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978-0-521-76019-5 - Shipping Interdiction and the Law of the Sea

Douglas Guilfoyle

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## PART I

# General principles

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## 1 Introduction: policing the oceans

The oceans are critical both to states' interests and to human prosperity, being a highway for commerce, a shared resource and a vector for threats to security. Ninety per cent of legal international trade moves by sea.<sup>1</sup> The oceans are also used by smugglers transporting prohibited substances or irregular migrants. Certain trade by sea, not previously unlawful, is now prohibited as threatening international security, for example supplying a non-state actor with weapons of mass destruction (WMD), or transferring such materiel to North Korea or Iran.<sup>2</sup> States may also have strategic concerns regarding the possibility of certain states covertly acquiring WMD and seek to prevent such transfers by sea.<sup>3</sup>

The oceans also feed humanity. Forty per cent of the protein consumed in the developing world is supplied by seafood.<sup>4</sup> The vast resource represented by world fish stocks is difficult to govern. Illegal, unreported or unregulated fishing threatens coastal state economies and human food security. To reduce such activity some states have implemented at-sea boarding and inspection measures to monitor fishing practices.

Vessels at sea are also vulnerable to violence. Ships are robbed or hijacked with alarming frequency, raising concerns that such attacks could finance terrorism or result in seized vessels being used as 'floating

<sup>1</sup> United Nations Division for Ocean Affairs and the Law of the Sea, *Oceans: The Source of Life* (New York: United Nations, 2002), p. 13, [www.un.org/Depts/los/convention\\_agreements/convention\\_20years/oceanssourceoflife.pdf](http://www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf).

<sup>2</sup> SC Res. 1696 (31 July 2006), para. 4; SC Res. 1718 (14 October 2006), paras. 8(a) and (b); SC Res. 1737 (27 December 2006), paras. 3, 4 and 7; SC Res. 1803 (3 March 2008), para. 8. See also SC Res. 1747 (24 March 2007), para 5; and SC Res. 1540 (28 April 2004), para. 2.

<sup>3</sup> M. Byers, 'Policing the high seas: the Proliferation Security Initiative' (2004) 98 AJIL 526.

<sup>4</sup> Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* (London: Penguin, 2006), p. 479.

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bombs' to attack major ports.<sup>5</sup> Individuals have also taken to the seas to circumvent state regulation, for example, the 'pirate radio' stations of 1960s Europe.

The law of the sea must harmonise states' competing interests in exploiting and regulating maritime activities; as part of this enterprise it should provide for the orderly allocation of jurisdiction to suppress unlawful or undesirable activities. This book examines interdiction at sea, using the term 'interdiction' to describe a two-step process:<sup>6</sup> first, the boarding, inspection and search of a ship at sea suspected of prohibited conduct; second, where such suspicions prove justified, taking measures including any combination of arresting the vessel, arresting persons aboard or seizing cargo. Throughout, the first exercise of enforcement jurisdiction will be referred to as 'boarding' or 'search' and the second as 'seizure'. Some authors distinguish between a 'right of approach' ('droit d'approche') and a 'right of enquiry' ('droit d'enquête du pavillon')<sup>7</sup> and may distinguish both from 'interdiction'. The 'right of approach' is based on the view that it is not unlawful for a government vessel (including warships) on the high seas to draw near a foreign vessel to observe its flag or other marks of nationality.<sup>8</sup> Given the doctrine of the freedom of the high seas, this 'right' seems redundant, possibly reflecting only a presumption that such actions by warships are not inherently hostile.<sup>9</sup> The distinct 'right of enquiry' may allow a government vessel to board a vessel, inspect its papers, question those aboard and possibly search it.<sup>10</sup> Interdiction might then be thought of as the further act of arresting the vessel. There is no real difference between distinguishing between a 'right of inquiry' and 'interdiction' and talking of the boarding and seizure phases of

<sup>5</sup> E. Barrios, 'Casting a wider net: addressing the maritime piracy problem in southeast Asia' (2005) BCICLR 149 at 153; 'Malacca Strait: no immediate threat from terrorists', *Lloyd's List*, 22 February 2008, p. 5.

