states on the mainland, two in the Andaman and Nicobar region and one at Kavaratti in the Lakshadweep and Minicoy Islands. In addition, there are Coast Guard Air Stations (CGASs) and Coast Guard Air Enclaves (CGAEs) for air operations from various locations along the coastline. There are presently 12 major ports and 200 notified minor and intermediate ports in India. The 200 non-major ports are in the following states: Maharashtra (48), Gujarat (42), Tamil Nadu (15), Karnataka (10), Kerala (17), Andhra Pradesh (12), Odisha (13), Goa (5), West Bengal (1), Daman and Diu (2), Lakshadweep (10), Pondicherry (2), and Andaman and Nicobar (23). Apart from five main fishing harbors, Mangalore (Karnataka), Kochi (Kerala), Chennai (Tamil Nadu), Vishakhapatnam (Andhra Pradesh) and Raichak in Kolkata (West Bengal), further, 23 minor fishing harbors and 95 fish-landing centres are designated to provide landing and berthing facilities to fishing craft. The coastal areas are safeguarded by the police forces of the respective coastal states and UTs, which have jurisdiction of up to 12 nautical miles (nm) from the coast. India, a traditionally maritime country with a rich maritime heritage, has an exclusive economic zone (EEZ) of 200 nm from its coast. India is currently seeking to extend its EEZ to 350 miles. The ICG and the Indian Navy have jurisdiction over the entire maritime zone up to 200 nm, including the 12 nm of territorial waters.

Security threats: India's long coastline poses a variety of security concerns:

i. Landing of arms and explosives at isolated spots on the coast
ii. Infiltration/ex-filtration of anti-national elements
iii. Use of the sea and offshore islands for criminal activities
iv. Smuggling of consumer and intermediate goods through sea routes, etc.

Indian Coast Guard: The ICG is a multi-mission organization that is responsible for coastal security in territorial waters, including areas to be patrolled by the coastal police. It is also responsible for maintaining maritime surveillance across India's two million sq. km EEZ, and contributes towards the development and implementation of an effective security mechanism to combat seaborne threats. The security matrix of the ICG encompasses a host of operations and involves measures undertaken to address coastal security, offshore security, anti-terrorism, antipiracy and port security. The ICG also provides support to the Indian Navy to ensure the maritime security of the country. After the terror attacks in Mumbai in 2008, there has been a paradigm shift in the maritime security apparatus.

Currently, there is an increased emphasis on surveillance, intelligence gathering and information sharing amongst the various stakeholders to ensure an effective response to any emerging situation. In February 2009, the ICG was additionally designated as the authority responsible for coastal security in territorial waters, including areas to be patrolled by the coastal police. The ICG is also responsible for overall coordination between the Central and state agencies in matters relating to coastal security. As part of coastal security mechanisms, a surveillance system called the Coastal Surveillance Network (CSN), comprising a chain of static sensors having radars, an automatic identification system (AIS), day/night cameras and metrological sensors has been established at 46 locations along the coastline and island territories by the ICG. In order to achieve near gap free surveillance of the entire coastline, 38 additional radar stations and eight mobile surveillance systems, apart from vessel traffic management system (VTMS) connectivity at the Gulf of Kutch and Gulf of Khambhat, are being installed under CSN Phase-II. The ICG has also promulgated standard operating procedures (SOPs) for ensuring coordination and cohesion amongst various agencies involved in coastal security. The ICG and marine police are working according to the 'hub-and-spoke' concept; the hub being the ICG stations and the spoke being the CPSs.

To revalidate the coastal security mechanism and create awareness among the fishermen at sea, regular boarding operations are also being conducted to validate and check the credentials of the occupants of the vessels, including their identity cards and registration documents. Further, based on intelligence inputs, coastal security operations are conducted by the ICG in coordination with other stakeholders. Community interaction programmes (CIPs) are conducted periodically by the ICG for the fishermen and coastal populace in order to sensitize them to security and safety issues. In order to develop their capacity, the ICG has been imparting regular training to marine police personnel since 2006. Regular training programmes are conducted at the Coast Guard District Headquarters corresponding to the coastal states/UTs.

In order to strengthen the capabilities of the ICG with regard to anti-smuggling and narcotics control, the Government of India has sanctioned the merger of the Customs Marine Organization (CMO) under the Department of Revenue with the ICG. In West Bengal earlier this year, the ICG commissioned a 27-m long high-speed interceptor boat C-424, which can reach a speed of 45 knots, for the further development of West Bengal's coastal security measures. Along with this new boat, West Bengal now has Coast Guard assets, including three fast patrol vessels, four hovercrafts, two interceptor boats, a radar station and an air cushion vessel (ACV) forward-operating base in Frazerganj.

In Andhra Pradesh, the ICG conducted 110 outreach programmes with the fishing community to sensitize them to the local government's coastal security undertakings. The fishermen were educated on search and rescue operations, precautionary measures during harsh weather, distress alarms and proper documentation requirements. The programme was a product of the policies that the state is trying to develop for better communication and cooperation between the coastal security officials in Andhra Pradesh and the fishing/trading community.

Keeping the 26/11 attacks in mind, the government has approved a 31,748 crore INR 'definitive five-year action programme' for the Coast Guard. The aim is to make the Coast Guard a 175-ship and 110-aircraft force by 2022 to plug the operational gaps and strengthen its capabilities to safeguard coastal security, island territories, offshore assets and the marine environment, as well as undertake anti-piracy, anti-smuggling, oil-spill and pollution-control operations.

The Coast Guard currently operates 130 ships consisting of 60 offshore patrol vessels, fast-patrol vessels and pollution control vessels, 18 hovercrafts, and 52 smaller interceptor boats/crafts. The air assets consist of 39 Dornier maritime surveillance aircraft, 19 Chetak choppers and four Dhruv advanced light helicopters (ALHs). For future requirements, the Coast Guard has 65 ships and interceptor crafts/boats under construction and has planned the acquisition of 30 helicopters. Further, 16 indigenous Dhruv choppers have already been ordered from Hindustan Aeronautics Ltd, and the procurement of 14 twin-engine EC-725 tactical choppers from Airbus is in the final stages of approval. The force is also looking for six more maritime multi-mission surveillance aircraft and the establishment of five air stations/enclaves.

Border Security Force: Established in 1965, the Border Security Force (BSF) is a paramilitary force responsible for guarding India's land borders during peace time and preventing transnational crime. The BSF falls under the administrative control of the MHA. In order to thwart the landing of terrorists through sea routes, the BSF formed its first commando unit called Creek Crocodiles. The Creek Crocodile Commando unit is an elite commando force with 42 commandos responsible for manning 85 km of hostile creek area where India shares a border with Pakistan along the Rann of Kutch. The coastline is abundant with creeks that could be used by infiltrators to evade security forces and radars. As a result, the circumstances mandate difficult defensive requirements, especially during high tides and tough weather. Further, the lands are entirely submerged and poisonous snakes and scorpions are rampant. The BSF primarily patrols the three largest creeks in the region— namely Sir Creek, Kori Creek and Padala Creek. The Creek Crocodile Commandos are equipped with around six all terrain vehicles (ATVs) and 30 fast patrol boats, including four American-made fast attack craft (FAC).

International Ship and Port Facility Security Code: The International Ship and Port Facility Security (ISPS) Code is a comprehensive set of guidelines and regulations established for the security of ships and port facilities. Developed by the International Maritime Organization (IMO) in response to the 9/11 attacks, the code is constituted in the International Convention for the Safety of Life at Sea (SOLAS), an international maritime treaty. All 148 signatories of the treaty, including India, are required to comply with the ISPS Code. The purpose of the set of regulations is to establish a standardized framework across international ports and ships, which then allows governments to efficiently evaluate risks and offset threats and vulnerabilities to shipping and port facilities through alterations to security levels and undertaking the security measures prescribed by the Code. Compliance with the ISPS Code falls within the spectrum of central programmes related to maritime security. The standardized regulations aim to:

a. Monitor the access of unauthorized persons on port premises.
b. Track cargo operations and detect security threats on vessels or on shore.
c. Assign appropriate security levels to ships and establish various duties and functions within each security level.
d. Prescribe roles and responsibilities for port state officers and on-board officers to manage maritime security threats at an international level.
e. Gather global data related to maritime security threats and results to tackle the same.

There are three security levels for ports within the ISPS Code, and each level consists of certain security undertakings that are mandatory for proper compliance.

1. Security level 1 (normal):

The ship or port facility operates normally. It mandates a set number of security measures to be active within the ports, which include compulsory pre-boarding checks, constant surveillance of ‘no access’ zones and coordinated supervision of cargo and minimum access to ships.

2. Security level 2 (heightened):

Level 2 stays active for as long as there is a substantial amount of risk present against the port/ship facility. It requires additional layers of security, over and above the minimum requirements, until the threat is mitigated. Security measures require deployment of additional personnel, limiting waterside access to the ship, establishing restricted areas, escorting visitors on board and conducting comprehensive searches on ships.

3. Security level 3 (exceptional):

Level 3 implies probable and imminent risk and requires maximum security for a limited time frame. Even if the specific target is unidentified, ports are expected to be ready to evacuate ships, limit access to a single point, suspend movement of any shipping traffic, suspend cargo and storage operations, and closely monitor personnel and vessels in the port facility.

Information Sharing and Law Enforcement

Information Sharing to Combat Maritime Piracy

A. The Primary Legal Sources Underlying the Duty to Cooperate: Combating maritime piracy requires commitment and active engagement by states. As indicated by Mr. Helmut Tuerk, the honorable justice of the International Tribunal for the Law of the Sea, “the practice of piracy has been widespread over the centuries and continues to be a menace. As a result, every State not only has a right, but also a duty, to take action to curb piratical activities." States are expected to take measures on both the domestic level for example, by criminalizing piratical acts and on the international level. The key element of the latter is international cooperation, whether directly among states or through the involvement of international organizations and other mechanisms created by states.

Indeed, international instruments repeatedly refer to the importance of international cooperation in the repression of maritime piracy. Thus, for example, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention") provides in Article 13 that state parties shall cooperate in the prevention of the offences defined by that convention. Similarly, the U.N. Security Council (UNSC), in its series of resolutions related to the threats of piracy and armed robbery at sea off the coast of Somalia (and more recently in the Gulf of Guinea), urged all states to cooperate with each other and with international organizations in combating acts of piracy and armed robbery at sea.

The importance of international and regional cooperation in this domain was also highlighted by the U.N. General Assembly in its resolutions on oceans and the law of the sea. Notably, Article 100 of UNCLOS, titled "Duty to cooperate in the repression of piracy," specifies that "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." The duty to cooperate is at the core of the piracy section of UNCLOS. Indeed, it is the first provision of this section, thereby providing an appropriate benchmark as well as framework for the substantive provisions that follow. Moreover, while international cooperation is a common theme of UNCLOS, Article 100 is unique in two ways. First, it is the only provision in UNCLOS in which the title is the duty to cooperate. Secondly, it uses the strongest wording found in UNCLOS with regard to this obligation; namely, that all states shall cooperate "to the fullest possible extent."

Article 100 of UNCLOS contains the precise wording of Article 14 of the 1958 Geneva Convention on the High Seas (HSC), which in turn incorporated (again, verbatim) the corresponding article adopted by the International Law- Commission (ILC) on the law of the sea. All of these provisions went beyond the proposal put together in the scholarly work known as the Harvard Research Draft, which later served as the basis for the discussions of piracy by the ILC and the negotiations of the piracy provisions in the HSC. Article 18 of the Harvard Research Draft provided that "the parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation." The commentary to this provision underscored that Article 18 imposes on states only "a general discretionary obligation to discourage piracy by exercising their rights of prevention and punishment as far as is expedient."

By establishing a duty to cooperate, UNCLOS and the HSC therefore send a clearer message than originally foreseen in the proposal of the Harvard Research Draft. Both UNCLOS and HSC, however, did not set out the precise obligations that fall within the scope of the general duty to cooperate, thereby leaving this provision open to interpretation with regard to the means that states should employ to sufficiently fulfill their obligation. At the very least, however, it is evident that inaction or failure to cooperate in response to piratical acts-where both the factual circumstances and the applicable legal framework allow for action and cooperation-cannot be reconciled with the duty as prescribed by Article 100.

The ILC, in its above commentary, clearly stated that "any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law." Similarly, Mr. Jack Lang, the Special Adviser appointed by the U.N. Secretary General to address the legal issues related to piracy off the coast of Somalia, underscored that the degree of flexibility provided by the wording of Article 100 "should not be used as a pretext for failure to prosecute." Professor Rudiger Wolfrum, the honorable justice and former President of the International Tribunal for the Law of the Sea, echoed this approach, stating that "a ship entitled to intervene in cases of piracy may not, without good justification, turn a blind eye to such acts." Professor Wolfrum went a step further by asserting that "turning a blind eye to the activities of pirates is in itself an act of piracy," and by suggesting that states permitting piracy activities may be subject to countermeasures and also, theoretically, to an intervention by the UNSC.

B. The duty to share information as a specific obligation under the general duty to cooperate: The concrete measures to be applied by states as part of their general duty to cooperate are determined based on the characteristics of the particular threat and the circumstances of each case. Whatever the specific measures are, however, there should be little doubt that information exchange is vital to ensure successful international cooperation in counter-piracy operations. Indeed, the duty to share information can be identified as a particular obligation within the general duty to cooperate. This conclusion is supported by relevant international instruments. For example, the SUA Convention provides that “States Parties shall co-operate in the prevention of the offences set forth in article 3, particularly by…exchanging information in accordance with their national law.” As explained by Justice Tuerk in reference to that provision: “there is a duty for States Parties that have a reason to believe that an offense set forth in the SUA Convention will be committed to furnish as promptly as possible any relevant information to those States having established jurisdiction over such offenses.”

In addition, the UNSC resolutions related to the suppression of piracy and armed robbery at sea also urge all states to share information on acts related to piracy and armed robbery at sea. The U.N. General Assembly has also emphasized the importance of information sharing as part of international cooperation in addressing the problem of piracy.”

On the regional level, the need for information sharing as a means of promoting cooperation in the suppression of piracy was a prime motivator for Asian states in adopting the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Re CAAP). A key feature of Re CAAP is the creation of an information sharing center, based in Singapore, whose role is to undertake the collection, collation, and analysis of information received from state parties and to ensure a flow of information between them. Similarly, the more recent sub-regional Codes of Conduct, adopted in 2009 in Djibouti and in 2013 in Cameroon, both inspired by Re CAAP, each provide that cooperation among the state parties shall include "sharing and reporting relevant information." The Codes of Conduct further provide for detailed obligations related to information sharing, such as the need to designate a national focal point to facilitate coordinated, timely, and effective flow of information.

The duty to exchange information related to the prevention and suppression of maritime piracy may also derive independently from the abovementioned principle of due diligence. This concept entails, inter alia, that states have a responsibility to forewarn other countries about potential threats by communicating relevant information and updating international police databases in a systematic and comprehensive fashion. The "responsibility to forewarn" is not a new notion under international law. For example, in the Corfu Channel case, the International Court of Justice pointed to the duty of states to notify and warn countries of an imminent danger based on certain general and well-recognized principles such as elementary considerations of humanity.

With the Corfu Channel case in mind, the obligation to forewarn was introduced into UNCLOS, where it is provided in Article 24(2) that “the coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.” It would be reasonable to contend that activities of a piratical nature pose a “danger to navigation” within the meaning of Article 24(2), thereby requiring the coastal state to warn other states of such known activity in its territorial waters. Beyond the territorial sea, the duty to forewarn is a corollary obligation of the duty to cooperate enshrined in Article 100 of UNCLOS, and by other relevant instruments, such as the SUA Convention and the abovementioned UNSC resolutions.

C. Scope of the Duty to Share Information and the “National Security” Exception: Frequently, the international instruments applicable to the suppression of piracy do not shed much light on the precise scope of the duty to share information. In the SUA Convention, the need to share information is mentioned, yet without further details. Consequently, states are left to decide what precise information should be shared, how it is to be transmitted, and when it is to be delivered. Moreover, even when more detail on the duty to share information is provided, restrictions are often imposed due to national security, sovereignty, or commercial confidentiality concerns. Such restrictions are found in the SUA Convention (exchange of information “in accordance with national law”), as well as in Article 302 of UNCLOS, a general provision concerning the disclosure of information: “Nothing in this Convention shall be deemed to require a State Party, in the fulfillment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security.”

These restrictions-in particular, those based on the “national security” argument-can be used by states to justify their decision not to share information. Nonetheless, it is submitted that the implementation of laws and regulations that prevent or restrict the exchange of information should be done only as an exception to the general obligation to share information deriving from Article 100 and the due diligence principle. Thus, if a state possesses relevant data, and it neglects-or even refuses-to share it, it carries the burden of justifying such a position.

This approach is grounded in the wording of provisions such as the abovementioned Article 302 of UNCLOS, which allows non-disclosure of information only for purposes of protecting "essential interests of state security. It is further based on the fundamental principle under international law requiring states to fulfill their obligations in good faith. Indeed, if, as a matter of policy, a state refrains from sharing information related to the prevention and suppression of maritime piracy, it can hardly be argued that it fulfills its obligation to cooperate in good faith.

This conclusion is further supported by the nature of piracy as, in essence, an ordinary law crime. Accordingly, the type of information whose sharing is of importance for the purpose of combating maritime piracy would typically be that which is exchanged as a standard procedure among law enforcement authorities when countering crime: identification of suspects, modus operandi, etc. Thus, in general, the sharing of such information between the entities involved in counter-piracy operations (whether the navies or law enforcement agencies) is unlikely to compromise national security. It should therefore not be surprising that at least among law enforcement agencies and based on INTERPOL's practice following the creation of its Global Maritime Piracy Database, in the domain of maritime piracy; very few restrictions have been imposed by INTERPOL's member countries on information exchanged via the INTERPOL information system.

D. Data sharing mechanisms: A range of mechanisms currently exist for sharing maritime monitoring and surveillance data at national and international level. While some national level mechanisms enable the sharing of data among different agencies for a range of different purposes, at the international level such mechanisms are single purpose.

National data sharing mechanisms: The French SPATIONAV information system is designed to collect and compile data generated by a range of sensors to assist maritime operational centres in the performance of their duties. The principal partners are the Navy, the Directorate of Maritime Affairs and the Customs Department. SPATIONAV, which makes use of data provided by coastal observation stations and AIS, operates alongside another mechanism, TRAFIC 2000, which was developed to implement the VTM Directive.

The primary role of TRAFIC 2000 is to provide the authorities responsible for maritime security the data necessary to assess risks to security, safety and the environment from vessels, including those carrying dangerous or polluting goods. The system is intended to be integrated with SafeSeaNet (see below). Finland has a well developed maritime data exchange mechanism the principal actors in which are the Navy, the Frontier Guard and the Maritime Administration. Pursuant to a 1993 inter-agency memorandum, AIS and VTS data, including data from the GOFREP reporting system are sent by the Maritime Administration to the Navy as are data gathered by the Frontier Guard from its patrol vessels and aircraft and sensors. This data is then compiled with the Navy's own classified data to create a real-time maritime picture. Data is then distributed to the two agencies in accordance with their needs. It is also supplied to a range of 'secondary' agencies including the environment ministry, customs, police and rescue service.

Regional AIS data sharing agreements: The HELCOM AIS Network enables the real time sharing of AIS data among the parties to the 1992 Helsinki Convention (Denmark, Estonia, EC, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden) and Norway. The North Sea Data Exchange, developed with the assistance of INTERREG III undertakes a similar function for North Sea countries Norway, Sweden, Denmark, the Netherlands, Belgium and the UK and a similar network is currently planned for the Mediterranean.

SafeSeaNet: SafeSeaNet is a data exchange system, based on an index server, developed by EMSA to support the implementation of elements of the VTM Directive (relating to port, HAZMAT, ship and alert notifications). SafeSeaNet is not specifically referred to in the VTM Directive although some of the reporting requirements are. It is envisaged that

SafeSeaNet, which is not yet fully operational will also be used to distribute LRIT data. One of the reasons for its slow implementation has been concerns at the Member State level over data security and the lack of a clear and binding data policy for SafeSeaNet.

Commercial AIS data sharing mechanisms: Because, AIS data is unencrypted and broadcast over publicly available wavelengths, a number of commercial companies have successfully established web-based AIS data sharing mechanisms. The first such service, and one of the largest, is AIS Live which is owned by Lloyds Register Fairplay Limited. Access to this service is by subscription.

Finland/Sweden : Since 2006 the Swedish and Finnish navies have routinely exchanged their respective compiled maritime pictures on the basis of a 2005 memorandum of understanding. The data shared is classified and is safeguarded in accordance with applicable national legislation.

Maritime Analysis and Operations Centre – Narcotics (MAOC-N): MAOC-N, which is based in Lisbon, is a law enforcement centre that coordinates the maritime interdiction of illegal drugs trafficked on the high seas. It was established in 2007 on the basis of an agreement between Ireland, the Netherlands, Spain, Italy, Portugal, France and the UK. Data is gathered from a range of sources including AIS and classified intelligence.

Virtual Maritime Traffic Centre (V-RMTC): The V-RMTC is a virtual network connecting the operational centres of a number of navies that enables the sharing via internet of unclassified information on merchant shipping. Coordinated by the Italian Navy, it was established in 2006 pursuant to an Operational Agreement between some 15 countries with naval interests in the Mediterranean.

NATO – Marine Situational Awareness (MSA) Concept: NATO's Maritime Safety and Security Information System (MSSIS) is based around AIS data, provided by NATO-member States and a number of non-NATO States, which the location and movement of some 10,000 ships to be tracked each day. This data is then analyzed using a range of software analysis tools, some of which make use of commercial and open source databases, to identify potential anomalies. The analyzed data is then fed into NATO's Maritime Command and Control Information System which also includes intelligence data, classified data and the real-time location of NATO vessels.

Other planned data sharing mechanisms: On 13 February 2008 the European Commission adopted a communication on the creation of a European Border Surveillance System (EUROSUR) with the main purpose of preventing unauthorized border crossings, reducing the number of illegal immigrants losing their lives at sea, and increasing the internal security of the EU. The communication proposes that in a first phase existing surveillance systems and mechanisms should be interlinked and streamlined and that a secure computerized communication network should be established in order to permit real-time data exchange 24 hours a day between centres in the Member States as well as FRONTEX.

Phase 2 is concerned with the development and implementation of common tools and applications for border surveillance at EU level while Phase 3 will seek to integrate all existing sectoral systems which are reporting and monitoring traffic and activities in

European waters into a broader network to allow border control authorities to take advantage of the integrated use of these various systems. Meanwhile the European Defence Agency (EDA) began work some two years ago on its Maritime Surveillance Project (MARSUR) in order to explore the needs and requirements for a purely European naval surveillance system.

D. Use of Force: Multilateral instruments and jurists recognize that force may be employed in maritime law enforcement and have forged standards for its use. The use of force, particularly deadly force, has the potential to trigger human rights considerations, even in instruments that do not expressly contain human rights provisions. The ICCPR provides that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The Pact of San Jose provides, "every person has the right to have his life respected. This right shall be protected by law and…no one shall be arbitrarily deprived of his life." Similarly, the ECHR provides that "everyone's right to life shall be protected by law." Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary.

Where actions in question involve maritime law enforcement, the ITLOS ruling in **M/V Saiga** represents the seminal case on the use force. M/V Saiga is particularly noteworthy, as no provision of the LOS Convention expressly addresses the use of force. The oil tanker Saiga, registered in Saint Vincent and the Grenadines, operated as a bunkering service in West Africa. Officers from Guinea fired on Saiga, boarded it, and arrested the crew approximately twenty-two miles from their coast. The Hamburg court held that "the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

Juno Trader involved a dispute before the ITLOS in 2004 regarding the detention of a fishing vessel and its crew for alleged illegal fishing in the EEZ of Guinea-Bissau. Judge Treves, in a separate opinion, wrote that "unnecessary use of force and violations of human rights and due process of law are elements that must also be taken into consideration in fixing a bond or guarantee that can be considered as reasonable." More recently, in the "***Enrica Lexie***" Incident order, ITLOS in 2015 reaffirmed "its view that the considerations of humanity must apply in the law of the sea as they do in other areas of international law."

The 'Enrica Lexie' Incident (Italy v. India: The two Italian marines, Massimiliano Latorre and Salvadore Girone, had opened fire on an Indin fishing boat killing two crew members. The case had become a major bone of contention between the two countries with India insisting that it could try them as the incident occurred in its territorial waters. Italy contested this on the ground that the ship flew an Italian flag and hence the crew would be tried under the Italian law.

The top court had later allowed both marines to leave the country for Italy while the jurisdiction issue was sorted out. Italy took the issue to an international tribunal constituted under the UN Convention on the Law of the Seas in Hague, Netherlands, after the court stayed the proceedings in the case on Aug 26, 2015. The tribunal ruled on May 21, 2020, that Italy would try the marines but India could seek compensation for the deaths of the fishermen. In a fresh application filed in court on Thursday , through standing counsel, BV

Balaram Das, the central government had decided to accept the tribunal award which is final and without any appeal. The application urged the court to accordingly close the proceedings pending before it since 2012.

The arbitral proceedings were instituted under the United Nations Convention on the Law of the Sea ("UNCLOS") on 26 June 2015, when Italy served on India a "Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based".

According to Italy, the Parties' dispute arises from an incident that occurred on 15 February 2012 approximately 20.5 nautical miles off the coast of India involving the "Enrica Lexie", an oil tanker flying the Italian flag, and India's subsequent exercise of criminal jurisdiction over the incident and over two Italian marines from the Italian Navy. According to India, the incident in question concerns the killing of two Indian fishermen on board an Indian vessel named the "St. Antony", and India's subsequent exercise of jurisdiction. It is alleged that the two Italian marines aboard the "Enrica Lexie" killed the fishermen. On 11 December 2015, Italy filed a "Request for the Prescription of Provisional Measures pursuant to Article 290, paragraph 1 of the United Nations Convention on the Law of the Sea". On 26 February 2016, India submitted the "Written Observations of the Republic of India on the Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 1, of the United Nations Convention on the Law of the Sea". Following a public hearing held in the Peace Palace, on 29 April 2016, the Arbitral Tribunal adopted an Order in respect of Italy's Request.

In accordance with the procedural calendar established by the Arbitral Tribunal, the Parties subsequently exchanged written pleadings on the Tribunal's jurisdiction and the merits of the case. On 30 September 2016, Italy filed its Memorial. On 14 April 2017, India submitted its Counter-Memorial, in which it, in addition to responding to Italy's Memorial, raised objections to the jurisdiction of the Arbitral Tribunal and the admissibility of Italy's claims, and presented counter-claims. On 11 August 2017, Italy filed its "Reply on the Merits – Counter-Memorial on Jurisdiction – Counter-Memorial on India's Counter-Claims". On 15 December 2017, India submitted its "Rejoinder on the Merits – Reply on Jurisdiction – Reply to Italy's Counter on India's Counter-Claims". On 9 March 2018, Italy filed its "Rejoinder on Jurisdiction and on India's Counter-Claims".

On 26 November 2018, the Republic of India appointed Dr. Pemmaraju Sreenivasa Rao as arbitrator. Dr. Pemmaraju Sreenivasa Rao succeeds Judge Patibandla Chandrasekhara Rao, who had passed away on 11 October 2018, on the Arbitral Tribunal. In the event of the passing of a member of the Arbitral Tribunal, Article 6 of the Rules of Procedure provides that "the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the Arbitral Tribunal decides otherwise." Due to the illness of Judge Rao, the hearing, originally scheduled to take place in the autumn of 2018, was postponed. On 19 December 2018, the Tribunal announced that the hearing would instead be held from 8 July to 20 July 2019. From 8 July to 20 July 2019, the hearing was held at the seat of the Permanent Court of Arbitration ("PCA") at the Peace Palace, The Hague, the Netherlands. The hearing addressed the jurisdiction of the Arbitral Tribunal as well as the merits of Italy's claims and India's counter-claims.

At the start of the hearing, on 8 July 2019, the Agent of the Italian Republic and the Agent of the Republic of India each made a brief opening statement, which was webcast live on the Internet. A video recording of the Agents' opening statements is available below, under the rubric "Video", the transcript is available under the rubric Transcripts/Minutes, and photographs of the hearing are available for download under the rubric "Image". Pursuant to Article 23, paragraph 3, of the Rules of Procedure, as amended by Procedural Order No. 7 dated 16 May 2019, the remaining parts of the hearing were confidential and not webcast.

On 2 July 2020, having issued its Award to the Parties, the Arbitral Tribunal published the operative part (disposit) of the Award on the PCA Case Repository. In accordance with the Rules of Procedure, as amended by Procedural Order No. 7, the Parties were provided with the opportunity to consider whether any parts of the Award should be designated as containing "confidential information". On 10 August 2020, the Award, with certain redactions made at the request of the Parties, was published on the PCA Case Repository.

Arbitral Tribunal (AT)'s May 21 award, released on July 2, requiring India to cease to exercise criminal jurisdiction over the two Italian marines, accused of killing two Indian fishermen on the high seas near Kerala on February 15, 2012. Despite Kerala's concerns over the AT's award depriving the Indian Supreme Court of criminal jurisdiction, the Centre has told the court that it has decided to accept and abide by the award, which is not appealable under the International law. *The Wire* breaks down the salient features of the five-member tribunal's award in terms of the majority decision and the two dissents.

Marines' immunity deconstructed: The Arbitral Tribunal has held that the two Italian marines, who shot dead two Indian fishermen on the high seas in 2012, are entitled to immunity because immunity of state officials is a well-established rule of customary International law.

"The marines are state officials who were acting in their official capacity during the incident; and to the extent that the "territorial tort exception" is a customary rule of international law, it would in any event not apply in this case because the Marines were not on Indian territory when they committed the acts at issue", the AT held in paragraph 873, explaining why India is precluded from exercising its jurisdiction over the marines. India had argued that even if the immunity of the marines is conceded, the "territorial tort" exception to immunity applies in this case because the alleged crime was "committed against Indian nationals, on an Indian flagged boat, which is assimilated to India's territory for the application of criminal law, and the marines have been found on India's territory". The AT agreed with India's position that "territorial tort" exception could be a valid one, but disagreed that the marines were on Indian territory when they committed the acts at issue.

According to India, the "legal fiction (of) assimilating ship and territory for the specific purpose of criminal law is well accepted and logical, especially since criminal jurisdiction can only be either territorial or personal, and for crimes committed on board a ship, India contended, territorial jurisdiction is the only possibility. (Paragraph 836). Responding to Italy's contention, India maintained that the fact that the marines were not on board the "St. Antony" fishing vessel when they committed the alleged crime does not invalidate

India's argument. Relying on a scholarly work which analyses various national legislation on immunity, India argued that general state practice shows that the overriding consideration is whether the injury has been suffered on the territory of the forum state." (Paragraph 837)

The AT, in its analysis, referred to the principle of objective territoriality, well established in international law, under which a state may assert its jurisdiction in respect of offences committed outside its territory but consummated within its territory or, as stated in 1926 by the Permanent International Court of Justice in its *S.S. Lotus* judgment, "if one of the constituent elements of the offence, and more especially its effects, have taken place (in its territory). (Paragraph 840)

The AT pointed out in paragraph 843 that under customary international law, immunity *ratione materiae* from foreign criminal jurisdiction is accorded to state officials in respect of their "official acts" or "acts performed in an official capacity". In paragraph 848, the AT held that immunity *ratione materiae* is enjoyed by state officials in general, irrespective of their position in the hierarchy of the state, and includes members of a state's armed forces on official duties.

In paragraph 862, the AT concluded that regardless of whether the marines' acts were *ultra vires* or unlawful, the evidence demonstrates that during the incident the marines were under an apprehension of a piracy threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy and of a VPD (Vessel Protection Detachment). A VPD comprises uniformed military personnel embarked on a vessel with explicit approval of the flag state. Unlike private security actors at sea, VPD operators are trained to follow strict and defined rules of engagement through traditional military chain of command.

In paragraph 868, the AT pointed out that there is a general understanding that the "territorial tort" exception would apply in cases where (i) the acts at issue were committed in the territory of the forum state (i.e. in India) ; (ii) by a foreign official who had been present in the territory of that state at the time of the acts at issue without the state's express consent for the discharge of his or her official functions.

In paragraph 870, it states that there is no support for the proposition that the second condition – the presence of a foreign official in the territory of the forum state without the state's consent – is dispensable. To the contrary, it says, commentary on the subject underscores the importance of the presence of the foreign official in the territory of that state at the time of the acts at issue, and whether such presence was with or without the state's express consent for the discharge of his or her official functions, for the exception to apply.

In paragraph 871, the AT says that it is undisputed that the marines were on board the *Enrica Lexie* and not on Indian territory when they committed the acts at issue. As such, there was no situation in which the Indian government's consent for the discharge of the marines' official functions could have been required or sought, and no intentional breach of India's sovereignty can be imputed to the marines or the Italian state, the tribunal concluded. Therefore, in Paragraph 872, the AT expressed its view that even if a "territorial tort" exception were recognised under customary international law, the exception would not apply in this case.

The AT's conclusion is inconsistent because it fails to recognise the possibility that even while on board the *Enrica Lexie*, the marines could commit an act whose consequences could be felt in India's territory without its consent. Also, if the AT's claim in paragraph 869 – that ships cannot be assimilated with national territory of the flag state – is correct, then the *Enrica Lexie* cannot be assimilated with Italian territory either, so as to grant the marines' immunity.

The dissents' significance: The AT's conclusions are vulnerable, if one reads the two dissents carefully. In the AT's own analysis, the Indian government's consent would not be required if the marines were discharging official functions, and therefore, no intentional breach of India's sovereignty could be imputed to the marines or the Italian State.

Dr P.S. Rao, one of the AT's members, said in his dissent: "I entirely disagree with its (AT's) finding that the marines are entitled to immunity from Indian jurisdiction, even when they were on a commercial (cargo) vessel, under private ownership, whereas immunity under general international law is reserved in respect of a ship used only on government non-commercial service".

