



Maritime Safety and Security Law Journal

2016

Issue 2

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Looking at the Montreux Document from a Maritime Perspective

Anna PETRIG¹

Abstract

The Montreux Document on Private Military and Security Companies was drafted with a view to apply to land-based settings. However, one of the prime markets of the private security industry today is the protection of merchant ships from criminal threats like piracy and armed robbery at sea. This warrants a discussion on the pertinence and applicability of the Montreux Document to security services provided in the maritime environment. Accordingly, this article engages a maritime perspective, exploring the implications that the maritime context and its specificities have on the underlying assumptions and concepts of the Montreux Document – most notably the three-fold structure of addressees, which are the Territorial, Contracting and Home States – as well as on selected substantive rules. It concludes that the Montreux Document is pertinent to maritime security services, but that it needs to be interpreted specifically with regard to its effective application at sea.

Keywords

Montreux Document, private security, protection of merchant ships, private military and security companies (PMSC), privately contracted armed security personnel (PCASP)

1. Applying an instrument geared to land-based operations at sea?

The Montreux Document on Private Military and Security Companies of 17 September 2008² is the first document of international significance setting out how international law applies to private military and security companies (PMSCs). It was the result of an initiative launched jointly by Switzerland and the International Committee of the Red Cross (ICRC). It is currently supported by 53 states and three international organizations: the European Union, the Organization for Security and Co-operation in Europe and the North Atlantic Treaty Organization.³

1 Dr. iur. Anna Petrig, LL.M. (Harvard) is a post-doctoral researcher and lecturer at the University of Basel, Switzerland. This article originated in a presentation given at the second meeting of the Montreux Document Forum (MDF <www.mdforum.ch> accessed 7 March 2016), which took place in Geneva on 29 January 2016. The MDF provides a venue for informal consultation among Montreux Document participants. The opinions expressed in this article are the author's alone and do not necessarily reflect those of the MDF participants. The author would like to thank the (anonymous) reviewers for the valuable comments they offered during the writing of this article.

2 'The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict' (17 September 2008) <www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf> accessed 7 March 2016 (Montreux Document).

3 For details, see Montreux Document Forum (MDF), 'Participating States and International Organisations' <www.mdforum.ch/en/participants> accessed 7 March 2016.



The Montreux Document pursues a restatement of the law approach. Hence, it does not endeavour to establish new rights or obligations but rather to sketch out existing law specifically with regard to the use of PMSCs.⁴ The document contains two parts: Part One recalls existing obligations of states under international law regarding PMSCs, while Part Two contains good practices, which provide guidance and assistance to states in ensuring respect for international law when dealing with PMSCs.⁵ The Montreux Document is geared towards private security services provided on *land*: primarily in armed conflicts⁶ but also in post-conflict situations and other comparable situations.⁷ Indeed, at the time of its drafting and adoption, which took place between 2006 and 2008, the prevalence of private security in the maritime context was marginal. It was only when Somali-based piracy reached its peak that merchant vessels passing through piracy-affected areas started to rely heavily on private security services.⁸ Today, the protection of merchant ships from criminal threats like piracy and armed robbery at sea is one of the top business sectors of the private security industry.⁹

This expansion in terms of the operational area of PMSCs – from primarily dry land to including the oceans – triggered a debate on the applicability and pertinence of the Montreux Document in the maritime context. It is against this background that the Montreux Document Forum agreed in 2014 to establish a working group on the use of private security companies in the maritime environment. The so-called Maritime Working Group shall serve as a forum to discuss the relevance of the Montreux Document to maritime security, the interaction with relevant international organizations and initiatives on maritime security and ways to assist states in implementing the instrument in that specific context.¹⁰ At the time of writing, the Maritime Working Group had not yet started its work

4 Montreux Document (n 2) Preface (2) and (4).

5 *ibid* Preface (2).

6 *ibid* Preface (2).

7 *ibid* Preface (5) and Part Two (Introduction).

8 It is estimated that in 2014, between 35 and 40 per cent of vessels transiting the area prone to Somali-based piracy relied on PMSCs. In the Gulf of Guinea, the number of vessels embarking international PMSC teams is lower (7.5 to 12.5 per cent) because most territorial states prohibit the use of foreign PMSC on board ships entering their territorial waters; instead, merchant ships (35 to 40 per cent) rely on local armed teams, which are made up of coastal states' naval or maritime police personnel and are regularly (in 56 to 76 per cent of the cases) supplemented by an unarmed security liaison officer from an international PMSC: Oceans Beyond Piracy, 'The State of Maritime Piracy Report 2014' (2015) 5 and 42-43 <<http://oceans-beyondpiracy.org/sites/default/files/attachments/StateofMaritimePiracy2014.pdf>> accessed 7 March 2016.

9 As of 7 March 2016, out of the 98 members of the International Code of Conduct Association (ICoCA), 51 members were operating on land, 20 members were operating in the maritime environment and 27 members pursued both maritime and land-based operations (e-mail correspondence with the Geneva Centre for the Democratic Control of Armed Forces of 7 March 2016; on file with the author). It is important to note that not all signatories to The International Code of Conduct for Private Security Service Providers (9 November 2010) <http://icoca.ch/en/the_icoc> accessed 7 March 2016 (ICoC), which is the most important self-regulatory instrument of the industry, are members of the Association. To become a member of the Association, the signatory company must have been certified by the Association, which is a public statement that the security company's policies and systems have been independently reviewed and found to be in compliance with the ICoC (see ICoCA, 'Get Involved' <www.icoca.ch/en/get-involved> accessed 7 March 2016).

10 Montreux Document Forum (MDF), 'Working Practices of the Montreux Document Forum as adopted on 16 December 2014: Annex to the Chair's Summary of the Constitutional Meeting of the Montreux Document Forum (MDF) of 16 December 2014' (17 February 2015) 7 and 13 <www.mdforum.ch/pdf/2014-12-16-Chairs-Summary.pdf> accessed 7 March 2016.



as a chair had yet to be named.¹¹

The following analysis looks at the Montreux Document from a maritime perspective, thus transposing several of its underlying assumptions and concepts to the maritime setting. This shall provide a clearer idea of the pertinence of this instrument for security services provided at sea and how it arguably needs to be interpreted, refined or clarified in order to match the specificities of the maritime context.

2. Focusing on security rather than military services: what are the implications?

The definition of PMSCs in the Montreux Document provides a good starting point for an analysis of the instrument's relevance for maritime security services. PMSCs are defined as 'private business entities that provide military and/or security services'. It further specifies that military and security services 'include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places'.¹² This definition is pertinent to the maritime context, where private armed guards protect individual (merchant) ships or convoys of ships and their crews from criminal behaviour, namely acts qualifying as piracy or armed robbery at sea.

However, for present purposes, it is important to bear in mind that the focus is on the provision of *security* rather than *military* services. It is about protecting (merchant) ships in areas where – due to, *inter alia*, armed conflict, a post-conflict situation or another comparable situation – security is not sufficiently ensured by the competent state(s)¹³ and where ships rely on private persons or entities¹⁴ to fill the resulting security gaps. Thus, in the maritime context, the 'M' in the abbreviation PMSCs would generally stand for *maritime* rather than for *military*; as a result, this is how the acronym is used in the paper at hand. The fact that such services are not provided in a conduct of hostilities context, but rather in situations where the law enforcement activities of the competent state(s) are insufficient to guarantee safe passage in a given maritime area, has implications on the pertinence of the different bodies of law referenced by the Montreux Document.

As regards the references in Part One of the Montreux Document recalling obligations of states under international law, they are relevant insofar as they pertain to general international law or hu-

11 Montreux Document Forum (MDF), 'Working Groups' <<http://mdforum.ch/en/working-groups>> accessed 7 March 2016.

12 Montreux Document (n 2) Preface (9.a).

13 The definition of 'complex environment' (ie the area where PMSC services are provided) in the ICoC (n 9) Section B, quite accurately reflects the idea that PMSCs are filling a security gap left by the competent state authorities: 'Complex Environments – any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the *capacity of the state authority to handle the situation is diminished, limited, or non-existent*' (emphasis added).

14 In this article, the focus is on private security personnel *embarked* on the ship to be protected; however, it also occurs that PMSCs *escort* the ship to be protected with their own vessels.



man rights law specifically,¹⁵ while the references to international humanitarian law¹⁶ are, as a general rule, not pertinent to the provision of security services at sea.¹⁷ The good practices contained in Part Two are not only geared towards situations of armed conflicts, they also provide, in the words of the Montreux Document, ‘useful guidance for States in their relationship with PMSCs operating outside armed conflicts’.¹⁸ Hence, most good practices are – unless referring explicitly to international humanitarian law¹⁹ – of great significance in the provision of private security at sea to protect ships from criminal threats.

3. The three-fold structure of addressees from a maritime perspective

The Montreux Document follows a three-fold structure distinguishing between obligations and good practices addressed to Contracting States, Territorial States and Home States.²⁰ This section discusses what meaning these three key concepts could have when viewed through a law of the sea lens. Thereby, it is necessary to be aware of at least two features of private security provided at sea.

First, the number of jurisdictions involved in situations where ships rely on private security is generally higher as compared to a classical land-based setting, such as the hiring of a private security company by a state to protect its embassy in a third state. As an example: a merchant ship flying the flag of Panama and owned by a Greek company contracts a PMSC incorporated in Switzerland whose personnel (nationals of different states) embarks at an Italian port. After navigating the Suez Canal, the ship passes through the territorial seas of various states, continues its journey on the high seas where the armed guards on board successfully ward off a violent act against the ship, before it enters the territorial waters of Kenya to call port at Mombasa where the armed guards are disembarked. A second feature is that not only is there more jurisdictions involved than would be in a land-based context, but there are also important non-state actors involved, notably ship-owners, ship

15 See, eg, Montreux Document (n 2) Part One (Statements 4, 6, 7, 8, 10, 12, 15 and 17).

16 See, eg, *ibid* Part One (Statements 2, 3, 9, 13 and 14).

17 See Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 131-35 on the inapplicability of international humanitarian law to counter-piracy operations off the coast of Somalia and in the Indian Ocean. These findings are, as a general rule, also valid for counter-piracy operations led or to be led in other maritime areas where piracy or armed robbery at sea occurs. See also Montreux Document (n 2) 39, stating that ‘fighting piracy is best understood as a matter of law enforcement (and not of armed conflict)’.

18 *ibid* Part Two (Introduction).

19 Most good practices do not refer to international humanitarian law in an isolated fashion but rather mention this body of law together with relevant national law and human rights law. The reference to violations of international humanitarian law in the Montreux Document (n 2) Good Practices (6.a, 32.a and 60) are nevertheless pertinent because they relate to the past conduct of PMSCs and their personnel, which is relevant for the assessment of whether to grant authorization.

20 While these three categories of states are the main addressees of the Montreux Document, it is important to note that the instrument also restates the obligations of ‘all other States’ [*ibid* Statements (18-21)]; this category notably encompasses the state of nationality of PMSC personnel. Furthermore, it sets out the obligations of PMSCs and their personnel [*ibid* Statements (22-26)].



charterers and shipmasters. The following section provides some thoughts on what these features of maritime-based security operations imply for the three-fold structure – Territorial, Contracting and Home States – on which the Montreux Document rests.

3.1 Implications for the concept of ‘Territorial State’

The notion of ‘Territorial State’ is defined in the Montreux Document as the state ‘on whose territory PMSCs operate’.²¹ This definition raises various issues, which are discussed in the following.

3.1.1 Territory: jurisdiction rather than a portion of land

First of all, clarification is needed as regards the word ‘territory’ in the Montreux Document’s definition of a Territorial State. The notion could, on the one hand, be understood as a geographical concept, referring to a portion of land. However, such a reading of ‘territory’ does not fit the situation where PMSCs operate on board ships: the view expressed by the Permanent Court of International Justice in the *Lotus* case in 1927 that ‘[v]essels on the high seas form part of the territory of the nation whose flag they fly’²² is no longer current doctrine. Hence, ships nowadays are not considered to be floating parts of a state’s territory.²³ In a legal context, the word ‘territory’ could, on the other hand, also denote jurisdiction, i.e. the competence to exercise legislative, executive and judicial functions.²⁴ This seems a more appropriate interpretation in the maritime context. As Brownlie encapsulates it: ‘[a]bstract discussion as to whether ships ... are ‘territory’ lacks reality, since in a legal context the word denotes a particular sphere of legal competence and not a geographical concept.’²⁵ Hence, it is submitted that the word ‘territory’ in the definition of a Territorial State in the Montreux Document does not refer to a portion of land but must be understood as jurisdiction.²⁶ The Territorial State is thus the state under whose jurisdiction a PMSC operates.

3.1.2 Who has jurisdiction: the flag, coastal or port state?

If, in the present context, territory means jurisdiction, the following question thus arises: which state has jurisdiction over a given vessel with shipboard private security? The notion of ‘Territorial State’, i.e. the state under whose jurisdiction a PMSC operates, can refer to different categories of

21 *ibid* Preface (9.d).

22 *The Case of the S.S. ‘Lotus’ (France v Turkey)* [1927] Series A No 10 PCIJ Rep 4 at 9.

23 Rainer Lagoni, ‘Merchant Ships’ (last updated January 2011) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 42.

24 Dolliver Nelson, ‘Maritime Jurisdiction’ (last updated January 2010) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 1.

25 Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 113.

26 Montreux Document (n 2) Part One (Statement 13): ‘In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.’ This statement supports such a reading of the notion of ‘territory’.



states in the maritime context.

On one hand, there is the situation where the ship is travelling on the high seas – that is, in an area under no state jurisdiction.²⁷ To prevent a jurisdictional void that ‘would lead to chaos’²⁸ on the high seas, the principles of nationality of ships and the jurisdiction of the flag state over ships flying its flag have been introduced. According to the second sentence of Article 91(1) UNCLOS, ships have the nationality of the state whose flag they are entitled to fly.²⁹ Among other functions, the nationality of a ship indicates which state is permitted and obliged³⁰ under international law to exercise jurisdiction over the vessel.³¹ Hence, when a ship protected by private armed guards is travelling on the *high seas*, the Territorial State in the sense of the Montreux Document – i.e. the state on whose territory the PMSC operates (or the state having jurisdiction over the ship on which the PMSC operates) – is the flag state, which enjoys exclusive jurisdiction subject to certain exceptions.³²

While flag states have prescriptive and enforcement jurisdiction over the ship flying its flag irrespective of its location, the jurisdiction may be concurrent with that of the coastal or port state as soon as the ship enters the internal or territorial waters of a third state or calls into port there.³³ Hence, as

27 Douglas Guilfoyle, ‘The High Seas’ in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 203; Doris König, ‘Flags of Ships’ (last updated April 2009) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 1.

28 ILC, ‘Articles concerning the Law of the Sea with commentaries’ in ‘Report of the International Law Commission covering the work of its eighth session’ (23 April-4 July 1956) UN Doc A/3159 279.

29 See also the almost identically worded Art 6(2) of the 1958 Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11. A few states are party to this instrument alone (eg the United States) but most are party to both it and the UNCLOS, which had 167 state parties as of February 2016. Therefore, this paper concentrates on the UNCLOS; references to the 1958 Convention on the High Seas remain incidental.

30 Art 94 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

31 On flag state rights and duties, see Richard Barnes, ‘Flag States’ in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 313-15; König (n 27) paras 16-17.

32 Barnes (n 31) 312; Guilfoyle, ‘The High Seas’ (n 27) 209, stresses that the term ‘exclusive jurisdiction’ used in Art 92(1) UNCLOS may be misleading: the flag state has exclusive *enforcement* jurisdiction (subject to exceptions based on consent, treaty law and custom) over ships on the high seas flying its flag. However, this does not prevent other states from exercising their *prescriptive* jurisdiction and to regulate the conduct of their nationals on board a foreign ship. Hence, the state of nationality of PMSC *personnel*, which falls under the category of ‘all other States’ of the Montreux Document [see (n 20)], retains the power to regulate conduct of PMSC personnel operating on board ships flying the flag of a state that is different from the state of nationality of the private security personnel. Also, the Home State, ie the state of incorporation of the *company* may have concurrent jurisdiction with the flag state; see below (3.3).

33 Barnes (n 31) 311; König (n 27) para 30. Bevan Marten, ‘Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation’ in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 112, suggests that even if – from a geographical point of view – a state exercising port state jurisdiction is also a coastal state, the two forms of jurisdiction must be discussed as separate concepts for at least three reasons. First, port state jurisdiction only relates to vessels located within the state’s territorial jurisdiction, while coastal state jurisdiction may extend to maritime zones not under territorial jurisdiction. Second, while UNCLOS governs coastal state jurisdiction in detail, the treaty is more or less silent on port state jurisdiction. Third, while port state jurisdiction is a result of a ship’s voluntary submission to the state’s jurisdiction, coastal state jurisdiction is closely associated with the concept of freedom of navigation and innocent passage.



soon as a ship with private security personnel on board enters waters under the jurisdiction of the port or coastal state, these states are also Territorial States in the meaning of the Montreux Document and can exercise jurisdiction over the ship. And this situation of concurrent jurisdiction, which is no different from jurisdictional overlaps in a land-based context, leads to the question: which state(s) – the flag, coastal and/or port state – are competent or obliged to fulfil the international obligations and good practices set forth by the Montreux Document?

3.1.3 The law of the sea allocates jurisdiction in various cases

The law of the sea (similar to general international law) lacks a rule stipulating that two or more national legal orders cannot apply in the same space at the same time to the same facts. However, the law of the sea contains various rules working towards the exclusion of jurisdiction in a given subject matter, which would otherwise be available.³⁴ Concretely, the law of the sea divides the waters into different maritime jurisdictional zones, such as territorial waters, the contiguous zone, the Exclusive Economic Zone and the high seas. And for each of these zones, it distributes powers between the flag, coastal and port states – a regime that carefully balances the different interests involved. States are bound to comply with these rules allocating jurisdiction.³⁵ Yet, in practice, states tend to assert maritime jurisdictional claims, which are inconsistent with the distribution of authority in the law of the sea.³⁶ Such excessive jurisdictional claims are on the rise in the realm of private shipboard security: various coastal states tend to regulate the use of PMSC on board merchant vessels passing through their territorial waters beyond what is permitted under international law.³⁷

Notwithstanding excessive jurisdictional claims, which not only occur at sea but also on land, the law of the sea rules allocating jurisdiction to either the flag, port and/or coastal state must be taken into account when deciding which category of states the Montreux Document refers to when assigning obligations to the Territorial State or when setting out good practices for the Territorial State. This issue is illustrated in the following by using two examples.

3.1.3.1 Regulating the possession and use of firearms by PMSC personnel

According to the Montreux Document, it is good practice for the Territorial State to enact rules on the possession of weapons by PMSCs and their personnel.³⁸ The question thus arises whether the flag, coastal and/or port state – all Territorial States in the eyes of the Montreux Document – have the power to regulate the mentioned issue under the law of the sea.

³⁴ Guilfoyle, 'The High Seas' (n 27) 210.

³⁵ James Kraska, 'Excessive Coastal State Jurisdiction: Shipboard Armed Security Personnel' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 168-69: most of these rules, which are contained in the UNLCOS, entered into customary international law and thus bind all states.

³⁶ *ibid* 167-68.

³⁷ *ibid*; see also below (3.1.3.1).

³⁸ Montreux Document (n 2) Good Practice (44).



As per Article 94(1) UNCLOS, every flag state is required to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters.’³⁹ Since flag state jurisdiction is exclusive (subject to limited exceptions) this rather ambiguous wording must be interpreted in a broad fashion – otherwise regulatory gaps will result. Hence, the notion of ‘jurisdictions and control’ refers to all types of jurisdiction, i.e. enforcement and adjudicative jurisdiction but also prescriptive jurisdiction (to which the mentioned good practices allude).⁴⁰ Furthermore, the wording ‘administrative, technical and social matters’ is to be construed broadly to include any matter affecting vessel operations.⁴¹ Article 94(2) and (3) UNCLOS lists – in an indicative rather than exhaustive manner⁴² – subject matter with regard to which the flag state shall take measures to ensure safety. Among them figure ‘equipment’ and ‘manning of ships’⁴³ – arguably, regulation of the possession and use of firearms by private security personnel on board merchant ships are covered by these notions. Lastly, even though Article 94 UNCLOS, the key provision on flag state duties, is located in the part of the UNCLOS pertaining to the high seas, its application is not limited spatially. Hence, the duty to effectively exercise prescriptive jurisdiction over national ships applies regardless of the maritime area in which the vessel is located.⁴⁴ In light of this interpretation, the flag state is not only allowed but obliged to enact rules pertaining to the possession and use of arms on board ships flying its flag, which apply irrespective of the actual locus of the ship.

To what extent does the law of the sea allow the port or coastal state – states that, next to the flag state, qualify equally as Territorial States in the meaning of the Montreux Document – to also regulate the issue? In other words, are port or coastal states allowed or even obliged to enact rules on the possession and use of firearms as the good practices suggest for Territorial States, or are they actually prohibited from doing so? According to the law of the sea, each state, whether coastal or landlocked, enjoys the right of innocent passage through the territorial sea of a third state.⁴⁵ The term ‘passage’ includes traversing a territorial sea without entering internal waters or proceeding to or from internal waters.⁴⁶ The passage is qualified as ‘innocent’ as long as it is not prejudicial to the peace, good order or security of the coastal state.⁴⁷ It is assumed for present purposes that mere presence of arms or armed guards on board a private ship, as well as the use of force and firearms in self-defence, are

39 See also Art 5(1) Convention on the High Seas.

40 Barnes (n 31) 314.

41 *ibid* 314.

42 *ibid*; this accrues from the words ‘in particular’ and ‘*inter alia*’ in Art 94(2) and (3) UNCLOS.

43 Art 94(3)(a) and (b) UNCLOS.

44 Barnes (n 31) 314.

45 Art 17 UNCLOS.

46 Art 18(1) UNCLOS; Kari Hakapää, ‘Innocent Passage’ (last updated May 2013) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 6; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer 2006) 148-52.

47 Art 19(1) UNCLOS.



innocent activities in the meaning of Article 19 UNCLOS.⁴⁸ Given that innocent passage is a cornerstone of the law of sea since it ensures freedom of navigation, Article 21 UNCLOS limits the coastal state's competence to enact rules pertaining to innocent passage in two ways.

First, Article 21(2) UNCLOS prohibits the coastal state from regulating innocent passage in one aspect, which is the 'design, construction, manning or equipment of foreign ships'⁴⁹ unless these domestic rules are giving effect to generally accepted international rules or standards.⁵⁰ Such *generally accepted* regulations, however, do not exist regarding the possession and use of firearms by private security personnel on board merchant ships.⁵¹ Of the four areas (design, construction, manning and equipment) where coastal states are divested of legislative power, the subject of armed security personnel on board merchant ships is arguably covered by the notion of 'manning of ships'. The rationale behind prohibiting the coastal state from enacting rules on the manning of ships (unless they give effect to generally accepted international standards) is to 'protect the integrity of global maritime navigation'.⁵² If every coastal state were free to enact its own manning standards, the resulting plethora of (potentially conflicting) coastal state regulations would hamper the freedom of navigation.⁵³ From this rationale follows that the prohibition to legislate mainly relates to manning standards, to which a ship cannot adjust during a voyage⁵⁴ and which would, *de facto*, deprive a ship of its right of innocent passage. Private armed guards can, at least theoretically, be disembarked for a certain passage and arms be stored and sealed on board the ship while passing through foreign territorial waters or even on a ship remaining on the high seas that functions as an arms depot.⁵⁵ Hence, having armed guards on board the ship is arguably not an unchangeable circumstance, and regulation by the coastal state is thus not excluded *per se* under Article 21(2) UNCLOS.⁵⁶

We now turn to the second limitation of the coastal state's competence to regulate innocent passage. If we assume that the coastal state is not prohibited as such from regulating PMSC personnel on board foreign-flagged ships passing through its territorial sea under paragraph 2 of Article 21 UNCLOS, it can only do so with regard to the subject matter exhaustively listed in paragraph 1 of

48 For a detailed analysis, see Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62(3) ICLQ 667, 679-83; Kraska (n 35) 180, reaches the same conclusion.

49 Yoshifumi Tanaka, 'Navigational Rights and Freedoms' in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 543; König (n 27) para 37.

50 Art 21(2) UNCLOS.

51 Doris König and Tim Salomon, 'Private Sicherheitsdienste auf Handelsschiffen - Rechtliche Implikationen' (März 2011) 13 <www.maritimesecurity.eu/fileadmin/content/news_events/workingpaper/PiraT_Arbeitspapier_Nr2_2011_Koenig-Salomon.pdf> accessed 1 February 2016.

52 Satya Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary - Volume II: Articles 1 to 85; Annexes I and II; Final Act, Annex II* (Martinus Nijhoff 1993) 201, para 21.11(f).

53 Nelson (n 24) para 11; Erwin Beckert and Gerhard Breuer, *Öffentliches Seerecht* (de Gruyter 1991) 116, para 313.

54 König and Salomon (n 51) 13; König (n 27) para 37.

55 On so-called floating armouries, see Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (n 48) 686-87.

56 König and Salomon (n 51) 13.



the provision and its regulation must be in conformity with the UNCLOS and other rules of international law.⁵⁷ While several subject matters listed in Article 21(2) UNCLOS clearly do not pertain to the issue of armed guards on board merchant ships,⁵⁸ the ‘safety of navigation and the regulation of maritime traffic’⁵⁹ and ‘the prevention of infringements of the customs ... laws and regulations of the coastal State’⁶⁰ seem potentially relevant. The use of armed guards arguably does not fall within the ambit of ‘safety of navigation and regulation of maritime traffic’. The term ‘safety of navigation’, which also appears in other provisions of the UNCLOS,⁶¹ refers, *inter alia*, to the construction, equipment, labour conditions and seaworthiness of the ships⁶² and thus hardly relates to PMSC personnel on board merchant vessels.⁶³ The coastal state further possesses the competence to legislate regarding innocent passage and ‘the prevention of infringement of the customs ... laws and regulations of the coastal State’.⁶⁴ Legislation ensuring that arms on board private ships passing through territorial waters are in line with customs laws and regulations thus seems to be allowed.⁶⁵

In sum, the law of the sea sets narrow boundaries on the power of a coastal state to enact rules relating to the possession of arms on board merchant ships passing through its territorial waters – arguably, the competence is limited to issuing rules pertaining to customs matters.⁶⁶ Hence, while a flag state is *obliged* under the law of the sea to enact rules on the possession and use of arms by private security personnel embarked on ships flying its flag (as Good Practice 44 of the Montreux Document suggests), a coastal state is *not permitted* to regulate these issues generally and broadly, but only with regard to customs matters. Meanwhile, the law of the sea does not contain a limitation on prescriptive jurisdiction similar to Article 21 UNCLOS for port states. And this is not an oversight but rather reflective of the fact that a port state should have a lot of leeway on how to regulate vessels visiting its

57 See the introductory sentence of Art 21(1) UNCLOS.

58 Art 21(1)(b)-(g) UNCLOS; they are therefore not considered in any more detail in the following.

59 Art 21(1)(a) UNCLOS.

60 Art 21(1)(h) UNCLOS.

61 See Arts 22(1)(a), 39(3)(a), 42(1)(a), 60(3) and 225 UNCLOS.

62 See, eg, Art 34 of the ILC’s Articles Concerning the Law of the Sea and the related commentary, which deals with ‘safety of navigation’ and provides an idea on how the term is understood: ILC (n 28) 280.

63 Reaching the same conclusion: König and Salomon (n 51) 13.

64 Art 21(1)(h) UNCLOS.

65 This finding pertains to *prescriptive* jurisdiction only; another issue is the *enforcement* of customs rules. While enforcement jurisdiction over vessels bound for or leaving a port [on port state jurisdiction and customs matters, see Erik Molenaar, ‘Port State Jurisdiction’ (last updated April 2014) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 1] seems rather uncontested, its existence is disputed as regards vessels simply transiting territorial waters or located in the contiguous zone [see, eg, Talia Einhorn, ‘Customs Law, International’ (last updated June 2014) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 12, affirming enforcement jurisdiction in these zones].

66 This finding contrasts with the practice of various coastal states to broadly regulate the use of arms and armed guards on board merchant ships – even though the law of the sea suggests the power to legislate to be much more limited: see Petrig, ‘The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates’ (n 48) 685-86.



ports. Such legislation does not hamper the right to innocent passage.⁶⁷ In sum, this division of competencies between flag, port and coastal states anchored in the law of the sea would have to be taken into account when discussing the applicability of the Montreux Document in the maritime context.

3.1.3.2 Ensuring criminal accountability for offences committed by PMSC personnel

A second example suggesting that the concept of ‘Territorial State’ has to be refined for the maritime context – i.e. that a differentiation between obligations and good practices of the flag, coastal and port states is necessary – provides the issue of ensuring criminal accountability for offences committed by a PMSC or its personnel.

Good Practice 49 of the Montreux Document recommends that Territorial States ‘provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel’. Furthermore, Territorial States are under an obligation to investigate misconduct by PMSCs and their personnel⁶⁸ and to investigate and prosecute crimes under international law.⁶⁹ This leads to the question: what are the conditions under which the flag, coastal or port state is competent to establish and exercise criminal jurisdiction over offences committed by a PMSC or its personnel on board the merchant ship it is protecting? The law of the sea contains various rules aimed at resolving positive jurisdictional conflicts in the area of criminal law between the flag state and the port or coastal state. Two specific jurisdictional rules limiting the coastal and port states’ competence to enforce their criminal laws in favour of the flag state’s criminal jurisdiction deserve mention.

First, Article 27 UNCLOS limits the *coastal* state’s competence to enforce violations of its domestic criminal law.⁷⁰ While the coastal state has criminal jurisdiction over ships bound for or leaving its internal waters,⁷¹ its criminal jurisdiction 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*’.⁷² However, the provision lists four exceptions where the coastal state can enforce its criminal law, including ‘if the consequences of the crime extend to the coastal State’⁷³ and ‘if the crime is of a kind to disturb the peace of the country

67 Marten (n 33) 111-12.

68 Montreux Document (n 2) Part One (Statement 10).

69 *ibid* Part One (Statement 12).

70 According to König (n 27) para 37, it follows from Art 27 UNCLOS, pertaining to the criminal jurisdiction of the coastal state over foreign ships, that the coastal state’s criminal law extends to the territorial sea. The applicability of the coastal state’s (criminal) law also follows from the fact that the sovereignty of the coastal state extends, beyond its land territory and internal waters, to the territorial sea: Art 2(1) UNCLOS.

71 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 11.

72 See the introductory sentence of Art 27(1) UNCLOS (emphasis added). On criminal offences committed *before* the ship entered the territorial seas, see Art 27(5) UNCLOS; there, the powers of the coastal state are even more limited: Tanaka (n 49) 544.

73 Art 27(1)(a) UNCLOS.



or the good order of the territorial sea^{74,75} Even if the possession of arms or armed guards on board a merchant ship were a criminal offence under the coastal state's criminal law, it seems not to be one where the consequences extend to the coastal state if the ship were simply passing through its territorial sea without making a port call. Hence, the exercise of criminal enforcement jurisdiction can arguably not be based on Article 27(1)(a) UNCLOS. It seems more promising to argue that the use of armed PMSC personnel disturbs the 'good order of the territorial sea'.⁷⁶ It could be contended that arms on board ships passing through the territorial sea enhance the risk that other ships are harmed by mistake or intentionally. However, it is doubtful whether the mere possession of arms – as opposed to their use beyond self-defence, and assuming mere possession is an offence under the coastal state's criminal law – is already likely to disturb the good order of the coastal state.⁷⁷ Such a reading is in line with the finding that mere possession of arms or the presence of armed guards can hardly be considered prejudicial to the coastal state's good order under Article 19 UNCLOS, which defines innocent and non-innocent passage.⁷⁸ In sum, the question of whether the coastal state has jurisdiction to enforce its criminal law in cases where PMSCs or their personnel allegedly violated it during their passage can only be answered on a case-by-case basis – yet it is clear that the law of sea limits its power to do so.

As soon as a merchant ship calls at a port, it is subject to the territorial jurisdiction of the *port state*.⁷⁹ As a result, the port state's criminal law applies and – subject to the limitations to which we turn now – the port state is competent to enforce its law against ships lying in its ports and persons on board. Ships are considered to be pretty much self-contained entities to which a comprehensive body of law and enforcement system applies (that of the flag state) even if they are in a foreign port. Hence, port states generally only enforce their criminal law if their interests are at stake; matters solely relating to the 'internal economy' of the ship are left to the flag state to deal with so long as they do not disturb

74 Art 27(1)(b) UNCLOS.

75 The exception of Art 27(1)(d) UNCLOS seems not relevant here, and Art 27(1)(c) UNCLOS simply reflects the general rule that the flag state can consent to the exercise of enforcement jurisdiction by another state on board the ship flying its flag. Art 97 UNCLOS, pertaining to the penal jurisdiction in matters of collision or any other incident of navigation, is not discussed here; the fact patterns covered by the provision (collision and incidents of navigation) will generally not be fulfilled by the criminal behaviour of PMSCs and/or their personnel. The application of that provision was discussed in relation to the *Enrica Lexie* case, where two Italian marines, who were part of a Vessel Protection Detachment protecting a merchant ship, mistakenly killed two Indian fishermen. Causing death by deliberately discharging a firearm from one vessel into another was not considered to be an 'incident of navigation' by India: Guilfoyle, 'The High Seas' (n 27) 219; Hari Sankar, 'Jurisdictional and Immunity Issues in the Story of Enrica Lexie: A Case of Shoot & Scoot turns around!' [2013] EJIL: Talk! <www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around/> accessed 7 March 2016.

76 Art 27(1)(b) UNCLOS.

77 König and Salomon (n 51) 14.

78 Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (n 48) 679-83.

79 König (n 27) para 31.



the peace, security or good order of the port.⁸⁰ States have different views on the ‘internal economy of the ship’ as opposed to an ‘activity that affects the interests of the port State’ and thus different enforcement policies, which may evolve over time.⁸¹ Certainly, the use of firearms by private guards beyond the rails of the ship or from the ship against external targets would be subject to port jurisdiction.⁸² It could even be argued that the mere presence of armed guards on board merchant ships in contravention of port state legislation is not an ‘internal affair’ for the ship. The port state has a considerable and legitimate interest to minimize risks at its ports, which is enhanced by the fact that foreign-flagged ships have arms and security-related materials on board.⁸³ This may especially hold true in small ports where the firepower of PMSCs is potentially superior to that of local law enforcement authorities. Furthermore, the potential violation of import regulations through the transportation of weapons into the territory of the port state⁸⁴ or the violation of its customs laws⁸⁵ may affect the interests of that state and thus justify the enforcement of its criminal law. For many centuries, port state jurisdiction was mainly exercised in the areas of immigration, sanitation, customs and national security. However, it has gained in recognition ‘as a remedy for the failure of flag states to exercise effective jurisdiction and control over their ships.’⁸⁶ Against the background that many flag states have not yet comprehensively regulated the use of PMSC personnel and the possession of arms on board merchant ships or do not effectively enforce such regulations, port states may take it upon themselves to fill this jurisdictional gap. Thus, in the future, port state jurisdiction could play an incrementally important role in this field.

To conclude, the law of the sea sets various limits on the competence of coastal and port states to enforce violations of their respective criminal law in favour of the flag state. In the meantime, the Montreux Document rests on the assumption that the Territorial State (understood as the state on whose land territory the PMSC operates) has full-fledged criminal enforcement jurisdiction over offences allegedly committed within its land borders. Hence, clarification is necessary as regards the Territorial State’s obligations and good practices under the Montreux Document, which pertain to ensuring criminal accountability.

80 Marten (n 33) 115-17; Barnes (n 31) 311-12. See König (n 27) para 33, and Molenaar, ‘Port State Jurisdiction’ (n 65) para 12, on the doctrinal dispute of whether port states do not extend their criminal enforcement jurisdiction over ‘internal affairs’ over the vessel by comity or whether customary international law requires them to refrain from exercising their jurisdiction; despite differing views, state practice is quite consistent and coastal states generally regard internal affairs of the ship to fall within the competence of the flag state.