<sup>6</sup> 'Interdiction' was first used in this sense by the US military in the 1940s and 1950s; see *Oxford English Dictionary* online <http://dictionary.oed.com>, *interdict* v., Add: 4, and cf. *interdiction* n., n. 4; although it probably entered English from French legal usage, e.g. [1950] II YBILC 67 at 69.

<sup>7</sup> Gidel, I, 289–300.

<sup>8</sup> This right may include the power to *require* a merchant ship to show its flag. See the comments of J. P. A. François, [1955] I YBILC, 26. This proposition was not codified. Note, however, that François also used 'droit d'approche' to describe what is called here the right of inquiry: [1954] II YBILC, 8 at para. 7.

<sup>9</sup> But see O'Connell, pp. 802–3.

<sup>10</sup> UNCLOS, Article 110; High Seas Convention, Article 22.

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interdiction. Both acts may be considered as part of 'interdiction', since seizure is always conditioned upon and preceded by boarding.

Interdictions may be conducted by coastal states, flag states or third states. A coastal state may be able to interdict vessels in various regulatory zones adjacent its coasts. A flag state has jurisdiction to interdict vessels granted its nationality on the high seas (i.e., that ocean area not subject to coastal state jurisdiction). Other states may only conduct an interdiction under a permissive rule of international law or with permission from the flag state or the coastal state in whose regulatory zone the vessel is present. The present study is especially concerned with high seas interdictions conducted by non-flag state vessels and interdictions in waters subject to coastal state jurisdiction conducted by foreign vessels. Such interdictions involve the jurisdictions of two states. This raises questions of general international law, the simultaneous validity of two national laws of police procedure and substantive criminal law aboard a vessel, state immunity and state responsibility. Interdictions which, if properly conducted, implicate only one national legal order are only briefly discussed.

The present discussion is accordingly divided into three parts. Part I introduces general principles of maritime jurisdiction. Part II considers the application of these jurisdictional principles in particular law enforcement contexts, as well as their interaction with other applicable international law rules which may affect the conduct of interdictions, such as obligations regarding the safety of life at sea or the protection of refugees. Part II considers fields of maritime policing practice in roughly the historical order in which the law has emerged. Chapters in Part II thus deal with piracy and the slave trade, drug trafficking, high seas fisheries management, unauthorised broadcasting, the transnational crimes of migrant smuggling and human trafficking, and maritime counter-proliferation of WMD. The analysis is historically situated, but focuses on modern state practice. While the law on piracy, slaving, drug trafficking, fisheries management and unauthorised broadcasting, respectively, represent different responses to different problems, they also represent a range of possible legal regimes that could be adapted to emerging concerns such as transnational criminal activity and WMD proliferation. What will be shown is that the approach founded on state consent to interdiction, adopted in drug smuggling and fisheries regulation, has prevailed over allocating universal and unilateral interdiction rights, as in the cases of piracy, slaving and unauthorised broadcasting.

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Part III deals with the positive law applicable to interdiction that can be deduced from existing interdiction practice and general rules of international law. The evidence in Part II reveals that there is no general international law of interdiction in the sense that general interdiction rights will arise if one proves that a certain activity is sufficiently damaging to the interests of an individual state or the wider international community. However, insofar as interdiction is a common tool of law enforcement applied in different contexts, useful observations may be made about the rules applicable in the course of any legally permitted interdiction. While a range of principles can be deduced, by far the most important relate to the use of force by a boarding party. Use of force is thus the principal concern of Chapter 10. Chapter 11 deals with the consequences of the simultaneous validity of two national legal orders during the conduct of an interdiction and considers three questions: the application of the boarding state's law to conduct discovered aboard a vessel; the boarding state's obligations under flag or coastal state law; and the immunity, if any, enjoyed by boarding state officials before flag or coastal state courts for their conduct. Chapter 12 deals with the consequences of wrongfully conducted boardings and issues of state responsibility.

Finally, it should be noted that this book is only concerned with the laws of peace and does not consider the laws of blockade, contraband or other belligerent rights, or Security Council-mandated interdiction regimes.<sup>11</sup> These provide a completely autonomous foundation for the exercise of boarding state jurisdiction, and do not implicate concurrent jurisdiction in the same manner as peacetime interdiction.

