

Authorizations for maritime law enforcement operations

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Abstract

Although there are areas of uncertainty and overlap, authorizations for maritime law enforcement operations are beholden to a different regime from that which governs the conduct of armed conflict at sea. This article seeks to briefly describe five regularly employed authorizations for maritime law enforcement operations at sea: flag State consent, agreed pre-authorization, coastal State jurisdiction, UN Security Council resolutions, and the right of visit.

Keywords: maritime law enforcement, law of the sea, jurisdiction at sea.

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Introduction

In March 2016, the Argentinian Coast Guard fired upon a Chinese fishing vessel allegedly engaged in illegal fishing within the Argentinian Exclusive Economic Zone (EEZ). The incident led to the use of direct fire to halt the delinquent

vessel, which ultimately sank.¹ That the use of force in maritime law enforcement (MLE) operations results in the sinking of a vessel is unusual; that this level of force is routinely employed in MLE, however, is not. And whilst the ultimate outcome – firing at or into a delinquent vessel – is an act that straddles both MLE and naval warfighting, the legal bases that govern these two maritime operations regimes are radically different. This article seeks to outline the legal bases for MLE operations.

MLE comprises those actions – including investigation and prosecution – taken to enforce all applicable laws regarding conduct or consequences on, under and over international waters, and in waters subject to the jurisdiction of the State carrying out those enforcement activities. MLE therefore presupposes authorizations for law enforcement agents and authorized vessels² to deal with other vessels (and the people and cargoes within) – including, in many situations, foreign vessels and nationals – by taking action at sea (and subsequently, ashore) in order to enforce the relevant laws. MLE may be employed either where the breach of law is committed at sea, or where the reach of the State extends to apprehension at sea for an offence committed “ashore” or elsewhere. An example of the former situation is apprehension of a vessel in a coastal State’s EEZ for illegal fishing,³ an example of the latter is a situation where the relevant States have cross-vested jurisdiction to each other to halt a vessel suspected of carrying a person subject to an arrest warrant for a terrorist act committed ashore.⁴ The

- 1 See “Argentina Coast Guard Sinks Chinese Fishing Vessel Illegally in South Atlantic”, *ABC News*, 16 March 2016, available at: www.abc.net.au/news/2016-03-16/argentina-coast-guard-sinks-chinese-fishing-vessel/7250208 (all internet references were accessed in June 2017); “Argentina Coast Guard Sinks Chinese Fishing Boat”, *The Diplomat*, 16 March 2016, available at: <http://thediplomat.com/2016/03/argentina-coast-guard-sinks-chinese-fishing-boat/>.
- 2 A general definition of “authorized vessels” is those official State vessels, including warships, coast guard cutters, marine police vessels and other specifically identified State vessels on non-commercial service, which are authorized to engage in MLE operations on behalf of their State. The 1982 UN Convention on the Law of the Sea (UNCLOS) contains no single definition, but the category is iteratively definable by tracing the definitional thread evident in (*inter alia*) Articles 29 (definition of warship), 31 (responsibility for damage caused by a warship or other government ship on non-commercial service), 32 (immunities), 95–96 (immunities of warships and ships on government non-commercial service on the high seas), 107 (ships entitled to seize other vessels on account of piracy), 110 (right of visit), 111 (hot pursuit), 224 (enforcement with respect to Part XII, which deals with protection and preservation of the marine environment), 236 (sovereign immunity in the context of Part XII) and 298(b) (disputes concerning military and law enforcement activities).
- 3 See, for example, UNCLOS, Art. 73. A further illustration is provided by a recent series of incidents involving the Republic of Korea and the Peoples Republic of China: “Appalling: Shots on Chinese Fishing Vessels by R. O. Korea Coast Guards”, *South China Sea Bulletin*, Vol. 4, No. 11, 2016, available at: [http://dspace.xmu.edu.cn/bitstream/handle/2288/127434/South%20China%20Sea%20Bulletin%20Vol.%204.%20No.11%EF%BC%88November%201,%202016\).pdf?sequence=1&isAllowed=y](http://dspace.xmu.edu.cn/bitstream/handle/2288/127434/South%20China%20Sea%20Bulletin%20Vol.%204.%20No.11%EF%BC%88November%201,%202016).pdf?sequence=1&isAllowed=y); “Chinese Fishing Boats Sink a Korean Coast Guard Vessel”, *Korea Herald*, 9 October 2016, available at: www.koreaherald.com/view.php?ud=20161009000240; Gabriel Samuels, “China ‘Very Dissatisfied’ after South Korean Coast Guard Fires Machine Guns at Chinese Fishing Boats”, *The Independent*, 5 November 2016, available at: www.independent.co.uk/news/world/asia/china-south-korea-fire-fishing-boats-response-a7398186.html.
- 4 For example, in accordance with the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Protocol), Article 4(7), adding a new Article 3ter to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention): “Article 3ter: Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally transports another person on board a ship

purpose of this article is to focus upon this legal framework – applicable to “routine” MLE – in order to provide a sketch of what lays on the “other” side of the dividing line between MLE and international humanitarian law (IHL) at sea (the law of naval warfare), to the extent that this line is capable of detailed delimitation. To this end, the analysis deals quite selectively and in brief with only one component of the legal framework applicable to MLE: the main legal bases for MLE action.

MLE – as with other forms of policing – is a highly interventionist process. Basic MLE authorizations generally include powers to undertake actions such as signalling, stopping and boarding suspect vessels; searching suspect vessels, and the people and cargo in such vessels; detaining or arresting people in suspect vessels, and/or the suspect vessel itself; seizing items on suspect vessels; directing or steaming suspect vessels, and the people and cargo in those vessels, to a coastal State port or similar place for investigation; the conduct of that investigation; and subsequent prosecution or imposition of other forms of administrative action or sanction.⁵ MLE therefore requires that a number of preconditions be in place before conducting operations. Where the focus of MLE is upon interference with foreign vessels for law enforcement purposes, these preconditions include that: (a) the coastal State has enacted a law that applies to the conduct which the MLE agent is using as the basis for their actions in relation to a particular suspect vessel;⁶ (b) the coastal State has authority to regulate that conduct in the maritime zone where the suspect vessel is located;⁷ (c) the MLE agent is

knowing that the person has committed an act that constitutes an offence set forth in article 3, 3bis or 3quater or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.’ See International Maritime Organisation, *Adoption of the Final Act and any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, LEG/CONF.15/21, 1 November 2005, available at: www.unodc.org/tldb/pdf/Protocol_2005_Convention_Maritime_navigation.pdf.”

- 5 See, for example, UNCLOS, Arts 73, 110, 111. These authorizations and powers are also often specifically enumerated in national legislation domesticating UNCLOS and other associated international law – for example, section 50 of Australia’s 2013 Maritime Powers Act (Commonwealth, available at: www.legislation.gov.au/Details/C2013A00015) specifically details a non-exhaustive list of “maritime powers” for MLE agents:

Maritime powers may be exercised only in accordance with Part 2 and include the following:

- (a) boarding and entry powers;
- (b) information gathering powers;
- (c) search powers;
- (d) powers to seize and retain things;
- (e) powers to detain vessels and aircraft;
- (f) powers to place, detain, move and arrest persons;
- (g) the power to require persons to cease conduct that contravenes Australian law.

- 6 See, for example, Rob McLaughlin, “The Continuing Conundrum of the Somali Territorial Sea and Exclusive Economic Zone”, *International Journal of Marine and Coastal Law* Vol. 30, No. 2, 2015.

- 7 For example, in *MV Saiga (No. 2)*, the International Tribunal for the Law of the Sea (ITLOS) determined (*inter alia*) that Guinea’s application of “customs” laws in its EEZ, but beyond the contiguous zone (in which such customs law enforcement is permissible), was invalid, and thus that the hot pursuit, arrest and prosecution that followed were also invalid in accordance with UNCLOS. ITLOS, *The M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, paras 110–152, available at: www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf. Another example is found in the *Arctic Sunrise* arbitration, where the Permanent Court of Arbitration

authorized under their coastal State's law to take MLE action against that suspect vessel, in relation to that suspected breach, in that maritime zone;⁸ and (d) there is no legal limitation (for example, a constitutional limitation of jurisdiction to a narrowly defined concept of "territory") to the application of the coastal State's law to the vessel and people that are the target of the coastal State's MLE action.⁹

It is therefore fundamental to recognize from the outset that MLE is at one level simply a routine peacetime policing operation (or, as is often referred to in the maritime domain, a "constabulary" operation) in that the determination of jurisdiction and authority is a necessary first inquiry. In other words, there is no role for IHL in routine MLE. That said, as other contributions in this issue of the *Review* well illustrate, there are multiple points at the fringes of MLE where IHL can and does come into play, and some of these will be noted in the final section of this article.