81 Molenaar, ‘Port State Jurisdiction’ (n 65) para 12.

82 König and Salomon (n 51) 17; Michael Mineau, ‘Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy’ [2010] *The Journal of International Business & Law* 63, 75.

83 König and Salomon (n 51) 17-18.

84 *ibid.*

85 The ports of a state are – similar to land borders – points of entry for goods and thus the logical points for customs controls; port state enforcement jurisdiction thus traditionally covers customs matters: Erik Molenaar, ‘Port and Coastal States’ in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 282; Molenaar, ‘Port State Jurisdiction’ (n 65) para 34.

86 Molenaar, ‘Port State Jurisdiction’ (n 65) para 34.



These two examples demonstrate that the law of the sea contains various rules allocating jurisdiction between the flag, coastal and port states in specific situations where these jurisdictions compete. Hence, it seems necessary to re-read the Montreux Document's obligations and good practices addressed to the Territorial State from a law of the sea perspective and to clarify which are meant to apply to the flag, coastal and/or port state – to the extent that the law of the sea allows such a clear statement.

3.2 Implications for the concept of 'Contracting State'

Next to the Territorial State, the Contracting States are also addressees of the international obligations and good practices of the Montreux Document. Contracting States are defined by the instrument as 'States that directly contract for the services of PMSCs'.⁸⁷ Hence, the underlying assumption is that a *state* relies on the services of the PMSC. However, in the maritime setting, this is the exception rather than the rule. States and international organizations notably relied on private armed guards to protect ships delivering humanitarian aid to Somalia.⁸⁸ However, the standard rule is that *private* persons or entities – most notably ship-owners and sometimes ship charterers⁸⁹ – hire PMSCs to protect their commercial vessels. What does it imply that the contracting entity is of a private rather than public nature, i.e. is usually not a state as is the underlying assumption of the 'Contracting State' concept of the Montreux Document?

Part One of the Montreux Document restates international legal obligations of the Contracting States. Looking at the substance, they are mainly about the obligation to enact and apply rules, i.e. about prescriptive and adjudicative jurisdiction. Concretely, Contracting States are required to give effect to their international human rights obligations, notably by adopting legislative measures (e.g. criminal norms or tort law provisions) and by preventing, investigating and providing effective remedies for misconduct by PMSCs and their personnel.⁹⁰ Furthermore, Contracting States must investigate and prosecute (or extradite) PMSC personnel suspected of having committed an international crime.⁹¹ Moreover, a Contracting State must provide reparations for violations of human rights law caused by the wrongful conduct of a PMSC or its personnel, provided such conduct is attributable to the state under customary international law pertaining to state responsibility.⁹² These are func-

87 Montreux Document (n 2) Preface (9.c).

88 Yet the World Food Programme was escorted by EUNAVFOR Operation Atalanta, see description of the mandate in Art 1(1) of the Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (as amended, most recently by Council Decision 2014/827/CFSP of 21 November 2014) [2008] OJ L301/33.

89 The Baltic and International Maritime Council (BIMCO) has a strong preference that the ship-owner and not the ship charterer concludes the contract with the PMSC, even if the latter arranges and pays for the services: BIMCO, 'GUARDCON - Standard Contract for the Employment of Security Guard Vessels: Explanatory Notes' 3 <www.bimco.org/~media/Chartering/Document_Samples/Sundry_Other_Forms/Explanatory_Notes_GUARDCON.ashx> accessed 7 March 2016.

90 Montreux Document (n 2) Part One (Statement 4).

91 *ibid* Part One (Statement 6).

92 *ibid* Part One (Statement 8).



tions that are incumbent on *states*. However, as mentioned, in the situation where PMSCs protect merchant ships, it is generally not a state contracting the services but a private entity, such as the ship-owner or the ship charterer. And private persons cannot fulfil the public functions of legislating and enforcing such legislation – in the strict sense of the terms – as the Montreux Document requires from Contracting States. Hence, for the provision of private security services in the maritime context, the concept of ‘Contracting State’ must be customized. There are essentially two (complementary) ways for doing so – each is sketched out briefly in the following and while they warrant further scrutiny, such discussion is beyond the scope of this article.

First, as regards the various international obligations restated by the Montreux Document, the notion of ‘Contracting State’ could be interpreted as meaning the state with which the private entity hiring the PMSC has a close jurisdictional link, i.e. a genuine connection based on territory or nationality⁹³ – both recognized bases under international law to confer prescriptive and adjudicative jurisdiction.⁹⁴ Thus, for example, it could be argued that the state of nationality of the private entity hiring the PMSC (in many cases, this will be the state where the ship-owner is incorporated, registered or where it has its principal place of management) has an obligation to criminalize certain omissions by that private entity. For example, it should criminalize the failure of the ship-owner (or other private hiring party) to diligently choose the PMSC, to prevent and inquire into abuses committed by the PMSC or its personnel and to report misconduct to the competent state authorities. By adopting such legislation, the state gives effect to its human rights obligations, as required by the Montreux Document.⁹⁵ Even if such a reading is considered to be an overly-expansive conception of ‘Contracting State’, the state of nationality of the ship-owner (or other private contracting entity) is seemingly still covered by the category of ‘all other States’.⁹⁶ And these ‘other States’ are notably also required to ‘implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations’.⁹⁷

A second (and complementary) avenue to customize the concept of ‘Contracting State’ to suit the maritime context would be to look at it from a ‘corporate responsibility to respect human rights’⁹⁸ perspective, i.e. to argue that business entities contracting PMSCs are themselves bound to respect

93 In some cases, there will be identity between this state and the flag state (on flag state duties, see above 3.1.2); in others, however, these will be two different states.

94 Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 42 *et seq* and 83 *et seq* (as regards criminal jurisdiction); Brownlie (n 25) 301 *et seq* and 303 *et seq*.

95 Montreux Document (n 2) Part One (Statement 4).

96 See *ibid* Part One (Statements 18-21) and (n 20).

97 *ibid* Part One (Statements 19 and 21).

98 This term is borrowed from Part II entitled ‘The corporate responsibility to respect human rights’ of the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ annexed to the ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie’ (21 March 2011) UN Doc A/HRC/17/31; endorsed by the Human Rights Council, ‘Resolution 17/4 on Human Rights and Transnational Corporations and Other Business Enterprises’ (6 July 2011) UN Doc A/HRC/RES/17/4 (Guiding Principles on Business and Human Rights).



human rights. Indeed, this idea that has gained ground in recent years, especially since the endorsement of the Guiding Principles on Business and Human Rights by the Human Rights Council.⁹⁹ According to these principles, '[b]usiness enterprises should respect human rights', which means that 'they should avoid infringing on the human rights of others' and should 'address adverse human rights impacts with which they are involved'¹⁰⁰ – notably by taking 'adequate measures for their prevention, mitigation and, where appropriate, remediation.'¹⁰¹ In particular, they should have policies and processes in place in order to meet their responsibility to respect human rights.¹⁰² It is important to note that the responsibility of business enterprises (such as ship-owners) to respect human rights not only requires that they avoid causing or contributing to an adverse impact on human rights through their own activities, but that they also '[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationship, even if they have not contributed to those impacts.'¹⁰³ Hence, it encompasses the situation where a ship-owner maintains a business relationship with a PMSC conducting itself in a way that has an adverse impact on human rights. Overall, in terms of the enactment and enforcement of rules, there is considerable overlap between the obligations flowing from the concept of corporate responsibility to protect human rights (as set out in the Guiding Principles on Business and Human Rights) and the obligations of the Contracting State under the Montreux Document.¹⁰⁴ Thus, it seems worthwhile to explore the idea that the concept of 'Contracting State' under the Montreux Document could actually mean 'Contracting Business Enterprises' – at least where the contracting entity is a moral rather than natural person.¹⁰⁵ As mentioned, 'Contracting State' could also refer to the state with which the contracting private entity has a close jurisdictional link. Indeed, corporate responsibility to respect human rights does not operate at the exclusion of the state's obligations nor does it diminish these obligations.¹⁰⁶

As regards the good practices, the Montreux Document is more flexible. In the introductory paragraph to the section on good practices for Contracting States, it is stated that '[i]n many instances, the good practices for Contracting States may also indicate good practice for other clients of PMSCs, such as international organizations, NGOs and companies'.¹⁰⁷ This covers the maritime situation where private persons and entities contract PMSCs. While some of the good practices can be fol-

99 See *ibid* Principle 11.

100 *ibid*.

101 *ibid* Principle 11 (Commentary).

102 *ibid* Principle 15.

103 *ibid* Principle 13.

104 Needless to say, the nature of rules enacted by private entities and the enforcement of these rules differ considerably from rules enacted by state authorities and enforced by the state apparatus.

105 The Montreux Document is primarily addressed to states; however, it also restates international obligations of natural and moral persons; see, eg, Montreux Document (n 2) Part One (Statements 22 *et seq*). Hence, the second avenue proposed here on how the concept of 'Contracting State' could be interpreted in the maritime context is not outside the instrument's scope.

106 Guiding Principles on Business and Human Rights (n 98) Principle 11 (Commentary).

107 Montreux Document (n 2) 16.



lowed by private entities without further ado,¹⁰⁸ others must arguably be customized if applied to a private entity, such as the ship-owner.¹⁰⁹ Thereby, the idea that both states *and* business entities have certain obligations under human rights law should be the starting point of any reading of the good practices.

3.3 Implications for the concept of 'Home State'

As mentioned, the Montreux Document addresses three categories of states: in addition to the Territorial and Contracting States, there are also Home States. They are defined as the 'States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated'. And if 'the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management' is considered to be the Home State.¹¹⁰

The concept of 'Home State' can, *prima facie*, be transposed to the maritime context without further ado. No different from the land-based context, the jurisdiction of the Home State may be concurrent with that of the Territorial State, i.e. the flag, port or coastal state. It is well-accepted that despite being termed 'exclusive', flag state jurisdiction does not operate at the exclusion of all other assertions of jurisdiction. Thus, state practice suggests that the *prescriptive* jurisdiction of flag states does not prevent other states from regulating the conduct of their nationals (be they natural or moral persons) on the high seas, even when on board a foreign-flagged ship.¹¹¹ Hence, Home States in the eyes of the Montreux Document have to regulate PMSCs incorporated under their jurisdiction.¹¹² However, on the high seas, the flag state has (subject to a limited set of exceptions based on consent, treaty law and custom) exclusive *enforcement* jurisdiction over ships flying its flag. This complicates, for example, investigative measures, such as fact finding, for the Home State. However, this is no different to land-based settings where PMSCs incorporated in one state operate in another state with exclusive enforcement jurisdiction on its land territory.¹¹³

To conclude, the three-fold structure of addressees under the Montreux Document – Territorial, Contracting and Home States – seems to be flexible enough to also cover security services provided at sea. However, the concepts of 'Territorial State' and 'Contracting State' need to be interpreted from

¹⁰⁸ Eg those relating to the criteria for the selection of PMSCs: *ibid* Part Two (Good Practices 5 *et seq*).

¹⁰⁹ Eg those relating to monitoring and ensuring accountability: *ibid* Part Two (Good Practices 19 *et seq*).

¹¹⁰ Montreux Document (n 2) Preface (9e).

¹¹¹ Guilfoyle, 'The High Seas' (n 27) 209; see also (n 32).

¹¹² In this vein, Switzerland adopted the Federal Act on Private Security Services Provided Abroad on 27 September 2013, which entered into force on 1 September 2015 (Classified Compilation of Swiss Law, No 935.41); an unofficial English translation of the Act is available on the website of the Swiss Government, <www.admin.ch/opc/en/classified-compilation/20122320/index.html> accessed 5 February 2016. As regards PMSC *personnel*, the jurisdiction of the state of nationality of PMSC personnel (which falls within the category of 'other States' of the Montreux Document) has concurrent jurisdiction with the flag state.

¹¹³ Anna Petrig, 'Private Sicherheitsunternehmen: Die Schweiz verleiht dem Internationalen Verhaltenskodex grössere Durchsetzbarkeit auf nationaler und internationaler Ebene' Jusletter of 20 January 2014, 7.



a maritime perspective specifically, which will eventually result in subcategories, such as the flag, port and coastal states. Such a 'maritime interpretation' of the Montreux Document needs to take into account the rules of the law of the sea, which allocate competencies between different jurisdictions, most notably the flag, coastal and port states.

4. Conclusion

The Montreux Document was clearly drafted with a view to apply to private security services provided on dry land. However, this does not imply that it is unsuitable for situations where private security personnel protect ships. It is for exactly this reason that the commentary section of the Montreux Document states that even though the instrument was written primarily with a view to apply in armed conflict environments, 'it is also meant to provide practical guidance in other contexts'.¹¹⁴ Yet, in order to be fully effective, it seems necessary to analyse and discuss the specificities of the maritime context and their implications for the reading of the Montreux Document. But is such an interpretative exercise opportune in light of the proliferation of soft and hard law¹¹⁵ regulating the use of (armed) security personnel on board merchant ships?¹¹⁶ Does the Montreux Document add something extra or novel to current discussion and regulation?

Numerous reasons exist for suggesting that a maritime-specific interpretation of the Montreux Document is useful. First of all, the authority of the existing legal instruments on private security at sea varies considerably. The Montreux Document certainly features among the instruments boasting rather high leverage and influence, notably due to its development and adoption in an intergovernmental context and the restatement of the law approach that it follows.¹¹⁷ Furthermore, the Montreux Document is of general applicability and not tailored to a specific criminal phenomenon occurring in a given geographical area. In contrast, the four sets of guidance issued by the International Maritime Organization cover the use of privately contracted armed security personnel on board ships

114 Montreux Document (n 2) 39.

115 For an overview on soft law instruments specifically applying to private security services at sea, see Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (n 48) 672-74. As regards hard law, many flag states have recently adopted legislation on the use of PMSCs on board ships, including Germany, Belgium, Greece, Italy and France (on the latter, see article by Philippe Grimaud, 'Pirates, but not of the Caribbean: the French Private Ship Protection Act', in this issue).

116 Some participants to the Montreux+5 Conference (which took place in 2013 on the occasion of the fifth anniversary of the Montreux Document and gathered representatives of over 60 states, members of international organizations, academia, civil society and private companies) opined that 'standards developed in other fora – in particular the IMO contact group – sufficiently address the issue' of private security services provided in the maritime sector: Montreux +5 Conference, 'Chair's Conclusions' (Geneva, 13 December 2013) 2 <www.mdforum.ch/pdf/2013-12-13-Montreux-5-Conference-Chairs-Conclusions_en.pdf> accessed 7 March 2016.

117 See text belonging to (n 3).



passing through the so-called 'High Risk Area', i.e. the area where Somali-based pirates are active.¹¹⁸ Having generally applicable guidance for the provision of private security – on dry land and at sea and to protect against any (criminal) threat – seems necessary given the fact that it is virtually impossible to foresee the future markets of PMSCs. The Montreux Document – with the necessary clarification as to its applicability in the maritime environment in general – appears to be a suitable instrument to take a prospective rather than reactive regulatory approach.¹¹⁹ What is more, the Montreux Document covers subject matter that is not regulated to the same extent by other guidance.¹²⁰ More importantly, it clearly takes a human rights-based approach – few legal instruments reference human rights obligations so explicitly and prominently.¹²¹

What seems necessary is a thorough analysis of the various existing instruments, identifying their scopes of application and subject matter covered. Such an assessment will allow for better identification and consideration of the intersections in terms of scope and substance between the Montreux Document and other legal instruments. In cases of overlap, some level of coordination seems advisable, such as by referring to or borrowing rules from other instruments, provided these rules reflect existing international law and fit into the restatement of the law approach followed by the Montreux Document. Such coordination prevents further fragmentation of the rules governing private security and contributes to a degree of consolidation of the law in the area, which is necessary in light of the perspective of those tasked with applying the rules, be they state authorities or private persons.

Last but not least, there are many unanswered questions as to how the law of the sea actually informs the use of PMSCs and armed personnel on board ships. Discussing the pertinence of the Montreux Document to the maritime context, and the implications this specific operational context has on its underlying assumptions, concepts and rules, certainly contributes to further clarification of existing international law and how it applies to activities of PMSCs – *nota bene* one of the aims pursued by the Montreux Document process.

118 IMO, 'Revised Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) IMO Doc SC.1/Circ.1405/Rev.2; IMO, 'Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (12 June 2015) IMO Doc MSC.1/Circ.1406/Rev.3; IMO, 'Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) SC.1/Circ.1408/Rev.1; IMO 'Interim Guidance to Private Maritime and Security Companies Providing Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) IMO Doc MSC.1/Circ.1443.

119 See Sarah Percy, 'Regulating the Private Security Industry: A Story of Regulating the Last War' (2012) 94 IRRC 941, on the need for a prospective rather than reactive regulatory approach.

120 Thus, eg, the issue of ensuring criminal accountability is not addressed in the June 2015 'Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (n 117) while it is in the Montreux Document, see above (3.1.3.2).

121 See David Hammond and Anna Petrig, 'Independent International Guidance on Deprivation of Liberty at Sea by Shipmasters, Crew and/or Privately Contracted Armed Security Personnel' (2015) <www.marsafenet.org/marsafenet/wp-content/uploads/2015/06/Marsafenet-HRAS_DoL-International-Guidance.pdf> accessed 7 March 2016, which takes a clear human rights-based approach and covers the issue of deprivation of liberty by PMSC personnel on which other soft law guidance is generally mute.

“Pirates, but not of the Caribbean”: The French Private Ship Protection Act

*Philippe GRIMAUD*¹

Abstract

After comparing the legal frameworks related to piracy with those of Europe’s main countries, the French legislator recently released a comprehensive set of rules in order to allow ship-owners to embark protection teams aboard merchant ships in an effort to prevent pirate attacks. As this kind of economic activity implies specific skills and liability linked to the possible use of force, the legislator has carefully crafted the material and geographical boundaries. The ship protection business can only take place on board cargo vessels and only in two specific areas: one off the coast of West Africa and the other in the Indian Ocean and Red Sea region. In order to ensure safety on board such vessels and compliance with all rules applying to maritime transport, the legislator has given state authorities broad power to regulate the firms and employees taking up such activity. Firms and employees must receive special approval from the state authorities monitoring their professional skills prior to undertaking the activity. On board the ship, the protection squad remains under the shipmaster’s direction and is subject to unannounced control checks from French warships or patrolling ships and aircrafts.

Keywords

French ship protection Act, ship protection at sea, defence teams, security at sea, piracy, ship-owners regulations, seamen labour regulations

Even though the notion of piracy remains closely tied to some romantic myth of cordial anarchy, pirates are first and foremost a threat to seafarers, navigation and trade. As the problem of piracy and armed robbery at sea persists,² the United Nations and many states with access to the seas and significant interest in maritime activity have created specific legal frameworks in order to counter the phenomenon of piracy by fighting and repressing these acts, which are perpetrated at sea, particularly in international waters beyond the reach of state sovereignty.

¹ Philippe Grimaud was an administrative officer in the Prime Minister’s office and graduated from ENA (2004). Since then, he was a judge at the Administrative Court of Versailles and the Administrative Court of Marseille. At present, he regulates municipal and local entities in Marseille’s regional audit chamber. The author would like to thank the reviewers of this journal for their kind advice while drafting this article. All translations are the author’s own.

² According to the 2014 IMO annual report on piracy, 242 acts of piracy or armed robbery at sea were committed in 2014 as well as 49 attempts (IMO, ‘Report on Acts of Piracy and Armed Robbery against Ships’ (2015)) <www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/219_Annual_2014.pdf> accessed 25 February 2016. See also, for an analysis of piracy’s economic costs Alexander Knorr, ‘Economic Factors for Piracy: The Effect of Commodity Price Shocks’ (2015) 38 *Studies in Conflict & Terrorism* 671.



On 15 July 1994, France passed Act n° 94-589 on the fight against piracy and the state's police powers at sea,³ implementing the relevant clauses of the United Nations Convention on the Law of the Sea (UNCLOS).⁴ It defined the offence of piracy and empowered state authorities, namely the commanders of state ships and aircrafts, to take any coercive measure necessary to fight this scourge.⁵ Nevertheless, in some regions,⁶ merchant ships are under constant threat of pirates using fast boats and firearms, who do not hesitate climbing aboard cargo vessels, often by way of violent and sudden actions. This requires a quick deterrent response, yet pirates often escape even when warships are patrolling the region, due in part to the sheer size of these hazardous areas. In order to cope with this threat, many European countries have gradually come to allow private protection squads on board merchant ships flying their flags, and some countries even permit national and foreign navy vessel protection detachments on board (such as France, Germany, Denmark, Belgium and Italy).⁷

Until 2014, France prohibited ship-owners from embarking private squads aboard their vessels. The 1 July 2014 Act on private ship protection businesses act (the 2014 Act⁸), preceded by a clear

3 *Loi n° 94-589 du 15 juillet 1994 relative à la lutte contre la piraterie et aux modalités de l'exercice par l'Etat de ses pouvoirs de police en mer* [Act on fight against piracy and state police powers at sea] *Journal officiel de la République Française* (Paris, 16 July 1994) 10244 <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000713756&fastPos=2&fastReqId=74943313&categorieLien=cid&oldAction=rechTexte> accessed 1 February 2016.

4 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) arts 100-107 and 110, grants warships a right of visit of any ship even on the high seas if involved in piracy.

5 The 1994 Act (n 3) allows control on board any suspicious boat (s. 2), preventive detention on board for suspects and precautionary seizure of goods or documents linked to the piracy act or attempt (s. 3) and ship's diversion to any port in order to deepen controls (s. 4).

6 Especially the South China Sea, Straits of Malacca and Singapore and Indian Ocean, see 2014 IMO Report (n 2) annex 2, 1-2.

7 See Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 *International and Comparative Law Quarterly* 667. For an example of a similar pattern in Europe after an evolution of the national legal framework, see the Italian legislation as discussed in Eugenio Cusumano and Stefano Ruzza, 'Contractors as a Second Best Option: The Italian Hybrid Approach to Maritime Security' (2015) 46 *Ocean Development & International Law* 111. Also see the Dutch legal scheme, practice and theoretical considerations: Bibi Van Ginkel, Frans-Paul Van Der Putten and Willem Molenaar, *State or Private Protection against Maritime Piracy? – A Dutch Perspective* (Netherlands Institute of International Relations, 2013) <www.clingendael.nl/sites/default/files/20130200_state_or_private_protection_web.pdf> accessed 1 February 2016. See also Kiara Neri 'The Use of Force by Military Vessel Protection Detachments' (2012) 51 *Military Law and Law of War Review* 73.

8 *Loi n° 2014-742 du 1er juillet 2014 relative aux activités privées de protection des navires* [Act on ship protection private business] *Journal officiel de la République Française* (Paris, 2 July 2014) 10890 <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029175262&fastPos=3&fastReqId=654263424&categorieLien=cid&oldAction=rechTexte> accessed 1 January 2016.



introductory text,⁹ aims at modifying the Transport Code¹⁰ and the Homeland Security Code,¹¹ in order to allow the ship-owners to embark such squads,¹² and set up the legal framework of this new business sector. This text was accompanied by five implementation decrees,¹³ which specify the material and geographical scope and requirements of the ship protection activity. This activity consists of ensuring the safety of crewmembers and any passengers travelling on board the ship, as well as the cargo, against external threats¹⁴ through the use of a protection team. This term external threats seems rather inaccurate, as it could also lead to authorising such squads to defend merchant ships against terrorist assaults, and although the 2014 Act's introductory text does not raise this issue, it is unknown whether the legislator shared such a broad view.

This article outlines the legal framework set by the 2014 Act and the five decrees, by introducing (1) its scope, (2) the requirements set by the regulations for firms and employees and its control by state authorities, and (3) the practical and legal constraints related to the ship protection mission. It must be noted that, as most of the 2014 Act's provisions have been codified in the French Transport Code and Homeland Security Code, the author makes direct reference to these Codes' article numbers, as modified or created by the 2014 Act.

1. A strictly limited scope of application

According to French law, granting a weapon-equipped protection team embarked on a merchant ship the right to use force in order to protect the hull, cargo and crew is quite similar to a state

9 ie the government statement explaining the act's goals and general architecture. See *Projet de loi relatif aux activités privées de protection des navires*, n° 1674, déposé le 3 janvier 2014 [Bill on private ship protection business] <www.assemblee-nationale.fr/14/projets/pl1674.asp> accessed 1 February 2016.

10 Transport Code, *Journal officiel de la République française* (Paris, 3 November 2010) 19645 <www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000023086525&dateTexte=20160120> accessed 1 February 2016.

11 Homeland Security Code, *Journal officiel de la République française* (Paris, 13 March 2012) 4533 <www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000025503132&dateTexte=20160120> accessed 1 February 2016.

12 The *Loi* n° 94-589 du 15 juillet 1994 relative à la lutte contre la piraterie et aux modalités de l'exercice par l'Etat de ses pouvoirs de police en mer [Act on fight against piracy and state police powers at sea] on fight against piracy and state police powers at sea did not authorize the ship owners to protect their ships from piracy by such means (n 3).

13 *Décret* n° 2014-1415 relatif aux conditions d'exercice de l'activité privée de protection des navires [Decree on conditions for ruling ship protection private business]; *Décret* n° 2014-1416 du 28 novembre 2014 relatif aux modalités d'exercice de l'activité privée de protection des navires [decree on means and procedures for carrying ship protection business]; *décret* n° 2014-1417 du 28 novembre 2014 relatif aux normes et référentiels admis en application de l'article L. 616-1 du code de la sécurité intérieure [decree on standards admitted under s. L. 616-1 of Homeland Security Code]; *décret* n° 2014-1418 du 28 novembre 2014 pris pour l'application de l'article L. 5442-1 du code des transports [decree implementing s. L. 5442-1 of Transport Code]; *Décret* n° 2014-1419 du 28 novembre 2014 pris pour l'application des dispositions du titre IV du livre IV de la cinquième partie du code des transports et relatif aux modalités d'exercice de l'activité privée de protection des navires [Decree implementing the provisions of title IV from book IV of fifth part of Transport Code and on means and procedures for carrying ship protection business] *Journal officiel de la République Française* (Paris, 30 November 2014) 19999-20008 <www.legifrance.gouv.fr/affichJO.do?idJO=JORFCONT000029813001> accessed 1 February 2016.

14 Homeland Security Code, s. L. 5441-1.



prerogative, traditionally used and controlled by public authorities, making it a radical notion for private businesses.¹⁵ Consequently, such a right to self-defence implying the right to use weapons to protect private activities and workers cannot be granted widely. Even if the freedom of navigation in secure conditions is at stake due to the threat of piracy, French law remains firmly attached to the principle that private individuals should not own and carry lethal weapons, except for purposes of self-defence in very specific, narrowly defined situations that pose a real threat to the owner.¹⁶ As a result of this rule, and prior to the 2014 Act, only state warships and patrol ships could be armed, and they still monopolise all tasks involving law enforcement, safety and security at sea. Thus, the scope of the 2014 Act is carefully delimited.

1.1 The 2014 Act's scope: French ships protected by private entities on the high seas

First of all, the Transport Code (s. L. 5441-1) draws the *rationae materiae* scope of the Code as follows: the ship protection business consists of protecting, on request and on behalf of the ship-owner, ships sailing under the French flag from outside threats. This definition thus dismisses a number of patterns which may have existed in historical periods,¹⁷ in both France and abroad, such as convoys under warship escort and the protection granted to all ships in an area regardless of their flag.¹⁸ The same section *in principio* excludes from the 2014 Act's scope a scenario directly involving public authorities in such activity: when the ship protection is carried out by state employees or employees acting on behalf of the state, the 2014 Act's provisions are no longer relevant and the traditional administrative liability system should take over from the *specialia* provided by the 2014 Act.

Section L. 5441-1 of the Transport Code § 2 defines the protection team competencies and underlines that this activity can only be carried out on board the ship it aims to protect. This rules out two types of protection, which fall within the competence of other French authorities and legal frameworks:

- When the ship is moored in a French harbour, the protection of the ship from the dock is entrusted to the state services in charge of port security (which is the *Gendarmerie Maritime* or, in some circumstances, the French Navy) or to land-based private security firms,

¹⁵ In order to understand the various frameworks available to states, see Natalino Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP 2011) 37.

¹⁶ Stemming from a 1939 decree which established as a principle the prohibition of weapon detention, now consolidated in Homeland Security Code, s. L. 311-1 *et seq.*

¹⁷ Especially World War II and the first Gulf War.

¹⁸ See, eg, the procedure called 'naval control', Defence Code, s. R. 1335-1: in the framework of existing law and when needed by the circumstances, the prime minister can impose a naval control on French maritime navigation, regardless of whether commercial, fisheries or pleasure navigation, in order to ensure the safest transit conditions. This control can be limited to determined geographic areas and apply only to certain ship categories.



which are governed by another Act.¹⁹

- The protection tasks only take place on board the ship: the 2014 Act prevents the ship-owner and the security firm from using means that are detachable from the protected ship, such as speed crafts and helicopters, to prevent piracy suspects from approaching their target. As a consequence, such action is reserved to state warships patrolling in the vicinity.²⁰

1.2 The 2014 Act only applies to cargo vessels and empty passenger ships

The 2014 Act applies to ships sailing under the French flag (s. L. 5441-1). Indeed, the French legislation only applies to such vessels and extending its territorial jurisdiction to other ships employing on board security firms is out of the question.²¹

According to the 2014 Act, all ship-owners can require a private protection team, but the n° 2014-1418 decree exempts a number of French-flagged ships from the benefit of these regulations: pleasure crafts – even commercial ones – and passenger ships, except for those that come within one of these two categories and have a hull exceeding 24 metres and carrying only their crew (composed of professional seamen in the case of pleasure crafts). The restrictions that apply by virtue of this decree may be explained by what would be the protection team’s operational constraints if it had to defend a ship carrying passengers. Indeed, beyond the great number and expanse of compartments in a passenger vessel, the sole fact that passengers are exposed to the action would be an insurmountable challenge for the protection team. This task is far from the mere protection against piracy. In addition, the state is, in principle, in charge of fighting terrorism and has issued specific regulations and operational plans – such as ‘Pirate Mer’ plan. It trains and dedicates special units for this kind of mission, referred to as counter-terrorism and hostage rescue teams, integrated into French Navy commandos.

19 *Loi n° 83-629 du 12 juillet 1983 réglementant les activités privées de surveillance, de gardiennage et de transport de fonds* [Act on private security activities] *Journal officiel de la République française* (Paris, 13 July 1983) 2155, now at Homeland Security Code, s. L. 611-1 *et seq.*

20 See, eg, the *Atalanta* operation led by the EU naval force (EUNAVFOR), designed to protect merchant vessels from piracy off the coast of Somalia. It is a joint action decided by the EU council on 10 November 2008 (Decision 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L301/33) and modified by decision 2012/174/CFSP of 23 March 2012 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2012] OJ L89/69). Joint Actions 2008/749/CFSP and 2008/851/CFSP were amended through Council Joint Actions 2009/907/CFSP ([2009] OJ L322/27), 2010/437/CFSP ([2010] OJ L210/33), 2010/766/CFSP ([2010] OJ L327/49) and 2012/174/CFSP ([2012] OJ 89/69). The *Atalanta* military operation fits in the legal framework set by the UN Security Council resolutions allowing the Member States to use any means in Somali national waters in order to fight piracy (UNSC Res 1846 (19 December 2008) UN Doc S/RES/1846/2008 [8] and UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020/2011 [10]). Since the beginning of *Atalanta*, the French navy has brought to this operation an Atlantique 2 patrol aircraft and a warship – or at least a frigate; in spring 2015, the offshore patrol vessel *L’Adroit* was added.

21 See arts 92-93 UNCLOS.



Nevertheless, the special dispensation granted to passenger ships carrying only their crew allows ship-owners to protect ships transiting through dangerous areas and avoids assaults like that suffered in 2008 by the French-flagged *Le Ponant* sailing cruise ship, which was attacked by Somali pirates in the Gulf of Aden while performing (without passengers) a connection navigation between Seychelles and the Mediterranean Sea.²² Moreover, section L. 5441-1 clearly states that the squad's activity aims at ensuring the safety of all persons embarked on board the vessel, crew and passengers and the goods transported. Thus, all cargo vessels transporting passengers – as is frequently the case – can host a defence team.

Having reduced the material scope of the Code, the French legislator also intended to limit its geographical area of application.

1.3 The 2014 Act only applies in predetermined dangerous areas

Given that the 2014 Act affords ship-owners options far beyond those authorised to other private persons by common law, the legislator has compelled the government to establish strict and appropriate geographic limits on this activity. First of all, the Transport Code (s. L. 5442-1) states that the 2014 Act's regulation only applies beyond the limits of the states' territorial sea and empowers the Prime Minister to set by ministerial order the boundaries of the areas under the regulation, according to the criterion of threats encountered, after having consulted an inter-ministerial committee including ship-owners' representatives. The committee can also suggest, if needed, modifications to the shape and extent of the relevant areas. It thus ensures that the geographical scope of the 2014 Act meets this naturally shifting threat.

The geographical scope of the 2014 Act is currently determined by a ministerial order of 28 November 2014,²³ which identifies two areas where merchants ships are authorised to embark a defence team:

- The first, 'West Africa', stretches from the 16th parallel north (i.e. roughly the Cape Verde Archipelago) to the 17th parallel south (approximately the continuation of the line separating Angola from Namibia). Its eastern border is the boundary of the territorial sea of the

²² See a parliamentary report depicting the assault: Christian Ménard, *Rapport fait au nom de la commission de la défense nationale et des forces armées sur le projet de loi (n° 2502), modifié par le Sénat, relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police de l'État en mer* [Report on the bill on fight against piracy and state's police powers at sea] (Assemblée Nationale, 9 November 2010) <www.assemblee-nationale.fr/13/rapports/r2937.asp> accessed 1 February 2016. For the criminal proceedings that followed, see Cass Crim 16 September 2009, no 09-82.077 <www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021053597&fastReqId=1657137381&fastPos=22> accessed 1 February 2016. For the pirate's complaint before the ECtHR, see *Ali Samatar and others v France* App nos 17110/10 and 17301/10 (ECtHR, 4 December 2014).

²³ *Arrêté* du 28 novembre 2014 fixant les zones dans lesquelles les entreprises privées de protection des navires peuvent exercer leur activité [ministerial order setting the areas where private ship protection firms can operate] *Journal officiel de la République française* (Paris, 30 November 2014) 19999 <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029813006&dateTexte=20160120> accessed 1 February 2016.



neighbouring states (from Senegal to Angola), that is 12 nm (22 km) from their shores.²⁴ Its western limit has been drawn along the 19th degree longitude west, departing roughly from a point 110 nm (200 km) off Dakar and stretching approximately to the area halfway between Ascension Island and Saint Helena. It is about 6 million km² large (1.7 million nm²).

- The second, ‘Indian Ocean and Red Sea’, covers between 10 and 12 million km². It ranges from the Gulf of Aden (16° north) and the Iranian and Pakistani maritime approaches (26° north) to 10° south (roughly the longitude of northern Madagascar). It ends with the 78° east, i.e. a line corresponding to the longitude of the southernmost point of India. Here again, the area is closed by the territorial sea of the neighbouring states (from Pakistan to Mozambique and Angola). This area is more or less equivalent to the EUNAVFOR’s *Atalanta* operation framework.²⁵

These areas cover most of the regions exposed to the threat of piracy and allow ship-owners to safeguard a significant amount of the worldwide seaborne traffic, yet disregard three blind spots – which may be for diplomatic reasons that have proved to be inescapable.

The first stems from the fact that the relevant areas end with the border of the territorial sea of the neighbouring states, betting that each of them is able to ensure the safety of its coasts and maritime approaches. However, neither failing states nor weak ones have sufficient means at their disposal to carry out coastal patrols in order to eradicate piracy. Nevertheless, on this point, the French legislator had no choice but to abide by international law, which inevitably led to this solution²⁶ (except when the neighbouring state or the UN Security Council allows it). Nonetheless, it does not appear to be a real constraint, at least not for the vessels passing through the territorial seas of these states without stopping at their harbours. Indeed, such ships can avoid coastal waters with a higher risk of attack and remain far from the hazardous areas.

