

COMBATting THE SMUGGLING OF PERSONS BY SEA UNDER THE UNCLOS HIGH SEAS REGIME

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ABSTRACT³⁴

The Secretary General of the United Nations has identified the crime of smuggling of persons by sea as one of the seven major threats to maritime security. Various factors - including economic deprivation, war, and violations of human rights - have all contributed to a dramatic increase in human smuggling. The dangerous journeys, often across the high seas, have forced irregular migrants to seek the assistance of smugglers to reach their destinations. Today, the international community faces serious problems raised by the smuggling of thousands of persons such as human tragedies, threats to the safety of navigation, and major economic burdens on recipient States. Regrettably, there are no provisions in the 1982 United Nations Convention on the Law of the Sea, which deal directly with this threat. Notwithstanding this lacuna, there are certain rules in the Convention that are relevant and indeed may contribute to combatting this crime. This article will examine to what extent, if at all, does the high seas regime in the 1982 United Nations Convention on the Law of the Sea, provide a legal basis for combatting the smuggling of persons by sea.

KEYWORDS: SMUGGLING OF PERSONS BY SEA – HIGH SEAS – FLAG STATE JURISDICTION – UNITED NATIONS CONVENTION ON THE LAW OF THE SEA – MARITIME INTERDICTION

³⁴ This article was reviewed by Dr Stefan Piazza LL.M. (IMLI).

COMBATTING THE SMUGGLING OF PERSONS BY SEA UNDER THE UNCLOS HIGH SEAS REGIME

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1. Introduction

In recent years, the conflict and instability present in certain regions of the world, such as the Middle East, Africa and South East Asia, has exacerbated the phenomenon of irregular migration by sea.³⁶ Migrant sea crossings are often organised by human smugglers,³⁷ who generally transport migrants in overcrowded and unseaworthy vessels.³⁸ As a result, distress at sea situations, have regrettably become a regular occurrence, leading to numerous human tragedies and negatively affecting the safety of navigation.³⁹ According to statistics compiled by the International Organization for Migration,⁴⁰ more than 5,417 migrants were reported dead or missing in 2015.⁴¹ As of July 2016, the same Organization reports that already 3,600 migrants have lost their lives.⁴²

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³⁶ In 2014, the United Nations High Commissioner for Refugees, hereafter referred to as UNHCR, reported over 162,000 sea crossings, mainly in the Mediterranean Sea, Gulf of Aden and the Red Sea, Bay of Bengal and Caribbean Sea. See World's Four Deadliest Sea Crossings (*UNHCR*, 9 December 2014) <http://www.unhcr.org/seadialogue/00_Worldwide.gif> accessed 4 July 2016. These figures are expected to rise dramatically in 2015-2016 in light of the exodus of Syrian Refugees, mainly crossing by sea from Turkey to Greece.

³⁷ According to statistics produced by the International Organization for Migration, it is likely that 'half of all illegal migrants have some interaction with smuggling or trafficking networks – a global industry that generates approximately \$10 billion per year'. See Fiona B Adamson, 'Crossing Borders: International Migration and National Security' (2006) 31:1 *International Security* 165, 174.

³⁸ See generally the United Nations Office on Drugs and Crime, *Issue Paper: Smuggling of migrants by sea* (UN Publications 2011) 26-32, hereafter referred to as *Smuggling of Migrants by Sea* and European Commission, DG Migration and Home Affairs, 'A Study on Smuggling of Migrants – Characteristics, responses and cooperation with third Countries', Final Report September 2015, 39-40.

³⁹ See Nathalie Klein, *Maritime Security and the Law of the Sea* (OUP 2012) 123; James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 657-659 and Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 404.

⁴⁰ Hereinafter referred to as IOM.

⁴¹ See Latest Global Figures (*Missing Migrants Project*) <<http://missingmigrants.iom.int/latest-global-figures>> accessed 4 July 2016.

⁴² The majority of deaths occurred in the Mediterranean Sea - a major commercial shipping route – that has now become the world's most dangerous destination for migrants. IOM reports that during the period between 2014 and 2015 over 7,000 migrants lost their lives

Smuggling of persons by sea also constitutes one of the fastest growing transnational organised crimes,⁴³ with possible links to other crimes such as those against the safety of navigation, terrorism and corruption.⁴⁴ It is for such reasons that smuggling of persons by sea,⁴⁵ has been identified by the United Nations Secretary General as one of the seven major threats to maritime security.⁴⁶

The vast majority of the oceans consist of areas which are known as the high seas,⁴⁷ and which cannot be appropriated.⁴⁸ This presents the international community with major challenges when it comes to maintaining law and order. Under the 1982 United Nations Convention on the Law of the Sea,⁴⁹ the preservation of order on the high seas relies on the principle of flag State jurisdiction,⁵⁰ where generally each State exercises exclusive jurisdiction and control over vessels flying its flag while sailing on the high seas.⁵¹

Smuggling vessels typically spend a considerably amount of time traversing the high seas.⁵² Even within a semi-enclosed sea, such as the Mediterranean, one

in the Mediterranean Sea. See Latest Global Figures (*Missing Migrants Project*) <<http://missingmigrants.iom.int/mediterranean>> accessed 4 July 2016. Migrant crossings continue to increase in 2016, where there have been over 200,000 arrivals by sea, with over 2,900 migrants reported dead or missing. See Refugees/Migrants Emergency Response Mediterranean (UNHCR) <<http://data.unhcr.org/mediterranean/regional.php>> accessed 4 July 2016.

⁴³ Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff 2010) 8.

⁴⁴ See generally United Nations Office on Drugs and Crime, *Issue Paper: Corruption and the smuggling of migrants* (UN Publications 2013). See also Benjamin Perrin, 'Migrant Smuggling: Canada's Response to a Global Criminal Enterprise' (2013) 1 *International Journal of Social Science Studies* 139, 142.

⁴⁵ In this study, unless the context indicates otherwise, references to smuggling shall be taken to mean smuggling of persons on the high seas.

⁴⁶ See Secretary General of the United Nations, 'Report of the Secretary General on Oceans and the Law of the Sea', 10 March 2008, UN Doc.A/63/63, paras 39 and 89-97.

⁴⁷ It should be noted that according to UNCLOS, Article 58(2), 'Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part'. Therefore, the geographical scope of this study will cover not only the high seas but also the contiguous zone and exclusive economic zone where a State has declared one.

⁴⁸ See David Attard and Patricia Mallia, 'The High Seas' in David Joseph Attard and others (eds), *The IMLI Manual on International Law -Volume I The Law of the Sea* (OUP 2014) 239, 242-243; Douglas Guilfoyle 'The High Seas' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 203 and David Freestone, 'Problems of High Seas Governance' in Davor Vidas and Peter Johan Schei (eds), *The World Ocean in Globalisation: Challenges and Responses* (Martinus Nijhoff Publishers, Leiden, 2011) 100.

⁴⁹ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 hereafter referred to as UNCLOS.

⁵⁰ *ibid* art 92(1).

⁵¹ *ibid* art 94.

⁵² For example, since October 2013, Italian rescue operations in the Mediterranean Sea have saved over 10,000 smuggled migrants on the high seas. See UNHCR, 'On a high seas rescue

may find huge passages of high seas which smuggling vessels would have to cross in order to reach their final destinations.⁵³ This article will examine to what extent, if at all, does the high seas regime in UNCLOS, provide a legal basis for combatting smuggling. It will begin by addressing possible reasons why UNCLOS does not include any provisions dealing explicitly with smuggling. It will then explain that despite this *lacuna*, there are certain UNCLOS rules which may be relevant to combatting smuggling. The article will also analyse one of the main tools to suppress smuggling on the high seas - maritime interdiction and how this is undertaken within the framework of UNCLOS rules. In this regard, the article will discuss the significance of UNCLOS rules regulating navigation on the high seas. The last section of the article will focus on specific UNCLOS rules, which may be utilised in the process of interdiction including those governing the right of visit, stateless vessels, slavery, and hot pursuit. It will also highlight the importance of the duty to render assistance and rescue in distress at sea situations involving smuggled migrants.

2. Smuggling and UNCLOS

The adoption of UNCLOS in 1982 proved to be a major milestone in the codification and progressive development of the law of the sea.⁵⁴ The Convention, often referred to as the 'constitution for the oceans',⁵⁵ provides a comprehensive legal framework to regulate ocean uses and the management of their resources. However, notwithstanding the broad ambit of the Convention, there are important *lacunae*.⁵⁶

mission with the Italian Navy', March 21 2014. <<http://www.unhcr.org/532c4cbb6.html>>. See also Smuggling of Migrants by Sea and European Commission, DG Migration and Home Affairs, 'A Study on Smuggling of Migrants – Characteristics, responses and cooperation with third Countries', Final Report September 2015, 27-29.