Italy Wants a UN Tribunal to Stop India from Trying its Marines. Here's Why It's Wrong.: In paragraph 80 of his dissent, Rao said:

"The conclusion reached by the AT on the merits of the Italian claim concerning the immunity of the marines does not fit well, like a square peg in a round hole, with the well-established principle under international law that government officials enjoy immunity from foreign jurisdiction for official acts performed. This is because the service rendered by the marines was part of an agreement amounting to a commercial contract".

Another member of the AT, Judge Patrick Robinson, in his dissent, is of the view that the AT ignored the correspondence between the immunity of a state official and the immunity of the state itself for an act carried out by its official. The immunity of a state official, in general, proceeds on the basis that the state itself enjoys immunity in respect of the acts of its officials. If the state does not enjoy immunity in respect of that conduct, it is difficult to see how the official could, since the state is the fountainhead of the immunity of its official, he opined.

Judge Robinson's dissent also drew attention to the nature rather than the purpose of the act, performed by an official. In distinguishing between the two acts (state and commercial), the law, as is evident from the practice of majority of states, calls for an identification of the nature of the act or transaction, and not its purpose, he explains. The preponderance of authorities supports the use of the criterion of the nature of the act rather than its purpose or motive to distinguish between an act *jure imperii* (i.e. the imperial public acts of the government of a state) and an act *jure gestionis* (the commercial activities of a state): the former act, being sovereign, attracts immunity while the latter, being commercial, does not.

Italy had submitted that even if the interests at issue were commercial, the distinction between acts *jure imperii* and acts *jure gestionis* is irrelevant to the functional immunity of state officials from foreign criminal jurisdiction as long as the acts at issue were performed in an official capacity. To this, Judge Robinson's reply is that the fact that the marines acted in an official capacity is immaterial; acting in an official capacity cannot by itself endow a state official with immunity if its state is not entitled to immunity in respect of his actions. The acts of the Italian state on the basis of which the marines performed their function amount to a commercial transaction, leaving Italy bereft of immunity for that conduct; therefore, the marines chosen by that country to implement the commercial transaction cannot be protected by an immunity that the Italian state itself does not have, he explains.

Judge Robinson further enunciates that state officials do not generate their own immunity by their acts; the source of their immunity is the state itself; if the state lacks immunity, as Italy does in this case, then it has no immunity to transmit to its officials or, in the language of the International Court of Justice, it has no immunity from which the officials would benefit. Therefore, the circumstances of the instant case are whole different from the situation dealt with in the cases set out by the AT majority to illustrate Italy's argument, he says. (Paragraph 69 of his dissent).

"The presence of the marines on the vessel is so intertwined with the essentially commercial transaction between the Italian government and the shipowners that it is not possible to separate the one from the other. When they fired the shots, they did so against the background and on the basis of a commercial transaction in which the government of Italy received from the shipowners the sum of 467 euros per person per day, amounting to 14,010 euros for 30 days of service and the shipowners were obliged to accept onerous obligations in order to protect the government of Italy from claims arising from the conduct of the marines. The shooting that led to the death of the two Indian fishermen was by its nature a commercial act carried out in defence of the interests of the shipowners. The services provided by the marines to the shipowners cannot attract immunity in the circumstances of this case," Judge Robinson categorically held in his dissent.

In order for the marines to enjoy immunity, Italy has the burden of establishing that in their service on the ship they remained in the employment of the Italian government and did not become employees of the shipowners, he concluded. Absent an agreement between Italy and India for their immunities as officials of a foreign state, the marines do not enjoy immunity from Indian criminal jurisdiction in respect of the shooting from the Enrica Lexie that resulted in the death of the fishermen, he concluded.

Indian Supreme Court's lapse?: The Indian Supreme Court did not have the opportunity to examine Italy's defence of immunity, because it asked the special court, constituted by it, to deal with the issue. This, perhaps, was a lapse on the part of the Supreme Court. Had the Supreme Court dealt with it in the judgment it delivered through a two-judge bench on January 18, 2013, it could have had a persuasive impact on the AT's award. The special court constituted by the Supreme Court died a natural death due to circumstances beyond its control, without even having to start its proceedings. The Kerala high court, however, had dealt with the issue, saying that the act of shooting the fishermen was neither an action in defence of the Italian state nor one in defence of the vessel, but a private, illegal and criminal act. Therefore, the single judge bench held that the two marines had no immunity. Unfortunately, the Supreme Court set aside the Kerala high court's judgment on the question of jurisdiction, which helped Italy to claim before the AT as follows:

"Despite Chief Master Sergeant Latorre's written notification to the Indian boarding team less than 24 hours after the incident that the marines were "exclusively answerable to Italian Judicial Authorities", Italy's February 18, 2012 note verbale *to India's Ministry of External Affairs asserting the marines' immunity, and Italy's repeated invocation of the marines' immunity to challenge the jurisdiction of Indian courts, the Indian authorities and judicial bodies have failed to decide the question of immunity to date." (Paragraph 829)*

The absence of an authoritative pronouncement on the marines' immunity by the Supreme Court thus led the AT to consider it a grey area, and an incidental issue to be decided by itself, even though its competence to do so, in the absence of clear provisions in the United Nations Convention on the Law of the Sea, came in for criticism from the dissenting judges. Two international instruments explicitly address use of force in a maritime law enforcement context, both articulating a necessary and reasonable standard where force cannot be avoided (as stated in Saiga). The 2005 SUA Protocols provides:

"When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances."

And, the U.N. Fish Stocks Agreement provides an inspecting State shall ensure that its duly authorized inspectors "avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duty. The degree of force used shall not exceed that reasonably required in the circumstances." Generally accepted standards for the use of force in maritime law enforcement have developed over the past two decades. While not every scenario has been addressed-notably private sector oversight and the use of force during rescue operations- the existence of generally accepted standards supports consistent training, uniform employment, and importantly, compliance with human rights.

E. Navies Carrying Out Law Enforcement Activities: Since piracy takes place on the high seas, and often very far from the shore, combating piratical acts requires more than the typical police-prosecution cooperation, which is predominant in land-based ordinary law crimes such as theft or robbery. Notably, it calls for the involvement of navies as the front-line entities that both prevent attacks and gather relevant information to facilitate prosecution. In fact, in such operations, the navies exercise activities of a law enforcement nature. This unique feature in combating maritime piracy creates certain problems including those related to information exchange. The lead role taken by navies in combating piracy has also led the international community to overlook the role of law enforcement organizations and agencies, particularly during the early stages of combating piracy off the coast of Somalia. Thus, despite the fact that by the end of 2008 a shift towards a law enforcement paradigm was already underway, it was not until late November 2010 that the UNSC-already in its eleventh resolution related to piracy off the coast of Somalia made a clear reference to organizations such as INTERPOL and Europol operating in the counter-piracy field.

In Resolution 1950, the UNSC underlined the importance of continuing to enhance the collection, preservation, and transmission of evidence of acts of piracy to competent authorities; welcomed the ongoing work of the International Maritime Organization (IMO), INTERPOL, and industry groups to develop guidance to seafarers on preservation of crime scenes following acts of piracy; and urged states, in cooperation with INTERPOL and Europol, to further investigate international criminal networks involved in piracy off the coast of Somalia, including those responsible for illicit financing and facilitation. This rather late inclusion of the law enforcement angle in UNSC resolutions (and elsewhere) was particularly surprising, given that the guidelines for involving police forces in combating maritime piracy had already been put in place when the situation off the coast of Somalia began to deteriorate.

By not considering the potential in engaging the law enforcement community, a number of difficulties have emerged, particularly with regard to facilitating the prosecution of pirates, a task that typically falls within the expertise of law enforcement agencies. Naval forces do not necessarily have the tools or the expertise to gather and preserve the relevant evidence necessary for criminal proceedings. In addition, they generally do not have criminal databases where important data such as personal information on suspects, fingerprints, and DNA can be stored and compared with existing data. Such expertise and tools are at the core of law enforcement activities and international police cooperation. The relative lack of involvement of the police in those early stages therefore created a gap, or a "missing link," between the navies operating off the coast of Somalia and the prosecution services. The growing recognition of the need to engage all relevant actors, including the law enforcement community, as part of the holistic interdisciplinary paradigm, led to welcome changes in the mindset that guided the international community in the early stages of combating piracy off the coast of Somalia.

Thus, in addition to the abovementioned UNSC Resolution 1950, three noteworthy examples of the positive shift in approach are found in the following instruments. First, in UNSC Resolution 1976, the UNSC, acting under Chapter VII of the U.N. Charter: (1) invited states, individually or in cooperation with regional organizations, UNODC, and INTERPOL, to examine domestic procedures for the preservation of evidence and assist Somalia and other states in the region in strengthening their counter-piracy law enforcement capacities; (2) underlined the importance of continuing to enhance the collection, preservation, and transmission of evidence to competent authorities; and (3) urged states and international organizations to share evidence and information for anti-piracy law enforcement purposes with a view to ensuring effective prosecution. UNSC Resolution 2020 further highlighted the importance of sharing information with INTERPOL and Europol, including for the purposes of investigating those responsible for illicit financing and facilitation.

The second example is the amendment to the 2008 European Union Council Decision on Operation Atalanta, which is the European Union military operation off the coast of Somalia. The amended framework explicitly instructs Operation Atalanta to: (1) collect data including characteristics likely to assist in identification of piracy suspects such as fingerprints; and (2) circulate, via INTERPOL's channels, and check against INTERPOL's databases, personal data concerning suspects, including fingerprints and other identifiers (e.g., name, DOB, etc.).

A third example concerns the updates introduced in the fourth version of the Best Management Practices for Protection against Somalia Based Piracy. In the Best Management Practices for Protection against Somalia Based Piracy, produced and supported by a number of prominent players in the civil industry and naval forces, a specific chapter was added on cooperation with law enforcement authorities.

These three examples illustrate a positive shift in the strategic view of counter-piracy undertakings. Yet, certain complexities related to the exchange of information between navies and law enforcement entities had to be addressed. First, as a matter of normal procedure, navies tend to designate the data they collect as "classified information." This poses serious impediments with regard to the use of such data for the purpose of prosecution on the national level, as well as in the context of international collaboration with entities (i.e., countries or international organizations) that generally do not have access to classified information. As an example from INTERPOL's practice, this issue had to be addressed during the discussions that led to the conclusion of a pilot agreement on information sharing between NATO and INTERPOL.

To address this concern, it is advocated that while the implementation of classified information rules is justified in the operations of navies during wartime or in preparation for military activities, a different approach should govern the operations of naval forces when carrying out missions of a law enforcement nature such as counter-piracy activities. Thus, applying standard navy classification procedures in this context, and consequently withholding from law-enforcement agencies important information such as fingerprints of suspected pirates, can hardly serve the original purpose of classified information. Further, it does not correspond to the general obligation to share information in combating maritime piracy. Piracy-related information either should not be designated as "classified information" in the first place, or it should be declassified as standard procedure.

Sharing information in the other direction, specifically from law enforcement entities to the navies, also posed certain challenges. For example, in the context of INTERPOL's work, a question arose whether INTERPOL may cooperate with navies considering Article 3 of its Constitution, according to which "it is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character." A plain reading of this provision could have led to the conclusion that INTERPOL must not share any information with the navies or organizations that operate off the coast of Somalia, such as NATO. INTERPOL nonetheless concluded that as long as the purpose and nature of the collaboration is confined to promoting international police cooperation, Article 3 does not prevent it from doing so. Based on this functional interpretation of Article 3 which permits, in principle, the flow of data from INTERPOL to the naval forces, INTERPOL shared information with the navies deployed in the Indian Ocean, such as a photo album of suspected pirates. The information contained in the photo album, gathered by INTERPOL from its member countries, can assist the navies in identifying Somali pirates, and it can potentially support a decision by the navy to detain suspects pending further investigations.

MODULE-V

ARMED CONFLICT & NAVAL WARFARE

MODULE-V - ARMED CONFLICT & NAVAL WARFARE

Law of the Sea during Armed Conflicts: The Second Geneva Convention applies in the first place in case of an international armed conflict that takes place wholly or partly at sea. Pursuant to Article 3 common to the four Conventions, fundamental protections also apply in the event of a non-international armed conflict at sea. While the meaning of the term 'sea' is central to determining the applicability of the Second Convention, the latter does not contain a definition of this term. It is commonly understood that the term 'sea' is used to distinguish the scope of application of the Second Convention from that of the First Convention, which applies on land. To avoid a protection gap between the two Conventions, the term 'sea' should be interpreted broadly. Thus, for the purpose of determining who deserves the protection of the Second Convention, the term 'sea' comprises not only salt water areas such as the high seas, exclusive economic zones, archipelagic waters, territorial waters and internal waters, but also other bodies of water such as lakes and rivers.

Once wounded, sick and shipwrecked members of the armed forces are put ashore, the Second Convention ceases to apply and these persons immediately benefit from protection under the First Convention. This principle applies regardless of the 'branch' of the armed forces a person belongs to: a member of the air force who is shipwrecked at sea is protected by the Second Convention, as much as a member of the navy who is wounded on land is protected by the First Convention.

Moreover, Additional Protocol I, applicable to international armed conflicts, supplements the Second Convention. It provides several definitions relevant to enhanced protection for the wounded, sick and shipwrecked at sea. The Protocol also extends the protection of the Second Convention to all civilians who are wounded, sick or shipwrecked, and to other medical ships and craft than those mentioned in the Second Convention.

Additional Protocol II, applicable to non-international armed conflicts, complements the provisions of Article 3 of the Convention. For example, it prescribes the search and collection of the wounded, sick and shipwrecked and their protection against pillage and ill-treatment.

Finally, it should be mentioned that customary humanitarian law also applies to warfare at sea. In this regard, special mention must be made of the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which, in its own words, is a "contemporary restatement – together with some progressive development - of the law applicable to armed conflicts at sea" and which "has been drafted by an international group of specialists in international law and naval experts". In parallel to these other IHL sources; the Second Geneva Convention also interacts with other sources of international law regulating activities at sea. This includes the 1982 UNCLOS. The outbreak of an armed conflict at sea does not terminate or suspend the applicability of most provisions of UNCLOS; they remain in operation and apply simultaneously to the Second Geneva Convention during an armed conflict. This complementarily is reflected in the updated Commentary on the Second Geneva Convention. The term 'warship', for example, used several times in the Second Convention, must be interpreted based on the definition provided for in Article 29 UNCLOS.

There are also a number of treaties adopted under the auspices of the IMO, in particular the Safety of Life at Sea (SOLAS) Convention and the Maritime Search and Rescue (SAR) Convention. With regard to those IMO treaties that do not expressly limit their scope of application by exempting warships, the question arises to what extent and how they apply during an armed conflict that takes place wholly or in part at sea. No clear answer to this question currently exists. Arguably, these IMO treaties are "multilateral law-making treaties" that, based on the International Law Commission's 2011 Draft Articles on the Effect of Armed Conflicts on Treaties, belong to the categories of treaties that may remain in operation during armed conflict, also when this takes place at sea.

Features of the Protective Scope of the Second Convention: There are certain substantive differences between the First and Second Geneva Conventions. These differences relate to the persons and objects protected under the respective Conventions.

1. Protection of the Shipwrecked: While the basic protection provided for in both Conventions is the same, the scope of persons covered by that protection in the Second Convention is adapted to warfare at sea. The Convention does not only protect the wounded and sick, but also the shipwrecked. Thus, the text of common Article 3 is worded slightly differently in the Second Convention compared to the other three Conventions, which has been reflected in the updated Commentary. Whereas in the First, Third and Fourth Geneva Conventions reference is made only to the "wounded and sick", the Second Convention consistently refers to the "wounded, sick and shipwrecked". For the purpose of common Article 3, a 'shipwrecked' person is someone who, as a result of hostilities or their direct effects, is in peril at sea or in other waters and requires rescue. A person would also qualify as shipwrecked where, for example, hostilities adversely affect the ability of those who would normally rescue them to do so in fact. It should be noted that a person in such situations must not commit any hostile acts.

Likewise, Article 12 which establishes the general obligation for States to respect and protect in all circumstances, refers to the "wounded, sick and shipwrecked", whereas Article 12 in the First Convention only refers to the "wounded and sick".

2. Protection of Hospital Ships and Coastal Rescue Craft: Logically, the difference between the First and Second Conventions also extends to the objects that are protected. While ambulances and other land based medical transports are protected under the First Convention, medical transports used on water are protected under the Second Convention in equal measure. Recognizing an important means by which its obligations may be implemented, the Second Geneva Convention affords protection to hospital ships and coastal rescue craft, as well as to ships chartered for the transport of medical equipment and to medical aircraft.

The operation of hospital ships constitutes one way in which parties to the conflict can carry out their obligation to protect and care for the wounded, sick and shipwrecked at sea. To be able to fulfill this function, hospital ships enjoy special protection "at all times", and they may neither be attacked nor captured. The hospital ship's personnel and crew are likewise accorded special protection, owing to the vital role they play in the ship's performance of its humanitarian functions.

In order to benefit from special protection under the Second Convention, hospital ships must have been "built or equipped.., especially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them". It follows that hospital ships may not serve any other than the said humanitarian purpose, and that they lose their protection if they are used to commit acts harmful to the enemy. As noted in the updated commentary on Article 22, it is their exclusively humanitarian function of impartially providing assistance to the protected persons that justifies their special protection, but parties to the conflict have the right to control and search hospital ships to verify that their use conforms to the provisions of the Convention. This far-reaching right has been inserted by States in the Geneva Conventions in order to counter the possibility that an enemy's hospital ship is being abused to further military operations.

At present, only a small number of States have military hospital ships, which are expensive to operate and maintain and difficult to protect against attack. The updated commentaries on Articles 33, as well as Articles 18 and 22, point out that one option available to parties seeking to comply with their obligations to respect and protect the shipwrecked, wounded and sick is to transform a merchant vessel into a hospital ship. It is important to note that once a merchant vessel has been transformed into a hospital ship by a party to the conflict, it may not "be put to any other use throughout the duration of hostilities".

Substantive Obligations under the Second Geneva Convention: Further to the central obligation on the parties to an armed conflict that takes place at sea to respect and protect the wounded, sick and shipwrecked, and to treat them humanely in all circumstances, the Second Convention sets out a number of additional obligations intended to ensure that this core obligation is fulfilled. This includes the obligation to take all possible measures to search for and collect the wounded, sick, shipwrecked and dead at sea.

To achieve the protective purpose of the Second Convention, it is paramount that the parties to the armed conflict, after each engagement, take all possible measures to search for and collect casualties. The parties might be the only actors sufficiently close to the victims to search for and collect them." Article 18 of the Convention thus requires the parties, after each engagement and without delay, to take all possible measures to search for and collect the wounded, sick, shipwrecked and dead at sea, without discriminating between their own and enemy personnel. The good faith interpretation and implementation of this provision is of critical importance in order to achieve the objectives of the Second Convention.

UN Charter and Armed Conflict

A. The notion of "Armed Attack"

i. The UN Charter system: The UN Charter was concluded in an era where the whole of the international community was in search of (a long lasting) peace. As a consequence, the prohibition on threat or use of force is set forward in very strict terms in Art. 2(4) of the Charter, which reads "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

As strict as it is, the provision is far from being unambiguous in itself and also in relation with other related provisions of the Charter. The provisions regarding “contra-peace situations” envisaged in the Charter employ different terms. As has just been set forth, the first term we see is use of force¸ in Article 2(4). The second term is aggression in Article 39, which is utilized in relation to the powers of Security Council regarding threats to peace, breaches of the peace and acts of aggression. The last term, armed attack in Article 51 has been put as a pre-condition for the exercise of the right to self-defence of the States. However, no definition has been given to these terms and thus their relationship has been left unclear. Before going into the definition of armed attack, a clarification on how these notions are related is necessary.

Article 51 of the UN Charter, which regulates the exercise of the right to self -defence stipulates that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”. The undefined notion of armed attack will now be explained by comparison to the notions of “aggression” and “use of force”.

ii. “Aggression” versus “armed attack” : The term aggression used in Article 39 of the UN Charter is defined in the well-known General Assembly Resolution on the Definition of Aggression. The definition given herein is composed by a general conception of the notion and a list of exemplary situations. The first Article is read as follows; “aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.” This definition, which can be interpreted as including both direct and indirect use of force9, shows a significant resemblance to Art.2(4) of the UN Charter which prohibits the threat or use of force but it does not include “threat”; for an act to be qualified as aggression, “an actual use of armed force is required”. Interestingly, the following Article of the Resolution, referring to “relevant circumstances” that should be taken into account in defining aggression also includes certain gravity of the acts or of their consequences.

What makes defining aggression crucial for the analysis of the meaning of armed attack is the utilization of the Resolution 3314 by the International Court of Justice (ICJ) while elaborating on the notion of armed attack. Indeed, all in the **Nicaragua**, **Oil Platforms** and **Armed Activities** cases, the Court takes the Resolution as a starting point in its analysis on the definition of armed attack. Furthermore, it is also noteworthy that while the Preamble of the Resolution refers to aggression as “the most serious and dangerous form of the illegal use of force”, the ICJ interprets armed attack as “the most grave form of the use of force”. Today, it is accepted by the majority of the doctrine that an armed attack necessarily constitutes aggression. It can be seen that the same view was shared by most of the states during the discussions within the Fourth Special Committee on the Question of Defining Aggression where they agreed that there is a “cascading relationship between the terms ‘use of force’, ‘aggression’ and ‘armed attack’”

iii. “Use of force” versus “armed attack” : To draw the borders of the prohibition of use of force, one must primarily define “force”. The general tendency in State practice, embodied in the Friendly Relations Declaration, is to limit its meaning to the military use of force.

Regarding the notion's relation with that of armed attack, it is widely accepted that the former constitutes a part of the latter. It is of note that the use of force is not only confined to the "armed force" whereas the notion of armed attack necessarily requires resort to arms. The direct and most important conclusion that can be drawn from this differentiation is that there exists a "force gap" between the two Articles and thus not every use of force can be replied by an exercise of the right to self-defence. The distinction between the notions is made mainly due to the gravity of the act or of its effects. Brownlie, for example, explains that a use of force must attain certain gravity in order to be defined as an armed attack. Looking at formal state practice, it can also be seen that during the travaux aiming at defining aggression, numerous states were of the view that only "most serious uses of force qualified as armed attack".

In any case, the most significant statement on the relationship of use of force and armed attack has been made by the ICJ, which has distinguished the "gravest forms of use of force" (i.e. those amounting to an armed attack) from "other less grave forms". This confirms the view that there indeed is a gap between the two relevant articles of the Charter. Second, it implies that there exists *"a form of de minimis threshold"* which is required for an act to constitute an armed attack. Thus, not every illegal use of force warrants states to resort to self-defence; the different wordings bring with them a considerable limitation to the exercise of the right to self-defence. In other words, "minor violations of the prohibition of the use of force falling below the threshold of the notion of armed attack do not justify a corresponding minor use of force as self-defence."

It is true that the Court, with its consistent statements, have put forward the gravity element as an important factor in determining an armed attack. Thus, an armed attack under Article 51 requires "a relatively large scale, […] a sufficient gravity, and […] a substantial effect." According to the ICJ, for example, "mere frontier incidents" do not have the necessary gravity to be considered as armed attacks. However, the Court does not draw the lines of what can be an armed attack in a very concrete way; on the contrary, it can be inferred from the Oil Platforms judgment that the threshold of gravity is a flexible one, which is dependent on the specific circumstances of each case. Taking into consideration the comparison the Court made between the use of force and armed attack as the "most grave form" of it, it can be said that such an intensity threshold is not needed or at least is much lower for an act to constitute use of force.

Lastly, a recent debate must be mentioned. The prohibition embodied in Article 2(4) of the Charter includes only inter-state use of force. In other words, the only entities bound by it are the states. The traditional acceptance regarding the source of armed attack and thus the target of the exercise of self-defence was also in parallel; only states could engage in such activities. However, the post-9/11 era brought upon some discussions on possibility of non-state groups engaging in armed attacks within the meaning of Article 51 of the Charter. Acknowledgment of such a possibility would lead to the creation of a group of acts which are not covered by the prohibition of use of force but which constitute armed attacks and thus the classical hierarchical categorization of the notions will be changed.

B. The notion of "international armed conflict" : The adoption the Geneva Conventions of 1949 was a milestone in the history of the law of war; until then, the law of peace and the law of war were mutually exclusive. From the outset of a war (in legal terms), belligerent states' “normal” relations would be disrupted. The Conventions have brought about the notion of “armed conflict”, a notion which is material rather than legal. With this “semantic contribution”, the application of humanitarian law was no longer dependent on the will of the states which, until then, could avoid being bound by the “rules of war” by simply denying the existence of a state of war. This purpose is clearly stated in the Commentary:

One may argue almost endlessly about the legal definition of ‘war’. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression ‘armed conflict’ makes such arguments less easy.

Common Article 2(1) of the Conventions thus reads as follows:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The following paragraph states that the Conventions will also apply to the cases of occupation “even if the said occupation meets with no armed resistance”. Therefore, there are three main situations to which the IHL of IAC is applicable. For the purposes of this paper, the only relevant one is that of “any other armed conflict” so the other options will just be briefly explained. The first option is declaration of war, which was a crucial element in the pre-1949 period as the laws of war and laws of peace were mutually exclusive. For the former to become into play, the war in legal terms (as opposed to in material sense) had to begin. However these declarations have today become obsolete. The second option is occupation, the beginning of which is still controversial and constitutes a debate. Be that as it may, any occupation amounts to an IAC, even without resistance, and IHL as a whole is applicable.

Turning to “any other armed conflict”, it is rather straightforward that IHL applies to them. What not as clear-cut is the beginning of an armed conflict; thus, the beginning of the application of IHL. It can be said that IHL deals with the rules applicable in bello and does not thoroughly draw the borders of its scope of application. It is understandable, due to the strict distinction between jus ad bellum and jus in bello; the classification of a situation as an armed conflict is almost never detached from the political nature of the former. Even so, there are two main sources which to a certain extent clarify the notion and which have been widely accepted in the academia. The Commentaries to the Geneva Conventions are a classical starting point in clarifying the provisions and Pictet introduces the so-called “first-shot theory” regarding the beginning of the application of IHL. He explains that

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances.

According to this theory, "as soon as the first (protected) person is affected by the conflict, the first segment of territory occupied, the first attack launched" IHL starts to apply. This purely facts-based approach is also later taken by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the **Tadic** case. According to the Court, "an armed conflict exists whenever there is a resort to armed force between States". In the first glance, it can be thought that whereas the Pictet Commentary directly refers to the beginning of a conflict, the ICTY refers its general description. In any case, a conciliating interpretation of the texts together leads to the result that IHL starts to apply from the first act.

C. Comparison of the two notions

i. The nature of the act : It has been explained in the previous section that the majority view is that any violent act can trigger the application of IHL and independently of any (subjective) statements of states. There is no limit on where the act is taken; it can be in the high seas or even in the space. Equally, the appreciation on how the violent act is taken is also quite inclusive; it can be air raids, shelling and today, even launching a cyber-attack. It is crystal clear that "any kind of use of arms" activates IHL. The Pictet Commentary and the **Tadic** interpretation are both inclusive of such incidents.

Looking from the reverse angle, it is also clear that the threat of force, as long as it does not amount to a declaration of war, is not enough to commence an IAC. On the other hand, threatening to use force and taking essential steps in what can objectively end in material damage are different things. For example, laying mines, if they directly endanger even one person, is qualified as an attack in the Commentary to the Additional Protocols of 1977. The sought clarification is about the notion of attack within the meaning of Article 49 of the Additional Protocol I but it is clear that any attack that goes under that Article can a fortiori trigger the application of IHL. Regarding armed attacks within the meaning of Article 51 of the UN Charter, that is to say an attack that warrants the exercise of right to self-defence, it is generally accepted that certain intensity is needed. In some instances, e.g. when there is artillery shelling or air strikes, it is clear that the threshold is met.

It is suggested that any act can constitute an armed attack if "they result in, or are capable of resulting in destruction of property or loss of lives". This is however, a position that takes into account the necessity and proportionality criteria that must be respected in answering the attack by resort to self-defence. That is to say, in less grave cases, as long as these criteria are respected, the answering act will be a legitimate exercise of self-defence. However, this view is connecting the notion of armed attack, which must be objectively defined in order to prevent abuses, to the respective criteria that must be observed in the use of force through self-defence. As explained in Part I, the gap left between the Articles 2(4) and 51 is on purpose, to avoid escalation of violence between states; the above-mentioned view is dangerously blurring the lines between the two. Moreover, the ICJ doesn't consider "mere frontier incidents" (unless they reach the necessary high intensity required in armed attacks) as forming armed attacks even though they are very well capable of resulting in loss of life. It rather considers them as a "less grave forms of use of force".

A more interesting debate on the nature of the triggering act is if capture of a soldier can qualify as such. The Commentary on the Geneva Convention III stipulates that

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.

This text can be interpreted in two ways. The generally accepted view is that the capture of a soldier can be the starting point of an IAC and trigger the application of (at least) the third Geneva Convention. The absence of any other hostilities or even absence of a pre-existent IAC is irrelevant; the capture is the first and the triggering hostile act of the conflict. In my opinion, it is not that clear, for two reasons.

First of all, the phraseology of the text is ambiguous; it may as well be interpreted as explaining the beginning of the material application (as different from applicability – e.g. in the case of an IAC where there are no prisoners of war the third Geneva Convention is not really applying) of the third Geneva Convention during an IAC.

Second, the use of the terms "capture of adversaries" can be understood as implying a pre-existing conception of an "adversary" in the moment of seizure, which itself implies a pre-existing IAC. In any case, the majority view is that the capture of a solider is sufficient for an IAC to begin.

Regarding the notion of armed attack, as will shortly be explained, certain intensity is needed. *"An armed attack presupposes a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property."*

In the clear cut armed attack cases such as artillery shelling, it is also clear that the application of IHL will be triggered; in these cases armed attack and the beginning of an IAC overlaps. However, "less grave" uses of force such as frontier incidents are not generally accepted as constituting armed attack, more due to the low intensity of the act rather than its nature.

Here, the notions of armed attack and the triggering act of IHL no longer overlap as "a mere frontier incident" is accepted as being capable of initiating an IAC. It should be noted that the first act is still unlawful under jus ad bellum as it's a type of prohibited use of force. However, it does not give rise to the exercise of the right to self-defence. In other words, any forceful answer of the attacked state will still be in breach of the UN Charter. Apropos capture of a soldier as a specific triggering act, it is unlikely that it meets necessary intensity threshold for armed attacks. In this situation an act which is able to trigger the application of IHL will nevertheless not give rise to the exercise of right to self-defence.

ii. The intensity of the act : The threshold of intensity needed in an act in order for it to trigger the application of IHL is extremely low, as can be deduced from the discussion on the nature of the triggering act above. A literal reading of the commentary to Article 2 and

ICTY's statement in the **Tadic** case leads to the same result. Furthermore, the text of Article 2 reads that an IAC exists "even if the state of war is not recognized by one of them"; the existence of an IAC depends on an objective assessment of the facts. However, it has been argued that in state practice isolated incidents were never taken as initiating IAC and so there indeed is an intensity threshold, but it is not the view of the majority. Thus, there is no need for an act which is intense per se or in consequences or which continues for a certain amount of time. In short, IHL "applies at the first resort to force between two state-armed forces". Returning to the example of frontier incidents, it is accepted in the doctrine as amounting to an act triggering the application of IHL.

Apropos the notion of armed attack, it has been mentioned before that there exists a threshold of intensity and the attacks that fall below this threshold are classified as use of force falling short of an armed attack. Nevertheless, this seuil is not a stable one; it is a "variable standard". It means that the necessary gravity or intensity is dependent of the specific circumstances of each case and it is not obligatory to apply them separately to each act, instead of in combination. In this regard, the decisions of the ICJ in **Nicaragua**, **Armed Activities** and **Oil Platforms** are interpreted as implying a doctrine of "accumulation of events". A concrete explanation given by Ruys to the notion is as follows:

It deals with situations where consecutive attacks take place that are linked in time, source and cause, in particular when those attacks are part of a 'continuous, overall plan of attack purposely relying on numerous small raids'. In this context, it is argued that incidents that would in themselves merely constitute 'less grave uses of force', when forming part of a chain of events, can qualitatively transform into an 'armed attack' triggering the right of self-defence. It is true that in all the cases, even if implicitly, the Court has accepted that some acts which fall below the intensity threshold by nature can "collectively" constitute an armed attack, which would in its turn give rise to exercising self-defence. However, for the sake of peace, it is better to interpret this doctrine in a narrow manner and not be forgotten that even though the Court accepted the possibility in principle, an example in practice does not exist.

It is clear that apropos the element of intensity there is a gap between armed attack and IAC. Whereas an attack does not have to be necessarily "intense" or "grave" to be able to trigger an IAC, it must reach a certain threshold to be able to qualify as an armed attack within the meaning of Article 51 of the UN Charter. If the accumulation of events theory is accepted, there would still be discrepancy between the notions. Having a very low threshold¸ IAC would be triggered with the first act which does not (alone) constitute an armed attack. However, the armed attack would be formed at the moment of "accumulation". Thus, during the time from the beginning of the IAC, until the formation of the armed attack, the prohibition of use of force would stay intact. (Unless an act of the answering state qualifies as an armed attack per se or cumulatively before.)

iii. The origin of the act : Traditionally, wars are carried out by the armed forces of the states. It is of no doubt that if the army of a state engages in hostile acts against another state, an IAC begins. However, this is not a prerequisite for an IAC; it is just a factual observation. Otherwise, it would practically be impossible for states which don't have armies, such as Costa Rica, to actually engage in such an activity. Before going through other means the states may employ in IAC, it must be noted that the acts of the private persons cannot constitute an armed conflict and by private it is meant that persons or groups who are neither (de facto or de jure) organs of the state nor are under its direction or control that would lead to the attribution of their acts to the state.

