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ANKARA YILDIRIM BEYAZIT UNIVERSITY
SOCIAL SCIENCES INSTITUTE

LIMITS OF EXTRATERRITORIAL JURISDICTION AT SEA:
AN ANALYSIS ON INTERCEPTION OF VESSELS EMBARKED WITH ILLEGAL MIGRANTS OR ASYLUM SEEKERS

DOCTORAL THESIS

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POLITICAL SCIENCE AND PUBLIC ADMINISTRATION PROGRAMME

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ANKARA, 2020

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PLAGIARISM

I hereby declare that all information in this thesis have been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work; otherwise I accept all legal responsibility.

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DEDICATION

I dedicate this work to my deceased father Mustafa DOĞAN, and respectable mother Emine DOĞAN.

ACKNOWLEDGEMENTS

I, hereby, want to extend my sincere gratitude to Prof. Dr. Yücel ACER for his precious efforts in my writing this thesis, and Asst. Prof. Dr. Yasin POYRAZ for his beneficial contribution.

I am honoured to present profound thanks to my family, my dear wife Nilüfer DOĞAN, and my beloved son Eren Berke DOĞAN and daughter Zeynep Naz DOĞAN, for their enduring my lack of attendance in daily life.

ABSTRACT

Although it has gradually been deprived of its initial dominance, the principle of freedom of the high seas has long been and still is a basic principle of the current maritime law. The freedom of high seas does not only belong to coastal State but also to landlocked States. The principle provides all States including non-recognized free navigation. Moreover, the right to overflight as well as laying cables, pipelines, and enjoyment of the sea resources are not subject to the exclusive jurisdiction of certain State or States. The usage of high seas is considered as in the character of *res communis*.

Even if migration and crimes committed upon seas are long-standing incidents, recent development in navigation and struggles in many regions have escalated smuggling and trafficking activities.

Migration has become one of the most common incidents to be faced in these seas. Recent incidents in the Mediterranean Sea demonstrate the weakness of international rules and their enforcement. It is also evident that international provisions are also failing to protect the migrants' fundamental rights including the right to life.

Rescue operations for persons in imminent danger and interdictions against vessels carrying illegal migrants have unveiled absence of necessary regulations, or inadequate interpretation of some of them. In order to protect migrants' life and fundamental rights, it is required that international bodies must act proactively.

Push back strategy from the maritime frontier and seaworthy boat practice for migrants upon the seas are the contemporary technics which clashed with the *non-refoulement* principle and the fundamental rights of the migrants. Extraterritorial application of right to life and *non-refoulement* are essential tools and responsibilities in migrant smuggling and interception measures in this regard.

Keywords: Extraterritorial Jurisdiction, Interception, Interdiction, Maritime Areas, Migrant Smuggling, Non-refoulement, Sovereignty, The Law of the Sea, Right to Life at Sea.

ÖZET

Başlangıçtaki ağırlığını zamanla yitirse de, açık denizlerin serbestliği süregelen ve hâlen mevcut olan bir prensiptir. Denizlerin serbestliği sadece kıyı devletler için değil aynı zamanda denize kıyısı olmayan devletler için de vardır. Bu prensip, tanınmayan devletler de dâhil tüm devletlere seyrüsefer serbestisi sağlar. Diğer taraftan, uçuş hakkının yanı sıra kablo ve boru hattı döşeme ile deniz kaynaklarından yararlanma belirli devlet ya da devletlere ait değildir. Açık denizleri kullanmanın *res communis* (herkese ait olan) bir karakterde oldu kabul edilmektedir.

Denizde göç ve suç işlenmesi uzun süredir devam eden olaylar olsa da, yakın zamanda seyrüseferdeki gelişmeler ve bir çok bölgede olan sıkıntılar kaçakçılık ve ticaret eylemlerini arttırmıştır.

Göç, denizde çok karşılaşılan bir olay haline gelmiştir. Yakın zamanda Akdeniz'de meydana gelen olaylar, uluslararası kuralların ve uygulanışının yetersizliğini göstermektedir. Bu, uluslararası düzenlemelerin göçmenlerin yaşama hakkı dâhil temel haklarını korumayı başaramadığını aşikâr etmiştir.

Yakın tehlike altındakileri kurtarma operasyonları ve yasadışı göçmenleri taşıyan gemilere müdahale, gerekli düzenlemelerin yetersizliğini veya bazılarının kifayetsiz yorumlandığını ortaya çıkarmıştır.

Denizdeki göçmenler yönünden deniz sınırından geri itme taktiği ve denize elverişli bot uygulaması günümüzün teknikleri olmuştur ki bunlar geri göndermeme ilkesi ve göçmenlerin temel hakları ile çatışmaktadır. Yaşama hakkının ve geri göndermeme ilkesinin sınır ötesi uygulanması temel araçtır ve bu anlamda göçmen kaçakçılığında ve müdahale tedbirlerinde temel sorumluluktur.

Anahtar kelimeler: Denizdeki Yaşama Hakkı, Deniz Hukuku, Deniz Alanları, Engelleme, Geri Göndermeme, Göçmen Kaçakçılığı, Hükümranlık, Müdahale, Sınır Ötesi Yetki.

TABLE OF CONTENTS

ABSTRACT vii

LIST OF ABBREVIATIONS xiii

INTRODUCTION 1

PART I: BASIC CONCEPTS AND MARTIME AREAS 5

I. Relevant Concepts 5

1. Concept of Maritime Vessel 5
2. Sovereignty and Sovereign Rights 7
3. Interdiction and Interception 9
4. Use of Force 12
5. Migrant, Immigrant, Asylum Seeker and Refugee 14

II. Principles Governing Limits and Legal Status of Maritime Areas 15

1. The Internal Waters 16
   - 1.1 Basic Features 16
   - 1.2 Sovereignty over the Internal Waters 21
2. The Territorial Seas 22
   - 2.1 Basic Features 22
   - 2.2 Sovereignty over the Territorial Seas 24
   - 2.3 Jurisdiction to Enforce Regulations 30
3. The Archipelagic Waters 31
   - 3.1 Basic Features 31
   - 3.2 The Territorial Sea of Archipelagic States 37
   - 3.3 Sovereignty over Archipelagic Waters 37
4. The International Straits 42
   - 4.1 Basic Features 42
   - 4.2 Sovereignty over International Straits 43

III. Maritme Areas Subjected to Certain Exculusive Rights of Coastal States 46

1. The Contiguous Zone 46
   - 1.1 Basic Features 46
   - 1.2 Sovereign Rights over the Contiguous Zone 47

2. The Fishery Zone 48
2.1 Basic Features 48
2.2 Sovereign Rights over the Fishery Zone 49
3. The Exclusive Economic Zone 49
3.1 Basic Features 49
3.2 Sovereign Rights over the Exclusive Economic Zone 50
4. The Continental Shelf 51
4.1 Basic Features 51
4.2 Sovereign Rights Regarding Continental Shelf 53
5. Historical Waters 55
6. Maritime Areas of Islands, Rocks, Low-tide Elevations Artificial Islands and Installations 60
6.1 Basic Features 60
6.2 Sovereignty over Those Elevations 65
7. The High Seas 70
7.1 Basic Features 70
7.2 Sovereign Rights at the High Seas 70
8. Marine Protected Areas 72
8.1 Basic Features 72
8.2 Sovereign Rights over the Marine Protected Areas 73
9. Ice-covered Areas 73
10. The Area (The Seabed) 74
10.1 Basic Features 74
10.2 Sovereign Rights at the Area 74
PART II: RIGHT TO INTERCEPTION AT SEAS 76
I. Maritime Areas, Interception and Interdiction 76
1. Interdiction or Interception 76
2. Sovereign Maritime Areas 81
2.1 Interception in Internal Waters and Territorial Sea 81
2.2 Archipelagic Waters 87
2.3 International Straits 87
3. Maritme Areas Subjected to Certain Exculusive Rights 89
3.1 The Contiguous Zone 89

3.2 The Fishery Zone 91
3.3 The Exclusive Economic Zone 91
3.4 The Continental Shelf 94
4. High Seas 96
4.1 Hot Pursuit 97
4.2 Flagless/Stateless Vessels 99
4.3 Flying False Flag 100
4.4 Piracy 100
4.5 Slave Trade 105
4.6 Unlawful Acts against Safety of Maritime Navigation 106
4.7 Illicit Narcotics Traffic 109
4.8 Unauthorized Broadcasting 114
4.9 Weapons of Mass Destruction 116
4.10 Crimes against Humanity 121
4.11 Fishery Management 123
5. The Area (The Seabed) 131
II. Interception and Interdiction in Certain Activities 131
1. Right to Self-defence 131
2. Hostage Taking 132
3. Natural and Cultural Heritage 133
4. Human Trafficking 134
5. Migrant Smuggling 136
III. Evidence for Interception 136
PART III: INTERNATIONAL RULES ON INTERDICTION OF VESSELS CARRYING ILLEGAL MIGRANTS OR ASYLUM SEEKERS 139
I. Some Concepts Relevant to Interdiction at Sea 139
1. The Concept of Illegal Migration, Smuggling and the Characteristics of Migration at Sea 139
1.1 Migrant and Illegal Migrant 139
1.2 Migrant Smuggling 141
2. Maritime Frontier 145
3. Control of Migration 146
4. The Principle of *Non-Refoulement* 148

II. Regulations on Interception of Vessels Carrying Illegal Migrants and Asylum Seekers 153
1. Basis of Interception of Vessels at Sea Carrying Illegal Migrants or Asylum Seekers 153
2. Rules Applicable to Different Maritime Areas 156
2.1 Internal Waters 156
2.2 Territorial Sea 158
2.3 Contiguous Zone 165
2.4 The EEZ and Continental Shelf 168
3. High Seas 169
4. Search and Rescue Operations 178
III. The EU Response to Migration Influx at the Mediterranean Sea 185
1. EU Attitude and Regulations on Illegal Migration 185
2. Frontex as Supranational Law 186
3. The Readmission Agreements 191
IV. Lacunae at the Regulations and Suggestions 194
1. Management of Illegal Migration through Sea 194
2. Protection of Illegal Migrants 198
CONCLUSIONS 203
BIBLIOGRAPHY 211
A- BOOKS 211
B-ARTICLES 217
C- OFFICIAL DOCUMENTS 226
D- COURT CASES 237
E- OTHERS 241
CURRICULUM VITAE 246

LIST OF ABBREVIATIONS

BCN: Biologic, Chemical, and Nuclear

CAT: Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

CCAMLR: The Convention on the Conservation of Antarctic Marine Living Resources

CHS: Convention of the High Seas

ECoHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EEZ: Exclusive Economic Zone

ExCom: Executive Committee

FAO: The UN Food and Agriculture Organization

FSA: Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

FRONTEX: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

ICC: International Criminal Court

ICCAT: International Commission for the Conservation of Atlantic Tunas

ICCPR: 1966 International Covenant on Civil and Political Rights

ICJ: International Court of Justice

ICTY: The International Criminal Tribunal of the Former Yugoslavia of 1993

IMO: International Maritime Organization

IMT: International Military Tribunal

ITLOS: International Tribunal for Law of the Sea

IUU: Illegal, Unreported or Unregulated (Fishing)

MARPOL: The International Convention for the Prevention of Pollution from Ships

MLE: Maritime Law Enforcement

NAFO: Northwest Atlantic Fisheries Organization Conservation and Enforcement Measures

NEAFC: North-East Atlantic Fisheries Commissions

NPAFC: The Convention for the conservation of Anadromous Fish Stock in the North Pacific Ocean

OSPAR: 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic

OUA Convention: Organization of African Unity Convention Governing the Specific Aspect of Refugee Problems in Africa

PCA: Permanent Court of Arbitration

PRC: People's Republic of China

PSI: The Proliferation Security Initiative

RFMOs: Regional fishery management organizations

SAR Convention: International Convention on Maritime Search and Rescue

SAR: Maritime Search and Rescue

SEAFO: The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean

SOLAS: The International Convention on the Safety of Life at Sea

SUA: Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf

TFSG: The Transitional Government of Somalia

The Migrant Smuggling Protocol: The Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the UNTOC

The 1951 Refugee Convention: Convention relating to Status of Refugees of 1951

The Global Compact: The Global Compact for Safe, Orderly and Regular Migration

TSC: Convention on Territorial Sea and Contiguous Zone

UDHR: Universal Declaration of Human Rights

UN: The United Nations

UNCCS: Convention on the Continental Shelf of 1958

UNCLOS: The United Nations Convention on the Law of Seas

UNHCR: UN High Commissioner for Refugees

UNSCR: UN Security Council Resolution

UNTOC: The UN Convention against Transnational Organized Crime

WCPFC: The Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

WMD: Weapons of Mass Destruction

INTRODUCTION

Traditionally, land areas are a matter of acquisition of sovereignty and effective occupation, which is the legitimate base for enjoying that sovereignty. With the exception of historic waters, sea areas are not subject to effective occupation. The principle of the freedom of the high seas has long been and is still the basic principle of the current maritime law. It means that high seas are open to all States, without any restriction, including those of which has no border to the sea. According to the principle of freedom of the high seas, common usage of the high seas and their resources, including navigation, overflight, fishing, laying cables, pipeline, etc. are not subject to exclusive jurisdiction of certain State or States. The use of the high seas is considered as compatible with the character of *res communis*.