⁵³ More than 50 percent of the Mediterranean Sea falls under the high seas regime. See <http://ec.europa.eu/maritimeaffairs/documentation/studies/documents/mediterranean_expert_group_report_en.pdf> accessed 4 July 2016.

⁵⁴ See generally Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) and David Freestone, 'The Law of the Sea Convention at 30: Successes, Challenges and New Agendas' (2012) 27 *The International Journal of Marine and Coastal Law* 675.

⁵⁵ Myron Nordquist, *The United Nations Convention on the Law of the Sea: A Commentary Volumes I* (Martinus Nijhoff 1995), hereafter referred to as *The Virginia Commentary*. See 'A Constitution for the Oceans', Statement by Tommy T.B. Koh, 11-16.

⁵⁶ Richard Barnes, 'The International law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control – Legal Challenges* (Martinus Nijhoff 2010) 103.

In relation to the high seas regime found in Part VII of UNCLOS,⁵⁷ the Official Records of the Third United Nations Conference on the Law of the Sea (Hereafter referred to as UNCLOS III) demonstrate that many of the rules found therein (unless adopted from the HSC) were drafted between 1973-1978.⁵⁸ Therefore, the drafting of Part VII reflects those maritime security concerns, which the international community was facing during that period.⁵⁹ With respect to smuggling of migrants, this temporal problem has two main ramifications: a) due to the development of certain maritime security threats, the effectiveness of certain rules found in UNCLOS may have to be questioned; and b) there exists a lack of rules dealing with certain contemporary maritime security threats.⁶⁰

UNCLOS, for the above-mentioned reasons, does not provide any rules that directly deal with the problem of smuggling.⁶¹ Although, during the negotiations at UNCLOS III, States may have been aware of the existence of this threat in certain parts of the world, the reasons for this *lacuna* are unclear.⁶² A possible reason for the exclusion is put forward by Barnes, who argues that the drafters may have left the problem of smuggling to be regulated in different fora.⁶³ However perhaps a more likely reason for such exclusion is that at the time of drafting of UNCLOS, smuggling was not considered to be the major problem it is today.⁶⁴ Thus the drafters may have not considered the problem to be serious enough to be included in the final text of the Convention. Notwithstanding this *lacuna*, Part VII does contain important UNCLOS rules, which are relevant to the suppression of smuggling. These rules will be examined hereunder.

⁵⁷ See Satya Nanda and Shabtai Rosenen (eds), *The United Nations Convention on the Law of the Sea: A Commentary Volumes III* (Martinus Nijhoff 1995) 173, hereafter referred to as the Virginia Commentary Volume III, 27-43.

⁵⁸ Official Records of UNCLOS III are available at <<http://legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html>> accessed 4 July 2016.

⁵⁹ See Felicity Attard, 'IMO's Contribution to International Law Regulating Maritime Security' (2014) 45 *Journal of Maritime Law and Commerce* 479, 560-561.

⁶⁰ See Felicity Attard, 'Maritime Security under the 1982 United Nations Convention on the Law of the Sea' (2014) 12 *Benedict's Maritime Bulletin* 162, 162.

⁶¹ Patricia Mallia, 'The Human Element - Stowaways, Human Trafficking and Migrant Smuggling' in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (OUP 2016) 492-493.

⁶² Richard Barnes 'The International law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control - Legal Challenges* (Martinus Nijhoff 2010) 108.

⁶³ *ibid.*

⁶⁴ During the negotiations at UNCLOS III, there were certain cases of smuggling of persons by sea, such as those of the Vietnamese 'boat persons' during the 1970s/1980s Indochina crisis, however these were confined to a certain area and therefore not considered an international problem. See Mark Cutts, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 79.

3. Maritime Interdiction as a Tool to Suppress Smuggling on the High Seas

One rationale for suppressing smuggling on the high seas is to ensure that States are not faced with legal problems or economic burdens associated with irregular migration, once smuggling vessels reach their shores. An effective way to prevent such scenarios is through the process of maritime interdiction.⁶⁵ A comprehensive definition of this term is provided by the United Nations High Commissioner for Refugee' Executive Committee, where for the purpose of smuggling, interdiction relates to all measures employed by States to,

- a) prevent embarkation of persons on an international journey;
- b) prevent further onward international travel by persons who have commenced their journey; or
- c) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law; where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the traveling public as well as persons being smuggled or transported in an irregular manner;⁶⁶

According to Guilfoyle, the process of interdiction has two 'potential' stages.⁶⁷ The first is a boarding procedure akin to the right of visit under Article 110,⁶⁸ which involves stopping, boarding and searching the vessel for evidence of illegal conduct. The second step involves possible seizure of the vessel or persons on board, once the boarding has revealed substantial evidence of illegal conduct.⁶⁹ If the interdiction is carried out on the high seas, as will be seen, both steps require consent from the flag State; however, the right of visit may be exercised without flag State consent in certain circumstances that will be discussed below.⁷⁰

⁶⁵ Interdiction measures implemented by States governments have proved to be very effective in preventing large masses of smuggled migrants arriving by sea. See Thomas Gammeltoft-Hansen, 'The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean', Danish Institute for International Studies Working Paper, 2008, No.6, 19 available at <<http://www.econstor.eu/bitstream/10419/44650/1/560120990.pdf>> accessed 4 July 2016.

⁶⁶ UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees* (1975-2009 Conclusion No. 1 - 109, 2009) No. 97, available at: <<http://www.unhcr.org/refworld/docid/4b28bf12.html>> accessed 4 July 2016.

⁶⁷ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 9.

⁶⁸ The right of visit will be discussed in detail in Section 3.5.1.

⁶⁹ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 9.

⁷⁰ See Section 3.5.1.

In the context of this study, maritime interdiction⁷¹ encompasses those measures which involve States exerting control over smuggling vessels, and this may also amount, in certain cases, to an assertion of jurisdiction.⁷² In practical terms, interdiction measures can be seen as a way in which official State vessels police the high seas for ships suspected of carrying out smuggling activities.⁷³ These ships may prevent the onward movement of a smuggling vessel by 'either taking passengers and crew onto their own vessel, accompany the vessel to port, or force an alteration in its course'.⁷⁴

In order for interdiction measures to be lawfully carried out on the high seas, the fundamental UNCLOS rules must be adhered to. The following sections will analyse these rules, their importance to interdiction procedures, and their overall significance in combatting smuggling on the high seas.

4. Navigation

4.1 Freedom of Navigation

The high seas regime found in UNCLOS Part VII includes the freedom of the navigation enjoyed by all States whether coastal or land-locked,⁷⁵ and are found in a non-exhaustive list provided for in Article 87 of the Convention.⁷⁶ UNCLOS extends this freedom to the exclusive economic zone by virtue of Article 58(1).⁷⁷

⁷¹ Interdiction may also be referred to as interception. In this study the two terms shall be used interchangeably. See Patricia Mallia, 'The Human Element – Stowaways, Human Trafficking and Migrant Smuggling' in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 21.

⁷² *ibid* 18-21.

⁷³ Interdiction may also take place within a State's territorial sea. However, for the purposes of this study, the measure of interdiction will be discussed in the context of the high seas, exclusive economic zone and contiguous zone when a State has not declared an exclusive economic zone.

⁷⁴ Joanne van Selm and Betsy Cooper, 'The New "Boat People": Ensuring Safety and Determining Status' [2005] Migration Policy Institute <http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf> accessed 4 July 2016.

⁷⁵ UNCLOS, art 87(1). It is important that this article is read in conjunction with UNCLOS, art 89. The latter provides that no State shall subject any part of the high seas to its sovereignty and is considered to be a counterpart to the rule that the high seas are open to all States. See The Virginia Commentary (n 23) Volume III, Part VII, 94-97.

⁷⁶ The list of freedoms in UNCLOS, Article 87 includes; freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines and freedom to construct artificial islands and other installations which are both subject to Part VI dealing with the continental shelf, freedom of fishing which is subject to Part VII, section 2 dealing with conservation and management of the living resources of the high seas, freedom to undertake scientific research which is subject to Part VI dealing with the continental shelf and Part XIII on marine scientific research.