First of all, other de jure organs of the state may be utilized to pursue hostile acts by the state, e.g. the police. In the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), it is set forth that a state is responsible for all the acts of its de jure organs. Furthermore, an IAC "may also materialize as a consequence of a military operation by a state but conducted by entities other than the regular armed forces, the question of "who" is involved in the operation is irrelevant." Thus, in the case where other state organs which are not integrated into the armed forces are utilized in an act which would constitute a triggering act of IHL if carried out by the regular armed forces, the consequences can still be the same as in the latter situation.

Second, normally the use of force by individual persons or groups is not sufficient to trigger an IAC. Nevertheless, under certain circumstances, some groups can be qualified as either de facto organs of the state or their acts can be attributable to the state and their acts can also amount to an IAC. In order for a group to be considered as a de facto organ of the state, it must be completely dependent to it. The ICJ has explained this concept in the Bosnian Genocide case. If this is the case, as any act of the group will be regarded as an act of the State within the meaning of Article 4 of ARSIWA, their acts will also be able to trigger an IAC.

Furthermore, even if a group does not meet this high threshold of complete dependency, their acts still can be attributable to a state and thus they can initiate an IAC. The ICTY has ruled in the ***Tadic*** case that if a state has overall control over a group, a conflict between them and another state can be classified as an IAC between the two states. The ICJ has acknowledged in the Bosnian Genocide case that even though it adopts the effective control test in order to establish states' international responsibility, the overall control test may as well be used to qualify a conflict. Thus, if it can be established that a group is a de facto organ or under the overall control of a state, that group can be the origin of the triggering act of IHL. Turning to who may engage in an armed attack, it is uncontroversial that a state can. Traditionally, the right to self-defence has always been exercised by one state against another. In this regard, the ICJ has held that "Article 51 of the Charter thus recognizes the existence of an inherent right to self-defence in the case of an armed attack by one state against another state."

The real debate on this subject has focused on whether an armed attack can be carried out by a non-state actor as opposed to a state rather than on which entities of the state can be used. Besides its emphasis on the fact that an armed attack can only be launched by a state against another state, the ICJ also accepts the possibility of having an indirect attack. In this regard, it seems to be of the view that only states can carry out such attacks.

Especially in the Nicaragua and Armed Activities cases, the Court held that acts of non-state actors that were "sent by or on behalf of a state" may, if meeting the other criteria, amount to armed attacks. If the non-state actors are not sent by the State, for their attacks to be able to amount to an armed attack, the state must at least have a "substantial involvement therein"; this criteria is necessary, in the view of the Court, to attribute the attack to the state. Thus, an attack which was launched from the territory of a state but in which the state isn't involved or which the state was simply unable to stop will not constitute an armed attack.

The main conclusion that can be reached from the statements of the Court is that self-defence can only be exercised against a state and thus for a non-state group to be the origin of an armed attack, its acts must be done on behalf of the state or must be attributable otherwise to the state. An armed attack cannot be made by a non-state group per se, without any type of involvement from a state. It is of note that the Court has not used the effective control test it had adopted in order to establish state responsibility for certain violations of non-state groups and by doing so, it has distinguished the two issues. However, the doctrine mainly accepts that Article 8 of ARSIWA which regulates responsibility for conducts directed or controlled by the state reflects the effective control test. In this case, when the threshold of this test is met, the act of non-state group will be attributable to the state and constitute an armed attacked launched by the latter.

This is the position taken by the ICJ, however, after the 9/11 attacks, the general debate and the state practice on the subject have grown towards the acceptance of the possibility that an armed attack by a non-state group alone can also justify the exercise of right to self-defence. These may be the cases for groups harboring in failed states or within states that passively tolerate them but without helping them materially. The wording of Article 51 of the UN Charter, while designating only states as targets of the attack, is silent on the issue of the origin of armed attack. There is thus space for an interpretation accepting that non-state actors can be the perpetrators of an act permitting the exercise of right to self-defence. Furthermore, in Resolutions 1368 and 1373, the Security Council has implicitly accepted the possibility to engage in self-defence against non-state actors. Lastly, even though as explained above that the majority of the ICJ has decided that an armed attack may only be engaged by a state, there was a considerable amount of judges who did not share this view. At a second stage, it is also controversial if the target of the act of self-defence would be the group itself or the harboring state, even in the absence of any control over the group. However, this debate is beyond the topic of the present paper.

Therefore, it may be said that both for IAC to begin and for an act to constitute an armed attack, states' own organs or entities can be engaged. Regarding acts of the non-state groups, the necessary control that a state must have over the group varies from one notion to the other; whilst for an IAC to be triggered overall control is sufficient, for an act to amount to an armed attack, the required threshold is higher. In this case, some acts that may trigger the application of IHL may nevertheless not warrant the exercise of the right to self-defence and thus the prohibition of use of force may stay intact. On the other hand, if we accept that a non-state group based in another state per se can launch an armed attack within the meaning of Article 51 of the UN Charter; this act can never set off an IAC. It is a subject of a completely different debate, if then; the self-defence answer which will naturally take place on the territory of a 3rd state can trigger the application of IHL of IAC.

iv. The target of the act : For an act to trigger an IAC, it must be directed against the state. It is not obligatory that the target is the armed forces, even though normally, as explained above, they would be the ones waging the war once the conflict has begun. For example, for IHL to be triggered, the act can be directed against the civilian population or against the territory of the state. What is important is not the material target but the abstract target, i.e. the state. The triggering act may appear, since there is no level of intensity needed, as affecting only one single person. In terms of IHL, there should be no controversy if the target is a soldier, a commercial vessel or a random person. However, regarding especially capture as a triggering act, the intention of the state may prove useful; it may as well be a law enforcement act.

The controversial issue is again about the non-state armed groups based on a state's territory. Does attacking such a group necessarily trigger the application of IHL of IAC even if the host state is simply unable to stop the group or has no control over it? Or can it be considered only as a single non-international armed conflict as actually the state per se is not attacked? The majority opinion is that in these cases there are parallel conflicts; one international and one non-international. However, it has also been argued that the mere trans-border nature of the conflict does not directly initiate an IAC and that the nature of the belligerent parties (one state and one non-state group) is the decisive factor in the absence of any hostile intent against the host state.8

Regarding non-state groups over whom a state has overall control being targeted by another state, things are even less clear than the situation in which the groups per se is the origin of an act. There isn't much written in doctrine on this subject neither. First, the two mentioned situations must be distinguished; the reason why an act of a non-state group can initiate an IAC is because they are acting on behalf or under the control of a state and thus their acts are attributable to the latter. Taking into account the second view explained in the preceding paragraph, when such a group is targeted by another state, how far can the host state itself be considered as the victim? What if the group under control is not within the territory of the controlling state? Should we again try to get some help from the element of intent as in the abovementioned case? In borderline cases, especially in ones including non-state armed groups as targets, the use of this element can prove to be useful. On the other hand, the moment the groups answers, the conflict would be classified as an international one; it seems illogical to give different classifications to the same conflict.

For the notion of armed attack, the target again must be the state itself. The attack can materialize against the "state's territory or its external manifestations abroad". So, it is not important where the target is located, it may even be within the territory of the attacking state. There has been a limited debate on the issue of differentiation between private vessels and military vessels as targets. The Definition of Aggression, a source heavily relied on by the ICJ whilst defining armed attack, does not include any non-territorial non-military targets, so a potential distinction can be appropriate. However, noting that "mining of a single military vessel" may warrant resort to the exercise of right to self-defence, the Court seems to imply that an attack against a private ship flying a state's flag (distinct from being owned by the state) can also constitute an armed attack. A possible difference on the required intensity has been left unclear.

On the issue of targeting of non-state actors based in third states, which are unable to stop them, it should first be reminded that the target of the armed attack can only be a state. In other words, if we accept that, taking into consideration jus ad bellum concerns such as avoiding the escalation of violation between states, it can be advocated that action can be taken against such groups without actually attacking the host state, i.e. without launching an armed attack. However, this is not uncontroversial, as there is definitely an attack against the territory of the state. For groups under the control of the hosting states, an interesting issue arises.

As explained before, in terms of establishment of the responsibility of states, the group must either be a de facto organ of the state (ARSIWA Article 4) or must be under the effective control of it (ARSIWA Article 8). If a group is a de facto organ of the state, we may say that an attack against the former will definitely be an attack against the latter as the organs are the state. If a group is under the effective control of the state, they are not the state but their acts are attributable to it, but does this mean that any act against them is actually directed to the state? In my opinion, the object of the ARSIWA is rather to settle the rules of active attribution rather than the passive attribution. In other words, the state cannot be victimised through the group as it's the acts of the groups that are attributable but not the group per se.

Hence, targeting of a wide range of objects can constitute both an armed attack and trigger the application of IHL. The difference between the two groups of targets is mostly due to the intensity requirement embedded in the notion of armed attack. Regarding the targeting of non-state actors, many controversial issues arise. In very general terms, it can be said that if a group is under the overall control of a state, an act against them will trigger an IAC between the two states as it was explained above that there is no good explanation to give two different classifications to the very same situation. If not, it is debated if a conflict between a state and a non-state actor in the territory of a third state will necessarily start an IAC.

For armed attacks, depending on the level of the relationship between them and the state, an attack against the group can also constitute an attack against the state. Even in the absence of such a relationship, the territorial state may be deemed to be a victim of an armed attack. Briefly, the classical targets for both acts more or less coincide (even though the group for IAC is bigger). For the non-state armed groups, they are determined according to different sets of rules.

v. The Object of the act : The replacement of the term "war" with "armed conflict" was, as explained before, a deliberate choice of the drafters of the Geneva Conventions. This replacement sought to base the application of IHL on objective norms and rendered how the states consider/classify the situation irrelevant. Thus, the significance of animus belligerendi was ruled out. However, in some borderline cases, the element of intent may prove useful; especially for eliminating the acts occurred due to errors such as accidental entrance of the military troops of one army into a neighboring state's territory. Then, it can be said that without an "intention to harm the enemy", these mistakes will not amount to an IAC. Furthermore, in cases where, for example, a member of the armed forces engages in a hostile act individually, it would be more logical to say that an IAC is not triggered. For his/her acts to be meaningful for the beginning of IHL, they must be placed within the regular hierarchy of the army.

When the act is carried out not by the state itself but by (or through) a non-state armed group, the overall test applied by the ICTY is more clear on the fact that there is no space for animus belligerendi. According to this test "a role in organizing, coordinating or planning the military actions of the military group" is sufficient; it is not necessary for the state to "plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations". Thus, any act carried out by such a group, even the ones not foreseen or intended by the state, (in terms of IHL) will be attributable to the state.

In respect of the notion of armed attack, the "attack" itself implies a certain intention as opposed the notion of "incident". The holding of the ICJ in the Nicaragua case is also in line with this interpretation. Indeed, the Court, while analyzing if the acts in question amount to an armed attack also mentioned "possible motivations" as an element to take into account. However, as a part of the doctrine sets forth, it is not that easy to determine the intention of the aggressor party (and states will not tend to be straightforward about an intention to "attack"). They argue that for this very reason, a mens rea element should not be included in the notion of armed attack.

Regarding armed attacks carried out by non-state groups if they are accepted as being able to do it individually, the abovementioned considerations will still be valid. In the case of an armed attack attributable to a state, as explained the sub-section "Origin of the Triggering Act", according to the ICJ, they must be sent on the behalf of the state or the state must have a substantial involvement in the act. It can be said that a state which has such a degree of involvement in the act will always also have the animus aggressionis and reversely, to meet the necessary threshold put by the Court, it is indispensable to have the said intent. Examining the same act through Article 8 of ARSIWA, thus through the effective control test, leads to the same result. In cases where a state has control over the armed group (thus is the origin of the attack), the intent that should be taken into account is that of the state and not of the armed group; it is irrelevant for what motives does the latter engage in such activities.

Briefly, it can be said that the notion of intent, at least for the simple and classical examples where states and only states are involved, does not play a crucial role in defining neither of the notions, though it can be useful in some specific cases. Mere attribution is sufficient for an act to constitute an armed attack and to trigger an IAC. Regarding the situations in which non-state actors are involved, it changes a little, especially for the notion of armed attack. The application of different attribution tests to same acts can sometimes result in an act triggering IHL without amounting to an armed attack, as the threshold of the overall test is lower. Furthermore, any act of the group under the overall control of a state is attributable to the latter, but effective control requires control for every specific act. Thus, it can be said that the second test inherently includes intent, no matter if the notion of armed attack per se requires it or not.

vi. The legality of the act : Concerning the legality of the act, the difference between the two notions stem not from their own characteristics but directly from the distinction between jus ad bellum and jus in bello. The legality of the act is irrelevant for the beginning of an IAC; "the applicability of the Geneva Conventions and Protocols does not depend on whether the use of force against another State is permitted or not." Accordingly, state's compliance/incompliance with jus ad bellum does not change the qualification of the situation as an armed conflict. The triggering act, "the act of war", just displays the application of IHL and does not refer to any jus ad bellum issues. For IHL, an armed attack is just another attack.

Armed attack is a notion of jus ad bellum and, at least within the meaning of Article 51, it is inherently unlawful. This can simply be explained by the fact that it warrants a use of force which would normally be unlawful itself. Furthermore, both in International Criminal Law and in Public International Law, self-defence is limited only against unlawful acts; it is thus impossible for an armed attack to be lawful. In other words, as long as an act is lawful (e.g. if it is itself an exercise of self-defence), it cannot be defined as an armed attack under Article 51.

The triggering act of IHL may or may not be lawful under jus ad bellum, as its scope and the scope of armed attack do not exactly coincide. In general terms, the scope of the triggering act covers more acts than what armed attack does, with the exception of independent armed attacks by non-state groups which would not amount to an IAC.

C. Non-International Armed Conflict : While it is a relatively simple matter to determine the existence of an international armed conflict, determining the existence of a non-international armed conflict presents several difficulties. In the 1949 Geneva Conventions, there is only one article referring to this type of situation. This is Article 3 common to the four Conventions, the first sentence of which is as follows:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:" The drafting of this article gave rise to lengthy debates at the Diplomatic Conference, largely on the question as to the point at which an armed entity, other than govern- mental, could be considered as a 'Party to the conflict'. Another question was what degree of intensity armed clashes had to reach before they could be termed armed conflicts. The Convention required only a very low intensity in armed clashes for the rules relating to international armed conflicts to be applied. Could this 'minimum' degree of intensity also be used mutatis mutandis for non-inter- national armed conflicts?

The Commentary gives the following reply to this question:

"Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities."

But, as the Commentary emphasizes, Article 3 must be implemented as widely as possible because, according to it, it calls for the observance of only a few rules which were recognized by the international community as essential long before the adoption of the 1949 Conventions. This interpretation is reinforced by Art. 1 of Protocol II of 8 June 1977 additional to the 1949 Conventions, which states that:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

The wording of this article creates conditions for application which are not present in Article 3 common to the 1949 Conventions, i.e., responsible command and a certain degree of control of the territory by a party. Unlike Article 3 of the Conventions, it expressly excludes situations of internal disturbances and tensions. The scope of its application is therefore smaller. Protocol II, the threshold of which is higher, would not cover, for example, a situation of urban guerilla in which insurgents are neither in a position to take care of wounded and sick nor to detain prisoners in decent conditions. Neither Protocol II nor Article 3 would apply, for example, in cases of the use of armed forces to quell sporadic demonstrations or to remove strikers from their place of work. Finally, it must be remembered that failure by one party to a conflict to respect IHL does not relieve an adversary of the obligation to respect it; it must at least observe the rules relating to the protection of the human person (Vienna Convention on the Law of Treaties 1969, art. 60, para. 5).

As it is the protection of the victims which interests us, it can be considered that there is no general condition in which the application of IHL could be suspended. Thus, a State might not subordinate, for example, the repatriation of prisoners of war which it holds to a political condition such as the recognition of a State, as in the Indo-Pakistanis conflict 1971. A further provision should be mentioned which does not directly affect the conditions for the application of Article 3 common to the Conventions or of Protocol II. This is to be found in the final paragraph of Article 3 and also applies to Protocol II: The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

This rule is an implicit reminder that the essential purpose of the Conventions is to protect the victims and that efforts to ensure respect for the Conventions can never in themselves imply the attribution of a certain status to a Party to a conflict. This rule was intended to soothe the fears of the States that rebels could use the implementation of Article 3 to claim the status of subject of public international law, (i.e. having the same rights as States).

Two aspects of Non-International armed conflict determining the applicability of international humanitarian Law: the organization of parties and the intensity of hostilities

In its judgment on the merits, the ***Tadic*** Trial Chamber interpreted the definition expounded in the Jurisdiction Decision as a 'test' for the existence of armed conflict and hence also for applicability of common Article 3. The definition 'focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict'. The Trial Chamber went on to say that in 'an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.

The two aspects of non-international armed conflict stated by the Tadic Trial Chamber – the intensity of the conflict and the organization of parties to the conflict – provide grounds for the characterization of a state of armed conflict (and thus also for the application of common Article 3). The Trial Chamber in the Delalic case highlighted this interpretation of non-international armed conflict, stating that 'in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organization of the parties involved'. This approach was echoed by the **Kordic** and

Cerkez Appeals Chamber which stated that 'the requirement of protracted fighting is significant in excluding mere cases of civil unrest or single acts of terrorism'.

In interpreting the definition of non-international armed conflict provided by the Tadic Jurisdiction Decision, the International Criminal Tribunal for Rwanda (ICTR) employed an approach in line with that of the ICTY. Applying it to the situation in Rwanda, the tribunal held that it was 'necessary to evaluate both the intensity and organization of the parties to the conflict'.

These two aspects of non-international armed conflict provide a basis for determining the existence of armed conflict and thus also the applicability of international humanitarian law. However, as noted by Idi Gaparayi, an Associate Legal Officer at the ICTY, 'determining what counts as "protracted" armed violence and as a "well-organized" armed group requires a case-specific analysis of the facts'. The sections that follow will examine the terms contained in the Tadic definition, focusing in particular on the meaning of 'organized armed group' and 'protracted armed violence'. In doing so, a framework for the analysis of facts on a case-by-case basis will be developed.

The organization of parties: The organizational requirement for the characterization of armed conflict has been highlighted on a number of occasions by the International Committee of the Red Cross (ICRC). The Seville Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement states that 'an armed conflict exists when the armed action is taking place between two or more parties and reflects a minimum of organization'. The importance of organization was also emphasized by the ICRC in the analysis of situations that are unclear in status.

Common Article 3 does not define the term 'party to the conflict'. In the case of an international armed conflict, the parties thereto in principle can only be States, but the situation in non-international armed conflicts is less clear, as in such cases at least one party to the conflict is not a State. The general consensus of expert opinion is that armed groups opposing a government must have a minimum degree of organization and discipline – enough to enable them to respect international humanitarian law – in order to be recognized as a party to the conflict.

Similarly, the commentary, Elements of War Crimes under the Rome Statute of the International Criminal Court , indicates the parties should be 'organized to a greater or lesser extent' in order for a situation to qualify as one of armed conflict. While the Tadic Jurisdiction Decision did not define what constitutes an 'organized armed group', indicators to this effect have been provided by subsequent case law. The Decision on Motion for Judgment of Acquittal (Miloševic Rule 98 Decision) rendered in the case of Prosecutor v. Miloševic highlights conditions indicative of the level of organization required for an armed group to qualify as 'organized' under the Tadic definition.

The context of the Rule 98bis Decision concerned the trial of Slobodan Miloševic for crimes including violations of the laws or customs of war allegedly committed in Kosovo. As violations of the laws or customs of war cannot occur in the absence of armed conflict, the

Trial Chamber examined the situation in Kosovo at the time the alleged violations took place to see if the requirements of the Tadic test were fulfilled.

In order for the situation to qualify as a legally cognizable armed conflict, hostilities are required to be of sufficient intensity and the parties to the conflict must be organized to a greater or lesser extent. For the **Miloševic** Trial Chamber, the latter required an evaluation of the Kosovo Liberation Army (KLA) as an organized armed group. In assessing the level of organization in the KLA, the Trial Chamber found 'a sufficient body of evidence pointing to the KLA being an organized military force, with an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms'.

The reasoning used in the Miloševic Rule 98bis Decision was cited in the Judgment of Trial Chamber II in the case of **Prosecutor v. Limaj**. In determining the existence of armed conflict during an earlier period in Kosovo, the Limaj Trial Chamber applied the Tadic test using an approach similar to that of the Miloševic Trial Chamber. The degree of organization in the KLA was assessed along with the intensity of hostilities prior to May 1998.

The Judgment of the **Limaj** Trial Chamber detailed how the KLA qualifies as 'an organized armed group' within the meaning of the Tadic formula. In assessing the level of organization in this armed group, considerable emphasis was placed on the role of the General Staff as the main governing body of the KLA. The functions of this body included the appointment of zone commanders, the supply of weapons, the issuance of political statements and communiqués, the distribution of KLA Regulations to units, the authorization of military action and the assignment of tasks to individuals within the organization. According to the Trial Chamber, the organized nature of the KLA was also shown in how members of the General Staff were involved in the negotiations with representatives of the European Community and foreign missions based in Belgrade.

The level of organization within the KLA was thus also evidenced by its operational effectiveness. The ability to coordinate a unified military strategy through a chain of command was clearly important in this regard. The Trial Chamber highlighted the role of the command structure utilized by the KLA in overall functioning of the organization:

"The KLA had a General Staff, which appointed zone commanders, gave directions to the various units formed or in the process of being formed, and issued public statements on behalf of the organization. Unit commanders gave combat orders and subordinate units and soldiers generally acted in accordance with these orders. Steps have been established to introduce disciplinary rules and military police."

The ability to recruit, train and equip new members was also cited as evidence of the level of organization within the KLA. The possession of weapons, including artillery mortars and rocket launchers, was further evidence relevant to this requirement. In the utilization of these weapons, the intensity of hostilities was emphasized by the Trial Chamber as an additional indicator of the KLA's level of organization:

"By the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces in areas from the Kosovo–Albanian border in the west, to near

Prishtina/Pristina in the east, to Prizren/Prizren and the Kosovo–Macedonian border in the south and the municipality of Mitrovice/ Kosovka Mitrovica in the north. The ability of the KLA to engage in such varied operations is a further indicator of its level of organization."

Evaluating the evidence, the **Limaj** Trial Chamber concluded that 'before the end of May 1998 the KLA sufficiently possessed the characteristics of an organized armed group, able to engage in an internal armed conflict'.

Accordingly, the first requirement of the Tadic test was fulfilled. The Trial Chamber's analysis of the KLA as an 'organized armed group' reveals a number of indicators relevant to the application of the Tadic definition. It is important however to appreciate, in view of the complex nature of non-international armed conflict, that each situation has to be considered on a case specific analysis of facts. The requirement of sufficient intensity is closely related to that of organization and will now be examined in the interpretation of the term 'protracted armed violence'.

The Intensity of hostilities: Similar to the organizational requirement, the threshold of 'protracted armed violence' requires the interpretation of facts on a case-specific basis. As noted in **Rutaganda** , 'the definition of an armed conflict per se is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis'. The need to proceed to consider each situation on its merits is also highlighted by the Inter-American Commission on Human Rights in the **Tablada** case:

"The most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating an especially violent situation of internal disturbances from the 'lowest' level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case."

It is useful to consider the terms of the Tadic definition as a means of clarifying this threshold for the application of international humanitarian law. It is clear that the intensity required for the existence of armed conflict is above that of internal disturbances and tensions. It is also clear that hostilities need not reach the magnitude of 'sustained and concerned military operations'. The issue is one of clarifying the threshold of intensity that is required for the characterization of a situation as one of armed conflict. This degree of intensity hinges on the interpretation of the word 'protracted'. The level of armed violence associated with this term determines the applicability of international humanitarian law when the organizational requirement of an armed group is also met.

On the use of the term 'protracted', Sonja Boelaert- Suominen comments that the decision of the Appeals Chamber seems to indicate that this implies a time element. The case-law of the Tribunal indicates that the terms 'protracted armed violence' should be interpreted in a flexible manner and that 'protracted' does not carry the same meaning as 'sustained'. Accordingly, there is no requirement that military operations be carried out in a sustained or continuous manner.

Similarly, Bahia Thahzib-lie and Olivia Swaak-Goldman state that:

"The protracted requirement is met when the hostilities are extended over time and include events attributable to the conflict. Whether or not hostilities are 'protracted' is assessed by reference to the entire period from the initiation of hostilities to the cessation of hostilities. While an examination of the 'protracted' nature of hostilities might be fairly straightforward in a more classic non-international armed conflict, it is more problematic if several non-State parties are involved. The extent to which hostilities originating from several different non-State parties can be aggregated in considering whether hostilities are protracted will depend on the relationship between the non- State parties."

Thus to the extent that the protracted element is considered, it must be loosely interpreted. It should not be read to require that hostilities be carried out in a sustained or continuous manner. Rather, it should be judged by reference to the entire period of hostilities.

The level of armed violence required for the application of common Article 3 must be high enough to exclude isolated or sporadic acts of violence, but low enough to include situations of internal conflict where hostilities are not necessarily carried out on a continuous basis.

The degree of intensity required for the existence of armed conflict was examined in the Miloševic Rule 98 Decision. The intensity requirement was assessed focusing on the length or protracted nature of the conflict and the seriousness of armed clashes, the spread of clashes over the territory, the increase in number of governmental forces sent to Kosovo and the type of weaponry used.

In clarifying the threshold for the application of international humanitarian law to the situation, the Trial Chamber made two significant points in response to submissions by amici curiae. The amici curiae, Steven Kay and Timothy McCormack, submitted that the KLA did not act under an organized civil authority and that, as a consequence, the situation fell short of the threshold of armed conflict. In responding to this claim, the Trial Chamber asserted it did not 'accept existence of a civilian authority as a requirement for the existence of an armed conflict'. In another submission, the amici curiae contended that the KLA did not exercise sufficient control over territory. In response, the Trial Chamber stated that it did not 'accept that such control of territory is a requirement for the existence of an armed conflict'.

While holding that control over territory and the existence of organized civil authority were not necessary for the characterization of a situation as one of armed conflict, the Chamber nevertheless noted these conditions did in fact exist in Kosovo during the period relevant to the indictment. In assessing the intensity of armed violence during a different period of the conflict in Kosovo, the Limaj Trial Chamber used a similar approach to that employed by the **Miloševic** Trial Chamber. The seriousness of armed clashes, the mobilization of troops by the government, the kind of weaponry utilized, the destruction of property, the displacement of local population and the existence of casualties were highlighted as conditions indicative of the intensity of hostilities. In assessing the intensity of hostilities, the Trial Chamber emphasized the level of armed violence between the parties to the conflict and the irrelevance of the purpose for which the parties were fighting:

"The two forces were substantially engaged in their mutual military struggle. While the Serbian forces were far more numerous and better trained and equipped, it appears they were ill-prepared to deal effectively with small guerrilla type forces that would not engage them in prolonged fixed engagements. Serbian military intelligence may also have overestimated the strength and capability of the KLA at the time so that the Serbian forces were arraigned in greater number and with greater military resources than was warranted by the actual KLA forces. In this respect, as revealed by the evidence, many combat operations were carried out in the area of Drenica where the KLA developed earlier and was probably best organized. But, most importantly in the Chamber's view, the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant."

This statement by the Trial Chamber indicates the irrelevance of jus ad bellum in determining the existence of armed conflict. This is an important point to note. Governments have been known to deny the applicability of international humanitarian law on the grounds of not recognizing the cause of an organized armed group. It should be emphasized in relation to such cases that the existence of armed conflict is determined on the basis of objective criteria and not the subjective judgment of either party to the conflict. As noted by the ICTR Trial Chamber in ***Akayesu***:

"It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfils their respective pre-determined criteria."

The predetermined criteria relating to common Article 3 are the level of organization possessed by parties to the conflict and the intensity of hostilities. In relation to the requirement of intensity, it is important to consider the evolution that has taken place in international humanitarian law since the drafting of the Geneva Conventions, in particular since the establishment of the international criminal tribunals for Rwanda and the former Yugoslavia, and to bear in mind that the characterization of situations should be approached on a case-by-case basis.

Some studies stipulate a numerical threshold of deaths for the recognition of a situation as one of armed conflict. The Yearbook of the Stockholm International Peace Research Institute sets a numerical threshold of 1,000 battle-related deaths, while the Uppsala Department of Peace and Conflict Research set a threshold of twenty-five battle-related deaths.

Such numerically defined thresholds would arguably be inappropriate in a legal context for a number of reasons. First, the focus of these thresholds is solely on the number of deaths and the criterion of organization on the part of non-state actors is overlooked. Second, the numbers of deaths that occur in the vast majority of armed conflicts represent only a subset of the total number of victims. Third, the stipulation of a numerical threshold would set an unwarranted restriction on the application of common Article 3 and other rules of customary international humanitarian law. The protection that might otherwise be provided by international humanitarian law would no longer apply to many situations, in particular in the early stages of hostilities or in cases of low-intensity armed conflict. As noted by Jean Pictet, 'the respect due to the human personality as such is not measured by the number of victims'.

As a condition for determining the existence of armed conflict, the intensity of hostilities is an important consideration for the application of international humanitarian law. While conditions evidencing the intensity of non-international armed conflict are often similar to those of international armed conflict, it is worth noting that the threshold for the application of international humanitarian law to the former is distinctly different from that of the latter. A state of international armed conflict can be said to exist in the absence of hostilities in cases of military occupation. A situation where two or more states are considered 'at war' also qualifies as international armed conflict in the absence of hostilities.

As a declaration of war in itself is sufficient to bring into force the Geneva Conventions, it is clear that the requirement of intensity need not be relevant to determining the status of an armed conflict initiated in this way. It is noteworthy also that the second paragraph of Article 2 stresses that the Conventions apply to all cases of occupation 'even if the said occupation meets with no armed resistance'.

Considering that the existence of hostilities is not a prerequisite for international armed conflict, it is clear that the threshold of applicability associated with such situations is distinctly different to that of non-international armed conflict. Any analogy between the two thresholds therefore needs to be carefully qualified. While there is considerable overlap in the customary international law standards applicable to international and non-international armed conflicts, it is important to recognize how such situations are characterized.

The former generally manifests itself as 'a resort to armed force between States' while the latter may be characterized according to the level of organization of armed groups and the intensity of hostilities. Common Article 3 provides no indication of the degree of intensity required for a situation to qualify as 'armed conflict not of an international character'. At the time of drafting, the material field of application associated with this provision was that of civil war, i.e. an armed conflict of dimensions similar to that of a conventional international war but taking place within the borders of a sovereign state. This concept of non-international armed conflict is now of less contemporary relevance. It bears little resemblance to the current threshold of application of common Article 3.

The category of situations that qualify as 'armed conflict not of an international character' has broadened considerably since 1949. The lowering of the threshold of intensity required for the existence of armed conflict has resulted in the extension of the protection provided by international humanitarian law. The definition of non-international armed conflict as 'protracted armed violence between governmental authorities and organized armed groups' has broadened the scope of 'armed conflict not of an international character'. It also implicitly reaffirmed the exclusion of situations of internal disturbance and tensions from the remit of common Article 3.

D. Mixed Conflict : International relations have developed to the point where that which affects one State also affects the other. The fabric of alliances and sympathies within each bloc has grown to the extent that there are many States which cannot engage in a conflict without taking with them a whole series of allied or friendly States, or at least putting those States in an awkward position, to say nothing of States which may find themselves bound by the same type of mutual defence treaty with two States who suddenly enter into armed conflict with each other. Moreover, as a direct confrontation between the great powers would bring with it the danger of global war, their differences tend to find expression through conflicts between small States or within States.

As the United Nations Charter (art. 2 (4)) reaffirmed the illegality of the use of force in international relations for most situations, the only type of armed intervention which remains possible is in situations not covered by the rules of the Charter, that is, those falling within the competence of the States - internal tensions and disturbances approaching civil war and often exacerbated by foreign intervention. When such interventions take the form of direct military interference in the internal conflict, for example through the sending of troops, the conflict becomes internationalized.

It is then said that there is a mixed conflict or an internationalized internal conflict. Thus in Angola the conflict between UNITA and the government is also an international conflict between Angola and South Africa. In Kampuchea, the conflict between the armed forces of the government of Democratic Kampuchea and Vietnamese troops is also a conflict between the forces of Democratic Kampuchea and the forces of the government of the Peoples' Republic of Kampuchea (Phnom Penh).

Law of Naval Warfare

Sources of Naval Warfare: The great dividing line in the historical development of the law of naval warfare must be drawn at the outbreak of the first World War in 1914, for what is generally referred to as the "traditional law" is substantially the law as it appeared at this date. In the main, the traditional law of naval warfare is customary in character, developing out of eighteenth and-particularly- nineteenth century practices. The various attempts to codify this customary law have never enjoyed the same degree of success that has attended similar efforts with respect to the codification of land warfare. There is no convention dealing with the regulation of naval hostilities that compares in scope and importance to the Regulations attached to Hague Convention IV (1907), Respecting the Laws and Customs of War on Land. The Hague Conventions of 1899 and 1907 which dealt specifically with the conduct of naval warfare are few in number and, with the exception of XIII (1907) concerning the Rights and Duties of Neutral States in Maritime War, of relatively minor significance.

Historically, the most important, and certainly the most controversial, disputes arising in the course of naval hostilities related to the extent and character of the right of belligerents to interfere on the high seas with private neutral trade. In the Declaration of London of i9o9 the attempt was made to produce a generally acceptable codification of nineteenth century practices in this area of the law. However, the Declaration was never ratified by any of the signatory states; and despite the occasional claims of belligerents and neutral states during the First World War that the Declaration of London set forth the valid law regulating belligerent behavior at sea, it was not binding upon the naval belligerents in either World War.