Thanks to the developments in maritime technology, coastal States have become able to benefit from not only nearby sea areas but also from distant high seas. Therefore, major naval States have mostly advocated the idea of the open seas; to ensure free navigation, trade, surveillance, fisheries, and enhance their national interests. Indeed, while those developments have ensured trade, surveillance, fisheries, etc. for the benefit of developed countries, those enhanced abilities have impaired the interests of developing or underdeveloped countries due to their weak capacity of navigation and technology. In other words, such recent developments have revealed the clash of interests on the seas because States have concurrent jurisdiction on some matters.

Contrary to the idea of the freedom on the high seas, developing technology enabled some States to explore sea resources, such as fishing, oil, and other mineral resources, to use surveillance techniques and long-range weapons in the expense of the exclusion of other States. Coastal States have tended to extend their territories into high seas by extending maritime areas such as territorial sea, contiguous zone, continental shelf, fishery zone, and exclusive economic zone. The extension of traditional maritime areas and formation of new maritime zones have somehow limited the freedoms enjoyed at the high seas.

The main reason for today's enormous problems concerning illegal migration through seas is not the expansion of jurisdictions in the seas. The concepts of territorial waters, the innocent passage and associated rights have long ago existed legally, and the newly emerging maritime areas (such as the continental shelf and EEZ) have not changed

the status of the water layer and open seas beyond the territorial waters, apart from the issue of natural resources.

The main reason for such fundamental problems is that effective international and national arrangements have not been made despite intensified illegal immigration. The fact that the regulations made are not clear enough and that they are not comprehensive and effective in effectively preventing illegal immigration and protecting the fundamental rights of illegal immigrants is the main cause of problems and requires regulations. In other words, the main problem is that, the national and international legislation has not developed at the same rate as the illegal migration, which has rapidly increased in the last fifty years and created various problems. This study is conducted to identify these situations and suggest remedies.

In order to create a binding rule in international law, custom or an international treaty are primary ways to do so. Sometimes, international treaties codifies already existing customary rules. It should be borne in mind that a State cannot make a national law in breach of a customary rule of international law or treaties to which that State is a party.[1] Moreover, the mere presence of a rule in various bilateral agreements does not mean that this rule has become customary international law.[2] On the other side, only a few ratification of a multilateral agreement may be an indicator of its not becoming customary international law.[3]

The Convention on the High Seas [Hereinafter: the 1958 CHS] done on 29 April 1958 and the United Nations Convention on the Law of the Sea [Hereinafter: UNCLOS] done on 10 December 1982 which came into force on 16th November 1994 are the basic regulations on law of the sea. These conventions regulate all significant maritime matters of our time including rights, jurisdictions and freedoms of all States in various maritime

[1] **Blay, Sam/ Burn, Jennifer/ Keyzer, Patrick** (2007) 'Interception and Off-Shore Processing of Asylum Seekers: The International Law Dimensions', UTS Law Review, Vol: 9, pp. 7-25, at p. 19.

[2] **Guilfoyle, Douglas** (2009) Shipping Interdiction at the Law of the Sea, Cambridge, Cambridge University Press, p. 279.

[3] Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands, International Court of Justice (ICJ), J.D.20.02.1969, para. 73. The dispute was related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other. The Parties petitioned the Court to specify the principles and rules of international law applicable, and delimit under these rules. The Court rejected the request of Denmark and the Netherlands regarding the delimitations in question which had to be executed in accordance with the principle of equidistance as is Article 6 of the 1958 Geneva Convention on the Continental Shelf. The court held that for the fact that Germany is not a party to the Convention, the Article was not applicable and that principle was not a rule of customary international law.

areas. Moreover, most of the provisions of these conventions codify the customary rules on these matters.

In recent years, migrant smuggling by sea is an increasingly common phenomenon. However, there are limited international instruments to effectively combat with such crimes. The problem of illegal transport of migrants or asylum seekers by sea includes many aspects concerning human rights in general, women and children's rights, and handling of asylum seekers, refugees and migration.

Moreover, the involvement of various countries in the incidents complicates the related problems. The involving States are: the country or countries where the smuggling organization is organized, the State of the nationality held by the smuggled person, the flag State of any ships that carry the illegal migrant, States where the migrants pass through to reach to their destination or to extradite, and, lastly, the State of destination. Additionally, the flag State of a vessel that interfered in the rescue operation and to supply medical treatment, nourishment, and conveyance to illegal migrants that are found in distress at sea.[4]

The UNCLOS and the 1958 CHS are the main regulations on authority of any State apart from flag State over vessels and persons on various maritime areas.[5] Moreover, some special conventions regulates the issue of jurisdiction over interception and control of vessels and persons involving in illegal migration.

According to these conventions, the freedoms on the high seas are not unlimited. This is also true for jurisdictions of States in terms of intercepting and controlling illegal migration through foreign vessels on various maritime areas. There are some strictly defined situations that justify interception on high seas. In this regard, clarifying and understanding the conditions for a State to stop, interdict, intercept, board, search, or seize a vessel on various maritime areas have a significant importance in examining this issue.

The purpose of this study is to first identify and then to analyse the existing legal situation, especially the principles regulating the interception and control of illegal migration in various maritime areas. The purpose in this context is not limited only to the jurisdictional matters but also covers nature of the legal rules concerning the protection of illegal migrants in terms of their fundamental rights.

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[4] UN General Assembly (1998) Report of Secretary General on Oceans and the Law of the Sea, A/53/456, p. 23.

[5] **Acer, Yücel/Kaya, İbrahim** (2019) Uluslararası Hukuk Temel Ders Kitabı, Ankara, Seçkin Yayıncılık, p. 222.

Secondly, this study aims at, as a result of all these analyses, to identify the legal insufficiencies or legal gaps (*lacunae*) and propose solutions to remedy them. Sometimes, the jurisdictional limits of States may not be sufficient to prevent or control the vessels carrying illegal migrants or the illegal migrants themselves. Quite contrary, there might be insufficiencies in terms of protection of fundamental rights of migrants. States may well be abusing the existing legal rules to control illegal migrants in the expense of violating the fundamental rights. These issues are addressed with a view to identify them and propose remedies.

Various basic concepts are going to be defined first in order to establish the necessary bases for relevant analysis. These concepts are also significant to identify the limits and nature of the jursidiction of States. All these analyses are going to be made on the basis of literatures and international jurisprudence as well as the acts that States undertake in case of smuggling migrants and asylum seekers on high seas.

PART I: BASIC CONCEPTS AND MARTIME AREAS

I. Relevant Concepts

Some key concepts are needed to be explained with some details in order to establish the necessary legal basis for analysis in this study. Thorough these concepts, it is going to concentrate on the main topic of the study on interception on high seas in cases of migrant smuggling and other illegal activates related to migration.

1. Concept of Maritime Vessel

Any maritime vessel, larger than a boat and has the capacity to cross open waters is regarded as a ship.[6] Old use of the term had been reserved for vessels that had three or more masts. However, in contemporary times, maritime vessels are described not for number of masts, but for their tonnage, such as 500 tons of displacement.[7] They are described as a hollow container for holding liquid, such as a bowl or keg[8] or "a craft of which is longer than a rowboat that built to navigate on sea, lake or river".[9] As a result, vessel has interchangeable meaning with ship and it includes all device capable of traversing the sea, including submersible vessels.[10]

The boat, however, is defined as "a small vessel for cruising on water, which are propelled by paddles, sails, or an engine."[11] It is a small sized vessel in the capacity to carry cargo.[12] It should be reminded that if it does not otherwise mentioned, the notion of vessel in this study covers boats, either.

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[6] **Walker, George K.** (2012) Definitions for the Law of the Sea Terms Not Defined by the 1982 Convention, Leiden/Boston, Martinus Nijhoff, p. 58-61.

[7] **Kim, Hyung Woo** (2015) 'Ships, Boats & Piracy: The Potential Maritime Menace inAntiquity', p. 2. Retrieved from https://www.academia.edu/11758022/Ships_Boats_and_Piracythe_Potential_Maritime_Menace_in_Antiquity, accessed 23.11.2019.

[8] **Webster, Oliver** (1944) United States Customs Court Reports: Cases Adjudged in the United States Custom Courts, p. 327.

[9] Marine Insight (2019) A Guide to Different Types of Boats. Retrieved from https://www.marineinsight.com/types-of-ships/a-guide-to-different-types-of-boats/, accessed 23.11.2019.

[10] **Walker**, p. 161.

[11] **Kim**, p. 2-3.

[12] https://www.marineinsight.com/types-of-ships/7-differences-between-a-ship-and-a-boat/#:~:text=A%20boat%20is%20a%20small,a%20variety%20of%20water%20crafts.

Government vessels are any ships or boats that are used for governmental purposes, such as law enforcement, coast guard, customs, military purpose, etc.[13] At the same time, government ships include commercial and non-commercial ships that are operated by a State. However, commercial ships of State are not deemed as government ships. Government vessels in this context refer to vessels acting on behalf of the government in maintaining public duties. But, this definition may not cover non-merchant ships such as research or survey ships.

According to Article 29 of the UNCLOS, a warship[14] is defined as a ship that belongs to a State's armed forces and equipped with crews who are subject to armed forces discipline. It must be commanded by an officer duly commissioned by a State. Such ships must be marked with its national signs. It also includes submarines excluding research ones. However, there are contemporary submarines used for drug trafficking.

Any ships flying a flag different from the flag of coastal State are regarded by the related coastal State as foreign ships. Nevertheless, a question emerges when those States do not recognize each other. In fact, it is not a necessity that non-recognition of a State does not consequence non-recognition of that State's flag. Therefore, any ship flying a flag belonging to a non-recognized State, enjoys rights of a foreign ship during traverse in the territorial waters of a coastal State which does not-recognize the State.[15]

The nationality of ships is determined by registration at present,[16] not the owner of the ship or balance of the personnel. When the document of registration is issued by the State, the right to fly the flag of that State is conferred.[17] Article 91(1) of the UNCLOS and Article 5(1) of the 1958 CHS require a genuine link of the vessel to the State the fly is flown. The 1958 CHS prescribes that flag State "must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Article 94 of the UNCLOS uses strong wording by using "shall" instead of "must" for the same issue and it increases the burden of flag State on measures ensuring the safety of the sea. The "genuine link" requirement has been established by the international community

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[13] **Poulantzas, Nicholas M.** (2002) The Right of Hot Pursuit in International Law (2nd ed.), The Hague, Martinus Nijhoff, pp. 194-195.

[14] This study will clarify ship or vessel for each kind of civil watercraft due to the fact that nature, shape, and propulsion is not so important in this study's aim. On the other hand, sort of governmental ships may be used at the specific names.

[15] Yang, Haijang (2006) Jurisdiction of Coastal State over Foreign Merchant Ships in International Waters and the Territorial Sea, Heidelberg, Springer, p.14.

[16] **O'Connell, Daniel P.** (Editor I. A. Shearer) (1984) The International Law of the Sea, Vol.II, Oxford, Clarendon Press, p. 752.

[17] UNCLOS Art. 91(2), the 1958 CHS Art. 5(2).

against the flag of convenience that provides simple registration, lower coast, and custom advantages.[18]

Dual nationality,[19] switching to another State's flag during voyage,[20] flying flags of more than one State,[21] leads to being a stateless ship.

2. Sovereignty and Sovereign Rights

The concepts of sovereign rights and sovereignty on certain zones are different notions and provide different extent of jurisdictions on relevant parts of the seas. Sovereignty means the exercise of full and exclusive jurisdiction over the State's territory. It is full and absolute, save for express exceptions, limitations and restrictions.[22] A State is only bound by international law, along with human rights law and humanitarian law while enjoying sovereignty over its territory.

On the other hand, sovereign rights are the rights which States may exercise within a zone on a specific issue or issues.[23] It is actually right based sovereignty, and those rights are exhaustive in nature. These rights are mostly recognized in international law, more specifically in international law of the sea. Enjoyment of those rights does not require one to become party to the international convention they are enshrined in. However, some of such rights are merely conventional and can be enjoyed by becoming a party to such conventions.