The two other blind spots are well-known for being the theatre of piracy and terrorist threats respectively. The first is the area composed of the Strait of Malacca and the South China Sea, which is seriously affected by piracy on account of its position as a key vector for global maritime traffic.²⁷ However, the bordering states have increased their patrols in the area, and piracy has decreased markedly over the last ten years. One must add that, in this sector, the outer limits of the territorial

²⁴ Art 3 UNCLOS.

²⁵ Decision 2008/851/PESC (n 20) s 1.2. See EUNAVFOR, ‘Mission’ <eunavfor.eu/mission> accessed 1 February 2016. To understand the situation and the legal framework that governs the fight against piracy in this area, see Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011).

²⁶ UNCLOS grants to each ship a right of innocent passage in territorial waters, even to armed ships flying the flag of another state (arts 17 to 32). This right excludes any exercise, manoeuvre or training implying the use of weapons (art 19(b)). Only the sovereign state in the area can regulate the activities in its own territorial waters (art 21) not the flag state.

²⁷ According to the 2014 IMO annual report on piracy (n 2), among the 242 piracy or armed robbery at sea acts committed in 2014, 82 took place in the South China Sea and 77 in the Strait of Malacca.



seas are so closely related that the area where ship-owners could implement the French 2014 Act would be too narrow to justify activating a protection team. Another area forgotten by (or rather excluded from) the 2014 Act's geographical scope is the Persian Gulf, which is also affected by a permanent threat of terrorist activity. It is necessary to emphasise that the bill that paved the way for the 2014 Act only addressed the problem of piracy. Thus, the government, when preparing the decrees and statutory orders intended to enforce the law and define the relevant areas, left out or overlooked the question of piracy-related terrorism in this region. Moreover, the outer limits of the territorial seas are again very close to those of the neighbouring states. It is also likely that given the nature of the risk, its intricacy and its links with the geopolitical context, the most relevant response is that provided by a few neighbouring states and the prepositioned Western forces.²⁸

It is evident that the legislator's intent was to carefully determine the situations in which the ship-owner is granted the right to hire a protection team insofar as the particular situation justifies such measures. This mirrors the cautious approach of public authorities in this respect, due to the nature of the activity and its means, which in a certain way breaks with some established usages among the maritime world. In addition, the 2014 Act provides for a strict legal framework because uncontrolled development of this sector can lead to various forms of mercenary crews on board French vessels.

2. Authorisation, certification and control are the keys to the system

With the aim of avoiding the surge of uncontrolled ship protection businesses, the 2014 Act and the decrees n° 2014-1415 and n° 2014-1417 create a twin control mechanism based on an administrative authorisation necessary for the firms wishing to involve themselves in this trade and an individual approval scheme for each employee of maritime security firms. This legal framework is directly inspired and almost identical to the system created 30 years ago for ground-based private security guards by the Act of 12 July 1983. The regulatory provisions specifying the conditions laid down by the 2014 Act have also been introduced in the Homeland Security Code, in parallel with 'classical' (i.e. ground-based) private security regulations, and use part of their legislative environment. The foundations of this system are as follows.

2.1 The private security firm must be certified, receive authorisation and its managers must be granted approval

First of all, the private ship protection business is reserved to the firms that are able to demonstrate that their organisation and internal procedures can cope with the kind of missions given by ship-owners. Each firm willing to enter the market has to be certified by an independent certifying

²⁸ The Fifth Fleet of the US Navy, which is headquartered in Manama (Bahrain) with at least one aircraft carrier and its group. For example, the French navy deployed the group on the *Charles de Gaulle* aircraft carrier six times between 2001 and 2015.



entity, according to the Homeland Security Code (s. L. 616-1), which only allows the firms having received this *ad hoc* certification to run such a business. This certification ensures that the private security firms putting protection teams at the disposal of ship-owners comply with the regulations connected with all on board security matters. These include the ability communicate directly with the vessel's crew and management rules within the protection team, rules regarding the use of force and the reporting of incidents, etc. (Homeland Security Code, s. R. 616-2). It is issued by the national commission for private security activities, which is a Home Office entity.

The procedure leading to the firm's authorisation is the same as that applied to all private security firms fulfilling this activity on the ground (Homeland Security Code, s. R. 612-1 *et seq.*). But given the specific requirements of the maritime environment, the nature of the tasks and the scope of rights given to the defence teams, special sections of the Code (s. R. 616-1 *et seq.*) strengthen the standards imposed on the applicants. Moreover and as a consequence of the regulatory demands imposed on the firm, each manager must request and receive individual administrative approval, which is a mandatory prerequisite to starting the business. It is delivered by a special administrative commission bringing together Home Office representatives, such as prefects, judiciary authorities and private security firms' representatives. This committee is the competent licensing authority for all private security firms and is known as the regional private security approval and control commission (Homeland Security Code, ss. R. 633-1 and R. 635-1). Given that ship protection is carried out beyond the limits of the territorial seas and not in a specific continental region of France, the Paris regional commission delivers the approvals enabling the ship protection firms (Homeland Security Code, s. R. 633-1) after checking the nationality of the future bearer, his professional skills and compatibility with such activity as well as a criminal record check.

It must be noted that the approval is not intended as a mere formality. Indeed, a comprehensive body of skills is expected from the private ship protection firm's manager (Homeland Security Code, s. R. 616-11): knowledge of the French legislation governing the activity, of possible criminal liability (especially as it relates to the protection of physical integrity), the duty to provide assistance and the obligation to prevent criminal offences. They are also supposed to master French legislation on firearms, the International Ship and Port Facility Security Code (ISPS code), the International Safety Management Code (ISM code) and the UNCLOS provisions regulating the right of innocent passage. Looking ahead in an effort to predict how these requirements will be interpreted by the public authorities handling the ship-owners' applications is no easy feat. Nevertheless, such conditions necessarily imply that only persons duly skilled and well-versed in issues related to the maritime field, especially naval safety, will be able to create and run private ship protection firms. It is thus probable that these conditions guarantee a suitable professional level in the sector.

In addition to these requirements, it must be noted that the first authorisation delivered to a firm can only be provisional (Homeland Security Code, ss. L. 616-1 and R. 616-1) and is limited to six months validity. The request lodged by the firm must include its procedure manual, approved by the Minister of Transport (Homeland Security Code, s. R. 616-3) and the contract with the certifying organisation controlling its procedures. After receiving this temporary authorisation, the firm must



obtain its certification within six months as this document is the *sine qua non* condition to receiving final approval (Homeland Security Code, s. R. 616-5).

2.2 The professional card bearing the ‘ship protection at sea’ label is the prior authorisation granting access to the profession

As the managers of the ship protection firms, and just like every security guard in France, each member of a protection team embarked on board a merchant ship has to carry a professional card that confirms the administrative authorisation allowing him to embark and fulfil the corresponding tasks (Homeland Security Code, ss. L. 616-2 and R. 616-6). Although issued by the employer, this card bears the personal registration number allotted by the public authorities. It must be shown whenever requested by police officers or other types of controlling agents.

As far as the basic principles of good moral character and integrity are concerned, there are few differences between the requirements that a ‘classical’ security guard must meet and those for ship protection agents. According to the Homeland Security Code (s. L. 612-20), the authorisation can only be issued if the potential employee produces a judicial record untainted by a felony or serious misdemeanour. An administrative inquiry also searches for possible evidence that the applicant has infringed rules of moral integrity or has been a threat to public order or state security. In such cases, the administration can refuse to grant the applicant approval. Foreign applicants subject to an expulsion order or judicially banned from French territory can also be denied approval. Last but not least, the applicant must also submit the documents establishing his skills.

There are two major differences between land-based security guards and those carrying out ship protection missions. First, in terms of professional skills, the Homeland Security Code (ss. R. 616-11 et R. 616-12) is much more demanding from ship-based security agents than their colleagues employed (on ground) under the Act of 12 July 1983: the members of protection squads have to master the knowledge expected from the managers (listed above), but they must also have received the basic training of seamen and be proficient in risk management procedures. In addition, they shall be acquainted with their own firms’ procedures for the use of force and reporting of incidents, with the maritime work environment, the vessels’ operating constraints and the chain of command on board. The regulations also insist that the agents possess theoretical and practical knowledge about firearms and on board security devices and have basic medical training. At the very least, medical fitness for sea service must be established as well as a medical statement proving their physical and psychological ability to carry a weapon.

Second, another distinction is made between the two categories of security guards: while the land-based guards receive firm authorisation if they fulfil the legal conditions, the ship protection agents can only be given a provisional approval when they first apply (Homeland Security Code, s. L. 616-2). The first professional card issued is only valid for one year and cannot be delivered if the applicant does not show a hiring letter from an authorised ship protection firm. This first issuance is a trial and qualifying period, which unknown to classical (ground-based) security guards, during which the



employee must be on board the vessel for at least 30 days and receive a favourable report from the firm. From this moment, he can submit a new application before the Paris regional commission in order to obtain a five year professional card (Homeland Security Code, s. R. 612-13), which is valid for four years after the probationary year. The commission can also deny the card (ss. L. 616-2 and R. 616-9).

Even access to training as a ship protection agent is submitted for authorisation (Homeland Security Code, s. L. 612-22). This rule is common for both these agents and ‘classical’ security guards but, unlike the latter, the ship protection agents cannot be provisionally employed during their training period (ss. R. 616-1 and R. 616-2). Finally, it must be noted that all the authorisations and approvals issued under the 2014 Act, whether that of the firm, the managers or employees, can be withdrawn if they cease to fulfil the legal conditions or challenge public order (Homeland Security Code, ss. L. 612-8, L. 612-9, L. 612-20).

2.3 The ship protection firms under state control

The Homeland Security Code (ss. L. 616-4 and L. 616-5) allows for the possibility of unannounced checks and for the state to investigate any incident involving the embarked defence squads and to punish any offences committed. A wide variety of state officials are empowered to carry out a control check at any moment: police commissioners and officers, *Gendarmerie* officers and non-commissioned officers, maritime affairs service officers and civil servants, commanders and second-in-command of navy warships, state ships and aircrafts devoted to maritime patrol, and customs officers.

The control check can take place on board the protected vessel and includes the right of all state ships commanders to order the diversion of a merchant ship so as to carry out the control check. The commissioned officials listed above can ask for the professional card of each member of the protection team, check the identity of all persons found on board the vessel and open all on board documents, especially the protection squad record held by its chief, which is designed to chart and track its activities (Transport Code, s. L. 5542-10). When controlling the ship, the authorised officers are granted the right to visit the whole vessel, especially the compartments designed to store weapons and ammunition. At the end of the inspection, an official written record must be drawn up. Each investigating police officer and a number of state commissioned agents (navy officers, navy ship pursers, etc.) are empowered to find and record the infringements of legislation related to ship protection activity. When appropriate, and after having received special authorisation from the public prosecutor, they can seize the weapons and ammunition and any document that could help prove the infringement.



3. The protection mission, its legal framework and operational constraints

3.1 The protection squad is under the shipmaster's oversight

Compared to traditional security missions taking place in office or commercial buildings, protecting a merchant ship en route entails technical requirements and restrictions, linked with the environment – i.e. the size of the ship and number of angles of attack,²⁹ compatibility of protection actions with the vessel's navigation, especially in circumstances such as heavy traffic, natural obstacles, hazardous cargo implying restrictions on firearm use, etc. Moreover, neither the shipmaster nor the squad have immediate access to public authorities and services, which are a natural extension of ground-based security guards, such as police and emergency services. However, it should be borne in mind that the threat requires the use of more powerful weapons or defence tactics than those granted to traditional security guards (who cannot carry firearms in France) and increases pressure on the ship protection team members, who will inescapably have to tackle war-like situations.

The main effect of these constraints was a conscious choice of the legislator: given the peculiarity of its environment, the ship protection squad is placed under the shipmaster's responsibility (Transport Code, s. L. 5542-9), who is traditionally and legally designated by the law as the guardian of public order and authority on board and in charge of the ship's safety (UNCLOS, arts. 27 and 94; Transport Code, s. L. 5535-1). The shipmaster's task regarding the protection team is all the more relevant because he is also in charge, on behalf of the ship-owner, of taking every decision or measure needed to safeguard the vessel and ensure its effective operation (Transport Code, ss. L. 5412-2 to L. 5412-4). Besides, this role implies that he is liable under civil and criminal law for any event related with the ship's navigation (s. L. 5542-4).

As a consequence, before departure, the ship-owner has to provide the shipmaster with a copy of an appendix to the contract signed between the shipping company and the ship protection firm. This annex lists the legal elements depicting the squad's composition and approvals, such as data on the firm's authorisation and employees' professional cards, brand, model and serial number of each weapon, name of the squad's captain (Transport Code, ss. L. 5442-7 and L. 5442-8). This document must also certify and provide evidence that the squad's captain is able to communicate with the shipmaster using the working language used on board, chosen by the ship-owner according to the Transport Code (s. L. 5513-1).

The shipmaster is to record in the ship's logbook any event questioning the role of the protection team or involving the weapons or ammunition on board. In the same logbook is the registration of all the boarding and landing movements of squad members, every storage and removal movement of arms or ammunition and the circumstances in which these are used (Transport Code, s. L. 5442-

²⁹ 200-300 metres (600-900 ft long) and 30 m (100 ft) wide ships are not uncommon.



11). In the event of an incident involving a member of the protection team, he must write an official report and send it to the national council for private security activities.

When the protection squad boards the ship, the shipmaster has to check the identity of each member and the weapons' serial numbers. He must then inform the state authorities – the prefect in mainland France or the commander-in-chief of the maritime area overseas – that the squad has embarked or disembarked (Transport Code, s. L. 5442-8). Furthermore, the shipmaster or a crew-member has to follow the protection agent in charge of carrying the weapons, in order to escort him between the vessel and the boundary of the port authority, upon both departure and arrival (Transport Code, s. R. 5442-5).

Lastly, the shipmaster is responsible for the defence strategy and its compliance with the vessels' requirements: he provides the protection team with any necessary information about the constraints linked with the safety and operation requirements of the ship, and he decides where and how the weapons must be stored (Transport Code, s. R. 5542-6).

3.2 The protection squad: composition, distinguishing marks and equipment

What can and must be the standard protection squad for a merchant ship is set by the Transport Code (ss. L. 5442-2 to L. 5442-6). The squad's composition is decided by both the ship-owner and the security firm. For this purpose, they must, according to the Code, analyse the potential hazards affecting the boat, taking into account its passive protection systems. According to the 2014 Act, the squad must consist of at least three members. Every agent wears a specific uniform allowing him to be identified on board, to avoid any confusion with police or military officers, and must be provided with a bulletproof vest.

Only the following weapon classes can be purchased, embarked and used:

- Semi-automatic shoulder firearms with calibre ranges from 5.56 mm (.22 inches) to 12.7 mm (.50 inches);
- Pump-action smooth-bore firearms;
- Handguns, no greater than 9 mm (.357 inches) calibre;
- Electromagnetic pulse (EMP) weapons;
- Tear gas or incapacitating spray bombs.

The squad may embark two weapons for each member and four additional weapons as a reserve (Transport Code, s. D. 5442-1-2). The ammunition needed, including incendiary ammunition, can also be embarked and stored on board. It must be noted that, even if the 2014 Act and subsequent regulations remain silent on this issue, they can be interpreted as forbidding the installation and use of firearms mounted on a fixed station aboard the ship. The authorised equipment may seem rather lightweight if one recalls that the protection team has to defend the ship even in grey zones where



piracy frequently profits from weapon smuggling, local conflicts and terrorism.³⁰

In some cases, the ship protection requirements have led some countries or operators to install fixed defence means on cargo vessels, such as small calibre guns on pivot mounts. The British firm Pacific Nuclear Transport Limited, for instance, which is in charge of transporting radioactive fuel for the British nuclear industry, operates three ships carrying a special police unit and fixed naval guns.³¹ Moreover, in France, a 1990 bill proposed to gather, if necessary when a crisis occurs, a ‘maritime complementary force’ consisting of militarised cargo ships, which might imply additional features such as machine gun mountings and light anti-aerial missile systems.³² Perhaps the same could happen when a merchant ship is requisitioned according to the Defence Code (s. R. 2213-21). These examples, however, reveal that this kind of protection pattern is usually reserved by both regulations and state practices for strategic cargo and acute crisis situations. Therefore, we can hardly imagine hundreds of merchant ships navigating around the globe with such defence means, which are disproportionate to the threat and creating other issues in terms of navigation safety, public order and international relations, by blurring the limits between a warship and a merchant ship.³³

It can therefore be assumed that the private ship protection mission was intended by the legislator to be a primary defence level, which was only designed to have a sufficiently strong preventative effect intended to deter pirates or at least to make them hesitate. It seems that the legislator regards the warships patrolling the zones as the true and final means of defence against piracy, and the level of naval control run in these areas is a meaningful clue in this sense.³⁴

3.3 The defence mission: how it is carried out

According to the Transport Code (s. L. 5442-7), the ship-owner must inform the state authorities that he intends to embark a protection squad on one of his vessels at least 72 hours before its boarding. At that time, he checks the professional cards of the agents and informs the captain of these elements. The declaration sent to state authorities must mention the ship’s scheduled itinerary and the protection squad’s boarding and landing programme. At the same time, 72 hours before

30 According to press reports, Somali pirates often use weapons, such as automatic assault rifles or rocket launchers (eg when attacking the French cruise ship *Le Ponant* in 2008 or the Liberian-flagged tanker *Sirius Star*). Moreover, in 2000 and 2002, speedboats apparently driven by suicide bombers/terrorists collided with the US Navy frigate *USS Cole* in Aden harbour and the French supertanker *Limbourg* close to the Yemeni shore.

31 These ships are M/V *Pacific Grebe*, *Pacific Heron* and *Pacific Egret*.

32 *Projet de loi relatif à la force maritime de complément*, n° 1190, déposé le 2 avril 1990 [Bill on the maritime complementary force] <www.assemblee-nationale.fr/14/projets/pl1674.asp> accessed 1 February 2016. The bill was sent to the Assemblée nationale but apparently never brought to debate.

33 Even if this was a common case until the beginning of the 18th century.

34 The French navy offers a voluntary naval control service, led by the Indian Ocean maritime area command. For the principles and rules of such control, see *instruction interministérielle* n° 1094/SGDN/PSE/PPS/CIPRS du 27 juin 2001 relative au contrôle naval volontaire [Interdepartmental instruction on voluntary naval control] *Bulletin officiel du ministère chargé de l’équipement* (Paris, 10 September 2001) 1112 <www.bulletin-officiel.developpement-durable.gouv.fr/fiches/BO200116/A0160050.htm> accessed 1 February 2016.



this transfer, the firm in charge of conveying arms and ammunition to the ready-to-sail ship must declare the transfer.

Once the ship is at sea, the shipmaster and the protection team's captain consider together the measures and countermeasures to be laid down in order to defend the vessel before it reaches the hazardous areas. There, the squad, if duly authorised by the captain, can begin its training. Indeed, the weapons can be removed from their storage compartments only when the boat sails into one of the two geographic areas discussed above and only the shipmaster can make such a decision and order the squad to put itself in readiness mode and defence condition (Transport Code, s. R. 5442-6).

The forms of action offered to the protection squad are defined by the Transport Code (ss. L. 5442-4 and L. 5442-6). In particular, the squad's members are the only persons on board who are legally entitled to handle the weapons and resort to force in order to ensure the vessel's protection.³⁵ If one of the aggressors turns out to be a prisoner or is picked up aboard the merchant ship after a failed assault, he must be placed under 'consignation' by the shipmaster,³⁶ who must inform the French embassy in the country where the next stop is scheduled.³⁷

3.4 After the mission: follow-up and feedback

Seeking to set strict norms for this new activity, the French legislator has built a comprehensive feedback system designed to gather and transmit to state authorities any useful information after the protection team has been activated. The shipmaster and the squad's captain are both required to write a separate report describing any incident that led the squad to resort to force (Transport Code s. L. 5442-12). The protection squad leader's report is attached to the shipmaster's report and sent to the maritime prefect as soon as is possible. If it carefully draws the conclusions of the event, this report can become the starting point of a true operational debriefing gathering the ship-owner, the ship protection firm and state authorities and allowing better knowledge of the threat to be gathered. Indeed, the legislator demands it to mention the attack's circumstances, nature, the means used by the pirates, especially their arms and assault methods, the number of pirates, description and language. Moreover, it collects the defence team's composition, written testimonies of its members, lists the arms and ammunition that were used, the wounds suffered and any damage to the ship or the cargo. The report must also analyse the event, the lessons learned from it, the procedures recommended to avoid new assaults and any breach of discipline rules assignable to the protection team.

³⁵ According to s. L. 5442-4, the squad mission is carried out in the framework laid down by Title II of Book I of the Penal Code, which suggests that only an appropriate and legitimate need for self-defence can justify forceful action.

³⁶ The aim of this coercive measure is to maintain public order on board by isolating any person who could endanger the vessel, the crew, the cargo or the passengers (Transport Code, s. L. 5531-19). It cannot be applied without the public prosecutor's agreement, but in cases of emergency, the shipmaster can decide to do so immediately if the prosecutor is duly informed.

³⁷ For the links between the protection squad issue and human rights, see Jessica NM Schechinger, 'Responsibility for Human Rights Violations Arising from the Use of Privately Contracted Armed Security Personnel Against Piracy. Re-Emphasizing the Primary Role and Obligations of Flag States' (2014) in Erik Jaap Molenaar, Sarah Nouwen and Cedric Ryngaert (eds), *What is Wrong with International Law? Liber Amicorum A.H.A. Soons* (Brill 2015).



There is no doubt that, provided these reports are thoroughly read and analysed by public authorities and the data collected to strengthen the response to piracy, they will be the most efficient state control tool for the sector. This is all the more necessary now that such missions will not tolerate any lack of professionalism, consciousness and sense of duty.

The Arctic Sunrise Arbitration and Acts of Protest at Sea

Dr Maria Chiara NOTO¹

Abstract

The present article analyses the *Arctic Sunrise* arbitration, which concerns the lawfulness of the boarding and seizure of the Dutch-flagged vessel, *Arctic Sunrise*, during a protest against the oil rig Prirazlomnaya in the exclusive economic zone of the Russian Federation. Even though the *Arctic Sunrise* vessel was three nautical miles from the rig, the Greenpeace activists on board were arrested, detained and charged with piracy, which was later replaced with a charge of aggravated hooliganism. Peaceful protest at sea is an internationally recognised lawful use of the sea, related to the freedom of navigation, and it is therefore subject to the limitations defined by, *inter alia*, the law of the sea. This necessitates a balancing of the right to protest at sea with other legitimate interests, including safety of navigation and the safety and security of artificial islands, installations and structures located on the continental shelf or in the exclusive economic zone of a State. According to the award, the coastal State should tolerate some level of nuisance caused by civilian protest as long as it does not amount to an interference with the exercise of its sovereign rights. In order to protect its sovereign rights, a coastal State may respond appropriately against acts of protest provided such measures are reasonable, necessary and proportionate. The *Arctic Sunrise* case raises a number of interesting legal questions concerning the phenomenon of acts of protest at sea, questions that have not been adequately explored to date. This paper aims to analyse the difference between acts of protest at sea, piracy and maritime terrorism, the limits on the right to protest at sea, and the connection between the law of the sea and the protection of human rights.

Keywords

right to peaceful protest, freedom of expression, piracy, maritime terrorism, fixed platform, law enforcement measures, international law of the sea, human rights, Greenpeace

1. Introduction

On the morning of 18 September 2013, two Greenpeace activists attempted to scale the Gazprom-operated Prirazlomnaya oil platform, located in the exclusive economic zone (EEZ) of the Russian Federation. This act was intended to be a non-violent direct action protesting the platform's

¹ Maria Chiara Noto holds her Ph.D. in International Law from the University of Milan and an LL.M. in Humanitarian Law from the University of Nice. At present, she is a legal adviser with the Italian Army and visiting research fellow at the Institute for International Legal Studies (ISGI) of the National Research Council (CNR) in Rome.



oil drilling activities.² The next day, in response to the protest, the Russian authorities boarded and seized the *Arctic Sunrise*, a Dutch-flagged Greenpeace vessel. The *Arctic Sunrise* was towed to the Russian port of Murmansk and was subsequently seized by the Leninsky District Court. Russian authorities arrested and detained the Greenpeace activists on board (the Arctic 30), charging them with piracy.³ One month later, the authorities dropped the piracy charge against the Arctic 30, replacing it with the charge of aggravated hooliganism.⁴

Piracy consists of acts of violence or depredation committed for private ends on the high seas, from persons on board a ship against another ship.⁵ The fact that the *Prirazlomnaya* is not a ship was the reason for the alternate charges of hooliganism against the Arctic 30. The initial charge of piracy, however, allowed the Russian authorities to board the *Arctic Sunrise* as provided by Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS) and, according to the principle of universal jurisdiction, to arrest and charge the Arctic 30.

On 4 October 2013, the Kingdom of the Netherlands instituted arbitral proceedings against the Russian Federation under Annex VII to the UNCLOS. On 22 November 2013, pending the constitution of the Arbitral Tribunal (Tribunal), the International Tribunal for the Law of the Sea (ITLOS) ordered the Russian Federation to release the *Arctic Sunrise* and its crew upon payment of EUR 3.6 million bond.⁶

2 Greenpeace International has drafted a detailed account of the events leading up to the arrest of the *Arctic Sunrise* and its crew: Greenpeace, 'Updates from the Arctic Sunrise activists' (*Greenpeace*, 1 August 2014) <www.greenpeace.org/international/en/news/features/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action-September-18-CET/> accessed 22 January 2016.

3 *ibid.*

4 See Shaun Walker, 'Arctic 30: Russia changes piracy charges to hooliganism' (*The Guardian*, 23 October 2013) <www.theguardian.com/environment/2013/oct/23/arctic-30-russia-charges-greenpeace> accessed 22 January 2016.

5 Art 15 of the Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 82 (High Sea Convention) and Art 101 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), to which Russia and the Netherlands are parties, both define piracy as '(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: i) on the high seas, against another ship or aircraft, or against persons or property on board such 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 sub-paragraph (a) or (b).'

6 This article does not investigate the ITLOS protective order of 22 November 2013 concerning provisional measures related to the *Arctic Sunrise* case. For comments on the ITLOS order, see Craig H Allen, 'ITLOS Orders Russia to Release Arctic Sunrise and its Greenpeace Protestors' (*Opinio Juris*, 25 November 2013) <<http://opiniojuris.org/2013/11/25/itlos-orders-russia-release-arctic-sunrise-greenpeace-protestors/>> accessed 16 January 2016; Giorgia Bevilacqua, 'Effettività del diritto internazionale del mare e tutela delle libertà fondamentali nel caso Arctic Sunrise' (2014) 1 *Diritti Umani e Diritto Intl* 188; Alex G Oude Elferink, 'The Arctic Sunrise Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 *The Intl J Marine and Coastal Law* 344; Douglas Guilfoyle and Cameron A Miles, 'Provisional Measures and the MV Arctic Sunrise' (2014) 108 *AJIL* 271; Richard Caddell, 'Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea' (2014) 45 *Netherlands YB Intl L* 359; Nuwan Peiris, 'Arctic Sunrise from ITLOS: The Arctic Surprise and in Search of a Balanced Order' (2015) 29 *Ocean YB* 44; Eva Rieter, 'Introductory Note to the "Arctic Sunrise" Case (Netherlands/Russia) (ITLOS)' (2015) 53 *ILM* 603.



Russia did not participate in the proceedings at any stage, invoking the declaration that it made when becoming a party to the UNCLOS, according to which ‘it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes ... concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction.’⁷ Prior to discussing the merits of the claims by the Netherlands, the Tribunal addressed issues of jurisdiction and admissibility, concluding that Russia’s declaration did not exclude, *prima facie*, the dispute from the jurisdiction of the Tribunal.⁸ According to Article 298(1)(b) UNCLOS, the optional exception in connection with disputes concerning law enforcement measures in regard to the exercise of sovereign rights or jurisdiction only applies with respect to disputes concerning marine scientific research and fisheries, neither of which was at issue in the *Arctic Sunrise* case.

Russia’s non-appearance did not constitute a bar to proceedings by virtue of Article 9 of Annex VII to the UNCLOS, according to which the Tribunal can make its award if the other party to the dispute requests the Tribunal to continue the proceedings.⁹ The Tribunal made its award on 14 August 2015, declaring that the boarding and seizure of the *Arctic Sunrise* by the Russian Federation and the arrest of the Arctic 30 was illegal; consequently, it ordered the Russian Federation to compensate the Netherlands for the damage caused to the *Arctic Sunrise* and its crew.¹⁰ The Tribunal did not discuss the direct action put in place by the two activists who had tried to climb the platform and their subsequent arrest by the Russian authorities, because the Netherlands statement of the claim focused on the legitimacy of the boarding.¹¹

This paper aims to analyse the legal aspects of the *Arctic Sunrise* case concerning the law of the sea and the international protection of human rights. In particular, it will explore the difference between

7 Note Verbale from Russia to ITLOS, 22 October 2013, Annex No 18 <www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Note_verbale_Russian_Federation_eng.pdf> accessed 25 January 2016.

8 *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Award on Jurisdiction) Case No 2014-02 (2014) <www.pcacases.com/web/sendAttach/1325> accessed 23 February 2016 [77]-[78]. For comments, see Anna Dolidze, ‘The Arctic Sunrise and NGOs in International Judicial Proceedings’ (2014) 18 American Society of Intl L <www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings> accessed 22 January 2016; Chao Zhang and Yen-Chiang Chang, ‘Letter to the Editors: The Russian Federation Refuses to Appear before the ITLOS and the Annex VII Arbitral Tribunal’ (2015) 14 Chinese J of Intl L 405.

9 According to Art 9 of Annex VII to the UNCLOS: ‘If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.’ Concerning the non-appearance of the Russian Federation, see the ITLOS order of 22 November 2013 concerning provisional measures related to the *Arctic Sunrise* case and the joint separate opinion of Judge Wolfrum and Judge Kelly: *The “Arctic Sunrise” Case (The Kingdom of Netherlands v Russian Federation)* (Request for the prescription of provisional measures, Order of 22 November 2013) <www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf> accessed 22 February 2016.

10 *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Award on the Merits) Case No 2014-02 (2015) <www.pcacases.com/web/sendAttach/1438> accessed 22 January 2016. See for comments, Maria C Noto, ‘Atti di protesta violenta in mare: pirateria, terrorismo o fattispecie autonoma?’ (2015) 4 Rivista di Diritto Intl 1198.

11 *ibid*; *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Notification and Statement of Claim dated 4 October 2013) <www.pcacases.com/web/sendAttach/1314> accessed 25 January 2016.



acts of protest at sea and piracy, on the one hand, and maritime terrorism on the other. Finally, this paper aims to examine the limits of the right to peaceful protest at sea and the human rights standards applicable to maritime law enforcement measures intended to prevent and punish violent acts of protest.

2. The association of protest at sea with illicit acts

The Russian Federation put forth a number of legal justifications for the measures taken against the *Arctic Sunrise*. The legal issue of the exercise of enforcement jurisdiction over the vessel and the activists was resolved by the fact that the Greenpeace activists were initially accused of piracy *ex* Article 101 UNCLOS. According to the general norm of international law codified in Article 105 UNCLOS, every State may seize a pirate ship and arrest the persons on board on the high seas and, in conjunction with Article 58(2) UNCLOS, in the exclusive economic zone. However, relying on a charge of piracy raised a number of different problems, which we discuss in the following. The Russian authorities accused the crew of the *Arctic Sunrise* of maritime terrorism, as provided by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation¹² and the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (together 1988 SUA Convention and its Protocol),¹³ to which the Netherlands and the Russian Federation are both parties. The 1988 SUA Convention and its Protocol were amended in 2005, but unlike the Netherlands, the Russian Federation did not ratify them.¹⁴ Thereafter, the Russian Federation, in a diplomatic note of 1 October 2013, accused the Greenpeace activists of infringing laws applicable to artificial islands, installations, structures and the surrounding safety zones in the EEZ, covered by Articles 56 and 60 UNCLOS.¹⁵

Acts of protest at sea are often associated – arguably incorrectly – with several offences against maritime security, such as piracy and terrorism. This is especially true when activists take violent actions against ships or installations that they consider unlawful or dangerous to the environment. For the purpose of this paper, it is useful to distinguish between peaceful protest, non-violent direct action and violent protest activities. This is a necessary distinction in terms of understanding when a State may tolerate protest activities instead of adopting maritime law enforcement measures to prevent or repress the violent acts or dangerous manoeuvres put in place by activists.

12 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (this Convention was amended in 2015). For comments, Maria C Noto, 'La repressione del terrorismo marittimo e del traffico illecito di armi di distruzione di massa dopo l'entrata in vigore della Convenzione SUA 2005' (2011) 2 *La Comunità Intl* 283.

13 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304. The mentioned Protocol was amended in 2015; Noto, 'La repressione del terrorismo marittimo e del traffico illecito di armi di distruzione di massa' (n 12) 283.

14 As of 17 December 2015.

15 On the legal regime of the safety zone around installations, see Sebastian von Pesch, 'Coastal State Jurisdiction around Installations: Safety Zones in the Law of the Sea' (2015) 30 *Intl J of Marine and Coastal L* 512.



Acts of peaceful protest are lawful measures and include distributing leaflets or displaying banners. Peaceful protests do not cause physical damage, but they may disrupt traffic, passers-by and business or everyday activities. Greenpeace, which is one of the most visible environmental non-governmental organisations (NGO) in the world, uses peaceful protest to achieve its environmental goals. However, Greenpeace activists sometimes undertake non-violent direct action with the aim of interrupting activities they consider unlawful or dangerous to the environment, such as the dumping of waste, whaling or oil drilling. For instance, the main method used by Greenpeace activists to impede whaling is to place themselves between the harpoon and the whales.¹⁶

Particular instances of non-violent direct action may be questionable in terms of their lawfulness. Examples of this kind of action include blockades, workplace occupation or sit-ins aimed at stopping certain activities such as oil drilling in the Arctic waters. The consequences of such acts may be significant economic loss and/or minor property damage. For instance, the field in which the Prirazlomnaya rig was drilling contains 72 million tons of oil reserves, enabling potential annual production of 6.6 million tons.¹⁷ It is estimated that the interruption of extractive activities for any reason, including acts of protest, may result in the Gazprom oil company incurring losses of approximately USD 800 million per day.

Acts of violent protest at sea are unlawful acts, such as ramming and boarding other vessels, launching smoke bombs and flares, or dangerous manoeuvres – usually resulting in or creating a risk of property damage. The Sea Shepherd Conservation Society is one of the most aggressive environmental groups, usually attacking Japanese whaling ships in the Antarctic waters.¹⁸ Sea Shepherd claims to have sunk ten whaling ships between 1979 and 2002.¹⁹ This organisation attempts to justify its law enforcement role under the United Nations World Charter for Nature.²⁰ Paragraph 21 of the Charter states that ‘individuals [and] groups [shall] ... [s]afeguard and conserve nature in areas beyond national jurisdiction.’²¹ Sea Shepherd’s interpretation of the Charter is clearly erroneous because the Charter is a soft law instrument adopted by the UN General Assembly, and it does not provide for coercive measures nor does it authorise individuals or NGOs to use force. Even though certain provisions of the Charter refer to the responsibility of individuals, the protection of the high seas and its resources remain a State prerogative. Due to the use of violence at sea against other vessels, some States have described the activities of Sea Shepherd as eco-piracy or eco-terrorism, which is arguably incorrect.²²

16 The main techniques used by activists to hinder whaling are described in the reports available on the website of The Institute of Cetacean Research <www.icrwhale.org/News.html> accessed 25 January 2016.

17 Gazprom, ‘Prirazlomnoye oil field’ <www.gazprom.com/about/production/projects/deposits/pnm/> accessed 21 January 2016.

18 ‘Paul Watson: Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts’ (*The Telegraph*, 17 April 2009) <www.telegraph.co.uk/earth/5166346/Paul-Watson-Sea-Shepherd-eco-warrior-fighting-to-stop-whaling-and-sealhunts.html> accessed 25 January 2016.

19 See Paul Watson, *Seal Wars: Twenty-five Years in the Front Lines with the Harp Seals* (Key Porter Books 2002) 36.

20 cf World Charter for Nature, annexed to UNGA Res 37/7 (28 October 1982) UN Doc A/RES/37/7.