Outline

As noted above, limitations of space and reader tolerance, and the availability of excellent scholarship on the myriad aspects of MLE,¹⁰ dictate that the aim of this article is restricted to a brief, selective and necessarily summative description of the threshold matter of possible legal bases for MLE action. There are, consequently, two limitations on the scope of this article that must be clearly acknowledged up front.

(PCA) dealt with the validity of Russian MLE action taken by reference to a decreed 3-nm warning zone around the Prirazlomnaya platform, and the validity or otherwise of this action when assessed against the UNCLOS Article 60(5) authorization for 500-metre "safety zones" around such installations. PCA, *The Arctic Sunrise (Netherlands v. Russia)*, Case No. 2014-02, Merits Award, 14 August 2015, paras 202–220, available at: www.pcacases.com/web/sendAttach/1438.

8 See for example, R. McLaughlin, above note 6, pp. 312–314.

9 Such a situation might arise where, for example, a seizure for piracy is challenged on the jurisdictional basis that the statute creating the offence of piracy is in some way generally limited by a jurisdictional reference to the statute applying in "the territory" of the State – see, for example, High Court of Kenya, *R v. Mohamud Mohamed Hashi and Eight Others*, Misc. Appl. 434, 2009; later overturned in Court of Appeal of Kenya, *AG of Kenya v. Mohamud Mohamed Hashi and Eight Others*, Civil Appeal 113, 2011, both cases available at: www.unicri.it/topics/piracy/database/.

10 See, for example: D. P. O'Connell, *The International Law of the Sea*, ed. Ivan Shearer, Vol. 2, Clarendon Press, Oxford, 1982, Ch. 28; Craig Allen, "Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives", *International Law Studies*, Vol. 81, 2006; Stuart Kaye, "Threats from the Global Commons: Problems of Jurisdiction and Enforcement", *Melbourne Journal of International Law*, Vol. 8, No. 1, 2007. Excellent monographs relating to MLE include Cameron Moore, *ADF on the Beat: A Legal Analysis of Offshore Enforcement by the Australian Defence Force*, Ocean Publications, Wollongong, 2004; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, Cambridge, 2009; Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford University Press, Oxford, 2011; James Kraska and Raul Pedrozo, *International Maritime Security Law*, Martinus Nijhof, Leiden, 2013; Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, Hart, Oxford, 2014. National doctrine publications dealing specifically with MLE include Australian Defence Force, *Australian Maritime Jurisdiction*, ADFP 06.1.2, 28 June 2010, available at: www.defence.gov.au/adfmc/Documents/DoctrineLibrary/ADFP/ADFP%2006.1.2.pdf; US Navy/US Marine Corps/US Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, July 20017 (US Commander's Handbook), Ch. 3, available at: http://usnwc.libguides.com/ld.php?content_id=2998109; German Navy, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*, 2002, Part I, available at: http://usnwc.libguides.com/ld.php?content_id=2998104.

The first is that there are, of course, several other vital matters that would need to be addressed in any comprehensive elaboration of the MLE legal authorities framework: self-defence and use of lethal force in MLE, as distinguished from use of force for MLE purposes outside immediate self-defence;¹¹ the requirement for clear elucidation of rights, powers and obligations for MLE agents in national laws;¹² the appropriate domestication of offences in national law;¹³ the right of hot pursuit (a key MLE power);¹⁴ the interaction of law enforcement and human rights at

- 11 See, for example, ITLOS, *Saiga*, above note 7, para. 156: “It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, the appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered”; Australian Defence Force, above note 10, para 8.32:

The requirements for firing at or into vessels may be considered to be as follows:

- a. The action must be a last resort. It must be absolutely necessary evidenced by patiently exhausting all less forceful means available, including warning shots, unless an urgent threat to life demands otherwise.
- b. The action must follow an explicit warning that shots are to be fired into the vessel.
- c. That all efforts are made to ensure that life is not endangered. Any appreciable risk to life would render the use of direct fire unlawful. A death would not necessarily render the action unlawful in itself provided that the risk of death from direct fire was extremely unlikely and mitigated against.

See, in general, Ivan Shearer, “Problems of Jurisdiction and Law Enforcement against Delinquent Vessels”, *International and Comparative Law Quarterly*, Vol. 35, No. 2, 1986.

- 12 See, for example, the US Drug Trafficking Vessel Interdiction Act (DTVIA), which was specifically designed to facilitate prosecution of those involved in the use of semi-submersibles to traffic drugs. Boarding such semi-submersibles in order to secure evidence was extremely dangerous for US MLE agents, as those in control of the submersibles, upon interdiction, scuttled the vessels. The DTVIA – leveraging the apparent vessel without nationality status of these submersibles – created the offence of operating such vessels, thus empowering US MLE agents to act against this particular drug trafficking *modus operandi* with reduced risk to life. See US Code, Title 18, § 2285(a); Brian Wilson, “Submersibles and Transnational Criminal Organisations”, *Ocean and Coastal Law Journal*, Vol. 17, 2011; J. Kraska and R. Pedrozo, above note 10, pp. 590–598.
- 13 For example, the challenge faced by a number of States during counter-piracy operations off the coast of Somalia, where apprehended pirates were not able to be prosecuted in the apprehending jurisdiction because of an absence of, or incomplete implementation of, the offence of piracy within that State’s law. See UNSC Res. 1819, 2010, op. para. 2: “[The Security Council c]alls on all States, including States in the region, to criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law.” See, generally, Tullio Treves, “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia” *European Journal of International Law*, Vol. 20, No. 2, 2009; Douglas Guilfoyle, “Counter-Piracy Law Enforcement and Human Rights”, *International and Comparative Law Quarterly*, Vol. 59, No. 1, 2010; Ilja van Hespem, “Developing the Concept of Maritime Piracy: A Comparative Legal Analysis of International Law and Domestic Criminal Legislation”, *International Journal of Marine and Coastal Law*, Vol. 31, No. 2, 2016. Some States, for example, had legislated an offence of piracy without the attached universal jurisdiction, thus allowing prosecution of pirates in that State’s jurisdiction only where there was a nexus to that State, such as the flag of the pirate vessel or pirated vessel, or where a pirate or victim held that State’s nationality. In such situations, whilst that State’s MLE agents (in this case, most often navies) could board pirate vessels and detain pirates, they were ultimately required either to release them or to transfer them to another jurisdiction which had the appropriate offence of universal jurisdiction in place within its domestic law.
- 14 UNCLOS, Art. 111, “Right of Hot Pursuit”. For an excellent study of the right of hot pursuit prior to its fuller elaboration in UNCLOS, see Nicholas Poulantzas, *The Right of Hot Pursuit in International Law*, Sijthoff, Leiden, 1969.

sea;¹⁵ and the series of cases and incidents that have defined the limits of use of force in MLE,¹⁶ are but some examples.

The second limitation is that although MLE is fundamentally a policing activity, the sources of authority for MLE operations are significantly wider than those traditionally understood from, and grounded in, criminal or administrative law and offences. Indeed, one of the complicating factors affecting MLE much more pervasively than policing ashore is this venue-enabled myriad of sources of legal authority – noting, of course, that implementation of an international MLE authority still requires appropriate incorporation in national law in order to appropriately empower a State’s MLE agents.

With these two limitations in mind, the article will therefore progress in line with the following structure. First, the final section of this introductory part will provide definitions or descriptions of a number of key terms and concepts, as these are a necessary adjunct to any elaboration of the authorizations for MLE operations. Following this, the second part of the article will outline a series of legal authorizations for MLE, commencing with the “default rule” of flag State consent, and then progressing through four of the most significant exceptions to this rule – exceptions that are themselves independent bases for MLE operations, but which do not hinge around the generally applicable requirement for case-by-case flag State consent. These independent bases are: pre-existing approvals; coastal State jurisdiction; certain United Nations (UN) Security Council resolutions; and the right of visit. The third part of the article will briefly outline a number of challenging issues regarding the interface between MLE and IHL at sea that repay further consideration.

Some key terms and concepts

Prior to embarking upon any substantive analysis of the authorizations for MLE operations, it is important to define a number of key terms and concepts. The first term that requires brief definition is “maritime zone”. For the purposes of

15 See, for example, Brian Wilson, “Human Rights and Maritime Law Enforcement”, *Stanford Journal of International Law*, Vol. 52, 2016; Seunghwan Kim, “Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context”, *Leiden Journal of International Law*, Vol. 30, No. 1, 2017.