Sovereignty or sovereign rights can be explained in two distinctions. In the first one, sovereignty covers all the sea area almost regardless of a specific issue. In the second one, sovereign right applies only to a specific issue or a vessel such as sovereign rights over ships of the flag State. Flag State jurisdiction over its ship emerged long time ago as a kind of floating portion of State territory. However, it is not unquestionable. Nowadays,

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[18] **Okur, Derya Aydın** (2009) Deniz Hukukunda Liman Devleti Yetkisi ve Denetimi, İstanbul, On İki Levha Yayıncılık AŞ, p.134-136.
[19] UNCLOS, Art. 91, 92(2).
[20] Ibid, Art. 92(1).
[21] Ibid, Art. 92(2).
[22] **Vella, Ivan**, A New Advent for Renewable Off-shore Resources: Norman A. Martinez Gutierrez (eds) (2010) Serving the Rule of International Law: Essay in Honour of Professor David Joseph Attard, New York, Routledge, p. 143.
[23] Jennings, Robert/Watts, Arthur (eds) (1992) Oppenheim's International Law, Vol.1 Peace, Part 2 to 4, 9th Edn, London, Longman, p. 773; Vella, p. 143.

scholars assert that State jurisdiction over ship has *sui generis* nature rather than a part of a territory on the sea.[24]

Following the documentation of registration, the flag State shall have exclusive jurisdiction and control on the relevant ship in the matters of administration, technics and social.[25] The flag State has right and entitlement of diplomatic protection wherever the ship is traversing, even if it happens in internal waters.[26] Diplomatic protection functions against the State, in fault, omission or deliberate acts as defined in international law. For the person on board of a stateless vessel, unlike the vessel which has no right of claim for diplomatic protection, they have right to claim diplomatic protection of the State they bear nationality of, and it should be respected by visiting State unless a jurisdictional nexus exists.[27] Exercising diplomatic protection does not require registration of the ship in question, but a genuine link of the ship to the State is given much more consideration. Additionally, according to general opinions, exercising diplomatic protection is subject to the voluntariness of persons those of aggrieved anyhow from the act or omission.[28]

Another significant concept is jurisdiction in this context. Indeed, jurisdiction and sovereignty are closely linked and sometimes overlap each other. Sovereignty is an essential regular counterpart of rights and legal personality of statehood. Jurisdiction refers to a State's legal competence in forms of liberties, powers, and rights.[29] Jurisdiction as the use of sovereignty means competence in exercising sovereignty in a broad sense, establishing rules and adjudicating its application in a midway sense, and using the power of the court in a narrow sense.[30]

While exercising law enforcement power, i.e. jurisdiction on the basis of principles of territory, nationality protection or universality flag State jurisdiction may also come into play.

Mostly, jurisdiction is divided into three main parts: enforcement, legislative and judicial jurisdiction. Enforcement jurisdiction is the enforcement of legislative jurisdiction. Namely, where no legislative jurisdiction exists, no enforcement jurisdiction may be

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[24] **Yang**, p. 26.
[25] UNCLOS, Art. 94; the 1958 CHS, Art. 10.
[26] **Yang**, p. 28.
[27] **Churchill, Robin Rolf/Lowe, Alan Vaughan** (1985) The Law of the Sea, Manchester, Manchester University Press, p. 214.
[28] **Yang**, p. 29.
[29] Ibid, p. 30.
[30] Ibid, p. 30.

exercised.[31] Enforcement jurisdiction includes all kind of acts that are designated to impose legislative jurisdiction such as monitoring, investigation of flag, stopping, hot-pursuit, boarding, search, investigation and prosecution, temporary detention, arrest, seizure, and confiscation.[32] On the other hand, this kind of power can be asserted by a third State in the case of a conflict of laws.[33] A coastal State may exercise its civil jurisdiction in internal waters, the territorial water, and the Exclusive Economic Zone [Hereinafter: EEZ].[34] However, criminal jurisdiction is more closely linked to national policies, and a court of the relevant State shall apply its own rules to the crimes committed on board of foreign ships in the coastal waters.[35] It should be touched upon here that "control" can be exercised even where there is no jurisdiction. Jurisdiction includes control mediums; however, the reverse is not always true. Inherently, self-defence is a kind of control mechanism that is exercised without jurisdiction.[36]

While a State has sovereignty on, in and through the water of internal and the territorial sea, it also has sovereign rights on, in or under the other parts of sea areas. Sovereign rights are those kinds of rights that are exercisable only by the relevant State for the related specific purposes, not by the other States. Those rights are conclusive and confers on the relevant State a prerogative to enforce its jurisdiction, limited to only those rights.[37]

3. Interdiction and Interception

Interdiction at the sea means the act of intercepting a vessel involving illegal activities upon the sea whether it occurs in territorial waters or international waters.[38] The UNHCR defines interception as

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[31] Ibid, p. 36.
[32] **Tütüncü, Ayşe Nur** (2004) Gemi Kaynaklı Deniz Kirliliğinin Önlenmesi, Azaltılması ve Kontrol Altına Alınmasında Devletin Yetkisi, İstanbul, Beta Yayınları, p. 47.
[33] **Yang**, p. 37.
[34] Ibid, p. 37.
[35] Ibid, p. 38.
[36] **Mallia, Patricia** (2010) Migrant Smuggling by Sea: Combating A Current Threat to Maritime Security Through the Creation of a Cooperative Framework, Leiden, Boston, Martinus Nijhoff, p.18.
[37] UNCLOS, Art. 56; **Fleischer, C. Ari** (1984) The Exclusive Economic Zone under the Convention Regime and in State Practice, Law of the Sea Institute Proceedings, p. 253; **Beckman, Robert/ Davenport, Tara** (2012) The EEZ Regime:Reflections After 30 Years, Securing the Ocean for the Next Generation, Seoul, Law of the Sea Institute, p. 7.
[38] **Wagner, Dean** (2014-2015) 'A Push to the Sea A Global Analysis of Immigration by the Sea: A United States Coast Guard Policy Expansion in Preparation for Influx of Migrants via the Sea', Loyola Maritime Law Journal, pp.303-334 at 304.

> "… encompassing all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air, or sea, and making their way to the country of prospective destination."[39]

Interception includes wider spectrum of measures than interdiction in international law.[40] Interception covers stopping, blocking, diverting, deflecting, boarding, searching, seizing a ship while it passes through or enters into a coastal State's internal seas,[41] and other sea areas in certain circumstances. The term also encompasses surveillance and control of traffic at the sea, the conservation of the vessels imperilled, the disruption of lines of communication, or the establishment of security zones and restricted sea areas.[42]

Interception encompasses any action that enables control over vessels. That is to say, locating a boat, preventing from movement, taking persons from on board, forcing alteration, accompanying to a port are samples of interception measures.[43] This also includes stopping the movement of vessels.

The term interception and interdiction modify the rights being compatible to use with it. The term of 'interdiction' is used for describing a two-step process: The boarding, inspection and searching a vessel at seas which is under suspicion to commit an outlawed act and arresting the ship and people aboard or seizing freight on the ground of a proven outlawed act.[44]

Gidel distinguishes between a 'right of approach' and a 'right of inquiry' in this respect.[45] The 'right of approach' in this study is based on the view that a government vessel (including warships) has the right to approach a foreign ship on the high seas to detect its flag or other signs of its nationality. On the other hand, the 'right of inquiry'

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[39] UNHCR ExCom (2000) Interception of Asylum-Seekers and Refugees:The International Framework and Recommendations for a Comprehensive Approach, EC/50/SC/CRP.17.

[40] **Kwast Patricia Jimenez** (2007) Maritime Interdiction of Weapons of Mass Destruction in International Legal Perspective, Netherlands Yearbook of International Law, p.171.

[41] **McLaughlin, Rob** (2016) 'Authorizations of Maritime Law Enforcement Operations' International Review of the Red Cross, Vol:68 No.2, pp. 465-490, at p. 467; Section 50 of Australia's Maritime Powers Act of 2013 lists enforcement as: " (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".

[42] **Heintschel von Heinegg, Wolf** (2006) 'Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality' International Law Studies, Vol:80, pp. 207-233 at p. 208-209.

[43] **Van Sein, Joanne/ Cooper, Betsy** (2006) The New Boat People: Ensuring Safety and Determining Status. Migration Policy Institute, p. 5.

[44] **Guilfoyle (2009)**, p. 4.

[45] **Gidel, Gilbert** (1932) La Droit International de la Mer: Le Temps de Paix, Paris, Impr. par les Établissements Mellottée, digitized 2008.

means boarding a vessel, inspecting its papers, questioning persons aboard and likely searching it.[46] According to *Guilfoyle*, since interdiction might be counted of as the farther action of arresting a vessel, distinguishing a 'right of inquiry' and interdiction may not constitute a real difference, and both acts may be considered as part of 'interdiction'. To reach this conclusion, he took into view that seizure of a vessel or contraband is always an aftermath of interdictions; and is usually preceded by boarding and 'interdiction'.[47]

Interdiction is related to extraterritorial enforcement jurisdiction of a State beyond its territory. This jurisdiction includes visiting, stopping, diverting, boarding, inspecting and searching a vessel; on the condition that any evidence revealed would lead to the arrest of persons and seizure (disposition) of vessels and cargos. Interception covers any preventive action to reach the territorial sea of coastal State and also includes directing, turning back and escorting outside of its territorial sea. Interdiction of such vessels is bound by consent of flag States[48] save for exceptional circumstances driven from customary international law or bilateral or multilateral agreements mentioned above. A consent given is just a remission of flag State jurisdiction and rarely contains automatic permission for seizure.[49] On the other hand, some treaties especially concerning drugs may contain rules according to which the permission includes seizure altogether. Even with that provision, the flag State may reserve the right to withdraw its consent or right to detain and/or prosecute the conduct or suspect.

Interdiction and interception are a kind of enforcement. Indeed, enforcement on the sea mentions not only the interception but also monitoring, trailing, stoppage, prevention, hot pursuit, boarding, investigation, arrest, detention, confiscation, a judicial proceeding, auction, etc.[50] In this work, stoppage, prevention, interdiction, and interception are the issues of prime concern. Stoppage and prevention are milted in the notion of interception. However, for the fact that monitoring and trailing are not active behaviours, those notions will not be mentioned. Push-back strategy is likely to be evaluated within the preventive activities of interception.

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[46] UNCLOS, Art. 110; the 1958 TCS, Art. 22.
[47] **Guilfoyle (2009)**, p. 4.
[48] UNCLOS, Art. 92(1); the 1958 TCS, Art. 6(1).
[49] **Guilfoyle (2009)**, p. 9.
[50] Ibid, p.5.

4. Use of Force

The coastal State has enforcement jurisdiction over foreign ships on the internal and the territorial sea based on its sovereignty. However as to extraterritorial jurisdiction, the coastal State's sovereign rights for using force against foreign ships are limited in case of certain circumstances.

The coastal State's naval forces conduct operations against crimes such as piracy, terrorism, smuggling of migrants, the trafficking of human beings. These kinds of operations are also called as "Maritime Law Enforcement" [Hereinafter: MLE].[51] MLE indicates the police-type operations carried out by warships and other vessels of a State against felon, or otherwise forbidden, activities at sea. MLE also means the interception of private vessels with the aim of exposing them to the control of State the flag which the intercepting vessel is flown and possibly executing criminal or administrative sanctions. MLE is generally used by coastal States in order to widen their jurisdiction inwards of international waters.[52] In this way, coastal States manage to act extraterritorially so as to prepare their response against potential security perils, give significance to their allegations over such areas and defend their political and economic interests against any alien obstruction.[53]

However, during the interception of a private vessel, a warship's level of force is subject to the rules of international law.[54] The UNCLOS does not regulate explicit regulation on the use of force in MLE.[55] This gap was replaced with the International Tribunal for the Law of the Sea's [Hereinafter: ITLOS] principles and rules on the use of force in MLE operations.[56] The concept of "force" only indicates the physical urge done by

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[51] **Kwast, Patricia Jimenez** (2008) '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 13(1):49-91; Tasikas, Vasilios (2004) 'Unmanned Aerial Vehicles and the Doctrine of Hot Pursuit: A New Era of Coast Guard Maritime Law Enforcement Operations' Tulane Maritime Law Journal 29(1): 59-80.

[52] **Knauss, John A.** (1985) 'Creeping Jurisdiction and Customary International Law' Ocean Development & International Law Vol:15, No:2, pp. 209-216.

[53] **Tondini, Matteo** (2017) 'The Use of Force in the Course of Maritime Law Enforcement Operations' Journal on the Use of Force and International Law, Vol:4, No:2, pp. 253-272.