In the period of over four decades that has elapsed since the outbreak of the First World War there has been only one international instrument concluded for the regulation of naval hostilities that has received general adherence, and that instrument is the London Protocol of 1936 requiring submarines to conform in their actions against merchant vessels to the rules of international law to which surface vessels are subject. To the extent, then, that the traditional law has been changed, such change has come principally through the practices of two World Wars.

Binding force of the Law of Naval Warfare: As a general rule, the binding force of conventional rules of war is limited to the contracting parties, and then only to the extent specified by the terms of the convention in question and by the conditions accompanying ratification or adherence. On the other hand, the customary rules of the law of war are binding upon all states and under all circumstances. The statement is frequently made that reprisals form one clear exception to the binding force of customary rules.

However; this manner of formulation may easily prove misleading. The act of taking reprisals does not represent a restriction to the binding force of customary law. On the contrary, this law remains fully binding, and the act of taking reprisals is itself a clear indication of the continued binding force of the customary law the violation of which forms the condition for the act of reprisal. Reprisals do not represent at least not in theory - an abandonment of the customary law (or the conventional law for that matter), but rather the enforcement of that law; at the very least, reprisals represent an act of self help permitted against a previous violation of law.

Apart from reprisals, the principle of military necessity has generally been considered as the most important qualification to the binding force of both the customary and conventional law of war. Indeed, the extent to which this principle may be held to restrict the operation of the rules of war has provided one of the most disputed issues among writers. The core of the controversy has centered about the doctrine that interprets military necessity as serving to justify departure from any of the established rules of war when the observance of these rules either would endanger the success of a military operation or would threaten the survival (self-preservation) of a military unit. In either circumstance, the principle of military necessity is considered to be operative and to free belligerents from behaving in accordance with otherwise valid law."

As against this interpretation of military necessity it has been argued, principally by English and American writers, that military necessity more precisely, that the circumstances held to constitute a condition of military necessity can justify a departure from behavior normally demanded by the law of war only when conventional or customary rules expressly provide for the exceptional operation of military necessity. According to this latter interpretation-which is believed to be correct military necessity must be interpreted "to denote those exceptional circumstances of practical necessity contemplated by express reservations to be found in several Articles of The Hague Regulations and other Conventions in regard to acts otherwise prohibited. The general principle is that conventional and customary rules of warfare are always binding upon belligerents and cannot be disregarded even in case of military necessity."

Hence, the principle of military necessity cannot be considered as superior to, and thereby restricting the operation of, all other rules of warfare, whether customary or conventional. On the contrary, it is the principle of military necessity that may be restricted by the positive law of war, and occasionally is so restricted. Not everything necessary to the purpose of war is allowed by the law of war. It is this latter, and more restrictive, interpretation of military necessity that has recently received clear judicial endorsement. In the war crimes trials following the Second World War the chief preoccupation of tribunals called upon to interpret the principle of military necessity was to determine when circumstances of military necessity could be considered as serving to justify departures from conduct normally prescribed by the rules of warfare.

Although the judgments of tribunals were by no means identical on a number of points, there nevertheless was a remarkable uniformity of judicial opinion, which-taken as a whole-clearly appears to support the narrow interpretation of military necessity. The following is a brief summary of these judgments.

1. Military necessity may serve as a defense plea against charges of committing acts normally forbidden by the law of war only when the rule in question can be interpreted as permitting such exceptional departure in circumstances constituting a condition of military necessity. Thus in the **Hostages Trial** the tribunal stated that the prohibitions contained in the Hague Regulations "are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. In the case of conventional law the rule in question must provide expressly for military necessity. In particular, where the prohibition contained in a rule is absolute in character, military necessity cannot be used as a defense. Thus circumstances of military necessity have not been considered as justifying the killing of prisoners of war.

2. In the case of rules allowing for the exceptional operation of military necessity, departure from normally prescribed behavior is justified for reasons of self-preservation or for insuring the success of a military operation. In addition, there must be an element of urgency involved that allowed-or seemed to allow-no alternative course of action. However, it does not appear that it is essential to establish that the circumstances constituting a condition of military necessity were objectively present in a given situation. It is sufficient only to establish that the individual putting forth the plea of military necessity as a defense honestly believed at the time that such circumstances were present.

Area of Naval Warfare: The area of naval warfare is that part of the seas in which the parties to an international armed conflict at sea are entitled to take belligerent measures. "Belligerent measures" are not restricted to the use of armed force against military objectives, they also comprise so-called prize measures, like visit, search, diversion, capture and seizure of vessels and/or cargoes. These measures may, of course, be taken in those sea areas where the belligerent states enjoy sovereignty, i.e. in their internal waters, in their territorial seas and, where applicable, in their archipelagic waters. Moreover, there is no prohibition from conducting naval warfare in the high seas.

Despite allegations to the contrary, neither the peaceful uses clauses of the UN Law of the Sea Convention nor international state practice have contributed to the emergence of a rule of international law restricting the parties to an international armed conflict at sea to their respective internal waters and territorial sea areas. In view of the special legal status of the area and in view of the rights neutral states continue to enjoy in the high seas, belligerents are, however, obliged to pay due regard to these aspects and to refrain from interference if that is feasible and reasonable. The same considerations apply if belligerent measures are taken in the Exclusive Economic Zone or on the continental shelf of neutral countries. Here, again, there is no prohibition of belligerent measures but an obligation to pay due regard to the legitimate rights neutral coastal states enjoy in these sea areas.

Certainly, the parties to an international armed conflict at sea are prohibited from taking belligerent measures within neutral waters or using them as a sanctuary. Neutral waters consist of the internal waters, territorial sea and, where applicable, the archipelagic waters of neutral states. Neutral states may, if they consider this essential for their security or for the safety of navigation, close their neutral waters to belligerent warships and auxiliary vessels. Other than in times of peace this closure may comprise the neutral state’s territorial sea as a whole and may last for the duration of the entire international armed conflict. The only restriction the neutral state has to observe vis-a-vis the parties to the conflict is the principle of impartiality. If, however, neutral waters are part of an international strait or of an archipelagic sea lane, the neutral state is not allowed to prohibit belligerent warships and auxiliary vessels from transit through these waters.

Legitimate Methods and Means of Naval Warfare Affecting Neutral Navigation: According to the law of naval warfare and the law of maritime neutrality, belligerent warships are entitled not only to harm the enemy in a cost-efficient way but also to exercise all measures of control to verify that the shipping of third states is not involved in activities contributing to the enemy's war fighting effort. Since there exists a duty of neutral merchant vessels to refrain from such activities, the aggrieved belligerent is entitled to take all necessary enforcement actions in order to prevent a violation of the law of maritime neutrality.

Prize measures: Neutral merchant vessels are subject to visit and search by belligerent warships (and military aircraft) everywhere beyond neutral waters if there are reasonable grounds for suspecting that they are subject to capture. They are subject to capture if either they might be considered legitimate military objectives or if they:

- are carrying contraband;
- are on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
- are operating directly under enemy control, orders, charter, employment or direction;
- present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
- are violating regulations established by a belligerent within the immediate area of naval operations; or

- are breaching or attempting to breach a blockade.

On the one hand, visit and search do not presuppose clear evidence. On the other hand, indiscriminate and arbitrary measures of control that cannot be based on “reasonable grounds of suspicion” are illegal. But even if there exist sufficient grounds, it is not always necessary to visit and search a merchant vessel. In many instances it will suffice if it is, with its consent, diverted from its declared destination. This alternative to visit and search has to be distinguished from diversion ordered for the purpose of visit and search, which does not require the consent of the vessel's master. This kind of diversion is appropriate and legitimate if visit and search at sea is impossible or unsafe. The law of maritime neutrality, designed as a compromise between the interests of the belligerents and those of non-participating states, thus accepts that neutral merchant vessels may suffer considerable losses due to the fact that their voyage is delayed by these measures of control.

If it is determined as a result of visit and search or by other means that they are legitimate military objectives or engaged in one of the activities mentioned above, neutral merchant vessels may be captured. Capture is exercised by sending a prize crew on board the vessel that will take control over the vessel. However, the legality of capture has to be established by the judgment of the competent prize court. A considerable problem exists as to the legality of capture if capture is justified on the ground of carriage of contraband. Not only the practice of the belligerents of the two World Wars but also of, inter alia, Egypt, India and Pakistan, has shown that the parties of an international armed conflict tend to extend their contraband lists, especially if the conflict lasts for a longer period of time.

In exceptional circumstances even the destruction of captured neutral merchant vessels is legal. This presupposes that military circumstances preclude taking or sending the vessel for adjudication as an enemy prize and that the following criteria are met beforehand:

- the safety of passengers and crew is provided for. For this purpose, the ship's
- boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board;
- documents and papers relating to the prize are safeguarded; and
- if feasible, personal effects of the passengers and crew are saved.

In addition, the San Remo Manual provides that:

“Every effort should be made to avoid destruction of a captured neutral vessel. Therefore, such destruction shall not be ordered without there being entire satisfaction that the captured vessel can neither be sent into a belligerent port, nor diverted, nor properly released. A vessel may not be destroyed under this paragraph for carrying contraband unless the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo. Destruction shall be subject to adjudication.” Finally, it is necessary to stress that the master of the merchant vessel as well as the neutral flag state are, in principle, obliged to tolerate the exercise of prize measures by a belligerent even if there are doubts as to their legality. It will be shown that only in some instances is there a possibility of protecting neutral merchant vessels against these measures. If this does not apply, the affected state or the affected private owner will have to rely on judicial remedies, i.e. either on diplomatic protection or on the judgment of the competent belligerent prize court.

Legitimate methods and means under the maritime "ius in bello" and the law of maritime neutrality: Not only belligerent prize measures have a negative or even harmful effect on neutral shipping, so also do those methods and means of naval warfare that characterized the armed conflicts at sea of the 20th century: naval mines, blockades, "exclusion zones" and attacks on neutral merchant vessels. Of course, submarine warfare had the most severe impact on neutral navigation during the two World Wars. Still, we will not have to specially concentrate upon submarine warfare in the present context. Today it is generally accepted that the law of naval warfare and of maritime neutrality equally apply to surface warships and submarines. Moreover, in modern armed conflicts at sea, submarines will only in rare cases be employed against merchant shipping. The submarine has become a true means of naval warfare and can no longer be considered a means of commercial warfare.

Enforcement of the Law of Naval Warfare: There are a number of means available to belligerents for inducing compliance with the rules governing war's conduct. In the event of unlawful behavior on the part of an enemy remedial action may take the form of direct protest and demand for compensation as well as for the punishment of individual offenders. Assuming, however, that the. unlawful behavior in question has either been directly instigated by order of the enemy government, or at least performed with its sufferance, other measures will generally prove necessary. The injured belligerent may direct an appeal to neutral states, requesting the latter to intervene for the purpose of bringing pressure to bear upon the delinquent party. And although neutral states have no duty to protest against the commission of illegitimate acts of warfare it has been frequently asserted that they have a right to do so. Finally, the injured belligerent may resort to repressive measures-sanctions-in reaction to unlawful behavior on the part of an enemy, measures which take the form of reprisals or of punishing captured offenders as war criminals.

A. Reprisals: As between belligerents reprisals are acts, otherwise unlawful, which are exceptionally permitted to one belligerent as a reaction against illegal acts of warfare committed by an enemy. It is generally acknowledged that reprisals should not be resorted to merely for revenge but only as a last resort in order to compel an enemy to desist from unlawful behavior. For this reason the injured belligerent should attempt, whenever possible, to obtain cessation of the illegal acts (and appropriate redress) through means other than reprisals. It is always preferable that if measures of reprisal are finally resorted to the order to employ them should emanate from the highest authority. However, in circumstances of urgent necessity it is conceded that subordinate military commanders may, on their own initiative, order appropriate reprisals. In all cases, reprisals must be terminated once they have achieved their objective, which is to induce a belligerent to desist from unlawful conduct and to comply with the rules regulating the conduct of war.

According to customary law measures of reprisal may be directed generally against the persons and property of an enemy. There need be no connection between the individuals performing the unlawful acts which give rise to the right of reprisal and the individuals made the objects of retaliatory measures. In a word, the essential principle characterizing measures of reprisal is that of collective responsibility. However, as between the parties to the 1949

Geneva Conventions, the individuals (and their property) who may be made the objects of reprisals have been substantially restricted. For these Conventions prohibit the taking of reprisals against any of the several categories of individuals afforded the protection of the Conventions. But apart from the prohibitions contained in the 1949 Geneva Conventions the only remaining restriction 8 laid upon belligerents is that forbidding retaliatory measures which are out of all proportion to the unlawful behavior forming the basis of the reprisals.

B. Punishment of War Criminals: War crimes may be defined as acts which violate the rules regulating the conduct of war and which result in the liability to punishment of the perpetrators. According to customary international law belligerents have the obligation to punish their own nationals found violating the law of war and the right-in principle-to punish captured enemy individuals who have committed similar acts." Prior to World War II, however, some doubt had existed as to whether or not a belligerent was entitled to exercise jurisdiction over individuals accused of war crimes when the acts" in question were not performed either on the territory of the belligerent or against its nationals. But in the light of recent practice it now appears clear that the right of a belligerent to exercise such jurisdiction is limited neither to offenses having a particular geographical location nor to offenses committed against the nationals of the belligerent claiming jurisdiction.

In addition, there is no rule of customary law preventing a belligerent from trying and punishing war criminals during the period following the termination of active hostilities but prior to the conclusion of a peace treaty, though the past practice of states has not been to continue proceedings against individuals accused of war crimes once peace has been re-established.

It is an interesting fact that among the war crimes trials held during and since the second World War only a relatively small number concerned violations of rules regulating the actual conduct of hostilities. In part, this may be explained by a reluctance to try members of the armed forces of the defeated states for the violation of rules whose status is no longer a matter of certainty. In part, the dearth of trials concerned with infractions of the rules regulating the actual conduct of hostilities may be attributed to the conviction that where both sides in a conflict openly departed from the established law, the requirements of justice forbade the prosecution of only those who happened to be on the defeated side.

There is little question, however, but that the commission of certain acts during the course of hostilities at sea must continue to be regarded as resulting-in the absence of special reasons to the contrary-in the individual (criminal) responsibility of the perpetrators. The unnecessary use of force particularly as against the merchant vessels of an enemy, the denial of quarter at sea, the firing upon survivors of sunken ships, the failure to search out and make provision for the survivors of sunken vessels when military interests so permit, the deliberate attack upon hospital vessels or other vessels granted special immunity, and the misuse of the Red Cross emblem constitute a summary of only the more important acts the com-mission of which may result in a liability to punishment upon capture by an enemy.

Where individuals have been charged with the commission of war crimes the principal difficulty has been that of determining what recognition ought to be given the defense plea that the acts in question were performed either by order of the belligerent government or on the command of a superior." Prior to World War II the attitude of states-and the opinions of writers on the law of war-had varied with respect to the treatment to be accorded the plea of superior orders, though a relatively strong case may be made on behalf of the assertion that illegitimate acts of warfare performed by direct order of the state were not considered to result in the individual responsibility of those performing such acts.

A decided change from earlier opinion and practice occurred both during and after the 1939 war. While that conflict was still in progress several of the belligerents amended their military manuals to provide that a violation of the law of war is not deprived of its character of a war crime, and does not confer upon the actor immunity from punishment, simply for the reason that it was performed in response to the order of a belligerent government or a superior. In the period following the termination of hostilities Allied courts and tribunals charged with the task of trying individuals accused of war crimes have uniformly endorsed this principle.

At the same time, it has been the consensus of judicial opinion that in order to establish responsibility the person must know, or have reason to know, that the act he is ordered to perform is unlawful under international law. Thus if the rule that allegedly has been violated is itself controversial or if-though of unquestioned validity-the rule has been departed from under the conviction that such departure forms a legitimate measure of reprisal, either circumstance may prove sufficient to relieve the actor of responsibility.

Furthermore, it would appear that if an individual though knowing that the act he has been ordered to perform is unlawful nevertheless has acted under duress this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.

What has been termed the "inverse case" of superior orders concerns the scope of the responsibility commanding officers must bear for illegitimate acts of warfare performed by subordinates." There is no question but that military commanders are liable for the unlawful acts they have ordered or authorized subordinates to perform. Equally well established is the responsibility of military commanders for the illegal acts of subordinates which the former had knowledge of but failed to take adequate measures to control. By the failure to suppress unlawful acts of subordinates as are known to military commanders, the presumption of acquiescence in these acts must arise.

It is clear, therefore, that the responsibility of commanders can result solely from inaction, though here it is inaction based upon knowledge that unlawful acts of subordinates have been committed. Finally, it would appear that the responsibility military commanders must bear for the acts of subordinates implies a further duty to take reasonable measures to insure that the latter will refrain from unlawful behavior, and, should unlawful behavior nevertheless occur, to discover and control the misconduct of subordinates. Where the failure to take precautionary or preventive measures is palpable and gross military commanders have been held liable for the unlawful behavior of subordinates even though without actual knowledge of such behavior.

The Principle of Distinction and the Concept of the Military Objective: If a law of armed conflict purporting to regulate the conduct of military operations is to exist, an essential element of this law, no matter how inchoate, is the principle of distinction, also referred to as the principle of identification. That law is premised upon a requirement to distinguish between objects or persons that may be attacked and also that may not be attacked. The increasing percentage of civilian casualties relative to total casualties in contemporary conflicts has led some writers to suggest that the principle of distinction has become blurred, but this could not be viewed as a positive development. The principle of distinction is a fundamental aspect of the law of naval warfare, although it has not been explicitly addressed in any treaty on the subject.

The major contemporary treaty on law of armed conflict is the 1977 Additional Protocol I to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, ratified by Canada on November 20, 1990.6 As a matter of convenience, of Additional Protocol I is not applicable to attacks directed against objects on, under, or over the seas, Article 48 of that document may be used as a statement of the principle of distinction:

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

It is necessary, however, to go further and explore the meaning of the term "military objective." "Military objective" is defined in Additional Protocol I and the relevance of that definition to naval warfare will be discussed later in this article. It suffices to note here that military objectives are not confined to warships and to naval auxiliary vessels operating in support of a nation's armed forces; depending on the circumstances, they may include privately owned vessels manned by civilian crews and flying the flags of states that are not involved in the conflict. Conceptually, one may explain the meaning of "military objective" in the law of naval warfare by a variety of means: a general definition of military objective; a list of objects constituting military objectives; a general definition and a list or; the converse of the above indicating objects exempt from attack.

No treaty contains a general definition of military objective for the law of naval warfare. As will be seen later, some treaties contain lists from which one might derive categories of vessels that are exempt from attack. Unfortunately, some of these lists are obsolete or unclear.

Some writers have proposed a zonal approach whereby, once appropriate measures have been taken to warn all concerned that presence in an area is dangerous, and to give ships and aircraft in the area time to leave it, a belligerent may presume anything in the area without permission to be there is a legitimate military objective. This approach facilitates the making of targeting decisions but it is certainly not a part of existing law, although state practice in recent conflicts indicates that some customary law standards for exclusion zones may be emerging.

Enemy Vessels and Aircraft that May be Attacked at All Times: All of the manuals reviewed indicated that attacks may be directed against enemy warships, naval or military auxiliary vessels, and military aircraft at any time anywhere outside neutral territorial seas. These attacks may be exercised without warning and without regard to the safety of the enemy crew. It was suggested during the Falklands conflict that the action of the United

Kingdom in sinking the Argentine Cruiser General Belgrano outside of proclaimed exclusion zones was unfair. There is no international legal requirement to confine attacks against warships, auxiliary vessels, or military aircraft to particular zones once an armed conflict occurs, except for the general obligation not to fight in neutral waters. None of the manuals consulted have attempted to define "naval or military auxiliary vessel.

The Merchant Ship as Target: The central issue concerning targeting in the law of naval warfare is, when may a merchant ship be a legitimate military objective?

A rough definition of merchant vessel is any cargo carrying vessel, publicly or privately owned, and flying the flag of a belligerent or neutral state. As indicated above, under the pre-1914 law merchant ships, enemy or neutral, could only be attacked on sight when they took a direct part in hostilities or when they were being convoyed by enemy warships, as they were then deemed to be resisting visit and search. In all other cases they had to be ordered to submit to visit and search and then refuse to comply with the order before they could be attacked, even if they were armed for defensive purposes.

The pre-914 law and its reaffirmation in the 1936 London Submarine Protocol notwithstanding, neutral and belligerent merchant ships unconvoyed by enemy warships or aircraft were attacked on sight by submarines, aircraft, and on occasion, surface warships in both World Wars. Further, unconvoyed neutral and belligerent merchant ships were attacked by aircraft and surface warships in the Iran-Iraq war. The only case in which individuals were charged with war crimes, including the attacking of merchant ships without warning, is the trial of Doenitz and Raeder before the International Military Tribunal at Nuremberg. As said above, they were both acquitted of the charges insofar as belligerent merchant vessels were concerned, convicted insofar as neutral merchant vessels were concerned, but awarded no sentence on the charge because of similar Allied practices.

Target Identification, Ruses, and Perfidy

Target Identification - One of the major problems in modern naval warfare conducted with current technology is target identification. Simply put, there is an imbalance between the technology for seeing and the technology for killing. Naval commanders have weapons available to them which they can use to attack targets beyond visual range (BVR) or even over the horizon (OTH), where it is difficult or impossible to confirm that the target is a legitimate military objective. They have an interest in ensuring that the object attacked is a legitimate military objective and also that it is not one of their own side's ships or aircraft (the Blue on Blue problem) or a ship or aircraft otherwise exempt from attack. Blue on Blue attacks are in fact quite common in modern conflicts; aircraft, in particular, are frequently shot down by their own side. These incidents occur because on scene commanders are concerned about the protection of their own units and believe that waiting until they have positive visual identification of potential targets will place their units at too great a risk; they must make targeting decisions on an assessment of probabilities.

The commanding officer of the USS Vincennes ordered that Iran Air Flight 655 be shot down in the Persian Gulf on July 3, 1988, because he believed, erroneously but on the basis of a less than reckless assessment of the facts provided to him, that the aircraft was an Iranian

F-14 which would attack his ship before it came within range for accurate visual identification.

The current law concerning ruses of war and perfidy in a naval setting is fairly straightforward but, in the light of the current state of weapons technology, one might question whether certain aspects of it, in particular the false flag rule, are not anachronistic and harmful to the underlying principles of the law of armed conflict.

Ruses - Ruses of war are permitted. They are acts that are intended to mislead an adversary and induce him to act recklessly, but they infringe no rule of international law applicable to armed conflict and are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. Examples of ruses are the use of camouflage, deceptions, utilization of enemy codes, passwords, and countersigns. The fog of war has not been completely dissipated by modern technology; it is still possible to deceive the enemy concerning the identity and location of naval units even in the era of radar and reconnaissance satellites.

Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colors and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing its true colors; use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is forbidden.

Merchant vessels are also permitted to practice this deception but they thereby run the risk of capture, damage, or even destruction. Belligerent military aircraft are not permitted to wear false markings in order to deceive the enemy.

Perfidy - Although ruses of war are permitted, perfidy is prohibited. Perfidy is defined in Article 37 (1) of Additional Protocol I as follows:

“Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”

Article 38 goes on to state:

“(1) It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

(2) It is prohibited to make use of distinctive emblem of the United Nations, except as authorized by that Organization.”

Article 39 (2), however, indicates the Protocol does not alter the traditional rules of international law concerning the use of flags in the conduct of armed conflict at sea.

It is unlikely that targeting decisions in a high technology naval conflict would be made at ranges where the color of a flag flown by a ship would be a relevant consideration. One might, however, question the current desirability of a rule that encourages the disguising of warships to simulate ships which might not be legitimate objects of attack. It is one thing to say that warships need not be required to take positive measures to indicate their location and status as warships; it is another to suggest that "feigning noncombatant status" still is a desirable practice.

The identification issue has been addressed by the ICRC and other organizations in an effort to ensure that medical transports and other ships and aircraft entitled to protection under the Geneva Conventions and the Additional Protocols are properly identified before they are subjected to the risk of attack.

Methods and Means of Naval Warfare in Non-International Armed Conflicts

The law of naval warfare is part of the larger body of law applicable to international armed conflicts. Accordingly, it applies to an armed conflict between two or more States, including conflicts involving State-sponsored forces.) Whether the law of naval warfare also applies to situations of non- international armed conflicts is a contentious issue. Therefore, the distinction between international and non- international armed conflicts is important when it comes to the applicability of the law of naval warfare to a particular armed conflict.

Unfortunately, the distinction between international and non-international armed conflicts is less clear than it seems at first glance. On the one hand, the "facts on the ground" may make it difficult to draw the line of demarcation between the two. Additionally, international scholars have taken quite different positions. For some, the distinctive criterion is the identity of the parties to the conflict, with the issue being whether or not those parties qualify as States under public international law. For others, it is not the identity of the parties alone, but also the geography of an armed conflict; they are prepared to apply the law applicable to international armed conflict to any case in which armed conflict "crosses the borders of the state," even if one of the parties is a non-State actor. Still others believe that the distinction has become irrelevant, because, they maintain, the formerly separate bodies of law have merged into a single body of law applying equally to both international and non-international armed conflict.

In armed conflicts the law of naval warfare undoubtedly applies, at least insofar as measures taken by the State party to the conflict are concerned. The non-State party to the conflict may also apply methods and means of naval warfare against its State enemy. However, the non-State actor may not interfere with neutral shipping unless the neutral State has-either explicitly or implicitly-recognized it as a belligerent.

A non-international armed conflict exists whenever there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."

Case Laws

In the **Von Ruchteshell trial**, a former commander of German surface raiders was found guilty of continuing to fire at merchant ships after they had indicated their surrender, and of sinking enemy merchant vessels without making any provision for the safety of survivors. This case also raised the issue of whether or not it was legitimate for a surface raider to attack a merchant ship without warning and, by implication; it held that no war crime was committed by such attacks when the merchant ship was incorporated into the enemy war effort by being armed or by having wireless communications.

In the **Peleus trial** which forms the basis for Gwyn Griffin's novel, Operational Necessity. The Peleus was a Greek ship torpedoed in mid-Atlantic in March, 1944, by a German submarine. After the ship sank, all but three survivors were killed by machine gun fire or hand grenades. The captain of the submarine and four crew members were tried by a British military court in Hamburg in 1945. The report of the case contains the following comment concerning the defence of operational necessity:

The Commander of the U-boat did not plead that he had acted on superior orders. His defence was that he thought that the floating rafts were a danger to him, *first*, because they would show an aero plane the exact spot of the sinking, and *secondly*, because rafts at that time of the war could be provided with modern signaling communications. The position of U-boats was very precarious, particularly in that part of the Atlantic where the incident occurred. Eck, therefore, thought his measure justified. It was clear to him that, as a result of his shooting at the rafts, the survivors would die. The Judge Advocate ruled that the question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life did not arise in the present case.

It may be, he said, that circumstances would arise in which such a killing might be justified. On the facts which had emerged in the present case, however, the Judge Advocate asked the Court whether or not it thought that the shooting with a machine gun at substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. A submarine commander who was really and primarily concerned with saving his crew and his boat would have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance.

The court found all of the accused guilty. The Captain and two crew members were executed. One crew member was sentenced to life imprisonment and the last received fifteen years imprisonment.

In ***Moehle Trial***, Lieutenant Commander Moehle, an officer formerly commanding a U-boat flotilla at Kiel, was tried and convicted for ordering the commanding officers of U-boats to destroy ships and their crews.

In ***Amerada Hess v. Argentina Republic***, the owners of the Liberian tanker Hercules sought damages from Argentina for a bombing attack on the Hercules during the Falklands conflict which occurred outside the exclusion zones proclaimed by Argentina and the United Kingdom. The United States Court of Appeal (Second Circuit), which seems to have relied primarily on peace time law of the sea treaties although it did conduct a cursory review of older law of naval warfare treaties, held that neutral ships had a right of free passage on the high seas, saying:

"In short, it is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation violates international law. Indeed, the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of the high seas. Where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the earliest recognized violations of international law."

International Law of Maritime Security: Proposal For Change

Maritime security is one of the latest buzzwords of international relations. Major actors have started to include maritime security in their mandate or reframed their work in such terms. Maritime security is a term that draws attention to new challenges and rallies support for tackling these. Yet, no international consensus over the definition of maritime security has emerged.

The world has undergone a security paradigm shift from conventional and military threats to nonconventional and nonmilitary ones in the post-cold war period. Terrorism threats now dominate the global security agenda, replacing the balance of terror of the cold war era.

Before terrorism became a major global concern, maritime security was somewhat on the back burner, with the maritime community's focus being primarily on safety of navigation. Because of this secondary status, ships and ports were found to be extremely vulnerable and susceptible to terrorist attacks.

Maritime security is ultimately the responsibility of States and measures on security will be impotent if the States themselves did not adopt a security culture. First, States have to be aware of security deficiencies in their territories and address them. In the field of maritime transport, an integrated global approach to security would be useful. This would call for a unified maritime security strategy, a global security scheme, partnerships among key stakeholders and consultation and accountability among and on the part of key stakeholders.

Maritime Security Threats and Initiatives

In the aftermath of the September 11, 2001, terrorist attacks, the international community, mostly led by the United States, has formulated a number of maritime security measures. While conventional maritime security concerns, represented by piracy, continue to threaten the safety of navigation, the newly adopted maritime security initiatives are primarily designed to address the growing security concern of ports, ships, cargoes, and maritime infrastructures. These initiatives are focused on preventive measures and have had a far reaching effect on maritime security, global trade, and international relationships. The recently adopted maritime security initiatives include: the International Ship and Port Facility Security Code (ISPS Code); the Container Security Initiative (CSI); the Customs- Trade Partnership Against Terrorism (C-TPAT); the Secure Freight Initiative (SFI); the 24-Hour Advance Manifest (24-Hour Rule); and the Proliferation Security Initiative (PSI).

1. Global Tracking System

Maritime security is closely related to border security, which requires a systems approach to protect the homeland from a terrorist infiltration or attack.

Officials investigating the 2008 Mumbai attacks in India, which left more than 160 people dead and injured hundreds more, said the attackers used a private fishing trawler to reach the Indian city after they overpowered the vessels' crew. In the 21st Century, when governments are doing so much to make their borders and citizens secure, it seems extraordinary that they have left a loophole big enough to sail a trawler full of explosives through. For the security of citizens around the world, it seems clear that it is time to close the loophole.

All vessels using international waters should be identifiable and be part of a global tracking system to close a "security loophole" on the high seas.

The call was made by the Global Ocean Commission, an "independent high-level initiative on the future of the ocean". The commission said current technology made the idea feasible and affordable. At present, only passenger and large merchant vessels are legally required to have unique ID numbers and tracking devices.

Vessels can use a number of electronic systems for identification and communication, one of which is known as the Automatic Identification System (AIS). It is a short-range system, using VHF radio. However, satellites in low-Earth orbit can also detect AIS signals, which provide real-time global coverage.

Legally requiring ID and real-time tracking of vessels using the high seas would also deliver other benefits, such as cracking down on human trafficking and illegal fishing opportunities.

Mandatory vessel ID and tracking would reward those who play by the rules and penalize those who do not. It would create economic opportunities for the 'good guys' and improve the social conditions of seafarers. Of the categories of vessels that are currently exempt from the numbering requirements, the fishing industry represents the biggest loophole.

2. Co-operation between nations to combat piracy.

There is minimal cooperation between nations to combat piracy. There is minimal law enforcement in international waters that pirates are known to be operating. Most piracy incidents take place in the Far East, in regions such as Indonesia, Malacca Straits, Malaysia, Singapore Straits, and South China Sea. Other geographical locations with reported cases include India, Philippines, Bangladesh, Gulf of Aden, Colombia, Venezuela, Vietnam, Red Sea, and Dominican Republic. Most of these countries have minimal resources for maritime patrolling and long coastlines, granting the freedom of looting to pirates. Corruption among maritime officials also adds to the complexity of law enforcement in these waters. Modern pirates use technology for vessel surveillance, automatic weapons, and motorized boats to hijack ships with valuable cargo. Investment in this technology is easily justified with potential loots that range from $8 million to $200 million per vessel. This is also a good financing source for terrorist operations and a catalyst in developing the interconnection between piracy and terrorism.

In this light, a strong maritime law enforcement mechanism to curb corruption among the maritime officials is required. Additionally, greater co-operation is required among the nations to combat piracy.

3. Balancing Fundamental Principles of International Law and Security Interests

The maritime security initiatives of the past decade place a great emphasis on security, resulting in some cases as a potential conflict with the underlying principles of the relevant international law and frameworks, including the LOS Convention. There are questions about the consistency of key elements of maritime security initiatives formulated in the wake of the 9/11 terrorist attacks with fundamental principles in the LOS Convention such as maritime sovereignty, freedom of navigation, and rights of innocent passage. Interdiction on the high seas, which constitutes a key principle of the PSI, if utilized is likely to violate the freedom of navigation on the high seas unless the consent of flag states is assured. While not an international law of the sea issue per se, the security requirements for enhanced container and port security measures may interfere with free trade and the efficient movement of cargo.

The challenge is to strengthen the legal grounds for maritime security initiatives in the context of respecting the international rule-making process. Laws should be made to establish the balance between the two.

4. Building a Regional Cooperation Regime in East Asia for Governing Maritime Security Issues

Together with the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, the Tokyo Memorandum of Understanding (MOU) on Port State Control might indicate a way to further cooperation in the realm of maritime security in the East Asian region. The Tokyo MOU, concluded in 1993 and brought into effect in 1994, establishes an effective port state control regime in the region through the cooperation of its members (port authorities) and the harmonization of their activities directed to the elimination of substandard shipping in order to promote maritime safety, protect the maritime environment, and safeguard the working and living conditions on board ships. The memorandum has 18 full members, including China, Indonesia, Japan, Korea, the Philippines, and Singapore, and a number of observers, including North Korea, the U.S Coast Guard, and the IMO.

Given that maritime affairs are increasingly becoming critical in East Asia, it is suggested that the establishment of a maritime organization, the East Asia Maritime Council, is necessary to deal with maritime issues and build a maritime regime in the region.