16 For example, the key “triptych” of cases and incidents comprised by *I’m Alone*, *Red Crusader* and *MV Saiga*, along with more recent cases such as *Guyana/Suriname*, *Arctic Sunrise*, and the *South China Sea Arbitration (Philippines v. PRC)*. See *SS I’m Alone (Canada v. United States)*, 3 RIAA 1609, 1935; “Claim of the British Ship ‘I’m Alone’ v. United States”, *American Journal of International Law*, Vol. 29, No. 2, 1935; Gerald Fitzmaurice, “The Case of the *I’m Alone*” *British Yearbook of International Law*, Vol. 17, 1936; *Danish Memorial*, 15 November 1961, UK National Archives File TS 58/577; *Danish Memorial*, 12 January 1962, UK National Archives File TS 58/577; *Memorial Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland – Anglo-Danish Commission of Inquiry: Case Concerning Incidents Affecting the British Trawler “Red Crusader”*, UK National Archives File TS 58/577; *Investigation of Certain Incidents Affecting the British trawler Red Crusader: Report of 23 March 1962 of the Commission of Enquiry Established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961*, 3 RIAA 521, 23 March 1962, pp. 521–539; D. H. N. Johnson, “Notes: Law of the Sea”, *International and Comparative Law Quarterly*, Vol. 10, No. 3, 1961.

this article, “maritime zone” refers to an area of oceanspace that is subject to one or more of the regimes set out in the 1982 UN Convention on the Law of the Sea (UNCLOS), or afforded by customary international law.¹⁷ It is vital to recognize at the outset that the rights and obligations particular to, and as balanced between, the coastal State on the one hand, and flag States on the other, differ between maritime zones.

The second term it is necessary to define is “international waters”. Whilst this term is not employed in UNCLOS, it provides a useful shorthand term encapsulating all areas of oceanspace not amenable to claims of full sovereignty. Internal waters, territorial seas and archipelagic waters are all “national” or “sovereign” waters in that – when claimed – the coastal State “owns” these waters and exercises full sovereignty over them, noting of course that there are certain international caveats that also apply (such as the right of innocent passage). Seaward of all territorial sea outer limits, however, coastal States may claim certain sovereign rights – such as fiscal, immigration, sanitary and customs (FISC) enforcement rights in the contiguous zone,¹⁸ resource-related rights in the EEZ and the continental shelf, and the right to take action against piracy on the high seas¹⁹ – but not sovereignty over the waters themselves. These areas outside “national waters” – that is, contiguous zones, EEZs and the high seas – can thus be conveniently referred to collectively as international waters.²⁰

Next, for the purposes of this article, “coastal State” is defined as a State which has a sea coast and which holds jurisdiction in those maritime zones over which it has sovereignty or sovereign rights (as the case may be), and which it has validly claimed/declared adjacent to its coast. The specific scope and nature of the sovereignty exercisable in each coastal State’s maritime zones differs in accordance with the type of zone and the specific issue in question.²¹ Additionally, in all maritime zones apart from internal waters, passage rights for vessels from other States exist as part of the international legal regime governing that zone. These rights extend from innocent passage in territorial seas and archipelagic waters (and certain types of straits²²), through a range of transit

17 See, for example, D. P. O’Connell, “The Juridical Nature of the Territorial Sea”, *British Yearbook of International Law*, Vol. 45, 1971, on the emergence and customary international law status of the territorial sea. See also International Court of Justice, *North Sea Continental Shelf Cases*, Merits Judgment, 20 February 1969, *ICJ Reports 1969*, pp. 70–78 – the essence of the judgment, in relation to this point, is that whilst the existence of the concept of the continental shelf was considered to have by then become part of customary international law, certain methods of delimitation between competing continental shelf claims had not.

18 UNCLOS, Art. 33(1).

19 Note that whilst the provisions on piracy apply – on their face – to the high seas (being that oceanspace outside all EEZ claims), UNCLOS Article 58 operates to import these high seas authorizations into all parts of EEZs seaward of the outer limits of territorial seas.

20 Some national doctrine publications employ this shorthand term – for example, US Commander’s Handbook, above note 10, § 1.6.

21 See, *inter alia*, UNCLOS, Arts 2(1) (territorial sea), 21 (laws and regulations relating to innocent passage), 24 (duties), 25 (rights of protection), 27–28 (criminal and civil jurisdiction), 33 (contiguous zone) and 55 (EEZ).

22 See UNCLOS, Arts 17–21, 45, 52

regimes for straits and archipelagos, to freedom of navigation in other maritime zones.

Finally, the concept of “flag State” is critical when analyzing MLE. The term “flag State” denotes the State of registration/nationality of a vessel. In accordance with UNCLOS (particularly Articles 91–94²³) and customary international law, all ships “shall sail under the flag of one State only”. Land-locked States may also be flag States.²⁴ The designation of a “flag” – the nationality of the vessel – serves a number of MLE-related purposes. First, it delineates which State has primary responsibility for implementing the duties set out in UNCLOS Article 94 and in other applicable international law, including regulating the conduct of the vessel and setting the requisite conditions for compliance with the wide range of international rights and obligations that pertain to vessels. In its *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, the International Tribunal for the Law of the Sea (ITLOS) observed that:

While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations.²⁵

The second purpose fulfilled by the designation of a flag State is that this nationality provides the primary jurisdiction applicable to the vessel; it is generally the law of the flag State that applies to regulating, investigating and prosecuting conduct within and (in many cases) by that vessel. A third purpose of the designation of a flag State is to provide an appropriate jurisdiction to which MLE requests regarding the vessel may be directed – for example, in certain situations, a request by a foreign warship to be permitted to board the vessel (often referred to as flag State consent²⁶ – see below). There is, however, one important caveat to note with respect to the UNCLOS Article 91 requirement that there must “exist a genuine link between the State and the ship” in order for the grant of nationality to be effective. This phrase has been interpreted, in the *MV Saiga (No. 2)* case, as follows:

23 UNCLOS also contains other, context-specific references to the duties and enforcement powers of flag States – for example, Article 217 in relation to pollution.

24 UNCLOS, Arts 69, 90.

25 ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, para. 138.

26 See, for example, European Court of Human Rights (ECtHR), *Medvedyev and Others V. France*, Application No. 3394/03, Judgment, 29 March 2010, *ECHR 2010-III*, available at: www.echr.coe.int/Documents/Reports_Recueil_2010-III.pdf. Para. 10 states:

In a diplomatic note dated 7 June 2002, in response to a request from the French embassy in Phnom Penh, the Cambodian Minister for Foreign Affairs and International Cooperation gave his government’s agreement for the French authorities to take action, in the following terms:

“The Ministry of Foreign Affairs and International Cooperation presents its compliments to the French embassy in Phnom Penh and, referring to its note no. 507/2002 dated 7 June 2002, has the honour formally to confirm that the royal government of Cambodia authorises the French authorities to intercept, inspect and take legal action against the ship Winner, flying the Cambodian flag XUDJ3, belonging to ‘Sherlock Marine’ in the Marshall Islands.”

The need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.²⁷

This interpretation was reiterated in the 2014 case of the *MV Virginia G*, where ITLOS again noted that the requirement for “a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships”.²⁸

Potential legal bases for exercising maritime law enforcement authorities

There are a range of authorities that allow MLE agents to stop, board and search a suspect vessel, and – in many but not all cases – to take some follow-on action depending upon a valid grant of jurisdiction. However, these authorities are strictly limited to their purpose, and must be correctly executed, for whether they are based in specific flag State consent or are a departure from the general rule that exclusive jurisdiction is vested in the flag State of a vessel legally entitled to fly the flag of that State, they are fundamentally bound by the limitations inherent and unique to each of these legal bases. This part of the article will first outline this general rule, and then discuss a series of four “exceptions” to this general rule, which provide authorization for MLE operations in the absence of case-by-case flag State authorization.

The “default rule”: Flag State consent

The primary jurisdiction over a vessel resides with its flag State. This means that the flag State can give permission to the MLE agents of another State to board a vessel claiming that flag State’s nationality.²⁹ States may also contract between them to set

27 ITLOS, *The MV Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Admissibility and Merits, Judgment, 1999, para. 83.

28 ITLOS, *MV Virginia G (Panama/Guinea-Bissau)*, Jurisdiction, Admissibility and Merits, Judgment, 14 April 2014, para. 110.