[54] **Anderson, David H.** Some Aspects of the Use of Force in Maritime Law Enforcement: Nerina Boschiero et al. (eds) (2013) Courts and the Development of International Law, The Hague, T.M.C. Asser Press, p. 234; **Guilfoyle (2009)**, p. 278.

[55] Spain v. Canada (Fisheries Jurisdiction), ICJ, J.D.04.12.1998, para. 80.

[56] Saint Vincent and the Grenadines v. Guinea [M/V ''Saiga'' (no. 2)], ITLOS, J.D.01.07.1999, paras 155-156. "Saint Vincent and the Grenadines requested for the prescription of provisional measures in accordance with article 290, paragraph 5, of the United Nations Convention on the Law of the Sea concerning the arrest and detention of the vessel M/V Saiga. In the incident, Guinea launched an attack on the M/V "Saiga" in the

warships as role of their law enforcement tasks.[57] In other words, force does not amount to a military measure applied against the State the flag of which the intercepted vessel flies or a non-State entity. It reflects a measure against individual vessel subjecting them to the measures and on the people aboard as private entities and individuals. The rules about the use of force resorted to by warships or other vessels owned by the State do not vary based on whether force is applied in territorial seas or international waters. However, conflicts of jurisdiction intensify in the high seas.[58]

The main feature of the use of force in MLE is that, it entails "a basic inequality between the entity which enforces the law and the object of the enforcement action."[59] Force is used for suspending the vessel, not for encountering an imminent threat, as long as the intervened vessel does not imperil in any way, the life or physical stability of the crew of warship.[60]

There are basic international law principles and case law samples regarding the use of force applicable by law enforcement personnel at sea. The most important case regarding the use of force in MLE is the *M/V Saiga II* case, deliberated by the ITLOS in 1999. The relevant case was about the arrest of the oil tanker Saiga, the Saint Vincent-flagged. The arrest occurred in the Gulf of Guinea by two Guinean guard boats on 28 Oct. 1997. In absence of resorting any signals primarily or warnings, and of any resentment from that tanker, one guard boat shot live-fire against the Saiga. Additionally, by the time of boarding, Guinean coast guard personnel had fired indiscriminately on the deck with their weapons and used gunfire to halt the ship's engine, with "little or no concern for the safety of the ship and the persons on board."[61] The Tribunal applied three essential criteria controlling the use of force in stopping a private vessel during of a MLE operation: unavoidability, reasonableness, and necessity.[62]

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exclusive economic zone of Sierra Leone, arresting and detaining the vessel and its crew. Guinea removed the cargo of gasoil, filed charges against St. Vincent and the Grenadines and subsequently issued a judgment against them."

[57] **Guilfoyle, Douglas** (2007) 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force' International and Comparative Law Quarterly, Vol:56, pp. 69-82.

[58] **Matteo**, p. 1-3.

[59] **Gill, Terry D.** (1992) 'The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law' 13 Netherlands Yearbook of International Law, Vol:13, pp. 105-173.

[60] IMO (1972) Convention on the International Regulations for Preventing Collisions at Sea, (COLREGs), London. Retrieved from http://www.mar.ist.utl.pt/mventura/Projecto-Navios-I/IMO-Conventions%20(copies)/COLREG1972.pdf, accessed 20.11.2019.

[61] Ibid, par. 157-158.

[62] M/V ''Saiga'' (no. 2), par. 155

The ITLOS states that the principles of unavoidability, reasonableness, and necessity should be applied within the framework of a two-tier test. First of all, to provide the legitimacy, the use of force should be unavoidable, i.e. there must be no reasonable options for the warship to halt the private vessel. According to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Official, the use of force or firearms is 'unavoidable' if "other means remain ineffective or without any promise of achieving the intended result."[63] The reasonableness test is to be evaluated under a subjective perspective. According to the ECtHR, force is assessed as reasonable "where it is based on an honest belief which is perceived, for good reasons, to be valid at the time [of its use, even if the officer's belief] subsequently turns out to be mistaken."[64] The principle of reasonableness should be evaluated along with that of necessity. 'Necessary force' is generally deemed as the lowest degree of force that is indispensable to overcome a threat, resistance, or attack.[65]

5. Migrant, Immigrant, Asylum Seeker and Refugee

A migrant is described as a person who enters into a State of his/her own choice where he/she is not a national, because of family union, better life, and job or other purpose.[66] The reason does not cover escaping from a conflict or persecution. Permanent residency status prevents him/her from becoming a migrant. Crossing border and entry must be in breach of national migration law of the State in question. Migration should also aim at financial benefit.[67] Immigrant is usually used interchangeably with the concept of migrant. So, in this study, these concepts are not differentiated with each other for being focused on interdiction and interception vessels carrying immigrant, migrant or smuggled people at the sea.

An asylum-seeker is an individual pursuing assurance from persecution or serious harm at the country where he/she is a national, and awaits a decision regarding his/her

[63] **Matteo**, p. 8.
[64] Giuliani and Gaggio v Italy, ECtHR (GC), No. 23458/02, J.D.24.03.2011, par.178. "The application was with regard to the death of Carlo Giuliani. It was backed by a claim that the Government forces exercised excessive use of force and that the respondent State had not taken the necessary legislative, administrative and regulatory measures to reduce as far as possible the adverse consequences of the use of force."
[65] **Hornberger, Julia** (2011) Policing and Human Rights: The Meaning of Violence and Justice in the Everyday Policing of Johannesburg, Abingdon/New York, Routledge, p. 68.
[66] https://emergency.unhcr.org/entry/44937/migrant-definition#:~:text=The%20term%20is%20increasingly%20used,is%20'forced'%20or%20voluntary. accessed 09.08.2020.
[67] **Guilfoyle (2009)**, p. 180.

application for refugee status; in line with relevant international and national regulations in this respect. In case of rendering a decision not-granting refugee status, the person must leave the country he/she made the application. Otherwise, unless the country does not grant residence status; and the subject may be expelled.[68] According to Article 33(1) of the Convention relating to the Status of Refugees of 1951 (Hereinafter: the 1951 Refugee Convention), a refugee is a person who is forced to leave his territory "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[69]

II. Principles Governing Limits and Legal Status of Maritime Areas

A State has exclusive sovereignty over its land, air, internal waters, and territorial sea, including islands, islets, rocks, and reefs.[70] However, even if an incident or act happens or is committed within its area of enjoyment of sovereignty, it has an appreciation to exercise jurisdiction over the persons engaged in the incident or act. Those jurisdiction principles in international law are territoriality, nationality, passive personality, protective and universality.[71]

One of the jurisdictional areas of the territories/beyond territories is the sea areas. The law of the sea is the classical and naval facets of international law and the dynamic one in this field. The law of the sea, as part of international law, embroils the geographical distribution of jurisdiction of States over the area which no State has full sovereignty on. According to the international law of the sea, the oceans are divided into various zones such as internal waters, territorial seas, the contiguous zones, the exclusive economic zones, archipelagic waters, the continental shelf, the high seas, the areas exercising historical rights on it, and specially protected areas. The Area described as a common

[68] **Perruchoud, Richard/ Redpath, Jillyanne** (2004) Glossary on Migration, 2. Edition, IOM, p. 12.
[69] Acording to Article 1(A)(2) of the Refugee Convention as amended by Protocol Relating to the Status of Refugees of 1966, Refugee is any person who "(2) [Omitted] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as [omitted], is unable or, owing to such fear, is unwilling to return to it."
[70] **Okur**, p.8.
[71] Ibid, pp. 10-14. Acer/Kaya, p. 185-186

heritage of mankind is beyond national jurisdiction in any way that the Area covers the sea-bed and ocean floor and subsoil thereof.[72]

The jurisdiction on the sea has gradually evolved from "open-sea" to "closed-sea" principle.[73] The principle implies that a riparian State may extend its sovereignty to a certain ocean space from the coast.[74] The spatial distribution of jurisdictions –zonal management approach- and regulating international cooperation between States –integrated management approach-coexist in the law of the sea. The international law of the sea reconciles these two approaches, which are essential in the law.[75]

Yet, States tend to protect their national interests by preserving and improving their specific economic, security and political interests even if within seas. In order to protect those interests, some rights have been enjoyed or claimed. As is explained above, sovereignty and sovereign rights are the legal grounds for any sort of enforcement action within the certain areas.

Since the interdiction right is determined by the location of the vessel and the sovereign rights of the riparian State, separation of the seas is an important aspect of this study. Primarily, it should be borne in mind that a State has sovereignty over its internal and territorial waters, and sovereign rights over continental shelf without announcing it to the awareness of another State. However, right based sovereignty over the EEZ, and contiguous zone depend on an announcement of these zones by a coastal State.[76]

1. The Internal Waters

1.1 Basic Features

There is a hypothetical line which is predicted for separating the internal waters and the territorial seas. The presumptive line named as a baseline is essential for the determination of internal waters and the starting line of territorial waters. Baseline will be

[72] UNCLOS, Art. 139; **Tanaka, Yoshifumi** (2008a) The International Law of the Sea, New York, Ashgate Publishing, p. 6.
[73] "Closed sea" doctrine ("*mare clausum*") is defined as the seas be subject to occupation and dominion (sovereignty) in the same manner as land. "Open sea" doctrine ("*mare liberum*") means a sea that is open to navigation to ships of all nations. Alvik, Ivar (2004) Law of the Seas – first lecture: History and sources of the law, Scandinavian Institute of Maritime Law, Hugo Grotius, The Free Sea, Liberty Fund Indianapolis.
[74] **Puspitawati, Dhiana** (2011) 'Indonesia's Archipelagic State Status: Current Development' Indonesian Journal of International Law, Vol:8, No:4, pp. 693-714 at p. 694.
[75] **Tanaka,Yoshifumi** (2008b) A Dual Approach to Ocean Governance: The cases of Zonal and Integrated Management in International Law of the Sea, New York, Ashgate Publishing, p. 21-5.
[76] **Okur**, p. 19.

examined here because it is relevant not only for internal waters but also for territorial waters, archipelagic waters, EEZ, continental shelf, etc.

Moreover, the baseline point is another issue to be solved. Taking into consideration that baselines have significant importance to determine the range of the territorial sea and the EEZ, disputes arise between States over its use. This is because islands converted through reclamation, installations permanently or temporarily constructed, and structures in any kind do not gain island status, and so do not have territorial sea and do not affect the territorial sea, the EEZ or the continental shelf.[77]

Historically, the baseline was being drawn for customs and neutrality in determining the offshore jurisdictional area in the 16th century.[78] In the 19th century, the mouth of bays and lines from either side of it came into play, known as the ten miles closing-lines.[79] While measuring the baseline, coastal States preferred low-water lines in the 19th century for delimiting territorial sea in order to maximize the area of their waters.[80] In some cases, the difference between low-tide and the high-tide line can extend to a mile such as the Bay of Fundy in Canada.[81] Where a bay is a subject to the baseline, it will be drawn via a closing line across each side of the mouth of the bay[82] and inward of that line shall be internal waters. Article 10(5) of the UNCLOS provides a restriction on drawing baseline concerning bays of which has a natural entrance of exceeding 24 n.m. from low water marks. Moreover, in case of the mouth of bay exceeding 24 n.m., the straight baseline will be drawn within the bay encompassing the largest space of water that is the possible length of that much.[83]

Once the semi-circle drawn in accordance with the length of the mouth of indentation is bigger than the indentation of the asserted bay, it will not be considered as a bay[84] and the baseline will be drawn as is the regular way. As to the river mouth, if the river flows directly to the sea, the straight line shall be drawn directly between each side of the river low-tide banks.[85] Where a delta comes into play, drawing the baseline from the

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[77] UNCLOS, Art. 60(8).
[78] **Alexander, Lewis M.** (1983) 'Baseline Delimitations and Maritime Boundaries' Virginia Journal of International Law, Vol:23, pp 503-536 at p. 505.
[79] Ibid, p. 506.
[80] **Swarztrauber, Sayre** (1973) Three Mile Limit of Territorial Seas, Annapolis, Naval Institute Press, p.218.
[81] **Klein, George Devries** (1963) 'Bay of Fundy Intertidal Zone Sediments' Journal of Sedimentary Petrology, Vol:33, No:4, pp. 844-854.
[82] UNCLOS, Art. 10(4).
[83] 1958 TSC, Art. 7(5); UNCLOS, Art. 10(4).
[84] 1958 TSC, Art. 7; UNCLOS, Art. 10(2).
[85] UNCLOS, Art. 9.