⁷⁷ UNCLOS, art 58(1) provides; 'In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms

and to the contiguous zone in those cases where a State has not declared an exclusive economic zone.⁷⁸

Unlike most of the freedoms laid down in Article 87, the exercise of the freedom of navigation is not contingent on any other part of the Convention.⁷⁹ However, it should not be considered as an absolute freedom, as it is subject to a general responsibility of flag States to act in accordance with international obligations.⁸⁰ Moreover, States must exercise such freedom with 'due regard' for the rights and interests of all other States as well as respect to activities carried out in the Area.⁸¹ This rule imposes an obligation on States to exercise this freedom in good faith. It may therefore be questioned whether there exists an obligation on a flag State to take all the necessary action to combat smuggling. It may be argued that if no action is taken, the flag State could be violating its freedom of navigation, as smuggling may have a detrimental effect on the safety and security of navigation as well as the protection of life at sea.⁸²

Finally, States are obliged to exercise their navigational freedoms in line with 'other rules of international law.'⁸³ In this respect it may be argued that there is a trend found in a number of international instruments leading towards a modification or evolution of these freedoms. Scovazzi describes these changes as contributing to an evolution in the law of the sea.⁸⁴ He notes that these modifications reflect a tendency towards a progressive erosion of the freedoms of sea.⁸⁵ It may be argued that the emergence of certain mechanisms, such as implied consent when the flag State fails to respond to a request to boarding,

referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention. See further Umberto Leanza and Maria Cristina Caracciolo, 'The Exclusive Economic Zone' in David Joseph Attard and others (eds), *The IMLI Manual on International Law - Volume I The Law of the Sea* (OUP 2014) 191-193.

⁷⁸ See further David Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press 1987) 79, 128-129.

⁷⁹ Only two of the six freedoms listed in article 87 of UNCLOS - the freedom of navigation and overflight remain unqualified by other provisions of the Convention.

⁸⁰ See UNCLOS, art 87(1). Some of these obligations would include ensuring safety of navigation, regulation of maritime traffic, protection of life at sea amongst others. See The Virginia Commentary Volume III 23) 81. See also David Attard and Patricia Mallia, 'The High Seas' in David Joseph Attard and others (eds), *The IMLI Manual on International Law - Volume I The Law of the Sea* (Oxford University Press 2014) 244.

⁸¹ UNCLOS, art 87(2).

⁸² See Section 1.

⁸³ UNCLOS, art 87(1).

⁸⁴ Tulio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 2001) 231.

⁸⁵ *ibid.*

constitute a limitation to the freedom of navigation. Implied consent is manifested in a number of bi-lateral ship boarding agreements between the United States and various other States⁸⁶ as part of the Proliferation Security Initiative.⁸⁷ These agreements provide authority, on a bi-lateral basis, to board ships suspected of carrying weapons of mass destruction. In order to avoid the risk that a reply to a request will not be given in a timely manner, most of these agreements establish an implied consent rule.⁸⁸ Depending on the specific agreement, authorisation may be implied if a certain amount of time after a request to board has elapsed.⁸⁹

It is submitted that these developments, whilst positive, may not be accurately described as inroads, for their implementation ultimately depends on the acceptance of the flag State. In respect to smuggling, the question does not arise – at least for the time being – as there are no anti-smuggling treaties, which provide for implied consent. This could however occur if the problem becomes more pressing. Indeed, this would be a positive development bearing in mind the often degrading and inhumane conditions which smuggled migrants are subjected to, and the need to remedy the situation in the shortest time possible.

It is possible to note a trend in the adoption of treaties, which amplify, compliment and extend the provisions of UNCLOS.⁹⁰ Scovazzi observes that the suppression of crimes of international relevance on the high seas is insufficiently addressed by UNCLOS.⁹¹ The UNCLOS provisions dealing with the suppression of

⁸⁶ These include Antigua and Barbuda, the Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama, and St. Vincent and the Grenadines. See Ship Boarding Agreements (U.S. Department of State: *Diplomacy in Action*) <<http://www.state.gov/t/isn/c27733.htm>> accessed 4 July 2016.

⁸⁷ Here after referred to as PSI. The PSI is a multinational response to the challenge posed by the proliferation and trafficking of WMDs. Launched in 2003, the PSI aimed to strengthen measures among participating States to interdict proliferation-related components at sea, in the air or on land once they have left their State of origin. See James Kraska and Raul Pedrozo *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 785-794; Nathalie Klein *Maritime Security and the Law of the Sea* (Oxford University Press 2012) 193-208 and Jacek Durkalec, 'The Proliferation Security Initiative: Evolution and Future Prospects' (2012) EU Non-Proliferation Consortium Non Proliferation Papers 16, 1.

⁸⁸ *ibid.*

⁸⁹ See for example the Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (Honolulu signed, August 13 2004 and entered into force November 24 2004) para. 3(d) which provides a time limit of 4 hours.

⁹⁰ Tulio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 2001) 225-226. See also Natalie Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2007) 35 *Denver Journal of International Law and Policy* 287, 302-313, 317-330.

⁹¹ Tulio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 2001) 220.

drugs on the high seas – for example – do not deal adequately with the problem and required strengthening.⁹² This deficiency was addressed by the 1988 United Nations Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁹³ which contains provisions aimed directly at suppressing drug trafficking on the high seas.⁹⁴ Article 17(3) of the Convention empowers a State party, which suspects that a foreign vessel is engaged in illicit drug trafficking, to request confirmation of registry from the flag State.⁹⁵ Once such confirmation is received, the suspecting State may also request authorisation from the flag State to take appropriate measures including, *inter alia*, boarding the vessel and searching it and if sufficient evidence is found to take further appropriate action.⁹⁶

It may be argued that the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime,⁹⁷ is another example of these treaties. The Smuggling Protocol is considered to be the primary instrument dealing with the suppression of smuggling of migrants. The Protocol essentially provides a criminal justice response⁹⁸ to various types of smuggling activities, by focusing on prosecution and punishment of smugglers themselves. In this respect, the Protocol provides a more comprehensive regime to deal with smuggling. It allows for the inspection of vessels suspected of carrying out smuggling activities through a boarding procedure similar to that contemplated in Article 17(3) of the 1988 Vienna Convention. Under Article 8 of the Protocol, a State party – that has reasonable grounds to suspect that a foreign ship is engaged in smuggling – may request flag State consent to take appropriate measures including boarding and searching that ship.⁹⁹ If evidence of smuggling is found, it may take further measures as

⁹² See UNCLOS, Article 108 which relates to the illicit traffic in narcotic drugs or psychotropic substances. Whilst, the two provisions found under article 108 encourage co-operation for the suppression of such drugs and substances, they fail to create a suitable legal structure to address the problem.

⁹³ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 10 March 1988, entered into force 1 March 1992) 27 ILM 685, hereafter referred to as 1988 Vienna Convention.

⁹⁴ See further Efthymios Papastavridis, 'The Illicit Trafficking of Drugs' in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (OUP 2016) 470-472.

⁹⁵ 1998 Vienna Convention, art 17(3).

⁹⁶ *ibid* art 17(4).

⁹⁷ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo, 15 November 2000, entered into force 28 January 2004) 40 ILM 384, hereafter referred to as the Smuggling Protocol.

⁹⁸ See generally Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 *Journal of Maritime Law and Commerce* 219, 223-225.

⁹⁹ Smuggling Protocol, Article 8(2). See further Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 434-437.

authorised by the flag State.¹⁰⁰ Whilst said treaties represent a positive development, they all ultimately respect the principle of exclusive flag State jurisdiction. It may therefore be pertinent to ask whether any limitation on exclusive jurisdiction of the flag State in respect of combatting smuggling can be imposed under general principles of law. One possible option, relates to intervention on the basis of the protective principle of jurisdiction.¹⁰¹ It could be argued that the protective principle allows coastal States to exercise jurisdiction over a foreign vessel on the high seas without flag State consent to prevent or combat acts that go contrary to its security interests. Malanczuk holds that a plot to break the coastal State's immigration rules may be the basis for the exercise of protective jurisdiction.¹⁰² Whilst, the protective principle is utilised by some States, it should be done so with great caution.¹⁰³ In respect of the case of boarding and arrest of a foreign vessel, the danger to the security of the boarding State must be real and imminent. In such cases it is probably necessary to exhaust all efforts to obtain flag State consent that remains a primary obligation.