29 See, for example, the new Article 8bis(5) introduced by the SUA Protocol of 2005 (set out in Article 8(2) of that Protocol), which clearly reinforces the requirement for flag State consent. See, generally, Robert Reuland, “Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction” *Vanderbilt Journal of Transnational Law*, Vol. 22, 1989; Rosemary Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, Martinus Nijhof, Leiden, 2004, Chs 1, 3. The issue of flag State consent to boarding was to some extent challenged in the early days of the Proliferation Security Initiative, when certain US officials appeared to float the idea that international law could accept non-consented boardings where the issue at stake was WMD – see, for example, John Bolton, “‘Legitimacy’ in International Affairs: The American Perspective in Theory and Operation”, Remarks to the Federalist Society, Washington, DC, 13 November 2003, available at: <https://2001-2009.state.gov/t/us/rm/26143.htm>. Bolton remarked that “[w]here there are gaps or ambiguities in our authorities, we may consider seeking additional sources for such authority, as circumstances dictate. What we do not believe, however, is that only the Security Council can grant the

conditions as to the nature and content of requests, and the timelines of responses.³⁰ In assessing whether any exception to this general rule exists, it is vital that the precise nature of the legal obligation or authorization is established. At this point it is important to remember, however, that these arrangements relate to peacetime MLE operations; under the law of naval warfare, there is no requirement for belligerents to seek flag State consent when employing those law of armed conflict means and methods which authorize stop, board and search powers against neutral vessels, such as blockade and visit and search.³¹

An example is illustrative of this default rule. Whilst the international community has undertaken – in accordance with UNCLOS Article 108, and as further refined in Article 17 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN Drug Convention) – to “co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas”, this authorization does not obviate the requirement to seek flag State consent prior to conducting a counter-narcotics boarding in international waters, unless separate arrangements for such consent have been made between the relevant States (see below).³²

The facts in the European Court of Human Rights (ECtHR) case of *Rigopoulos v. Spain* (1999) offer a case study of how a situation in which flag State consent is required might progress. On 23 January 1995, in accordance with Panamanian consent combined with Article 17(3) and (4) of the UN Drug Convention, the *Archangelos*, a vessel flying the Panamanian flag and suspected to be trafficking cocaine, was stopped on the high seas (approximately 3,000 nautical miles from the Canary Islands). A team from the Spanish Customs vessel *Petrel I* boarded the *Archangelos*, and there was an “exchange of fire with several members of the crew who had barricaded themselves into the engine room”. Ultimately, the vessel was brought under Spanish control and subjected to Spanish jurisdiction. Whilst the legal reason for the MLE operation was enforcement of a general authorization to cooperate in the suppression of drug trafficking by sea, in accordance with both UNCLOS and the UN Drug Convention, the operation would nevertheless not have been possible without the initial consent of the flag State – Panama.³³

authority we need, and that may be the real source of the criticism we face.” Also see, generally, Michael Byers, “Policing the High Seas: The Proliferation Security Initiative”, *American Journal of International Law*, Vol. 98, 2004, p. 527 *inter alia*.

30 For example, the Agreement between the Government of the United States of America and the Government of the Republic of Croatia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials, 2005 (US–Croatia Shipboarding Agreement), Art. 4(3)–(4), available at: www.state.gov/t/isn/trty/47086.htm. Article 4(4) (b), for instance, states that “[t]he requested Party shall answer through its Competent Authority requests made for the verification of nationality and authorization to board and search within four (4) hours of the receipt of such written requests”.

31 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (San Remo Manual), Rule 118.

32 See generally, Rob McLaughlin, “Towards a More Effective Counter-Drugs Regime in the Indian Ocean”, *Journal of the Indian Ocean Region*, Vol. 12, No. 1, 2016.

33 ECtHR, *Rigopoulos v. Spain*, Appl. No. 37388/97, Decision, 12 January 1999, *ECHR 1999-II*, p. 439, available at: www.echr.coe.int/Documents/Reports_Recueil_1999-II.pdf.

Where flag State consent is sought to board a vessel, the requesting State is generally required to detail the reasons for the boarding request, and what “follow-on” actions it may wish to take. Where the flag State does not give consent to the boarding (noting that silence, in the absence of a pre-existing agreement to any other effect, is interpreted as the absence of consent), the requesting State – in the absence of another legal basis – must desist. If, however, the flag State grants the request to board, it should ensure that understandings are in place with respect to issues such as responsibility or liability for damage to the vessel or cargo during any boarding or search, or injuries suffered during the boarding.³⁴ One recent recapitulation of the primacy of this “default rule” is provided by Article 8*bis* of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its Protocol of 2005, which clearly reinforces the requirement for flag State consent, whilst simultaneously setting out some of the “safeguards” that apply to immunize the boarding State from liability under flag State law where that boarding State has acted within the limits of the consent.³⁵

Some States exercise the right to board a vessel flagged by another State based on consent given by the master of the vessel, who grants this authority on behalf of the flag State. However, not every flag State grants masters of vessels flying their flag this authority.³⁶ Another claimed, and by some States routinely exercised, right is the “Approach and Assist Visit” (AAV),³⁷ a non-MLE-focused opportunity for information exchange between a vessel master and a boarding team, where the boarding team’s presence on board the vessel is at the consent/

34 See, for example, US–Croatia Shipboarding Agreement, Art. 13, “Claims”:

1. Injury or Loss of Life. Any claim for injury to or loss of life of a Security Force Official of a Party while carrying out operations arising from this Agreement shall normally be resolved in accordance with the laws of that Party.

2. Other Claims. Any other claim submitted for damage, harm, injury, death or loss, asserted to have resulted from an operation carried out by a Party under this Agreement may be submitted to the boarding Party or the flag State Party, and the claim shall be processed in accordance with the domestic law of the Party in which the claim is submitted and in a manner consistent with international law.

3. Consultation. If any damage, harm, injury, death or loss is suffered as a result of any action asserted to have been taken by the Security Force Officials of one Party in contravention of this Agreement, including action taken on unfounded suspicions, or if any improper, disproportionate or unreasonable action is asserted to have been taken by a Party, the Parties shall, without prejudice to any other legal recourse which may be available, consult at the request of either Party with a view to resolving the matter and deciding any questions relating to compensation or payment.

35 SUA Protocol, Art. 8.

36 E. Papastavridis, above note 10, pp. 63–66. See also US Commander’s Handbook, above note 10, § 3.11.2.5.2: “A consensual boarding is conducted at the invitation of the master ... of a vessel that is not otherwise subject to the jurisdiction of the boarding officer. ... The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority. A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction per se. The scope and authority of a consensual boarding may be subject to conditions imposed by the master and may be terminated by the master at his discretion.”

37 See, for example, “HMS Monmouth Conducts Maritime Approach and Assist Operations”, *Combined Maritime Forces*, 24 March 2013, available at: <https://combinedmaritimeforces.com/2013/03/24/hms-monmouth-conducts-maritime-approach-and-assist-operations/>.

invitation of the master, not the flag State. However, where the ultimate goal of the boarding State is search, potential seizure and/or prosecution, it is accepted best practice – as identified in treaties such as the SUA Convention – to request permission to board from the flag State rather than the master. This is not least because the absence of appropriate flag State consent must (except in those exceptional situations noted below) bring into question the authority and jurisdiction of the boarding State to take any action, and may well open the boarding State (and its MLE agents, should they come within flag State jurisdiction) to legal consequences.

Exception 1: Treaty/agreement-based pre-existing boarding approvals

The pre-existing approvals “exception” is, in fact, merely a function of flag State consent rather than an international law caveat upon flag State consent.³⁸ A flag State may pre-authorize MLE agents of another State to board a vessel with the flag State’s nationality without having to first receive permission. However, such approval is often limited to a specific set of situations, as opposed to being a general grant of approval in all situations. For example, State A and State B may agree, via a treaty or other legal instrument, that they can each halt, board and search the other State’s vessels in international waters, where there is a reasonable suspicion that the vessel is trafficking illicit drugs³⁹ or illicit weapons of mass destruction (WMD) materials.⁴⁰ The agreement may specify, for example, that this can be done without seeking flag State consent. Alternatively, the agreement may specify that a request for flag State consent must still be made, but that if no response is received after a set time limit (for example, four hours), then flag State consent is deemed to have been granted. States may also

38 See, for example, the eleven ship-boarding agreements settled between the United States and a number of major flag States, available at: www.state.gov/t/isn/c27733.htm.

39 See Agreement Concerning Co-Operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, 2003 (UN Drug Convention), Art. 16, “Boarding”, available at: www.state.gov/s/l/2005/87198.htm. The Agreement states: “When law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party, located seaward of any State’s territorial sea, this Agreement constitutes the authorisation by the claimed flag State Party to board and search the suspect vessel, its cargo and question the persons found on board by such officials in order to determine if the vessel is engaged in illicit traffic, except where a Party has notified the Depositary that it will apply the provisions of paragraph 2 or 3 of this Article.”