5. Effective legislation

The effective repression of transnational organized crime at sea will never be possible without having adequate and precise legislation in place. It is a common observation that very often States sign and ratify treaties, yet they fail in taking the appropriate legislative measures to give teeth to these international instruments. As a consequence, many incidents involving transnational organized crime at sea never reach a trial phase, while it is observed that often national courts assume a divergent and controversial standing in relation to some issues, e.g. drug trafficking. Therefore, an effective national legislation should be developed by countries.

6. Risk Management

Improve security management through the development and consistent application of risk assessment methodologies to prioritize and track the outcomes of security improvement efforts. Since 9/11, much has been done by the federal government and the various stakeholders to make the MTS more secure by deterring terrorists, decreasing the vulnerability of assets, and putting in place measures to mitigate the consequences of a terrorist attack. Central to these efforts, risk management principles have provided a framework for stakeholders to characterize risk, prioritize efforts/resources, and achieve a balance between system security and functionality. We must continue to build upon this framework and knowledge base by developing risk assessment methodologies and consistently applying them across all agencies. We must transition to the use of a common risk framework, which will allow the results of a risk analysis done by owners and operators, or sector specific agencies, to be comparable and useful for supporting security related decisions. This framework must be built on a central risk management system which contains a comprehensive set of threat, vulnerability, and consequence data. This system will guide our decisions, and also help to

- Ensure sufficient public and private resources are focused on the practical mitigation of the most serious threats in (and through) the maritime domain.

- Promote a continuous awareness of ever-changing maritime domain security risks at the international, national, regional, and local levels so that all key stakeholders can quickly react to changing threat environments in a coordinated way.

- Enact necessary changes in regulatory frameworks and policies to provide substantial impacts on key risks without overly burdening operations in the MTS.

- Provide a compelling, technically defensible basis for the key elements of the maritime security policy, including benefit (risk reduction) versus cost evaluations of strategy options.

- Establish a common focal point on important risks and a decision-making discipline that helps produce a fully coordinated U.S. government effort that protects U.S. interests in the MTS.

For this risk framework to flourish and succeed, we must provide all agencies with the proper training and tools. These will not only help users to understand the risks and risk assessment methodologies, but also provide them with the knowledge to communicate the risks to all stakeholders.

7. Security Information Management

Develop an interagency security data management plan to improve the quality, transparency, sharing, and protection of critical security information among all appropriate stakeholders, including federal, state, and local government agencies.

Multiple agencies and operators make up the security nets protecting the Marine Transportation System (MTS). To serve their roles in security effectively, stakeholders need critical information that often is distributed among several databases/sources across multiple agencies. Failing to have reliable transparent information readily accessible will hinder security efforts to detect, interdict, respond to, and recover from possible terrorist attacks. Layers of protection and defense-in-depth against all of the high-risk scenarios are only effective if pertinent information can pass through the security management system's critical interfaces for stakeholders to use. A proper balance between information transparency and sharing and information security must be achieved. Allowing information to fall into the wrong hands will enable terrorists to exploit the security network. And, if access to information systems is not secure, terrorists will be able to create "covers" to hide movement of terrorists and materials for performing terrorist acts. Government agencies continue to share information that facilitates screening capabilities and optimizes safe and effective law enforcement actions. Nevertheless, opportunity remains to improve efficiencies and build upon existing relationships.

Security Training

Ensure that port and maritime personnel both domestically and internationally are properly trained in maritime security in accordance with their function within the MTS.

The U.S. Congress, through MTSA 2002, and the IMO, through the ISPS Code, explicitly recognized the critical importance of properly trained personnel in the enhancement of maritime security. To support this effort the U.S. has created a national system of certification and course approval for the training of U.S. maritime security personnel, which includes federal, state, and local officials as well as private sector personnel. In addition, the U.S. is currently offering security training as part of its international antiterrorism programs. While there has been much progress in this area, more comprehensive and sustained efforts both domestically and internationally are needed to engage all stakeholders and leverage the eyes and ears of all MTS workers.

Domestically and internationally, there is a need to increase the training capacity of carriers and facilities that lack the resources to provide all workers with recurring security training. This training will not only help personnel to recognize security vulnerabilities, it will also arm them with the knowledge to address and resolve them. Beyond the current security training requirements, a more comprehensive training program needs to address other MTS workers who are not typically part of current security teams. By engaging all stakeholders through security training, we can make it more difficult for terrorists to exploit the vulnerabilities of vessels, facilities, and infrastructure of the MTS.

The following guidelines shall be considered for detailed implementation of this recommendation:

- Expand education and security training for maritime transportation workers at U.S. shore facilities.

- Expand security training for developing countries.

- Include risk management principles in maritime security training.

- Expand the Department of Energy Mega ports Initiative.

Other initiatives to counter maritime terrorism and the proliferation of WMD

Firstly, reference should be made to resolutions 1373 (2001) and 1540 (2004) on terrorism and WMD respectively, which marked a significant departure from the traditional understanding of the Council's role and powers under Chapter VII and the beginning of a new chapter of quasi-legislative action of the Council in these areas. In more detail and in chronological order, the Security Council passed resolution 1373 on 28 September 2001, only 17 days after the terrorist attacks on New York and Washington, DC. The resolution commences by "reconfirming that such acts, like any act of international terrorism, constitute a threat to international peace and security". In its operative paragraphs, resolution 1373 decides that all States shall prevent and suppress the financing of terrorist acts, including by criminalizing terrorist fund-raising and donation activities, and by freezing assets of known terrorist individuals or entities. It goes on that all States shall take necessary steps to prevent the commission of terrorist acts, deny safe haven to those who finance, plan or support terrorist acts, and ensure that any person who participates in terrorist acts is brought to justice.

Required Action to Strengthen Maritime Security

A decade later, coastal preparedness is better than earlier, but the overall picture remains less than satisfactory.

Regrettably, the proposal to set up an apex coastal authority remains frozen. India's policymakers recognise the need for a full-time manager to coordinate the large number of agencies (over 15) in the coastal security space. Officials say that the National Committee for Strengthening Maritime and Coastal Security, which presently coordinates joint activities, is at best an ad hoc arrangement. Yet, parliament has not been able to clear the coastal security bill that would establish a National Maritime Authority (NMA).

Worryingly, there has been a surge in illicit activity in the littorals. Narcotics trafficking incidents have witnessed an uptick, the most prominent incident being the seizure of the M.V. Henry in August 2017. Beyond using the country's porous coastline for narcotics smuggling, drug traffickers are turning old harbours like Tuticorin into a hub of contraband and illicit trade. The government has responded by enhancing coastal security allocations to the states, and by seeking to extend the jurisdiction of coastal police stations up to 200 nautical miles (even if it overlaps uncomfortably with the coast guard's area of responsibility).

Critical 'gaps' persist, particularly at Indian ports, where authorities are yet to install fool-proof security measures.

By some accounts, Indian security agencies have tended to focus on the terrorism threat, placing less emphasis on non-traditional challenges such as human trafficking, IUU fishing, climate-induced crises and maritime pollution. Even so, the navy and coast guard have developed significant capability to deal with irregular challenges and the multiagency exercises such as *Sagar Kavach* have helped improve coordination.

The most heartening development has been the strengthening of the coast guard that has built
substantial strength in recent years, and even recently revealed plans to become a 190 ship, 100 aircraft force by 2023.

Yet critical ‘gaps’ persist, particularly at Indian ports, where authorities are yet to install fool-proof security measures. According to an Intelligence Bureau audit in 2016, out of 227 minor ports in India, 187 had little or no security at all. More than six years after the home ministry cleared the setting up of radiation detection equipment in 16 of the major ports in 2011, two of these ports have yet to receive the equipment he security of oil infrastructure poses a peculiar problem. While most of India’s crude oil imports are through certain identified ports and Single Point Moorings (SPMs), there is no integrated strategy for their protection. Chapter III of the Coast Guard Act 1978 places the responsibility for protection of artificial islands and offshore terminals within the ICG’s functional ambit but CG officers say the task of protecting SPMs 15 nautical miles from the shoreline must be performed by the CISF. The latter claims they lack required assets and trained personnel to discharge the function.

Meanwhile, a proposal for a Central Border Police Force, proposed by Maharashtra is still under consideration. The central government wants the new agency to be modelled after the Central Reserve Police Force (CRPF) — raised, funded, and administered from New Delhi. But many security experts believe the plan is unviable. With no authority to register offences or carry out investigations, the new agency, they fear, could end-up being a toothless force.

Even as Indian agencies grapple with the security threats in the near-seas, it would be fair to say that security planners have a better sense than earlier of the complexities involved in the coastal project. Indian agencies have begun an active collaboration in the near-littorals and are seeking to align visions and pursue operations with unity of purpose.

POLICY RECOMMENDATIONS:

Surveillance and Interagency Coordination

For better domain awareness, India needs better surveillance coverage. Beyond expediting the installation of coastal radar chains and AIS stations and ensuring broad access to information, the authorities must ensure the mandatory fitment of AIS on power-driven vessels with a length more than 10m. The central government must address the problems of coordination arising out of the interactions of multiple agencies (with overlapping jurisdictions) and delayed responses.

Stronger Involvement of Coastal Police

Instead of setting up a coastal border security force with no legal powers, the authorities must move to strengthen and better integrate the coastal police into the littoral security architecture.

A Legislative Framework

Comprehensive legislations must be enacted to place systems and processes for the protection of India's maritime infrastructure, covering both the shipping and port sectors. Statutory duties of government departments, Port trusts, state maritime boards, non-major ports and private terminal operators and other stakeholders need to be clearly outlined, as also minimum standards of port security requiring statutory compliance.

Strengthening Of The Coast Guard

The CG must be strengthened to play a leadership role in coastal security. Ambiguities from the Coast Guard Act need to be removed to ensure all security agencies are clear about the roles and responsibilities they are expected to perform.

National Commercial Maritime Security Policy Document

The government must promulgate a National Commercial Maritime Security Policy Document, to articulate its strategic vision for maritime security. It must also promulgate a national strategy for Commercial Maritime Security for efficient, coordinated, and effective action for protection of the port and shipping infrastructure.

Reinforce Coastal Regulation Zone Regulations

There is an apprehension among environmentalists that CRZ laws are being diluted in favour of tourism, shrimp farming and industry lobby groups, without taking into consideration the views of experts or the public. The draft coastal regulation zone notification 2018 (CRZ- 2018) was twice amended in 2018 by the Union ministry of environment, forests and climate change (MoEFCC) in "public interest" but without consulting the fish-working community — India's largest, non-consumptive coastal stakeholder

Illegal migrants must be stopped and have good surveillance over on them to protect maritime region security, protection to satellites, surveillance aircrafts, helicopters, UAVS, Coastal Security Bill was pending since 2013, it should passed by parliament as earliest so has to Maritime Security will be strengthen in India.

MODULE-VI

IMPACT OF COVID-19 ON MARITIME SECURITY

MODULE-VI- IMPACT OF COVID-19 ON MARITIME SECURITY

Introduction: The Covid-19 pandemic has had a huge influence on the global economy and on international trade. In the maritime industry, many segments have been affected, but to extremely varying degrees. That is partly due to the nature of specific types of operations, but also to the resilience and crisis management arrangements of individual companies. Any emergency will affect companies unevenly and therefore has to be managed differently. No two contingency plans are identical. Any plan that is a perfect fit for one company may not suit another. The pandemic itself is obviously a major concern for most companies in the maritime sector. Shipping companies, for example, face the possibility of staff and crew contracting the virus while they also have to deal with restrictions in port calls and crew changes, impacts on cargo volumes and handling as well as unexpected work-from-home arrangements for shore-based staff.

Whether and to what degree Covid-19 will impact existing maritime security threats around the world is a separate question. Overall, there is no evidence to suggest that the impact of Covid-19 has led to an immediate increase of threat levels for merchant shipping around the world. At the same time, our forecasts show that shipping operations will continue to face certain challenges in the coming months.

Moreover, local conditions are much more important to determine certain threat levels which may be influenced by measures to curb the spread of Covid-19, by relatively low oil prices or by a broad range of other factors on the regional, national or even local level. For all companies involved in the maritime sector, situational awareness is therefore extremely important. Shipping companies, insurers, port and terminal operators – these are just some examples of companies which have to deal with many types of security threats on a daily basis.

Covid-19 and Maritime security in Asia- Pacific: Covid-19 is showing the world how a health crisis can exert disproportionate pressure on existing social and political fissures. The Asia–Pacific maritime environment is no exception, with hybrid challenges persisting and non-conventional incidents on the rise. As state budgets adjust to accommodate the health crisis, non-state actors are escalating violence on land that is spilling over into the maritime domain.

Before the onset of the pandemic, illegal, unreported and unregulated fishing incidents were gaining recognition as a serious security issue. Known as hybrid challenges, these incidents are characterised by the combination of regular and irregular tactics used by adversaries to exploit non-conventional concerns in order to gain an asymmetric advantage. These tactics include the use of criminal behaviour, subversion, sponsorship of proxy forces and even military expansionism.

Covid-19 is not hindering state and non-state actors from posing maritime hybrid threats despite national budgets being diverted to crisis response. The sinking of a Vietnamese fishing boat near the Paracel Islands, harassment of supply ships off Sarawak, and China's annual announcement of a fishing ban are some of the irregular hybrid tactics that persist alongside the global pandemic.

Non-state actors are also exploiting the health crisis and perceived weakening of state capacity to heighten internal violence, with negative consequences for the Asia–Pacific's maritime domain. Organised violence in Myanmar's Rakhine and Chin states increased by 74% from January to April 2020 compared with the year before. The increased violence is causing mounting civilian fatalities, displacing villagers and pushing migrants out to the Andaman Sea—a maritime route into other regional countries. As countries reject migrants for fear of spreading unidentified infections, the exodus under pandemic conditions could trigger a repeat of the 2015 migration crisis.

There has also been a marked increase in piracy and armed robbery during this period. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) Information Sharing Centre reported a two-fold increase in the number of piracy and armed robbery incidents from January to June 2020 as compared to 2019. Security arrangements such as the Eastern Sabah Security Command were also on high alert after receiving information of a raised risk of armed Abu Sayyaf Group members targeting vessels in the Sulu and Sulawesi seas.

The heightened risk of instability at sea is accompanied by related reports of clashes between government forces and militants on land. In Sultan Kudarat province, Philippine government forces targeted Bangsamoro Islamic Freedom Fighters militants that are associated with a kidnap-for-ransom group. Violent clashes with Abu Sayyaf Group members were also reported in Sulu.

While these maritime challenges demand an immediate security response, Asia–Pacific countries are preoccupied with battling Covid-19 infections within their own borders. By redirecting more resources towards containing the spread of Covid-19, regional countries are experiencing corresponding budget cuts to other state functions—including defence. For example, Indonesia's defence budget has been lowered by 7% and Thailand's budget will shrink by 8%. For Thailand, this has translated into a standstill on military procurement purchases including two Chinese-made submarines.

Despite these restrained national resources, regional governments are still adopting strategies to compensate for any shortfall in state capacity. To maintain a coordinated and balanced response to both domestic and external threats, Malaysia is implementing the integrated 'Ops Benteng' to enhance enforcement along maritime and land borders. In the Philippines, a controversial bill designed to strengthen the country's counterterrorism authorities came into effect on 18 July. Meanwhile, annual multilateral naval exercises such as Southeast Asia Cooperation and Training, or SEACAT, have shifted to virtual platforms to maintain active levels of information sharing and multilateral coordination among naval forces in the region.

Covid-19 is placing intense pressure on pre-existing political and social fissures in the Asia–Pacific. Non-state and state actors are taking advantage of a perceived reduction in state capacity to pursue activities that result in maritime instability. An extended pandemic period threatens to exert further pressure on national budgets and state capacity to protect exclusive economic zones. Although Covid-19 began as a threat to public health, it is slowly evolving into a threat to maritime security too.

Threats to maritime security:

According to a prominent maritime security consultancy, the Coronavirus emergency will be the defining threat trend of the year with simultaneous impacts in a number of areas.

Dryad Global says the emergence of COVID-19 as a severe global public health issue has created significant ramifications, including economic disruption and the threat of a global recession, logistical complexities, geopolitical considerations, and security issues.

The shipping industry and maritime domain has not been insulated from these. It is expected that COVID-19 will be the defining threat trend of the year, which will shape commercial and security trends within shipping. During this period of instability, it is key that vessels, vessel owners and the maritime community rely on clear-headed, data-driven and reliable solutions, which will facilitate economic activity within this new reality.

Emerging Threats: Piracy & Maritime Crime

West Africa is particularly vulnerable to rises in piracy, partly driven by a lack of effective mitigation strategies, and co-ordinated security responses to piracy and maritime crime remain embryonic across the region. Should, as is likely, COVID-19 spread out throughout sub-Saharan Africa, overwhelming healthcare systems and becoming most states' main priority, efforts to mitigate regional maritime crime in West Africa will likely be neglected. Therefore, with the heightened risk that security responses are hampered due to widespread infection, it is unlikely there will be a decrease in piracy incidents and a partial increase is eminently possible. Nigeria is likely to remain the epicentre of West African maritime security issues, with any downturn in vessel volume unlikely to alter the current trend.

Dryad currently assesses the likely impact of COVID-19 on piracy in the Indian Ocean as minimal. While there has been an increase in the number of reported incidents in the Gulf of Aden in 2020, none of these incidents have been confirmed as acts of piracy. The spread of COIVID-19 throughout the key risk areas in the Indian Ocean, is unlikely to significantly alter events or the security picture in the short to medium-term.

As states increasingly restrict the movement of citizens, trade is likely to be exacerbated in areas such as the Gulf of Guinea, Gulf of Aden, Red Sea, Gulf of Oman and the Malacca Strait, where black market activity has been observed in the past. The economic impact of COVID-19 on these areas is likely to lead to an increase in illicit maritime trading. The scale of COVID-19 infection in global maritime crime hotspots will likely determine the degree to which current social economic problems are exacerbated by the crisis. Where there is evidence of longer-term economic impact then it is likely that there will be an increase in incidents.

Emerging Geopolitical Threats

As an industry, we should assume that the spread of COVID-19 will result in the re-contextualization of the operational threat profile. As nation states focus on their own internal affairs, it is likely that current geopolitical threats will fade for the time being.

However, this is not to suggest that the overall threat to vessels and personnel will reduce or disappear. Operational security may be negatively impacted by reductions in monitoring and enforcement capabilities, as organisations struggle with maintaining deployment commitments.

Pressure on the maritime industry resulting from complex geopolitical narratives, such as those seen with Iran in the Persian Gulf, which was a key driver of maritime instability in 2019, have likely reduced considerably for the coming months. However, Iran is currently grappling with issues resulting from ongoing economic isolation, global oversupply of oil and the struggle to contain COVID-19.

Emerging Threats: Crime & Internal Stability

Fragile states with volatile domestic agendas are most likely to suffer violence and disorder in the short to medium term as COVID-19 spreads. Theft, looting, and general disorder will likely be a feature of many states.

Emerging Threats: Migrants

As disorder and panic spread, it is realistic to anticipate a rise in global migration from states which cannot sufficiently quarantine and lockdown infected regions. An area of particular concern is Libya, which has in recent years seen high levels of migration.

Laws and Regulations of crimes related to maritime security during Pandemic

A. Laws related piracy and maritime crimes:

On this occasion, we have decided to talk about a topic of great interest and impact on the maritime sector: maritime piracy in times of the Covid-19. Especially considering that in the case of maritime transport, the International Maritime Organization (IMO) along with the World Health Organization (WHO), the International Chamber of Shipowners (ICS) and the International Federation of Transport Workers (ITF), have come up with guidelines and a series of recommendations for pertinent governments and authorities on how to facilitate maritime trade during the Covid-19 pandemic and guarantee all logistics such as port operations while ensuring and preserving the health and safety of human beings; and guaranteeing the normal functioning of food supply and distribution chains, medicines and basic supplies that support human way of life as we know it.

According to the latest figures of the United Nations Conference on Trade and Development (UNCTAD), more than eighty percent (80%) of the world's merchandise trade in volume and seventy percent (70%) in value are transported by sea. For this purpose, there is a fleet of more than 49,000 vessels, which includes oil tankers, bulk carriers, container ships, general cargo ships and cruise ships.

Taking into account that this coronavirus disease pandemic has substantially impacted people's lives and livelihoods and has caused extreme stress on the world's socioeconomic systems, UNCTAD has suggested a 10 points action plan to strengthen international trade and transport facilitation in times of the coronavirus pandemic (COVID-19).

UNCTAD suggests that this plan will be of major relevance to successfully face and overcome this unprecedented global challenge as well as to reduce the international spread of the virus and mitigate the potentially devastating long-term consequences of the pandemic, especially for the most vulnerable countries. Competent authorities and policymakers need to take into account a series of measures to ensure of international trade operations and transport of goods, which it is crucial to keep vessels moving, ports open and operational and cross-border trade and transit trade robust, while ensuring that border agencies can safely undertake all necessary controls.

Maritime Piracy and its regulation

It is well-known that planet earth is convulsed nowadays due to COVID-19. The World Health Organization (WHO) declared on March 11, 2020 that the outbreak derived from COVID- 19 or Chinese virus was a pandemic. During this period, piracy attacks and armed robberies as well as other criminal activities in aquatic areas, have increased as Dr. Belisario correctly points out *"an enormous aspect of organized crime is currently a network of perpetuated violence and corruption, harmful activities that coldly collect the pages of newspapers and magazines in places where these media instruments work freely and properly. These criminal actions also take place in different maritime areas, but mainly in areas outside national jurisdiction."*

Such criminal activities represent a scourge that travels the world nowadays, and that the phantom of piracy represents a crime against international law and consequently against humanity itself, is indisputable.

Nevertheless, it is appropriate to mention that piracy originated almost simultaneously with the beginning of sea navigation, that is to say, since maritime trade has existed, there have been criminals in the seas.

Since the very moment that human beings began to use the sea as a means of transporting goods for commercial exchange, others took advantage of it in order carry out criminal activities of predation against vessels, people or goods on board such ships.

In the international field, the Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[9], reproduces almost textually the content of Article 15 of the 1958 Convention on the High Seas, defining international piracy, as follows: *"Piracy consists of any of the following acts: a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed: (i). On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii). Against a ship, aircraft, persons or property in a place outside not subject 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 section b).*

Likewise, an act of piracy in the international sphere is considered to be any act committed by warships or by state ships, dedicated to the acts stipulated in article 101 of the aforementioned convention, whose crew has mutinied and seized the ship or aircraft, in accordance with the provisions of article 102 of the UNCLOS – 1982.

This allows us to state that, from international law standpoint, acts of violence against ships or aircrafts, especially those committed in the port or jurisdiction of a State, would not be considered by international law as acts of piracy as such, but as acts of armed robbery against ships.

Regarding Venezuela, criminal offenses related to crimes at sea, including armed robbery, are mainly criminalized in the Criminal Code, and everything related to piracy is therein regulated.

Article 152 of the Criminal Code defines piracy at the national level as: *"... This crime is incurred by those who, governing or manning a ship not belonging to the Navy of any Nation, nor provided with a* letter of marque *duly issued, or as part of an armed corps on board, attack other ships or carry out depredations on them or in the places on the coast where they arrive, or declare themselves in rebellion against the Government of the Republic*".

Notwithstanding the above, the crime of piracy set out by article 152 of the Criminal Code applies both to piracy practiced on high seas, as well as to committed in national waters and on homeland coasts, which were not regulated by the Geneva Conventions of 1958, let alone UNCLOS – 1982, since in accordance with international law, the classification and/or typification of any crime to domestic criminal law corresponds to each State. This criteria, for example, is the one that courts in Singapore have taken when considering that piracy applies both to criminal activities committed on high seas, as well as those committed in national waters and coasts of that country, against vessels located inside their aquatic spaces.

This does not mean though that the qualification and/or typification made by Venezuelan law must be recognized by other States, as was the case of the German M/V Falke, used by Román Delgado Chalbaud in 1929 to invade the Venezuelan coasts. The vessel was considered as a pirate ship by the Venezuelan Government, based on Venezuelan criminal law, while the German Government did not consider that it was an act of piracy in accordance with international law, because piracy is a criminal activity practiced in a places outside not subject the jurisdiction to any State.

Another important difference to highlight between article 152 of the Criminal Code and the regulations in the International Conventions on the Law of the Sea, is that these refer to acts committed by a pirate ship to a ship that would be the victim of the piracy or property or people on board such ship, which is what differentiate piracy from hijacking. In this sense, article 152 of the Criminal Venezuelan Code also includes the acts that are committed *"... in the places on the coast where they arrive or declare themselves in rebellion against the Republic".*

On the other hand, it is appropriate to point out that Article 152 of the Criminal Code does not consider a piracy crime when such is provided with a letter of marque, since in the Venezuelan case, the privateering figure is still in force according to Venezuelan Law.

As Dr. Villarroel points out, one of the differences found between pirates and corsairs is that the latter enjoyed the license or permission of the governments of the States of their respective flags to carry out acts of seizure, looting and destruction of ships belonging to enemy states, so they would not be committing crimes in the eyes of their own states.

Likewise, it is worth mentioning that existence requirements of piracy, as established in Article 152 of the Criminal Code, and of armed robbery, as qualified by article 457 of the same Criminal Code, concur in many aspects, due to the requirement of the elements of: violence, seizure of property on board and profit. However, the fundamental difference between both crimes lies in the geographical area where the crime is committed; that is, in the case of a vessel, for there to be armed robbery and not piracy, the ship must be located and docked at the dock and not in the sea, sailing or anchored.

That being said, it is worth noting that the criminal activity of piracy has become a serious threat to the freedom, security and navigation of ships, their crews and even the international community, since it is a very lucrative activity within the international organized crime.

Piracy and armed robbery during the COVID-19 Pandemic in Maritime Transport

Acts of piracy perpetrated against any type of vessels have been increasing during the Covid-19 Pandemic in various areas of the world with greater violence in its way of acting, which undoubtedly constitutes a serious danger and scourge for international maritime trade and for humanity.

The position that the European Union has taken supports the necessity to repel attacks of the Somali pirates using warships that, even when not sailing under the same flag, would be ready to protect the same interests. In other words *"the vessel patrolling acts as an organ that validly represents the world community in this matter, since pirates are considered hostis humanis generis"*.

When it comes to piracy acts, their perpetrators do not know of any type of restrictions. Regardless the type of vessel, nothing prevents it from being the object of acts of piracy, as has been registered both in international waters and on the coasts of some countries such as Colombia, Peru, Mexico, Venezuela, and others.

According to the latest report from the United Nations Conference on Trade and Development (UNCTAD) global trade and economic output stagnated in 2019, according to its analysis of the *Handbook of Statistics* 2019.

They also point out that world maritime trade lost momentum in 2018 as heightened uncertainty, escalating tariff tensions between China and the United States of America, and mounting concerns over other trade policy and political crosscurrents sent waves through global markets, as indicated in its *Maritime Transport Report 2019*.

As a result, international maritime trade lost momentum during 2018, with volumes increasing 2.7%, below historical averages of 3.0% and the 4.1% recorded during 2017. However, total volumes are estimated to have reached 11 billion tons, an all-time high, according to UNCTAD records. It is foreseen that there was a growth of 2.6% in 2019.

Furthermore, UNCTAD had mentioned in their report that oversupply remained a prominent characteristic of most shipping segments. During early 2019, total world fleet capacity stood at 1.97 billion DWT , after a 2.61% growth – the slowest growth of the decade. Gas carriers experienced the highest growth (7.25% during the 12 months to January 2019), mainly due to significant expansion in the liquefied natural gas sector. This trend is expected to continue in view of the mounting environmental concerns and pressure from IMO and the international maritime community to switch to cleaner fuels. The world container fleet also continued to increase (5%). In comparison, the chemical-tanker and dry-bulk-carrier segments registered stable growth, and the oil tanker segment underwent a downward trend. Bulk carriers recorded the highest level of ship deliveries, representing 26.7% of total gross tonnage built in 2018, followed by oil tankers (25%), container ships (23.5%) and gas carriers (13%). Since 2014, there has been a trend towards an increased number of container-ship and gas-carrier new buildings, compared with the number of new buildings of oil tankers and dry bulk carriers, which has decreased. This can be attributed to greater demand for container ships of large capacity (above 15,000 TEUs) and less demand for oil tankers and bulk carriers as a result of the existing oversupply in those segments.

Nevertheless, according to estimations of the World Trade Organization, a drastic reduction in world trade in 2020 is expected from between 13% to 32% as a consequence of the affectation of world economic activity as a consequence of the global Pandemic.

UNCTAD in its 2019 annual report on Maritime Transport (*Review of Maritime Transport 2019*) express *"Maritime transport remains the backbone of globalized trade and the manufacturing supply chain, as more than four fifths of world merchandise trade by volume is carried by sea. However, growth in international maritime trade fell slightly in 2018, owing to softer economic indicators amid heightened uncertainty and the build-up of wide-ranging downside risks. This decline reflects developments in the world economy and trade activity. Volumes increased at 2.7%, below the historical average of 3.0% from 1970–2017 and 4.1 per cent in 2017. Nonetheless, total volumes reached a milestone in 2018, when they achieved an all-time high of 11 billion tons – the first time on UNCTAD record… Dry bulk commodities, followed by containerized cargo, other dry bulk, oil, gas and chemicals, contributed the most to this growth."*

Piracy has been a serious concern for the international community for a long time. According to data from the IMB Piracy Information Center, the four regions of the world where there is a high risk of piracy are: The Strait of Malacca area; The Horn of Africa / Somali Coast; The Niger Delta area and, The Caribbean and the Panama Canal. What such have in common is that they are areas of great maritime traffic, where State authority is difficult to apply.

As the author Garat Pérez mentioned, piracy activity in the Strait of Malacca has greatly decreased thanks to the efforts of Indonesia and Malaysia, supported by several western countries, which have intensified the means of warning and protection against piracy, thus hindering their action. In the Niger Delta, the expansion of oil platforms is combined with the existence of violent groups, together with limited capacity of the State to repress them. The situation in Somalia has been particularly worrying: the instability and insecurity that Somalia has experienced since the fall of the Government in 1991, considered de facto a "*failed*" state, has revitalized and leveraged piracy. Today, it is a sanctuary for all kinds of criminal activities. Its geographical location makes it the ideal territory to establish the bases of action for pirates. The main difference between piracy in Somalia and other areas is that the Somali pirates' goal is to obtain ransom for ships and their crews, while in the rest of the world it is theft.

The importance for the maritime trade of the Indian Ocean is undisputable since two thirds of the total freight of tanker ships transits through this area; half of the cargo in containers and a third of the cargo in bulk. In addition, 20% of world tuna fishing takes place there.

Faced with the considerable increase in pirate attacks in the area, the international community began to react since 2008. The United Nations Security Council (UN) approved Resolutions numbers 1814, 1816, 1838, 1846 and 1851 that same year, where they authorized the escort for the ships of the FAO World Food Program; requested the commitment of States in the fight against piracy and armed robbery in Somalia's territorial waters; urged the deployment of military units and as well as the repression of piracy and armed robbery. The exhorted to international coordination, supporting actions from land, since such actions against ships continued to pose a serious threat to the country itself and others in the region, as well as to maritime navigation and security on international maritime routes.

Since then, several anti-piracy and armed robbery operations have been launched in the area (Somalia), involving a large number of countries and a large air-naval presence from multiple countries. The most important for the EU has been Operation Atalanta (EU NAVFOR), launched in December 2008 and which is still in force.

The main objectives of mission's mandate are the following:

i. To Protect vessels of the World Food Program (WFP), African Union Mission in Somalia (AMISOM) and other vulnerable shipping;
ii. To deter, prevent and repress piracy and armed robbery at sea;
iii. To monitor fishing activities off the coast of Somalia;
iv. To support other EU missions and international organizations working to strengthen maritime security and capacity in the region.

On July 30, 2018 the Council of the EU extended the mandate of the Operation Atalanta until December 31, 2020. It includes the area of operations covering the Southern Red Sea, the Gulf of Aden and a large part of the Indian Ocean, including the Seychelles, Mauritius and the Comoros, also includes the Somali coastal territory, as well as its territorial and internal waters. This represents an area of about 4,700,000 square nautical miles (approximately 8,700,000 square kilometers).

According to data from the EU NAVFOR itself since the beginning of this Operation to combat piracy and armed robbery, pirate attacks decreased considerably from the 176 occurred in 2011 to just 6 in 2017. The number of successful pirate attacks had also decreased considerably.

Pirates captured and hijacked 47 ships with their crews in 2010. In 2011, the number was reduced to 25; In December 2012, the hijacking of 4 ships was recorded; In 2017, 2 ships were hijacked; Since 2011, the number of crew members kidnapped has dropped from 680 to 0 by 2017.

Many countries have suffered piracy attacks, specifically in the surroundings of the African Continent, the Indian Ocean, the Gulf of Guinea and other areas close to America, according to a report by the Piracy Reporting Center [IBM PRC] & International Maritime Bureau [ICC]. In 15 of those incidents, 91 crew members were taken hostage, while in another 13 attacks, 75 sailors were kidnapped from their ships. As for the victims, 3 sailors were killed and 6 were injured as a result of the acts of violence by pirates.

According the latest piracy report of July 15, 2020 from the Piracy Reporting Center [IBM PRC] & International Maritime Bureau [ICC], violent attacks against vessels and their crews have increased from January to June 2020, with 77 seafarers taken hostage or kidnapped. Being the Gulf of Guinea off West Africa, the area where the danger for commercial shipping has increased, accounting for just over 90% of maritime kidnappings worldwide. Meanwhile ship hijackings are at their lowest since 1993.

In summary, the IBM PRC recorded 98 incidents of piracy and armed robbery during the first half of 2020, up from 78 in the second quarter of 2019, further indicating that the increasing threat of piracy adds to hardships already faced by hundreds of thousands of seafarers working beyond their contractual periods due to pandemic restrictions that currently exist, on crew rotations and limitations to travel.