4.2 Nationality of Ships and Flag State Duties

The freedom of navigation is intimately linked to nationality.¹⁰⁴ According to Article 91(1) of UNCLOS:

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.¹⁰⁵

According to the above provision, only registered ships have the right to navigate on the high seas, and they must fly the flag of their State.¹⁰⁶ This rule

¹⁰⁰ See Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 *Journal of Maritime Law and Commerce* 219, 230-232.

¹⁰¹ Under the protective jurisdiction a State may assert its authority over matters which are prejudicial to State security, irrespective of where those acts take place or by whom they are committed. See James Crawford (ed) *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 462.

¹⁰² See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 112.

¹⁰³ *ibid.*

¹⁰⁴ Tina Shaughnessy and Ellen Tobin, 'Flags of Inconvenience: Freedom and Insecurity on the High Seas' (2006-2007) V *Journal of International Law and Policy* 1,1. See also Douglas Guilfoyle, 'The High Seas' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 214-215.

¹⁰⁵ UNCLOS, Article 91(1).

¹⁰⁶ Under UNCLOS, Article 92 ships may only sail under the flag of one State.

may imply that a ship, which is stateless, is not entitled to navigate on the high seas, but also risks arrest by a warship¹⁰⁷ of any State.¹⁰⁸

The granting of nationality by a State to a ship, typically through registration,¹⁰⁹ creates a legal link between the ship and that State. The mere administrative act of registration is however insufficient; there must be what is known as a genuine link connecting the State to a ship flying its flag.¹¹⁰ Regrettably, UNCLOS does not define what constitutes a genuine link.¹¹¹ In fact, despite the importance of the genuine link requirement, there appears to be no generally accepted criterion by which 'genuineness' is measured.¹¹²

The requirement of a genuine link has been quite controversial.¹¹³ It is within the flag State's discretion to decide the conditions upon which nationality are granted.¹¹⁴ This discretion has led to the development of the so-called 'flag of

¹⁰⁷ For a definition of warship, see UNCLOS, Article 29.

¹⁰⁸ This is of particular importance to smuggling as in the large majority of cases, the whole or part of the smuggling occurs on stateless ships. It is argued that this would expose such vessels to the control and jurisdiction of all States. See Sections 4.3 and 5.3 respectively for further discussion on exclusive flag State jurisdiction and statelessness of vessels.

¹⁰⁹ Registration is the administrative act by which nationality is conferred upon vessels. It is an official confirmation that ships meet the relevant flag State laws and regulations in return for the flag State's protection of the ship. See Richard Coles and Edward Watt, *Ship Registration - Law and Practice* (2nd edn, Informa 2009) 7.

¹¹⁰ This link is fundamental as it governs discipline in all areas of maritime navigation, the attribution of responsibility of States in cases of violations of the applicable rules by their ships as well as the exercise of flag State jurisdiction and control. See *The Virginia Commentary Volume III* (Martinus Nijhoff 2010) 104. See generally David Attard and Patricia Mallia 'The High Seas' in David Joseph Attard and others (eds), *The IMLI Manual on International Law - Volume I The Law of the Sea* (Oxford University Press 2014) 248-249 and Douglas Guilfoyle 'The High Seas' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 215-216.

¹¹¹ Tullio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 2001) 221. In the absence of clarification on the meaning of genuine link under UNCLOS, this criterion is often interpreted in the context of the *Nottebohm* judgment, where the International Court of Justice held that with regards to the nationality of an individual there must exist '... a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.' The absence of this link may lead to non-recognition of nationality by a third State. See *Nottebohm judgment (Liechtenstein v. Guatemala); Second Phase [1955] I.C.J. Reports (6 April) 4*.

¹¹² Robin Churchill, 'The Meaning of the "Genuine Link" Requirement in relation to the Nationality of Ships', A Study prepared for the International Transport Worker's Federation, October 2000, available at <<http://www.itfglobal.org/seafarers/icons-site/images/ITF-Oct2000.pdf>> accessed 4 July 2016.

¹¹³ The lack of agreement between States on firm conditions for the establishment of a genuine link is evidenced by the failure of the 1986 United Nations Convention on Conditions for Registration of Ships which is not in force. See further Richard Barnes, 'Flag States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 307.

¹¹⁴ This principle is laid down in UNCLOS, Article 91(1).

convenience States', which allow ship-owners to register under their flag with little or no real connection to that State. This situation may also lead to problems of enforcement due to poor control, as flag of convenience States may be either unable or unwilling to exercise proper jurisdiction and control over their ships.¹¹⁵ The use and abuse of flags of convenience by ships are often linked to illegal activities,¹¹⁶ including smuggling.¹¹⁷ In 2008, the European Commission produced a working document,¹¹⁸ which examined the creation of a European surveillance system to better control the EU's external borders.¹¹⁹ This document *inter alia* discusses the problems of irregular immigration, especially in the Mediterranean, and submitted that a popular method employed by smugglers is the use of larger ships '...under a flag of convenience from a country often located far from the Mediterranean...'¹²⁰ in order to transport smuggled persons on to smaller stateless vessels which eventually reach the shore. Moreover, the International Transport Workers' Federation has also expressed its concern about the numerous security risks associated with flag of convenience States, as they are less likely to enforce international requirements concerning the ship and its activities, providing 'unregulated havens' for smugglers to carry out their criminal activities.¹²¹

¹¹⁵ This could also result in smuggling cases either being ignored or going unnoticed. See Matthew Gianni, 'Real and Present Danger: Flag State Failure and Maritime Security and Safety' available at <http://www.itfseafarers.org/files/publications/9315/flag_state_performance.pdf> accessed 4 July 2016.

¹¹⁶ Judge Jesus, Dissenting opinion, para 34 of the *M/V Virginia G* case <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19_Diss_Op_Jesus_orig_E.pdf> accessed 4 July 2016.

¹¹⁷ See Commission of the European Communities, Examining the creation of a European border surveillance system (EUROSUR) – Impact assessment, Accompanying document to the Communication from the Commission, Commission staff working document, SEC(2008) 151 (Brussels, 13 February 2008), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0151:EN:HTML>> accessed 4 July 2016, hereafter referred to as Commission of the European Communities staff working document SEC (2008) 151.

¹¹⁸ *ibid.*

¹¹⁹ The European Border Surveillance System (EUROSUR) is an information sharing system, which became operational on the 2 December 2013. EUROSUR is aimed at improving management of EU external borders and providing faster responses to new routes and methods used by smuggling networks. See Eurosur (*Frontex*) <<http://frontex.europa.eu/intelligence/eurosur/>> accessed 4 July 2016.

¹²⁰ Commission of the European Communities staff working document SEC (2008) SEC(2008) 15 (Brussels, 13 February 2008) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0151:EN:HTML>> accessed 4 July 2016.

¹²¹ Defining FOCs and the Problems They Pose (*ITF Seafarers*) <<http://www.itfseafarers.org/defining-focs.cfm>> accessed 4 July 2016.

There has been much discussion on how to reduce illegal activities carried out by ships registered under flags of convenience.¹²² This discussion centres on an interpretation of UNCLOS Articles 91 and 94,¹²³ the former dealing with the nationality of ships, whilst the latter deals with flag State duties. Every flag State is required to, 'exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'¹²⁴ If the flag State is not in a position to exercise these duties, this may have implications as to the existence of a genuine link. However, the precise relationship between the capacity to exercise jurisdiction and control and the principle of genuine link is uncertain. The International Tribunal for the Law of the Sea,¹²⁵ helped to clarify the law on this issue in the *M/V Virginia G* case.¹²⁶ The case concerned a Panamanian registered oil tanker which was confiscated, together with the fuel it was carrying, by Guinea-Bissau for unauthorised refuelling of fishing vessels in its exclusive economic zone.¹²⁷ Panama claimed that it was entitled to repatriation for damage suffered during the ship's detention. However, Guinea-Bissau argued that the absence of a genuine link between *M/V Virginia G* and Panama was a cause for inadmissibility of the claims of Panama and the basis for a counter-claim against Panama for repatriation costs.¹²⁸

In its judgment, ITLOS dwelt on the meaning of genuine link and the extent to which the right of a State to grant nationality depends of such a link. The Tribunal referred to and confirmed its previous findings in the *M/V Saiga (No. 2)* case,¹²⁹ where on the interpretation of UNCLOS Articles 91 and 94 it held that,

¹²² Judge Jesus, Dissenting opinion, para 34 of the *M/V Virginia G* case < https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19_DissOp_Jesus_orig_E.pdf> accessed 4 July 2016.