40 For example, Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, 2004. Article X(6) of the Supplementary Arrangement (available at: www.state.gov/t/isn/trty/32859.htm), which remained unaltered by the Amendment to the Supplementary Arrangement, provides that “[i]f there is no response from the requested Party within two (2) hours of its receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel’s documents, questioning the persons on board, and searching the vessel to determine if it is engaged in illicit traffic”.

agree between themselves a more general grant of authorizations, as is the case with a 1998/99 agreement between the United States and Costa Rica:

V. Operations Seaward of the Territorial Sea

1. Whenever US law enforcement officials encounter a suspect vessel flying the Costa Rican flag or claiming to be registered in Costa Rica, located seaward of any State's territorial sea, this Agreement constitutes the authorization of the Government of the Republic of Costa Rica for the boarding and search of the suspect vessel and the persons found on board by such officials.

If evidence of illicit traffic is found, US law enforcement officials may detain the vessel and persons on board pending expeditious disposition instructions from the Government of the Republic of Costa Rica.⁴¹

The non-MLE-based issue of interdiction of vessels in national self-defence

Many States assert a right to board a foreign flagged vessel, without first gaining flag State consent, if this is necessary in national self-defence in accordance with UN Charter Article 51. A classic scenario is the “floating bomb”, where a hijacked vessel has been turned into an explosive device of significant destructive power, and is being steamed towards a concerned State's port. If the vessel is in the territorial sea, there is no question that it can be interdicted, as the vessel is clearly perpetrating a threat of force in violation of both the UN Charter and the regime of innocent passage.⁴² Indeed, there is a strong argument that a coastal State could interdict such a vessel in its contiguous zone (12–24 nm), given that the importation of the explosive device will inevitably constitute a customs offence.

The more difficult issue is whether the coastal State may interdict the threat vessel even further out to sea – for example, at 70 nm from the coast, in order to neutralize the threat vessel before it enters a heavily trafficked sea lane. There is no doubt that many States claim this right;⁴³ further, as a practical matter, the same processes and procedures utilized in MLE may in fact be used in such situations – halting and boarding, search and seizure, detention and arrest. However, such action will generally be focused upon disruption of the deleterious conduct rather than intended prosecution, and thus is not predominantly a MLE matter. Further, the applicable international legal regime is more properly that

41 Agreement between the United States of America and Costa Rica Signed at San Jose, 1 December 1998, and Amending Protocol Signed at San Jose, 2 July 1999, available at: www.state.gov/s/l/treaty/tias/120164.htm.

42 UNCLOS, Art. 19(2)(a); whether it also constitutes an “armed attack” is a more problematic question which is beholden to the wider query as to whether non-State actors may perpetrate armed attacks that enliven Article 51, and the associated issues of scale and gravity that often accompany that debate.

43 See, for example, the arrangements in Part IIIAAA of the Australian Defence Act of 1903 (Commonwealth) in relation to the “offshore area”, available at: www.legislation.gov.au/Details/C2016C00955.

concerned with national security, UN Charter Articles 2(4) and 51, and a range of associated rules of international law; this “exception” will therefore not be further discussed in this article.

Exception 2: A coastal State’s jurisdiction in relation to its own internal waters, archipelagic waters, territorial sea, contiguous zone, EEZ or continental shelf

As is well established in both UNCLOS⁴⁴ and customary international law, coastal States may assert and enforce their jurisdiction in those maritime zones in which they hold either sovereignty or sovereign rights. A coastal State’s jurisdiction is generally at its greatest closest to its baselines, attenuating to seaward as an authorized vessel enters more distant maritime zones. For example, in internal waters, a crime committed on a foreign (non-sovereign immune⁴⁵) vessel can be within the jurisdiction of the coastal State even if it is entirely self-contained within the vessel; the Coastal State may also seek to execute civil process against a vessel within internal waters on the basis of foreign claims.⁴⁶ However, in archipelagic waters or the territorial sea, the coastal State may only intervene – subject to additional caveats – where there is a breach of innocent passage, or where the consequences of the crime committed on the foreign vessel extend to that coastal/archipelagic State.⁴⁷ However, the coastal State may not generally seek to execute any civil proceedings against a foreign vessel (unless related to a vessel that has just left that coastal State’s internal waters).⁴⁸

Similarly, in the contiguous zone – a band of international waters extending no more than a further 12 nm seaward from the outer limit of the territorial sea (a claimable maritime zone that is in practice effective between 12 and 24 nm from that coastal State’s baselines) – that coastal State retains “prevent” and “punish” jurisdiction in relation to an outbound foreign vessel that has breached (in that coastal State’s national waters), or is suspected to be intending to breach (inbound into those national waters), a relevant coastal State fiscal, immigration, sanitary or customs (the FISC powers) law. Beyond 24 nm, however, these

44 UNCLOS, Arts 2 (internal waters, territorial sea and archipelagic waters), 8 (internal waters), 27–28 (criminal and civil jurisdiction), 33 (contiguous zone), 49 (archipelagic waters), 56 (EEZ), 77 (continental shelf), 78 (high seas).

45 Sovereign immune vessels are those vessels – warships and State vessels on non-commercial service, including coast guard, marine police and customs vessels – which are authorized to, and which are, carrying out the orders of their sovereign. See, *inter alia*, UNCLOS, Arts 29–32, 58, 95–96, 102, 107, 110–111.

46 This issue formed the backdrop to the unsuccessful bid by Ghanaian authorities to execute civil process on behalf of a US court order to the benefit of a private US commercial entity against the State of Argentina, by arresting the Argentine Navy sail training vessel *ARA Libertad* whilst it was alongside in a Ghanaian port. The dispute was submitted to ITLOS, which determined that the *Libertad* was a warship and thus entitled to sovereign immunity (UNCLOS, Art. 32), and that, consequently, such civil orders could not be executed against her, including in a third State’s internal waters. ITLOS, *ARA Libertad Case (Argentina v. Ghana)*, Case No. 20, Order, 15 December 2012, available at: www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Order_151212.pdf.

47 UNCLOS, Art. 27.

48 *Ibid.*, Art. 28.

powers cease (unless a valid hot pursuit has commenced).⁴⁹ Additionally, however, the contiguous zone is also a part of that coastal State's EEZ (extending out to 200 nm from the baselines) and thus MLE action against illegal fishing activity in the 12–24 nm band of oceanspace is also permitted – but this is because it is part of the EEZ, not because it is (simultaneously) the contiguous zone.

On the high seas – which for fisheries purposes comprise that oceanspace seaward of all EEZs – States enjoy a caveated freedom to fish,⁵⁰ and coastal State MLE vessels must not interfere with this activity unless empowered to do so under an international agreement that applies over such areas (such as where a specific regional or sub-regional fisheries arrangement is in force over the adjacent high seas).⁵¹ A coastal State may also take MLE action against a vessel or platform engaged in unlicensed drilling for oil/gas on the coastal State's continental shelf⁵² (as was the contested claim in the *Guyana/Suriname* arbitration⁵³), but may not do so beyond this zone, unless authorized in accordance with the specific arrangements flowing from Part XI of UNCLOS, as this is an area – known as “the Area” – subject to that specific regime.⁵⁴

In most cases, consequently, the existence of coastal State jurisdiction in relation to a given maritime zone negates the normal requirement to gain flag State consent prior to taking MLE action in relation to that vessel. This is because in these situations, the coastal State has an independent jurisdiction related to its own territory, maritime zones and rights. This standard does not apply to warships or government vessels operating on government non-commercial service, which remain at all times sovereign immune; the proper coastal State response to a delinquent sovereign immune vessel (for example, a warship fishing in the territorial sea and thus breaching innocent passage) is to “require” it to desist and depart.⁵⁵

49 *Ibid.*, Art. 33.

50 *Ibid.*, Arts 87(1)(e), 116–120.

51 See, for example, the jurisdiction exercisable beyond the outer limits of EEZs in accordance with the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, in force as of 11 December 2001, Art. 3, “Application”, available at: www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm. The Agreement states: “Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.”

52 Which may extend, in certain cases, to no more than 350 nm from that coastal State's baselines: see UNCLOS, Art. 76.

53 PCA, *Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between: Guyana and Suriname*, Award, 17 September 2007, available at: www.pcacases.com/web/sendAttach/902.

54 UNCLOS, Art. 1(1)(1): “‘Area’ means the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”

55 *Ibid.*, Art. 30.

Exception 3: Certain UN Security Council resolutions

UN Security Council resolutions are a further exception to the default rule requiring flag State consent for MLE operations that involve stopping and boarding a vessel in international waters. These resolutions can provide legal authority under international law to confront maritime challenges, and such regimes often complement land-based responses. Security Council resolutions addressing MLE-type interdiction operations are generally tethered to Chapter VII of the UN Charter, and decisions taken by the Security Council in accordance with this Chapter are binding on all UN member States. However, it is only when the Security Council employs certain specific indicators and phrases (see below) that the requirement for implementing MLE agents to seek flag State consent prior to halting, boarding, searching and potentially diverting a vessel is negated. Some of these indicators and phrases are universal, such as references to acting under Chapter VII. Others, however, are seemingly unique to mandatory Security Council MLE authorizations (see below).⁵⁶ Security Council Chapter VII practice includes a wide range of resolutions focusing on the maritime environment, including in relation to piracy, proliferation and migration.