21 *ibid.*

22 See, below Sec 2.2.



2.1 Acts of protest *versus* piracy

In the *Arctic Sunrise* case, Greenpeace's acts of protest were initially qualified as piracy by the Russian authorities, but in light of the lacking 'two-vessel' requirement, the authorities later replaced the charge with aggravated hooliganism.²³ As the Greenpeace activists took action against a platform rather than a ship, the Tribunal simply concluded that their actions could not constitute piracy within the scope of Article 101 UNCLOS, without further analysing the compatibility of acts of protest at sea with the constitutive elements of the piracy definition.²⁴ Considering that the Award of the Tribunal in the *Arctic Sunrise* case does not provide any useful guidance as to whether the definition of piracy may also encompass acts of violent protest at sea, it is necessary at this stage to compare the two phenomena.

Several elements are common to both acts of protest at sea and piracy, namely the location, the fact that two vessels are involved and, on occasion, the use of violence. Article 101 UNCLOS formulates the definition of piracy in broad terms and seems, *prima facie*, capable of applying to acts of violent protest at sea. During the negotiations of the High Seas Convention, the definition was formulated in broad terms in order to facilitate agreement on the constitutive elements of piracy;²⁵ however, this has resulted in interpretative uncertainty. Article 101 UNCLOS assumed the definition of piracy contained in Article 15 High Seas Convention without any modifications that would have clarified the meaning.

Several national courts have considered non-violent protest acts as acts of piracy. In *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin*,²⁶ the Belgian Court of Cassation qualified as piracy the acts of protest undertaken by Greenpeace activists against two Belgian vessels, the *NV Mabeco* and the *NV Parfin*, which had discharged toxic substances on the high seas. Greenpeace activists boarded and seized the two vessels until law enforcement authorities arrived. The Belgian Court stated that in order to characterise illegal acts as piracy, it was sufficient that 'the acts in question were committed for personal ends.'²⁷ This interpretation by the Belgian Court appears to be incorrect because the term 'personal' is not a synonym for 'private'. Private ends are those not taken on behalf of a State. According to the United States Court of Appeals for the Ninth Circuit: 'The term [private ends] is normally used as an antonym to "public" (e.g., private attorney general) and often

23 *Netherlands v Russia* (Merits) (n 10) [123]-[124].

24 *ibid* [238]-[240]. For an in-depth analysis of the elements of distinction between acts of protest and piracy, see Noto, 'Atti di protesta violenta in mare' (n 10) 1198.

25 ILC, 'Report of the International Law Commission on the work of its seventh session' (2 May to 8 July 1955) UN Doc A/2934 (1955) II YB of the ILC 25.

26 Part of the judgement relating to the case *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (1988) 77 ILR 537. For comments, see Eric David, 'Greenpeace: Des Pirates!' (1989) 2 *Revue Belge de Droit Intel* 395; Samuel P Menefee, 'The Case of *Castle John*, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law' (1993) 24 *California Western Intl L J* 7; Alexandre Kiss and Dinah Shelton, *Manual of European Environmental Law* (Hart Publishing 1993) 510.

27 *Castle John and Nederlandse Stichting Sirius* (n 26) 537.



refers to matters of a personal nature that are not necessarily connected to finance (e.g., private property, private entrance, private understanding and invasion of privacy).²⁸

The locution 'private ends' was included in the draft articles of the High Seas Convention by the International Law Commission in order to exclude cases of piracy by warships or other government ships operated for non-commercial purposes. On this point, during the work of the Commission, Sir Gerald Fitzmaurice observed that: 'The Commission's conception had been that piracy was essentially an act committed by a ship's company or persons acting on their own authority, thereby excluding warships'.²⁹ The expression 'private ends' subsequently maintained in the UNCLOS serves to highlight the fact that an act of piracy can only be undertaken by private entities (individuals or NGOs), regardless of the underlying purpose (e.g. personal, economic or environmental). According to a Judge Kozinski of the United States Court of Appeals for the Ninth Circuit:

You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.³⁰

According to this perspective, any act of violence committed for private ends may be characterised as piracy if carried out on the high seas by persons on board a ship against another ship, regardless of the purpose pursued, which could be economic or social.

Even if the broad definition of piracy seems, *prima facie*, to include violent acts of protest, we can differentiate between the two phenomena. The purpose of activists is collective or social; activists mainly use non-violent methods of protest, but they occasionally resort to violence in order to resist during sit-ins, workplace occupations or to highlight certain activities in the media. The human and economic costs of piracy off the coast of Somalia and, more recently, off the coast of Guinea³¹ are not comparable.³² Crewmembers are rarely involved in incidents during the protests and no deaths

28 *Institute of Cetacean Research v Sea Shepherd Conservation* 725 F.3d 940 (CA, 9th Cir, 2013) 11 (Kozinski). For comments, see Ryan Keefe, 'Ninth Circuit Issues Preliminary Injunction Recognizing Activist Conservation Society as Pirates' (2013) 3 *Suffolk Transnational Law Review* 461; Tullio Scovazzi, 'La caccia ai cacciatori di balene' (2013) 28 *Rivista giuridica dell'ambiente* 457.

29 ILC, 'Report of the International Law Commission on the work of its eighth session' (23 April to 4 July 1956) UN Doc A/CN.4/104 (1956) I YB of the ILC 47 [53]-[55].

30 *Institute of Cetacean Research* (n 28) 2.

31 Many of the pirates acting in the Gulf of Guinea are guerrillas belonging to the Liberation Movement of the Niger Delta (MEND) and they are considered more violent than Somali pirates are, see ICC International Maritime Bureau (IBM), 'Piracy and Armed Robbery Against Ships: 2014 Annual Report' (January 2015) <www.hellenicshippingnews.com/wp-content/uploads/2015/01/2014-Annual-IMB-Piracy-Report-ABRIDGED.pdf> accessed 21 January 2016.

32 The IBM and the International Maritime Organization (IMO) constantly monitor piracy. The data reported in the text, updated as of 15 December 2015, can be found at the IMO and the IBM websites, respectively: <www.imo.it> and <www.icccs.org> accessed 20 January 2016.



have occurred to date. Pirates kidnap crewmembers and cargo on board private ships in order to extort ransom payments for their release.³³ The seizures may continue for long periods, sometimes even many years. Hostages may be subjected to inhuman treatment and their lives may be in danger because they are detained in constricted places or in unsanitary conditions.³⁴ The purpose pursued by pirates is mainly economic and the methods they employ include boarding vessels, committing armed robbery and stealing cargo.³⁵ Finally, pirates use violence systematically to break the will of the victims and the use of firearms is common. For the above reasons, it is not possible to qualify acts of protest at sea as 'piracy'.

2.2 Acts of protest *versus* terrorism

Due to the forceful methods used by activists, several States, such as Canada³⁶ and the United States,³⁷ consider the acts of protest employed by certain NGOs as 'eco-terrorism'.³⁸ In the *Arctic Sunrise* case, the Russian authorities claimed that the *Arctic Sunrise's* rigid hull inflatable boats (RHIBs) had attacked the *Prirazlomnaya* and its crew was therefore suspected of terrorism. In particular, the Russian authorities described the Greenpeace protest action as 'aggressive and provocative' and bearing 'to outward appearances' the characteristics of 'terrorist activities which could put lives in danger and have serious consequences for the platform,' and which 'exposed the Arctic region to the threat of an ecological disaster of unimaginable consequences'.³⁹

The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf appears to cover, *prima facie*, the actions of the *Arctic Sunrise* against

33 IBM, 2014 Annual Report (n 31).

34 Oceans Beyond Piracy, 'The Human Cost of Maritime Piracy 2012' (Working Paper, 2012) <www.oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf> accessed 20 January 2016.

35 IBM, 2014 Annual Report (n 31).

36 In a report on 'Single Issue Terrorism', the Canadian Security Intelligence Service declared that: 'Watson and his supporters have been involved in a number of militant actions against whale hunting, driftnet fishing, seal hunting and other related issues [and mentions] activities against logging operations in Canada', see G Davidson (Tim) Smith, 'Single Issue Terrorism' (Commentary no 74, Canadian Security Intelligence Service, 25 April 2008) <<http://ftp.fas.org/irp/threat/com74e.htm>> accessed 22 February 2016.

37 James F Jarboe, of the Counterterrorism Division of the FBI, has argued that Sea Shepherd is one of the main organisations involved in acts of eco-terrorism, see 'The Threat of Eco-Terrorism' (Congressional Testimony, 12 February 2002) <www2.fbi.gov/congress/congress02/jarboe021202.htm> accessed 22 January 2016.

38 See Raffi Khatchadourian, 'Neptune's Navy' (*The New Yorker*, 5 November 2007) <www.newyorker.com/reporting/2007/11/05/071105fa_fact_khatchadourian> accessed 22 January 2016; Yoko Wakatsuki, 'Japanese Accuse Anti-Whaling Activists of "Terrorism"' (CNN, 12 February 2007) <<http://cnn.com/2007/WORLD/asiapcf/02/12/japan.whaling/index.html?iref=newsserarch>> accessed 20 January 2016; Joseph Elliot Roeschke, 'Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters' (2009) 20 Villanova Environmental LJ 98; Amanda M Caprari, 'Lovable Pirates? The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean' (2010) 42 Connecticut L Rev 1511; Atsuko Kanehara, 'So-Called "Eco-Piracy" and Interventions by NGOs to Protest Against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position' in Clive R Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) 195.

39 *Netherlands v Russia* (Merits) (n 10) [98].



the *Prirazlomnaya*. Article 2 of the 1988 Protocol provides that if a person unlawfully and intentionally 'seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation', he or she commits an offence under the Protocol.⁴⁰ However, in the *Arctic Sunrise* case, the Tribunal rejected Russia's allegations of terrorism. In particular, the Tribunal stated that 'there were no reasonable grounds for the Russian authorities to suspect the Arctic Sunrise of terrorism and therefore any purported suspicion of potential terrorism could not provide a legal basis for the measures taken by the Russia against the vessel on 19 September 2013'.⁴¹ However, it is still worthwhile to note in short the similarities and distinctions between acts of protest and terrorism.⁴²

In the absence of a generally accepted definition of international terrorism contained in a binding legal instrument, our attention turns to the draft Comprehensive Convention on International Terrorism. According to the draft, international terrorism is any act that unlawfully and intentionally causes:

- (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; ... when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁴³

International terrorism is an offence with a specific scope, such that a connection exists between the conduct and intent. In other words, the offender must expect and intend the event to be a consequence of his or her action. Based on the definition mentioned above, the purpose of terrorist conduct is, by its nature or context, to intimidate the population or to compel a State or an international organisation to act in a certain way. The purpose of terrorism is political because the intention is to force a State or an international organisation to adopt a specific form of conduct. Although terrorists attack ships and the individuals on board, the target is actually the flag State or an international organisation.

In order to determine whether acts of violent protest could be equated with terrorism, it is necessary to determine whether the conduct of the activists is suitable to intimidate the population and if the aim of the activists is political. As specified above, some environmental NGOs use violence to disrupt activities, which, in some cases, may constitute illegal acts. The use of violence is not directed against individuals, but against vessels or installations involved in activities considered unlawful or

40 1988 Protocol (n 13).

41 *Netherlands v Russia* (Merits) (n 10) [322].

42 For an in-depth analysis of the elements of distinction between acts of protest and instead maritime terrorism, see Noto, 'Atti di protesta violenta in mare' (n 10) 1198.

43 UNGA Res 59/894 (12 August 2005) UN Doc A/59/894. On the definition of international terrorism, see Chiara Di Stasio, *La lotta multilivello al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali* (Giuffrè Editore 2010) 15; Christian Walter, 'Terrorism' *Max Planck Encyclopedia of Public International Law* (2011) <www.mpepil.com> accessed 20 January 2016.



dangerous to the environment by the protesters. By contrast, terrorist organisations use violence systematically. Terrorist attacks often involve weapons or explosives and aim to provoke fear or terror in the population and institutions, and to cause a large number of civilian casualties. Finally, terrorists use information tools and media to promote rapid, mass dissemination of information about the attacks and their effects, with the aim of amplifying the threat as well as raising fear and a perception of a lack of safety within the population.⁴⁴ Regarding the aim, environmental organisations exercise continuous pressure upon States in an attempt to induce them to modify their conduct in environmental matters.⁴⁵ For instance, Greenpeace's *Save the Arctic* campaign⁴⁶ aims to sensitise involved States to the environmental risks resulting from drilling activities in the Arctic, while the *GrindStop 2014* campaign,⁴⁷ organised by Sea Shepherd, strives to save pilot whales in the Faroe Islands. The mentioned awareness campaigns seem to be politically motivated like terrorism acts, insofar as they are directed against States that undertake activities dangerous to the environment. The activities of environmental NGOs aim to protect the environment and to raise public awareness of issues affecting the ecosystem, in order to influence States' policies in environmental matters or encourage the effective implementation of treaties to which they are a party. For instance, on 7 January 2012, two Sea Shepherd activists illegally climbed aboard the Japanese whaling vessel *Shonan Maru 2* and delivered a letter to the commander containing the following message: 'We are taking this action to remind the Australian government of their obligation to enforce existing laws pertaining to the prohibition of whaling ships in our waters.'⁴⁸ The activists were unarmed and they immediately surrendered when the crew of the *Shonan Maru 2* attempted to arrest them.⁴⁹

Peaceful protests, direct actions and even violent acts of protest do not have the same intensity as acts intended to terrorize the population or to compel a State to behave in a particular way. For these reasons, acts of protests at sea should not be equated with terrorism.

3. Right to protest at sea and freedom of navigation

In an *amicus curiae* brief submitted to the ITLOS in the provisional measures procedure initiated by the Netherlands, Greenpeace justified its direct actions against the oil rig *Prirazlomnaya* by invoking

44 Joseph Kunkle, 'Social Media and the Homegrown Terrorist Threat' (*The Police Chief*, February 2016) <www.policchief-magazine.org/magazine/index.cfm?fuseaction=display&article_id=2692&issue_id=62012> accessed 24 February 2016.

45 cf Caprari (n 38); Alana Preston, 'Eco-Terrorism in the Southern Ocean: A Dangerous Byproduct of the Tangled Web of International Whaling Conventions and Treaties' (2012) 34 *Whittier L Rev* 117.

46 The program of the campaign is available at *Save the Arctic* <www.savethearctic.org> accessed 20 January 2016.

47 Information on the *GrindStop 2014* campaign is available at Sea Shepherd <www.seashepherd.org/grindstop/> accessed 20 January 2016.

48 The facts are reported at Sea Shepherd, 'Three Australian Prisoners Now Detained on a Japanese Whaler in Australian Waters' (7 January 2012) <www.seashepherd.org/news-and-media/2012/01/07/three-australian-prisoners-now-detained-on-a-japanese-whaler-in-australian-waters-1309> accessed 25 January 2016.

49 *ibid.*



the right to peaceful protest.⁵⁰ The right to protest is part of the freedoms of expression, assembly and association, which are regulated by customary law and codified in several international human rights treaties.⁵¹ In accordance with the freedoms of assembly and expression, every individual has the right to express his opinion, his opposition and even to dispute decisions taken by any State. The European Court of Human Rights (ECtHR), in *Women on Waves v Portugal*, underlined the ‘crucial importance’ of the freedom of expression, which constitutes one of the preliminary conditions of a functioning democracy.⁵² Moreover, in *Youth Initiative for Human Rights v Serbia*, the ECtHR considered NGOs to be ‘critical watchdogs’ because they play the important task of disseminating information on matters of public interest in civil society.⁵³

The International Maritime Organization (IMO) has also addressed the right to protest at sea, and it is currently drafting a Code of Conduct for Assurance of the Safety of Crew and Maritime Navigation during Demonstrations/Campaigns against Ships on the High Seas.⁵⁴ This Code aims to provide guidelines for stakeholders to ensure and promote the safety of crewmembers, maintain maritime order and preserve the right to organise peaceful manifestations.⁵⁵ The text used as a basis for negotiations clarifies that acts of protest ‘should not involve violent activities, or threats of violent activities. Violent activities for the purpose of this Code include activities that are a risk (not only directly but also indirectly) to human life and property and safe navigation of vessels.’⁵⁶

The IMO is not the only international forum to discuss acts of violent protest at the sea and its consequences for maritime security. In 2011, the International Whaling Commission (IWC) adopted Resolution 2011-2, which recognises the right to peaceful protest at sea but condemns all illegal or dangerous acts at sea. Moreover, the Resolution invited Member States to call on the masters of vessels to take responsibility for ensuring that safety at sea is their highest priority and to observe strictly international collision avoidance regulations. Finally, the Commission has requested Member States that are often the target of protests to adopt appropriate measures in order to avoid incidents at sea during protests and demonstrations.

50 Greenpeace, ‘*Amicus Curiae* Submission by Stichting Greenpeace Council (Greenpeace International)’ (30 October 2013) <www.greenpeace.org/international/Global/international/briefings/climate/2013/ITLOS-amicus-curiae-brief-30102013.pdf> accessed 25 January 2016.

51 Philip Leach, *Taking a Case to the European Court of Human Rights* (3rd ed, OUP 2005) 326; Luzius Wildhaber, ‘Aspects of the Freedoms of Expression and Association Under the European Convention in Human Rights: Articles 10 and 11’ in Sergio A Fabris (ed), *Trends in the International Law of Human Rights Law: Studies in Honour of Professor Antônio Augusto Cançado Trindade* (OUP 2005) 191; Jasper Teulings, ‘Peaceful Protests Against Whaling on the High Seas – A Human Rights-Based Approach’ in Clive R Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) 221; Ian Currie, ‘Freedom of Expression and Association’ in Mark Tushnet, Thomas Feiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 231.

52 *Women on Waves v Portugal* App no 31276/05 (ECtHR, 3 February 2009) para 29.

53 *Youth Initiative for Human Rights v Serbia* App no 48135/06 (ECtHR, 25 June 2013) para 20.

54 IMO, Sub Committee on Safety of Navigation, NAV 54/10/1 of 25 April 2008.

55 *ibid* [1.2].

56 *ibid* [3.1.1].



According to the *Arctic Sunrise* arbitral award, peaceful protest at sea is ‘an internationally lawful use of the sea related to the freedom of navigation.’⁵⁷ As is well known, the freedom of navigation is a principle of customary international law, which foresees that, apart from the exceptions provided for in international law,⁵⁸ ships flying the flag of any sovereign State shall not suffer any interference from other States.⁵⁹ Every ship is subject to the jurisdiction of its flag State (i.e. ‘flag State jurisdiction’), which establishes criteria for inclusion of ships in its registry and determines the causes of vessels’ removal from it (Article 91 UNCLOS).

Based on recent practice, the jurisdiction of the flag State encompasses the ability to exercise diplomatic protection in favour of all individuals on board, regardless of their nationality.⁶⁰ In this regard, the Tribunal considered the *Arctic Sunrise* a unit such that its crew, all persons and goods on board, as well as its owner and every person involved or interested in its operations, constituted part of an entity linked to its flag State.⁶¹ This entitled the Netherlands to bring claims in respect to alleged violations of its rights under the UNCLOS. The flag State also has a duty (a due diligence obligation) to ensure that the ships flying its flag are not used to commit unlawful acts. Due to the dangerous and unlawful method of protest used, some States, such as the United Kingdom, have removed vessels used by Sea Shepherd from their ship register.⁶²

4. Limits to the right to protest at sea

The Tribunal in the *Arctic Sunrise* case recognised that acts of peaceful protest at sea may result in possible disruption of the freedom of navigation and expressed the view that this should be tolerated

⁵⁷ *Netherlands v Russia* (Merits) (n 10) [227].

⁵⁸ Art 110 UNCLOS provides for several exceptions, namely piracy, slave trade, unauthorised broadcasting, sailing without nationality, practicing deception with regard to nationality.

⁵⁹ Albert J Hoffmann, ‘Freedom of Navigation’ *Max Planck Encyclopedia of Public International Law* (2011) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1199?prd=EPIL>> accessed 25 January 2016.

⁶⁰ See *The M/V ‘Saiga’ (No 2) Case (Saint Vincent and the Grenadines v Guinea)* (Judgment, 1 July 1999) ITLOS Reports 1999 <www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf> accessed 20 January 2016. See for comments Maria I Papa, ‘Protezione diplomatica, diritti umani e obblighi erga omnes’ (2008) 3 Rivista di Diritto Intl 669.

⁶¹ *Netherlands v Russia* (Merits) (n 10) [172]. According to Art 18 of the Draft Articles on Diplomatic Protection adopted by the ILC in 2006: ‘The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crewmembers, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.’ See also *The M/V ‘Saiga’ (No 2)* (n 60) [106]; *The M/V ‘Virginia G’ Case (Panama/Guinea-Bissau)* (14 April 2014) ITLOS Reports 2014 [127].

⁶² The following States have removed vessels belonging to Sea Shepherd from their ship registers: Belize, Canada, the Cayman Islands, Great Britain and Togo; see also Sea Shepherd, ‘The Bob Barker Goes Dutch’ (25 May 2010) <www.seashepherd.org/news-and-media/2010/05/25/the-bob-barker-goes-dutch-194> accessed 20 January 2016.



by the coastal State so long as they do not interfere with the exercise of the sovereign powers of the State.⁶³ The European Court of Justice (ECJ), in *Eugen Schmidberger v Republic of Austria*, similarly stated that '[non-violent direct actions] usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.'⁶⁴ Moreover, the ECtHR, in *Sergey Kuznetsov v Russian Federation*, stated that:

any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.⁶⁵ However, it could be difficult to identify the limit beyond which acts of protest cause a level of disruption such that the State concerned may adopt appropriate measures. There is a presumption that manifestations or campaigns of protest are peaceful, unless there are reasonable grounds to believe that the activists intend to use or incite violence, which is never permissible. Acts of violent protest against a ship and its crew or performing dangerous manoeuvres at sea can cause accidents. In certain cases, they have serious consequences for the safety of maritime navigation, human life at sea or the marine environment.⁶⁶

According to the *Arctic Sunrise* award, the right to protest at sea is related to the freedom of navigation and is therefore subject to the limitations defined, *inter alia*, by the law of the sea.⁶⁷ Ships are subject to the jurisdiction of their flag State, the exercise of which differs according to the maritime zone in which the vessel is located. As is well known, the relevant maritime zones include internal waters and the territorial sea, the contiguous zone, the EEZ (if declared by a coastal State) and the high seas. As a ship sails away from a State's coastline, the extent of jurisdiction shifts in favour of the flag State, until it gains exclusive jurisdiction on the high seas. Conversely, as the ship approaches a State's coastline, the balance shifts partially in favour of the coastal State.

According to Article 87 UNCLOS, the high seas are open to all States. The freedom of navigation must be exercised by all States with due regard for the interests of other States in the exercise of the freedom of the high seas (Article 87(2) UNCLOS). Ships sailing the high seas are under the exclusive jurisdiction of their flag State (Article 92 UNCLOS). According to the principle of exclusive jurisdiction of the flag State on the high seas, only that State may intervene, i.e. stop and board vessels

63 *Netherlands v Russia* (Merits) (n 10) [328].

64 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* Case C-112/00 [2003] ECR I-5694 [91].

65 *Sergey Kuznetsov v Russian Federation* App no 10877/04 (ECtHR, 23 January 2009) para 44.

66 See Glen Plant, 'International Law and Direct Action Protests at Sea: Twenty Years On' (2002) 33 *Netherlands YB Intl L* 75; Atsuko Kanehara, 'Legal Responses of Japan to the Impediments and Harassments by Foreign Vessels against Japanese Vessels during Research Whaling in the Antarctic Sea' (2009) 56 *Japanese Digest of Intl L* 556; Kanehara (n 38); Preston (n 45); Noto, 'Atti di protesta violenta in mare' (n 10) 1198.

67 *Netherlands v Russia* (Merits) (n 10) [228].



involved in protest activities. If a third State has an interest in intervening – for example, the State of nationality of the vessel that is the target of the protest – it must obtain the authorisation of the flag State prior to boarding the activists' ship. The principle of flag State jurisdiction impedes any interference with the navigation of foreign ships without the permission of their flag States. Article 88 UNCLOS reserves the high seas for peaceful purposes, and any intentional collisions or other unsafe conduct occurring during protests on the high seas violate this norm. The principle of good faith, the prohibition of abuse of rights and the peaceful use of the high seas are precise limits, according to which States exercise the freedom of navigation in accordance with the interests of all other States exercising the freedom of the high seas.

The framework relating to the high seas is also applicable to the EEZ, in which States must exercise their rights with due regard for the interests of the coastal State. Vessels sailing within the EEZ of a coastal State must comply with its laws and regulations in matters of management of natural resources, research and protection of marine environment, installation and the use of artificial structures (Article 58 UNCLOS). A platform located within the EEZ may be subjected to special security measures, such as allowing the coastal State to establish a safety zone not exceeding 500 metres around the platform, in which unauthorised access is prohibited (Article 60(5) UNCLOS). Breaching the safety zone without authorisation is therefore a violation of the Coastal State's sovereign rights and the flag State cannot invoke the freedom of navigation to justify this infraction. A breach of the safety zone around the installations located in the EEZ allows the coastal State to take all necessary measures in order to protect the platform, including boarding, searching and seizing the vessel (Article 55 in conjunction with Article 56 UNCLOS).⁶⁸ Moreover, according to the *Arctic Sunrise* award, a coastal State may pursue a vessel involved in illegal activities within the safety zone of the installation if the pursuit began in this area and if the pursuit has not been interrupted.⁶⁹ According to Article 111 UNCLOS, hot pursuit prevents foreign ships, which have violated the laws and regulations of a coastal State, from evading their responsibility by fleeing to the high seas. Such pursuit must commence when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, the contiguous zone or safety zones around continental shelf installations of the pursuing State, and may only continue outside these zones if the pursuit is uninterrupted. Article 111 UNCLOS sets out four conditions for lawful exercise of the right to hot pursuit: (1) a violation of the laws of the coastal State, (2) commencement of pursuit (within the relevant zone), (3) location of the pursued ship and the giving of a signal to stop, (4) continuity of pursuit. These conditions are 'cumulative' and therefore each must be satisfied.⁷⁰ In the *Arctic Sunrise* case, the Dutch ship arrived in the vicinity of

68 According to Art 55 UNCLOS, in the exclusive economic zone, the coastal State has: '(a) sovereign rights ... for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures.' In exercising its rights and performing its duties under Art 58(3) UNCLOS, in the exclusive economic zone, 'States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention.'

69 *Netherlands v Russia* (Merits) (n 10) [272].

70 *The M/V 'Saiga' (No 2)* (n 60) [146].



the *Prirazlomnaya* on 17 September 2013, but it remained outside the safety zone established around the platform by the Russian Federation.⁷¹ Despite the constructive presence⁷² of five RHIBs launched from the *Arctic Sunrise* that approached the *Prirazlomnaya* rig, the Tribunal concluded that the pursuit was interrupted.⁷³ Moreover, having reviewed the evidence, the Tribunal stated that the Russian warship ‘remained in proximity to the *Arctic Sunrise* not as part of an ongoing pursuit, but rather to ensure that the Greenpeace ship did not undertake any further actions at the platform and in the expectation of further instructions from a higher authority.’⁷⁴

Acts of protest at sea may entail a risk not only to the security of navigation and installations, but also to the marine environment. Consider, for instance, the consequences for the marine environment following the collision of two vessels. Article 221 UNCLOS allows coastal States to take preventive measures against foreign ships and their crews in order to protect their coastlines from pollution or threat of pollution following an accident at sea or actions related thereto, when harmful consequences for the marine environment are reasonably expected. According to the *Arctic Sunrise* award, coastal State may adopt ‘enforcement measures [which] are to be “proportionate to the actual or threatened damage” to protect the coastal State’s interests from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty.’⁷⁵ However, in this case, the Tribunal stated that:

even if it were to accept that the actions of the *Arctic Sunrise* constituted an ‘occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo,’ the threatened damage to Russia’s interests could not reasonably have been expected to result in major harmful consequences.⁷⁶

The adverb ‘reasonably’ is found throughout the various provisions of the law of the sea providing for the adoption of maritime enforcement measures, but there are no legal parameters to identify the meaning and, as discussed below, could become a problem.

In the territorial and internal waters, foreign ships are under the exclusive coastal State jurisdiction as regards matters of taxation, immigration, health and security. For all other matters, the coastal State must ensure the innocent passage of foreign ships through its territorial sea (Article 24 UNCLOS). Coastal States may restrict or prevent access of foreign ships to its territorial sea when the

71 There was an issue concerning the legality of the breadth of the Russian safety zone. The Tribunal found no evidence that the Russian authorities, unlike what they declared, established a three-nautical mile safety zone. Therefore, the Tribunal concluded Russia’s EEZ not exceed 500 metres in radius, as confirmed by the Federal Law No. 187-F3 dated 20 November 1995 ‘On the continental shelf of the Russian Federation’: *Netherlands v Russia* (Merits) (n 10) [202]-[220].

72 The doctrine of constructive presence is incorporated into Art 111(4) UNCLOS.

73 *Netherlands v Russia* (Merits) (n 10) [275].

74 *ibid* [272].

75 *ibid* [308].

76 *ibid* [310].



passage could reasonably be considered prejudicial to the peace, good order or security of the State (Article 25 UNCLOS). The passage of certain NGO vessels may not be innocent, especially when they organise protests, which could cause a level of disruption to ordinary life, without asking for the coastal State's authorisation.

5. Limits to the maritime law enforcement measures from UNCLOS and (other) rules of international law

The preventive measures that a coastal State may adopt have specific limits and they must fulfil the tests of reasonableness, necessity and proportionality. The Tribunal in the *Arctic Sunrise* case gave careful and detailed consideration to the types of protest actions that could reasonably be considered to constitute an interference with the exercise of a coastal State's sovereign rights, particularly in the context of the case before it. In this regard, the Tribunal considered it reasonable for a coastal State to prevent: '(i) violations of its laws adopted in conformity with the Convention; (ii) dangerous situations that can result in injuries to persons and damage to equipment and installations; (iii) negative environmental consequences ... and (iv) delay or interruption in essential operations'.⁷⁷ In the case at hand, the Tribunal did not deny the violation of the security zone or undue interference on the sovereign rights of the Russian Federation. Instead, the Tribunal stated that due to the boarding and seizure of the *Arctic Sunrise*, it was no longer engaged in actions that could potentially interfere with Russia's exercise of its sovereign rights as a coastal State or with the operation of the *Prirazlomnaya*. Therefore, if the Russian Federation had wanted to arrest the *Arctic Sunrise* crewmembers for acts committed before the boarding and seizing, it should have obtained authorisation from the flag State.

Acts of protest may interfere with the exercise of the sovereign rights of a coastal State because they could be a threat of maritime safety and security and the safety of installations. The State concerned may adopt maritime enforcement measures in order to: (1) reduce and control vessel-source pollution in its EEZ (Article 220 UNCLOS), (2) prevent and repress the use of dangerous manoeuvres for the safety of navigation and the human life at sea (Rule 2 of the Convention on the International Regulations for Preventing Collisions at Sea),⁷⁸ (3) protect the security of installations in its EEZ or contiguous zone if a vessel enters the security zone without permission (Article 60(4) UNCLOS), (4) arrest a ship that was pursued after having committed unlawful acts against the security of coastal State, as well as its installations and resources (Article 111 UNCLOS), (5) arrest any person or ship engaged in unauthorised broadcasting and seize the broadcasting apparatus (Article 109 UNCLOS).⁷⁹ In compliance with the principle of exclusive jurisdiction of the flag State, the State of nationality of

⁷⁷ *ibid* [327].

⁷⁸ Convention on the International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entered into force 15 July 1977) 1050 UNTS 16.

⁷⁹ Broadcasting is sometimes employed for propaganda activities at sea. In cases other than those mentioned, and based on the aforementioned principle of flag State jurisdiction, only the flag State may exercise enforcement jurisdiction against ships employed for protest activities.



the targeted vessel of the protest, which could have an interest in intervening so as to defend it, shall make good faith efforts to obtain the consent of the flag State of the activists' ship prior to boarding it. Even if, in certain circumstances, the UNCLOS permits the use of maritime enforcement measures such as boarding, arrest or seizure of ships,⁸⁰ it does not specify when and how much force is acceptable for law enforcement authorities to use.

Concerning the maritime enforcement measures that a State may adopt in the cases mentioned above, Article 301 UNCLOS provides that: 'In exercising their rights and performing their duties under this Convention, State 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.' The use of force must be avoided to the extent possible. This is an important remark made in several dispute settlements such as the *I'm Alone*,⁸¹ the *Red Crusader*⁸² and the *MV Saiga (No. 2)*⁸³ cases. However, if the use of force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Force must be used only when strictly necessary and it must be proportional to lawful objectives. Moreover, the use of restraint in the use of force minimises damages and injuries. According to the Basic Principles on the Use of Force and Firearms, force may be used:

only in self-defence or defence of others against imminent threat of death or serious injury, or to prevent a particularly serious crime that involves a grave threat to life, or to arrest or prevent the escape of a person posing such a threat and who is resisting efforts to stop the threat, and in every case, only when less extreme measures are insufficient.⁸⁴

The intentional use of lethal force and firearms are only allowed when strictly unavoidable in order to protect human life. Finally, according to the *MV Saiga (No. 2)* case, 'considerations of humanity must apply in the law of the sea, as they do in other areas of international law.'⁸⁵ This important remark of the ITLOS, rather than amounting to a rule of law,⁸⁶ appears to be a moral principle, which should guide a State towards the adoption of appropriate maritime enforcement measures. The notion of 'humanity' includes all common human values, such as respect for human life and dignity, which a State cannot disregard when using force to arrest a ship.

Limits to the use of force in the exercise of police action authorised by international law – which

80 For comments, see Noto, 'Atti di protesta violenta in mare' (n 10) 1198.

81 *S.S. I'm Alone (Canada, United States)* (1935) 3 RIAA 1609.

82 *Investigation of certain incidents affecting the British trawler Red Crusader* (1962) 29 RIAA 521.

83 *The M/V 'Saiga' (No 2)* (n 60) [155].

84 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.1.

85 *The M/V 'Saiga' (No 2)* (n 60) [10].

86 There is a certain amount of disagreement concerning the source, scope and function of the notion of 'humanity'. See Elena Carpanelli, 'General Principles of International Law: Struggling with a Slippery Concept' in Laura Pineschi (ed), *General Principles of Law – The Role of the Judiciary* (Springer 2015) 125.



vary from, yet are compatible with, those contained in the UNCLOS – have been specified in dispute settlement and treaty practice. According to the *Arctic Sunrise* award, Article 293 UNCLOS ‘ensures that, in exercising its jurisdiction under the Convention, a Tribunal can give full effect to the provisions of the Convention. For this purpose, some provisions of the Convention directly incorporate other rules of international law.’⁸⁷ Article 293(1), however, does not constitute a source of jurisdiction and does not extend the jurisdiction of a Tribunal, but authorises the application of other rules of international law, which are integrated into the norms contained in the UNCLOS.⁸⁸ The Tribunals in *MOX Plant*⁸⁹ and *Chagos Islands*⁹⁰ likewise asserted that Article 293(1) does not constitute a grant of jurisdiction over claims falling outside the scope of the UNCLOS.⁹¹

The international legal order depends on the consent of States. Tribunals deriving their jurisdiction from the UNCLOS can exercise jurisdiction over disputes only where States have granted them jurisdiction. Article 288(1) limits the jurisdiction of UNCLOS Tribunals to disputes relating to the interpretation or application of the UNCLOS. The words ‘other rules of international law’ contained in Article 293 UNCLOS can only refer to secondary rules of international law that help one interpret and apply the UNCLOS provisions.

This interpretative approach is confirmed by Article 31(3)(c) of the Vienna Convention,⁹² which provides that in cases of broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the UNCLOS in order to interpret and apply its provisions. The UNCLOS is therefore to be interpreted and implemented in accordance with other relevant rules of international law, such as those relating to the protection of human rights.⁹³ The Netherlands requested that the Tribunal interpret the relevant provisions of the UNCLOS in light of international human rights law, in conformity with Article 31(3)(c) of the Vienna Convention.