outermost low-water line is by discretion of the coastal State, and it will remain valid until the coastal State has changed in accordance with the UNCLOS.[86] Despite the UNCLOS not mentioning estuaries in provision directly as wording, the rules for bay should also be applied to estuaries.[87] This interpretation can be reached from the wording of the same Article of "other natural conditions". However, whether the 24-n.m. limit for the bay is applicable for the estuaries is controversial since no restriction has mentioned in the UNCLOS. For instance, Venezuela closed the mouth of the Orinoco River by a 99 n.m. line in spite of the mouth of the bay being 30 n.m.; and Portugal is evaluating the Setubal Bay as the mouth of the Sado River so as to close its mouth of 31 n.m.[88]

In short, three types of baselines exist in the UNCLOS. One is the normal baseline along the coast following low-tide line, the second is the straight baseline for deeply indented coasts, and the third, for archipelagic waters.[89] The normal baseline is useful for States that have a considerably strait coast. However, the UNCLOS includes a closing line for mouth of bays and internal waters within archipelagic waters,[90] and straight lines for the river mouth. The straight line is the shortest distance provisionally drawn between two points. The UNCLOS uses the term "straight line" first in Article 9 for determining closing line across a river, and second in Article 76(7), regarding the outer limits of its continental shelf. Article reads as "by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude."[91] The UNCLOS requires that in drawing these baselines, the coastal State shall not depart from the general direction of the coast; sea areas inward the lines must be adequately closely associated to the land realm, to be subject to the internal waters regime.[92]

However, when it comes to the State having indented coasts, the normal baseline becomes impracticable. Therefore, the straight baseline is created for such coasts. The straight baseline may be applied on condition that the coastline is extremely indented and cut into, highly unstable because of delta presence and fringe with islands in the immediate vicinity of the coast.[93] At the *Anglo-Norwegian Fisheries* Case, the International Court of

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[86] UNCLOS, Art. 7(2).
[87] **Alexander**, p. 513.
[88] Ibid, p.513.
[89] **Alexander**, p. 504.
[90] UNCLOS, Art. 50.
[91] **Tanaka** (2008a), p.61; **Stephens, Tim/Rothwell, Donald** (2010) The International Law of the Sea, Oxford/Oregon, Hart Publishing, p. 268.
[92] UNCLOS, Art 7(3).
[93] Ibid, Art. 7.

Justice [Hereinafter: ICJ] concluded that the Norwegian implementation of a straight baseline was not contrary to international law.[94] In line with the judgment, Article 7(1) of the UNCLOS provided for similar wording.

Article 7 of the UNCLOS contains some provisions for a straight baseline. First, it must not depart from the overall trend of the coast. Second, the sea areas inward of the line must be adaquately closely associated to the land realm. Third, it shall not be drawn to or from low-tide elevations except for lighthouse-like installations permanently above the water. Forth, in case of deeply indented coast and an outskirt of islands along the coast, economic interest, reality, and importance evidenced through long usage must be taken into consideration. Fifth, it may not be implemented in such a manner as to break into the territorial waters of another State. And the sixth, where a straight baseline encompasses an area not being so considered formerly, right of innocent passage shall be enjoyed.[95]

Additionally, for the ice-covered areas, it is widely accepted that the straight baseline is to be drawn at the outermost points of land.[96] On the other hand, Article 7(4) states that straight baselines may not be a base point and therefore, baseline may not be drawn to low-tide elevations or event from them to another base point unless lighthouses or the like installations that are constantly above sea level, have been built on them. Artificial islands and installations may not be considered as a point of baseline. However, extensive moles, piers, jetties, and breakwaters are regarded as part of the coast. Due to the Article 12 of the UNCLOS, roadsteads, normally one or two miles away from the coast but such as at Richard Bays up to five miles offshore, are within the territorial sea of the coastal State in so far as it is used for ships to load, unload and anchor of.[97]

It should not be overlooked that, while drawing a baseline, the island along the coast that is a point of baseline must be above the water at high tide.[98] On the other hand, while measuring islands situated on atolls or islands having fringing reefs, the baseline should be drawn from the seaward low-water line.[99] The latter condition has been added to

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[94] United Kingdom. v. Norway (Anglo-Norwegian Fisheries), ICJ, Order, J.D.18.02.1951, p.7. The United Kingdom contested the legitimacy of the baseline drawn by the Norway. She was of the opinion that the line was in conflict with customary law referred to as the 'ten-mile rule'. Although the ICJ did not rule on the argument she contested, the Court decided that: "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."
[95] UNCLOS, Art. 8(2).
[96] **Kuran, Selami** (2009) Uluslararası Deniz Hukuku, İstanbul, Türkmen Kitabevi, p. 69.
[97] **Alexander**, p. 513.
[98] UNCLOS, Art. 121.
[99] UNCLOS, Art. 6.

the UNCLOS in divergent with the 1958 Territorial Sea and Contiguous Zone Convention [Hereinafter: the 1958 TSC].[100] This addition demonstrates the newly independent subtropical State's effect. However, where drawing baselines to and from such low-tide elevations have obtained common international recognition, then it can be a point for a baseline; regardless of whether installations have been built on it. If low-tide elevations are accepted within the territorial sea of a riparian State, the point may be the basis of the baseline. The elevation may be wholly or partly within the limits of the territorial sea, or it may be either rocks or banks.[101]

Furthermore, apart from previous drafts, the UNCLOS allows an archipelagic State to determine a straight archipelagic baseline connecting the outermost points of the outermost islands and drying reefs of the archipelago.[102] Archipelagic States may draw a normal baseline so as to determine its internal waters for each of its islands.[103] Although the UNCLOS regulates archipelagic water for only the State being formed islands, for instance, Ecuador claims Galapagos archipelago is in her internal waters.[104]

Straight baseline system is identical in both the UNCLOS and the 1958 TSC save for the additions through Article 7(2) and 7(4) of the UNCLOS; first of which includes base point for delta and other natural features. The second includes prohibition of low-tide elevations, unless installations permanently above the water have been built on it or the base point has generally been recognized. It must be reiterated here that by drawing a straight baseline, a part of the territorial sea becomes internal water; in this case the innocent passage of foreign ships shall prevail at the particular area.[105] The existence of the former right of innocent passage in the area of internal water which was not the case before straight baseline, was the impact of judgment at the *Anglo-Norwegian Fisheries* case of ICJ.[106] If the inland seas such as the Caspian Sea divided among more than one State, they

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[100] The 1958 TSC has been signed at the UNCLOS I Conference. Later on UNCLOS II Conference held in between 1960 and concluded fruitless in signing an agreement.
[101] Kuran, p. 514.
[102] UNCLOS, Art. 47(1).
[103] **Lestari, Maria Maya** (2017) 'Study of the Right of Foreign Ship against State Sovereignty (Case Study Indonesia)' Indonesian Journal of International Law, Vol:14, No:4, pp. 497-513 at p. 503.
[104] The Republic of Ecuador, Division for Ocean Affairs and the Law of the Sea. Retrieved from http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ecu_2010_decree_english.pdf, accessed 20.11.2019.
[105] 1958 TSC, Art. 5(2); UNCLOS, Art. 8(2).
[106] **Coquia, Jorge R.** (1962) 'The Territorial Waters of Archipelagos' Philippine International Law Journal, pp. 139-156 at p. 154.

will determine its status among them.[107] However, if there exists any special international agreement for the inland seas, the agreement shall prevail.

1.2 Sovereignty over the Internal Waters

Internal waters bestow almost the same rights as land territory on the relevant State. Even if the sovereignty extends to the outer limit of the territorial sea, internal waters and territorial sea differentiate for some rights bestowed on foreign vessels. In certain circumstances, foreign vessels have the right to innocent passage within internal waters. The concept of innocent passage will be explained in the upcoming chapter. Article 8 of the UNCLOS specifies that following the re-drawing of a straight baseline in line with Article 7 if an area falls into internal waters, foreign vessels shall have the right to innocent passage within that area. In case that a vessel proceeds to internal waters or a call at a port facility from the territorial sea, the coastal State may take required measures to prevent breaching the conditions the vessel is subject.[108] This rule provides for circumstances in which a coastal State prevents foreign ships to use the right to an innocent passage in the territorial sea, to enter internal waters.

According to *Churchill and Lowe*, where a vessel enters a port within internal waters, it subjects itself to the sovereignty of the coastal State. For this reason, the coastal State is allowed to apply its regulations against the vessel and those on board, subject to the routine rules regarding sovereign and diplomatic immunities, which stems from the case of State-owned vessels.[109]

Canals are artificial waterways and subject to laws of internal waters.[110] However, the Canals of Panama, Suez, and Kiel, linking oceans, have management rules of their own. There is a treaty between the US and Panama, regarding the Panama Canal. For the Suez Canal, following nationalization, Egypt announced the recognition of freedom of navigation through the canal. The Kiel Canal, operated by the German Government, is open to all merchant ships without prior approval or consent.[111]

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[107] **Kuran**, p.68.
[108] UNCLOS, Art. 25; Bardin, Anne (2002) 'Coastal State's Jurisdiction over Foreign Vessels' Pace International Law Review, Vol:4, pp. 28-75. Retrieved from https://digitalcommons.pace.edu/pilr/vol14/iss1/2, accessed 22.11.2019, p. 30.
[109] **Churchill/Lowe**, p. 49-51.
[110] **Yang**, p.77.
[111] Ibid, p.79-80.

In addition, all ports and off-shore terminals belong to the coastal State and are evaluated as if it were land territory. The coastalState has exclusive jurisdiction over their entry, and there is no customary international law binding the State to accept a foreign vessel to its port.[112] The authority of the coastal State is extended in cases regarding seaworthiness of vessels at the port or off-shore terminal; in that, the State shall take administrative measures to prevent sailing, in order to preserve the marine environment.[113]

2. The Territorial Seas

2.1 Basic Features

Early ideas and practices of State with regard to territorial waters are that, it was a belt sea owned and regarded a territory of the adjacent State or it was an area which littoral State might exercise certain jurisdiction.[114] Indeed, this zone is an extension of the coastal State's territory.

Maritime jurisdiction zones do exist on the condition of the announcement of the coastal State,[115] except territorial waters of 3 n.m. at minimum. When a State decides to announce a territorial water limit, to where does the limit extend? One might think it is easy to determine the territorial sea. The territorial sea is based on the inward line and extends to the outer limit. Indeed, both lines were controversial for a very long time. Yet, many situations exist in the world to determine not only its baseline, but also its boundaries between States, on islands, and historic considerations. The inward limit of the territorial water is baselines that are mentioned above. The outer limit of the territorial sea has also been a long standing debate, and the customs of States in this regard, are different.

In 1782, *Galiani* asserted that international law requires an *ex officio* minimum 3 n.m. of the territorial sea.[116] On the other hand, the claim of States were varied, in this regard. Since earlier in the eighteenth century, while some of them claimed 3 and 4, others claimed 6 n.m. territorial sea.[117] Moreover, the United States Congress enacted a statute in 1794 granting jurisdiction to the district courts on the capture of foreign ships "within the

[112] **Okur**, p.56-58.
[113] UNCLOS, Art. 219.
[114] **Acer, Yücel** (2003) The Aegean Maritime Disputes and International Law, New York, Routledge, p. 69.
[115] **Guilfoyle (2009)**, p.10; **Acer/Kaya**, p. 204.
[116] **Byers, Michael** (2004) Power and the Power of Rules: International Relations and Customary International Law Custom, Cambridge, Cambridge University Press, p. 115.
[117] See for further information Byers, p.115.

waters of the United States, or within a marine league [three miles] of the coasts or shores thereof."[118] In 1921, the Soviet Union claimed a twelve-mile limit. It was the first State to make this assertion which was limited to respect to fishing rights throughout its Arctic coast, as well as in the White Sea. ICJ reiterated that international law grants at least 3 n.m. territorial sea zone to coastal States.[119] The upper limit of the territorial sea is 12 n.m. from the baseline, outward of the internal sea[120] as was done by the Soviet Union.