¹²³ *ibid.*

¹²⁴ UNCLOS, art 94.

¹²⁵ Hereafter referred to as ITLOS.

¹²⁶ *M/V Virginia G* (Panama v Guinea Bissau) (Merits, Judgment of 14 April 2014) ITLOS Reports 2014, hereafter referred to as the *M/V Virginia G* case.

¹²⁷ *ibid.*, para 62.

¹²⁸ *ibid.*, para 21.

¹²⁹ *M/V 'Saiga' (No 2)* (Saint Vincent and the Grenadines v Guinea) (Merits, Judgment of July 1 1999) ITLOS Reports 1999. In this case Guinea arrested an oil tanker, the *M/V Saiga* for providing gas and oil to fishing boats off West Africa which was considered to be a violation its customs laws. Although the *M/V Saiga* was registered in St. Vincent and the Grenadines, the beneficial owner was a Cypriot company which was managed by a Scottish company and then chartered out to a Swiss Company. The officers and crew on board the vessel were Ukrainian. Guinea claimed that the vessel had not been validly registered in St. Vincent and the Grenadines at time the arrest, but that even if it had been there was no genuine link between the *M/V Saiga* and St. Vincent and therefore St. Vincent was not competent to bring a claim on behalf of the *M/V Saiga*. St. Vincent argued that the arrest was contrary to international law.

- a) The discretion of a State to grant nationality is a matter reserved to that State, which may under its domestic law prescribe conditions for the registration of such ships in its territory and the right to fly its flag.¹³⁰
- b) The purpose of the genuine link is to secure ‘...more effective implementation of the duties of the flag State’,¹³¹ and to not establish prerequisites to be satisfied for the exercise of the right of the flag State to grant nationality to its ships.¹³²

In the *M/V Virginia G* case, the ITLOS held,

...once a ship is registered, the flag State is required under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices.¹³³

In the view of the Tribunal, a genuine link between a ship and its flag State exists through the performance of the flag State duties listed in Article 94. A ship may be registered with a flag State, but will only retain the genuine link if it abides with its international obligations to ensure effective jurisdiction and control over that vessel. What are consequences of a lack of genuine link? As a component for the granting of nationality under UNCLOS, the absence of such a link may arguably render a vessel stateless. Within the context of smuggling, flag States which permit or fail to take action against registered vessels carrying out illegal smuggling activities, may be failing to carry out their flag State duties. The absence of a genuine link in such cases may render smuggling ships stateless and therefore subject in the first place to the right of visit under Article 101.¹³⁴ Statelessness, as a ground to combat smuggling on the high seas, will be examined below.¹³⁵

4.3 The Principle of Exclusive Flag State Jurisdiction

As elaborated upon in Section 1, no State may claim rights or control over any part of the high seas. However, a flag State may exercise authority over their vessels located on the high seas, through the principle of exclusive flag State

¹³⁰ *ibid* para 63.

¹³¹ *ibid* para 83.

¹³² *ibid*.

¹³³ *M/V Virginia G case G (Panama v Guinea Bissau) (Merits, Judgment of 14 April 2014) ITLOS Reports 2014, para 113.*

¹³⁴ See Section 5.1.

¹³⁵ See Section 5.3.

jurisdiction. This principle is crucial in relation to interdiction. According to Article 92(1) of UNCLOS,

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.¹³⁶

Exclusive flag State jurisdiction is considered to complement the freedom of the seas found in Article 87, and was inserted in order to avoid '...the absence of any authority over ships sailing the high seas which would lead to chaos.'¹³⁷ Therefore, according to Article 92(1), a vessel is subject only to jurisdiction of the State to which it is flagged. This principle, which was also upheld by the landmark *S.S Lotus* judgment,¹³⁸ where the Permanent Court of International Justice held that,

It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly.¹³⁹

This idea of 'exclusivity' implies that UNCLOS does not allow for non-flag State action over ships on the high seas except: a) in those limited circumstances provided for in the Convention,¹⁴⁰ which include the suppression of slave trade,¹⁴¹ piracy,¹⁴² illicit traffic in narcotic drugs and psychotropic substances,¹⁴³ and unauthorised broadcasting;¹⁴⁴ or b) if they have been granted permission by that flag State.¹⁴⁵ Therefore, other than the aforementioned situations, any other action taken on the high seas would amount to an assertion of jurisdiction over the high seas,¹⁴⁶ and '...would undoubtedly be contrary to international law.'¹⁴⁷

¹³⁶ UNCLOS, art 92(1).

¹³⁷ ILC, 'Report of the International Law Commission on the Work of its 8th Session' (23 April- 4 July) UN Doc (A/3159), Article 30 Commentary, para 1.

¹³⁸ *SS Lotus Case (France v Turkey)* [1927] PCIJ Rep Series A No 10 (7 September) 25, para.1.

¹³⁹ *ibid.*

¹⁴⁰ The exceptions to the principle of flag State jurisdiction will be elaborated upon later on in this Section.

¹⁴¹ UNCLOS, art 99.

¹⁴² *ibid* art 105.

¹⁴³ *ibid* art 108.

¹⁴⁴ *ibid* art 109.

¹⁴⁵ See Douglas Guilfoyle 'The High Seas' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 220-221.

¹⁴⁶ Natalie Klein *Maritime Security and the Law of the Sea* (Oxford University Press 2012) 106.

¹⁴⁷ *SS Lotus Case (France vs. Turkey)* [1927] PCIJ Rep Series A No 10 (7 September) 25, para.1.

This point was emphasized by the Netherlands in the *Arctic Sunrise Case (Kingdom of the Netherlands vs. Russian Federation)*.¹⁴⁸ The proceedings before ITLOS concerned a request by the Netherlands for provisional measures under Article 290(5) of UNCLOS,¹⁴⁹ following the arrest of a Dutch-flagged Green Peace vessel and its crew. The arrest was carried out after the vessel's crew attempted to stage a protest against an offshore oil rig in the Russia Federation's EEZ.¹⁵⁰ The arrest was made without the consent of the Netherlands, which claimed that,

By acting in this way, without the prior consent of the Kingdom of the Netherlands, the Russian Federation has violated the freedom of navigation of the flag State and its right to exercise its jurisdiction over the vessel under the United Nations Convention on the Law of the Sea and under customary international law...¹⁵¹

The Netherlands continuously argued its position as the flag State of the *Arctic Sunrise*, and consequently it was the only State entitled to take enforcement action against the vessel. At the heart of the case put forward by the Netherlands were the fundamental principles of the freedom of navigation and exclusive flag State jurisdiction.¹⁵² In the light of the urgency of the matter, the Tribunal prescribed provisional measures through the posting of a bond or other financial security of 3,600,000 Euros by the Netherlands, which required the Russian Federation to immediately release the *Arctic Sunrise* and all persons who had been detained.¹⁵³

¹⁴⁸ The *Arctic Sunrise case (Kingdom of the Netherlands vs. Russian Federation)* (Provisional Measures, Order of 22 November 2013) ITLOS Reports 2013. During proceedings, the Russia Federation did not appear before the Tribunal.

¹⁴⁹ According to this Article, if a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part of Part XI, Section 5 of the Convention, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment pending the final decision. See UNCLOS, Article 290(5). See further Douglas Guilfoyle and Cameron Mile, 'Provisional Measures and the MV *Arctic Sunrise*' (2013) 108 *The American Journal of International Law* 271.

¹⁵⁰ ITLOS, Press Release 201, 'Request for Provisional Measures submitted Today to the Tribunal in the *Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation).

¹⁵¹ ITLOS, *The Arctic Sunrise case* (Kingdom of the Netherlands v. Russian Federation) Public sitting held on Wednesday, 6 November 2013, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, Verbatim Record, lines 12-15 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/ITLOS_PV13_C22_1_Eng.pdf> accessed 4 July 2016.

¹⁵² *ibid.*

¹⁵³ The *Arctic Sunrise case (Kingdom of the Netherlands v. Russian Federation)* (Provisional Measures, Order of 22 November 2013) ITLOS Reports 2013, para 105.

It is submitted that the principle of exclusive flag State jurisdiction has important implications when attempting to interdict foreign flagged vessels involved in smuggling on the high seas. Other than the exceptions provided for in the Convention, or other treaties, a State must receive flag State consent before boarding, searching or interdicting foreign flagged smuggling vessels on the high seas.