Concerning the application of human rights law, the Tribunal in the *Arctic Sunrise* case noted that

87 *Netherlands v Russia* (Merits) (n 10) [188]; see analogously *Ireland v United Kingdom* (*‘MOX Plant Case’*), Procedural Order No 3 (2003) 126 ILR 310 [19] *The “ARA” Libertad Case* (*Argentina v Ghana*) (Order of 15 December 2012) ITLOS Reports 2012 [7] (Wolfrum and Cot).

88 *Netherlands v Russia* (Merits) (n 10) [188].

89 *MOX Plant Case* (n 87) [19].

90 *Chagos Marine Protected Area Arbitration* (*Mauritius v United Kingdom*) (Award No 2011-03) (PCA, 18 March 2015) [2007] PCA Award Series 1.

91 In addition, the Philippines did not seek to assert jurisdiction under Art 293(1) UNCLOS. See *The Republic of Philippines v The People’s Republic of China* (Award No 2013-19) (PCA, 8 July 2015) Jurisdiction Hearing Day 2 Final Transcript 97. Conversely, see *The M/V ‘Saiga’* (No 2) (n 60) and *Guyana v Suriname* (Award, 17 September 2007) (2008) 47 ILM 164.

92 Art 31(3)(c) Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 requires that, for the purposes of the interpretation of a treaty, there shall be taken into account, together with the context, ‘[a]ny relevant rules of international law applicable in the relations between the parties’.

93 Bernard H Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1997) 36 Columbia J of Transnational L 399; Budislav Vukas, ‘Droit de la mer et droits de l’homme’ in Giuseppe Cataldi (ed), *La Méditerranée et le Droit de la mer à l’aube du 21e siècle* (Bruylant 2002) 85; Sophie Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 Sri Lanka Journal of Intl L 85.



it is entitled to have regard, to the extent necessary, to all applicable rules of customary international law, including international human rights standards, in the interpretation and application of the provisions of the UNCLOS. The Tribunal considered that ‘if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate.’⁹⁴ The Tribunal recognised instead that it does not have jurisdiction to apply, or determine breaches of, the freedom of expression and the right to liberty (Articles 9 and 12 ICCPR),⁹⁵ as requested by the Netherlands. This treaty has its own jurisdiction and, as the Tribunal held, a UNCLOS Tribunal is not competent to act as a substitute for those regimes.⁹⁶

On 16 March 2014, the Arctic 30 brought the question to the ECtHR, asking for a finding that their arrest and detention by the Russian authorities constituted a violation of their right to liberty and security and the freedom of expression (Articles 5 and 10 of the European Convention on Human Rights).⁹⁷ To date, the ECtHR has not yet rendered a decision, but assuming all of the admissibility requirements are met, a finding of a violation by the Russian Federation is likely. While the measures adopted by the Russian Federation arguably pursued legitimate objectives – such as maintaining public order and the protection of the Prirazlomnaya rig – they were not proportionate to achieving their objectives and may therefore constitute a violation of the applicants’ freedom of expression and right to liberty.

6. Conclusions

The events at issue in the *Arctic Sunrise* case fall within the aforementioned category of non-violent direct action. This category constitutes a grey area of international law, the qualification of which as lawful or unlawful essentially depends on the nature of the acts put in place by the activists. This means that the legality of conduct by activists must be evaluated case by case. A protest must be presumed peaceful unless there are reasonable grounds to believe that the activists intend to use or incite violence, which is never permissible. Using violence against a ship and its crew or performing dangerous manoeuvres at sea may cause accidents with serious consequences for the safety of maritime navigation, human life at sea or the marine environment.

The violent conduct of the activists seems to be equated, *prima facie*, to piracy and terrorism due to the wider definitions contained in Article 101 UNCLOS and in the draft Comprehensive Convention

⁹⁴ *Netherlands v Russia* (Merits) (n 10) [197].

⁹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). The Netherlands and Russia are both parties to the ICCPR.

⁹⁶ *Netherlands v Russia* (Merits) (n 10) [197].

⁹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222. See, eg, application forms of Ms. Sini Annuka Saarela, Mr. Kieron John Bryan, and Mr. Gizem Akhan and the form of other activists at <www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/Peace-Dove/Arctic-30/European-Court-of-Human-Rights/> accessed 20 January 2016.



on International Terrorism respectively. Acts of peaceful protest at sea instead represent a legitimate exercise of freedom of navigation, the possible disruption of which should be tolerated, unless these acts interfere with the exercise of the sovereign rights of a State. The Prirazlomnaya platform belongs to a private company, Gazprom, which the Russian Federation authorised to drill for oil in Arctic waters. Greenpeace activists have the right to protest as much as the Gazprom Company has the right to enjoy its property rights as the owners of the oil rig. Russia protected the property rights of Gazprom in its EEZ where, according to Article 56 UNCLOS, Russia not only has the sovereign rights of economic exploitation and exploration of that zone, but also jurisdiction – including enforcement jurisdiction – with regard to the installations in the EEZ. In this zone, according to Article 58(3) UNCLOS, States must have due regard to the rights and duties of the coastal State and must comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the UNCLOS. The coastal State should protect lawful activities on its territory, even if the threat comes from foreign individuals or NGOs.

The Tribunal in the *Arctic Sunrise* case gave us detailed indications to identify which acts of protest could reasonably be considered to constitute an interference with a coastal State's sovereign rights, particularly in the context of the case at hand. The Tribunal further provided several parameters in order to identify what preventive measures would be reasonable for a coastal State.⁹⁸ Of key importance are the first and fourth parameters: violations of the coastal State's laws adopted in conformity with the UNCLOS, and delay or interruption in essential operations. Given the constructive presence of the five RHIBs launched from the *Arctic Sunrise* that approached the Prirazlomnaya rig, the breach of the safety zone around the platform provided a basis that in principle allowed the Russia Federation to adopt preventive measures against the vessel. Referring to the fourth parameter, it is not clear what 'essential operations' means. Oil drilling or the production of energy from the water is probably not an essential operation, but in order to be protected by the coastal State, it should be sufficient that the activities that are unduly disturbed or interrupted are legal. 'Essential' is too high of a standard. If the coastal State has reasonable grounds to suspect that a ship is engaged in illicit acts against installations located in its EEZ, it may take preventive measures in order to protect them.

The preventive measures that a coastal State may adopt have specific limits and they must fulfil the tests of reasonableness, necessity and proportionality. Necessity and proportionality are parameters used for assessing the use of force in relation to a threat or unlawful acts. Preventive measures must therefore be necessary and proportionate to the objective pursued, namely preventing the commission of an unlawful act, or, if it has already occurred, impeding further negative consequences. The reasonableness test, unlike the others, is useful when measuring the legitimacy of the coastal State's suspicions. While the first two parameters appear to be objective, the latter is indicative of a State's perception, which could be overly broad.

The Tribunal in the *Arctic Sunrise* case tackled several legal issues. However, the crosscutting legal point – central to the resolution of the dispute – is the right of hot pursuit. According to the Tribu-

98 See above Sec 4.



nal, the pursuit was interrupted, thereby delegitimising the boarding of the *Arctic Sunrise*. However, the aim of Article 111 UNCLOS concerning the right to hot pursuit is clear: that is, balancing the rights of the coastal State against the rights of the international community. In order to ensure that the *Arctic Sunrise* did not undertake any further actions against the platform, the Russian authorities never lost sight of the vessel. This could suffice to ensure the continuity of the pursuit. An excessively narrow interpretation of Article 111 UNCLOS is likely to frustrate its meaning, ensuring the impunity of conduct, which although appreciable for the aims pursued, can at times jeopardise the safety of ships, navigation or installations, or directly or indirectly cause economic and material damage.

EUNAVFOR *Operation Sophia* and the International Law of the Sea

Efthymios PAPASTAVRIDIS¹

Abstract

EUNAVFOR *Operation Sophia* was launched in summer 2015 in order to combat the smuggling of migrants in the South Mediterranean Sea, as part of a more comprehensive response by the EU to the ongoing and increasing refugee crisis in Europe. Its mandate includes the interdiction of vessels suspected of engaging in the smuggling of migrants from Libya, the seizure of such vessels and even their disposal in certain cases. This paper discusses the legality of the interdiction operations against the background of the law of the sea, in particular the UN Convention on the Law of the Sea, as well as other applicable rules of international law. Special emphasis is given to UN Security Council Resolution 2240 (2015), which provides an extra layer of authority for the boarding operations. In addition, the question of the seizure and prosecution of the suspected vessels and smugglers respectively is examined by reference to the international rules governing the exercise of jurisdiction and the relevant provisions of the UN Smuggling Protocol.

Keywords

European Union, smuggling of migrants, EUNAVFOR *Operation Sophia*, interdiction operations, jurisdiction, UNCLOS

1. Introduction

On 22 June 2015, the second naval operation of the European Union (EU)² was launched with the aim of disrupting the business model of human smuggling and trafficking networks in the Southern Central Mediterranean (EUNAVFOR MED). This operation is part of the EU's so-called Comprehensive Approach to the current refugee crisis in Europe, which was first conceived on 23 April 2015 by

1 Part-time Lecturer in Public International Law, Democritus University of Thrace and Research Fellow, Academy of Athens, papastavridis@academyofathens.gr. The author would like to thank Dr Anna Petrig (University of Basel), Dr Gemma Andreone (Institute for International Legal Studies) and Mr Sotirios-Ioannis Lekkas (University of Oxford) and the anonymous reviewers for reading and offering valuable comments on previous versions of this paper. The usual disclaimers apply.

2 The first naval operation was EUNAVFOR Operation Atalanta. See Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia [2008] OJ L301/31. For comments see Efthymios Papastavridis, 'EUNAVOR Operation Atalanta off Somalia: the EU in Unchartered Legal Waters?' (2015) 64 International & Comparative Law Quarterly 533 and Ricardo Gosalbo-Bono and Sonja Boelaert, 'The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing 2014) 87-134.



the European Council³ after approximately 800 'boat people' lost their lives in the Mediterranean Sea.⁴

In accordance with Article 2 of Council Decision (CFSP) 2015/778 dated 18 May 2015, which approved the operation,

(2) EUNAVFOR MED shall be conducted in sequential phases, and in accordance with the requirements of international law. EUNAVFOR MED shall:

(a) in a first phase, support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law;

(b) in a second phase, (i) conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, under the conditions provided for by applicable international law, including UNCLOS and the Protocol against the Smuggling of Migrants; (ii) in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, conduct boarding, search, seizure and diversion, on the high seas or in the territorial and internal waters of that State, of vessels suspected of being used for human smuggling or trafficking, under the conditions set out in that Resolution or consent;

(c) in a third phase, in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.⁵

Since 7 October 2015, as agreed by the EU Ambassadors within the Security Committee on 28 September 2015, the EUNAVFOR MED mission moved to its second phase (Phase II) as set out in the Council Decision and was renamed '*Sophia*' (after the name given to a baby born on board a ship participating in the operation which rescued her mother off the coast of Libya).⁶ As reported by the EU External Action Service, there are currently 24 contributing Member States, while the Operation

3 On 23 April 2015, the European Council expressed its indignation about the situation in the Mediterranean and underlined that the EU would mobilise all efforts at its disposal to prevent further loss of life at sea and to tackle the root causes of this human emergency, in cooperation with the countries of origin and transit, and that the immediate priority is to prevent more people from dying at sea. See European Council, 'Special Meeting of the European Council, 23 April 2015 – statement' (2015) <www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> accessed 1 March 2016.

4 On 19 April 2015, more than 800 people drowned after their 20 metre boat capsized in the Mediterranean Sea. The migrants reportedly fell overboard when they rushed to draw the attention of a passing merchant vessel, causing their ship to capsize. See reports in the press, *inter alia*, Patrick Kingsley, Alessandra Bonomolo and Stephanie Kirchgaessner, '700 migrants feared dead in Mediterranean shipwreck' (*The Guardian*, 19 April 2015) <www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet> accessed 28 January 2016.

5 See Art 2 Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31 (Council Decision).

6 See European Council, 'EUNAVFOR Med: EU agrees to start the active phase of the operation against human smugglers and to rename it "Operation Sophia"' (28 September 2015) <www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor/> accessed 20 February 2016.



Commander is an Italian national.⁷

As the above Council Decision mentions, *Operation Sophia* is to be conducted ‘in accordance with the requirements of international law’, which in the present case includes, *inter alia*, requirements of the law of the sea, international human rights law and international refugee law. This legal framework was supplemented by a long-anticipated Security Council Resolution under Chapter VII of the UN Charter.⁸ Since May 2015, the EU had been trying to secure a resolution that would authorise the interdiction of smuggling vessels either on the high seas or, more importantly, within the territorial waters of Libya.⁹ These efforts were intensified during the ensuing months in light of the reticence of the Libyan side to consent to such operations within its waters.¹⁰ Finally, the Security Council adopted Resolution 2240 two days after the commencement of the second phase of the operation on the high seas on 9 October 2015.¹¹

In short, Resolution 2240 sets off by identifying the ‘recent proliferation of, and endangerment of lives by human trafficking and migrant smuggling in the Mediterranean Sea ... off the coast of Libya’ as the situation that needed to be addressed through the Council’s action under Chapter VII.¹² It then condemns all acts of smuggling of migrants and human trafficking from Libya.¹³ As per the enforcement measures at sea, after calling upon Member States to use the already existing legal bases for boarding vessels on the high seas, the Council decided to authorise the inspection and seizure of suspected vessels.¹⁴

7 See ‘European Union Naval Force – Mediterranean Operation Sophia’ (*EU External Action*, updated 11 March 2016) <http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf> accessed 20 March 2016.

8 See UNSC Res 2240 (9 October 2015) UN Doc S/RES/2240.

9 See ‘EU seeks UN support to tackle migrant smuggling’ (*BBC News*, 11 May 2015) <www.bbc.com/news/world-europe-32695483> accessed 28 January 2016.

10 See in this regard Giuliana Ziccardi Capaldo, ‘The EUNVFOR MED Operation and the Use of Force’ (*ASIL Insights*, 18 December 2015) <www.asil.org/insights/volume/19/issue/27/eunavfor-med-operation-and-use-force> accessed 28 January 2016.

11 For the negotiations leading to the adoption of UNSC Res 2240, see ‘Vote on a Resolution on Human Trafficking and Migrant Smuggling in the Mediterranean’ (*What’s in Blue*, 8 October 2015) <www.whatsinblue.org/2015/10/vote-on-a-resolution-on-human-trafficking-and-migrant-smuggling-in-the-mediterranean.php> accessed 28 January 2016.

12 *Cf* UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816, on the counter-piracy operations off the coast of Somalia, where the Council linked the ‘threat to the international peace and security’ to the situation in Somalia and did not coin piracy as such a threat. For further comments on this, see Marta Bo, ‘Fighting Transnational Crimes at Sea under UNSC’s Mandate: Piracy, Human Trafficking and Migrant Smuggling’ (*EJIL: Talk*, 30 October 2015) <www.ejiltalk.org/fighting-transnational-crimes-at-sea-under-unscs-mandate-piracy-human-trafficking-and-migrant-smuggling/> accessed 28 January 2016.

13 See UNSC Res 2240, para 1.

14 See *ibid*, paras 7 and 8.



At the time of writing, Phase II of EUNAVFOR MED *Operation Sophia* has been operative for around four months.¹⁵ According to the EU External Action Service, '[t]ill now [12 February 2016], the Operation contributed to save more than 9000 lives while 48 people have been arrested as possible smugglers and/or traffickers by competent Italian Judicial Authorities following EUNAVFOR MED activities and 76 boats have been removed from illegal organizations' availability'.¹⁶ In addition, it is noticeable that the irregular migration flows from Libya have decreased in comparison to the flows in the Aegean Sea.¹⁷ Notwithstanding this *prima facie* success, *Operation Sophia* is susceptible to criticism on many grounds: for example, it could be put forth that a military operation is an unsuitable response to a predominantly humanitarian problem or that its geographical scope is restricted to the central Mediterranean, while the smuggling of migrants occurs mainly through the Aegean Sea.

The purpose of this paper, however, is not to address this criticism or assess the efficacy of *Operation Sophia*; rather, it is to explore the legal bases for the interdictions¹⁸ and seizures that take place during the operation and to assess their legality against the background of the applicable rules of international law, mainly the law of the sea and the aforementioned Resolution 2240. Also, it discusses the often-neglected, yet very important, issue of the *a posteriori* assertion of jurisdiction by domestic courts. Accordingly, this paper will first discuss the boarding of suspected vessels on the high seas and, second, their seizure and the subsequent assertion of jurisdiction over the suspected offenders. It will conclude that, as far as the interdiction and seizures at sea are concerned, the operation is consistent with international law; nonetheless, there are some operational as well as jurisdictional 'grey areas' that invite discussion. Needless to say, the analysis will focus on the interdictions taking place in the course of the operation and not on the other measures that states may take in relation to the smuggling of migrants or on questions regarding search and rescue services. Furthermore, it will not address the operation's consistency with international refugee law or international human rights law nor will it discuss questions of international responsibility of either the EU or the Member States involved, which may arise in cases of violations of international law in the course of the operation.¹⁹

15 For further information about operation, see 'EUNAVFOR MED Operation SOPHIA' (*EU External Action*) <http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm> accessed 28 January 2016.

16 See 'EUNAVFOR MED: 24 EU Member States part of Operation Sophia' (*EU External Action*, 12 February 2016) <http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/news/20160212_01_en.htm> accessed 20 February 2016.

17 According to the UNHCR, out of the 1,018,616 arrivals by sea in 2015, 851,319 had been to Greece and only 153,600 in Italy and 105 to Malta coming from Libya: see 'Refugees/Migrants Emergency Response – Mediterranean' <<http://data.unhcr.org/mediterranean/regional.php>> accessed 28 January 2016.

18 The term 'interdiction' and 'interception' are used interchangeably in the present paper denoting the interference with navigation of suspected vessels and their boarding on the high seas. See, on the terminology used in this respect, Efthymios Papastavridis, *Interception of Vessels on the High Seas* (Hart Publishing 2013) 60-62 [Papastavridis, 'Interception'].

19 For an analysis of responsibility questions in the context of the first naval operation of the EU, ie EUNAVFOR *Operation Atalanta*, see Papastavridis (n 2) 551-66.



2. The interdiction of suspect vessels on the high seas

2.1 The right of visit of vessels in the context of *Operation Sophia*

The point of departure for a discussion of the legal basis for all the cases of interception on the high seas is Article 110 of the United Nations Convention on the Law of the Sea (UNCLOS),²⁰ which prescribes the right of visit of foreign-flagged vessels on the high seas. Article 110 sets forth that the right of visit is accorded to warships against only those vessels reasonably suspected of having engaged in certain proscribed activities. These activities are: (a) piracy, (b) slave trading, (c) unauthorised broadcasting, (d) absence of nationality of the ship, or (e) though flying a foreign flag or refusing to show its flag, the ship is in reality of the same nationality as the warship.²¹ *In casu*, it is evident that on the face of this provision, trafficking and transporting illegal migrants or refugees are not contemplated by the Convention as a specific ground for visiting a foreign vessel on the high seas. As a result, the requisite legal basis should either be extrapolated from the above-mentioned grounds for interception or be sought in another legal framework.

Regarding the UNCLOS, it goes without saying that the ‘piracy’ and ‘unauthorised broadcasting’ grounds are completely irrelevant to the present survey. Moreover, the ‘same nationality’ ground seems not to raise any particular problems, since in this case the vessel will be subject to the full jurisdiction of the flag state pursuant to Article 92 UNCLOS. By contrast, the grounds of ‘the absence of nationality’ as well as ‘the slave trade’ are of relevance. As far as the former ground is concerned, it is often the case that the transportation of the persons in question is carried out using non-registered small vessels, without a name or flag, i.e. stateless vessels. With regard to the latter ground, it is submitted that there is room for the application of the slave trade provision to cases of a consistent pattern of human trafficking at sea. However, the analysis of this argument falls beyond the ambit of the present article.²²

Furthermore, by virtue of the chapeau of Article 110(1) UNCLOS, the power to interfere can be conferred by a treaty on other grounds.²³ Accordingly, states have concluded multilateral and bilateral agreements that provide for the right of visit on the high seas with a view to addressing the smuggling of migrants at sea, while in everyday practice, interception of foreign vessels on the high seas takes place on the basis of more informal or *ad hoc* arrangements, namely with the consent of the flag state

20 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

21 See, *inter alia*, Myron Nordquist and others (eds), *UNCLOS 1982: A Commentary*, vol III (Martinus Nijhoff 1993) 237; Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 203.

22 See more on this Papastavridis, ‘Interception’ (n 18) 267-78 and Efthymios Papastavridis, ‘Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law’ (2009) 36 *Syracuse Journal of International Law and Commerce* 145.

23 Both Art 22(1) 1958 High Seas Convention (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 and Art 110(1) UNCLOS contain the exception ‘where acts of interference derive from powers conferred by treaty’.



authorities or even with the consent of the master of the vessel (so-called 'consensual boarding').²⁴

The sole multilateral treaty providing for the right of visit on the high seas for counter-migration purposes is the 2000 Smuggling of Migrants Protocol.²⁵ The right of visit of a foreign-flagged vessel is stipulated in Article 8(2) as follows:

A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures with regard to that vessel. The flag State may authorise the requesting State, *inter alia*: (a) To board the vessel; (b) To search the vessel; and (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

Obviously, under this provision, any action against a foreign vessel on the high seas must be based on express flag state authorisation. Neither tacit consent nor the mere consent of the master of the vessel is sufficient to trigger Article 8(2) of the Protocol.²⁶ There have also been a few bilateral instruments granting the right of visit for counter-immigration purposes in the central Mediterranean Sea, most notably the Italy-Libya accords, which are no longer in force.²⁷

In light of the foregoing, it follows that the interdiction of vessels smuggling migrants in the Mediterranean Sea could be lawful based on either the statelessness of the vessel in question or the consent of the flag state. The latter could be granted either pursuant to the Smuggling Protocol or on an *ad hoc* basis. Indeed, as Article 2(b)(i) of Council Decision 778/2015 sets forth, EUNAVFOR MED 'shall conduct boarding, search, seizure and diversion on the high seas ... under the conditions provided for by applicable international law, including *UNCLOS* and the *Protocol against the Smuggling of*

24 See, *inter alia*, Louis B Sohn, 'International Law of the Sea and Human Rights issues' in Thomas Clingan (ed), *The Law of the Sea: What Lies Ahead?* (Law of the Sea Institute 1988) 56; David Wilson, 'Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warships' (2008) 55 *Naval Law Review* 157.

25 See Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Smuggling Protocol). As of 4 February 2016, the Protocol has 142 contracting States, see the United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en> accessed on 5 February 2016; an overwhelming majority of the states bordering the Mediterranean Sea are parties to the Smuggling Protocol.

26 See further analysis in Papastavridis, 'Interception' (n 18) 279-80. See also Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 430-38; Ximena Hinrichs, 'Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective' (2003) 36 *Revue Belge de Droit International* 413.

27 See, *inter alia*, Alessia Di Pascale, 'Migration Control at Sea: The Italian Case' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 281-309 and Mariagiulia Giuffr , 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 *International Journal of Refugee Law* 692. On other similar agreements in the European context see Papastavridis, 'Interception' (n 18) 283-91.



Migrants.²⁸ Accordingly, only stateless vessels and vessels for which consent was obtained should be boarded. This was explicitly acknowledged in the previous version of the Rules of Engagement (RoEs) of *Operation Sophia*, namely the version prior to the initiation of Phase High Seas,²⁹ and more importantly, in Resolution 2240, particularly paragraphs 5³⁰ and 6.³¹

Resolution 2240, however, added a third alternative, i.e. the authority of the Security Council Resolution under Chapter VII of the UN Charter.³² In particular, the Security Council authorises:

Member States, acting nationally or through regional organizations [the EU], to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, provided that such Member States and regional organizations make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph.³³

This is not the first time that UN Member States have been authorised to interdict and inspect foreign-flagged vessels on the high seas. Such authorisations have been given previously in order to enforce sanctions under Chapter VII of the UN Charter³⁴ or, under stricter conditions, to combat the nuclear proliferation activities of Iran and North Korea.³⁵ More recently, the Council did give a similar authorisation for the inspection of vessels illicitly carrying crude oil from Libya.³⁶ This is the first time, however, that the Council authorised inspections on the high seas for the purpose of fight-

28 Emphasis added.

29 See EUNAVFOR MED Rules of Engagement (RoEs) No. 170-3; applicable during the First Phase of the Operation (on file with the author).

30 UNSC Res 2240, para 5: 'Calls upon Member States acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking to inspect, as permitted under international law, on the high seas off the coast of Libya, any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya, including inflatable boats, rafts and dinghies.'

31 UNSC Res 2240, para 6: 'Further calls upon such Member States to inspect, with the consent of the flag State, on the high seas off the coast of Libya, vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organized criminal enterprises for migrant smuggling or human trafficking from Libya.'

32 On Chapter VII Resolutions, which may entail binding measures on Member States, see generally Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (OUP 1999) and Linos-Alexandre Sicilianos, 'Entre multilatéralisme et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force' (2008) 339 *Recueil des Cours* 9.

33 UNSC Res 2240, para 7.

34 See, *inter alia*, UNSC Res 665 (25 August 1990) UN Doc S/RES/665 (on Iraq); UNSC Res 820 (17 April 1993) UN Doc S/RES/820 (on the Former Republic of Yugoslavia); UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132 (on Sierra Leone); UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (on Libya). See also A Soons, 'A New Exception to the Freedom of the High Seas: The Enforcement of U.N. Sanctions' in Terry D Gill and Wybo P Heere (eds), *Reflections on Principles and Practices of International Law* (Martinus Nijhoff 2000) 205, 212.

35 See, *inter alia*, UNSC Res 1929 (9 June 2010) UN Doc S/RES/1929 (on Iran); UNSC Res 1874 (12 June 2009) UN Doc S/RES/1874 (on North Korea). See further analysis in Papastavridis, 'Interception' (n 18) 110-12.

36 See UNSC Res 2146 (19 March 2014) UN Doc S/RES/2146.



ing the smuggling of migrants and human trafficking at sea.³⁷ What is more striking is the wording employed by Resolution 2240, which authorises states to inspect suspect vessels on the high seas only after good faith efforts have been made to secure the consent of the flag state. Thus, there is an obligation of conduct or a best efforts obligation³⁸ incumbent upon Member States, and more specifically on the EU, to make all best efforts, or more precisely all 'good faith efforts', to obtain the consent of the flag state prior to taking any measures pursuant to this Resolution.

It appears that the EU has taken this obligation into serious consideration. The current RoEs of Operation Sophia, which govern the conduct of the operation,³⁹ set out the following: the EU External Action Service will first seek to obtain permanent consent from certain flag states. The RoEs do not specify how this will be achieved, but obviously this involves a certain form of standing agreements, which are also in line with the EU law.⁴⁰ If such consent has not been obtained, the Operation Commander is to seek the *ad hoc* consent of the flag state of vessels suspected of being engaged in the smuggling of migrants from Libya.⁴¹ The 'good faith efforts' mentioned in Resolution 2240 'will be considered to have been exhausted if there is no response to the request made pursuant to actions taken under GENTEXT 13 within 4 (four) hours from the time of the request within the given time preparatory measures are authorised'.⁴² Thus, for the EU, 'good faith efforts' mean requesting the flag state for its consent to board the suspect vessel and waiting for four hours for that state to respond, after which the authority of Resolution 2240 is triggered and the boarding takes place without the respective flag state's consent.

In my view, this time window of four hours seems reasonable both in terms of the area's geographical circumstances and the urgency of the situation. It may well be that the safety of lives of the migrants on board would be further endangered with the passage of time or that the suspect vessel could easily flee within these four hours and enter the territorial waters of neighbouring states where

37 Some authors erroneously assimilate the Resolution under scrutiny with the Resolutions issued by the Council in relation to piracy off the coast of Somalia (see UNSC Res 1816 (2008) and UNSC Res 1851 (2008)); see also Bo (n 12). Nevertheless, the UNSC Resolutions on piracy never authorised the inspection of suspect vessels on the high seas, since this was already permitted under Art 110 UNCLOS. See relevant analysis in Efthymios Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century' in Ademola Abass (ed), *Protecting Human Security in Africa* (OUP 2010) 122, 136-39.

38 As summarised by James Crawford, 'obligations of result involve in some measures a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one's power to achieve a result, but without ultimate commitment': see 'Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur' (ILC, 51st Session, 30 April 1999) UN Doc A/CN.4/498/Add.2, para 67. See also relevant comments in Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 *European Journal of International Law* 371, 379.

39 On the legal nature of the Rules of Engagement, see remarks in Papastavridis, 'Interception' (n 18) 58-59.

40 See Arts 37 and 218 of the TEU and also Aurel Sari, 'The Conclusion of International Agreements by the European Union in the Context of ESDP' (2007) 56 *International & Comparative Law Quarterly* 53.

41 See EUNAVFOR MED Operation Sophia-Revised Draft 3-ROEAUTH-004, EEAS (2015) 10394 REV3, GENTEXT/13 (on file with the author) [Operation RoEs].

42 Operation RoEs, GENTEXT 14, *ibid*.



the operation lacks mandate and authority. Moreover, this practice is not unknown in maritime interdiction operations; quite to the contrary, this ‘tacit or deemed authorisation model’ is commonly found in various US bilateral agreements either in the context of the Proliferation Security Initiative (PSI)⁴³ or in the context of the fight against drug trafficking in the Caribbean Sea.⁴⁴ Tacit or deemed authorisation is also an option under the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Navigation (SUA Protocol).⁴⁵ It is telling that in some of these treaties the window is even smaller, i.e. two hours instead of four.⁴⁶

Consequently, it could be argued that the RoEs of *Operation Sophia*, as they stand, are consistent with the international law of the sea and the terms of Resolution 2240 and thus, according to these RoEs, any boarding would be lawful. However, it goes without saying that the legality of each boarding should be scrutinised on an *ad hoc* basis.

2.2 The *modus operandi* of the interdictions undertaken by *Operation Sophia*

Next, there is the question of the *modus operandi* of the interdiction operations, i.e. the modalities that the EU forces employ in order to board the suspect vessels, and whether they are in accordance with general international law, including the law of the sea and human rights law. In short, under the law of the sea, before boarding a suspect vessel on the high seas, it is customary for warships to approach the vessel and ask it to identify itself, this being a right and not a duty *per se* (right of approach).⁴⁷ If there are reasonable grounds to believe that the vessel is engaged in a proscribed activity under Article 110 UNCLOS, the warship has the right to stop the suspected vessel. To effect a stoppage, of course, the warship will hail the suspect vessel or, if this is impossible or ineffectual, fire across its bow.⁴⁸ This may also include the use force, but in extreme moderation and in strict accord-

43 See in this regard Papastavridis, ‘Interception’ (n 18) 146, and Douglas Guilfoyle, ‘Maritime Interdiction of Weapons of Mass Destruction’ (2007) 12 *Journal of Conflict and Security Law* 1.

44 See, *inter alia*, Joseph Kramek, ‘Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future?’ (2000) 31 *University of Miami Inter-American Law Review* 121, 137.

45 Art 8bis (para 4) includes an option that boarding is permitted to proceed after four hours of no response, provided the flag state had previously notified the Secretary General to this effect: 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc LEG/CONF 15/21.

46 See, eg, US-Mongolia and the US-Antigua and Barbuda PSI agreements: the text of these agreements is available at US Department of State, ‘Ship Boarding Agreements’ <www.state.gov/t/isn/c27733.htm> accessed 5 February 2016.

47 See Yves Van der Mensbrugghe, ‘Le Pouvoir de Police des Etats en Haute Mer’ (1975) 11 *Revue Belge de Droit International* 56, 61, and Robert Reuland, ‘Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction’ (1989) 22 *Vanderbilt Journal of Transnational Law* 1161, 1170.

48 See René Jean Dupuy and Daniel Vignes, *Traité du nouveau droit de la mer* (Economica 1985) 371.



ance with the requirements of necessity and proportionality.⁴⁹ The actual verification of the flag takes place aboard the suspect vessel, which requires the warship to send a party under the command of an officer to the suspect vessel, who will examine the papers and documentation of the suspect vessel.⁵⁰ The whole operation is subject to international human rights law, including the right to life and the prohibition of *refoulement*, provided that the state of the warship exerts control over the suspect vessel and the persons on board.⁵¹

The EU has seemingly taken into account the above requirements and has included very detailed procedures within the Operation RoEs. For example, the latter set out that prior to an engagement, identification is to be established visually or with other systems requiring a positive response from the unidentified unit, including electro-optic, thermal imaging or electronic warfare support measures (right of approach).⁵² Also, when the firing of warning shots or the minimum use of force is authorised, 'due precautions shall be applied not to induce panic that will compromise maritime safety or is likely to put lives at risk'.⁵³ The latter also flows from the authorisation provided by Resolution 2240 itself: in authorising the EU and its Member States to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers, it makes explicit reference that these measures should be in full compliance with international human rights law, as applicable, and they should provide *for the safety of persons on board as an utmost priority* and to avoid harming the marine environment or the safety of navigation.⁵⁴

An extensive analysis of all the applicable RoEs and procedures of the boarding operations is beyond the ambit of the present paper; be that as it may, it is submitted that even though 'due regard precautions' have been included therein, the idea that electronic warfare⁵⁵ or even that the minimum use of force is permitted against a boat full of migrants is at least alarming. In any case, an assessment of the legality of the boarding operation and whether it would be conducted in full compliance with the above rules on the permissible use of force, as well as with international human rights law, can only be made on an *ad hoc* basis and not *a priori*. From the vantage point of having read the applica-

49 The *locus classicus* in this regard has been the judgment of the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Saiga (No 2)* case (1999). The Tribunal expressed the view that 'international law requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law': *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* ITLOS Case No 2 (1999) 38 ILM 1323, para 155. See also Vaughan Lowe, 'National Security and the Law of the Sea' (1991) 17 *Thesaurus Acroasium* 162, and Efthymios Papastavridis, 'The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)' (2015) 2 *Journal of Territorial and Maritime Studies* 119.

50 See Art 110(2) UNCLOS.

51 See, *inter alia*, *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR Grand Chamber Judgment, 23 February 2012) and Anna Petrig, *Human Rights and Law Enforcement at Sea* (Brill 2014) 326 *et seq.*

52 Operation RoEs, ROEAUTH/231.

53 Operation RoEs, ROEAUTH/151.

54 UNSC Res 2240, para 10 (emphasis added).

55 Operation RoEs, ROEAUTH/361.



ble RoEs, the conclusion may be drawn that the latter have indeed taken into account the applicable legal framework and thus the operation is in principle conducted in accordance with international law; this notwithstanding, there are certain operational 'grey zones' within these RoEs, which give rise to concerns about their implementation.

3. The seizure of suspect vessels and the assertion of jurisdiction over alleged smugglers

Operation Sophia is not only engaged in boarding suspect vessels in the South Mediterranean Sea, but according to its mandate, it is also engaged in seizing them and diverting them to ports.⁵⁶ The assertion of further enforcement measures, including the prosecution of suspected smugglers, fall beyond the remit of the operation, according to both the Council Decision and its RoEs,⁵⁷ and this matter is dealt with exclusively by the state of the competent authorities to which the suspects are being transferred, which for the time being is Italy.⁵⁸ Nevertheless, it certainly merits scrutiny since, as argued elsewhere,⁵⁹ transnational organised crime can be suppressed only on land and not at sea; and in this regard, it is of the utmost importance to have established and exercised jurisdiction. In other words, states, *in casu* Italy, should have prescribed legislation that criminalizes the conduct in question, i.e. the smuggling of migrants, prior to arresting the suspect smugglers after the latter's vessels have been brought to their ports and initiating criminal proceedings against them in their domestic courts.

Under the law of the sea, in particular Article 92 UNCLOS, vessels on the high seas are subject only to the prescriptive and enforcement jurisdiction⁶⁰ of their flag state. Even in cases where the law of the sea accords the right of visit on the high seas under Article 110 UNCLOS, this does not automat-

⁵⁶ See Art 2(2)(b) Council Decision.

⁵⁷ See Operation RoEs GENTEXT/11, which explicitly exclude from the mandate of *Operation Sophia* the assertion of jurisdiction over the persons concerned.

⁵⁸ See (n 16).