<sup>11</sup> See generally *Annotated Commander's Handbook*, ch. 7; Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995), pp. 176–80, 214–21; G. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (London: Kegan Paul, 1998), Part II; Wolff Heintschel von Heinegg, 'The law of armed conflict at sea', and M. Bothe, 'The law of neutrality' in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* 2nd edn (Oxford University Press, 2008), pp. 475–569, 571–604; N. Ronzitti, 'The crisis of the traditional law regulating international armed conflicts at sea and the need for its revision' in Natalino Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Dordrecht: Martinus Nijhoff, 1988), pp. 1–58; D. Guilfoyle, 'The Proliferation Security Initiative: interdicting vessels in international waters to prevent the spread of weapons of mass destruction?' (2005) 29 MULR 733, 744–7. On Security Council-authorised interdiction regimes see R. McLaughlin, 'United Nations mandated naval interdiction operations in the territorial sea?' (2002) 51 ICLQ 249; Alfred. H. A. Soons, 'A "new" exception to the freedom of the high seas: the authority of the UN Security Council' in Terry D. Gill and Wybo P. Heere (eds.), *Reflections on Principles and Practice of International Law: Essays in Honour of Leo J. Bouchez* (The Hague: Nijhoff, 2000), pp. 205–21.

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## 2 Basic principles of maritime jurisdiction

### 1 State jurisdiction over vessels at sea

This book principally examines situations where one state exercises jurisdiction over a vessel otherwise subject to the exclusive jurisdiction of a flag or coastal state. 'Jurisdiction' refers to a state's power 'under international law to govern persons and property by its [national] law' and to 'make, apply, and enforce rules of conduct' to that end.<sup>1</sup> It is commonly held that

the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power ... in the territory of another State. ... [Jurisdiction] cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.<sup>2</sup>

State power applied beyond territorial limits seems exceptional, justifiable only by permissive rules or exceptions. The extraterritorial exercise of state jurisdiction over maritime areas and vessels at sea thus requires explanation. International law distinguishes between the scope of prescriptive and enforcement jurisdiction of national criminal law; ordinarily the latter is regarded as absolutely territorially constrained, while the former may extend extraterritorially in

<sup>1</sup> David Harris, *Cases and Materials on International Law*, 6th edn (London: Sweet & Maxwell, 2004), p. 265, and Vaughan Lowe, 'Jurisdiction', in M. Evans (ed.), *International Law*, 2nd edn (Oxford University Press, 2006), p. 335; cf. Meyers, pp. 33–40.

<sup>2</sup> *Lotus Case*, 18–19; cf. Brownlie, p. 297; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999), p. 53; Roger O'Keefe, 'Universal jurisdiction: clarifying the basic concept' (2004) 2 JICJ 735 at 740.

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certain cases.<sup>3</sup> A state may prohibit or regulate at least certain classes of extraterritorial conduct ('prescriptive jurisdiction') even where it has no authority to enforce that law outside its territory ('enforcement jurisdiction'), such prescription being logically independent of enforcement.<sup>4</sup> This may result in states having concurrent jurisdiction over the same conduct, but this is a more desirable outcome than no state having jurisdiction. The exercise of concurrent jurisdictions with respect to the same acts may be regulated by rules of priority, as discussed in subsequent chapters. In addition to prescriptive and enforcement jurisdiction, some authors refer to 'curial' or 'adjudicative' jurisdiction to describe the power of local courts to hear a case and impose penalties. Although this will normally be coextensive with prescriptive jurisdiction, the term remains useful in certain situations, especially those involving some procedural immunity from the application of a substantive law (which will apply if the immunity is waived).

States may assert prescriptive jurisdiction over the extraterritorial conduct of their nationals and potentially over extraterritorial criminal conduct affecting their nationals ('active' and 'passive' nationality jurisdiction). Thus where a citizen of state A murders a citizen of state B in the territory of state B, both states may have prescriptive jurisdiction over the offender's conduct, but only state B may arrest him while he remains in state B's territory. As the Permanent Court of International Justice (PCIJ) said in the *Lotus Case*,

[f]ar from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, ... [international law] leaves them ... a wide measure of discretion which is only limited in certain cases by prohibitive rules.<sup>5</sup>

It has helpfully been said of this passage:

A distinction must be made between prescriptive jurisdiction and enforcement jurisdiction. The above-mentioned *dictum* concerns *prescriptive jurisdiction*: it is about what a State may do *on its own territory* when investigating and prosecuting crimes committed abroad, not about what a State may do on the territory of other states... Obviously, a State has no *enforcement jurisdiction* outside its territory: a State may, failing permission to the contrary, not

<sup>3</sup> Lowe, 'Jurisdiction', pp. 337 ff.