There are essentially two types of mandatory, MLE-based regimes that the Security Council has employed when utilizing its Chapter VII powers: sanctions enforcement and the recent Mediterranean-focussed counter-people-smuggling UNSC Res. 2240 (2015). There is a further example – the authorization to extend international counter-piracy efforts into the Somali territorial sea⁵⁷ – but this authorization, albeit referencing Chapter VII, was fundamentally pre-conditioned on the consent of the accepted representative of the coastal State (the Transitional Federal Government). This type of Security Council Chapter VII MLE authorization is actually a product of coastal State consent, and thus will not be further examined under this “exception”.

Mandatory UN Security Council Chapter VII sanctions regimes

When the Security Council implements a mandatory sanctions regime, or authorizes some other form of interdiction regime, States may sometimes provide

56 See, generally, Rob McLaughlin, “United Nations Security Council Practice in relation to Use of Force in No-Fly Zones and Maritime Exclusion Zones”, in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford, 2015, Ch. 11.

57 UNSC Res. 1816, 2008, op. para. 7:

[The Security Council] decides that for a period of six months from the date of this resolution, States cooperating with the TFG [Transitional Federal Government] in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

- (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
- (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.

vessels and personnel trained in MLE to implement those sanctions. Such sanctions regimes are mandated at the required level via well-settled phrases and words.⁵⁸ The archetypal example is found in UNSC Res. 665 (1990), in relation to the sanctions regime imposed on Iraq following its invasion of Kuwait:

Having decided in resolution 661 (1990) to impose economic sanctions under Chapter VII of the Charter of the United Nations ...

1. [The Security Council c]alls upon those member states cooperating with [Kuwait] which are deploying maritime forces to the area to *use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping*, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions relating to such shipping laid down in resolution 661 [emphasis added] ...

The effect of such authorizations is, essentially, to empower those States contributing to the interdiction regime to engage in “international MLE”, employing those same tactics, techniques and procedures that MLE agents routinely use in dealing with delinquent vessels in national MLE. Importantly, this includes – in pure MLE situations such as sanctions enforcement in the absence of a concurrent armed conflict⁵⁹ – those same limitations on the use of force as apply when executing national MLE tasks. The approach of individual States to ensuring sufficient authorization in national law for their MLE agents to exercise international MLE authorizations varies; for some it is a customary, executive or prerogative matter of law, whilst others have legislated specifically for such situations. Australia, for example, has created a specially tailored “international decision authorization” trigger for the exercise of MLE-focused “maritime powers”, permitting employment of these statutorily enumerated MLE powers once this authorization is formally triggered in accordance with this domestic regime.⁶⁰ Section 8 of the 2013 Maritime Powers Act defines the “international decision” trigger thus: “*international decision* means a decision

58 Rob McLaughlin, “United Nations Mandated Naval Interdiction Operations in the Territorial Sea?”, *International and Comparative Law Quarterly*, Vol. 51, No. 2, 2002.

59 As was not the case with respect to Libya, where mandatory UN Security Council sanctions under UNSC Res. 1973 (2011) were implemented by NATO at the same time as NATO maritime forces were engaged in IHL-governed operations in relation to Libya – see, *inter alia*, Martin Fink, “UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector”, *Military Law and the Law of War Review*, Vol. 50, No. 1–2, 2011.

60 See, *inter alia*, the Maritime Powers Act of 2013 (Commonwealth), § 12:

When international agreements and decisions apply. An international agreement or international decision applies to a vessel, installation or aircraft at a particular time if:

- (a) the agreement or decision provides for the exercise of powers by Australia in relation to the vessel, installation or aircraft at that time; and
- (b) either:
 - (i) the agreement or decision is prescribed by the regulations; or
 - (ii) the Minister has approved the exercise of powers under the agreement or decision in relation to the vessel, installation or aircraft, and the approval has not lapsed.

made by: (a) the Security Council of the United Nations; or (b) another international body that, under international law, makes decisions that are binding on its members”.

At this point, it is important to note that not all Security Council Chapter VII mandatory sanctions regimes provide a full exception to the default rule concerning flag State consent. For example, the sanctions established by UNSC Res. 1718 (2006) subsequent to Democratic People’s Republic of Korea (DPRK) nuclear tests – although mandated under Chapter VII of the UN Charter – did not go so far as those relating to (for example) Iraq, and did not provide an authorization for boarding DPRK WMD-transporting vessels in international waters, in the absence of flag State consent:

Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41, [the Security Council] ...

8. Decides that: ...

(f) In order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, *in accordance with their national authorities and legislation, and consistent with international law*, cooperative action including through inspection of cargo to and from the DPRK, as necessary [emphasis added].

This form of Chapter VII-“lite” authorization does not overcome the requirement for Flag State consent with respect to boarding suspected sanctions-breaching vessels in international waters.

UNSC Res. 2240

The second type of MLE-focused authority the Security Council has employed to obviate the requirement (in a narrow set of circumstances) to first gain flag State consent for boarding is evident in UNSC Res. 2240 (2015), dealing with migrant flows in the Mediterranean Sea:⁶¹

Affirming the necessity to put an end to the recent proliferation of, and endangerment of lives by, the smuggling of migrants and trafficking of persons in the Mediterranean Sea off the coast of Libya, and, for these specific purposes, acting under Chapter VII of the Charter of the United Nations, [the Security Council] ...

7. Decides, with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels as mentioned above, to authorise, in

61 See, *inter alia*, Brian Wilson, “The Mediterranean Migrant Crisis: Key Considerations for the UN Security Council”, *Harvard National Security Journal* (online), 2015, available at: <http://harvardnsj.org/wp-content/uploads/2015/10/Harvard-NSJ-The-Mediterranean-Migrant-Crisis-Wilson.pdf>.

these exceptional and specific circumstances, for a period of one year from the date of the adoption of this resolution, Member States, acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking, to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, *provided that such Member States and regional organisations make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph;*

8. Decides to authorise for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organisations to seize vessels inspected under the authority of paragraph 7 that are confirmed as being used for migrant smuggling or human trafficking from Libya, and underscores that further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith [emphasis added].

This authorization clearly permitted those MLE forces engaged in responding to the Mediterranean migrant crisis to board vessels without flag State consent, and indeed to assert sufficient jurisdiction over them in order to take follow-on action, provided that the necessary prior “good faith efforts to obtain the consent of the vessel’s flag State” had been made.

Exception 4: The right of visit

Article 110 of UNCLOS provides an important and very powerful set of authorizations for MLE in international waters: the “right of visit”.⁶² The right of visit – as an MLE power which is not to be confused with the law of naval warfare regime of visit and search – is generally exercised by sending a seaboat with a boarding team (or in some situations by fast-roping from a helicopter) to the suspect vessel, so that the authorized MLE agents can then board the vessel and carry out the necessary inquiries or inspections associated with that specific Article 110 purpose.

The key elements of the right of visit are that:

- (a) only authorized vessels may exercise the right;
- (b) MLE agents are not required to seek flag State consent prior to conducting a right of visit boarding; however, the right of visit is only available in five specified circumstances, and cannot be used outside those circumstances (being situations of piracy, the slave trade, unauthorized broadcasting, vessels without nationality, or where the vessel, “though flying a foreign flag

62 UNCLOS, Art. 110, “Right of Visit”.

or refusing to show its flag, ... is, in reality, of the same nationality as the warship”);

- (c) the authority to engage in “follow-on” MLE actions and assertions of jurisdiction is separate from the authority to exercise the right of visit. Some of the circumstances enumerated in Article 110 include a follow-on authority to prosecute, whilst others do not confer any authority for follow-on actions beyond confirming (or not) the relevant suspicion; and
- (d) the right of visit does not apply to sovereign immune vessels (warships and State vessels used only on government non-commercial service, as per UNCLOS Articles 95 and 96) – that is, the right of visit cannot be used to justify the boarding of a sovereign immune vessel.

In exercising the right of visit, it is thus essential to recall that each of the five grounds for using the right of visit (as noted at (b) above) carries with it different requirements and permissions in terms of exercising follow-on MLE jurisdiction. A short summary of said requirements is illustrative of these differences and nuances.