⁵⁹ See UNODC, 'Combating Transnational Organized Crime Committed at Sea' (Issue Paper, March 2013) <www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf> accessed 1 February 2016.

⁶⁰ Under international law, there is a basic distinction between legislative or prescriptive jurisdiction (i.e. the power to make laws and regulations) and enforcement jurisdiction (i.e. the power to take executive or judicial action in pursuance of or consequent on the making of decisions or rules), see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 486. On jurisdiction in general see, *inter alia*, Frederick Alexander Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 1, and Frederick Alexander Mann, 'The Doctrine of Jurisdiction Revisited after Twenty Years' (1984) 186 *Recueil des Cours* 11; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015). As rightly observed by O'Keefe, 'separate reference is sometimes made, especially in the civil context, to jurisdiction to adjudicate ... But in the criminal context the distinction is generally unnecessary. The application of a state's criminal law by its criminal courts is simply the exercise or actualization of prescription: both amount to an assertion that the law in question is applicable to the relevant conduct': Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 737. See similarly Michael Akehurst, 'Jurisdiction in international Law' (1972-73) 46 *British Yearbook of International Law* 145, 179, and Patrick Daillier, Alain Pellet and Nguyen Quoc Dinh, *Droit International Public* (6th edn, LGDJ 1999) §§ 334-36.



ically mean that the boarding state may assert enforcement jurisdiction over the respective offence, including the right to bring the offenders before their domestic courts. The only provision in this part of the UNCLOS, i.e. the part about the high seas that provides for the assertion of both prescriptive and enforcement jurisdiction over crimes committed therein, is Article 105 concerning piracy.⁶¹

Thus, in the realm of smuggling, it is essential for third states, i.e. non-flag states, to have either a treaty provision analogous to Article 105 UNCLOS, or a customary rule in the form of a jurisdictional principle, such as the protective⁶² or universality principle,⁶³ which would provide the necessary legal basis for the establishment of prescriptive jurisdiction. As per enforcement jurisdiction, the fundamental principle governing enforcement jurisdiction on the high seas is that it may not be exercised without the consent of the flag state. If the flag state accords its consent for the exercise of enforcement jurisdiction, this could entail measures such as bringing the vessel to a port of the boarding state, seizure of the vessel, arrest of the suspects on board, initiation of criminal proceedings pursuant to previously enacted legislation and confiscation of the illicit cargo and of the vessel itself. This consent may be granted either by a pre-existing international agreement or on an *ad hoc* basis. Agreements that grant the right of visit often also permit further enforcement measures. Alternatively, the boarding state may request the authorisation of the flag state for such enforcement measures after the visit and search of the delinquent foreign-flagged vessel. Even in these cases, however, the lawful assertion of enforcement jurisdiction, including the right to try the suspected smugglers, is contingent upon the existence of prior legislation proscribing the offence in question.

Special attention should be given in this regard to stateless vessels, which are often used in order to smuggle migrants to the EU. While by virtue of Article 110(1)(d) UNCLOS, warships or other duly authorised vessels of any state may exercise the right of visit on stateless vessels, this does not *ipso facto* entail the full extension of the jurisdictional – both prescriptive and enforcement – powers of the boarding states. This is the submission of the present author notwithstanding a significant strand of legal doctrine, which supports that the boarding states may also completely subject stateless ves-

61 Under Art 105 UNCLOS, 'every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith'. See further analysis of Art 105 in Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011).

62 Under the protective principle, a state claims jurisdiction over crimes which are injurious to its national security. Hence, the nexus for this basis of jurisdiction is the nature of its interest that has suffered harm. This jurisdiction allows a state to claim jurisdiction over offences directed against the security or vital interests or other offences threatening the integrity of governmental functions that are generally recognised as crimes: see, *inter alia*, Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot 1994).

63 On universal jurisdiction see, *inter alia*, Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005); O'Keefe (n 60).



sels to their laws.⁶⁴ The boarding states would have to rely on another legal basis in order to exert jurisdiction over persons and property on these vessels, since the statelessness itself would fall short of according them such jurisdiction. In other words, the states concerned should have enacted legislation in accordance with a well-accepted principle of international jurisdiction that criminalizes the conduct in question, even on stateless vessels on the high seas, in order to lawfully arrest and subject the offenders to their criminal jurisdiction.

In the context of the present enquiry, as elaborated above, the boarding of vessels suspected of being engaged in the smuggling of migrants from Libya is allowed pursuant to the statelessness of the vessel or, as regards a foreign-flagged vessel, pursuant to the consent of the flag state and the authority of Resolution 2240. Do the above suffice as the legal bases for the seizure of the suspect vessel and the prosecution of the arrested smugglers?

Firstly, neither the Smuggling Protocol nor Resolution 2240 includes any particular provision in relation to enforcement jurisdiction with regard to vessels without nationality. Article 8(7) of the Smuggling Protocol sets out that:

[A] State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality ... may board and search the vessel. If evidence confirming the suspicion is found, that State Party *shall take appropriate measures in accordance with relevant domestic and international law*.⁶⁵

On the other hand, paragraph 5 of Resolution 2240 remains silent on enforcement measures following the inspection of stateless vessels. Thus, the legality of any seizure of vessels and of any trial of the arrested smugglers would be assessed on the basis of the 'relevant domestic and international law'.

It is submitted that the states that will prosecute suspected smugglers on stateless vessels, in particular Italy, the ports of which the vessels seized during *Operation Sophia* are brought, should have appropriate legislation in place criminalizing the commission of these offences on the high seas and then enforce it pursuant to the Smuggling Protocol and the UN Convention against Transnational Organized Crime (UNTOC). Indeed, Italy has long considered the 'stateless vessel' ground as sufficient for the arrest and assertion of criminal jurisdiction over illegal migrants on the high seas bound for the coast of Italy.⁶⁶ More recently, in 2014, the Italian Court of Cassation held in *HH v Court of Catania* that the reference to 'appropriate measures' in Article 8(7) of the Smuggling Protocol also

64 This is in line with UK and US practice, that a stateless vessel may be seized by any state as it enjoys the protection of none, see Daniel Patrick O'Connell and Ivan Shearer (ed), *The International Law of the Sea*, vol II (Clarendon Press 1984) 756, and also the United States Department of the Navy, 'The Commander's Handbook on the Law of Naval Operations' (NWP 1-14M, Edition July 2007) para 3.11.2.3 <www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf> accessed 1 February 2016.

65 Emphasis added.

66 See, eg, the decision of Tribunale di Crotone, 27 September 2001, *Pamuk et al*, cited in 2001 RDI 1155, and for commentary: Seline Trevisanut, 'Droit de la Mer' (2006) 133 *Journal du droit international* 1035.



entails the diversion of the vessel to a port and the initiation of criminal proceedings against the suspected persons.⁶⁷

These cases notwithstanding, it is the view of the author that it would be on a sounder legal basis to argue the following: from the moment that the stateless vessels and the suspected smugglers are diverted to the ports of Italy, the diversion *per se* being lawful,⁶⁸ Italy may make use of the principle *aut dedere aut judicare*⁶⁹ under Article 16(10) UNTOC and prosecute the alleged offenders found on its territory.⁷⁰ The provision enunciates that:

A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.

To that end, Article 15(3) UNTOC sets out that:

For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite.

It follows that if both Italy and the state of nationality of the alleged offender are parties to the UNTOC and its Smuggling Protocol,⁷¹ Italy could lawfully assert prescriptive jurisdiction first and then upon the diversion of the suspected vessel to its port, enforcement, including adjudicative, jurisdiction in this regard. In all other cases, i.e. in cases where the above instruments are not applicable, and no matter how broadly Italian courts interpret its immigration laws, the assertion of enforcement jurisdiction would be contestable.

As regards foreign-flagged vessels that are suspected of being engaged in the smuggling of migrants and are boarded by the authorities participating in *Operation Sophia*, the following remarks are in order. Firstly, the Smuggling Protocol retains the exclusive enforcement jurisdiction of the flag state on the high seas. Thus, any measure taken under the Protocol, including diversion, let alone asser-

⁶⁷ See *Harabi Hani Abdal Qadir Saad v Tribunale di Catania*, 23 May 2014, No. 36052, Corte di Cassazione (Sez. I penale). See comments by Giuseppe Cataldi, 'Judicial Decisions' (2014) 24 Italian Yearbook of International Law 468, and Gemma Andreone, 'Chronique de la Jurisprudence' [2014] *Annuaire du Droit de la Mer*, Tome XIX, 678.

⁶⁸ This was the opinion also of the Special Rapporteur of the International Law Commission François: see Regime of the High Seas, Draft Articles (A/CN.4/17) in Yearbook of the International Law Commission, vol II (1950) 29.

⁶⁹ See, for the customary nature of this principle, Michael Plachta, 'The Lockerbie case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*' (2001) 12 *European Journal of International Law* 125.

⁷⁰ By virtue of Art 1(2) Smuggling Protocol, the provisions of the UNTOC apply *mutatis mutandis* to this Protocol.

⁷¹ In view of the wide ratification of the Smuggling Protocol (142 parties, as of 4 February 2016), it is very likely that this would be the case. Italy has been a party to the Smuggling Protocol since 2 August 2006; see United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en> accessed 5 February 2016.



tion of enforcement jurisdiction, should be pursuant to the express consent of the flag state.⁷² Should the flag state consent to the diversion of the vessel to the Italian ports or to the ports of other states participating in the operation, then the above-mentioned *aut dedere aut judicare* mechanism may be lawfully triggered.

In addition, Resolution 2240 extends its authorisation under Chapter VII not only to the boarding as such, but also to the seizure of suspected vessels coming from Libya. In more detail, it decided to

authorise for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organisations to seize vessels inspected under the authority of paragraph 7 that are confirmed as being used for migrant smuggling or human trafficking from Libya.⁷³

However, it underscored that ‘further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith.’⁷⁴

It follows that the EU and its Member States may not only inspect but also seize the suspect vessels after good faith efforts have been made to secure the consent of the flag state. Be that as it may, Resolution 2240 is silent on the assertion of enforcement jurisdiction *per se*: it only says that it must be ‘in accordance with applicable international law’. Thus, absent the consent of the flag state concerned, it is exclusively a matter of the domestic jurisdiction of Italy or any other EU Member State that assumes jurisdiction over the crime in question. Needless to say, the Smuggling Protocol and the UNTOC with its *aut dedere aut judicare* principle would be instrumental. Besides this, it is well worth mentioning another recent Italian Court of Cassation judgment, which interestingly held that the violation of Italian immigration laws had been committed in Italian territorial waters even though the smuggled migrants were rescued on the high seas. It held that smugglers committed the crimes as indirect perpetrators (*autore mediato*) through the Italian rescue authorities. The authorities acted as the smugglers’ innocent agents by bringing the migrants to Italy.⁷⁵

In sum, the EU Member States do have various jurisdictional tools on hand in order to lawfully prosecute alleged smugglers, provided that they have enacted precise and foreseeable legislation pursuant to the Smuggling Protocol and the UNTOC. As noted above, it remains to be seen how states, and in particular the Italian courts, will implement their legislation vis-à-vis the apprehended smugglers of migrants.

⁷² See Art 8(5) Smuggling Protocol.

⁷³ UNSC Res 2240, para 8.

⁷⁴ *ibid.*

⁷⁵ *Procuratore della Repubblica presso il Tribunale di Catania v Haji Hassan*, 27 March 2014, No. 14510, Corte di Cassazione (Sez. I penale).



4. Concluding Remarks

EUNAVFOR *Operation Sophia* was launched in summer 2015 in order to combat the smuggling of migrants in the South Mediterranean Sea, which is one part of a comprehensive response by the EU to the continuing and increasing refugee crisis in Europe. Its mandate includes the interdiction of vessels suspected of being engaged in the smuggling of migrants from Libya, the seizure of such vessels and even their disposal in certain cases. Even though not within the mandate of the operation, a closely linked issue of particular relevance is that of the assertion of jurisdiction over the suspected smugglers after being handed over to the competent authorities of a Member State, namely Italy for current purposes.

This paper canvassed the legality of the interdiction operations against the background of the law of the sea, in particular the UNCLOS as well as other applicable rules of international law. The interdictions would be in accordance with international law as far as they are conducted either on stateless vessels or pursuant to the consent of the flag state. In addition, Resolution 2240 provides an extra layer of authority for the boarding operations: if good faith efforts to obtain the consent of the flag state have been exhausted, the boarding state may use the relevant authorisation of the said Resolution. The EU has construed these 'good faith efforts' as a time window of four hours from the initial request to the flag state to grant its consent. If the flag state does not respond within four hours, the EU assets may proceed with the interdiction in accordance with Resolution 2240. Mindful of the geographical circumstances of the Mediterranean basin, this time window seems to satisfy the requirement of 'good faith efforts'. In assessing the interdiction operations, it is necessary to have regard to the *modus operandi* of the operation as such and ascertain whether it is in accordance with the rules governing law enforcement at sea, including the right to life. It is the author's view that even though the RoEs of *Operation Sophia* make explicit reference that due regard will be made for the safety of persons on board the smuggling vessels, the simple fact that forcible action against these vessels is permissible certainly gives cause for concern.

Lastly, the question of the seizure and prosecution of the suspected vessels and smugglers was examined by reference to the international rules governing the exercise of jurisdiction and the relevant provisions of the Smuggling Protocol. It is submitted that the assertion of jurisdiction by Italian courts over interdictions on the high seas should be made pursuant to the Smuggling Protocol. That said, this is not currently the position of the Italian courts – especially insofar as stateless vessels are concerned.

The Arbitral Award in the Bangladesh-India Maritime Delimitation in the Bay of Bengal and its Contribution to International Maritime Boundary Law: A Case Commentary

Suzette V. SUAREZ¹

Abstract

The Arbitral Tribunal rendered its Award in the maritime delimitation dispute between Bangladesh and India in the Bay of Bengal on 7 July 2014. It delimited the parties' territorial sea, exclusive economic zone and the continental shelf, including the area beyond 200 nautical miles. Overall, the Arbitral Tribunal's approach in delimiting the exclusive economic zone and the continental shelf between Bangladesh and India stayed faithful to established jurisprudence, which is mainly a preference for the application of the equidistance line unless relevant circumstances exist to justify adjustment of the line. The Arbitral Tribunal's decision to exercise jurisdiction despite the absence of recommendations concerning the outer limits from the Commission on the Limits of the Continental Shelf was sound as it clarifies that in accordance with the United Nations Convention on the Law of the Sea: (1) delimitation and delineation, while interconnected, are two separate processes, and (2) delineation is not a prerequisite to delimitation. Unfortunately, the Arbitral Tribunal was restrained in its consideration of the role that Article 76 plays in the delimitation of the continental shelf beyond 200 nm, thereby losing the historical opportunity to offer the first judicial or arbitral articulation of the law surrounding the issue.

Keywords

Bay of Bengal, maritime delimitation, territorial sea, exclusive economic zone, continental shelf within and beyond 200 nm, *acquis judiciaire*

1. Introduction

On 7 July 2014, the Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),² rendered its Award in the *Bay of Bengal Maritime Boundary Arbitration* (Award) between Bangladesh and India.³ Both parties welcomed the Award as

¹ Dr iuris (Hamburg), LLM (Dalhousie), LLB (Univ Philippines).

² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

³ *In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India) (Award)* (Arbitral Tribunal) Case No 16 (2014) <www.pca-cpa.org/BD-IN%2020140707%20Award2890.pdf?fil_id=2705> accessed 7 November 2015.



a positive end to a long-standing dispute between them.⁴ The Award constituted the definitive end to a legal journey that Bangladesh started in 2009 when it initiated two separate arbitration proceedings against its neighbours, India and Myanmar, under Annex VII of the Convention concerning the delimitation of the territorial sea, exclusive economic zone and the continental shelf in the Bay of Bengal.⁵ Bangladesh, India and Myanmar are all State Parties to the Convention.⁶ An arbitral tribunal under Annex VII of the Convention is the default mechanism when neither party to the dispute chose any or the same settlement mechanism.⁷

By way of separate unilateral declarations, Myanmar and Bangladesh agreed to transfer the arbitration proceedings between them to the International Tribunal for the Law of the Sea (ITLOS) in December 2009.⁸ ITLOS considered the case between Bangladesh and Myanmar before the Bangladesh-India Arbitration and delivered the judgment on 14 March 2012, two years prior to the Award in the case between Bangladesh and India.⁹

The main purpose of this Commentary is to provide a summary of the issues considered in the Award, and to reflect on the process and approach employed by the Arbitral Tribunal in completing its task to delimit the maritime zones of the parties. The Arbitral Tribunal's treatment of the issues relating to the delimitation in the area of the continental shelf beyond 200 nautical miles (nm) will be given particular attention since this is only the second time a court or tribunal has delimited an area of the continental shelf beyond 200 nm. The Commentary will conclude with a discussion of the Award's contribution to the further development of international maritime boundary law – if any.

4 Ministry of Foreign Affairs (Government of the People's Republic of Bangladesh), 'Press Statement of the Honourable Foreign Minister on the Verdict of the Arbitral Tribunal/PCA' (8 July 2014) <www.mofa.gov.bd/media/press-statement-hon%E2%80%99ble-foreign-minister-verdict-arbitral-tribunalpca> accessed 7 November 2014; Ankit Panda, 'International Court Rules in Favor Bangladesh on Maritime Dispute with India' (10 July 2014) <<http://thediplomat.com/2014/07/international-court-rules-in-favor-of-bangladesh-on-maritime-dispute-with-india/>> accessed 7 November 2015.

5 Copies of Bangladesh's notifications to India and Myanmar initiating arbitration proceedings under Annex VII are attached, as Attachments A and B, in the letter of Bangladesh dated 13 December 2009 to the President of the International Tribunal for the Law of the Sea <www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Notification_Bangladesh_14.12.09.pdf> accessed 5 November 2015.

6 Bangladesh acceded on 27 July 2001; Myanmar acceded on 21 May 1996; and India acceded on 29 June 1995: Division for Ocean Affairs and the Law of the Sea, 'Chronological list of ratifications, accessions and successions to the Convention and related Agreements as at 2 January 2015' <www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea> accessed 5 November 2015.

7 Art 287 UNCLOS.

8 Myanmar and Bangladesh made separate declarations, on 4 November 2009 and 12 December 2009 respectively, to accept the jurisdiction of the ITLOS in the matter of the maritime delimitation dispute between them. On 13 December 2009, the Ministry of Foreign Affairs of Bangladesh informed the ITLOS concerning the separate declarations in its favour, and on 14 December 2009 the case was entered in the List of Cases as Case No. 16: *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of 14 March 2012) <www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf> accessed 5 November 2015 [5]; Letter of 13 December of the Bangladeshi Minister for Foreign Affairs to ITLOS <www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Notification_Bangladesh_14.12.09.pdf> accessed 5 November 2015.

9 *ibid.*



2. The Award

2.1 Jurisdiction

The parties submitted three main issues to the five-person Arbitral Tribunal for consideration. The first pertained to the Arbitral Tribunal's jurisdiction. In the absence of any declaration pursuant to Article 287(3) UNCLOS, as well as the absence of any written declaration excluding certain categories of dispute under Article 298 UNCLOS, the Arbitral Tribunal unanimously voted that it had jurisdiction.¹⁰ The Arbitral Tribunal noted that both parties' submissions concerning the outer limits of the continental shelf beyond 200 nautical miles were still pending before the Commission on the Limits of the Continental Shelf (CLCS) pursuant to Article 76 UNCLOS.¹¹ Neither India nor Bangladesh considered this fact as a ground for the Arbitral Tribunal to refrain from exercising its jurisdiction to delimit the continental shelf beyond 200 nm.¹² On the contrary, it was important for the parties that the Arbitral Tribunal resolved the delimitation dispute in order to allow the CLCS to continue consideration of their submissions. Both parties informed the CLCS that a delimitation dispute existed between them with respect to the area that was the subject of the submission and that the arbitration proceedings to resolve the dispute were ongoing.¹³ Under Rule 46 and Annex I, paragraph 5(a) of the Rules of Procedure of the CLCS, consideration of a submission will be deferred unless all parties to a dispute give their consent for the CLCS to consider the submission,¹⁴ which was the case here.

Consistent with the ruling of the ITLOS in the *Bangladesh/Myanmar* case, the Arbitral Tribunal underlined that the procedure under Article 76 UNCLOS and the dispute settlement mechanisms under the Convention are separate, independent, yet complementary, procedures.¹⁵ Article 76 requires that the process of delineating the continental shelf beyond 200 nm, which is a sovereign prerogative of a coastal State, be submitted for review to the CLCS. The settlement of maritime delimitation disputes, on the other hand, is a function assigned to the different dispute settlement mechanisms under Part XV UNCLOS. There is nothing in the UNCLOS that explicitly states that

¹⁰ *ibid* 19-20 [65]-[73].

¹¹ India submitted to the CLCS information relating to the outer limits of its continental shelf on 11 May 2009 <www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/ind_clcs48_2009e.pdf> accessed 7 November 2015. Bangladesh submitted to the CLCS information relating to the outer limits of its continental shelf on 25 February 2011 <www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/clcs55_2011_feb_2011.pdf> accessed 7 November 2015.

¹² *Bay of Bengal Maritime Boundary Arbitration* (n 3) 20 [74].

¹³ Bangladesh, in a Note Verbale dated 29 October 2009, informed the CLCS that it is disputing the area claimed by India as its continental shelf beyond 200 nm: <www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/bgd_re_ind_clcs48_2009e.pdf> accessed 7 November 2015. India, in a Note Verbale dated 20 June 2011, informed the CLCS of the ongoing dispute between it and Bangladesh relating to the area of the continental shelf beyond 200 nm: <www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/ind_nv_un_001_20_06_2011.pdf> accessed 7 November 2015.

¹⁴ CLCS, Rules of Procedure of the Commission on the Limits of the Continental Shelf (17 April 2008) CLCS/40/Rev.1, <www.un.org/depts/los/clcs_new/commission_rules.htm> accessed 7 November 2015.

¹⁵ *Bay of Bengal Maritime Boundary Arbitration* (n 3) 22 [80]; *Bangladesh/Myanmar* case (n 8) [369]-[394].



delineation shall first be completed before delimitation can take place. Article 9 of Annex II UNCLOS, which mandates that the actions of the CLCS shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts, leads one to conclude that delineation under Article 76 is not a prerequisite to delimitation under Article 83 UNCLOS.¹⁶

2.2 Land boundary terminus

The second issue concerned the location of the land boundary terminus at the mouth of the Bay of Bengal, which separates India from Bangladesh. In determining the exact location of the land boundary terminus, the Arbitral Tribunal's main task was to interpret two terms of the Radcliff Award of 1947, which established the boundary between India and the then-newly independent Pakistan, as well as to determine the evidentiary value of the map attached thereto, which purported to show where the land boundary terminus was located.¹⁷ The Arbitral Tribunal reached a unanimous verdict on the location of the land boundary terminus, positioning it at 21° 38' 40.2"N; 89° 09' 20.0"E (WGS-84).¹⁸

2.3 Delimitation line

The third and final issue that the Arbitral Tribunal voted on was the delimitation line marking the boundary between the territorial sea, exclusive economic zone and the continental shelf between the parties. The parties asked the Arbitral Tribunal to draw a single maritime boundary line delimiting the three maritime zones.¹⁹ Consistent with previous jurisprudence, the Arbitral Tribunal emphasised at the outset that it would undertake its delimitation task in three stages because different legal parameters apply for each maritime zone.²⁰ The first segment delimited the territorial sea, the second segment was the delimitation of the exclusive economic zone and the continental shelf within 200 nm, and the final segment concerned the delimitation of the continental shelf beyond 200 nm.²¹ The Arbitral Tribunal's decision on the delimitation line was not unanimous, with Rao dissenting in part.²²

16 cf Separate Opinion Judge Tafsir M Ndiaye, *Bangladesh/Myanmar* case, 28, 36-38 [87], [106]-[116] <www.itlos.org/file-admin/itlos/documents/cases/case_no_16/C16.sep_op_Ndiaye.TR.E.pdf> accessed 7 November 2015.

17 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 26 [89], [91] 46 [158], [159] 46-47 [161] 50 [178] 51 [184] 50 [181].

18 *ibid* 52 [188].

19 *ibid* 57 [190].

20 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40 [173]-[174] referring to *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246 [194].

21 *ibid*.

22 *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (Concurring and Dissenting Opinion Dr PS Rao) 12-13 [9], [20]-[22] <www.pca-cpa.org/BD-IN%2020140707%20Concurring%20and%20Dissenting%20Opinion%20of%20Dr%20PS%20Rao5fb0.pdf?fil_id=2706> accessed 7 November 2015.



2.3.1 Territorial sea

In the territorial sea, the Arbitral Tribunal drew the boundary line by applying Article 15 UNCLOS.²³ Article 15 requires the use of the median/equidistance method unless special circumstances exist to justify the use of another method. The Arbitral Tribunal interpreted Article 15 in accordance with established jurisprudence, that is to say, it first drew a provisional equidistance line, following which it considered whether special circumstances existed to justify the use of another delimitation method.²⁴

The Arbitral Tribunal constructed the provisional equidistance line with two base points: one from the Bangladeshi coast, point B-1 at 21° 39' 04" N; 89° 12' 40" E, which was a proposal of Bangladesh, and the other, I-1 from the Indian coast, which was determined by the Arbitral Tribunal itself, at the low-water line of Moore Island at 21° 38' 06" N; 89° 05' 36" E. The mid-point between the two base points became the starting point of the median/equidistance provisional line at Prov-0 at 21° 38' 35.0" N; 89° 09' 08.0" E. Prov-0 thereafter was made to continue at an initial azimuth of 171° 40' 32.81" until it reached the 12 nm limit for both States.²⁵ It is interesting to note that the accepted base points were located on the coastlines of the parties, not on any low-tide elevation. According to the Arbitral Tribunal, none of the proposed base points on low-tide elevations met the criteria for 'protuberant coastal point' as elaborated by the International Court of Justice (ICJ) in the *Black Sea* case.²⁶

Bangladesh contended that two special circumstances – that is, coastal instability and coastal concavity – justified the use of an alternative method, namely the angle-bisector method.²⁷ With respect to coastal instability, Bangladesh submitted evidence that the Bengal Delta is the principal recipient of 'massive quantities of sediment' from the Ganges and Brahmaputra Rivers.²⁸ The consequence of this has been the long-time rapid erosion of the western portion of the Delta, where Bangladesh's Haringhata River and the mouth of India's Hooghly River are located, and accretion in the eastern part.²⁹ The erosion of the Bengal Delta has been further aggravated due to a rise in sea level,³⁰ such that radical alterations to the coastline by 2100 are anticipated.³¹ The Arbitral Tribunal, however, declined to accept Bangladesh's argument of existing and future coastal instability, pointing out that Bangladesh was able to submit base points for the establishment of a provisional equidistance line,³²

23 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 71 [246].

24 *ibid.*

25 *ibid* 75 [270].

26 *ibid* 74 [263] (quoting *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61 [117]).

27 *ibid* 67 [234].

28 *ibid* 68 [237].

29 *ibid.*

30 *ibid.*

31 *ibid* 109 [376].

32 *ibid* [215].



which meant that the physical reality at the time of delimitation allowed the parties to apply the equidistance line to delimit the territorial sea.³³ Bangladesh's argument on concavity, or significant indentation of the coast, was also rejected as a special circumstance, with the Arbitral Tribunal noting that within 12 nm, concavity as such does not produce a cut-off effect.³⁴

After it drew the provisional equidistance line, the Arbitral Tribunal realised that the land boundary terminus it earlier identified on the basis of the *Racliffe Award* was not at a point equidistant from the selected base points.³⁵ The Arbitral Tribunal considered this a special circumstance similar to that faced by the tribunal in *Guyana v Suriname* where the terminus of a previous delimitation line that did not fall on the median line had to be connected with the delimitation line based on equidistance.³⁶ The provisional equidistance line dividing the territorial seas between the parties was adjusted by gradually connecting the land boundary terminus in a southerly direction to the median line at 21° 26' 43.6"N; 89° 10' 59.2"E.³⁷

2.3.2 Exclusive economic zone and the continental shelf within 200 nm

In the exclusive economic zone and the continental shelf within 200 nm, the Arbitral Tribunal confirmed that Articles 74 and 83 UNCLOS apply to the delimitation of the exclusive economic zone and the continental shelf. Unlike Article 15 UNCLOS, Articles 74 and 83, which contain identical provisions, do not mandate a particular delimitation method. India argued that modern jurisprudence has mostly favoured the application of the equidistance line/relevant circumstances method.³⁸ Bangladesh countered that application of the equidistance method would be inequitable and advocated for the application of the angle-bisector method at an initial azimuth of 180°. Bangladesh relied on the ruling of the ICJ in *Nicaragua v Honduras*, which used the angle-bisector method by drawing a straight line reflecting the general direction of the parties' coasts.³⁹

The Arbitral Tribunal, in making its decision on which delimitation method to use, underscored that, in addition to achieving an equitable solution, the delimitation method must also be transparent and objective.⁴⁰ The Arbitral Tribunal compared the two methods and arrived at a conclusion that the three-step equidistance line/relevant circumstances technique followed by the ICJ in the

33 *ibid* 64 [223]; *Black Sea Case* (n 26) 106 [131].

34 *ibid* 75 [272].

35 *ibid* 75 [273].

36 *ibid*; *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname (Guyana v Suriname)* (2007) XXX RIAA 1, 90 [323].

37 *ibid* 76 [276].

38 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 92 [319]. India referred to the observation of the tribunal in *Guyana v Suriname* that the equidistance method has been the preferred delimitation method (n 36).

39 *ibid*; *Bay of Bengal Maritime Boundary Arbitration* (n 3) 99 [342]; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Merits) [2007] ICJ Rep 659, 69, 294-298 [748]-[749].

40 *ibid* 98 [339].



Black Sea case, being more structured and transparent, offered a clear advantage in giving an equitable result to the parties.⁴¹ The equidistance line method starts with the establishment of a provisional equidistance line ‘based on a geometrically objective criteria, while at the same time account is taken of the geography of the area through the selection of appropriate base points.’⁴² The second step of the equidistance method involves adjusting the provisional equidistance line when relevant circumstances are found to exist.⁴³ The third step is to check whether the delimitation line produced during the second step is proportionate.⁴⁴

After the provisional line was established starting at point Prov 3 with an initial azimuth of 171° 40’ 32.81” located at 21° 07’ 44.8”N; 89° 13’ 56.5”E up to point Prov 7 at the 200 nm limit,⁴⁵ Bangladesh argued that the provisional line should be adjusted on the basis of three relevant circumstances: instability of the coast, concavity of the coast and its population’s dependency on fishing in the Bay of Bengal.⁴⁶ Although the Arbitral Tribunal agreed with Bangladesh’s observation that its coast is unstable, it did not consider this a relevant circumstance to adjust the provisional line. Citing a similar ruling by the ICJ in *Nicaragua v Honduras*,⁴⁷ the Arbitral Tribunal reasoned that despite the instability of the coast, it was still feasible for Bangladesh to establish base points for its proposed provisional line. As for future instability of the coast, the Arbitral Tribunal reiterated the position it took in the delimitation of the territorial sea, underscoring that ‘only the present geophysical conditions are of relevance ... Future changes of the coast, including those resulting from climate change, cannot be taken into account in adjusting a provisional equidistance line.’⁴⁸

As for Bangladesh’s claim of fishing dependency in the Bay of Bengal, the Arbitral Tribunal found the evidence submitted by Bangladesh to be insufficient.⁴⁹ The Arbitral Tribunal referred to a similar ruling made by the *Barbados/Trinidad and Tobago* tribunal, which declined to adjust the provisional line to favour the fishermen from Barbados since their interest in fishing was not proven to be long-standing.⁵⁰ Like the tribunal in *Barbados/Trinidad and Tobago*, it did not completely exclude socio-economic considerations from delimitation law, but it effectively set a very high bar for this particular factor to be considered relevant.⁵¹

41 *ibid* 99 [343]-[345].

42 *ibid*.

43 *ibid* 99 [345].

44 *ibid* 98 [341].

45 *ibid* 105 [368].

46 *ibid* 105 [371].

47 *ibid* 116 [399]; *Nicaragua v Honduras* (n 39) 745.

48 *ibid* 117; *Bay of Bengal Maritime Boundary Arbitration* (n 3) 116-117 [399].

49 *ibid* 124 [424].

50 *ibid*; *In the matter of an arbitration between Barbados and the Republic of Trinidad and Tobago* (Award) (2006) XXVII RIAA 147, 221-23 [264]-[271].

51 *ibid*.



With respect to concavity, the Arbitral Tribunal underscored the established view in jurisprudence that concavity by itself is not a relevant circumstance capable of automatically adjusting a provisional equidistance line.⁵² Concavity must produce a cut-off effect in order to be considered relevant. For the cut-off effect to be relevant, the Arbitral Tribunal tested it against two criteria. First, did it prevent Bangladesh from extending its maritime boundary as far seaward as international law permits? Second, if the provisional line was not adjusted, would it fail to achieve an equitable solution as required under Articles 74 and 83 UNCLOS?⁵³ The Arbitral Tribunal did not explicitly answer the two questions in the affirmative but offered the following observations: 1) that the area allocated to Bangladesh narrowed into the shape of a triangle the further it was from the coast; and 2) that from point Prov 3, the 'provisional equidistance line bends markedly eastward to the detriment of Bangladesh.'⁵⁴ The Arbitral Tribunal therefore decided to adjust the line in order to produce an equitable result, but with the caveat that such adjustment must not 'produce an unreasonable result for India.'⁵⁵

2.3.3 The continental shelf beyond 200 nm

The Arbitral Tribunal decided to delay its adjustment of the provisional line only after its consideration of the delimitation issues of the continental shelf beyond 200 nm.⁵⁶ This move is consistent with the Arbitral Tribunal's position that, in law, there is a single continental shelf.⁵⁷ Since the Arbitral Tribunal concluded that it was dealing with a single continental shelf, it also decided that the delimitation method used in the area within 200 nm – namely the three-step equidistance/relevant circumstance method – must also be applied for the area beyond 200 nm.⁵⁸

The Arbitral Tribunal first established a provisional equidistance line in the area beyond 200 nm, starting from the 200 nm limit, which was at a point between point Prov 6 and point Prov 7, continuing towards Prov 7, and from Prov 7, at an azimuth of 175° 50' 50.30", progressing until it met the ITLOS Boundary Line.⁵⁹ India argued that no adjustment to the provisional equidistance line in the area of the continental shelf beyond 200 nm was necessary and proposed that the same provisional equidistance line within the 200 nm be retained and, from point T-7, should continue at an azimuth of 172.342° until it meets the ITLOS Boundary Line.⁶⁰

52 *ibid* 117 [402]; *Bangladesh/Myanmar case* (n 8) [292]; *Case Concerning the Land and Maritime Boundary (Cameroon v Nigeria)* [2002] ICJ Rep 303 [272].

53 *ibid*; *Bay of Bengal Maritime Boundary Arbitration* (n 3) 122 [417].

54 *ibid* 123 [418].

55 *ibid* 123 [419].

56 *ibid* 123 [421], 129 [437].

57 *ibid* 129 [437].

58 *ibid* 142 [465].

59 *ibid* 142 [464].

60 *ibid* 136 [451], 143 [468].