As IMB Director Michael Howlett notes “Violence against crews is a growing risk in a workforce already under immense pressure. In the Gulf of Guinea attackers armed with knives and guns now target crews on every type of vessel. Everyone’s vulnerable.”

This report also reveals that, so far this year, 49 crew members have been kidnapped for ransom in the Gulf of Guinea and held captive on land for periods of up to six weeks. The rates of this type of crime are accelerating, with 32 crew members kidnapped in the last three months alone. And they’re happening further out to sea: Two-thirds of the vessels were attacked on the high seas from around 20 to 130 nautical miles off the Gulf of Guinea coastline.

In a recent case commended by IMB, the Nigerian Navy prompted action to a distress call from a fishing vessel boarded and kidnapped by armed assailants in Ivory Coast waters, as a result the crew was saved and the vessel was prevented from being used as a possible mother vessel to carry out further attacks.

In another incident, a product tanker was attacked while sailing around 127 nautical miles off Bayelsa, Nigeria. Eight armed pirates kidnapped ten crew members and stole cash, personal valuables, and ship´s property. IMB PRC contacted regional and international authorities, and a Nigerian Navy Security Vessel was dispatched. A nearby sister vessel helped the four remaining crew members to sail the tanker vessel to a safe port. The kidnapped crew were released three weeks later.

The Singapore Strait saw 11 incidents in the first half of 2020, increasing the risk of collisions in this busy shipping channel, especially at night. Although most are opportunistic, low-level attacks that are aborted once the alarm is sounded; two reports in May 2020 indicated crew were threatened with knives by pirates, and taken hostage and injured. Furthermore, there were 10 attacks in Indonesian anchorages and waterways in the second quarter of 2020, compared up from five in the first quarter of 2020. For their part, no incidents were reported off Somalia. However, IMB PRC recommends vessels to continue implementing **BMP5** recommended practices while transiting these waters. The Somali pirates still maintain the capability to carry out attacks.

IMB PRC is recording more incidents in new areas of Latin America, but it says many of those new attacks go unreported, making the problem more difficult to handle. The four attacks that were reported in Mexico all targeted offshore vessels, and all occurred within a span of 11 days in April. Likewise, incidents continue to be reported off Callao, Peru anchorage. Meanwhile, vessels off neighboring Ecuador have recorded incidents each year since 2017, with at least three container ships attacked while underway in the second quarter of 2020.

The Caribbean remains one of the areas with the highest piracy and armed robbery activity. Mostly due to the fact that it is a geographical area with many raw materials exploitation, by virtue of which, it is usual for ships with high value cargoes being targeted for this type of criminal activity. Venezuela, according to the latest news reports, occupies an important place of pirate attacks. And it is easy to understand why the Venezuelan coasts are favorable for these types of events.

It has an extensive coastal area of 2,394 kilometers, in the northernmost part of South America, a vital crossroads for international maritime traffic. It also has an EXCLUSIVE ECONOMIC ZONE (EEZ) around 580,000.00 km2, 1/5 of the total surface of the Caribbean, with a high economic potential, a large fishing reservoir, huge oil reserves and other minerals. In addition to a complex economic, political and social crisis that serve as a breeding ground for these types of criminal activities.

In the Venezuelan case, several incidents of piracy and armed robbery have been recorded in its coast waters during the first half of 2020. Most of them have not been reported to the IBM PRC. The most recent attack occurred on July 1st, 2020 in the Orinoco river, where 10 seafarers of the transfer station vessel Boca Grande II owned by the Venezuelan company Ferrominera Orinoco, were kidnapped and robbed of cash, and personal valuables. The vessel was anchored off Punta Pescador, in the narrow Boca Serpentine, between Venezuela and Trinidad and Tobago.

During the pandemic, piracy and armed robbery attacks on vessels and their crews, as well as other criminal activities in the aquatic spaces have increased.

Piracy is similar and important in most countries' laws. Moreover, it has such relevance that in most of them it is located immediately after the crimes of *lese-majesty*, given that its danger lies in its destructive force.

This crime has had such transcendence that the position used by the Roman Empire to declare pirates enemies of all humanity has been taken up temporarily in European legislation, even when considering the idea that it has been declared an international crime in the Rome Statute.

A greater understanding of the concepts is essential to classify a fact as a crime and attribute the appropriate classification to it, so that hijacking is not confused with piracy, or piracy with armed robbery.

The safety of ships and their crews in the seas is a global concern that will only be achieved through international cooperation. One of the basis to protect them is based on the principle that a warships that do not sail under the same flag, could protect the same interests, that means *"the vessel patrolling acts as an organ that validly represents the world community in this matter, since pirates are considered **hostis humanis generis***".

The 1988 Rome Convention was the first international agreement attempting to subordinate crimes against the safety of maritime navigation of ships and their crew under the scope of International Law, seeking to cover all criminal acts that could be generated to a ship or its crew. However, many States did not ratify said convention, as was the case with Venezuela, but their domestic legislation includes many of the crimes established in these international regulations. It is so natural that Venezuela should incorporate the text of the Convention into his laws and ratify it.

In the private sector, more initiatives such as the Baltic and International Maritime Council (BIMCO) with approval of various standard contracts and clauses[31], such as the *Bimco Piracy Clause*, which allows shipowners to negotiate with companies specialized in security issues the possibility to carry a group of people on board solely responsible for the protection of the vessel, crew, and its cargo, so that the shipowner can fully comply with the obligations set forth in the respective *Charter Party*.

Finally, an aspect of importance that must be considered within the subject of international cooperation is that of jurisdiction: which courts will be the ones competent to judge people who commit crimes of piracy and armed robbery.

B. The Challenge of COVID-19 for Floating Armories

1.2 million seafarers on more than 55,000 ships form the backbone of the global economy. The outbreak of COVID-19 threatened these supply lines and affected crew serving these ships. It is estimated that between 400,000 and 600,000 seafarers are affected by crew changes worldwide, this includes crew trapped onboard vessels and those unable to earn wages as they cannot embark vessels. Some of the crew on vessels have been on vessels for well over a year.

Limitations to port access, flights and immigration are at the center of the problem. Often when crew can disembark at a port, visa arrangements might not be available. Flights could also be restricted or not be available at the port location or the end location and are often canceled at the last moment.

This problem is compounded in the Red Sea, the Western Indian Ocean, and the Gulf of Oman, where Private Armed Security Teams (PASTs) are stuck on floating armories (FAs) with some of the armories at double their intended capacity. Living conditions onboard some armories are deteriorating and safety standards are compromised in the process. The current situation also has security implications due to increased stress levels onboard and the compensation problems that some guards are experiencing.

An incident indicative of the stress armed guards are currently under occurred on July 21, 2020 when the bulker MV *Jaeger* embarked a PAST in the Indian Ocean. One of the three guards refused to surrender his weapon to the master as protocol dictated. He took control of the ship and diverted the vessel from its course. The guard also discharged his weapon onboard. All these actions were the result of a compensation dispute with the Private Maritime Security Company (PMSC) that employed him, as he claimed he had not been paid for five months. After three days, the security situation was resolved with the help of the ship's owner, Eagle Bulk Shipping, and maritime security experts. No crew was harmed during the incident. The PAST disembarked at an FA in the Southern Red Sea.

This situation escalated further when the same guard, in an attempt to receive back pay, broke into the FA *Golden Palm's* armory a month later and took the crew hostage. The standoff has reportedly been resolved, but not after he discarded the weapons owned by his employers into the sea.

Private Armed Security Teams

By 2010, piracy off the coast of Somalia, the Red Sea and the Western Indian Ocean extended 1,000 nm from the Somalian coast and as far south as Madagascar. More than a thousand hostages were taken in that year and 49 vessels were hijacked. Although a few PASTs appeared on commercial vessels in 2009, more were noted in 2010 as flag state legislation changed to permit firearms onboard vessels. By 2011 it became a common practice. Attacks increased in 2011, but success rates dropped significantly with 40 percent fewer successful attacks.

The use of PASTs onboard vessels, combined with the intervention of foreign navies, the establishment of the Internationally Recommended Transit Corridor, the promulgation of "Best Management Practices" (BMP), and the arrest and prosecution of pirates, were the measures that had the largest impact on countering piracy off the coast of Somalia, the Red Sea and the Western Indian Ocean. As it is impossible for foreign navies to cover all vessels in the area at all times, the most effective and ultimate responsibility for the security of the ship lies with the ship itself. PASTs on vessels provide immediate onboard security, which allows navies time to respond to attacks. However, due to national and international laws and regulations, merchant ships are unable to dock in most foreign ports with arms and ammunition onboard.

Floating Armories

To solve the problem of weapons onboard ships and PASTs embarking and disembarking with weapons, FAs or Vessel Based Armories (VBAs) were established. These armories function as stationary weapons and ammunition storage facilities in key locations in international waters. By the end of 2012 the use of FAs by PAST was common. At the end of 2018, four companies with 19 vessels were supporting 1,500-1,800 embarkations per month in the Red Sea, the Gulf of Oman, and the Western Indian Ocean. Today the same four companies are still operational.

The armories provide a variety of security services. PAST-owned weapons and security equipment can be stored onboard the FA. Flag state approval is mandatory for storage of weapons onboard. Accommodations for PASTs are provided as well as shuttle services between the armories and port, as well as transfer to and from their clients' merchant ships. The average stay under normal circumstances is about seven days, but there had been incidents when PASTs remained onboard for more than 100 days in the past.

Regulations

Some FAs are professionally operated and adhere voluntarily to the International Organization for Standardization (ISO) and are willing to be regulated and welcome inspections of the facilities regarding the safe storage of weapons. There are however shortcomings in regulations governing FAs such as regulations regarding weapons storage, record keeping of weapons stored and transferred, and flag state registration - especially registration under Paris MoU black list flag states.

The lack of regulation is of special concern to the Indian Maritime Administration which called for regulations that will ensure that armories are registered to responsible flag states and that there should be some form of certification requirement and binding legal regime for floating armories.

Concerns around FAs have been discussed at meetings of the Maritime Safety Committee of the International Maritime Organization, the Contact Group for Piracy Off the Coast of Somalia (CGPCS) and the United Nations Security Council.

The United Nations Office on Drugs and Crime (UNODC) has examined the issue and a draft summary of applicable law was discussed at the UNODC Global Maritime Crime Program's Legal Conference in Colombo, Sri Lanka in June 2018. A UNODC "Summary of Laws Regulating Floating Armouries and their Operations" was published in August 2020.

While FAs are not directly addressed by any International regulations, several international and national laws and regulations apply to the vessel itself and the services provided, and the individuals involved. While coastal states have full powers over FAs in their territorial waters, this does not extend to the EEZ and International Waters. FAs will however normally transfer weapons at sea prior to entering port and will not enter territorial waters or port in their function as FA.

COVID-19 and Armories

COVID-19 produced some unexpected challenges for operations on FAs in the Red Sea and Western Indian Ocean. One such vessel is the *Grey Palm*, which was reportedly hosting more than double its intended capacity with a reported 180 people onboard in June 2020. Some of these guards have reportedly been on duty from nine months to a year, including Indian, Nepalese, European, Sri Lankan and Chinese nationals. They have also reported concerns about the amount of safety equipment onboard, including life jackets and lifeboats. It is reported that this is not the only FA currently experiencing such problems. A year ago, the *Grey Palm's* sister ship, *White Palm*, had a fire onboard. Guards complained about overcrowding and insufficient emergency measures onboard at the time.

A part of the problem for PASTs and FAs is that compromises in quality appear to be occurring due to competitive pressure. The prevailing rates for PASTs have been driven too low as a result of fierce competition between PMSCs; this is a consequence of the number of companies in operation and a general demand by the shipping industry for cutting costs. The perception of a lower threat due to very low reported hijacking incidents in recent years also plays a factor in driving down prices.

Looking for solutions

The problems FAs are experiencing is a two-layer problem. First there is the general problem of lack of enforcement of regulations applicable to FAs, and secondly the immediate problem of COVID-19 and the problems it has created for crew changes.

As a FA is still a ship or merchant vessel, the primary legal tool to apply to FAs is the ISM Code, as it is mandatory for all vessels and it provides an international standard for the safe management and operations of ships. It is the flag state's responsibility to ensure compliance with the ISM Code, and it is the shipowner or any party that has assumed such responsibility such as the manager or bareboat charterer of the vessel that has agreed to take over responsibilities imposed by the Code, such as establishing a safety management system for the ship. While the flag of the vessel might well be on the Paris MoU black list, the company could be registered in another state, which could enforce the Code.

The United Nations Office on Drugs and Crime, Global Maritime Crime Programme "Summary of Laws Regulating Floating Armouries and their Operations" should give some clarity to which laws apply to FAs. The next step would be to establish international agreed regulations and guidance to govern armories and to eliminate the current ambiguities.

FA operators/companies should be registered in an FA registry which will include the current names and number of the FAs operating under the company, the FAs' IMO numbers, flag state, owners as well as address of company, owners and insurer. There should also be a regime where FAs can be inspected and audited, especially with regard to weapons they carry and security protocol with regard to the safe storage of these weapons and records of these weapons. Records should also be kept of PMSCs making use of the FA.

PMSCs need to hold the FAs they use to account, as the safety of their employees is their responsibility. Shipping companies should be willing to pay for decent services as the price war the PMSC industry is currently experiencing will lead to long term compromises in standards in PAST. This already had filtered down to FAs as well.

COVID-19 related solutions

A recent commitment of nations to allow crew changes for seafarers may relieve the problem of overcrowding and crew changes on FAs in the short term if it can be extended to more countries in their areas of operation. Thirteen leading maritime nations joined an initiative to recognize seafarers as essential workers and thereby enable crew changes by allowing more international flights and to allow exemptions in quarantine, visa and port controls and better coordination between these entities. The International Maritime Organization has also created a 12-step process of Protocols for states to facilitate crew rotations. While some countries are working towards finding a solution for this humanitarian crisis, others have increased restrictions on crew changes or reversed their commitment mainly due to non-adherence to protocols and abuses of test results and compliance by seafarers. The situation remains in flux and notwithstanding the commitment of some countries not a lot of progress has been made yet.

At times it is possible for PASTs to be added to a commercial vessel's crew lists to disembark at port and where possible it could be a viable option. It is however usually more difficult to disembark from a shuttle boat servicing the FA.

A further problem is that most of these countries that agreed to better coordination and disembarkation are not in the operational area of the FAs. Saudi Arabia and the United Arab Emirates, two of the 13 nations that agreed to allow disembarkation could be possible alternatives for crew changes in the Red Sea and Gulf of Oman. Crew changes were indeed possible for several PASTs at the end of July at Suez, Dubai, and Sri Lanka, although port entry was difficult in Dubai. Saudi Arabia is not seen as a practical option for PAST crew changes at this stage. Traditionally it has been harder for PASTs to disembark in Saudi ports as the same rules do not apply for PASTs as for permanent marine crew.

To alleviate the problem of crew changes on FAs a collaborative approach between international organizations such as the IMO, UNODC and the CGPCS, flag states and regional countries are suggested and efforts should be made to ensure that measures to allow for crew changes in general should also be extended to PAST, as they are also essential workers in their area of operation. A commitment to allow crew changes by countries in the Red Sea, the Gulf of Oman, and the Western Indian Ocean should also be considered.

Armories should refrain from disembarking guards through ports if they are COVID-19 positive so port authorities will not shut down movement through ports. All FAs should have isolation cabins for COVID-19 patients. Approved COVID-19 tests before embarking and disembarking PASTs should be administered. Insisting that guards completing Covid-19 questionnaires 24 hours prior to disembarking on to and from FAs could be a good practice. COVID-19 preventative supplies such as thermometer cameras, Personal Protective Equipment (PPEs), disinfectants and blood test kits should be available onboard FAs.

Preventing further problems

With the absence of any other viable solution for logistical support for PASTs in the Red Sea and Indian Ocean, FAs clearly have a role to play in anti-piracy solutions. As PASTs providing security on vessels are a unique class of role-player in the industry, the outbreak of COVID-19 has left them with unique problems. Around the world crews of vessels are facing repatriation problems. For PASTs it is compounded with the fact that they are not permanently deployed on a vessel and after their service is completed, they have nowhere to go, which leaves FAs with an impossible situation. Overcrowding of FAs and the tension onboard can and had already led to security and safety issues onboard. The question however is how and who will be able to solve this unique problem before we are faced with a serious security problem or human tragedy.

C. *Migration issues and regulations for combating covid-19:*

As states across the world reel under the weight of Covid-19 pandemic, the primary and uniform strategy adopted by them has been to shut their borders so as to contain the spread of corona virus. Visa controls have tightened, air travel has been subjected to severe restrictions and most states have aggressively brought their citizens abroad back home. However, the plight of stateless persons that refers to persons without a nationality and devoid of the sovereign protection of any state has been most affected during these times of global public health emergency.

The severity of the plight of stateless persons can be gauged from seeing the case of Rohingyas, the world's largest stateless community who have been persecuted and arbitrarily denied their citizenship by Myanmar. In the times on Covid-19 pandemic, Rohingyas, have been undertaking risking sea journeys, in fishing boats often arranged by smugglers, fleeing Bangladesh's refugee camps to reach countries like Malaysia for better life opportunities. While such maritime movements have been a common feature of the Bay of Bengal, the pandemic as a factor has however, drastically changed the equations of such migration.

The pandemic counter-stream

The Covid-19 pandemic has led to countries like Malaysia viewing the issue of Rohingyas entering its maritime borders as a serious cause of concern, thereby undertaking measures to strengthen security at borders. Malaysia had resorted to continuously turning back such boats. Even in one case where a boat could not be turned back on account of its engine failure, the Malaysian authorities have detained the Rohingyas aboard. But there are still fears that they may again be sent back to international waters once their boat is repaired (Reuters 2020).

Malaysian Prime Minister Muhyiddin Yassin has cited the reasons of economic struggles and scarce resources faced by the country due to the coronavirus pandemic for pushing back the Rohingya boat people (Aljazeera 2020a). Coupled with this is also the anti-Rohingya sentiment that has gained currency in Malaysia during this time. As rumours about Rohingyas demanding Malaysian citizenship spread faster than the corona virus, the stateless community, as well as human rights defenders became increasingly subjected to hate speech and death threats on social media platforms like Facebook, Twitter, Change.org and Avaaz (Human Rights Watch 2020). Cases of doxing also have seen a rise in this case. For example, a female Malaysian activist, from the European Rohingya Council rights group was threatened with rape on Facebook when she asked the Malaysian government to allow Rohingyas to disembark (Dhaka Tribune 2020a). Similarly, Australian Al Jazeera journalists have faced death threats, doxing, sedition and defamation charges for releasing a documentary that criticized harsh Malaysian government's policies against undocumented migrant workers during the Covid-19 period(The Guardian 2020a).

The Malaysian stance under the pandemic has been in sharp contrast to its earlier sympathetic approach towards accommodating the Rohingyas. Malaysia for a long time has been the most preferred destination for this stateless community. A recent report by Stable Seas, that analysed maritime security in the Bay of Bengal, had showcased Malaysia as a role model of reception destination country in southeast asia of maritime migration as it had offered legal work to Rohingya refugees and asylum seekers in the plantation and manufacturing sectors of the economy. However, it is not the case that the situation of Rohingyas living in Malaysia has in any way improved. The situation remains grim as

Rohingyas living in the country have reported how they live with the mental trauma on a daily basis and face a continual fear of detention and harassment by police making their life worse than that in the refugee camps of Bangladesh. The pandemic has further questioned this 'image' of Malaysia as a model reception state by causing a 'counter-stream of migration' of Rohingyas back to Bangladesh resulting in further boat tragedies.

Bangladesh too that has always been applauded for absorbing the maximum number of Rohingya refugees, the largest being the Cox bazar camp housing 1.1 million refugees, has tightened its borders even after taking back the Rohingyas who could not reach Malaysia. Around 308 Rohingyas have already been sent to live in the cyclone shelters built on the isolated island of Bhasan Char (Dhaka Tribune 2020b). Bangladesh was already planning to decongest the refugee camps in cox bazar by relocating thousands of Rohingya refugees to Bhasan Char island. However, this proposal was met with resistance from United Nations (UN) and various civil society organisations as the island is prone to natural disasters. During a visit to the island in early 2019, Yanghee Lee, the United Nations special rapporteur on Myanmar, not only questioned the habitability potential of it but rather warned that it had the potential to create a 'new crisis' situation (Reuters 2019b). But now the pandemic has been able to change this equation and resuscitate Bangladesh's proposal. The fear of this infectious corona virus has in a way fructified the relocation of refugees as Bhasan Char currently serves as a preferred quarantine destination for incoming Rohingyas who failed to reach Malaysia and were rescued by the Bangladesh coastguard.

'COVIDIFIED' *maritime migration in the Bay*

The UN Refugee Agency, United Nations High Commissioner for Refugees (UNHCR), while recognising the sovereign right of states to restrict the entry of non-nationals to protect public health, said in a statement that imposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards, in particular as linked to the principle of non-refoulement. (UNHCR 2020a)

However, ensuring that states respect these guidelines and customary principle of international law of non-refoulement has become difficult to monitor even as agencies like UNHCR is often unable to reach the refugees and asylum seekers due to lockdowns and restrictions on freedom of movement within countries due to the pandemic.

In a joint statement of May 2020, *on protection at sea in the Bay of Bengal and Andaman Sea***,** the UN agencies, UNHCR, International Organization for Migration (IOM) and United Nations Office on Drugs and Crime (UNODC) feared that the boat tragedies of 2020 under Covid-19 were quickly becoming a 2.0 version of the 2015 'boat crisis' in the Bay of Bengal where again thousands of refugees and migrants including vulnerable groups like women and children in distress at sea will die (UNHCR 2020b). They urged a regional solution to this problem of irregular migration by making use of the regional mechanism of Bali process that comprises of 49 members co-chaired by Indonesia and Australia. This forum adopted an important declaration called as the *Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime 2016* which stressed that while sovereign states take measures to disrupt the smuggling networks and punish human traffickers involved in arranging boats for irregular migration by sea, they must adopt a victim-centered and protection-sensitive approach vis-à-vis vulnerable groups such as women and children and those in need of asylum (Bali Process 2016).

However, in addressing this issue there exist no straightforward solutions. This is because Maritime Migration (MM) is undeniably a very complex mode of migration. Firstly, this type of migration is 'irregular' and illegal and so the issue of national security comes in. However, states are also obliged under *UN Convention on the Law of the Sea 1982* to save the lives of everyone found in distress at sea (International Maritime Organization 2015). However, currently, the sensitivity of states is heightened towards this migration as protecting public health from the global pandemic is also seen as a national security issue and so border controls against non-nationals become justified.

Secondly, MM involves an element of crime as human smuggling networks are often involved in arranging fishing boats of all sizes to undertake risky sea-crossings. The size of these unseaworthy boats used for unsafe migration in the Bay of Bengal region has undergone a change. According to UNHCR, large fishing trawlers or cargo boats were being used to smuggle 300 to 1000 people in one trip in 2015 which shifted to smaller fishing boats to incorporate 20 to 100 persons in 2018 and in the current phase larger vessels that can take in 200 people at one go are in use (UNHCR 2019a). Even in the latest boat incidents under Covid-19, human smugglers were involved and there were even reports of them asking for more money by holding stranded Rohingyas at sea as hostages (Aljazeera 2020b).

Thirdly, MM often involves a mixed group of people that migrate for different reasons and have varying protection needs and profiles. They can either comprise of refugees, asylum-seekers and stateless people who may be fleeing persecution and conflict or poor migrants who are seeking better economic opportunities. While the 2015 Bay of Bengal crisis saw mixed flows of Bangladeshi immigrants along with Rohingya refugees, in 2020, only Rohingyas have been seen to migrate from Bangladesh perhaps to seek better opportunities in Malaysia. But it is still not yet clear as to why the pandemic couldn't deter them from taking such perilous journeys. Nevertheless, the principle of non-refoulement, that is a refugee should not be returned to a country where they face serious threats to their life or freedom, should apply to the Rohingyas reaching the shores of Malaysia even if they have departed from refugee camps in Bangladesh which are considered safe. Returning Rohingyas to harsh international waters or even putting them on a flood prone island that poses serious threats to their life is nothing but indirect refoulement.

As the urgent need to care for citizens takes over and borders are shut down to control the virus, the distinctions between insider and outsider have become sharpest in the age of Covid-19. Stateless persons who are non-citizens everywhere face extreme difficulties and discrimination in accessing basic services of health care, education and employment and so, the rightlessness associated with Statelessness often becomes a push factor for migration (Sironi 2016). What the pandemic has shown through the case of irregular maritime migration of stateless Rohingyas in the bay is this: the world continues to be deeply divided into sovereign states and if a person isn't a citizen of any of these states, they have no human rights whatsoever and belong nowhere. The seas are not habitable and harsh to human life. But they seem even harsher to the stateless who undertake such desperate journeys in desperate times.

A glimmer of hope in this '***COVID-ification'*** of desperate maritime journeys has been the exemplary humanitarian resolve displayed by the ordinary fishermen of Indonesia who saved the lives of Rohingya boat people in June 2020 (The Guardian 2020a). By this act, they not only upheld the customary law of rescuing people at sea but also indirectly kept the promise contained in the pledges of Indonesian government, of assisting the needs of stateless persons, made at the *2019 High-Level Segment on Statelessness* (UNHCR 2019b). Whether or not Indonesia will now show political will and take lead as the co-chair of the Bali process mechanism in solving this complex regional crisis is something only time will tell.

Rules-Based Maritime Security in Asia: The Rules-Based Order (RBO) constitutes the foundation for the international maritime trading and security system. A subject of growing deliberation in strategic studies circles and policy establishments, it has come to be regarded as a prerequisite for seaborne trade and commerce, and a crucial factor in the formulation of national security policy. The issue of RBO has also gained currency in official discourse in some Indo-Pacific states. Some treat RBO as a conceptual prism for the evaluation of emergent challenges in littoral-Asia; others see it as a device to generate consensus around clearly defined standards of acceptable behaviour in the regional littorals.

In recent months as China has sought to consolidate power and influence in the South China Sea, the question of 'rules-based security' is back in focus. Beijing's expansive island-building program in the Spratly group of islands, and aggressive 'grey zone' activity in the adjoining seas have caused disquiet in Southeast Asia, where many view China's actions as undermining international law. With Chinese militia boats operating close to the shores of Indonesia, Vietnam, Malaysia and the Philippines, and their coast guard and naval intelligence ships expanding presence operations in areas as far as the Australia and Japan's Senkaku islands, there are growing concerns that Beijing might be working on a plan to dominate the Pacific littorals.

As China's neighbours see it, Chinese posturing at sea represents intimidation through the use of military force. Consequently, Southeast Asian states have scaled up naval, coast guard and militia operations in their own near-seas. While Vietnam has used its fishing fleets to assert sovereignty over spaces close to the Spratly islands, Indonesian navy and coast guard ships have engaged in pushback against Chinese fishing activity around the Natuna islands. Both Jakarta and Hanoi have underscored the importance of a regional rules-based order, but their efforts have met with little results, as China has persisted with its belligerent stance.

Counter-action by China's neighbours in the South China Sea has had an impact on the negotiations for a regional Code of Conduct (CoC). As China has moved to assert greater control over hotspots in Southeast and East Asia, dialogue has stalled. With the prospects of a regional code fast receding, ASEAN has expressed "serious concerns" over the absence of a "conducive environment" for CoC negotiations. Regional states have highlighted the 1982 UNCLOS (United Nations Convention on the Law of the Sea) as legal basis for territorial disputes, "legitimate interests" and "all activities in the oceans and seas"—a signal to Beijing that negotiations for a code of conduct will not be on China's terms. With tit-for-tat exercises by the US Navy and the PLAN in the South China Sea, regional stability appears more perilous than ever.

From an Indian perspective, three developments in the regional littorals call attention to the need for maritime norms. First, there has been a rise in the presence of China's research and survey vessels in the Eastern Indian Ocean. After the Indian Navy expelled the Shiyan 1, a Chinese research vessel found intruding into the exclusive economic zone off the coast of India's Andaman and Nicobar Islands in September 2019, there is concern in India's security establishment over Chinese maritime presence in the neighbourhood. At a time when there is talk of a China-backed plan to construct a canal across the Thai isthmus and a secret agreement for a Chinese naval base on the Cambodian coast, a surge in Chinese presence in the eastern Indian Ocean has triggered disquiet in New Delhi. To add to India's discomfort, China's mining operations in the South Indian Ocean have expanded considerably; so too has the presence of Chinese fishing boats in areas close to India's territorial waters.

Analysts are also considering a second factor: the growing presence of Chinese intelligence ships in the IOR and the Western Pacific. The People's Liberation Army Navy (PLAN) has been deploying its Dongdiao class intelligence-gathering ships in the Eastern Indian Ocean to keep an eye on the Indian naval installations, and a spy ship was spotted close to the eastern sea border near the Andaman and Nicobar Islands late last year. While such activity is not without precedent, the fact that Chinese intelligence ships are now venturing close to Indian islands is a disconcerting development.

Third, Chinese militia operations in the South China Sea have been focused on the region's Western end close to the Indian Ocean and seem to target countries that India has been closely involved with in regional security initiatives. Since September 2018, when a PLAN Type 052C destroyer came within 45 yards of the *USS Decatur* near Gaven reef in the South China Sea, China's naval and militia operations have harassed regional maritime forces, including the coast guards of Vietnam and Indonesia. In January this year, China sparked a major confrontation with Indonesia when dozens of Chinese fishing vessels, along with a coast guard escort, entered waters off the Natuna Islands, within Jakarta's exclusive economic zone. In April, days after a Chinese fishing boat rammed a Japanese warship and caused a meter-long gash on its side, another Chinese ship struck and sunk a Vietnamese fishing boat, and then prevented Vietnamese coast guard ships from rescuing the fishermen.

Below , we will discuss the security order in littoral-Asia from a maritime-operations lens, evaluating India's options. It argues that despite a shared understanding of common principles of maritime conduct, regional states (including India) have viewed 'rules-based' security through the prism of strategic autonomy and 'balance of power'. Consequently, the maritime rules-based system has never been properly upheld. Yet, it is possible for India to devise a protocol of regional engagement that would reduce the possibility of conflict with China and ensure practical cooperation, notwithstanding the present odds that seem heavily stacked against such an endeavour.

Rules-Based Order: Conceptual Underpinnings

The RBO debate has manifold layers. At its heart lie questions about how states perceive their stakes in the international system: how they see rules, norms and principles emerge; and how these rules serve national interests in a contested geopolitical environment. In the 21stcentury, Asia has come to acquire prominence in the international order, even exert influence in matters of global security and economic development. As the region gains greater significance within the international system, Asian states have become more willing to exchange views and ideas on how to design governance systems to optimise efficiency. Having a rules-based framework allows for a baseline level of predictability, or regularity around maritime interactions that reduces the possibility of conflict. The concept suggests the existence of not only a "system" but a "society of states whose members share a sense of common interests in the elementary goals of social life; rules prescribing behavior that sustains these goals; and institutions that help to make these rules effective."

In theory, a rules-based order is an instrument of multilateralism that facilitates common responses to non-traditional security challenges, such as natural disasters and transnational crime. The purpose of maritime rules is to establish a certain level of operational cooperation between agencies that would meet the common interests of all partners. Advocates of a norms-based architecture highlight multinational maritime crisis operations in the aftermath of the 2004 Indian Ocean tsunami, joint-relief operations after Typhoon Haiyan, counter-piracy initiatives in the Western Indian Ocean and Southeast Asia, and the search missions for Malaysian Airlines flight MH370 and Air-Asia flight QZ850.

In practice, however, the 'rules'-narrative is often deployed by Pacific powers to preserve a favourable balance of power in littoral-Asia. Since the 2016 Arbitration Tribunal's decision that rejected Chinese claims in the SCS, regional powers have focused on protecting their near seas from Chinese incursions. The norms-based maritime order has largely been a way of preventing Beijing from undertaking unilateral measures to establish hegemony in littoral Southeast Asia by permanently altering facts on the ground.

Structural and Operational Considerations

Beyond China's unchecked aggression in the littorals, there are three interconnected problems in the application of maritime norms. The first issue is the problem of legitimacy. For a system based on rules to be effectively implemented, regional states believe the individual rules must be seen to be observed by all sides. However, the record of big Pacific democracies is seen by many Asian countries to be less than exemplary. Scholars of international relations point out that the United States—the principal proponent of rules-based order—has a record of unilateralism on the world-stage that inspires little confidence. Military interventions in Iraq and Afghanistan, and the trade war with China render the US unfit to be the prime mover of a rules-based international system. Similarly, Japan's refusal to stop its whale-hunt in the Southern Pacific, and Australia's treatment of refugees seeking asylum, are seen by many as evidence that the rules do not uniformly apply to stakeholders and that powerful states are selective in observing international norms. The propensity of a few to unequally apply the rules, say theorists, has led to a polarisation of opinion over norms in the maritime domain– a phenomenon in clear evidence in the South China Sea.

A related issue is that of equity. Political analysts and policymakers agree that a rules-based order must work to the advantage of all stakeholders, but there is a perception that it serves the geopolitical interests of the big powers. Many say the regime of maritime-access—promoted by the United States and characterised by the free movement of trade, investment and people—is focused squarely on commerce and strategic balance, and largely unresponsive to needs of human security and development.

A final debility with the rules-norms framework is its lack of enforceability, which leads to cooperation focused mainly on the provisioning of lower-order security goods. Since there is no transcendental and impartial authority that can enforce rules in a fair and consistent fashion, states know they must rely on themselves for their own security. This awareness prompts states towards self-interested behaviour, limiting their cooperation to mere law-enforcement in the commons.