The first right of visit authorization relates to *piracy*, and the rules in UNCLOS on jurisdiction after a piracy boarding are more detailed than those for most other aspects of Article 110.⁶³ The crime of piracy is one of “universal jurisdiction”, which means that any State which apprehends a pirate may prosecute that pirate regardless of whether there was any national or vessel of the apprehending State involved in the piracy, provided it has the relevant domestic law in place to allow it to do so.

The second head of power arises where *the ship is engaged in the slave trade*, empowering MLE agents to board and detain a vessel and its crew in international waters on the basis of such a suspicion. UNCLOS also contains a separate provision – Article 99 – which prohibits the transport of slaves and establishes that any slave who takes “refuge on board any ship, whatever its flag, shall ipso facto be free”. Whilst the MLE boarding authority targeting vessels suspected of being engaged in the slave trade is clear, the separate issue of jurisdiction to prosecute is not as well settled. The simplest answer is that the flag State retains this jurisdiction; however, this will to some extent depend upon the other obligations which that flag State has adopted, and the way in which it defines and distinguishes (or not) between “slavery”, “trafficking in people” and other forms of compulsory labour, debt bondage and forced movement of people. Indeed, some of these manifestations of bondage are subject to other international instruments which create “prosecute or extradite” obligations amongst the States Parties, but not universal jurisdiction.⁶⁴ While some States consider that elements

63 *Ibid.*, Arts 100–107.

64 For example, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000, Art. 3(a), states: “‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the

of the 1926 Slavery Convention and the 1956 Supplementary Convention are now applicable to all States as customary international law, this is not universally agreed.⁶⁵ Additionally, the jurisdictional authorizations laid down in these conventions – which mandate close cooperation so as to ensure the practice is stamped out, and reflect an obligation to prevent and punish – are not considered by all States to necessarily be the same as the universal jurisdiction which applies in relation to piracy.

As with piracy, the jurisdictional arrangements for situations in which *the ship is engaged in unauthorized broadcasting and the flag State of the authorized vessel has jurisdiction under Article 109*⁶⁶ are reasonably well enumerated within UNCLOS. The follow-on jurisdictions available on the basis of this authorization are then set out in Article 109: Article 109(2) defines “unauthorised broadcasting”, and Article 109(4) then acts to limit the right of visit, in relation to unauthorized broadcasting, to only the authorized vessels of a State which has the jurisdiction to prosecute the unauthorized broadcasting vessel. Article 109(3) then enumerates those States that have this authority to prosecute. The effect, however, is that a State with a single national on board a vessel engaged in unauthorized broadcasting gains MLE jurisdiction over not only its own national, but also over other people on board the vessel, and the vessel itself.⁶⁷

A powerful, often utilized, but still debated Article 110 authorization is that which allows an MLE agent to board another vessel where they reasonably suspect that *the ship is without nationality*. States are naturally opposed to the idea that a vessel might hold no nationality – that is, not be subject to a regulating and responsible flag State – because this would imply that there is no jurisdiction applicable over that vessel. The modern view, consequently, is that a vessel without nationality is subject to the jurisdiction of all States.⁶⁸ The US

purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

65 Principle 2 of the *Princeton Principles on Universal Jurisdiction* (2001, available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf) certainly takes the view that the crime of slavery is subject to universal jurisdiction:

1. For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.
2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

It is important – for the purposes of jurisdictional scope and offence/elements of offences characterization and analysis – to recall that slavery as a crime in general international law (and subject to routine MLE jurisdiction) can to some extent be differentiated from slavery as a war crime, and slavery as a crime against humanity.

66 UNCLOS, Art. 109, “Unauthorized Broadcasting from the High Seas”.

67 See, generally, J. C. Woodliffe, “The Demise of Unauthorised Broadcasting from Ships in International Waters”, *International Journal of Estuarine and Coastal Law*, Vol. 1, 1986.

68 See, generally, Angeline Lewis, “Flag Verification on the High Seas: Understanding Requirements for Masters and Commanders”, *International Journal of Marine and Coastal Law*, Vol. 30, 2015; Allyson Bennett, “That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act”, *Yale Journal of International Law*, Vol. 37, 2012; Charles Fritch, “Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction over the Illicit

Commander's Handbook on the Law of Naval Operations describes the reasoning as follows:

Vessels that are not legitimately registered in any one nation are without nationality and are referred to as “stateless vessels”. They are not entitled to fly the flag of any nation and, because they are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations. Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions.⁶⁹

It should be noted that US statutes, case law and MLE doctrine tend to use the concepts of “vessel without nationality” and “stateless vessel” interchangeably.⁷⁰

Some States have legislated for specific instances of the power to deal with vessels without nationality. One example is the US Drug Trafficking Vessel Interdiction Act (DTVIA), which deems semi-submersibles to be vessels without nationality and thus subject to US jurisdiction. Australia has also incorporated a specific power to deal with vessels without nationality within the Maritime Powers Act of 2013.⁷¹ However, not all States agree as to the ultimate extent of the jurisdiction that can be asserted; additionally, those found on board a vessel without nationality will also in most cases still have claim to the protection of a State of nationality based on their citizenship. In summary, however, a vessel may generally be treated by MLE agents as being without nationality, and thus boarded without the contextually impossible requirement to seek the consent of an unidentified or unidentifiable flag State, when:

- (a) the master of the vessel fails, upon request, to make a valid claim of registry;
- (b) the claim of registry is denied by the State whose registry is claimed;

Narcotics Trade and the Ninth Circuit’s Unnecessary Nexus Requirement”, *Washington University Global Studies Law Review*, Vol. 8, No. 4, 2009; Ted McDorman, “Stateless Fishing Vessels, International Law and the UN High Seas Fisheries Conference”, *Journal of Maritime Law and Commerce*, Vol. 25, No. 4, 1994; Anna van Zwanenberg, “Interference with Ships on the High Seas”, *International and Comparative Law Quarterly*, Vol. 10, No. 4, 1961.

69 US Commander’s Handbook, above note 10, § 3.11.2.3

70 See, for example, *ibid.*, § 3.11.2.4 (“vessels assimilated to statelessness”). In terms of judicial dealings, see, for example, US Court of Appeals, *United States v. Cortes*, 588 F.2d 106 (5th Circuit), 1979, p. 109, per Justice Rubin.

71 Maritime Powers Act, 2013 (Commonwealth), § 21:

Vessels without nationality

- (1) An authorising officer may authorise the exercise of maritime powers in relation to a vessel if:
 - (a) the vessel is not flying the flag of a State; or
 - (b) the officer suspects, on reasonable grounds, that the vessel:
 - (i) has been flying the flag of more than one State; or
 - (ii) is flying the flag of a State that it is not entitled to fly; or
 - (iii) is not entitled to fly the flag of any State.

Meaning of vessels without nationality authorisation

- (2) An authorisation under subsection (1) is a *vessels without nationality authorisation*.

- (c) the master of the vessel makes a claim of registry that is not confirmed by that State; or
- (d) the vessel is a “stateless vessel” in the manner described in the British Palestine Mandate case of the *Asya*⁷² – that is, the vessel claims the nationality of a State not recognized by the boarding/apprehending State.

UNCLOS also allows that one further type of vessel may be defined as a vessel without nationality in that Article 92 provides that where a vessel sails under two or more flags, and swaps them according to convenience, it may be “assimilated to a ship without nationality”.⁷³

As a practical MLE matter, the right of visit includes, as a minimum, the authority to board a vessel encountered in international waters, without flag State consent, where that vessel is not flying a flag to indicate its claimed nationality. Often, such nationality may be readily and quickly confirmed by an inspection of vessel documents or through consultation with the claimed flag State; however, this is not always the case, particularly if the flag State is difficult to contact, or the vessel is of a size where the flag State does not require it to carry or display formal indicia of registration.

The final Article 110 head of power arises when *though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the authorized vessel*. This final ground of authority for the right of visit is quite narrow. In essence, this authority arises in the following situation: an authorized vessel of State A encounters a vessel, in international waters, that is flying the flag of State B. However, based on information held by State A, the MLE agents reasonably suspect that the vessel flying a State B flag is actually of State A nationality – the vessel may, for example, be suspected of flying a State B flag in order to make the State A MLE agents believe they have no jurisdiction over that vessel, and therefore cannot stop and board it. In this situation, the MLE agents of State A may board the vessel to determine whether it is truly a State B vessel or is in fact a State A vessel attempting to hide its actual nationality. If the vessel is a State A vessel, State A can then take further MLE action against that vessel, as it is clearly within State A’s jurisdiction. If, however, the vessel truly is a State B vessel, then UNCLOS Article 110(3) permits State B to request compensation from State A on behalf of that vessel.