Bangladesh, on the other hand, argued that the concavity of its coast was a relevant circumstance that justified the adjustment of the provisional line.⁶¹ According to Bangladesh, the ‘results produced by an equidistance line in the case of a concave coast become more unreasonable as the line moves further from the coast.’⁶² The Arbitral Tribunal agreed with Bangladesh that the concavity of its coast resulted in a cut-off effect within 200 nm, the detrimental consequence of which continued beyond 200 nm, and was therefore a relevant circumstance justifying the adjustment of the provisional line.⁶³ In explaining the cut-off, the Arbitral Tribunal referred to two observations. The first was that the area attributed to Bangladesh within and beyond 200 nm was limited in scope in comparison with the area in which the entitlements of the parties overlap.⁶⁴ Second, the Arbitral Tribunal observed that starting at point Prov 3, the provisional equidistance line within 200 nm gave ‘insufficient weight’ to the south-facing coast of Bangladesh.⁶⁵ Beyond these two observations, however, the Arbitral Tribunal did not make further elaborations on the cut-off effect of the concavity of the coast. The Arbitral Tribunal clarified that its objective in adjusting the line was to ‘ameliorate the excessive negative consequences’ for Bangladesh and, at the same time, to ensure that no unreasonable ‘encroaches on the entitlement of India’ ensued.⁶⁶

It is interesting to note that Bangladesh proposed to adjust the provisional delimitation line by way of an angle-bisector method starting at the land boundary terminus, with an initial azimuth of 180° at point Prov-0 to continue up to the 200 nm limit, thereafter to deflect at an azimuth of 215° in order to run parallel to the ITLOS Boundary Line between Bangladesh and Myanmar until it reaches the declared outer limits of the continental shelf of Bangladesh.⁶⁷ With respect to its proposal to deflect the line at the 200 nm point to an azimuth of 215°, Bangladesh defended this position by arguing that the delimitation line adopted within 200 nm need not be the same in the area beyond 200 nm if doing so would result in an inequitable situation for either of the parties.⁶⁸ Bangladesh calculated that if the equidistance line were to remain unchanged, it would give Bangladesh only a small entitlement in the area beyond 200 nm as it ‘terminates a full 140 nm short of the claimed outer limits it submitted to the CLCS.’⁶⁹

The Arbitral Tribunal did not accept Bangladesh’s proposal and set out to adjust the provisional line starting at point Prov 3 with a geodetic line at an initial azimuth of 177° 30’ 00” until it met the ITLOS Boundary Line in *Bangladesh/Myanmar*.⁷⁰ The Tribunal stated that the adjusted line ‘does

61 ibid 131 [440].

62 ibid 143 [467].

63 ibid 144 [471].

64 ibid 144 [473].

65 ibid 144 [474].

66 ibid 147 [477].

67 ibid 133 [444].

68 ibid 132 [443].

69 ibid 132 [441].

70 ibid 147 [478].



not unreasonably limit the entitlement of India⁷¹ and since it ‘avoids turning points ... is simpler to administer and implement by the Parties.’⁷²

Although Rao voted with the majority on jurisdiction and the location of the land boundary terminus, he dissented on the final delimitation line on three points. First, Rao argued that prov Point 3, which was located within 200 nm, was well before any significant cut-off to Bangladesh’s entitlement occurred.⁷³ Second, Rao found the Arbitral Tribunal’s reasoning unsatisfactory. Finally, Rao, describing how the azimuth line at 177° 30’ 00” looked very similar to Bangladesh’s proposal of an azimuth line at 180°, called the decision ‘arbitrary and intrinsically runs counter to the majority’s own reasoning which effectively rejected a bisector as a matter of law.’⁷⁴

The Arbitral Tribunal took the final step in delimiting the continental shelf beyond 200 nm by performing the disproportionality test. The ICJ in the *Black Sea* case explained that the test is designed to check whether ‘a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.’⁷⁵ The Arbitral Tribunal further underscored that the process of applying the disproportionality test is not a ‘mathematical exercise’⁷⁶ and must be undertaken ‘by reference to the overall geography of the area.’⁷⁷ The Arbitral Tribunal applied the disproportionality test by comparing the ratio of the relevant maritime space it accorded to each party to the ratio of the parties’ relevant coastal lengths. Bangladesh’s relevant coast is 418.6 kilometres⁷⁸ and India’s is 803.7 kilometres.⁷⁹ The ratio between the lengths of the relevant coasts is 1:1.92. The relevant area as established by the Arbitral Tribunal was 406,833 square kilometres.⁸⁰ After adjustment of the line, the area allocated to Bangladesh was approximately 106,613 square kilometres and India’s was approximately 300,220 square kilometres. The resulting ratio, which was approximately 1:2.81, was considered by the Tribunal to not be disproportionate, thus requiring no further shifting of the line.⁸¹ Map 12 below is the illustrative map provided by the Arbitral Tribunal and depicts the final delimitation line.⁸²

71 *ibid* 147 [479].

72 *ibid* 147 [480].

73 Concurring and Dissenting Opinion of Dr Rao (n 22) 12-13 [9], [20]-[22].

74 *ibid*.

75 *Black Sea Case* (n 26) 99-100 [110].

76 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 153 [494].

77 *ibid* 154 [494].

78 *ibid* 81 [286].

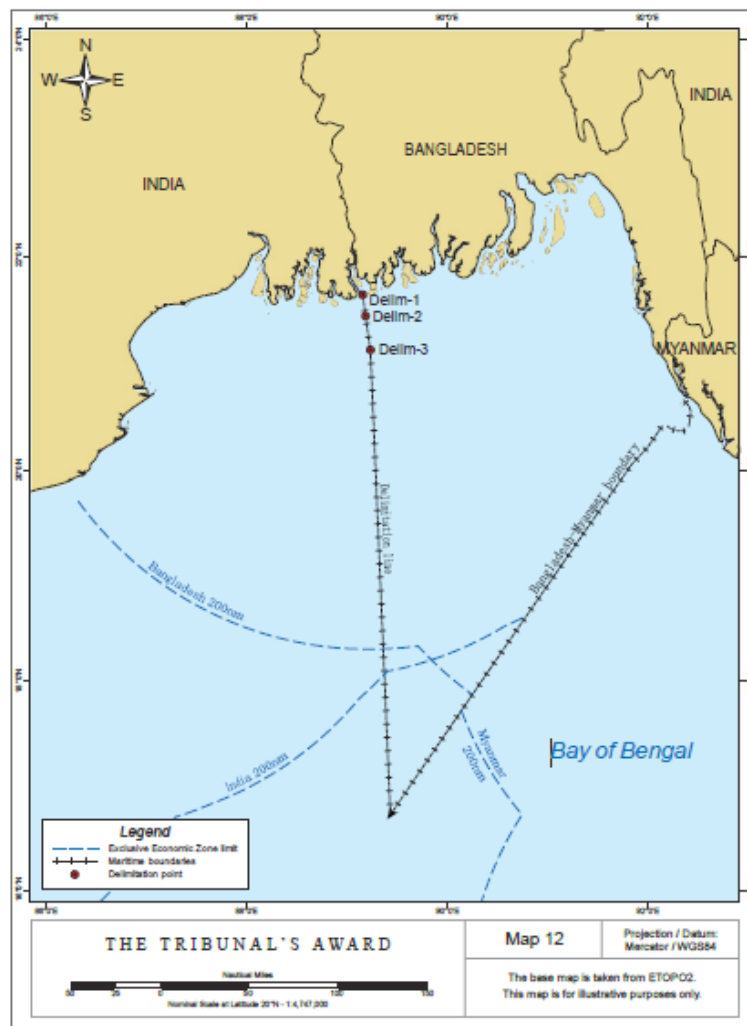
79 *ibid* 87 [305].

80 *ibid* 88 [311].

81 *ibid* 154 [497].

82 *ibid* 163.

MAP 12



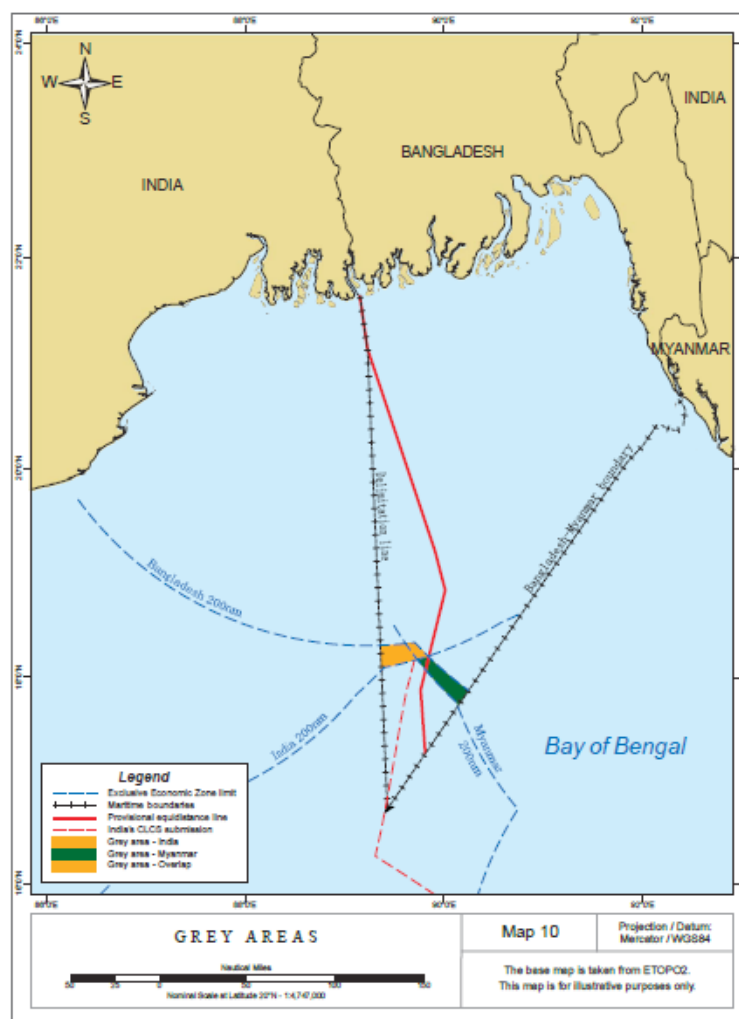
2.3.4 The grey area

The final delimitation line that the Arbitral Tribunal drew resulted in a so-called 'grey area.' In the grey area, which lies beyond the 200 nm limit of Bangladesh, Bangladesh only has rights to the seabed and subsoil of the continental shelf, but not to the superjacent waters of the exclusive economic zone, which fall within 200 nm of India and thus belongs to the latter.⁸³ A further complication of

⁸³ *ibid* 156 [503].

the said grey area is that it partially overlaps with the grey area created by ITLOS in the *Bangladesh/Myanmar* case.⁸⁴ Map 10 below illustrates the grey areas created as a result of the delimitation line drawn by the Arbitral Tribunal.⁸⁵

MAP 10



⁸⁴ *ibid* 156 [506].

⁸⁵ *ibid* 159.



The creation of a grey area following a delimitation exercise, whether negotiated bilaterally or the outcome of a judicial or arbitral process, is not unknown.⁸⁶ The main reason that grey areas come to be is because the legal bases of entitlement over the territorial sea, the exclusive economic zone and the continental shelf differ from the legal principles of delimitation.⁸⁷ Entitlement to the territorial sea and the exclusive economic zone is based purely on distance from the coast.⁸⁸ Entitlement to the continental shelf is based either on distance, if the area claimed is up to 200 nm, or on geology and geomorphology, if an area of continental shelf beyond 200 nm is claimed.⁸⁹ Under the law of the sea, delimitation is undertaken only when there is an overlap of claims.⁹⁰ Unless a historic title exists, the territorial sea is delimited with the median line/special circumstances method.⁹¹ Delimitation of the exclusive economic zone and the continental shelf, on the other hand, is undertaken without any preferred method and with the main objective of an equitable solution.⁹²

Rao did not share the majority's position on the resulting grey area for two reasons. First, he disagreed that within the exclusive economic zone, sovereign rights on the water column may be divided from sovereign rights in seabed and subsoil.⁹³ His point was that sharing of rights might exist between exclusive and inclusive rights, such as the sovereign rights within the exclusive economic zone and the freedom of the high seas.⁹⁴ The Arbitral Tribunal defended the resulting grey area, contradicting Rao by stating that:

The establishment of a maritime area in which the States concerned have shared rights is not unknown under the Convention. The Convention is replete with provisions that recognize to a greater or lesser degree the rights of one State within the maritime zones of another. Within the provisions of the Convention relating to the exclusive economic zone and the continental shelf, articles 56, 58, 78 and 79 all call for States to exercise their rights and perform their duties with due regards to the rights and duties of other States.⁹⁵

Rao's second objection was on policy, arguing that 'international courts and tribunals should avoid

86 Alex G Oude Elferink, 'Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue' (1998) 13 Int'l J Marine & Coastal L 143; Oude Elferink cited the following cases dealing with grey areas: *Grisbadarna* case (Norway/Sweden) decision of 23 October 1909 (1910) 4 AJIL 226-236; *Dubai/Sharjah Border Arbitration* (Decision) (1981) 91 ILR 543; *Delimitation of the maritime boundary between Guinea and Guinea-Bissau* (1985) XIX RIAA 149.

87 *ibid* 147.

88 Arts 3 and 57 UNCLOS.

89 Art 76 UNCLOS.

90 Arts 15, 74 and 83 UNCLOS.

91 Art 15 UNCLOS.

92 Arts 74 and 83 UNCLOS.

93 Concurring and Dissenting Opinion of Dr Rao (n 22) 19 [36].

94 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 19 [34].

95 *ibid* 156 [507].



delimiting boundaries in a way that leaves room for potential conflicts between the parties.⁹⁶ Indeed, the Arbitral Tribunal was aware of a potential conflict scenario and advised the parties not to leave the situation as it is, but to enter into cooperative arrangements to 'ensure that each is able to exercise its rights and perform its duties within this area.'⁹⁷

3. The delimitation of the area of the continental shelf beyond 200 nm - a lost opportunity in law-making?

In his Declaration in the *Bangladesh/Myanmar* case, Wolfrum, referring to the fact that the UNCLOS did not specify a delimitation method for the exclusive economic zone and the continental shelf, argued that a court or tribunal's rulings on delimitation have a 'law-making function.'⁹⁸ Past judicial rulings on delimitation are '*acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 73 and 84 of the Convention.'⁹⁹ The Arbitral Award of 7 July 2014 was only the second time that a court or tribunal delimited the continental shelf beyond 200 nm. The opportunity and scope to address and clarify issues relating to the law on delimitation of the area of the continental shelf beyond 200 nm was therefore present. However, the Arbitral Tribunal did not fully take advantage of this opportunity.

The first missed opportunity was the absence of a clear ruling on whether the parties' entitlements to an area of the continental shelf beyond 200 nm overlapped. Before a court or tribunal can establish an overlap, the entitlement of each coastal State must first be confirmed, which, however, the Arbitral Tribunal did not do. The basis of the title to an area of the continental shelf that extends beyond 200 nm is different from a continental shelf up to 200 nm, which is based on distance. Under Article 76(4), the geology and geomorphology of the seabed and subsoil are decisive in whether a coastal State can claim an extended continental shelf or not. The CLCS is of the view that before a coastal State can delineate or establish the outer limits beyond 200 nm, it must clearly demonstrate or offer positive proof that its outer limits lie in an area beyond 200 nm.¹⁰⁰ In practice, the CLCS calls this 'the test of appurtenance' and requires a coastal State to delineate a line based on either or both paragraph 4(a)(i) of Article 76 UNCLOS on locating the foot of the slope or paragraph (4)(a)(ii) on determining the thickness of the sedimentary rocks.¹⁰¹ Requiring the parties to provide proof

96 Concurring and Dissenting Opinion of Dr Rao (n 22) 19 [35].

97 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 157 [508].

98 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* Declaration of Wolfrum, 2 <www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16.decl.Wolfrum.rev.E.pdf>.

99 *ibid.*

100 CLCS, Scientific and Technical Guidelines, adopted 13 May 1999, CLCS/11, s 2.2.1 <www.un.org/Depts/los/clcs_new/documents/Guidelines/CLCS_11.htm> accessed 8 November 2015.

101 *ibid* s 2.2.8.



of their entitlement would have been a practical matter considering that both States have already made their submissions to the CLCS. The Arbitral Tribunal, however, did not require the parties to provide positive proof of entitlements beyond 200 nm in accordance with Article 76(4). Instead the Arbitral Tribunal simply relied on the parties' submissions that they both agreed that each is entitled to an area of the continental shelf beyond 200 nm.¹⁰² While the delimitation method can be a matter of agreement between the parties, proof of entitlement can only be determined in accordance with Article 76 UNCLOS, not by agreement between the parties.¹⁰³

The majority should have also elaborated that the continental shelf beyond 200 nm has a different legal basis of title than that of maritime zones based on distance, thereby warranting consideration of the issues that differ from the principles applied to the delimitation of areas within 200 nm. Title to maritime areas within 200 nm is based on distance, whereas title to the continental shelf beyond 200 nm rests on geological and geomorphological requirements in accordance with Article 76. The Arbitral Tribunal was actually aware of this conceptual difference and indeed stated that in the delimitation of the continental shelf beyond 200 nm, in addition to Article 83, Article 76(4) UNCLOS also applied.¹⁰⁴ Article 76(4) refers to the formulas that coastal States must apply in delineating the outer limits of the continental shelf beyond 200 nm. It reads as follows:

- (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
 - (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
 - (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
- (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

So what roles do these formulas play in the delimitation? Some experts are of the view that geomorphological and geological elements serve as relevant circumstances in the delimitation of the continental shelf beyond 200 nm, but that they 'do not operate to exclude other facts.'¹⁰⁵ Unfortunately,

¹⁰² *Bay of Bengal Maritime Boundary Arbitration* (n 3) 131 [438].

¹⁰³ Bjorn Kunoy, 'A Geometric Variable Scope of Delimitations: The Impact of Geological and Geomorphological Title to the Outer Continental Shelf' (2006) 11 *Austrian Rev Intl & Eur L* 49, 72.

¹⁰⁴ *Bay of Bengal Maritime Boundary Arbitration* (n 3) 138 [456].

¹⁰⁵ David Colson, 'The Delimitation of the Outer Continental Shelf between Neighbouring States' (2003) 97 *AJIL* 91, 107; see also Bjorn Kunoy, 'The Rise of the Sun: Legal Arguments in Outer Continental Margin Delimitations' (2006) 53 *Netherlands International Law Review* 247.



the Arbitral Tribunal did not elaborate on how exactly Article 76(4) applied nor did it elaborate on the role of Article 76(4) in the delimitation process.

4. Conclusion

Overall, the Arbitral Tribunal's approach to delimiting the maritime zones between the Bangladesh and India stayed faithful to established jurisprudence in maritime delimitation. The final delimitation line established by the Arbitral Tribunal was a result of detailed application of the three-step approach of the provisional equidistance/relevant circumstances developed by past judicial rulings and refined in the *Black Sea* case. With respect to the adjusted line, there is some merit to the critique that the Award did not provide a fully reasoned explanation as to how the Arbitral Tribunal arrived at its decision. However, the same critique can be made of many decisions that have applied the provisional equidistance/relevant circumstances method. No matter how objective a court or tribunal is in establishing the provisional line, its adjustment on the basis of relevant circumstances always calls for the application of judicial discretion.¹⁰⁶ There will therefore always be an element of subjectivity with respect to a final adjusted line.

In contrast to its faithful application of established doctrine, the Arbitral Tribunal's attempt at law-making was not as successful. As previously discussed, the Arbitral Tribunal held back from elaborating certain fundamental underlying issues, which prevented it from fully contributing to the progressive development of the law on maritime delimitation of the continental shelf in areas beyond 200 nm. These issues included the necessity of undertaking the test of appurtenance in order to confirm entitlement and any ensuing overlap of claims as well as the importance of elaborating the principles applicable to the delimitation of the continental shelf beyond 200 nm.

Nevertheless, this Award occupies a distinct place in international jurisprudence, as it was one of the first two cases in which the extended continental shelf beyond 200 nm was delimited before the CLCS made its recommendations concerning the outer limits.¹⁰⁷ Prior to the two cases, the courts and tribunals tended to refrain from exercising jurisdiction over a delimitation dispute involving the continental shelf beyond 200 nm, rather waiting for the CLCS to make its recommendations.¹⁰⁸ This reluctance can be attributed to the idea that delineation by the CLCS, which also involves making a determination concerning a coastal State's entitlement to an extended continental shelf, must be completed before delimitation can take place.¹⁰⁹ In addition, there is also doubt whether a judicial or arbitral body comprised of legal experts is qualified to determine a coastal State's entitlement to

¹⁰⁶ *Bay of Bengal Maritime Boundary Arbitration* (n 3) 99 [344].

¹⁰⁷ The other case was the *Bangladesh/Myanmar* case (n 8).

¹⁰⁸ Robin Churchill, 'The *Bangladesh/Myanmar* Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation' (2012) 1 CJICL 137, 148.

¹⁰⁹ This was the reason given by the Arbitral Tribunal which decided the *France/Canada Maritime Boundary Delimitation* in 1992: Louise de la Lafayette, 'The Award in the *Canada-France Maritime Boundary Arbitration*' (1993) 8 IJMCL 77, 86.



a continental shelf beyond 200 nm as it involves the application of a complex set of geological and geomorphological factors.¹¹⁰ There is nothing in the UNCLOS that explicitly states that delineation shall first be completed before delimitation can take place. On the contrary, and which was argued earlier, Article 9 of Annex II of the UNCLOS, which mandates that the actions of the CLCS shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts, leads one to conclude that delineation under Article 76 is not a prerequisite to delimitation under Article 83 UNCLOS. Finally, it must be noted that by exercising jurisdiction to delimit the area beyond 200 nm and resolving the delimitation dispute, the Arbitral Tribunal paved the way for the CLCS to consider the submissions of India and Bangladesh and to make recommendations on the outer limits of the continental shelf of both countries.¹¹¹

¹¹⁰ *ibid* 150.

¹¹¹ This was the same outcome for the submissions of Bangladesh and Myanmar when ITLOS decided to settle their delimitation dispute with each other: *Bangladesh/Myanmar* (n 8) 115 [391]-[394].

The Maritime Frontier between Italy and France: A Paradigm for the Delimitation of Mediterranean Maritime Spaces

*Fabio CAFFIO*¹

Abstract

A recent agreement (signed on 21 March 2015 but not yet entered into force) between Italy and France on the delimitation of their maritime spaces provides a unique opportunity to discuss the solutions adopted in light of the 'single maritime boundary' practice. The new Agreement, on the basis of the customary rules of international law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS), settles the delimitation of both territorial waters and other maritime zones under national jurisdiction; for the former, the principle of equidistance was applied, and in respect of the latter, the Agreement relies on the equitable principle. The following article observes that the trend in the Mediterranean basin is undoubtedly moving towards a fragmentation of the high seas. In this connection, the author references Italy's long-standing interest in preserving the freedom of navigation in the Mediterranean and thus refraining from establishing maritime zones of functional jurisdiction. The author – after having considered the current state of maritime relations between Italy and France, which is inspired by the duty of cooperation established by the UNCLOS in semi-enclosed seas – argues that the result achieved could serve as a template for other Mediterranean maritime delimitations that have yet to be resolved. Reference is thus made, concerning the western and central Mediterranean regions, to the case of unresolved maritime delimitations concerning on one side Spain and France and, on the other side, Malta and Italy.

Keywords

Mediterranean Sea, maritime disputes, boundary delimitations, UNCLOS, EEZ, continental shelf

1. Introduction

On 21 March 2015, Italy and France signed the Agreement on the delimitation of the territorial waters and the other areas under national jurisdiction such as the continental shelf and the exclusive economic zone (EEZ). At the time of writing, the Agreement has not yet entered into force but has

¹ Fabio Caffio is an Italian Navy Officer (ret.) and expert in International Maritime Law. Adm. Caffio previously represented the Italian Ministry of Defence at international meetings concerning the law of the sea, negotiations of maritime agreements and the law applicable to armed conflicts at sea. The author (who can be contacted at facaffio@tin.it) thanks the reviewers of this journal for their patient work.



been published by France.² In a nutshell, the Agreement defines the maritime frontiers of all the maritime spaces of the two countries, namely the French EEZ,³ the Italian environmental protection zone (EPZ),⁴ as well as the continental shelf and territorial waters. The boundary adopted for the water column is the same as the seabed and its subsoil, and the Agreement thus endorses the practice of a 'single maritime boundary' recently employed by Cyprus, Egypt and Israel in delimiting their EEZs in the Eastern Mediterranean.⁵ It is not without significance, however, that the International Court of Justice (ICJ) followed the same criteria in several cases. As matter of fact, the ICJ observed that

the concept of a single maritime boundary does not stem from multilateral treaty law but from state practice, and that it finds its explanation in the wish of states to establish one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them.⁶

2 SHOM Communiqués, 'Un accord délimitant les zones de souveraineté et de juridiction entre la France et l'Italie' <www.shom.fr/le-shom/actualites/les-communiques/actualite-detaillee/article/france-de-nouvelles-frontieres-maritimes/> accessed 30 September 2015. See 'Accord entre le Gouvernement de la République française et le Gouvernement de la République italienne relatif à la délimitation des mers territoriales et des zones sous juridiction nationale entre la France et l'Italie' <http://reglementation-polmer.cherz-alice.fr/Textes/accord_frontiere_maritime_franco_italien.pdf> accessed 30 September 2015.

3 The institution of the French EEZ in the Mediterranean was adopted by Décret n° 2012-1148 du 12 octobre 2012 portant création d'une zone économique exclusive au large des côtes du territoire de la République en Méditerranée <www.legifrance.gouv.fr/> accessed 1 December 2015. This Decree replaced the former Décret n°2004-33 du 8 janvier 2004 portant création d'une zone de protection écologique au large des côtes du territoire de la République en Méditerranée, maintaining the same external border lying beyond the hypothetical equidistance line with Italy.

4 The Italian Parliament took into account the French initiative of the EPZ in the Tyrrhenian Sea (see Camera dei Deputati, Disegno di legge n. 5368-2004) in approving the Law n. 61-2006 of the 8 February 2006 on the institution, case-by-case, of specific EPZs; the first EPZ - adopted by Presidential Decree no. 209 of 27 October 2011 - established an ecological protection zone in the north-west Mediterranean, the Ligurian Sea and the Tyrrhenian Sea (for an English language version of the text see <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_2011_Decree.pdf> accessed 1 December 2015).

5 Cyprus concluded two EEZ delimitation agreements: in 2003 with Egypt and in 2010 with Israel (both texts available at United Nations Oceans & Law of the Sea <www.un.org/Depts/los/> accessed 1 December 2015). In 2007, Cyprus also signed an EEZ delimitation agreement with Lebanon (Lebanon did not ratify it claiming an area that overlaps the EEZ delimited by Cyprus and Israel); see Tullio Scovazzi, 'Maritime Boundaries in the Eastern Mediterranean Sea' (*GMF Policy Brief*, June 2012) <www.gmfus.org/publications/maritime-boundaries-eastern-mediterranean-sea> accessed 1 February 2016.

6 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40 [173]. See also Malcom D Evans, 'Maritime Boundary Delimitation' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 254, where the following cases are quoted: *Gulf of Maine*, *Jan Mayen*, *Nicaragua/Colombia*, *Black Sea*, *Perù/Chile*; as well as Irini Papanicopolulu, *Il confine marino: unità o pluralità* (Giuffrè Editore 2005) whose study deals with both state practice and international case law. It must be noted that the delimitation of the EEZ and continental shelf is regulated by Arts 74 and 83 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) in an identical manner. In theory, the boundaries of the two zones can be different, considering that the legal regime of the water column is quite different from that of the seabed. Furthermore, in many cases, the continental shelf (that belongs to the concerned state *ab initio* and *ipso jure*, not depending on any proclamation) was delimited before the consolidation of the EEZ regime in the UNCLOS. Thus, a state can have a continental shelf without an EEZ, but an EEZ is always interfaced with the underlying seabed and subsoil. In this case, two states with opposite or adjacent coasts can establish a single boundary of the EEZ that, unless otherwise provided for by the parties, refers also to the continental shelf.



The Agreement also expresses the sound maritime neighbourly relations between Italy and France. The two countries have calmed their former divergence of opinions on the method of delimitation to be adopted⁷ – quite the opposite from other neighbouring countries, which continue to maintain rigid or unilateral approaches. On the other side, the Agreement confirms that the progressive maritime delimitation of the Mediterranean Sea and the subjection of vast sections of it to national jurisdiction are eroding the spaces designated as the high seas – that is, the waters beyond the national jurisdiction of any state.

2. Background

2.1 The Mediterranean: *mare liberum v mare clausum*

The Mediterranean Sea is an ancient sea, formerly *mare clausum* during the Roman Empire (the Latin expression *mare nostrum*, which translates to ‘our seas’, refers to the Roman Empire’s exclusive military control of the basin⁸) and later partially controlled by the Byzantine Empire, the Republic of Genova, the Serenissima Republic of Venice, the Spanish Kingdom and the North Africa Barbary Coast States.⁹

The Mediterranean became *mare liberum* during the 19th and 20th centuries as a consequence of British interest in freeing the ‘Route to India’. The basin maintained this character after World War II when the United States assumed the same role as the United Kingdom in the international community,

7 A selection of the diplomatic documents concerning the Franco-Italian talks (1972-1974) on the continental shelf delimitation is in Umberto Leanza, Luigi Sico and Maria Clelia Ciciriello, *Mediterranean Continental Shelf: Delimitations and Regimes, International and National Legal Sources*, vol 2, book IV (Oceana Publications 1988) 1613. See also Gian Piero Francalanci and Paola Presciuttini, *A History of the Treaties and Negotiations for the Delimitation of the Continental Shelf and Territorial Waters between Italy and the Nations of the Mediterranean* (Istituto Idrografico della Marina 2001) 71, which references the problem of the application, to the various segments of the hypothetical boundary, of the principle ‘equidistance-plus special circumstances’ in force under the rules of the 1958 Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1965) 499 UNTS 311, in relation to different factors, such as the effect on the delimitation of certain Italian islands. Art 6(1) of the Convention stipulates that:

Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

No substantive rule on the delimitation of the continental shelf is provided for by Art 83(1) UNCLOS either, which establishes only the following procedural rule: ‘The delimitation of the exclusive economic zone between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.’

8 See Alfred T Mahan, *The Influence of Sea Power Upon History: 1660–1783* (CUP 1889) 15-21.

9 David Abulafia, *The Mediterranean in History* (Thames & Hudson 2003); Tullio Treves, ‘Historical Development of the Law of the Sea’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 3.



carrying out the so-called Freedom of Navigation Programme (FON).¹⁰ Significantly, the US focused their FON in the Mediterranean on certain claims by coastal states - considered excessive and unlawful - such as the straight baselines encompassing previously claimed historic bays. The well-known dispute between the US and Libya concerning the Gulf of Sidra ended in 1973¹¹ by drawing a straight baseline of 306 nm. Yet it is no secret that in 1984, the US also protested the claim to the Gulf of Tarento by Italy pursuant to the framework of the Presidential Decree 816-1977 of 26 April 1977¹² concerning the system of straight baselines. Moreover, it must be recalled that the former Soviet Union tried to oppose this US policy following the Russian Empire's classification of the Black Sea as *mare clausum*, according to which the basin was to be demilitarized and placed under the control of riparian states.¹³

2.2 Italy's stance on maintaining the freedom of navigation on the high seas

Italy openly supported the US efforts to ensure, in the Mediterranean Sea, the freedom of navigation on the high seas and the related maritime mobility of naval forces. The aim of this geo-strategic perspective was to counter the claims of some countries for a legal regime restricting the freedom of navigation in both the territorial waters and the EEZ in various ways, such as the request of prior notification of innocent passage in territorial waters or the restriction on naval manoeuvres in the

10 See J Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (3rd ed, Martinus Nijhoff 2012) 13, and The US Department of State, 'Maritime Security and Navigation' <www.state.gov/e/oes/ocns/opa/maritimesecurity/> accessed 1 December 2015) which so defines the FON:

U.S. policy since 1983 provides that the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Law of the Sea (LOS) Convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses. The FON Program since 1979 has highlighted the navigation provisions of the LOS Convention to further the recognition of the vital national need to protect maritime rights throughout the world. The FON Program operates on a triple track, involving not only diplomatic representations and operational assertions by U.S. military units, but also bilateral and multilateral consultations with other governments in an effort to promote maritime stability and consistency with international law, stressing the need for and obligation of all States to adhere to the customary international law rules and practices reflected in the LOS Convention.

Criticisms to the FON are expressed in Amitai Etzioni, 'Freedom of Navigation Assertions: The United States as the World's Policeman' [2015] *Armed Forces and Society* 1, 17 <<https://icps.gwu.edu/sites/icps.gwu.edu>> accessed 1 December 2015.

11 See Roach and Smith (n 10).

12 For an English version, see Decree of the President of the Republic No. 816 of 26 April 1977 containing regulations concerning the application of Law No. 1658 of 8 December 1961 authorizing accession to the Convention on the Territorial Sea and the Contiguous Zone, adopted at Geneva on 29 April 1958, [516 UNTS 205] and giving effect to that Convention <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_1977_Decree.pdf> accessed 1 December 2015.

13 Memorandum on the Soviet Doctrine and Practice with Respect to the Regime of the High Seas prepared by the Secretariat, UN Doc A/CN.4/38 (21 November 1950) <http://legal.un.org/ilc/documentation/english/a_cn4_38.pdf> accessed 10 February 2016. See also Natalino Ronzitti, 'Law of the Sea Aspects and Legal policies of Naval Arms Control in the Mediterranean' (*The International Spectator*, IAI Rome, Oct-Dec 1993) 52; Natalino Ronzitti, 'The Law of the Sea and Mediterranean Security' (GMF-IAI, 2010) 20 <www.iai.it/sites/default/files/mediterranean-paper_06.pdf> accessed 1 December 2015.



EEZ with the purpose of protecting the environment and natural resources.¹⁴

According to Professor Budislav Vukas,¹⁵ the position of Italy, which favours naval mobility of the military fleets, discouraged other Mediterranean countries from declaring a full EEZ. Accordingly, this is the reason why in 2003, Croatia chose to create a *sui generis* ecological and fishing protection zone (EFPZ) rather than an EEZ. In any event, Italy, in line with this stance, issued the following declaration when signing and ratifying the United Nations Convention on the Law of the Sea (UNCLOS):

According to the Convention, the coastal state does not enjoy residual rights in the Exclusive Economic Zone. In particular, the rights and jurisdiction of the coastal state in such zones do not include the right to obtain notification on military exercises or manoeuvres or to authorize them ... None of the provisions of the Convention, which corresponds on this matter to customary international law, can be regarded as entitling the coastal state to make innocent passage of particular categories of foreign ships dependent on prior consent or notification.¹⁶

2.3 Italy's commitment in delimiting the continental shelf with neighbouring states

It is common knowledge that the problem of creeping jurisdiction of certain coastal states asserting *ultra vires* functional rights in the water column of their EEZ is related to the '[c]onstructive ambiguities of the LOSC [that] have led to disagreements regarding its interpretation'.¹⁷ The issue mainly concerns the peaceful use by foreign militaries (e.g. military exercises) of the EEZ that some states

14 On the possible Confidence Building Measures (CBM) aimed to solving the problem see 'Guidelines for Navigation and Overflight in the Exclusive Economic Zone, EEZ Group 21' (26 September 2005) <<http://nippon.zaidan.info>> accessed 1 December 2015. On the problem of naval mobility of fleets, see also Fabio Caffio, 'Il problema del transito delle Forze Navali nelle ZEE' [2007] *Glossario del Diritto del Mare*, *Supp Rivista Marittima* 196 <www.marina.difesa.it> accessed 1 December 2015.

15 See Budislav Vukas, 'The extension of jurisdiction of the coastal State in the Adriatic Sea' in Natalino Ronzitti (ed), *I rapporti di vicinato dell'Italia con Croazia, Serbia-Montenegro e Slovenia* (Luiss University Press 2005) 251.

16 Italy ratified the UNCLOS on 13 January 1995 by the Law of 2 December 1994 n.689 (*Gazzetta Ufficiale* n. 295 of 19 December 1994). See Italy's statement at United Nations Division for Ocean Affairs and the Law of the Sea (updated 29 October 2013) <www.un.org/Depts/los/convention_agreements/convention_declarations.htm> accessed 30 September 2015.