<sup>4</sup> O'Keefe, 'Universal jurisdiction', esp. at 755.

<sup>5</sup> *Lotus Case*, 19. On the contested meaning and correctness of this dictum, see Lowe, 'Jurisdiction', p. 341; O'Keefe, 'Universal jurisdiction', 738 n. 12; Meyers, pp. 52-3.

exercise its power on the territory of another State. ... In other words, the permissive rule only applies to prescriptive jurisdiction, not to enforcement jurisdiction: failing a prohibition, State A *may*, on its own territory, prosecute offences committed in State B (*permissive rule*); failing a permission, State A *may not* act on the territory of State B.<sup>6</sup>

However, the rule that enforcement jurisdiction is ordinarily territorial is qualified in maritime cases. As exceptions to the general rule, flag states may exercise criminal enforcement jurisdiction over acts committed aboard their flag vessels in international waters ('the high seas'), and under certain circumstances so can non-flag states.

Interdiction concerns the extraterritorial exercise of enforcement jurisdiction, and in any given case one must first ascertain the permissible extent of that jurisdiction. An interdiction has two potential steps. The first is stopping, boarding and searching the vessel for evidence of the prohibited conduct ('boarding'). Where boarding reveals evidence of such conduct the arrest of persons aboard and/or seizure of the vessel or cargo may follow ('seizure', although some treaties refer to 'disposition').

Boarding and seizure involve different exercises of enforcement jurisdiction. Coastal states may have jurisdiction over a vessel present within certain regulatory zones adjacent their coasts. When it is in international waters a vessel is subject to the exclusive jurisdiction of its flag state, therefore government vessels generally may not board foreign vessels in international waters without flag state consent.<sup>7</sup> Flag state consent will also be required for some interdictions by coastal states, where a vessel is interdicted in a regulatory zone in respect of acts which the coastal state lacks express jurisdiction to regulate.

Where a flag state grants consent to a state seeking to interdict its vessel ('the boarding state'), such permission usually constitutes only a partial waiver of flag state jurisdiction. Permission to board seldom automatically includes permission to seize. Such situations are sometimes inaccurately said to create 'concurrent' jurisdiction. Jurisdiction will be concurrent as to rights of boarding, but not seizure.

<sup>6</sup> *Arrest Warrant Case*, 169 at para. 49 per Judge ad hoc Van Den Wyngaert (Dissenting Opinion), footnote omitted (emphasis in original). Many would dispute, however, any suggestion that prescriptive jurisdiction is generally unconstrained: Lowe, 'Jurisdiction', p. 341.

<sup>7</sup> *Lotus Case*, 25; High Seas Convention, Article 6(1); UNCLOS, Article 92(1). On exceptions, see *Oppenheim*, 9th edn, p. 736.



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Concurrent jurisdiction might properly arise where, as under some drug interdiction treaties, the boarding state is granted enforcement permission both as to boarding and seizure, but the flag state reserves a right to withdraw its consent and resume exclusive control over any detention and subsequent prosecution. This is called ‘primary’ or ‘preferential’ jurisdiction, but such terms are strictly a misnomer: the phenomenon derives from the fact that permission may be given subject to conditions, including conditions subsequent.