72 UK Privy Council, *The Asya (Molvan v. The Attorney-General, Palestine)*, UKPC 42, 1948. See also William Bishop Jr, “Molvan v. Attorney General for Palestine” *American Journal of International Law*, Vol. 42, No. 4, 1948.

73 UNCLOS, Art. 92, “Status of Ships”:

1. 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.
2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Some issues for further consideration regarding the interface between maritime law enforcement and IHL at sea

As noted at the outset of this article, there are a range of issues that continue to present significant interpretive challenges to identifying and defining the “dividing line” between situations where the applicable legal regime is the MLE regime, and often very similar situations that ought properly to be assessed in accordance with the application of IHL at sea. This is a critical vulnerability when analyzing the use of force at sea, for – as noted previously – the legal authorizations for interference with the vessels of other States differ greatly between these two regimes. The status of “maritime militia” fishermen and fishing vessels where they engage in activities subject to both MLE responses (such as illegal fishing)⁷⁴ and IHL responses (such as acting as an auxiliary if an armed conflict is under way, which is most problematic when combined with the special protection afforded to coastal fishing vessels under the law of naval warfare),⁷⁵ is one such issue. Another concern is the extent to which MLE vessels

74 See, for example, James Kraska and Michael Monti, “The Law of Naval Warfare and China’s Maritime Militia”, *International Law Studies*, Vol. 91, 2015; Andrew Erickson and Conor Kennedy, “Countering China’s Third Sea Force: Unmask Maritime Militia before They’re Used Again”, *The National Interest*, 6 July 2016, available at: <http://nationalinterest.org/feature/countering-chinas-third-sea-force-unmask-maritime-militia-16860>; Andrew Erickson and Conor Kennedy, “China’s Maritime Militia: What It Is and How to Deal with It”, *Foreign Affairs*, 23 June 2016, available at: www.foreignaffairs.com/articles/china/2016-06-23/chinas-maritime-militia; James Kraska, “China’s Maritime Militia Upends Rules on Naval Warfare”, *The Diplomat*, 10 August 2015, available at: <http://thediplomat.com/2015/08/chinas-maritime-militia-upends-rules-on-naval-warfare/>; “South China Sea: Courting Trouble”, *The Economist*, 16 July 2016, available at: www.economist.com/news/china/21702069-region-and-america-will-now-anxiously-await-chinas-response-unappointed-tribunal; Bill Hayton, *The South China Sea: The Struggle for Power in Asia*, Yale University Press, New Haven, CT, 2014, Chs 3, 4; Rob McLaughlin and Hitoshi Nasu, “The Law’s Potential to Break – Rather than Entrench – the South China Sea Deadlock?”, *Journal of Conflict and Security Law*, Vol. 21, No. 2, 2015.

75 See, *inter alia*, San Remo Manual, above note 31. The indicia of “formal incorporation” into a State’s maritime militia or auxiliary forces are unexplored, noting that San Remo Manual Rule 13(h) defines such status as follows: “auxiliary vessel means a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service”. However, coastal fishing vessels have long been considered to have a special status and a right to non-interference during armed conflict at sea. See *ibid.*, Rule 47: “The following classes of enemy vessels are exempt from attack: ... (g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection.” See also US Supreme Court, *The Paquete Habana*, 175 US 677, 1900, *inter alia* at p. 689, per Justice Gray: “The doctrine which exempts coast fishermen, with their vessels and cargoes, from capture as prize of war, has been familiar to the United States from the time of the War of Independence.” Similarly, at p. 708:

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that, at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy, nor when military or naval operations create a necessity to which all private interests must give way.

such as coast guard cutters, and even “private” vessels acting under State orders, can be considered to be conducting “military” activities,⁷⁶ thus opening the characterization of their use of force to assessment in terms of the common Article 2 threshold for international armed conflicts. A third matter relates to the continued relevance – or desuetude – of the concept of insurgency at sea, and the consequences this holds for transforming an MLE matter (piracy) into an IHL matter.⁷⁷ Similarly, the parallel operation of routine MLE in the same geographic space in which armed conflict at sea is also taking place (by, for example, neutrals in relation to each other, or between belligerents and neutrals in non-armed-conflict-related contexts, or through the parallel implementation of both an MLE activity such as UN Security Council sanctions enforcement against Iraq, and an IHL activity such as visit and search during the armed conflict phase of operations in 2003⁷⁸) requires attention. And these are but a few of the situations where the legal dividing line between MLE and IHL remains under-explored.⁷⁹

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

The question that arises is whether all fishing activity in the South China Sea meets this “coastal” requirement, or whether some activity could be described more accurately – in line with the reasoning of Justice Gray above – as “deep sea” or “high sea” in nature.

- 76 See, for example, PCA, *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People’s Republic of China*, Case No. 2013-19, Award, 12 July 2016, para. 1161, available at: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>. “On the basis of the record set out above, the Tribunal finds that the essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines’ armed forces that is engaged in a stand-off with a combination of ships from China’s Navy and from China’s Coast Guard and other government agencies. ... Although, as far as the Tribunal is aware, these vessels were not military vessels, China’s military vessels have been reported to have been in the vicinity. In the Tribunal’s view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another.”
- 77 For example, the case of the *Santa Maria* in January–February 1961, where the Portuguese dissidents who seized the vessel claimed the status of insurgents engaged in (or seeking to commence) an armed conflict (revolution) against the Salazar dictatorship – a status that has a long history in the law of war as exempting its claimants from characterization as pirates. See, *inter alia*, “Part IV: Piracy”, *American Journal of International Law Supplement*, Vol. 26, 1932; Ferenc Vali, “The Santa Maria Case” *Northwestern University Law Review*, Vol. 56, 1961–1962; Leslie Green, “The Santa Maria: Rebels or Pirates”, *British Yearbook of International Law*, Vol. 37, 1961; *Whitman’s Digest of International Law*, Vol. 4, Department of State Publication 7825, US Government Printing Office, Washington, DC, April 1965, pp 665–666; David Raby, “Transatlantic Intrigues: Humberto Delgado, Henrique Galvao and the Portuguese Exiles in Brazil and Morocco”, *Portuguese Journal of Social Science*, Vol. 3, No. 3, 2004. See also the response to questions by Mr. C. Ian Orr-Ewing, Civil Lord of the Admiralty, House of Commons Debates, Vol. 633, 24 January 1961, cols 32–35, available at: <http://hansard.millbanksystems.com/commons/1961/jan/24/>.
- 78 David Letts and Rob McLaughlin, “Law of Naval Warfare”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016, p. 268. See, generally, Rob McLaughlin, *United Nations Naval Peace Operations in the Territorial Sea*, Martinus Nijhoff, Leiden, 2009.
- 79 On the analogous and similarly vexed issue of use of force at sea in terms of the MLE–UN Charter Article 2 (4) delineation conundrum, see Patricia Jimenez Kwast, “Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award”, *Journal of Conflict and Security Law*, Vol. 13, No. 1, 2008.

Conclusion

Maritime law enforcement operations are fundamentally policing operations. They are governed by “peacetime” legal regimes (such as UNCLOS, the UN Drug Convention, and the SUA Convention and its Protocols of 1988 and 2005) and employ “peacetime” powers, jurisdictions and authorizations (including in relation to the use of force).

These MLE powers, jurisdictions and authorizations are comprehensive, routine and fairly well enumerated in international law, and to the untrained eye can represent a rough facsimile of many aspects of the law of naval warfare; however, MLE must at all times be differentiated from the law of naval warfare. This can on occasion be difficult, as many of the practical actions involved in MLE are also employed in armed conflict at sea – halting, boarding and searching vessels, and seizing cargoes, for example, are key enablers both in MLE and in the law of naval warfare regimes of blockade, and visit and search.

Similarly, it is at all times important to maintain clear distinctions between similarly named regimes – the MLE “right of visit” is a very different legal authority from the law of naval warfare regime of “visit and search”, despite the fact that both are premised upon (different) legal authorizations that obviate the need to seek and secure flag State consent prior to boarding. Additionally, it is not unusual for an MLE authorization to exist concurrently with a law of naval warfare authorization, such as when the UN Security Council sanctions enforcement regime in relation to Iraq operated in parallel with a visit and search regime during the 2003 armed conflict between the United States and its coalition allies, and Iraq; this was also (less conclusively) the situation in relation to Libya in 2011. However, despite the apparent availability of – and need for – clear delineations between the two paradigms, there are a number of customary rules (such as the effect of the law of war status of “insurgent”, and the modern IHL concept of “direct participation in hostilities”, upon the MLE issue of piracy) and emerging challenges (such as the implications of “maritime militias”) that render such demarcations quite difficult. These points of permeability warrant urgent analysis from both the MLE and law of naval warfare perspectives.