Three conferences had been made to gather the understandings of territorial sea breadth before the UNCLOS was signed. Article 3 of the UNCLOS permits up to twelve nautical miles for territorial sea claim. It means it is not mandatory but claimable. Among the signatory States of the UNCLOS, 78 of 137 announced 12 n.m. territorial water limit. In contrast, 26 countries announced more than 12 n.m. territorial waters. As of 31st December 2011, there were seven States still claiming more than 12 n.m. territorial sea; namely Benin, Ecuador, El Salvador, Peru, Philippines, Somalia and Togo.[121] Six of them are a party to the UNCLOS and Ecuador accessed in 2012. Ecuador and Peru claim 200 n.m. territorial waters.[122]

Taking into account that the UNCLOS has not been ratified by all States,[123] it may be argued that the Convention does not have a binding effect on non-signatory States. As a result of this understanding, non-signatory States may assert different breadth of the territorial zone as Ecuador and Peru have done. It is asserted that the UNCLOS was a codification of customary international law and its customary rules are binding for all States.[124] It should be borne in mind that all of Articles have not, however, been able to be

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[118] The Neutrality Act. (1794). 1 Stat. 369 (1794),18 USC sections 960–2 (1982).
[119] Anglo-Norwegian Fisheries Case, p.160.
[120] UNCLOS, Art. 3.
[121] **Roach, J. Ashley/ Smith, Robert M.** (2012) Excessive Maritime Claims, 3rd Edition, Leiden, Brill&Nijhoff, p. 148.
[122] The Republic of Ecuador, Division for Ocean Affairs and the Law of the Sea. Retrieved from http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ecu_2010_decree_english.pdf, accessed 20.11.2019.
[123] 168 State parties are bound by it till 2018, See: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=treaty&mtdsg_no=xxi6&chapter=21&Temp=mtdsg3&clang=_en, accessed 20.11.2019.
[124] For instance, as one of four nations that did not sign the treaty, President Reagan of the United States declared that the United States would accept that most of provisions of the UNCLOS III is customary international law and they are binding for the United States, either. Together with that address, Reagan did oppose to the seabed exploitation provisions and did not recognize it being customary law. See: **Sulmasy, G. M., & Tribolet, C.** (2012). The United Nations Convention of the Law of the Sea. In P. Rosenzweig, J. M. Timothy, & E. Shearer, National Security Law in the News: A Guide for Journalists, Scholars and Policymakers. Chicago: American Bar Association. Moreover, the General Assembly of the United Nation has made many resolutions that the Convention is a source of customary international law like the preface of

asserted as customary international law. Even if Articles include customary international rules, some part of it may not assume that status.

Additionally, when a State decides the limit of territorial waters, how it must be drawn from one point to other is another complicated issue. The fact that shores are not straight and indented, a method of either trace parallel[125] or courbetangante[126] may be chosen. Both of them are available for the State as a method of drawing. The courbetangante method may be employed for its advantages for indented coasts.[127]

Moreover, once a State determines boundaries, it may use the median line, thalweg, or mixed methods for boundaries of territorial water between neighbouring States. A Median line shares equal right of exploitation and in other usages. On the other hand, thalweg takes navigational interests into account.

2.2 Sovereignty over the Territorial Seas

The sovereignty of a State extends to the outward limits of the territorial sea.[128] More broadly, sovereignty not only includes surface and in-water of the territorial sea but also air space over it and subsoil and seabed under it. On the other hand, the sovereignty on the territorial sea is subject to some restrictions apart from the land territory and internal waters. While some of them have been regulated in the UNCLOS, some of those restrictions may be other rules of international law.[129]

The forehead limitation on enforcement jurisdiction of a coastal State is the innocent passage of foreign merchant ships. Indeed, the innocent passage refers not to the ship itself, but the relevant persons aboard, together with the ship.[130] Within the judgment of the *Siaga* case, the ship together with persons involved and interested in the operation,

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Resolution 49/28 of General Assembly, adopted in 1994, recognises "the universal character of the Convention and the establishment through it of a legal order for the seas and oceans."

[125] At this method, the line drawn is parallel to the general trend of the coast. It is well applied when the coast is straight or gently curving. However, it does not so good when the coast is irregular or highly indented. Namely, the outer limit of the territorial sea is to look like as the coastline.

[126] At this method, the line is drawn in accordance with arcs of circles to seaward from every point on the baseline. The area encompassed by all the arcs of circles to the baseline forms the territorial water. Despite the fact that the resulting line is not a straight line, it does not follow the rugosities of the coastline. Namely, the outer limit of the territorial sea is to look like somehow quarter circles or such.

[127] Koh, Tommy T. (1987) 'The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea' Malaya Law Review, 29(2):163-199.

[128] UNCLOS, Art. 2.

[129] Ibid, Art. 2(3).

[130] **Yang**, p. 14.

and everything on it was treated as an entity linked to the flag State.[131] Therefore, before examining other conditions of innocent passage, the scope of innocent passage shall be explained.

The innocent passage is based on navigational expediency[132] and has been defined in the 1958 TSC. Later, the UNCLOS has re-written the same rule in a similar context adding new elements, and strengthening the regime of innocent passage. In order to evaluate a passage as innocent, the passing action should carry the purpose of either traversing the territorial sea without infringing internal sea or proceeding to internal waters, or moving from internal waters into the territorial sea.[133] In both conditions, calling at roadstead or port facility outside of internal sea and a call at them may nor be evaluated infringing of the right of innocent passage.[134] The vessel exercising the right of innocent passage shall enjoy that right continuously and expeditiously. It does not mean that a vessel in any way may not anchor or stop within the territorial sea. In the case of an accident, force majeure or distress, the vessel may stop or anchor.[135]

Moreover, where another vessel, person, or aircraft is in danger or distress, the vessel encountering such a circumstance, shall have the right to stop and anchor for the aim of rendering assistance, and will not be in scope of infringement of innocent passage. The accidental stop may occur with congestion in a ship lane and distress may exist during or after a storm or the like. On the other hand, unseaworthiness does not itself amount to distress status and bestow rights for this situation.[136] Distress in maritime law implies the position of a vessel involving "the existence of exceptional medical or other circumstances of an elementary nature of extreme urgency."[137]

The right to enjoy innocent passage is not limited to vessels owned by coastal States; as land-locked States also have similar rights as riparian States, in enjoying the right of innocent passage.[138] The innocent passage traversing through territorial waters

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[131] The M/V Saiga (No.2), para. 106.
[132] UNCLOS, Art.18; 1958 TSC, Art. 14.
[133] Ibid, Art. 18.
[134] This rule is lack at Article 14 of 1958 TSC.
[135] UNCLOS, Art. 18(2).
[136] **Barnes, Richard** (2004) 'Refugee Law at Sea' International and Comparative Law Quarterly, Vol:53, pp. 47-77.
[137] New Zealand v. France (Rainbow Warrior), New Zealan-France Arbitration Tribunal. D.D.30.04.1990, pp.555. The commentary of the International Law Commission explains "distress" as "a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question" (Yearbook. ILC. 1979, p. 133).
[138] UNCLOS, Art. 17.

should be executed without impairing the coastal State peace, public order or security.[139] Article 19(2) of the UNCLOS has listed exhaustive preconditions which are deemed breaching peace, good order, and security.

Submarines have right to enjoy same right in the territorial water; however, they must cruise on the surface and fly their flag.[140] Moreover, tankers, nuclear-powered vessels, and vessels embarked with dangerous substances have the right to innocent passage as other vessels, provided applicable additional conditions are concurred with, by those vessels. The State which has the sovereign right on the relevant sea part may designate special sea lanes for those vessels.[141] Besides, vessels powered by a nuclear tribune and those carrying dangerous and noxious substances shall carry relevant documents and obey special precautionary measures provided for by international agreements.[142]

In short, Article 19(2) of the UNCLOS requires that any vessel benefitting from the enjoyment of innocent passage must not collect information, and act against security and defence of the relevant State. Moreover, it must not practice weaponry and use or threaten to use arms against the littoral State. It must not have an aircraft or military devices on board. Customs, fiscal, immigration or sanitary laws, and regulations of the coastal State must not be breached. Furthermore, the vessel enjoying innocent passage must not wilfully pollute the sea, fish and research within the area. It should not be an act of bearing passage and interfering with communication.

On the other hand, Article 21 of the UNCLOS prescribes for regulatory steps that can be taken by the coastal State using sovereignty on the territorial sea. Measures that can be taken may be concerning those of the navigational safety and the arrangements on maritime traffic. Moreover, the preservation of navigational services, other equipments, installations, cables, pipelines, the living reserves of the sea are other area that a State can make regulations. Protection of fishery rules and the environment as well as the prohibition, reduction and control of pollution are under the sovereignty of coastal State. The coastal State can manage marine scientific research and hydrographic surveys, and enforce the customs, fiscal, immigration, or sanitary laws and rules. It is argued that those

[139] Ibid, Art. 19(1); 1958 TSC, Art. 14(4).
[140] UNCLOS, Art. 20.
[141] Ibid, Art. 22(2).
[142] Ibid, Art. 23. Moreover, the Basel Convention of 1989 puts the requirement of formerly written consent for transboundary shipment of hazardous wastes as restriction of innocent passage (Art. 4 and 6(3)).

offenses mentioned here are not conclusive and a State may regulate other areas which will not hamper innocent passage and put additional burden on the vessels.[143]

As is seen from the nature of those acts, they are somehow touching upon the coastal State's interest. It is understood that if the act does not meet the conditions of innocent passage, such that will infringe any interest of the coastal State, given that the interest should is not arbitrary, such passages may not be accepted as innocent.

On the other hand, laws and regulations put into force shall not apply to the design, construction, manning, or equipment of foreign ships. This is acceptable on condition that such regulations are made with regard to generally accepted international rules or standards.[144]

Ships that are enjoying the right of innocent passage through a State's territorial sea other than its flag, shall abide by laid down laws and regulations; and in addition, all other international regulations generally accepted, regarding the prevention of collisions at sea. In this regard, a riparian State may establish sea lanes and traffic separation schemes by taking recommendations of competent authorities into account, such as the IMO.[145] In addition, coastal States shall take into view channels used for international navigation for long time and special characteristic of a particular ship.

Whereas, where the passage is not considered innocent, the coastal State will have the right to take necessary steps to prevent that vessel from traversing the territorial sea.[146] Contrary to that authority, in the case that the passage is innocent the State is under a duty not to hamper passage of such ship. In the event that the State imposes additional requirements that result inpractically denying or impairing the enjoyment of that right, it would be in contradiction to Article 24 of the UNCLOS. Besides, the State in question should not discriminate against any ship in the implementation of conditions with regard to its flag, destination, or departure.

Through designated sea lanes, the coastal State may protect living resources or cables by diverting sea traffic away. By the same procedure, it may conserve the environment and debar it from pollution. According to the International Convention on Safety of Life at Sea [Hereinafter: SOLAS], the routing system may be established by the coastal State in her territorial sea, even restricting for only some kind of cargo or ships, and

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[143] **Özman, Aydoğan** (2006) Deniz Hukuku I: Kaynaklar, Kişiler, Nesneler, Deniz Alanları, Ankara, Turhan Kitabevi, p. 324.
[144] UNCLOS, Art. 21(2).
[145] Ibid, Art. 22.
[146] Ibid, Art. 25(1).

the establishment of routing is under-appreciation of the relevant State, free from submission of the IMO.[147] However, the routing system shall not prejudice the rights and duties conferred by international law. The IMO involvement safeguards the uniformity of application among States.

Moreover, the Basel Convention of 1989 requires administrative, legal and other measures to be taken in order to implement and enforce that convention provisions, which force to take measures to reduce "the environmentally sound and efficient management".[148] Additionally, the vessel enjoying innocent passage may not be subject to charges solely for this action; unless the coastal State provides other services to the ship, like towage.[149] It must be taken into view that imposing such payment may not be discriminatory in nature.

The coastal State has the right to the enjoyment of suspension of innocent passage where it is necessary for its security, such as the announcement of the security zone and weapon exercise.[150] To do so, the relevant State has to announce that suspension and apply the suspension without discrimination. Where a vessel's innocent passage is suspended because of real and undeniable force majeure, it will still benefit from the right of innocent passage.[151]

The riparian States of which a vessel is cruising should not exercise an enforcement jurisdiction with regard to a crime committed on board to arrest any person or conduct any investigation.[152] Concerning the right of interception which is explained below, the crime of piracy cannot be committed within the territorial sea and therefore no State may interfere with any act claiming it amounts piracy within the territorial sea on the ground of the UNCLOS. Similarly, other States cannot intervene in any acts without consent of the coastal State.

As it happened in the example of Somalia, a littoral State may consent to an act of law enforcement against other States within its territorial sea. In this case, during the UN operation in off shore Somalia, pirates had returned to the territorial sea of Somalia, and thus they were escaping from being caught. Following that, the Somalian authorities permitted operation in its territorial sea; bringing into existence, law enforcement in the

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[147] **Yang**, p. 193.
[148] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Arts 4(2)(d) and 4(4).
[149] UNCLOS, Art. 26.
[150] Ibid, Art. 25(3).
[151] Ibid, Art. 27(1); 1958 TSC, Art. 19(1); **Kuran**, p. 146.
[152] UNCLOS, Art. 27; The exemption of this constraint will explain in following chapter.

territorial sea of Somalia. In the incident, the Transitional Federal Government of Somalia [Hereinafter:TFGS] conveyed a letter indicating that international assistance was needed and would be welcomed to scrutinize the issue. The Permanent Representative of the Somali Republic to the United Nations submitted the letter on 27 February 2008 to the President of the Security Council, conveying the consent of TFCG to the Security Council for urgent assistance in ensuring that the international as well as the territorial waters of Somalia was under a secure management of shipping and navigation.[153] Even though the UN is the operational unit, the coastal State consent is mandatory thereof.