17 Sophia Kopela, 'The "territorialisation" of the Exclusive Economic Zone: Implications for maritime jurisdiction' (IBRU Durham 2009) 2 <www.dur.ac.uk/resources/ibru/conferences/sos/s_kopela_paper.pdf> accessed 1 December 2015.

attempt to restrict.¹⁸ The EEZ regime - as affirmed by the ICJ in the 1985 *Libya/Malta Continental Shelf* case¹⁹ - had become part of customary international law in the late 1970s when the UNCLOS was still being negotiated. At that time, Italy negotiated with its neighbouring countries on the delimitation of the continental shelf and concluded agreements with the former Yugoslavia (1968), Tunisia (1971), Greece (1974), Spain (1977) and Albania (1992).²⁰ However, each agreement contains a clause similar to the following: 'The agreement does not affect the legal status of the waters and of the air space superjacent the continental shelf'.²¹

Figure 1: Limits of the Italian continental shelf established by agreement (Source: DOALOS)



18 The question of the military uses of the EEZ is at the core of the *Lexie* case between Italy and India, concerning, *inter alia*, the exclusive jurisdiction on the military unit of Vessel Protection Detachments (VPD) embarked on an Italian flagged vessel engaged in an 'incident of navigation' allegedly happened in the international waters lying inside the Indian Ocean Piracy HRA (see Valeria Eboli and Jean Paul Pierini, 'The "Enrica Lexie Case" and the limits of the extraterritorial Jurisdiction of India' (March 2012) 39 <www.lex.unict.it/cde/quadernieuropi/giuridiche/39_2012.pdf> accessed 1 December 2015). It must be remembered that the Italian VPD that fired warning shots against suspected pirates was embarked - in accordance with IMO Recommendations related to the transit in the Indian Ocean Piracy High Risk Area - on an Italian-flagged merchant vessel sailing in the Indian EEZ. In this zone India claims a *sui generis* regime affirming that '[t]he 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' (see <www.un.org/depts/los/convention_agreements/convention_declarations.htm> accessed 21 January 2016).

19 Robin Churchill and Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 160.

20 The text of each is available at <www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm> accessed 1 December 2015. On the various solutions of delimitation adopted in these agreement, see Francalanci and Presciuttini (n 7).

21 This principle is established in Art 78(1) UNCLOS, which reads: 'The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters'.



The reasons behind the Italian commitment to delimiting its continental shelf by agreement can be found in a policy aimed at economic growth through the exploration and exploitation of the natural resources of the seabed and subsoil of the Mediterranean Sea – even though, in the 1970s, the available underwater technology only allowed for mining in zones no greater than 200 meters in depth. Not surprisingly, the European Union, taking into account the progress made by offshore oil drilling technology in deep sea waters, recently assumed a similar policy in both of its long-term strategies: Blue Growth²² and Energy Security.²³ Thus, the EU Member States were encouraged to delimit by agreement their maritime zones, since the establishment of such zones is a prerequisite to the exploitation of their natural resources.

The cooperative approach adopted by Italy in negotiating various delimitation agreements on the continental shelf with other Mediterranean coastal states complies with the duties incumbent on states surrounding a closed or semi-enclosed sea, as defined by the UNCLOS.²⁴ Due to its geographical characteristics, the Mediterranean Sea is qualified as a ‘semi-enclosed sea’ – a sea surrounded by two or more states and connected to another sea by a narrow outlet – in which the coastal states, according to Article 123 UNCLOS, should cooperate with each other in the exercise of their respective rights²⁵ and to refrain from unilateral initiatives in various domains. This duty of cooperation can be interpreted broadly, as applicable to coastal states even when they establish their maritime zones, even if not expressly provided for by Article 123. Apart from this legal aspect, the Mediterranean region is characterised by a clear geographical factor (i.e. a distance of less than 400 nm from opposite coasts), which prevents unilateral institution of an EEZ in its maximum extension. Furthermore, Mediterranean countries are interconnected each other through a wide net of cooperative political and economic relations, which should dissuade, if not entirely prevent, unilateral initiatives.

Accordingly, the establishment of an EEZ in the Mediterranean region was, until the 1990s, considered to be inopportune,²⁶ also taking into account the aforementioned military and political concerns associated with the freedom of navigation. Nevertheless, in order to prevent illegal fishing on the high seas, some countries unilaterally proclaimed *sui generis* zones, partially applying the EEZ

22 European Commission, ‘Maritime Affairs’ <http://ec.europa.eu/maritimeaffairs/policy/seabed_mining/index_en.htm> accessed 20 September 2015.

23 European Commission, ‘Energy Security Strategy’ <<https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy>> accessed 20 September 2015.

24 See Budislav Vukas (ed), *The Legal Regime of Enclosed or Semi-Enclosed Seas: The Particular Case of the Mediterranean* (Faculty of Law, University of Zagreb 1988).

25 Ronzitti, ‘The Law of the Sea and Mediterranean Security’ (n 13).

26 Tullio Scovazzi (ed), *Marine Specially Protected Areas: The General Aspects and the Mediterranean Regional System* (Kluwer Law International 1999) 52, defines the Mediterranean Sea as ‘an old fashioned sea’ characterised by a large area of high seas.



regime regulated by the UNCLOS.²⁷ For instance, Algeria created a 'fishing reserved zone' (FRZ) in 1994,²⁸ Spain adopted a 'fishing protection zone' (FPZ) in 1997,²⁹ followed by Croatia, which unilaterally created the above mentioned EFPZ in 2003, the establishment of which was adamantly objected to by Italy.³⁰

3. Environmental protection of the Mediterranean Sea: a common interest of Italy and France

3.1 Attempts to enter into a maritime dialogue

Since the 1990s, Italy, France and Monaco have adopted perspectives oriented towards environmental protection, establishing the Pelagos Sanctuary for the Conservation of Marine Mammals in

27 On the qualification of FRZs or FPZs as *minoris generis* zones in respect of the EEZs in which the concerned state exercises partially, as regards environmental protection, the functional rights attributed by the UNCLOS in the EEZ, see Gemma Andreone, 'The Exclusive Economic Zones' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 183; see also Irini Papanicopolu, 'The Mediterranean' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 610.

28 The Algerian Legislative Decree No. 94-13 of 28 May 1994, establishing the general rules relating to fisheries adopted '[a] reserved fishing zone located beyond and adjacent to the national territorial waters ... The breadth of the zone measured from the baseline shall be 32 nautical miles between the western maritime border and Ras Ténès and 52 nautical miles between Ras Ténès and the eastern maritime border'.

29 Royal Decree 1315/1997 of 1 August 1997 establishing a Fisheries Protection Zone in the Mediterranean Sea; the list of geographical coordinates of points constituting the delimitation, modified in 2000, is contained in the Note Verbale No. 256 of 13 April 2000 of the Permanent Mission of Spain to the United Nations <www.un.org/Depts/los/doalos> accessed 1 December 2015. The French point of view on the legality of this delimitation line is in the Statement of the position of the French Government with respect to the Spanish communication concerning the deposit of a list of geographical coordinates in 'Law of the Sea Information Circular' (November 1998) 25 <www.un.org/Depts/los/LEGISLATIONANDTREATIES/losic/losic8e.pdf> accessed 10 February 2016. Later, Spain changed the EPZ regime into that of the EEZ (see below n 43).

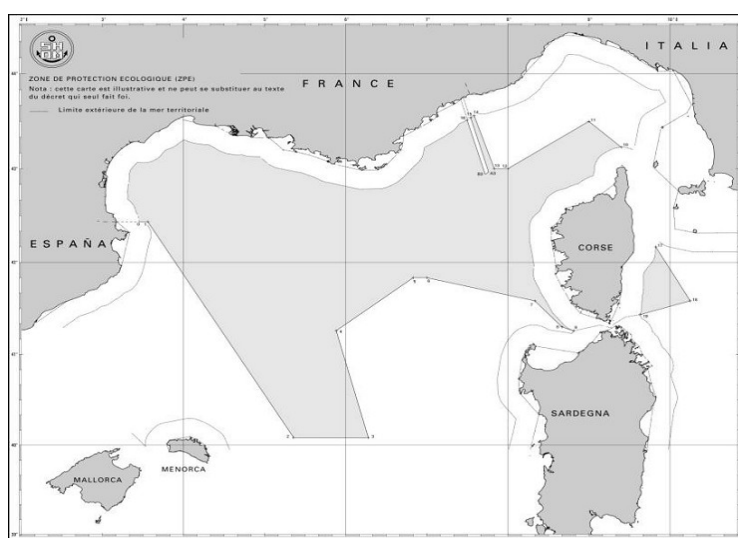
30 Croatia, on 3 October 2003, suddenly and unilaterally created the EFPZ that contains almost all the rights that can be exercised under the EEZ regime. The limit of the Croatian EFPZ temporarily coincides, until otherwise agreed, with the boundary of 1967 Continental Shelf Treaty between Italy and Former Yugoslavia. This unilateral solution is not accepted by Italy assuming that there are no provisions in international law that consider the delimitation line of the continental shelf employable as the boundary of the EEZ. The Croatian initiative (also disputed by Slovenia, which complains about the closure of its free access to international waters) seems to be unlawful due to its unilateralism in violation of the rights of neighbour countries and of the obligations of cooperation in semi-enclosed seas. Italy, in protesting declared, *inter alia*, that:

[T]he constant jurisprudence of the International Court of Justice has consistently recognized that the delimitation of sea areas invokes special circumstances that differ by continental shelf and by superjacent waters—such as, for example, historic fishing rights—which lead to different delimitation methods. Consequently, in this specific case, there is no legal foundation for the automatic extension, however provisional, of the seabed line of delimitation agreed upon in 1968 to superjacent waters, since any delimitation must be considered in close relation to the circumstances of the case that produce it and that change over time. Therefore, international jurisprudence has always considered necessary the consent of the concerned States to the automatic extension of the seabed line of delimitation to superjacent waters. This principle holds especially true in this specific case when one considers that the line of the 1968 Agreement was set during a period in which the notion of the exclusive economic zone was not yet well defined in international law of the sea.

'Law of the Sea Bulletin' (No 60, 2006) <www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin60e.pdf> accessed 25 September 2015).

the Tyrrhenian Sea. The legal regime of this Sanctuary, regulated by the 1999 Tripartite Agreement, is only applicable to State Party-flagged ships, not *erga omnes*.³¹ The western section of the Sanctuary, as a part of the high seas, changed its status after France decided in 2003 to proclaim, beyond its territorial waters, the EPZ³² shown in Figure 2 partially coinciding with the Sanctuary. However, the outer limit of this EPZ facing the Italian coast did not exceed the hypothetical median line. On the Spanish side, the French EPZ partially overlapped with the FPZ previously declared by Spain.³³

Figure 2: The French EEZ (former EPZ); on the western side there is the overlapping area with Spain's EEZ (former FPZ)³⁴



31 Giuseppe Notarbartolo-di-Sciara and others, 'The Pelagos Sanctuary for Mediterranean Marine Mammals' (2008) 18 *Aquatic Conserv Mar Freshw Ecosyst* 367 <www.cetaceanalliance.org/download/literature/NotarbartolodiSciara_etal_2008.pdf> accessed 25 September 2015.

32 Décret n° 2012-1148 (n 3).

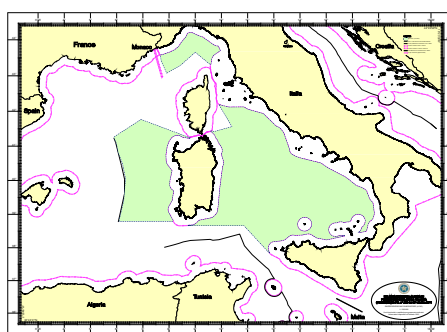
33 In this regard, France expressed its disagreement which is deemed to apply principles penalizing concavity of the French coasts: see Juan Luis Suárez de Vivero, 'Jurisdictional Waters in the Mediterranean and Black Seas' (European Parliament 2009) 47 <www.eurocean.org/np4/file/2063/download.do.pdf> accessed 21 September 2015. On the dispute between France and Spain on the matter of delimitation in the Gulf of Lion see below (n 41).

34 'Création d'une Zone de Protection Écologique (ZPE) en Méditerranée' <www.afcan.org/dossiers_reglementation/zone_pe.html> accessed 1 February 2016.

3.2 Franco-Italian parallel initiatives

After the oil tanker disasters involving the *Prestige* and the *Erika*³⁵ in the Atlantic Sea, which led France to proclaim its EPZ in the Mediterranean,³⁶ Italy came to share France's concerns surrounding the ecological risks posed to its seas. Thus, as mentioned above, in 2006 the Italian Parliament approved an act containing the legal framework for the establishment of EPZs, even though the institution of specific zones was left to later decisions to be adopted by decree. The first of these EPZs was established by Presidential Decree 209-2011³⁷ and encompasses the area between France and Italy (Figure 3). It is located not far from that of the French EPZ, the two boundary lines are separated by a narrow strip of the high seas. Through the establishment of their EPZs, France and Italy can apply national and European rules dealing with environmental protection to foreign vessels as well as the international provisions to which they are bound, such as the rules of the MARPOL Convention.³⁸

Figure 3: The 2011 Italian EPZ (Source: Maridrografico)



35 Peter Wetterstein, 'Environmental Impairment Liability after the Erika and Prestige Accidents' (SISL, 2010) 230 <www.scandinavianlaw.se/pdf/46-12.pdf> accessed 1 February 2016: '[T]he sinking of the *Erika* outside Brittany (12 Dec. 1999) and the *Prestige* accident off the north-western coast of Spain (13 Nov. 2002). The Maltese tanker *Erika* transported 31,000 tons of heavy fuel oil when it sunk. No less than 19,800 tons of oil leaked into the sea and polluted France's west coast from Quimper to La Rochelle. The accident caused large-scale environmental damage and economic losses for the fishing and tourist sectors.'

36 On the French EPZ see above (n 3).

37 Presidential Decree no. 209 (n 4).

38 The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. The MARPOL Convention was adopted on 2 November 1973 at IMO. The Protocol of 1978 was approved in response to a series of tanker accidents in 1976-1977. As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention. The combined instrument entered into force on 2 October 1983. In 1997, a Protocol was adopted to amend the Convention and a new Annex VI was added which entered into force on 19 May 2005. MARPOL has been updated by amendments through the years. The Convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes. Special Areas with strict controls on operational discharges are included in most Annexes (IMO <www.imo.org/en/About/Conventions> accessed 1 December 2015).



Furthermore, Italy and France have collaborated over the years on the regime of transit in the Strait of Bonifacio. Within this framework, the two countries adopted the 1986 Agreement on the delimitation of the maritime boundaries in the area of the strait.³⁹ They also agreed to the 'Bonifacio traffic system', a mandatory ship reporting system aimed at controlling maritime traffic in order to avoid incidents in the perilous waters of the strait.⁴⁰ While the two countries were carrying out the mentioned initiatives, they were also negotiating the delimitation of the respective areas of national jurisdiction between their opposite and adjacent coasts. The policy of only declaring an EPZ, common to both states, was disregarded in 2012 when France modified its EPZ into a full EEZ. Italy, on the other hand, has yet to follow France's lead, while Spain, which initially opposed the French initiative as a matter of delimitation in 2012,⁴¹ declared a full-scale EEZ in the Mediterranean through Real Decreto 236/2013.⁴²

39 Agreement between the Government of the French Republic and the Government of the Italian Republic on the delimitation of maritime frontiers in the area of the Strait of Bonifacio <www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/FRA-ITA1986MB.PDFA/513> accessed 27 September 2015. On the contents of this agreement see Fabio Caffio, 'L'accordo di delimitazione delle acque tra la Sardegna e la Corsica' (1990) *Rivista Marittima* 7, and Umberto Leanza, 'L'accordo di delimitazione delle acque territoriali nelle Bocche di Bonifacio' in *Lo Stretto di Bonifacio* (Scuola Sottufficiali Marina Militare La Maddalena 2011) 11.

40 Nicolas Mariel, 'La réglementation française' in *Lo Stretto di Bonifacio* (Scuola Sottufficiali Marina Militare La Maddalena 2011) 57.

41 Spain sent the following Note Verbale 'Communication from the Government of Spain dated 23 October 2012' <www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA.htm> accessed 29 September 2015:

The Ministry of Foreign Affairs and Cooperation presents its compliments to the Embassy of the French Republic in Madrid and has the honor to refer to Decree No. 2012-1148 of 12 October 2012, which establishes a French exclusive economic zone in the Mediterranean (Official Gazette of the French Republic of 14 October 2012). The Government of Spain recognizes the right of all States to establish an exclusive economic zone in the Mediterranean, but not when that right is exercised in a unilateral manner. The authorities of Spain wish to stress that, in accordance with article 74 of the United Nations Convention on the Law of the Sea, the delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, in order to achieve an equitable solution. In the view of the Government of Spain, a line that is equidistant from the baselines from which the breadth of the territorial sea is measured would be the most just and equitable solution, and would be subject to modification only in the case of special or particular circumstances.

The authorities of Spain therefore wish to place on record their opposition to the unilateral establishment of the aforementioned exclusive economic zone, which has boundaries that extend far beyond the equidistant border line between the two coasts that was drawn in accordance with international law, and thus contravene article 74 of the United Nations Convention on the Law of the Sea. For this reason, the Government of Spain believes that none of the coordinates set out in the Decree can in any way be considered to constitute a dividing line between the maritime areas of the two States. In addition, the authorities of Spain wish to place on record their surprise at the unilateral establishment of the exclusive economic zone at a time when both countries are involved, on the one hand, in informal talks on maritime delimitation that would affect the Mediterranean, among other areas, and, on the other, in finding ways to improve the environmental protection of the area, within the framework of, for example, the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean to the Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona Convention) of 1978. Under these circumstances, the Government of Spain reserves the right to carefully consider the practical consequences of the decision of the French Government. ... Madrid 23 October 2012.

42 Real Decreto 236/2013, de 5 de abril, por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental (BOE-A-2013-4049) <www.boe.es/diario_boe/txt.php?id=BOE-A-2013-4049> accessed 1 December 2015.

4. A single maritime boundary between Italy and France

4.1 Old and new negotiations on maritime spaces

As far as the continental shelf is concerned, it is necessary to recall that Italy and France negotiated the delimitation of the continental shelf between 1969 and 1975, but they failed to reach an agreement.⁴³ Their differences of opinion at the time were related to the modalities of the application of the equidistance criterion between their opposite coasts, mainly in the areas of the Gulf of Genova and Cape Corso, as well as between Corsica and the islands of the Tuscan Archipelago.⁴⁴ During the negotiations, a French proposal aimed at creating a 'common area of cooperation' – located west of the Strait of Bonifacio, between the maritime zones of Spain, France and Italy – was also discussed. Although it was not the right time for such an agreement, the fruits of the negotiations would later become evident when the two countries met again to solve their respective points of disagreement.

Since the end of the bilateral negotiations in 1975, many things had changed between Italy and France: the UNCLOS entered in force and the concept of the EEZ received widespread acceptance in state practice. Moreover, at that time, the 'equidistance principle' rule, provided by the 1958 Convention on the Continental Shelf,⁴⁵ was no longer the guiding criterion for the delimitation of the continental shelf.⁴⁶ Thus, when Italy and France resumed negotiations at the beginnings of the 21st century, the legal framework to be considered under the UNCLOS had changed when compared to the past. Furthermore, the practice of drawing a 'single maritime boundary'⁴⁷ between the maritime areas of seabed, subsoil and EEZs was gradually affirmed, as demonstrated by the aforementioned EEZ delimitation agreements signed by Cyprus with Egypt, Lebanon and Israel.⁴⁸

While there are no official records of the new round of negotiations between Italy and France, the preamble of the Agreement states that the parties met for four negotiation sessions in Rome (2006),

43 See Francalanci and Presciuttini (n 7) 76.

44 The islands of the Tuscan Archipelago (Gorgona, Capraia, Elba, Pianosa, Montecristo, Scoglio d'Africa, Giglio and Giannutri) became part of the Italian straight baseline system established by Decree 816-1977 (n 12) several years after the conclusion of the negotiations. According with Ronzitti, 'The Law of the Sea and Mediterranean Security' (n 13) 9: 'The United States does not recognize the straight baseline drawn by Italy along the Tuscan Archipelago either a delimitation that has recently (2009) been challenged by France as well, after years of acquiescence'.

45 On the application of the equidistance principle under the Convention on the Continental Shelf see (n 7).

46 In 1969, the ICJ did not recognise the 'equidistance principle' for the delimitation of the continental shelf as an international customary rule (*North Sea Continental Shelf (Federal Republic of Germany/Netherlands) (Judgment)* [1969] ICJ Rep 3 [101]). Indeed, the Court introduced the new doctrine of the 'equitable solution', according to which no criterion of delimitation would prevail over the others (this doctrine was then embodied in the UNCLOS in 1982). The ICJ affirmed, *inter alia*, that 'delimitation [of the continental shelf] is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other'.

47 On the matter of the 'single maritime boundary' see (n 6).

48 On the Cyprus EEZ agreements see (n 5).



Paris (2007), Elba Island (2007) and Rome (2012). The duration of the negotiations⁴⁹ is not surprising since similar negotiations took even more time: for instance, the 40 years of on-again, off-again negotiations⁵⁰ regarding the maritime dispute between Russia and Norway in the Barents Sea, which ended when the Agreement between the Kingdom of Norway and the Russian Federation on Delimitation and Cooperation in the Barents Sea and the Polar Ocean was signed on 15 September 2010. The negotiation between Italy and Malta for the delimitation of the continental shelf also started in 1965 when the two countries agreed on a provisional and spatially limited *Modus Vivendi*;⁵¹ but it has not yet been concluded, although Articles 83(2) UNCLOS stipulates: 'If no agreement can be reached within a reasonable period of time, the states concerned shall resort to the procedures provided for in Part XV [Settlement of Disputes]'.

Recalling that in the 2006-2015 timeframe, Italy and France proclaimed their respective maritime zones beyond the territorial sea, by the agreement under discussion, the situation of the maritime areas between Italy and France was finally well-defined and clarified. Moreover, the lesson learned from the past demonstrate that a positive conclusion of maritime delimitation negotiations requires a complete overview of all the maritime factors to be considered (the maritime spatial planning policy elaborated by the EU is based on this comprehensive approach⁵²) as well as a general willingness to explore mutual concessions as regards the applicable international law.

4.2 Delimitation of territorial waters under the equidistance method

The preamble of the Agreement clarifies that the two parties applied the equidistance method in delimiting their territorial waters. The chart annexed to the Agreement (Figure 4) shows that there are three concerned zones in which the territorial waters were subject to delimitation. The first lies in

49 Ten years from the first meeting to the signing ceremony in Caen, but 45 years starting from the beginning of the negotiations in 1971: Francalanci and Presciuttini (n 7) 69.

50 Thilo Neumann, 'Norway and Russia Agree on Maritime Boundary in the Barents Sea and the Arctic Ocean' (*ASIL Insights*, 10 November 2010) 14, 34 <www.asil.org/insights/volume/14/issue/34/norway-and-russia-agree-maritime-boundary-barents-sea-and-arctic-ocean> accessed 1 February 2016.

51 The *Modus Vivendi* was concluded in 1970 when Italy and Malta formalized the change of letters. On this partial and provisional arrangement related to the median line between Malta and Sicily within the isobath of 200 mt - so not beyond this depth limit as instead claimed by Malta - see Francalanci and Presciuttini (n 7) 133, and 'Modus Vivendi on Continental Shelf' (*Times of Malta*, 9 December 2010) <www.timesofmalta.com/articles/view> accessed 1 December 2015. The text of the *Modus Vivendi* (also named 'Provisional Understanding') is published in Umberto Leanza, Luigi Sico and Maria Clelia Ciciriello, *Mediterranean Continental Shelf: Delimitations and Regimes, International and National Legal Sources*, vol 1, book I (Oceana Publications 1988) 131.

52 Antonia Zervaki, 'Introducing Maritime Spatial Planning Legislation in the EU: Fishing in Troubled Waters?' (2015) 1 *MarSafeLaw Journal* 95 <www.marsafelawjournal.org/wp-content/uploads/2015/09/Issue1_Zervaki_Article.pdf> accessed 1 December 2015. The matter of the MSP is regulated in the framework of the Integrated Maritime Policy (IMP) of the EU by Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning [2014] OJ L 257/135: possible activities and uses and interests such as fishing areas, installations and infrastructures for the exploration, exploitation and extraction of oil, of gas and other energy resources, of minerals and aggregates, and for the production of energy from renewable sources, maritime transport routes and traffic flow, military training areas, nature and species conservation sites and protected areas.



the Menton Bay where a *de facto* delimitation previously existed, under a *projet de convention arrêté en 1892*⁵³ concerning local fishing activities within a limit of three miles. The second zone is in the international Strait of Corsica (also named Canal de Corse), which is 14 miles wide and falls under the regime established by Article 34 UNCLOS. The strait connects the high seas to the territorial sea,⁵⁴ separating Cap Corse from the island of Capraia, and it is where France adopted a regulation prohibiting oil tankers from navigating within five miles off the French coast.⁵⁵ It can be assumed that the parties, when drawing the equidistance line in this area, took into account their straight baselines since Article 15 UNCLOS requires them to do so.⁵⁶ The third zone is in the Strait of Bonifacio,⁵⁷ an international strait wholly covered by the territorial waters of Italy and France. In its preamble the Agreement recalls the 1986 Paris Agreement⁵⁸ confirming its further validity and adopting the same coordinates previously established for both delimiting the territorial waters of the strait and drawing the limits of the 'joint fishing zone' dedicated to the local traditional fishing activities on the western side of the territorial waters of the strait. It is also noteworthy that the confirmed boundary of the 1986 Paris Agreement is inspired by equidistance criterion, even if modified by certain circumstances⁵⁹ related to navigational factors justifying an adjustment of the hypothetical median line under Article 15 UNCLOS.⁶⁰

53 Jean-Pierre Quéneudec 'La France et le droit de la mer' in Tullio Treves and Laura Pineschi (eds), *The Law of the Sea: The European Union and Its Member States* (Martinus Nijhoff 1997) 188.

54 See Fabio Caffio, 'Il regime internazionale degli stretti' in *Lo stretto di Bonifacio* (Scuola Sottufficiali Marina Militare La Maddalena 2011).

55 Umberto Leanza, *Collected Courses of the Hague Academy of International Law: 1992 Académie de Droit International de la Haye* (Martinus Nijhoff 1994) 238.

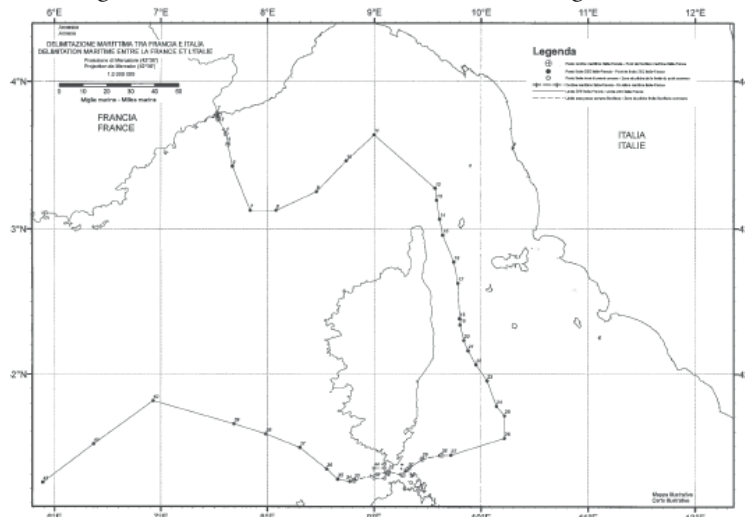
56 Art 15 UNCLOS reads as follows: 'Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two states is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance therewith.'

57 On the Strait of Bonifacio's transit regime, see Mariel (n 40).

58 Agreement between the Government of the French Republic and the Government of the Italian Republic (n 39).

59 See Leanza, 'L'accordo di delimitazione delle acque territoriali nelle Bocche di Bonifacio' (n 39).

60 See Leanza, *Collected Courses of the Hague Academy of International Law* (n 55).

Figure 4: The chart annexed to the 2015 Caen Agreement⁶¹

4.3 Delimitation of the continental shelf and other spaces under national jurisdiction according to the equitable principles

The preamble of the Agreement clearly states that the parties applied the rules and principles of international law, namely the equitable delimitation principle, in respect to both the delimitation of the continental shelf and the waters under their respective national jurisdiction. The later reference complies with the practice of recent delimitation agreements; accordingly, the term ‘waters under national jurisdiction’ has a wide scope, encompassing both the French EEZ and the Italian EPZ established with different purposes and regimes on the two sides of the boundary.⁶²

The Agreement is nonetheless silent in respect to the methods adopted in order to achieve an equitable result. This is normal practice and permissible when ‘different methods have been used in different sectors, especially if reciprocal concessions in different areas have been made.’⁶³ In any case, the parties appear to have been aware of the delimitation criteria adopted by the ICJ in several cases, such as the 1969 *North Sea* case⁶⁴ and the 1985 *Malta/Libya* case, which delimited the disputed continental shelf zones in the Mediterranean as equitably as possible⁶⁵. On this matter, even though no explicit reference

61 Accord entre le Gouvernement de la République française et le Gouvernement de la République italienne relatif à la délimitation des mers territoriales et des zones sous juridiction nationale entre la France et l’Italie (n 2).

62 David Anderson, ‘Negotiating Maritime Boundary Agreements: A Personal View’ in Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Brill 2006) 135.

63 *ibid.*

64 *North Sea Continental Shelf* (n 46).

65 Tullio Scovazzi, ‘The Mediterranean and Black Sea Maritime Boundaries’ in Jonathan I Charney and others (eds), *International Maritime Boundaries*, vol V (Martinus Nijhoff 2005) 3485.



is made to it by the Agreement, the two parties surely resorted to the so-called 'three-step process' in order to assess the equitable result of the negotiations, in accordance with Articles 74 and 83 UNCLOS. Under the three-step process, recently affirmed by the ICJ in its decisions following the rule of 'equitable principle/relevant circumstances',⁶⁶ the parties must first determine a theoretical equidistance line – drawn on the basis of geography and geometry – between the relevant coasts. Second, they have to adjust or shift the said line taking in account relevant circumstances, including the proportionality between the lengths of the relevant coasts. Third, the parties must perform a proportionality test in order to compare the extension of the area attributed to each with the length of its relevant coasts.⁶⁷

It is evident, however, that in any case, concerned states are not obliged to declare the methods they followed in the delimitation process, as international law provides for a certain degree of discretion in the negotiations. Nevertheless, a technical appraisal of the line agreed by Italy and France, whose coordinates are expressed in World Geodetic System 84 (WGS), would allow for the formulation of evaluations on achieving an actual equitable result: to this aim it must be focused the effect attributed to the Italian islands of the Tuscan Archipelago for the delimitation of the zones under national jurisdiction, in terms of adjustment of the equidistance line in favour of France. As a matter of fact, Article 121 UNCLOS⁶⁸ on the regime of islands in international law does not provide for any specific principle of delimitation of the continental shelf and EEZ. The effect of islands is thus not an abstract notion but falls on the general principle of achieving an equitable solution set in Articles 74 and 83 UNCLOS. The ICJ, in cases such as the 2001 *Qatar/Bahrain* case⁶⁹ and the 2009 *Black Sea* case,⁷⁰ recognised no effect to certain islands involved in the delimitation. Such a technical evaluation of the delimitation line of the Agreement is beyond the scope of the present article, but considering the practice of former Italian delimitation agreements of the continental shelf,⁷¹ it may be argued *prima facie* that the parties made reciprocal concessions in various zones. It is nevertheless evident that, animated by a constructive spirit of good neighbourliness and a willingness to successfully conclude their negotiations, they have put aside the reservations which previously hindered an agreement.⁷²

66 See Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (CUP 2015) 447, which references the most recent international case law such as the 2012 ITLOS *Bangladesh/Myanmar* judgment or the 2009 ICJ *Black Sea (Romania/Ukraine)* judgment, clarifying that in the 2014 *Chile/Perù* case, the ICJ based instead its decision on existing treaty obligations without considering any relevant circumstances.

67 Laurent Lucchini, 'La Délimitation Des Frontières Maritimes Dans La Jurisprudence Internationale: Vue D'Ensemble' in Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Brill 2006) 5.

68 On the state practice and case law on the application of Art 121 in the delimitation the territorial waters as well as the continental shelf and EEZ, see Leonardo Barnard, 'The Role of Islands on Maritime Boundaries Delimitation: A Look at the Recent Decision of ITLOS' (2012) <<http://cil.nus.edu.sg/wp/wp-content/uploads/2012/12/LeoBernard-Effect-of-Islands-in-Maritime-Delimitation-19-Nov-2012.pdf>> accessed 1 December 2015, which focuses mainly on the ITLOS Case No 16 (*Bangladesh/Myanmar*).

69 In (*Qatar v Bahrain*) (n 6) [248] the ICJ did not recognise, *inter alia*, any effect on the Island of Fasht Al Jarim.

70 In *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61 [188] the ICJ concluded that 'Serpents' Island should have no effect on the delimitation in this case, other than that stemming from the role of the 12-nautical-mile arc of its territorial sea.'

71 On these agreements see (n 20).

72 Francalanci and Presciuttini (n 7) 71.



A relevant aspect of the Agreement is the fact that the terminal point of the delimitation line falls north of the initial point 'A' of the 1974 Agreement between Italy and Spain on the delimitation of the continental shelf. Accordingly, the Agreement does not in any way affect the delimitation questions related to the pending dispute between France and Spain.⁷³ This also implies that Italy, as a third party, will respect any settlement between the two countries. Finally, it is worth mentioning the clause contained in Article 4 of the Agreement relating to transboundary oil and gas deposits, which, in accordance with international practice on the matter,⁷⁴ provides for a set procedure to solve cooperatively the issues related to the exploitation of such deposits.

⁷³ On the issue of the maritime dispute between France and Spain see above (n 29 and 41).

⁷⁴ See Ana E Bastida Adaeze Ifesi and others 'Cross-Border Unitization and Joint Development Agreements: An International Law Perspective' (2007) *Houston Journal of International Law* 375.



5. Conclusion

The way in which Italy and France concluded such a complex agreement concerning all their maritime zones is indeed notable. Maritime agreements, especially if related to maritime frontiers, have their own level of solemnity, from which we recall the history and foundation of the principles of international law. This Agreement, in its simplicity and clarity, shares such a character. Moreover, it represents a paradigm for the unresolved cases of delimitation that trouble the waters of the Mediterranean Sea, namely in certain areas off the coasts of both France⁷⁵ and Italy.⁷⁶

⁷⁵ See, on the specular position of Spain against the French EEZ, Note Verbale (n 41). Reference is made to the area of the Gulf of Lion where Spain unilaterally created a Fishing Protection Zone that does not take in account the rights of France. France, in 'Statement of the position of the French Government with respect to the Spanish communication concerning the deposit of a list of geographical coordinates' (n 29), declared that: The French Government wishes to protest against the part of this declaration that relates to the line delimiting the edge of the Spanish fisheries zone facing the French coasts. It protests against this delimitation initiative conducted by Spain. In any event, it considers that the delimitation resulting from the line joining the points specified in the Spanish communication cannot be invoked against it. The French Government recalls on this occasion that under international public law, the delimitation of a boundary must take place by agreement. Moreover, in this specific case of a maritime boundary, such delimitation must result in an equitable solution, thus ruling out in this instance use of the equidistant line employed by the Spanish side.

⁷⁶ Reference is made to the vast area of the Central Mediterranean unilaterally claimed by Malta ignoring the Italian rights beyond the meridian 15°10', which were indirectly recognised by the ICJ in the 1985 *Malta/Libya* case when it affirmed that: 'The limits within which the Court, in order to preserve the rights of third States, will confine its decision in the present case, may thus be defined in terms of the claims of Italy, which are precisely located on the map by means of geographical coordinates. During the proceedings held on its application for permission to intervene, Italy stated that it considered itself to have rights over a geographical zone delimited on the West by the meridian 15°10' E, to the south by the parallel 34° 30' N, to the east by the delimitation line agreed between Italy and Greece ... and its prolongation, and to the north by the Italian coasts of Calabria and Apulia': *Case Concerning The Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13 [24]. On the partial and provisional 1970 Modus Vivendi's delimitation between Sicily and Malta see also (n 51). Recently, the two countries, in order to avoid the diplomatic tension related to the offshore activities carried out by Malta in the continental shelf disputed zone, resorted to a Confidence Building Measure like the Oil Drilling Moratorium: see Fabio Caffio, 'Informal Agreement Between Italy, Malta on Moratorium Offshore Sicily' (*Natural Gas Europe Newsletter*, 19 November 2015) <www.naturalgaseurope.com/informal-agreement-between-italy-malta-drilling-moratorium-south-east-off-sicily-26434> accessed 1 December 2015.