In essence, a warship cannot exercise control or jurisdiction over a foreign ship suspected of smuggling, unless it has flag State consent. From a review of the State practice, it appears that States still jealously protect the principle of exclusive flag State jurisdiction. This author could find no case where boarding of a vessel to combat smuggling took place without flag State consent. It is significant that even under the Smuggling Protocol boarding can only take place with the consent of the flag State. Furthermore, from a review of anti-smuggling bi-lateral agreements, it appears that flag State consent has always been required.

Significantly some may argue that the implied consent mechanism is not justified, as it puts extra burdens on the administration, but more importantly it is held that when a State that signs a counter-smuggling agreement in good faith, it is bound to give consent. Whilst this argument has some logic, it may be desirable to insert such mechanisms in counter-smuggling treaties. Considering the importance, of the safety of lives of the smuggled persons, it is important that flag State consent is forth coming in the shortest time possible.

5. The Effectiveness of UNCLOS Rules to Suppress Smuggling on the High Seas

5.1 *The Right of Visit*

Under UNCLOS Article 110, public vessels such as warships,¹⁵⁴ and other duly authorised vessels may exercise the right of visit against foreign flagged vessels on the high seas.¹⁵⁵ The right of visit¹⁵⁶ refers to the right to board, search and inspect foreign vessels on the high seas, but only if there are reasonable grounds to suspect that the vessel is engaged in piracy, slave trade, unauthorised broadcasting¹⁵⁷ or is flying a foreign flag or refusing to show its flag, where the ship is in reality the same nationality as the warship.¹⁵⁸ In order to exercise this

¹⁵⁴ For a definition of warship, see UNCLOS, art 29.

¹⁵⁵ UNCLOS, art 110(1)(a) and 110(5).

¹⁵⁶ See UNCLOS, art 110(2).

¹⁵⁷ *ibid* art 110(1) a-c.

¹⁵⁸ *ibid* art 110(1) d-e.

right the warship must first proceed to verify the foreign vessel's flag and check its documents. If after this initial inspection the suspicion remains, then the warship may proceed to carry out a more thorough examination on board the vessel.¹⁵⁹ As explained in Section 3, this may be considered to be the first step in the process of maritime interdiction of smuggling vessels. This boarding procedure under Article 110 does not require flag State consent,¹⁶⁰ but once the vessel inspection has ended, the boarding State must either leave that vessel or obtain the Master's consent to stay on board.¹⁶¹ However, it is important to that no enforcement action may be carried out by the boarding State without authorisation from the flag State, even if there are signs of illegal activities on board.¹⁶²

From a *prima facie* reading of Article 110, smuggling is not listed as one of the grounds for which the right of visit may be exercised. Notwithstanding this fact, it may still be exercised in cases of: a) stateless vessels which are often used for smuggling voyages; and perhaps to a lesser extent b) slavery depending on an interpretation of the definition of this term and thus whether smuggled migrants may qualify as slaves. Both of these issues will be dealt with in detail in the following sections.¹⁶³

Furthermore, while UNCLOS does not specifically mention smuggling as a ground for the exercise of the right of visit, the wording of the Convention does contemplate situations where this right may emanate from other treaties: '...except where acts of interference derive from powers conferred by treaty...'¹⁶⁴ As observed by Anderson, examples of such interference are found in numerous bi-lateral, regional and global treaties between States which provide specific boarding procedures.¹⁶⁵ An example of this is the right of visit provided for under article 8 of the Smuggling Protocol.¹⁶⁶

It is submitted that whilst the right of visit under UNCLOS may be a useful tool in detecting and searching vessels suspected of smuggling, its effectiveness as a means of suppressing the crime may be limited. The right of visit only provides a

¹⁵⁹ UNCLOS, art 110(2).

¹⁶⁰ James Kraska, 'Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search and Seizure' (2010) 6 *Ocean and Coastal Journal* 1, 26.

¹⁶¹ Patricia Mallia 'The Human Element – Stowaways, Human Trafficking and Migrant Smuggling' in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 19.

¹⁶² *ibid.*

¹⁶³ Section 5.3 and 5.4 respectively.

¹⁶⁴ UNCLOS, art 110(1).

¹⁶⁵ David Anderson, 'Freedom of the High Seas in the Modern Law of the Sea' in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea* (OUP 2006) 342.

¹⁶⁶ See Smuggling Protocol, art 8(2) and Section 4.1 respectively.

non-flag State with the power to board and search vessels smuggling vessels, but does not allow it to unilaterally conduct any enforcement action such as arrest or seizure of the vessel. This limitation may weaken the ability of this right to adequately address the threat of smuggling.

5.2 Hot Pursuit

The right of hot pursuit provided for in Article 111 of UNCLOS, allows a coastal State to pursue and arrest foreign flagged vessels on the high seas when it has '...good reason to believe that the ship has violated the laws and regulations of that State.'¹⁶⁷ In order for the pursuit to commence, the foreign flagged ship must be in the pursuing State's internal waters, archipelagic waters, territorial sea, contiguous zone, exclusive economic zone or continental shelf and the pursuit must also be uninterrupted.¹⁶⁸ This right may be exercised by warships and military aircraft and only '...after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.'¹⁶⁹ If all these conditions are fulfilled, the right of hot pursuit results in the coastal State's right to seize and arrest the pursued vessel onto the high seas.¹⁷⁰ Guilfoyle argues that this right is considered to be, '...an extension of existing coastal State enforcement jurisdiction, which entirely ousts the jurisdiction of the flag State.'¹⁷¹ This author agrees that hot pursuit is one of the most effective tools under Part VII, to combat cases of smuggling, as it extends the jurisdictional powers of non-flag States over smuggling vessels on the high seas. This may lead to arrest and seizure, often considered to be the second step of the interdiction process.¹⁷²

Special attention should be given to hot pursuit commencing in the contiguous zone. Under UNCLOS Article 33, a coastal State may in its contiguous zone, exercise the control necessary to prevent and punish infringement of its immigration laws.¹⁷³ Thus, UNCLOS does permit specific measures to be taken in the contiguous zone in relation to smuggling, whether it forms part of the exclusive economic zone or the high seas.¹⁷⁴ A coastal State can exercise hot

¹⁶⁷ UNCLOS, art 111(1). See generally David Attard and Patricia Mallia, "The High Seas" in David Joseph Attard and others (eds), *The IMLI Manual on International Law –Volume I The Law of the Sea* (Oxford University Press 2014) 239, 263-266.

¹⁶⁸ *ibid.*

¹⁶⁹ UNCLOS, art 111(4).

¹⁷⁰ Douglas Guilfoyle *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 19.

¹⁷¹ *ibid.*

¹⁷² See Section 3.

¹⁷³ UNCLOS, art 33.

¹⁷⁴ See Section 3.4.1.

pursuit against foreign vessels for violations of immigration laws, which can commence up to the outer limit of the contiguous zone i.e. 24 nautical miles.¹⁷⁵

5.3 Stateless vessels

Statelessness of vessels may arise through failure to acquire nationality,¹⁷⁶ or a ship may be treated as stateless, where it 'sails under the flags of two or more States,' according to convenience.¹⁷⁷ The treatment of stateless vessels under UNCLOS is relevant to combatting of smuggling, as many smuggling vessels are stateless.¹⁷⁸ This was confirmed by a 2007 study carried out by the European Commission, which found that illicit migration in Europe's southern maritime external border '...is mainly characterised by being carried out by means of flagless and/or unseaworthy sea craft.'¹⁷⁹ Under Article 110(1)(d), a State may carry out the right of visit which allows it to board and search stateless vessels.¹⁸⁰

An interesting question relates to what are the powers given to non-flag States, beyond the right of visit, over a stateless vessel on the high seas.¹⁸¹ Some authors believe that UNCLOS does not specifically confer rights upon non-flag States to subject interdicted stateless vessels to measures such as seizure and arrest. Churchill and Lowe, for example, insist that there '...is a need for some jurisdictional nexus in order that a State may extend its laws to those on a boarding stateless ship and enforce [its] laws against them.'¹⁸² However, other authors such as Rayfuse argue that the consequences of stateless are so grave, that they can result in stateless ships being '...arrested on the high seas and subject to the jurisdiction of any other State.'¹⁸³ The present author agrees with the latter position, considering that stateless vessels do not enjoy the freedom of navigation,¹⁸⁴ which is only given to registered vessels. Stateless vessels

¹⁷⁵ UNCLOS, art 111(1).