Moreover, from a tactical-operational perspective, the key problem with the RBO is the lack of implementation. Experts say the proponents of a ‘rules-based order’ must contend with the differing interpretation of provisions enshrined in the UNCLOS, particularly freedom of navigation of warships in the Exclusive Economic Zones of a foreign state, as well as the freedom to carry out marine scientific research and intelligence gathering and other military activity. For some countries like the US, freedom of navigation implies high seas freedoms for warships in a coastal state’s 200-nautical miles exclusive economic zones (EEZs). It is only within the 12 nautical miles territorial seas limit that the US believes military ships must abide by the rules of “innocent passage” which preclude military-related activity, but do not still require prior notification or approval of the coastal state. As China sees it, foreign military ships must obtain prior permission of the coastal state before entering the EEZs and the 12-nautical mile territorial sea. From a Chinese perspective, the USN’s freedom of navigation patrols in the South China Sea amount to a display of aggressive intent in China’s near-seas

The disagreements over ‘freedom of navigation’ and ‘military activity’ in the South China Sea, however, have not prevented regional states from seeking to improve coordination and communication in the contested commons (See Table 3). Three initiatives in recent years have been prominent. First, Asia Pacific states have sought to regulate interaction between naval ships and aircraft through a Code for Unplanned Encounters at Sea (CUES). Signed by 21 countries in the Asia-Pacific region at the Western Pacific Naval Symposium in April 2014, the CUES is meant to “offer safety measures and a means to limit mutual interference, limit uncertainty and facilitate communication when naval ships or naval aircraft encounter each other in an unplanned manner.” The CUES is seen by many as a noteworthy effort to create greater predictability in maritime interactions in the Asia-Pacific. It has been put into regular practice by regional navies, including the USN, the Japan Maritime Self-Defense Force, the PLAN, and the Indonesian navy.

The United States and China have also signed a Memorandum of Understanding (MoU) for the safety of air and maritime encounters that outlines rules of behaviour in a way that enables crisis communication to prevent misunderstandings and miscalculation. Following a series of dangerous incidents since 2000 between the US navy and the PLAN in the South China Sea—including attempts by Chinese forces to harass US survey ships operating in and over China’s 200-nautical-mile exclusive economic zone—and repeated instances of buzzing US intelligence, surveillance and reconnaissance airborne assets, Washington and Beijing agreed to a set of mutually acceptable norms to prevent future incidents at sea. The agreement is seen to have played a part in establishing a ‘bottom-line’ consensus on military exercises, until the USS Cowpens incident in 2018 reversed things to an earlier version of themselves.

A third arrangement to calm regional tensions is the code of conduct (CoC) discussions between ASEAN and China. Conceived in 2002 as a mechanism to enable interaction and peaceful resolution of differences in the South China Sea, efforts to establish a regional code gathered momentum in 2017, when ASEAN and China endorsed a framework document. In 2019, a draft text was circulated for the consideration of parties, but talks soon ran into rough weather as China sought to take advantage of the COVID-19 crisis to advance its territorial claims, falling back on the use of aggressive force.

Conscious of the scale of the challenges faced, regional observers remain skeptical about the utility of the aforementioned arrangements in resolving differences between the US and China. Though marginally useful, the CUES, analysts posit, has failed to address operational divergences between the US navy and the PLAN. Its key weakness is that it excludes activities by the Chinese coast guard and maritime militia and does not apply to within 12 nautical miles of the disputed features, where much of China's aggressive maneouvring takes place. The China-US agreement on maritime and air encounters, too, has not lived up to expectation. US watchers lament that the arrangement is not strictly binding under international law and can be discontinued by either side. Furthermore, the agreement waters down existing legal commitments, even providing an opening for China to further diminish navigational rights. After an incident in February 2020, when a US Navy P-8A Poseidon maritime patrol aircraft flying in airspace above international waters west of Guam was 'lased' by PRC navy destroyer, American confidence in the CUES and the MoU with China is at an all-time low.

As regards the Code of Conduct, it is not a dispute resolution mechanism at all, and has shown little potential to resolve overlapping sovereignty claims in the South China Sea. Experts say that with claimant and non-claimant states involved in the CoC discussions, negotiations on issues such as military exercises and resources management are likely to be highly complex. Worryingly, China has been insisting on the insertion of a clause that would prevent "parties from holding joint military exercises with countries from outside the region, without prior notification and the explicit expression of no objection from others" – a stance unacceptable to ASEAN. Southeast Asian states are also not willing to accept China's position that all sides must "desist from joint oil and gas exploration in their claimed waters with foreign energy firms". In such a scenario, it is unlikely that any of the parties will come to entirely accept the others' priorities. With China getting increasingly aggressive in the South China Sea, many say the CoC is unlikely to come through any time soon.

India and the Rules-Based Order

India's strategic elite view the 'global system of rules' in the maritime commons as being inherently tied to the Indo-Pacific concept and the structural power shift underway in the global maritime system. Indian observers say the integrated maritime space rimming the Asian continent emphasises the rise of India and China as principal economic and military actors, with a growing ability to transcend their respective sub-regions amidst a worsening geopolitical environment. In this, Indian scholars stress the importance of the Eastern Indian

Ocean as a bridge linking the littoral sub-regions of Asia, reminding regional powers of the need to share equally in the burdens of economic development and security.

Even so, Indian reactions to a rules-based order tend to be contradictory. Whilst some political watchers embrace the notion of a rules-based order—viewing it as a rejection of China's aggressive, hegemonic conduct—others regard the concept with more circumspection. The proponents of 'rules' argue for a proactive approach in the maritime domain, injecting greater strategic content into New Delhi's relationships with major East Asian states. Beyond facilitating smoother maritime operations, supporters of an RBO argue in favour of a viable cooperative architecture for the Indo-Pacific region. Skeptics, meanwhile, remain wary of the idea of norms in the maritime domain. Notwithstanding advances in the international legal system – underpinned by UN conventions and global accords – the rule of force, doubters say, continues to trump the rule of law at sea. As realists see it, there is little that the international community can do to bring China to abide by the norms, which renders the rules-based order illusory.

With little consensus on the way forward in the maritime domain, New Delhi's approach has been to leverage the norms-discourse in the political-economic realm by highlighting the need for transparency and accountability in inter-state interactions, urging synergy in multilateral endeavours. In his 2018 Shangri-La Dialogue speech, Prime Minister Narendra Modi called upon the Indo-Pacific states to adopt a common rules-based order, emphasising regional norms that "must equally apply to all nations individually, as well as to the global commons." Mr Modi's concept of SAGAR (Security and Growth for All in the Region) stresses Indian stakeholdership in an Indian Ocean system of rules that is fair and equitable. At the 2019 East Asia Summit in Bangkok, the prime minister took the SAGAR doctrine one step further by proposing partnerships in the maritime domain through an "Indo-Pacific Oceans Initiative" aimed at the enhancement of maritime security; sustainable utilisation of marine resources; expansion of maritime trade and transport; and disaster prevention and management.

India's foreign policy establishment also stresses the need for a rules-based order, underscoring "emerging geopolitical and geo-economic fault-lines straining globalization". A viable system of global rules, officials aver, must focus on inclusiveness, sustainability and transparency, and respect the principles of sovereignty and territorial integrity in connectivity initiatives. Yet, New Delhi's RBO discourse remains largely confined to a high-principles framework, never quite getting to the level of operations in the maritime commons. While emphasising Indian stakes in maritime governance–the importance of protecting the territorial seas, the safe-guarding of Indian islands, and the significance of being an early responder and net-security provider in the Indian Ocean–Indian policymakers and security managers have not quite engaged with the specifics of a RBO framework in the littorals.

Instead, Indian officials have used the rules-discourse to highlight Indian interests in the global international order. Overarching global themes such as robust multilateralism, multi-polarity in international governance, and viable and sustainable economic practices remain a focal point of political interest. Whilst criticising Chinese predatory practices vis-à-vis Belt and Road Initiative (BRI) projects in South Asia, Indian policy-planners have sidestepped the issue of maritime rules in the littorals.

Navigating a Competitive Dynamic

Operational aspects of 'rules-based security', however, bear greater attention. Maritime theorists aver that any system of maritime rules must thrive on legitimacy, consensus and dialogue. In Asia, however, naval competition and strategic brinkmanship have served to undermine the process of dialogue and rule-making. China's rapid modernisation of its navy has pushed Southeast Asian states into reactive mode, each moving to expand their naval fleets, inducting larger platforms, developing underwater combat capability to deny China tactical space in the littorals.

The competitive dynamic is also at work in the Western IOR, where regional powers have been jostling for strategic space, setting up bases in the Horn of Africa and the Persian Gulf. Implicit threats of the closure of key chokepoints—Bab el Mandeb and the Suez Canal – have led to an aggravation of regional tensions, leading to fears that the putative rules-based order could fast unravel. Beijing's first Indian Ocean logistics base in Djibouti – were the PLA is reported to have undertaken the construction of a massive pier to dock its frontline warships – only complicates the security dynamic for India, leading to fears that China could set up multiple 'dual-use' outposts along important SLOCs in the Indian Ocean. Analysts say these ostensible civilian commercial sites could be upgraded for military use to support China's fishing fleet and intelligence gathering activity.

For its part, the Indian navy has been clear about its preference for norms of interaction in the maritime commons. With China's economic interests in the Indian Ocean growing rapidly, Indian officials underscore the need for regional rules. Many point to Chinese presence in the Bay of Bengal and the Northern Indian Ocean, where the PLAN in January this year held exercises with the navies of Iran and Pakistan. With the Chinese-built and operated port at Gwadar now fully operational and growing Pakistan naval acquisitions from China, Indian influence in South Asia, analysts aver, is under threat from China. Rising suspicion that Chinese infrastructure in Sri Lanka, Bangladesh and Myanmar has a maritime military dimension has prompted the Indian navy to expand its mission-based deployments in key Indian Ocean chokepoints.

When it comes to maritime rules, however, India is faced with a dilemma. While expressing support for the principle of freedom of navigation and over-flight in international waters and the peaceful resolution of disputes in the South China Sea, New Delhi has reservations about the United States' Freedom of Navigation patrols near the Chinese held Spratly and Parcel Islands. From an Indian standpoint, unannounced forays by foreign naval ships through territorial waters and EEZs of another coastal state under the rubric of "innocent passage" or "freedom of navigation" are a problematic proposition. In 1995, when it ratified the UNCLOS, New Delhi had clarified its position in a declaration that read thus: "The Government of the Republic of India understands that the provisions of the convention do not authorize other states to carry out in the EEZ and on the continental shelf military exercises or maneuvers, in particular those including the use of weapons or explosions, without the consent of the coastal state". US offers for joint patrols in the Asian commons do not elicit an enthusiastic response from Indian policymakers because US freedom of navigation patrols have in the past challenged Indian claims in the territorial waters and exclusive economic zones.

The logic of US FONOPS also has implications for the defence of the Andaman and Nicobar Islands (ANI). Since India does not have archipelagic status, Indian analysts say that the ANI remains vulnerable to incursions by foreign warships. US navigation patrols in the South China Sea could encourage greater PLAN maritime activism near the ANI, ironically, employing the same tactics as the US Navy in the Pacific littorals. The problem for India is that its declared maritime zones around islands territories are not consistent with legal principles.[68] New Delhi's declaration of straight base-lines delineating zones around the Andaman and Nicobar Islands (on the Western edge) are incompatible with the provisions of article 7 and 47 of the UNCLOS (meant specifically for archipelagic states).

The increasing deployment of autonomous underwater systems in the littorals adds another layer of complexity to the discussion of rules. According to analysts, the use of unmanned underwater systems in maritime Asia is on the rise and is fuelling naval competition between China and the United States. In December 2019, China is said to have deployed a fleet of 12 underwater drones in the Southern Indian Ocean for the gathering of Oceanographic data. The US, too, has been deploying unmanned platforms in the South China Sea to keep an eye on Chinese maritime activity. One such US underwater drone was seized by the Chinese navy in the waters off the Philippines in 2016.

Even if no US drones have been found operating in Chinese EEZs and territorial waters, experts say greater US-China friction in the commons could cause a strategic escalation. The fact that many of these underwater drones are dual-use (with information gathered ostensibly for civilian purposes having utility in military operations) the legality of their deployment is questionable. With both UNCLOS and the 1972 IMO Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) silent on underwater drone operations, the maritime community finds itself in uncharted waters.

Evolving a Cooperative Framework

To prevent misunderstanding and miscalculation at sea, some Indian analysts have suggested an India-China 'incidents at sea' agreement with objectives similar to the US–USSR 'INCSEA' pact of 1972. In the late 1960s, after several incidents between the US Navy and the Soviet Navy – including military planes passing near one another and ships in near-collisions–Moscow and Washington signed an 'incidents at sea' agreement in 1972. The pact provides for collision avoidance and non-interference in the "formations" of the other party, also requiring surveillance ships to maintain a safe distance from the object of investigation so as to avoid "embarrassing or endangering the ships under surveillance". The INCSEA pact sought the use of international signals when ships maneouvred near one another, asked ships not to simulate attacks or to illuminate the bridges of the other side's ships; and informing vessels when submarines are exercising near them. It also required aircraft commanders to use the greatest caution and prudence in approaching aircraft and ships of the other party and provides for notice three to five days in advance, as a rule, of any projected actions that might "represent a danger to navigation or to aircraft in flight".

At first glance, the idea of an India-China maritime pact seems impractical. With the clash at Galwan still fresh in the minds of Indian officials and policymakers, New Delhi is likely to be ill-disposed to the idea of maritime cooperation with China. Yet, after committing to a military disengagement in Eastern Ladakh, India and China would be keen to explore ways to avoid future confrontation, including at sea. The key to preventing accidental encounters in the littorals would be to pursue confidence-building measures, whilst acknowledging the other's cross-regional interests. Indian planners have in the past discussed CBMs with China, but Beijing's interest has been limited to cooperation in the India Ocean. For New Delhi, however, any cooperative arrangement with Beijing that does not recognise Indian stakes in the Western Pacific is a non-starter. A pact confined to the Indian Ocean, Indian officials say, creates the false impression that China's stakes in the IOR are legitimate, but not Indian stakes in the South China Sea.

Another suggestion is to evolve a regional maritime governance framework through the Indian Ocean Rim Association (IORA). The body's pan-Indian Ocean character is well suited to evolve a holistic maritime system for the Indian Ocean, and it has since the 2017 'Jakarta Concord', given high priority to maritime security, focusing on issues such as disaster-response, blue-economy, capacity building, and infrastructure creation. The association has enjoined states to reinforce maritime safety and security by institutionalising cooperative mechanisms such as White Shipping Agreements and the establishment of an Information Fusion Centre for strengthening Maritime Domain Awareness (MDA). A Maritime Safety and Security Working Group helps build capacities, enhance cross-border cooperation and knowledge sharing, and promote harmonised implementation of the international regulations.

While China (an IORA dialogue partner) has been wary of India's Indian Ocean strategy, it has been willing to work alongside IORA to contribute to the security of the regional littorals, including in the Pacific. Evolving rules for maritime conduct in Asia's littoral spaces, however, needs more than an understanding between India and China; it also requires rim association countries to coordinate with the ASEAN Regional Forum and the Council for Security Cooperation in the Asia-Pacific (CSCAP). Developing area-wide norms on freedom of navigation, over-flight, and military activities in regional chokepoints and EEZs will not likely be possible, without professional inputs from the Indian Ocean Naval Symposium (IONS) – a grouping of Indian Ocean navies that seek to improve maritime cooperation amongst littoral states. Unfortunately, coordination between IORA and the IONS has so far been lacking. With political differences between many regional states unresolved, an Indian Ocean multilateral organisation seems unsuited to evolve a framework for rules of conduct in the littorals.

A third proposal is for South Asian and Southeast Asian navies and coast guards to agree to a set of rules in the EEZs that clearly outline rules of engagement – directives that would define the conditions, circumstances, degree and manner in which to use force or employ provocative means to deter a seemingly hostile maneuver or incursion. Observers say a system of rules in the Indo-Pacific could work well if Asian maritime agencies take all possibilities into account. Conflict avoidance provisions must reaffirm international rules of the road, restrict most forms of harassment, regulate communications at sea, and provide advance notice for close quarter exercises. Even in areas where international law is vague such as military activity in the EEZs, partner states would have to agree upon a set of principles to be followed.

Any optimism about a possible rules-based order, however, ought to be tempered with caution. The protracted negotiations that preceded the CUES (2014) are instructive of the hurdles inherent in evolving a code of security conduct. The Western Pacific Naval Symposium has had, since 2003, a voluntary code for un-alerted encounters at sea. At the symposium meet in 2012 in Malaysia, however, when members sought to formalise the CUES for maritime forces in the Asia Pacific, China rejected the proposal. Vice Admiral Ding—PLAN deputy commander—stated that China felt that certain parts of CUES (2003) needed to be further discussed and that the word 'code' implied a legally binding agreement which was not acceptable to China. Ding argued that the territorial sea should be deleted from the applicable scope of the code as foreign warships entering China's territorial sea need to seek prior authorisation from China's government (and therefore, there would be no un-alerted encounters between Chinese and foreign warships). Further, China held that the WPNS is not authorized to formulate a Code for Un-alerted Encounters at Sea for public vessels and state aircraft, and that the code could only apply to naval warships and naval aircraft.

Following China's objections, a review of the original CUES-2003 produced modifications to a number of provisions in ways that would satisfy Beijing. Unlike its predecessor, which described 'Unplanned Encounters at Sea' to cover coast guards, marine surveillance and fisheries agencies, CUES 2014 is limited to naval ships and naval aircrafts. While CUES 2003 applied to the high seas, territorial waters, contiguous zones, exclusive economic zones, and in the archipelagic waters of archipelago states, the 2014 iteration does not specify the maritime zones in which it operates. Crucially, China did not allow key elements of its aggressive posture at sea to be regulated by CUES. When Japanese Defence Minister Itsunori Onodera suggested at the WPNS press conference that the CUES 2014 would ban such dangerous behaviour as radar-locking on ships and aircraft of other countries at sea, China expressed the view that all "sides concerned should not misinterpret deliberately the CUES, which is a technical regulation under the multi-lateral framework, and make a selective reading of it to make a fuss."

A Likely Scenario

Amongst the many possibilities, it seems China would be least inclined to sign up to a binding regional code that would comprehensively cover all maritime operations. What Beijing might be open to consider is a bilateral/multilateral MoU with India and other Bay of Bengal states that would cover certain kinds of operations, but which could also serve as a basis for establishing regional rules. To be sure, India would want the scope of the pact to cover a wider maritime space in Asia. As improbable as it seems, a regional code of behavioural norms could prove helpful in establishing an effective RBO. There is an example in South Asia that gives cause for optimism. In 2005, the Indian Coast Guard (ICG) and Pakistan Maritime Security Agency (PMSA) signed a memorandum of agreement for exchange of information on EEZ violations, apprehended vessels, marine pollution, natural disasters/calamities, smuggling, illicit trafficking, piracy, and coordination in search and rescue. The pact has worked well and was extended in March 2016 for a further five years.

There is also a precedent for India-China cooperation in the maritime domain. The IN and PLAN have worked together on the antipiracy initiative off the coast of Somalia, and there also exists a bilateral Memorandum of Understanding for cooperation in the field of ocean science and technology (2003), which seeks to promote development and cooperation in areas such as integrated coastal zone management, sea-based resources exploration and exploitation technology, and marine resources. While New Delhi's political appetite for cooperation with Beijing is at an all-time low—given recent developments on the Himalayan border–a broader understanding on maritime principles, and the terms of naval engagement in overlapping areas of interest could prove mutually beneficial.

To be sure, a regional pact on maritime rules as such would be hard to reach, and might need concessions from all sides, with many rounds of structured negotiations. But the idea for New Delhi would be to get China to agree to a cooperative framework on largely favourable terms while Beijing is amenable to accept such a proposal. Since law enforcement capacities are likely to be stretched in a post-COVID-19 world, it might be desirable to come to an understanding on the normative principles of interaction in the littorals. It could even drive greater regional collaboration by pushing China to accepting a cooperative regime of maritime operations.

Admittedly, at the present juncture a regional agreement on maritime rules seems a remote possibility. The imperative to counter China triumphs over any competing impulse. For the moment, India's pressing need is to improve maritime interoperability, and communications with partner navies to deal with China's expanding presence in India's near-region. Beyond equitably dividing the burden of security, a collaborative approach with the United States, Japan and Australia would ensure the creation of leverage to keep potential violations by China at bay. The Indian Navy would also need to scale up its operations and domain awareness to keep a watchful eye on the developments in Indian Ocean. Issues of equipment incompatibility with partners, diverse operational and communications procedures, will need to be immediately addressed.

In the long term, however, accepting a 'rules-based' model of maritime security would entail greater tactical synergy, operational engagement and strategic trust between maritime agencies in South and Southeast Asia. It would need New Delhi to look beyond the marginal confines of its immediate neighbourhood. Vital as it is to the rules-based order in Asia, the Indian navy will need to align its priorities with partner navies and expand its presence in regions of strategic interest. Dealing with China in the maritime domain will need a healthy amalgamation of cooperation and deterrence. More importantly, it will need some unconventional thinking by military and foreign policy decision-makers.

Port Denials and Restrictions in Times of Pandemic: A few months ago the World Health Organization declared the spread of the corona virus to be a public health emergency of international concern (PHEIC), the maritime world is facing a constantly increasing array of port restrictions and denials. States have adopted variously restrictive measures which range from indiscriminate prohibitions on access to ports to measures discriminating between ships on account of their nationality or based on objective considerations, like previous calls in infected areas. A more appropriate approach is specifically based on the health situation on the ship, assessed after appropriate testing. But very few States adopted it. As per today, Canada appears to be the only green spot on the globe, with its ports open for disembarkation and embarkation.

The cruise ships' situation which attracted most media attention, but these restrictions apply equally to the merchant fleet with dire consequences. 90% of international trade is maritime. Its continuity is essential to most countries' supply, including for basic commodities (energy, chemicals, food, consumables including health products). Port restrictions put a heavy burden on ship-owners and ship operators, but also and especially on the crew. To cope with the emergency, seafarers have been required to keep working, way beyond the maximum duration of service periods, with no perspective of change, while they are being denied shore-leave, disembarkation with a view to repatriation or even for medical emergencies, if they are infected with the virus. Deep anxiety, psychological distress and extreme fatigue of the crew are bound to increase. This is an explosive cocktail in a confined space like a ship at sea. If the emergency regulations are to be extended all over the globe for several months (which is a likely hypothesis), States must find mechanisms to allow for ports to be open not only to the merchandise carried by the ships, but also to all these invisible workers thanks to whom trade is still possible.

International law on access to ports is no black and white, as the rules leave a large margin of appreciation to States. But even then, they do not have free rein to repudiate all international rules and to confine themselves to a unilateralism seriously tainted by nationalism.

Freedom of Commerce and Non-Discrimination in Emergency Situations

By virtue of their territorial sovereignty, States may freely regulate access to their ports (Article 25.2 of the United Nations Convention on the Law of the Sea). But this principle does not confer upon States unfettered discretion to close ports even in the case of a pandemic.

The International Health Regulations (IHR 2005), which are binding upon all the 194 States member of the WHO, give a framework to respond to sanitary emergencies while avoiding "*unnecessary interference with international traffic*" (Art. 2 of the IHR). In relation to maritime transport, the principle is that of *free pratique*, meaning the "*permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores*" (Art. 1 of the IHR). Furthermore, Article 28.1 states that *"a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry"*. Article 28.2 specifies that a ship shall not be denied the embarkation and disembarkation of passengers either.

It is true that, in cases of PHEIC, States can adopt measures which are more restrictive than the recommendations made by the relevant international organizations (Art. 43 IHR). Yet, even then, States must comply with three requirements. *Firstly*, such measures "*shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives*" (Art 43.1). This is the principle of reasonableness. *Secondly*, States must rely on scientific studies or WHO recommendations to justify these measures (Art.43.2). This is the principle of objective necessity and proportionality. *Thirdly*, they must convey these justifications to the WHO (Art 43.3). This is a corollary of the obligation of international cooperation, based on notification and sharing of information. The organization may hence request its members to "*reconsider the application of the measures*" (Art. 43.4).

Even if they have no general obligation to open their ports to foreign ships, States parties to the 1923 Convention on the International Regime of Maritime Ports are bound to treat equally the ships of all States, including their own (Art.2). It is true that the 1923 Convention has not been widely ratified, but the principle of non-discrimination was codified in Article

24.1.b of UNCLOS. It is equally recalled by the 1965 IMO Convention on Facilitation of International Maritime Traffic, specifically in relation to sanitary measures and health formalities (Art. 4.7 of the Annex to the FAL Convention; also Art. 42 of the IHR). According to this principle, there is no reason to discriminate between ships which fly the flag of the port State and other ships, or between seafarers according to their nationality, even in the case of a pandemic.

Duty of Assistance in Emergency Situations

The duty to render assistance at sea (Art. 98 UNCLOS, also referred to in Art. 18 UNCLOS) has ramifications in the field of access to ports. According to Rules 2.17-2.24 of the FAL Convention, States must allow disembarkation in the event of a medical emergency on board. If humanitarian evacuation is not granted, shipmasters may invoke distress as the *ultima ratio* to get permission to dock (Art. 28.6 of the IHR). But States can still appreciate which are the most appropriate means, short of access to ports, to respond to the medical emergency.

In the same vein, the duty to render assistance to people found in distress at sea (often invoked in cases of mass migration) ends with the disembarkation of the rescued persons in a place of safety. This creates an obligation for all interested States to provide for such a place as soon as reasonably practicable (Regulations 3.1.6, 3.1.9 and 4.8.5 of the SAR Convention). As a consequence of the COVID crisis, Malta and Italy declared their ports not to be places of safety. The emergency legislation adopted by France, which closes ports to all ships carrying passengers, still provides for an exception in cases of ships having rescued people at sea. The obligation of disembarkation after mass-rescue has too often been the victim of lack of solidarity among the Mediterranean States. With COVID, it completely disappeared from the agenda.

Seafarers, the invisible essential workers

Every month, virtually 150,000 seafarers contract end somewhere in the world. This means that, at present, there is half a million of seafarers who stay at sea beyond their contract. Most of them come from The Philippines, China, India, Russia and Ukraine. Seafarers’ unions have sounded the alarm. On 17 March, the International Transport Workers’ Federation thus pointed out “*the failure of flag states to protect seafarers’ and passenger’s health during this humanitarian crisis*”. On 31 March, the ILO also expressed its grave concern with the effects of these measures on seafarers and international trade.

Under the 2006 Maritime Labour Convention (Rule 2.5), seafarers have a right to repatriation or to be granted a safe stay in the country of disembarkation. It is the obligation of the shipowners to cover the related expenses. But shipowners cannot meet their obligations, even when they want to, if port States do not allow for crew changes. The flag State must ultimately ensure that seafarers rights are respected.

IMO calls for cooperation between flag State authorities, port State authorities and control regimes, companies and shipmasters. The flag State could provide medical equipment and prompt medical care on board the ship. Unfortunately, the flag States, especially the flags of convenience, demonstrate a guilty passivity in this respect.

Finally, the suspension of regular commercial flights in the context of COVID makes necessary the implication of the consular services of the State of nationality to coordinate the repatriation of seafarers. But so far, States of nationality have been more prompt to repatriate tourists than seafarers.

Is good faith cooperation gone with the wind?

Coordinated and safe disembarkation and embarkation can only be ensured through cooperation between States. On 13 Feb. 2020, the IMO and WHO adopted a joint statement insisting on the necessity to avoid severe disruption of maritime traffic. Since then, the IMO published several circular letters, providing guidance for States to reconcile public health concerns and the continuation of maritime activities. On 8 April 2020, the European Commission adopted Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships. The creation of a network of designated ports in which embarkation and disembarkation are made possible and safe is central to the EC's proposals. Will States finally engage with the international and regional institutions?

In this crisis, multilateral cooperation is not an obligation of conduct. It is an obligation of result and the only sustainable response. It applies to access to ports, but also to scientific cooperation and share of information, to coordination for the production and distribution of medical equipment and one day of the vaccine. Never before were all States in the same boat as they are now. Alas, for the moment, the boat looks more like the Raft of the Medusa or, according to a more optimist view, the Titanic.

International Maritime Law and COVID-19:

The sudden and dramatic COVID-19 pandemic raises many novel questions of international law. Once the pandemic phase eventually ends, serious questions will be raised as to the ability of existing international law and global governance structures to cope with such an event. Lessons will be learned, and international law will evolve.

Meanwhile, it is important to consider the existing legal framework and the extent to which international law is responding to the pandemic, as well as the nature of international legal problems that have arisen, or that will clearly develop.

Below, we will discuss international legal issues surrounding the global health response and the developing crisis at sea. Obviously there are many other issues that arise, including serious issues of international trade, restrictions upon international aviation and international freedom of movement, as well as the human rights implications from the sudden and extraordinary domestic measures in many countries that restrict freedom of movement in the most severe ways.

The Framework Role of the WHO

The international community has long-feared the outbreak of a health pandemic. However international law has been relatively poorly equipped to respond. The World Health Organisation (WHO) has been the focus of international co-operative efforts to meet the pandemic challenge. The basis of that response is the International Health Regulations (the

“Health Regulations”) which were originally adopted in 1969. They are made under the authority of Articles 21(a) and 22 of the Constitution of WHO and are binding upon all WHO Member States who do not specifically choose to opt out after adoption by the Health Assembly of the WHO.

The current version of the Health Regulations was adopted in 2005. They came into force for 196 States in June 2007. The Health Regulations provide a basis for international co-operation, in good faith, between States. Importantly for present circumstances, the 2005 Health Regulations were significantly updated and amended in response to the SARS respiratory epidemic. The Health Regulations permit the Director-General of the WHO to declare the existence of a public health emergency of international concern. Following the detection of COVID-19 in December 2019 in Wuhan, China, and the rapid escalation of infection and death within China and throughout many countries, the Director-General declared a public health emergency on 30 January 2020. However, even following the declaration of emergency, the effectiveness of the Health Regulations is open to question.

Part of the issue is that the Health Regulations (properly) seek to balance the protection of health with unnecessary interference with international traffic and trade (Article 2). Whilst that balance is appropriate and necessary, it may have worked against taking the early and drastic steps affecting international traffic which may have helped to reduce the global spread of the COVID-19 virus. One area in which the Health Regulations do seem to have assisted is in relation to the relatively early international communication by China of the detection of the virus. Surveillance of possible disease (Article 5) and communication of disease (Article 6) is a central aspect of the Health Regulations.

Article 6 requires a State to notify the WHO within 24 hours of assessment of all events that may constitute a public health emergency of international concern occurring within the State’s territory. Obviously questions will be asked as to whether China’s actions amounted to strict compliance with this obligation, and the extent to which earlier notification may have been critical. It should be noted however, that on the information available China does seem to have complied with its obligations under Article 6(2) to provide detailed information including (laboratory testing results and RNA sequencing), which has enabled progress to be made in relation to potential vaccines.

Following the declaration of a public health emergency, the Director-General is empowered by Article 15 of the Health Regulations to make immediate temporary recommendations designed to reduce the international spread of disease. However the power in Article 15(2) is conditioned not only by the need to reduce the spread of disease, but also by the need to “avoid unnecessary interference with international traffic”. It might be expected that following this pandemic the balance sought to be drawn between the competing goals will be closely examined.

On 30 January, the Director-General made a series of recommendations. They included that China communicate with its population in relation to the outbreak and conduct screenings at international airports and ports to facilitate early detection of symptomatic travellers. The recommendations called upon other countries to be prepared for containment of the outbreak and prevention of onward spread, and cooperate by identifying the source of the virus and develop necessary treatment.

Interestingly, Article 18 provides expressly that recommendations may include placing suspect persons under public health observation, isolating and treating suspect persons, and implementing quarantine of suspect persons.

The Director-General’s recommendations on 30 January appear, with hindsight, to have been ineffective and inadequate to meet the challenge of containing the viral spread. That may well be a function of the existence of asymptomatic airline passengers, and the possibility that by 30 January 2020 the virus was already globally well distributed. The content of the recommendations and the effective and timely implementation of domestic provisions to give effect to them in this pandemic will need to be closely examined.

Beyond the recommendations of the Director-General, the WHO has taken a coordination role, facilitating the collaboration between States that is required by Article 44 of the Health Regulations. The size and critical nature of this pandemic, together with the speed with which it erupted, place great stress upon the principles of collaboration and create an environment in which States tend to be inwards looking, and concerned about domestic survival. Whilst understandable, global cooperation remains a key to medical research responses to the pandemic, as well as to the provision of medical supplies to States and peoples most in need at any one time.

International Disputes

It is very clear that the extraordinary measures taken by many States would, in ordinary circumstances, amount to breaches of existing bilateral, multilateral and investor-state regimes. Measures taken by States include some apparently directly based upon the Director-General’s recommendations. Other States have acted unilaterally to impose very significant restrictions. The extent to which those measures may amount to actionable or internationally wrongful acts, or to trigger expropriation or other provisions of investor-state agreements, is a matter deserving detailed consideration in a separate note.

Any claims might be expected to be the subject of defences based upon the urgent and critical nature of the threat. Defences of a general nature under customary international law could include those of *force majeure* or necessity. The onus would be on the defending State to make good a claim that the crisis made an obligation impossible to perform (in the case of *force majeure*) or that the action taken was the only, and proportionate, response to the situation. Defences to claims of wrongful conduct may also arise under particular treaty exceptions. Some treaties, including some bilateral investment treaties include ‘public order’ or similar exceptions; others make provision for urgent public health measures (for example by Articles 5.5 and 9.11 of the China-Australia Free Trade Agreement).

For present purposes it should be noted that any dispute arising in relation to the Health Regulations themselves (presumably including the interpretation of, and consistency with, the Director-General’s recommendations, as well as possibly extending to the treatment of cruise ships) may be the subject of dispute settlement procedures under Article 56 of the Health Regulations. The extent to which investors trigger dispute settlement provisions of BITs or investor-state agreements, and whether States resort to dispute settlement procedures under Article 56 (to arbitration under the rules of the Permanent Court of Arbitration, or to external dispute settlement processes) will become clear in coming months.