Even if the activities may encourage slavery, the coastal State has full sovereignty over acts and foreign States do not have authority within the territorial sea of others, unless otherwise decided by mutual agreement. Any High Contracting Parties to the Slavery Convention of 1926 shall "undertake to adopt all appropriate measures to prevent and suppress the embarkation, disembarkation, and transport of slaves in their territorial waters and upon all vessels flying their respective flags."[154]

Coming back to the right of innocent passage of warships, in the UNCLOS, which is, roughly speaking, codifying former customary international law, all of the above vessels' right of innocent passage has been written down. But, the right of innocent passage of warship is not as clear as there had been a fierce debate during the conference. Even though Article 17 does not make a distinction between warships and others, the contesting parties of Article 21 of the UNCLOS tried to include "security" provision in order to restrict the passage of warships. Even though that provision was not inserted in the paragraph, they managed to make a presidential statement that, that right was reserved under Article 19 and 25 of the UNCLOS.

On the other hand, *Przetacznick* contested that foreign warships have the right to innocent passage through the territorial sea in line with customary international law.[155] Since the 1958 TSC regulates that general provisions for warships and merchant ships regarding innocent passage and following special provisions for a warship that does not include innocent passage provision, it is asserted that warships should enjoy the right of innocent passage. In other respects, it is argued that whether the vessel propulsion with

[153] Resolution 1816 (2008) of United Nations Security Council.
[154] The Slavery Convention of 1926, Art. 3.
[155] **Przetacznik, Franctiszek** (1977) 'Freedom of Navigation Through Territorial Sea and International Straits' Revue De Droit International De Sciences Diplomatiques et Politiques, Vol:1977, pp. 299-319.

nuclear power has the same right as a warship. The US-USSR joint declaration states that they are to have the same right; however, many States have taken the opposite position.[156]

What happens in the case of that a State ratified the 1958 TSC but in contrast has not ratified the UNCLOS? Namely, does a State in that position have the right to innocent passage through the territorial sea? According to *Koh*, due to the fact that the relevant Article of the UNCLOS satisfies the criteria established by ICJ at the case of *North Sea Continental Shelf* between Germany and Netherlands of "merely codifying pre-existing law" and "reflecting the emerging customary international law", a State of non-party of the UNCLOS may invoke to benefit from the right to innocent passage through the territorial sea.[157]

The right of innocent passage of foreign vessels is a limitation of coastal State's sovereignty over territorial sea. Yet, limitation of innocent passage is the coastal State's usage of sovereignty over the vessels enjoying passage.

2.3 Jurisdiction to Enforce Regulations

Jurisdiction will be touched upon here for the reason of sovereignty. Two different approaches are to be examined within the scope of the enforcement capability of the coastal State. One of them is enforcement under the rules of the UNCLOS; and the second one is enforcement under general international law and basic legal doctrines.

During the innocent passage of merchant ships, the coastal State may interfere in claiming breach of port entry conditions,[158] crimes committed,[159] some civil action to be taken,[160] violations of environmental regulations.[161]

For any vessel that voluntarily initiates entry into a port, the port State has the right of boarding and inspection, as it is entering its internal waters. During this initiation, the permission of the flag State is not required; nevertheless, this act must be carried out on a

[156] **Özman**, p. 318-22.
[157] **Koh**, p. 198.
[158] UNCLOS, Art. 25(2).
[159] Ibid, Art. 27, (Crimes consequences of which is extended to coastal State and disturb good order of coastal State, and the crimes of illicit traffic of narcotics, for the crimes master or consular of flag State requested)
[160] Ibid, Art. 28.
[161] Ibid, Art. 220.

non-discriminatory basis. This port entry inspection may occur before entering the port namely within the territorial sea.[162]

It is reminded that according to Article 24 (a) of the UNCLOS, any imposition of requirements that have affected impairment or denial of innocent passage constitute tampering with that right. Together with that, where the coastal State has the right of interference with the ship under above conditions, the ship shall still have the right of innocent passage through internal waters and territorial sea apart from the reason of interference. Namely, interference does not annul that right itself.[163]

Enforcement power is justifiable under general international law on condition of an incident or casualty resulting in a gross violation of applicable rules. Moreover, the infringing ship may be subject to enforcement when it arrives in internal waters or ports. Additionally, flagrant offense committed through the ship or on board, may lead to using enforcement power.[164] Enforcement power may emerge from administrative matters such as traffic management, rights of protection, fisheries services, revenue, custom, immigration, protection of submarine cables, and pipelines, etc.[165] The International Convention for the Prevention of Pollution from Ships [Hereinafter: MARPOL] 73/78[166] authorizes the coastal State to embody appropriate measures for the application of its provisions. Article 4(2) and 6(1) of the MARPOL 73/78 give discretion to the coastal State to either investigate the violation or hand over the evidence to the flag State. It should be kept in mind that the coastal State may not enforce criminal jurisdiction concerning an offense being committed on the vessel that it was not within the territorial sea.[167]

3. The Archipelagic Waters

3.1 Basic Features

Archipelagic waters are mainly the waters between islands of an archipelagic State. This approach is laid down on the basis of unity of islands of the archipelagic State into one State. Yet, many researchers and international law bodies have argued in their treatise

[162] The U.S. Department of Navy (2017) Commander's Handbook on Law of Naval Operations, p.4-8.
[163] The ILA Committee (2000) Coastal State Jurisdiction Relating to Marine Pollution Final Report, p.13-14.
[164] **Yang**, p. 197.
[165] Ibid, p. 207.
[166] The International Convention for the Prevention of Pollution from Ships of 1973 as modified by the Protocol of 1978.
[167] **Kuran**, p.138.

that archipelagos should have been considered as forming a unit and they should have had the special territorial sea.[168] The archipelagic sea concept was based on the interest of economics, politics, history, and geography, which was firstly claimed by Indonesia and the Philippines.[169] In line with those arguments, the archipelagic State principle has become the Indonesian national approach incorporated in its Constitution at Article 25(a), at the time of the UNCLOS Conferences.

Actually, archipelagic waters had been discussed at the 1958 Geneva Conference that the Philippine Delegation vowed that it should have been as a straight baseline and inward water been evaluated as internal waters.[170] The Yugoslavian Delegation also proposed a straight baseline method be applied to the group of islands at the coast and inward waters be considered as internal waters.[171]

A significant State in this respect is Indonesia, which stretches 3.200 miles across the Indian Ocean. Its doctrine in this regard is known as the Indonesian Archipelagic State Doctrine. According to that doctrine, the baseline which reaches outer island would constitute archipelagic baseline, and the waters inwards of that line constitute archipelagic waters. While drawing such baselines, low-tide elevations may not be the point of lines, "unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island."[172]

Archipelagic waters are internal waters in the concluding analysis but bestow less sovereignty as compared to internal waters. *Kusumatmadja* argues that archipelago is a system including islands and waters within the baseline drawn in line with the principle

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[168] **Coquia**, p. 149; **Lokita, Sora** (2010) 'The Role of The Archipelagic Baselines in Maritime Boundary Delimitation', The United Nations-Nippon Foundation Fellowship Programme 2009 – 2010, Division For Ocean Affairs And The Law Of The Sea Office Of Legal Affairs, New York, The United Nations, p. 6.

[169] **Lestari**, p. 497.

[170] The Philippines Delegation to the U.N. Geneva Conference of 1958. The Philippine Proposal at Document A/Conf. 13/C. 1/L. 98 of the U.N. In fact, the Philippines Delegation had submitted two alternative proposal. "Alternative one: the method of straight baseline shall be applied to archipelagos, lying of the coast, whose components are sufficiently close to one another to form a compact whole and have been historically considered collectively as a single unit. The baseline shall be drawn along the coast of outermost islands, following general consideration of the archipelago. The waters within such baselines shall be considered as internal waters.

Alt. two: When islands lying off the coast are sufficiently close to one another as to form a compact whole and have been historically considered collectively as a single unit, they may be taken in their totality and the method of straight baselines in article 5 may be applied to determine their territorial sea. (Continues similar to last two sentence of above alternative)."

[171] The Yugoslavian Delegation to the U.N. Conference of 1958. Document A/Conf. 13/C. 1/L. 59 of the U.N.

[172] UNCLOS, Art. 47(4).

above.[173] Indeed, Fiji and the Philippines somehow support that doctrine. Since the Middle Ages and later during the colonialism of European powers, the existence of international water had been recognized between islands.[174] According to the Dutch East Indies and up till 1963 by the Republic of Indonesia, all waters beyond the three miles from high tide lines of various islands were international waters, which resulted in the Sunda, Java and Banda seas becoming high seas.[175] Nevertheless, expansions of internal waters hundreds of miles from shorelines are contrary to customary international law and international custom within Southeastern Asia.[176]

In contrast, the Philippines had been defining a group of the island as a single unit. Even though it was considered as a single unit, Article III of the Treaty of Paris between Spain and the U.S. on 10 Dec. 1898 described the Philippines archipelagos as the Philippines Islands; thus, as one unit. The Philippines acted as though the waters within the archipelagos were internal waters.[177] In fact, the Philippines Delegation asserted that existing or vested rights might not be taken without going by the due process of law required for adopting new laws, as it is municipal law.[178]

The UNCLOS has defined archipelago as;

> "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters, and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."[179]

In order for an archipelago to constitute an archipelagic State, the State shall be composed of archipelago/s or additional island/s.[180] It can be concluded from the definition that a State of non-archipelagic nature, may possess one or more archipelagic islands.

It is understood from Article 46(b) of the UNCLOS that first there should be a group of islands interconnecting through waters; second, they should have natural features interrelating them as a single unit; third, the entity must have the same intrinsic geographic,

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[173] **Kusumaatmadja, Mochtar** (1978) 'Bunga Rampai Hukum Laut. In D. Puspitawati, Indenosia's Archipelagic State Status: Current Development' Indenosian Journal of International Law 2011, Vol:8, No:4, pp. 693-714 at p. 695.
[174] **Alexandrowicz, Charler Henry** (1967) An Introduction to the History of the Law of Nations in the East Indies:(16th, 17th and 18th centuries), Oxford, Clarendon Publishers, p. 64-65.
[175] **Draper, Jack A.** (1977) 'The Indonesian Archipelagic State Doctrine and Law of the Sea: Territorial Grab or Justifiable Necessity' The International Lawyer, Vol:11, pp. 143-162.
[176] Ibid, p. 158.
[177] **Coquia**, p. 145.
[178] See for full statement: Ibid, p. 147.
[179] UNCLOS, Art. 46(b).
[180] Ibid, Art. 46(a).

economic and political characteristics. Before the UNCLOS there was no pre-existing law on archipelagic waters supporting the claim of the Philippines.[181] The Philippines and Indonesia issued laws on their island waters, 1961 and 1957, respectively. Both States made the requirement for foreign warships to provide prior notification of passage through their defined island waters. Those behaviours had been protested by States having significant naval forces due to the fact that announced areas covered important sea lanes and straits such as the Java Sea, the Sunda Strait, and the Lombok Strait. Apart from mild oceans, another claim had come from Iceland. The Iceland Government announced on 25 March 1955 that the islands composing of islets and skerries would have been an independent baseline system,[182] which was in line with the criteria of the ICJ at the *Anglo-Norwegian Fisheries* case.

Archipelagic baselines shall be drawn from the outer most points of low tide baseline of outermost islands.[183] Like the straight baseline, permanent installations and lighthouses may be a base point at archipelagic baseline.[184] To draw the archipelagic baseline, four criteria must be satisfied.[185] First, the main island must be included in the baseline. Second, the area of water included archipelagic water must not exceed nine times of archipelagic islands' total area, including atolls. If it exceeds it must be narrowed to satisfy this criterion. Where this reduction cannot be done, the group of islands cannot benefit from the archipelagic baseline system. While calculating the ratio of the land area of atolls, those should be taken into account within drying reefs lying in the circumference of the plateau: waters lying within the infringing reefs of islands and atolls, steep-sided of the oceanic plateau of those parts which are encompassed or almost encompassed by a chain of limestone islands Third, the baseline drawn shall not deviate from the general direction of the archipelago to an appreciable extent. Fourth, every baseline is drawn, save for three percent, and shall not be longer than 100 n.m. The three percent may be exceeded up to 125 n.m. If the baseline exceeds, then they must be re-drawn to satisfy this criterion. Otherwise, the archipelagic State claiming that status shall not be entitled to archipelagic waters.