¹⁷⁶ See Section 4.2.

¹⁷⁷ UNCLOS, art 91(1).

¹⁷⁸ Secretary General of the United Nations, 'Report of the Secretary General on the Oceans and the Law of the Sea', 5 October 1998, UN Doc.A/53/456, para 135. See also Section 4.2.

¹⁷⁹ European Commission, Study on the international law instruments in relation to illegal immigration by sea, Brussels, 15 May 2007, SEC (2007) 691.

¹⁸⁰ See Section 5.1.

¹⁸¹ Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmented Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 International Journal of Refugee Law 1, 13.

¹⁸² Robin Churchill and Vaughn Lowe, *The law of the Sea* (3rdedn, Manchester University Press 2009) 214.

¹⁸³ Rosemary Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff 2004) 57. See also Myres Smith MacDougal and others, 'The Maintenance of Public Order at Sea and the Nationality of Ships' (1960) 54 American Journal of International Law 25.

¹⁸⁴ See Daniel Patrick O'Connell, *The International Law of the Sea - Volume II* (Clarendon Press, 1984) 755 and Robert Reuland, 'Interference with Non-National Ships on the High Seas:

effectively lose the protection of any State and may be subjected to the domestic laws of the boarding State.¹⁸⁵

This view also finds support in two leading judgments on the issue, in the *Asya* case,¹⁸⁶ the United Kingdom Privy Council held that,

...For the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly and are entitled to fly the flag of a State which is within the comity of nations. The *Asya* did not satisfy these elementary conditions...¹⁸⁷

Moreover, in *Pamuk case*,¹⁸⁸ Italian custom officers had actually seized a flagless vessel which was transporting smuggled migrants on the high seas to another vessel which had then entered the Italian territorial sea; the Italian *Tribunale di Crotone* justified the assertion of enforcement jurisdiction by Italian authorities on the basis that the smuggling vessel was stateless.

5.4 Slavery

According to Article 99, UNCLOS requires every State to take effective means 'to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose'.¹⁸⁹ Although, UNCLOS provides no definition of slavery, it is most likely referring,¹⁹⁰ to the traditional definition of the term which is provided for in the 1926 Slavery Convention¹⁹¹ as meaning '...the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'¹⁹² However, this definition may now be considered obsolete, considering that virtually all States

Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction' (1989) 22 *Vanderbilt Journal of Transnational Law* 1161, 1198-1201.

¹⁸⁵ Marten de Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 236.

¹⁸⁶ *Naim Molvan v. Attorney General for Palestine (The "Asya")*, 81 Ll L Rep 277, United Kingdom: Privy Council (Judicial Committee), 20 April 1948. This case involved the seizure of a vessel *the Asya* by a British destroyer. The *Asya* was travelling toward Palestine with many illegal migrants on board. When it was first spotted by the British Destroyer it was not flying any flag. Soon after it was sighted, it hoisted the Turkish flag and later replaced by a Zionist flag. The ship had no documents to verify its nationality and was then apprehended by the British Destroyer and taken to Haiti.

¹⁸⁷ *ibid* 546.

¹⁸⁸ *Pamuk et al.* cited in Rivista di Diritto Internazionale (2001) 1155.

¹⁸⁹ UNCLOS, art 99.

¹⁹⁰ Satya Nanda and Shabtai Rosenen (eds), *The United Nations Convention on the Law of the Sea: A Commentary Volumes III* (Martinus Nijhoff 1995) 179-180.

¹⁹¹ Slavery Convention (Geneva, 25 September 1926, entered into force on 9 March 1927) 60 L.N.T.S. 253.

¹⁹² *ibid*, art 1(1).

have outlawed slavery.¹⁹³ Nevertheless, modern forms of slavery and slave-like practices are still very evident in many parts of the world. It could be argued that the crime of smuggling is a manifestation of more modern forms of slavery, considering the harsh and inhumane effects on victims of these crimes and the complete control, which is exercised over smuggled persons. Smuggled migrants are exposed to inhumane and degrading treatment on board smuggling vessels and may also be subjected to violence by the smugglers themselves.¹⁹⁴ In addition to being forced to endure such cruel conditions throughout the smuggling voyage, there are also cases where migrants enter into debt bondage situations or are forced in domestic servitude in order to pay smuggler fees.¹⁹⁵ Such situations could arguably also be considered as contemporary cases of slavery.

Papastavridis argues that UNCLOS ‘...should be interpreted in the light of the contemporary legal meaning of the terms slavery and slave trade and not only in the light of the meaning when the [UNCLOS] was drafted’.¹⁹⁶ Moreover, he claims that there is nothing in UNCLOS ‘...to intrinsically prevent an evolutive interpretation of the notion of slavery...’¹⁹⁷ It may be argued that the concept of slavery should not remain static but should adjust itself to contemporary developments, especially in light of the growing need for States to suppress and control harmful smuggling practices.

Consequently, a broad interpretation of UNCLOS provisions dealing with slavery to also include smuggling, would invoke the right of visit, which as explained above may be useful in intercepting and detecting smuggling vessels.¹⁹⁸ However, unlike other maritime security threats such as piracy,¹⁹⁹ UNCLOS does not allow States to seize foreign flagged vessels or arrest those on board under Article 99, and in this regard neither does the right of visit. Therefore, even if, a wide interpretation of term slavery were used to include smuggling activities,

¹⁹³ Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing 2013) 270.

¹⁹⁴ Migrant Smuggling in the Horn of Africa and Yemen: the political economy and protection risks, Mixed Migration Research Series, June 2013, Study 1, 41 available at <http://www.regionalmms.org/fileadmin/content/rmms_publications/Migrant_Smuggling_in_the_Horn_of_Africa_and_Yemen_report.pdf> accessed 4 July 2016.

¹⁹⁵ James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 658-659.

¹⁹⁶ Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing 2013) 277.

¹⁹⁷ *ibid.*

¹⁹⁸ See Section 3.3.

¹⁹⁹ Under UNCLOS, art 105; all States may seize and arrest pirate vessels on the high seas. See further Mariyan Kulyk, ‘Piracy, Hijacking and Armed Robbery against Ships’ in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (OUP 2016) 396-400 and Felicity Attard (n 26) 534-535.

the use of this provision would be still limited when it comes suppressing such activities on the high seas.²⁰⁰ In this respect, flag State control would still be recognised to go beyond the right of visit, unless of course the smuggling vessel is stateless.²⁰¹

5.5 The Duty to Render Assistance and Rescue at Sea

As examined above, migrants often cross the high seas in overcrowded, unseaworthy vessels.²⁰² Unfortunately, distress at sea situations have become a common occurrence. These situations raise important humanitarian concerns. The duty to rescue persons in distress at sea arises under customary international law and is codified in a number of international conventions,²⁰³ most notably UNCLOS. Article 98(1) of UNCLOS imposes a duty on flag States to ensure that shipmasters of vessels flying their flag provide assistance to persons in distress at sea:²⁰⁴

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- (a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
- (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.²⁰⁵

²⁰⁰ Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 *Journal of Maritime Law and Commerce* 219, 228.

²⁰¹ See Section 3.5.2.

²⁰² See Section 1.

²⁰³ See also Regulation 33, para.1 of Chapter V of the International Convention for the Safety of Life at Sea (London, 1 November 1974, entered into force 1 May 1991) 1184 UNTS 3 and Chapter 2, paragraph 2.1.10 of the Annex to the International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97.

²⁰⁴ The duty is placed on all shipmasters of all vessels irrespective of whether it may be a military, private or commercial ship. See Anne Gallagher and Fiona David *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 447.

²⁰⁵ UNCLOS, art 98(1).

The shipmasters obligation to render assistance at sea, is supplemented by the requirements of coastal States to organise and carry out search and rescue services,

Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.²⁰⁶

While the general obligation to render assistance at sea is provided for under UNCLOS, Part VIII on the high seas, this should not be construed to mean that the duty should be carried out exclusively in areas beyond national jurisdiction. In fact, the duty has been described by Nordquist, as an obligation of broad application that extends to all areas of the ocean space 'whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or on the high seas.'²⁰⁷

UNCLOS requires the shipmaster to proceed to the assistance of any person in distress at sea.²⁰⁸ This requirement ensures that there is no distinction exercised in the rescue of persons at sea, the obligation therefore clearly extends from seafarers to irregular migrants in need of assistance at sea. The duty under UNCLOS also requires the shipmaster to be proactive in two ways: a) on receiving relevant information,²⁰⁹ take active steps to alter the ship's course to rescue persons in distress at sea; and b) to render the same assistance if, *en route*, he happens to discover persons in distress at sea. The duty is qualified in that the shipmaster may provide assistance to persons in distress, only in so far as such action may be reasonably expected of him.²¹⁰ Accordingly, he may be relieved of his duty under certain circumstances; for example, in cases where the rescue operation proves to be unfeasible or may endanger the safety of his vessel, passengers or crew.