The special case of Cruise Ships

The position of cruise ships (and other vessels) requires close examination. It seems clear that the contagious nature of COVID-19 has allowed transmission within cruise ship populations at a high level, with the *Diamond Princess* being the most obvious example. The result is the unedifying sight of many thousands of cruise ship passengers in a state of international limbo, unable to land, and in some cases being denied prompt access to ports for purposes of refuelling and reprovisioning, or even allegedly the provision of appropriate medical treatment for individuals on board.

The Health Regulations deal with the position of vessels in great detail, and State parties to the WHO are bound by legal obligation to comply with those provisions.

A distinction is drawn between ships "coming from an affected area" and those which do not. Where a ship is not coming from an affected area, Article 25 requires that it be permitted to take on fuel, water and supplies, and that no health measure be applied to the vessel.

However given the number of affected areas, in the COVID-19 pandemic, the more significant provisions are those dealing with ships coming from affected areas.

Such vessels, when in transit, are governed by Article 27. That Article permits a coastal State, if evidence of a public health risk or clinical signs of infection are observed, to disinfect the vessel, and take other steps within the scope of the health Regulations to secure an "adequate level of control of the public health risk". Importantly, the vessel may be allowed to depart and must be permitted to take on fuel, water, food and supplies before departure.

By Article 28(1), a vessel must not be prevented from calling at any port of entry of a coastal State, although it may be directed to a port of entry which is more appropriately equipped to deal with the health crisis. By Article 28(2) vessels must not be refused *free pratique* (the ability to enter a port on assurance that the vessel is free from disease) on public health grounds, although the coastal State may grant *free pratique* on condition of inspection, decontamination or other necessary measures to prevent the spread of infection. The coastal State obligations under Article 28 to permit the taking on of fuel, water, food and supplies have been severely tested by the COVID-19 pandemic, given that it seems that with present medical science it is not easily possible to disinfect or otherwise deal with on board infection so as to prevent the spread of risk within the coastal State.

Notably, Article 28(6) permits an officer in command of a ship to take "such emergency measures as may be necessary for the health and safety of travellers on board". It is not clear at the date of writing whether any ships' captain has declared a mayday emergency or taken other forceful steps to ensure the health treatment of infected passengers and crew,

The operation of Article 28 is expressly made subject to Article 43. Article 43, entitled "additional health measures", permits a State to implement health measures consistent with international law in response to specific public health risks or public health emergencies of international concern which are otherwise inconsistent with (relevantly) Articles 28(1) or 28(2). Any measure which involves refusal of entry to international travellers or conveyances (including vessels) must be notified to the WHO together with the rationale for the restrictive measure.

Notably, Article 43 does not exclude the possibility of a ships' captain taking emergency measures to secure the health and safety of those on board. States are obliged under the 1979 International Convention on Maritime Search and Rescue to ensure that assistance is provided to any person in distress at sea and to provide for medical and other needs and deliver them to a place of safety.

Regrettably, it seems increasingly likely at the date of writing that vessels may have to declare states of distress in order to obtain coastal State assistance for seriously and critically ill passengers and crew. The fact that vessels are in such a predicament demonstrates with harsh reality the extraordinary tension between coastal state self-interest and obligations to those at sea.

Maritime Security Policy and the Corona virus Outbreak in different countries:

In Japan, the Ministry of Health, Labor, and Welfare first issued an announcement on the novel coronavirus on January 6, 2020, stating that there had been 59 cases of "pneumonia with no identified causative agent" in China since December 2019, 7 of which were severe. It added that there was no evidence of human-to-human transmission and no confirmed cases of infection among healthcare workers. Thailand reported its first case on January 13, and Japan on January 14, confirming that the disease had spread outside China.

By January 20, the number of infected people in Wuhan reached 198, with other cases reported in Shenzhen and Beijing. A lockdown in Wuhan was announced on January 27, as the number of cases in China jumped to 2,744, and the death toll reached 80.

The date of the lockdown was notable for national security reasons as well; China Coast Guard vessels that had been hovering in the contiguous zone off the Senkaku Islands all month suddenly disappeared. The ships had retreated in the past during stormy weather when waves reached over 2 meters high, but the weather on January 27 was cloudy, with forecasts of rain and slightly higher waves the following day. But the seas were not so rough as to force the ships to leave the scene. Could this have been related to the coronavirus outbreak?

Beijing's Maritime Security Policy since the Outbreak

As it turns out, Chinese ships remained out of sight for only four days in late January. On January 31, a day after the number of cases in China shot up to over 7,700, the World Health Organization identified COVID-19 as a "public health emergency of international concern," stopping short of calling it a pandemic. Nevertheless, on February 1, four China Coast Guard vessels reappeared off the Senkaku Islands, intruding into Japan's territorial waters on February 5. As of the end of March, there has since been a constant Chinese presence around Senkaku, with ships hovering in the contiguous zone and, at times, making incursions into Japan's territorial sea. Only on three stormy days—February 17 and 18 and March 5—have Chinese vessels been absent.

On March 11, Chinese President Xi Jinping made his first post-coronavirus visit to the city of Wuhan, the source of the infection, and declared that the virus had been brought under control. Soon thereafter, on April 3, a China Coast Guard vessel off the Paracel Islands in the South China Sea rammed and sank a Vietnamese fishing boat, prompting the US State Department to comment it was "seriously concerned" by the incident. The spokesman also reported that China was building new "research stations" on military bases it built on Fiery Cross Reef and Subi Reef in the Spratly Islands.

The Chinese aircraft carrier Liaoning sailed through the Miyako Strait between Okinawa and Miyako Islands on April 11, advancing into the western Pacific and expanding the scope of China's naval activities. The next day, the carrier sailed east and south of Taiwan and conducted military exercises in the seas southeast of the island. Commentators have noted that these activities were timed to coincide with the US Navy's reduced presence following the outbreak of the coronavirus aboard the aircraft carrier Theodore Roosevelt.

These developments demonstrate that the spread of the coronavirus has not resulted in significant changes in China's maritime security policy in the East and South China Seas.

Japan's Response

How should Japan respond to China's continued maritime provocations? Japan's ocean policy has been to uphold the rule of law and the rule-based order with the goal of establishing "open and stable seas." Based on this policy, the Japan Coast Guard (JCG) has dealt calmly and resolutely with incursions by Chinese vessels in the waters around the Senkaku Islands, protecting Japan's territorial waters and preventing an escalation of tensions. The first step, then, is to reinforce the Japan Coast Guard, which is responsible for dealing with such sensitive situations.

China has been expanding the size and armaments of its paramilitary ships, so the JCG needs to upgrade its patrol boats and aircraft. A ministerial meeting was held in 2016 with the aim of strengthening the coast guard system, and annual meetings have since been held to follow up on the steps taken and to approve new measures.

Plans for fiscal 2020 include not only additional patrol boats and aircraft but also a beefing up of the overall structure, including more personnel. To ensure a "free and open Indo-Pacific," moreover, the meeting confirmed the need to strengthen maritime law enforcement by cooperating with the coast guard agencies of regional countries and supporting their capacity building. It also emphasized the importance of maintaining and expanding the rule-based order at sea. These policies must be steadily advanced and implemented.

The spread of coronavirus infections aboard ships is wreaking havoc on ensuring adequate maritime security. In February, JCG patrol vessels transported COVID-19 patients from the Diamond Princess to area hospitals and carried test kits to the cruise ship. Fortunately, no Coast Guard personnel was found to have contracted the disease. Still, outbreaks have been reported not only on the USS Theodore Roosevelt but also on a French aircraft carrier, limiting the operation of these ships. Warships and patrol boats tend to be more cramped and have more personnel on board than cargo ships. Hygienic and health standards must be maintained at the highest levels to prevent infections from spreading quickly throughout such ships.

Italy: Is the decision to close Italian ports compliant with human rights obligations?

The Inter-ministerial Decree n. 150 of 7 April 2020 of the Italian Minister of Infrastructure and Transport, in agreement with the Ministers of Foreign Affairs, Interior and Health, has established that:

For the entire period of health emergency resulting from the spread of the COVID-19 virus, Italian ports will lack the necessary requirements to be classified "Place of Safety" under the definition of the Hamburg Convention on search and maritime rescue, for cases of rescue carried out by naval units flying a foreign flag outside the Italian SAR [Search and Rescue] area.

In short, the Decree intends to prevent all the "castaways" (in particular, migrants and asylum seekers) rescued by NGOs flying non-Italian flags from landing in Italian ports.

The measure is justified, juridically, with the declaration of a state of emergency, and politically, with the need to protect public health. The preventive effect would be threefold: first, avoidance of new outbreaks from potentially infected migrants; second, prevention of further burdens on the already overloaded national health system; third, protection of the health of migrants themselves, whom would not have adequate access to medical care in Italy due to the current crisis.

Despite these premises, there are serious doubts about the Decree's legitimacy and compatibility with human rights law.

It must first be noted that all coastal States, including Italy, are bound to rescue and assist people in distress at sea. This duty reflects international customary law and is directly applicable in the Italian legal order via art. 10 paragraph 1 of the Italian Constitution, as confirmed by the Italian Court of Cassation. Italy is also part of a series of international treaties imposing the same obligation, such as the 1974 Convention for the Protection of Human Life at Sea (Chapter V, art. 15) and the 1982 UN Convention on the law of the sea (UNCLOS) (art. 98).

Art. 19 of the UNCLOS clarifies that a ship can be considered prejudicial to security if, inter alia, it engages in the unloading of people contrary to immigration or sanitary laws. This provision is mentioned en passant in the recitals of the Decree to justify the landing ban. However, it cannot be presumed that the people in question will pose a threat to health if they are automatically rejected without medical checks. Moreover, both literal and systematic interpretation indicates that art. 19 cannot be understood as an exception to the duty to rescue.

According to the 1979 Convention on maritime search and rescue (SAR), as amended in 2004, the duty to provide relief does not end with the recovery of castaways at sea, but entails the accessory obligation to land them in a "place of safety", which is a: "Location where rescue operations are considered to terminate … where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met (Guidelines on the treatment of people rescued at sea attached to the SAR , par. 6.12)." The Decree itself is based on the premise that "people who may be rescued … should be assured of the absence of threats to their lives, the satisfaction of primary needs and access to basic services”. Therefore, the rescue obligation does not end with embarkment on the boat, which certainly cannot qualify as a safe place with medical care and basic services.

This view is confirmed by the Italian Court of Cassation: a ship at sea cannot be classified as a “place of safety”, since “not only it is at the mercy of adverse weather events, but also it does not ensure respect for fundamental human rights of rescued people” (Criminal Section III, sentence no. 6626/20). In further confirmation, the Court recalls the resolution no. 1821 of 21 June 2011 of the Council of Europe (The interception and rescue at sea of asylum seekers, refugees and irregular migrants), according to which “the notion of “place of safety” should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights”.

The Court noticed that the duty of rescue entails, in particular, the respect for the fundamental right to ask for asylum pursuant the Refugee Convention of 1951. The principle of non-refoulement (art. 33 of the Refugee Convention) is a peremptory norm and cannot be derogated under any circumstances. Such principle is also encompassed by articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention of Human Rights (ECHR). The mentioned provisions are mandatory and non-derogable, not to mention that Italy has not made the declaration of “derogation in time of emergency” ex art. 15 ECHR yet.

The principle of non-refoulement has extra-territorial applicability. As the European Court of Human Rights (ECtHR) clarified in ***Hirsi Jamaa v. Italy***, Italy is obliged to respect it even when operating rescues in the high sea. However, the question arises if the principle is triggered when castaways are rescued by non-Italian vessels in non-Italian seas, in proximity of territorial waters. Arguably, the principle of non-refoulement entails also the prohibition of “rejection of entry” or “non-admission” at the border, including at the sea. Asylum seekers are protected from refoulement also when they are located on a ship close to the State’s territorial sea and they manifest their intention to ask for international protection. By virtue of the principle or non-refoulement, States should ensure admission of asylum-seekers to their territory, at least on a temporary basis, to determine their status and protection needs.

At the very minimum, States should ensure adequate procedures at their frontiers to permit asylum application. This operation certainly cannot be carried out on ships (especially private ones), as noted by the Italian Court of Cassation. A fortiori, asylum seekers are covered by the prohibition of refoulement once they reach territorial waters, where they are under the State’s full control. In the Italian system, State duty to ensure access to asylum procedures is further strengthened by art.10 paragraph 3 of the Constitution, which imperatively stresses the right to seek asylum. The mentioned provision has been largely and univocally interpreted as granting the subjective right to enter the national territory in order to ask for asylum. Only once this right to entry has been ensured. The State will evaluate the existence of the requirements for international protection and decide on the seeker’ status accordingly. This means that blanket provisions preventing effective access to asylum procedures are illegitimate. Thus, the automatic mechanism of rejection of the Decree appears in clear violation of the national and international rules relating to international protection.

Finally, the Decree conflicts with the prohibition of collective expulsions enshrined in the Charter of Fundamental Rights of the European Union (art. 19) and Protocol no. 4 to the ECHR (art. 4), as elaborated by the case-law of the ECtHR starting from Hirsi Jamaa v. Italy: applications for international protection must be considered individually and on a case-by-case basis. The Decree, on the contrary, provides for an automatic and indiscriminate rejection, forbidding disembarkment from all non-Italian ships that have carried out a rescue in international waters, despite the ships having reached the Italian SAR zone in the meantime and therefore are subject to national jurisdiction.

It should be noted that the inter-ministerial Decree, while seriously affecting fundamental rights and peremptory norms, is formally an administrative act. In the Italian legal system, ministerial decrees are not autonomous sources of law, but secondary sources which cannot derogate from the superordinate ordinary laws or the Constitution, let alone international treaties or jus cogens. The principle of legality and hierarchy of legal sources cannot be derogated even in the name of state of emergency. Furthermore, precisely by virtue of their purely regulatory nature, administrative acts escape controls by constitutional power (can only be appealed before the administrative court under stringent circumstances). Therefore, they are easily abused to legislate on sensitive topics, while their function should be implementing primary legislative sources. It is evident that the instrument of ministerial decree is unsuitable to regulate situations affecting the right to request international protection.

There are also serious doubts about the necessity and proportionality of the measure adopted. In addition to general international law, Italian constitutional law requires emergency decrees to be adopted only in “extraordinary cases of necessity and urgency” and in compliance with the principles of proportionality, reasonableness and adequacy. As mentioned, the Decree’s objectives are three: avoid new contagions; preserve the national health system; protect migrants’ health. As for the first two goals, the Decree does not seem to be strictly required by the circumstances. It is unlikely that further disembarkments will compromise the functionality of national health structures, considering the small number of refugees rescued at sea in recent months, This number is likely to decrease, as currently there is only one NGO rescue boat patrolling central Mediterranean. Moreover, rescued migrants have not posed any threat to the national system so far. The first and only migrant positive to coronavirus has been registered on April 10th (i.e. after the imposition of the ban), among migrants who reached the Italian coast autonomously, who are not covered by the Decree.

Further, the public health objectives could be achieved more effectively by less restrictive measures. If actual epidemiological dangers were to be registered, these could be addressed with quarantine procedures and health checks, as has happened so far. Moreover, rescues by NGOs facilitate medical checks and reduce independent landings, which are likely to escape authorities’ controls or have them delayed. These arguments show that these justifications behind the Decree are, if not pretentious, at least based on unfounded concerns.

Lastly, we have noted that the ban applies only to ships flying a foreign flag. It does not sound reasonable that concerns for migrants’ health arise only in relation to the ones rescued by NGOs: if Italy cannot be considered a safe place, that would apply vis-à-vis landings assisted by the Italian Finance Police and “autonomous” landings too, which, on the contrary, continue regularly. The Decree’s premise is that “assistance and rescue to be implemented in the "safe harbour" can be ensured by the flag country." This prognostic judgment seems rather optimistic, but in fact it is impossible to presume in advance the security of foreign ports, as we do not know what the country in question will be, nor what the situation will be in that country "for the entire period of health emergency."

Rather, the evaluation of the safest port must necessarily be carried out on a case-by-case basis. It cannot be excluded a priori that the safest place is Italy, only by virtue of proclamation of state of emergency. The situation in Malta, Spain and other Mediterranean countries is certainly more critical than the situation in Italian southern regions, where all the landings happen. In any case, even if an alternative, safer harbour is identified, it is not presumable in advance that the rescuing ship will have sufficient resources to reach the country of flag. At the same time, navies and law enforcement agencies should also be aware of these threats and how they influence the private sector. When it comes to Covid-19 in particular, the response and recovery phases of the pandemic will likely stretch over many months, perhaps even years. Covid-19 is far from an average crisis and it is reasonable to assume that most contingency plans that were in place by the end of 2019 did not include the risk from a pandemic. However, the maritime community can build on its experiences and be better prepared next time.

India's Strategy for The Indian Ocean in Light of Covid-19 and Confrontation with China: Indian strategy for the Indian Ocean revolves around retaining preeminence across the body of water, tacitly seen as *India's Ocean*; a term implying if not hegemony, then at least a sort of regional leadership and regional preeminence. The External Affairs Minister Subrahmanyam Jaishankar was explicit at the Indian Ocean Conference held in the Maldives in September 2019 that India's "core interests are in Indian Ocean," that "the fact remains that where India can really make a difference is in the Indian Ocean itself," and that the Indian Ocean is for India "a natural arena for its influence and of overriding security consequence." Jaishankar went on in March 2020 to argue in a speech titled "Emerging Geopolitical Landscapes" that "where maritime security is concerned, India has emerged as a key player, especially in the Indian Ocean."

Indian strategy in and for the Indian Ocean during the 2010s has been threefold: building up its naval-maritime infrastructure (bases and support facilities), building up power projection assets, and strengthening relations with increasingly China-concerned powers. Indian strategy for the Indian Ocean during the 2010s has involved building up its naval infrastructure out from the Indian subcontinent. This has involved development of military facilities on the Lakshadweep archipelago off the western coast, but even more so on the larger Andaman and Nicobar archipelago on the other eastern side of the Bay of Bengal at the head of the Malacca Strait.

This has also involved support facilities with sympathetic partners like Oman (Duqm), Iran (Chabahar), Madagascar, Mauritius, and Singapore. A common sub-theme is India trying to avert Chinese penetration of Indian Ocean micro-island states and littorals, where China's Maritime Silk Road (MSR) is considered by Delhi as detrimental to Indian interests. In that vein, the Indian Navy has established Joint Exclusive Economic Zone surveillance exercises with the navies of the Maldives, Seychelles, and Mauritius; and Coordinated Patrols (CORPATs) with the navies of Bangladesh, Myanmar, Thailand, and Indonesia.

Indian strategy for the Indian Ocean during the 2010s also involved building up its naval assets, headed by aircraft carriers and nuclear submarines. The Indian Navy currently operates one aircraft carrier, INS *Vikramaditya* (a refurbished Soviet carrier), while the second, INS *Vikrant*, is under construction in Cochin, ready to commence her basin trials in September 2020, due for delivery in 2021, and active commissioning expected in 2022. Both vessels have a displacement of around 45,000 tons each. A third aircraft carrier, INS *Vishal*, a 65,000-ton giant with 54 aircraft, is envisaged for the longer term. India's Navy chief Admiral Karambir Singh reiterated in December 2019 that the force's long-term capability planning envisaged the induction of three aircraft carriers so that two are continuously available for deployment in the Indian Ocean Region, one by the Western Command, and one by the Eastern Command. The Indian Navy is expected to push for a grant of Acceptance of Necessity (AoN) clearance for the third carrier, the IAC- 2, soon.

This building up of India's naval assets represents internal balancing. Yet the navy's share in the defense budget declined from an 18 percent high in 2012 to a lower 13 percent by 2019-2020. Due to recent budget constraints, the requirement of 200 ships has been brought down to 175. Moreover, in February 2020 Chief of Defence Staff General Bain Rabat indicated that in competitions for resources the acquisition of new submarines might take priority over aircraft carriers.

Thirdly, Indian strategy for the Indian Ocean in the 2010s involved strengthening cooperation in the Indian Ocean with other significant external (U.S. and Japan) and internal (France, Australia, and Indonesia) actors. Diplomatic milestones for this line of effort include:

- India-U.S.: *Joint Strategic Vision for the Asia-Pacific and Indian Ocean region* (January 2015)
- India-France: *Joint Strategic Vision of India-France Cooperation in the Indian Ocean* (March 2018)
- India-Indonesia: *Shared Vision of India-Indonesia Maritime Cooperation in the Indo-Pacific* (May 2018)

All three elements of India's maritime strategy are implicit levers to constrain and manage the otherwise growing Chinese presence in the Indian Ocean. This implicit leverage was demonstrated at the start of 2020 at the Raisina Dialogue, held January 14-16, which included a panel titled "Fluid Fleets: Navigating Tides of Revision in the Indo-Pacific." On the panel, India's Chief of Naval Staff Karambir Singh sat alongside Australia's Vice Chief of the Defence Force, Vice Admiral David Johnston, Japan's Chief of Staff, General Koji Yamazaki, France's Deputy Director of Strategy at the French Ministry of the Armed Forces, Luc de Rancourt, and the U.K.'s Chief of Naval Staff, Admiral Tony Radakin. At that discussion, Admiral Singh noted of China that "they have seven to eight warships in the Indian Ocean at any given time [.…] We are watching. If anything impinges on us, we will act"; to which he gave the then-recent example of the Indian Navy escorting Chinese ships out of their sensitive Exclusive Economic Zone (EEZ) around the Andaman and Nicobar Islands in December 2019.

During 2020, two unexpected events signally affected India's maritime strategy in the Indian Ocean. In retrospect it was no surprise that the biannual Naval Commanders'

Conference held in August 2020 particularly focused on the entry and operations of "extra-regional" forces (read: China) in the Indian Ocean Region, and operational procurements. The Ministry of Defence said that the Commanders Conference "assumes greater significance in the backdrop of recent events on our northern borders [Galwan] and the unprecedented challenges posed by the COVID-19." Both of these issues are affecting India's maritime strategy for the Indian Ocean.

COVID-19 and Its Impact: COVID-19 first hit India in January 2020, with national lockdowns introduced in March, but cases were still spreading rapidly. Current figures recorded in late September listed India as having 5,487,580 confirmed cases, second only to the U.S.' 6,883,931. India's confirmed COVID-19 deaths number at 87,882 (third behind U.S.' 200,710 and Brazil's 136,895). The resulting impact of COVID-19 on Indian maritime strategy for the Indian Ocean has been fivefold.

Firstly, it disrupted basin trials of India's second aircraft carrier, INS *Vikrant*, due in September 2020, with commissioning now delayed until September 2021. Secondly, Indian regional naval diplomacy was disrupted as the biannual MILAN itineration, due to be held in March 2020, was cancelled. In one sense this was a setback for Indian naval diplomacy, yet after a record number of invites (41, but not including Pakistan or China) and acceptances (over 30), it still showed India's increased status in the Indian Ocean in 2020.

COVID-19 also meant that the INDRA exercises with Russia in September 2020 were restricted to at-sea only. Nevertheless, India's readiness (matched by Russia) to deploy two warships and a supply tanker in the Bay of Bengal indicated India's natural focus and locational advantage in these waters. They also were subtle message for China that its close links were not exclusive, and that China could not necessarily rely on Russia in any China-India conflict.

The pandemic enabled India to extend COVID-related assistance to various Indian Ocean states. This was on show in June 2020 with Mission Sagar, which India claimed was "a major milestone in India's engagement with Indian Ocean region countries." There, the landing ship INS *Kesari* was sent to the Maldives, Mauritius, Comoros, Seychelles, and Madagascar, complete with teams of healthcare professionals, medicines, and food onboard to help with pandemic response. Meanwhile, India's naval might was on show in Operation Samudra Setu (Sea Bridge), in May 2020. There, INS*Jalaswa* and INS *Magar*, dispatched from India's Southern Command at Kochi and escorted by other warships of the Western Fleet, brought back over 600 COVID-threatened Indian citizens from the Maldives.

Structurally, India slid into marked economic downturn as the COVID-19 pandemic accelerated during summer 2020. Its economy shrank 23.9 percent year-on-year in the second quarter of 2020. A 4.2 percent GDP growth for 2019-2020 (in slow decline since January 2018) is already set to be replaced by a negative 3.2 percent figure in 2020-2021. The result is that India's capitalization program is under threat, and the drive to initiate a three-aircraft carrier program is threatened with delay at best and cancellation at worst.

Galwan and its Impact: The second major challenge facing India in 2020 was deadly confrontation with China. This was sharpest at the Galwan Valley, where China objected to Indian moves up the valley. Confrontation between forces escalated in mid-June 2020, with

20 Indian soldiers reported as killed in direct fighting with Chinese troops. Eventual pullbacks of forces were halting and uneasily carried out in late July, but with further warnings coming from India on August 30. The Foreign Ministers' joint press statement released by Jaishankar and Wang Yi may have had a five-point plan of action, but hardly represents something new, and left vague calls for "new confidence building measures" without any substance. Yet clearly India's focus firmly remains on its land frontier, and the swathe of confrontation points that have opened up.

However, the extended confrontation and continuing standoff at Galwan has had an ambiguous two-fold impact on Indian strategy for the Indian Ocean. On the one hand this has contributed to a further deterioration in India-China relations, both at the government level, and in terms of wider public opinion. China's growing presence in the Indian Ocean is all the more perceived in India as a threat to Indian interests, and part of a disadvantageous encirclement policy by China and an increasingly encircled position for India. On the other hand, the extended land confrontation and growing friction along the Himalayas reinforces a landward imperative and encourages reinforcement of India's army and air force presence along its northern flank, which could come at the expense of naval acquisitions.

In the wake of Galwan, India has accelerated weapons purchases. India's Ministry of Defence announced on July 2 that "in the current situation and the need to strengthen the Armed Forces for the defence of our borders" arms procurement projects worth U.S.$5.55 billion were approved. These included long-range land-attack missile systems with a range of 1,000 kilometres and Astra missiles featuring beyond visual range capability. Both "will bolster the attack capabilities of the Navy," and "will serve as a force multiplier and immensely add to the strike capability of the Navy."

The Indian Navy argument is that Chinese aggression in the Himalayas generates the need for a stronger Indian position in the Indian Ocean, in the face of related Chinese expansion there. Even as India reinforced its troop levels on its northern flank, simultaneously in the wake of Galwan, India's navy was deploying more actively and dispatched in greater strength around the Malacca Strait. The navy thereby demonstrating India's potential to threaten China's sea lines of communication, the so-called *Malacca Dilemma* facing Beijing. The Indian Navy has also been pushing a sense of urgency for "Acceptance of Necessity" (AoN) for a third aircraft carrier, which has been pending since 2015.

Certainly, India has immediately sought to strengthen its own position in the Indian Ocean, through an extra focus on the Andaman and Nicobar Islands. The geopolitical and military value of the Andaman and Nicobar Islands remain tangible. In conjunction with the Indian littoral and the Eastern Command at Vishvakapman, India's possession of the Andaman and Nicobar Islands provides a firm enclosure of the Bay of Bengal, and a chokepoint onto the Malacca Strait.

Consequently, exercises in which several destroyers and frigates were joined by maritime patrol aircraft were conducted around the Andaman and Nicobar Islands in July 2020. Headed by the Eastern Command naval chief Rear Admiral Sanjay Vatsayan, units came from the Andaman and Nicobar Command (ANC), the Eastern Naval Command, and with some warships deployed near the Malacca Strait also taking part. Submarine hunting Poseidon-8I aircraft, complete with Harpoon Block-II missiles, torpedoes, rockets, and depth charges were dispatched from their base at INS Rajali naval air station in Arakkonam (Tamil Nadu). They were seen as sending "a signal to China" according to the Times of India on July 18.

Extending Strategic Cooperation in the Indian Ocean with France, Japan, Australia, and the U.S.

A tacit development since Galwan has been a push by India to strengthen its partnerships with other powers operating in the Indian Ocean that also have concerns about China's assertiveness. India's support from the U.S. in the Indian Ocean continued to strengthen in 2020. India was more than happy with U.S. endorsement in February 2020 in their *Strategic Convergence in the Indo-Pacific* (part of their "Vision and Principles" Joint Statement) that "the United States appreciates India's role as a net provider of security, as well as developmental and humanitarian assistance in the Indian Ocean Region." The term "net provider of security" describes India as taking a leading regional role and providing security for others beyond India's own immediate needs. Delivery of advanced American-made Sikorsky anti-submarine helicopters, with China in mind, was accelerated in May 2020. July 2020 also witnessed naval drills with the *Nimitz* Carrier Strike Group in the Andaman Sea.

India's relationship with France has also deepened. The two navies conducted joint patrols around Reunion in March 2020. These joint activities with France represent an operationalization of the Logistics Support Agreement (LSA) that India signed with France in 2018. The LSA has expanded the presence and the type of naval operations that the Indian Navy is able to undertake in the Southwestern Indian Ocean, given that France has military facilities on the islands of La Réunion, Mayotte, and the French Southern and Atlantic Lands – all of which could now be used by India. India can also now tap into France's base at Djibouti. This in effect further extends India's strategic footprint and effective area of operation in the Indian Ocean further southward and westward.

June 2020 saw Indian Navy ships INS *Rana* and INS *Kulish* exercising with the Japanese Navy ships, JS *Kashima* and JS*Shimayuki*. A significant logistics development was the Acquisition and Cross-Servicing Agreement (ACSA) signed in September 2020 between India and Japan. This will enable closer cooperation with Japan in the Indian Ocean, with Japanese access to the Andaman and Nicobar islands being likely, reciprocated with Indian access to Japan's base at Djibouti.

Relations with Australia moved forward noticeably in 2020. Their summit in June 2020 witnessed their joint *Shared Vision for Maritime Cooperation in the Indo-Pacific*. It also witnessed their Mutual Logistics Support Agreement (MLSA). From India's point of view this enables Indian use of military facilities on Australian territory in the Eastern Indian Ocean, notably Christmas Island and Cocos Island. This in effect further extends India's strategic footprint and effective area of operation in the Indian Ocean further eastward. INS *Sahyadri* and INS *Karmuk* also carried out anti-air bilateral exercises with the Australian Navy in the eastern Indian Ocean in September.

India has also further strengthened its strategic position in the Indian Ocean with two new tri-laterals. The first India-France-Australia trilateral dialogue was held in September 2020. Harsh Vardhan Shringla, Foreign Secretary of India, met French and Australian counterparts, held virtually due to the pandemic. Their stated focus was "economic and geostrategic challenges and cooperation in the Indo-Pacific," explicitly with regard to the pandemic, but also implicitly with regard to China. Their mutual support for the Indian Ocean Regional Association (IORA) and the Indian Ocean Commission (IOC) was stated, as was their common focus on "synergizing their respective strengths to ensure a peaceful, secure, prosperous and rules-based Indo-Pacific region." The advantage for India in this new minilateral is that it reduces naval dependence on just cooperation channeled via the United States.

Another new minilateral in the offing. In early September it was announced that External Affairs Minister Jaishankar would be meeting for an upcoming meeting with his Indonesian and Australian Foreign Minister counterparts, with agreement set on maritime cooperation in the Indian Ocean.

A final impending effect of India's confrontation with China at Galwan is a sense of India now withdrawing its previous hesitations over allowing Australia to participate in the trilateral MALABAR naval exercises currently held between India, the U.S., and Japan. The expected invite to Australia for the next MALABAR exercise in the Bay of Bengal, in Fall 2020, represents Indian acceptance of the so-called "Quad" taking on some military dimensions.

Paradoxically, though COVID-19 has weakened India's economic ability to fund its naval infrastructure and assets program for the Indian Ocean, it has enabled India to strengthen its links with Indian Ocean micro-states through the humanitarian assistance delivered by the navy. Meanwhile, land confrontation with China at Galwan has encouraged India to deepen its military links with other maritime powers operating in the Indian Ocean. In an unstated but evident balancing fashion, this is enabling India to improve its maritime position in the Indian Ocean vis-à-vis China.

Conclusion: The effects of this pandemic will continue to impact the regional and global maritime security calculus not only in the immediate future but for some years to come. As economies flounder under its onslaught, the socio-economic challenges faced by nations will take precedence and defence budgets may see a reduction as the world braces to effect an economic recovery. New military acquisitions and modernisation programmes may have to be re-prioritised which may affect certain capabilities, the loss of which could have long term effects. There may be a reduction in the deployment footprint due to logistic constraints which could also impact operational turn-around times of ships and submarines. Multinational and bilateral exercises which enhance interoperability and cooperative engagement may have to be truncated which could impact response capability against transnational threats and threats to the maintenance of good order at sea. The effect on a navy's support functions ashore is also a matter of concern. Curtailment of training programmes, delays in induction of personnel, movement of personnel on postings and for various duties are other areas of concern. Assisting the state in combating the pandemic will lead to a diversion of resources, material and human, meant otherwise for the front line. The impact of this virus is, therefore, going to affect the operational preparedness in many direct and indirect ways for which countries will have to reorient their response strategies for their other roles and missions.

Maritime security includes much more than just the role of navies. It includes safe passage of trade and commerce, the security of energy flows, food security, the economic effects on the maritime industry, sustainable ocean development, effect on the livelihood of coastal communities and many more such issues, each of which is being affected by the current crisis. It will take a visionary and well-coordinated all-of-government approach to address these comprehensively and optimally. The extent to which nations can measure up to this task will determine their credibility and strategic posture.

There is a view that the post-COVID world order could look quite different as the quality of the response by various countries thus far has cruelly laid bare their vulnerabilities and governance deficits. Economically stressed countries may become vulnerable to external pressures. To meet their immediate concerns, they may be tempted to seek financial largesse from more powerful countries which could in the longer term lead to sovereignty issues. India, as the pre-eminent maritime power in the Indian Ocean and a net security provider in the region has to put in place an inclusive and comprehensive economic capacity building multi-sectoral initiative in its strategic neighbourhood and adequate security capacity and capability to ward off predatory interests which may try to exploit regional vulnerabilities.