It is probably more accurate to describe most interdictions as creating a parallel jurisdiction in the boarding state. Both flag and boarding state jurisdictions will apply aboard the vessel. The question is, first, the extent of the boarding state’s authority (granted by the flag state or by treaty or customary rules) and, second, which jurisdiction takes precedence if a search proceeds to seizure and then prosecution. Such rules of priority are usually provided for, sometimes in a less than satisfactory way, in relevant treaties.<sup>8</sup>

## 2 Zones of maritime jurisdiction

### 2.1 Introduction

Jurisdiction to interdict a vessel without flag-state permission depends upon its location. It is thus necessary to sketch the basic principles of maritime jurisdiction and discuss several points about enforcement jurisdiction that are sometimes poorly understood. Under the 1982 United Nations Law of the Sea Convention (‘UNCLOS’),<sup>9</sup> three forms of coastal state jurisdiction are acknowledged over adjacent waters: a territorial sea, a contiguous zone and an exclusive economic zone (EEZ). Each of these will be discussed in turn before considering the specific issues of hot pursuit, flag-state jurisdiction and stateless vessels.

### 2.2 Territorial sea

Generally a coastal state’s zones of maritime jurisdiction are elective: they do not exist unless declared by the coastal state.<sup>10</sup> International

<sup>8</sup> See especially Chapter 5.

<sup>9</sup> 1833 UNTS 3, entered into force 16 November 1994, 157 parties at 16 July 2008, [www.un.org/Depts/los/reference\\_files/status2008.pdf](http://www.un.org/Depts/los/reference_files/status2008.pdf).

<sup>10</sup> A state has, however, inherent rights over seabed and subsoil resources of its continental shelf: *North Sea Continental Shelf Cases*, [1969] ICJ Rep. 3 at 22; O’Connell, ch. 13; Churchill and Lowe, ch. 8; cf. [1950] II YBILC 67 at 87–113.

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law, however, imposes at least a 3-n.m. territorial sea upon coastal states.<sup>11</sup> The permissible maximum breadth of the territorial sea is uncertain as a matter of customary law. Arguably, such a variety of claims existed prior to UNCLOS that there was no single historically established rule, although such claims seldom extended beyond 12 n.m.<sup>12</sup> Under UNCLOS, a state's territorial sea may extend up to 12 n.m. from its 'baselines' (Art. 3). In theory, as UNCLOS is not a universal convention, non-party states could assert various lesser limits and demand their reciprocal acknowledgement. Although a few states briefly attempted this, experience suggests that state practice has gravitated towards the treaty rule.<sup>13</sup>

Under UNCLOS, a coastal state's sovereignty extends throughout its territorial sea, although its exercise is subject to the Convention and 'other rules of international law'.<sup>14</sup> The main constraint upon state enforcement jurisdiction within territorial waters is the 'innocent passage' immunity accorded merchant ships in UNCLOS Articles 17–28. Under UNCLOS, a coastal state can enforce its criminal law against ships bound for, or leaving, its internal waters. Article 27 specifies that a coastal state generally 'should not' exercise criminal enforcement jurisdiction over foreign flag vessels (and those aboard) simply passing through territorial waters. Exceptions include crimes committed aboard affecting the coastal state, the master requesting assistance or suppressing drug trafficking. However, the phrase 'should not' is 'hortatory only' and does not clearly prohibit criminal law enforcement in other cases.<sup>15</sup> Churchill and Lowe explain the provision as codifying usage. Although all states ordinarily restricted their exercise of enforcement jurisdiction within territorial waters to the circumstances described above, views differed on that practice's significance. Some states believed their enforcement jurisdiction was restricted to those subject matters, others, that their jurisdiction was plenary, but that they restrained its exercise out of comity. The latter

<sup>11</sup> *Anglo-Norwegian Fisheries Case*, [1951] ICJ Rep. 116 at 160, per Judge McNair (Dissenting Opinion); Churchill and Lowe, pp. 80–1.

<sup>12</sup> Byers, *Custom, Power and the Power of Rules*, pp. 114–18; Churchill and Lowe, pp. 77–81.

<sup>13</sup> Byers, *Custom, Power and the Power of Rules*, pp. 104–5; cf. US Department of Defense, *Maritime Claims Reference Manual* (June 2005), [www.dtic.mil/whs/directives/corres/html/20051m.htm](http://www.dtic.mil/whs/directives/corres/html/20051m.htm).

<sup>14</sup> UNCLOS, Article 2(3).

<sup>15</sup> I. Shearer, 'Problems of jurisdiction and law enforcement against delinquent vessels' (1986) 35 ICLQ 320 at 327; contra Meyers, pp. 77–80; cf. Evans, 'Law of the sea', pp. 630–1, 633.