²⁰⁶ *ibid* art 98(2).

²⁰⁷ Satya Nanda and Shabtai Rosenen (eds), *The United Nations Convention on the Law of the Sea: A Commentary Volumes III* (Martinus Nijhoff 1995) 173.

²⁰⁸ The challenges facing the rescue of migrants in distress at sea who are generally found on board small and unseaworthy vessels are discussed above.

²⁰⁹ For example, if a shipmaster is prompted to rescue by a distress call from the vessel in distress or from rescue services ashore. See Richard Barnes, 'The International law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control - Legal Challenges* (Martinus Nijhoff 2010) 136-137 and Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 *International Journal of Refugee Law* 329, 338.

²¹⁰ UNCLOS, art 98 (1)(c).

The duty to assist and provide rescue at sea are considered to be humanitarian obligations towards persons in danger at sea. Interdiction on the other hand, is a tool used by law enforcement agencies to limit or regulate the number of irregular migrant arrivals to their shores.²¹¹ The general view is that although flag State consent is necessary for interdiction and boarding of a foreign ship, it is not required when undertaking a rescue at sea operation.²¹² This exception is based on the need to protect life at sea. In fact, it should be narrowly interpreted to be strictly restricted to cases of rescue at sea and great care should always be taken to ensure that beyond humanitarian considerations flag State consent is obtained.

Despite having different policy objectives, in practice the activities of interdiction and rescue at sea may overlap, blurring the boundary between these two types of operations.²¹³ For example, law enforcement authorities that have targeted a vessel for interdiction purposes may later discover that the vessel is in distress.²¹⁴ Uncertainty may arise as to whether such an operation should be classified as one of interdiction due to suspicion of smuggling on board the vessel, or a rescue at sea because of the distressed condition of the vessel.²¹⁵

This uncertainty has led to a disconcerting trend among States which rely on the principle of rescue at sea as a means of interdicting vessels.²¹⁶ Besides providing a legal pretext to interdicting foreign vessels on the high seas, the reasons for what Miltner terms as ‘interception “cloaked” as rescue’²¹⁷ are considerable. A State, which has conducted an interdiction operation, will then be responsible for the disembarkation and processing of any asylum seekers.²¹⁸ Furthermore, if a State does secure rescue related disembarkation at a third State, the former may

²¹¹ See Section 3.

²¹² Barbara Miltner, ‘Human Security in the Maritime Context’ in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010) 221.

²¹³ *ibid* 220.

²¹⁴ The European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union (Frontex) for example argues, ‘...that saving lives at sea and intercepting both migrants and the people who smuggle them go hand in hand.’ See ‘Sea’ (*FRONTEX: European Border and Coast Guard Agency*) <<http://frontex.europa.eu/operations/types-of-operations/sea>> accessed 4 July 2016.

²¹⁵ Barbara Miltner ‘Human Security in the Maritime Context’ in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010), 220.

²¹⁶ Jasmine Coppens, ‘Search and Rescue of Migrants at Sea’ in Adam Weintrit (ed) *Marine Navigation and Safety of Sea Transportation: Navigational Problems* (CRC Press/Balkema 2013) 117.

²¹⁷ See also Barbara Miltner, ‘Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception’ (2006) 30 *Fordham International Law Journal* 75, 111.

²¹⁸ Barbara Miltner ‘Human Security in the Maritime Context’ in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010) 221.

benefit by transferring its international protection responsibilities (e.g. screening, processing asylum claims) to the latter.²¹⁹ In light of these problems, UNHCR warns States ‘...to avoid the categorization of interception operations as search and rescue operations, because this can lead to confusion with regard to disembarkation responsibilities.’²²⁰

Coppens observes that this practice may also constitute an abuse of right under international law considering that in such cases the duty to render assistance in a rescue is clearly not being used for the purpose for which it was intended,²²¹ Furthermore, it may be argued that such activities may violate the duty of good faith under UNCLOS Article 300²²² considering that the practice is not only burdening coastal States with excessive and undue disembarkation responsibilities, but may also put at risk persons who require international protection. Whilst States should be obliged to respect the distinction between rescue and interdiction, it may not always be practicable or advisable to place further limitations on the obligation to rescue at sea, for it may shackle or place further burdens on States’ responses to granting rescue.

6. Conclusion

Despite the lack of any specific rules to combat smuggling under UNCLOS Part VII, it does contain certain provisions, which can be useful in fighting smuggling. Generally, the combatting of smuggling takes place through the process of interdiction,²²³ indeed this has become a major activity that enables States to take action on the high seas, thereby preventing the landing of migrants that were being illegally transported on vessels.²²⁴ It should, however, be noted that in the ultimate analysis for effective action, this process has limitations, as generally in the absence of an agreement, it requires the consent of the flag State.²²⁵ This is a reflection of the fundamental principle enshrined in Article 92(1) of UNCLOS, which grants the flag State exclusive jurisdiction over its ships

²¹⁹ *ibid.*

²²⁰ UNHCR, ‘The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees: Report of the Office of the United Nations High Commissioner for Refugees’ 11 April 2008, A/AC.259/17, para 20.

²²¹ Jasmine Coppens ‘Search and Rescue of Migrants at Sea’ in Adam Weintrit (ed) *Marine Navigation and Safety of Sea Transportation: Navigational Problems* (CRC Press/Balkema 2013) 123.

²²² See Article 300 of UNCLOS, which provides that State parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner, which would not constitute an abuse of right.

²²³ See Section 3.

²²⁴ *ibid.*

²²⁵ See Section 4.3

when on the high seas.²²⁶ In this respect the ambiguity of the genuine link requirement is not helpful particularly with regard to vessels registered in States where the legislative and administrative controls may not be satisfactory.²²⁷

Usually the first stage of the interdiction process is the right of visit, which is regulated by Article 110 of UNCLOS.²²⁸ Whilst this visit may apply effectively, particularly to stateless ships, the consent of the flag State is required for any action once evidence of smuggling found.²²⁹ Another helpful rule is the right of hot pursuit found under Article 111 of UNCLOS.²³⁰ This institution is extremely useful for it allows for the pursuit of smugglers on to the high seas. In this respect, it was noted that the contiguous zone and the exclusive economic zone are subject to the relevant high seas provisions and therefore the right of hot pursuit is also applicable in these zones.²³¹ Noteworthy also is the right of the coastal State to exercise the control necessary in order to prevent or punish the infringement of immigration laws under Article 33 of UNCLOS.²³² With respect to stateless vessels, the denial of the freedom of navigation to such vessels by the Convention may be a useful weapon in the hands of enforcement authorities conducting the fight against smuggling.²³³

Smuggling raises many safety concerns as it generally involves hazardous journeys on unseaworthy vessels.²³⁴ UNCLOS provides the basis for the execution of the obligation to render assistance and rescue at sea.²³⁵ It was noted that there exists a delicate relationship between rescues at sea, which may sometimes lead to abuse.²³⁶

It is submitted that the relevant articles on the high seas regime in UNCLOS provide a useful basis for combatting smuggling. Nevertheless, one cannot rely exclusively on the Convention to effectively combat this threat. This has led to the adoption of other international instruments in particular the Smuggling Protocol, which provides further elaboration and development of the rules found in UNCLOS.²³⁷ The Protocol provides a more comprehensive regime allowing for interdiction activities in the cases of vessels suspected of smuggling. However,

²²⁶ *ibid.*

²²⁷ See Section 4.2.

²²⁸ See Section 5.1.

²²⁹ *ibid.*

²³⁰ See Section 5.2.

²³¹ *ibid.*

²³² *ibid.*

²³³ See Section 5.3.

²³⁴ See Section 1.

²³⁵ See Section 5.5.

²³⁶ *ibid.*

²³⁷ See Section 4.1.

ultimately any legal responses to smuggling found in the Protocol, work within a broader legal framework involving obligations under UNCLOS, in particular, respect for the principle of exclusive flag State jurisdiction.