What happens when a continental State has archipelagos? A continental State may have two types of archipelagos. One of which is fringing along the coast of the continent

[181] **Koh**, p. 190.
[182] Report of the International Law Commission, (1955), 7th Session, A/2934, p. 29.
[183] UNCLOS, Art. 47.
[184] **Alexande**r, p. 521.
[185] **Koh**, p. 192.

and second of which is in the far Ocean. If there are fringing archipelagos, the State shall not be evaluated as archipelagic State under Article 46 of the UNCLOS. On the other hand, the straight baseline method may come into play between those islands without breaching close-continental State's right; and taking into account other considerations drawn by international dispute resolution bodies or custom. Second, oceanic archipelagos of continental States have been discussed during the UNCLOS III conferences. At the latest, the relevant articles dropped from the draft and Article 46 of the UNCLOS defines the archipelagic State as forming islands. Some scholars are debating that archipelagic waters rule shall apply to archipelagic State, but some argue that no indication exists that oceanic archipelagos of continental States cannot benefit from those principles or another principle.[186]

As a result, the system of archipelagic baseline shall not apply for the archipelagic islands belonging to continental States, such as Hawaii, the Nicobar and Andaman Islands, and the Greek Islands.[187] On the other hand, they may use a straight baseline method for their oceanic archipelagos and recognition of that use may turn it to customary international law.[188] Nowadays, straight baselines delimited by Denmark around the Faeroes, by Norway around Svalbard, and by Ecuador surrounding the Galapagos are not archipelagic baselines, as the islands are not independent States. Nevertheless, those straight baselines are similar to the system of archipelagic baselines.[189]

Even though the Republic of Ecuador did not benefit from the principle of archipelagic waters, Ecuador put into force the Supreme Decree of 959-A with which the Republic of Ecuador defined straight baseline system at the Galapagos Archipelago (protested by the U.S.), and moreover, the Republic of Ecuador declared a 15 n.m. ecological protection zone in 1986.[190]

By the Decree no. 156 of 1963, Denmark drew a straight baseline around the Faroe Islands as starting line of 12 n.m. for the fishing zone, in which Denmark stated that "The so-called archipelagic principle, which is not recognized under international law, has been

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[186] **Nong, Hong/ Jianwei, Li/ Pingping, Chen** (2013) 'The Concept of Archipelagic State and the South China Sea' *China Oceans Law Review*, Vol:2013, No:1, pp. 209-239 at p. 221.
[187] **Koh**, at p. 192.
[188] **Nong et al**. p. 221. Scholars, especially Chinese ones, argues that archipelagic baseline method should be applied to oceanic archipelagoes of continental states due to equality, having similar problems with archipelagic States, or becoming de facto punishment of different application (see. Nong et al, p. 222).
[189] **Alexander**, p. 518.
[190] **Nong et al**, p. 223.

utilized to delimit the Faroes straight baseline."[191] Denmark further reiterated the depart from normal baseline on 21 September 1976 through Decree no. 598 by expressing that the straight baselines should be drawn, and 200 n.m. fishery zone would be measured from that point.[192] Denmark reproduced its basepoint for the Faroe Islands in 2002 by Executive Decree no. 306 by combining a straight baseline and normal baseline, which did not receive any protest from the international community.[193]

Norway established a straight baseline on Svalbard archipelago by Royal Decree of 25 September 1970.[194] Norway further reiterated its position by promulgating a regulation on 1 June 2001 including territorial sea to outward of straight lines.[195] Spain has a stance with other continental States having oceanic archipelagos. Spain issued a Royal Decree no. 2510/1977, by which she drew a straight baseline at the Canary Islands.[196] Spain reiterated its position in 1978 by Act no. 15/1978 on the EEZ. Article 1(2) reads as follows:

> "In the case of archipelagos, the outer limit of the economic zone shall be measured from straight baselines joining the outermost points of the islands and islets forming the archipelagos, so that the resulting perimeter conforms to the general configuration of each archipelago."[197]

Portugal established a mixed line of normal and straight baseline as well as closing lines.[198] The U.S. protested this drawing as it did for others claiming that an continental State may not draw archipelagic waters which is inconsistent with Part IV of the UNCLOS.[199] The People's Republic of China's [Hereinafter: PRC] position on drawing a

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[191] The US Department of State the Bureau of Research, International Boundary Study Straight Baseline Faeroe. Retrieved from https://www.state.gov/documents/organization/62005.pdf, accessed 21.11.2019.

[192] Decree No. 598 of Denmark, The Fishing Territory of Faeroe Islands. Retrieved from http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1976_Decree.pdf, accessed 21.11.2019.

[193] **Nong et al**, p. 229.

[194] The US Department of State the Bureau of Intelligence and Research, Straight Baselines Savalbard. Retrieved from https://www.state.gov/documents/organization/61539.pdf, accessed 21.11.2019.

[195] Royal Decree of Minitry of Foreign Affairs of Norway, The Regulation relating to the Limit of Norwegian Territorial Sea around Svalbard. Retrieved from http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/nor_mzn38_2001.pdf, accessed 21.11.2019.

[196] Kingdom of Spain, Royal Decree No. 2510/1977. Retrieved from http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1977_Decree.pdf, accessed 21.11.2019.

[197] Kingdom of Spain, Act No 15/1978 on the Economic Zone. Retrieved from http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1978_Act.pdf, accessed 21.11.2019.

[198] **Nong et al**, p. 235.

[199] The US Department of State Bureau of Oceans and Affairs, United States Respons to Excessive Maritime Claims, No. 112, p.31. Retrieved from.https://www.state.gov/documents/organization/58381.pdf, accessed 21.11.2019.

straight baseline for oceanic archipelagos of continental States is like other States having oceanic archipelagos. The PRC accepts and emphasizes that those archipelagos must have internal waters determined by straight baseline; and the PRC acted in line with its opinion at drawing straight baseline around the Xisha Islands and the Diaoyu Islands.[200]

3.2 The Territorial Sea of Archipelagic States

The traditional approach to the territorial sea of archipelagos was that every island had its own territorial waters.[201] The Preparatory Committee of the Hague Conference of 1930 discussed that the territorial sea of a group of islands belonging to the single State might have been recognized, but it was very narrow in comparison with the UNCLOS drawing.[202] Even if it was accepted that archipelagos deserve special territorial water, some States argued that each island should have its own territorial sea and others asserted that they have a single territorial sea. Moreover, how close islands were to be considered in a single unit, was another discussion following the Hague Conference of 1930.[203]

According to the UNCLOS, if the State in question forms one island, the territorial sea of around was to be defined in a regular way. In the case that a State is made up of more than one archipelagic island, the territorial sea is to be defined from the archipelagic baselines explained above.

The effect of the archipelagic baseline is defined inward of the territorial sea, the EEZ, contiguous zone, and the continental shelf.[204] The covered area of baselines is the archipelagic waters of the State in question. The depth of sea and breadth of the line towards the island is not a determiner of archipelagic waters.[205] The territorial sea of archipelagic State in question shall begin from the archipelagic baseline, outwards.

3.3 Sovereignty over Archipelagic Waters

Even though archipelagic waters had been discussed from the 1920s and discussed in both 1930, the Hague Conference, and the UNCLOS I, no conclusion had been reached for some reasons. The Philippines Delegation to the Geneva Conference of 1960 asserted

[200] **Nong et al**, p. 237-238.
[201] **Coquia**, p. 141.
[202] League of Nations Document, C-196, M-70.1927. V., p. 72.
[203] **Coquia**, p. 150-151.
[204] UNCLOS, Art. 48.
[205] Ibid, Art. 49(1).

inland waters of the island as internal waters, but they had recognized innocent passage, the right of historic passage and free traverse from international straights.[206]

According to the UNCLOS, to claim archipelagic State status, the State in question must draw an archipelagic baseline; otherwise, it cannot claim archipelagic status.[207] There are two types of archipelagos: Mid-ocean archipelagos and fringing archipelagos. As is seen from the explanation above, the landward side of the baseline is internal waters in general understanding. However, where archipelagic water comes into play, the landward side of the straight archipelagic baselines is named and given the status of archipelagic waters. Since those areas are wider than internal waters which may be determined for the continental States and those areas may cover main sea lanes and straits, signatory States of the UNCLOS intended to limit the relevant States' sovereignty on those waters. In strengthening the idea that archipelagic waters are not internal waters of the archipelagic States, Article 50 of the UNCLOS states that archipelagic States may draw internal waters within archipelagic waters in accordance with Article 9, 10 and 11.

Archipelagic waters grant the right to enjoy sovereignty over, the airspace above, subsoil, sea-bed and resources of them. However, the rights bestowed through archipelagic waters are narrower than those for the internal sea, and wider than that of territorial waters. The important notion here is that the UNCLOS refers to those rights as sovereignty. For instance, territorial sea passage is to be innocent on the surface for submarines, but on archipelagic waters submarines may navigate in normal mode,[208] which is, submerged. Within archipelagic water, three kinds of passage may come into play for other States: the right of innocent passage in the territorial sea, archipelagic sea-lane passage in archipelagic waters, and the right of transit passage through the international straits.[209]

The archipelagic waters depart from internal waters and close to the territorial sea on the right of innocent passage of foreign ships. At the same point, it departs from the territorial sea by virtue of the right of suspension of innocent passage on the ground of security corresponding two conditions; one of which is non-discrimination in fact and form, and the other is duly publication of those suspensions.[210] In archipelagic waters, foreign States can claim innocent passage, archipelagic sea-lane passage, the traditional

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[206] **Coquia**, p. 148.
[207] **Nordquist, Myron H./ Satya, Nandan H./ Shabtai, Rosenne** (eds)(1995) United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. VI, Dordrecht, Martinus Nijhoff, p. 403.
[208] UNCLOS, Art. 53(3).
[209] **Lestari**, p. 498
[210] UNCLOS, Art. 52(2).

right of fishing and other activities, and the right of submerging submarine cables.[211] In two cases innocent passage may not, however, be enjoyed. One exception is on the waters which determine internal waters by applying Article 50 of the UNCLOS and the second exception is the existence of a broader archipelagic sea lane passage.[212]

The archipelagic State may designate sea-lanes through its archipelagic waters and adjacent territorial sea furnishing expeditious and continuous passage of transit[213] including submerged passage of submarines. The right to transit passage through archipelagic sea-lanes must be continuous, expeditious and unobstructed.[214] According to Article 54, Article 39(1)(b) is applicable to the archipelagic sea lane passage; namely, the vessel may only divert, stop, or slow on the condition of *force majeure* or distress. The UNCLOS does not consent to other sorts of activities.[215] The vessel traversing through archipelagic sea-lanes must follow Article 39, 40, 42 and 44 of the UNCLOS with regard to international straight. Article 39 regulates that vessels shall refrain from activities constituting a threat to the coastal State, other than a normal mode of expeditious and continuous passage, as non-compliance of international regulations on safety at sea and pollution from ships. Article 40 regulates surveys and researches. Article 42 embodies right of bordering States on fishing, pollution, regulation of maritime traffic, and fiscal, immigration and customs law. Article 44 includes the duty of a bordering State of not hampering transit passage and due publicity of any danger.

The sea-lanes must include the normal route of international navigation and the relevant State's archipelagic waters and territorial sea.[216] Namely, an archipelagic State cannot draw a sea-lane not including its sovereign areas. In case that an archipelagic State does not designate sea lanes, that right may be performed through the routes regularly benefitted for international navigation.[217] Indonesia has been designated sea lanes and submitted to the IMO in accordance with the UNCLOS, as the only archipelagic State drawing sea lanes.[218] Applying this concrete sea-lane passage, Indonesia had a discussion with the U.S. regarding interpretation of Article 53(12) of the UNCLOS. In the Bawean

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[211] Overview of the Workshop on Historic Waters and Archipelagic Regimes (2005) China Oceans Law Review, pp. 571-576 at p. 575.
[212] **Nordquist et al**., p. 456.
[213] UNCLOS, Art. 53(1).
[214] Ibid, Art. 53(3).
[215] **Oxman, Bernard H.** (2000) 'Transit of Straight and Archipelagic Waters by Military Aircraft' Singapore Journal of International and Comparative Law, Vol:2000, No:4, pp. 377-417 at p. 402.
[216] UNCLOS, Art. 53(4).
[217] Ibid, Art. 53(12).
[218] **Nong et al**, p. 218.

Island case, the U.S. asserted that Indonesia had not drawn east-west route but north-south route on its lane, and she had right to enjoy the normally used east-west lane for international navigation. On the other hand, Indonesia claimed that just after she drew sea lane passage, none of the other routes formerly used for international navigation was to be in use.[219]

The designated sea-lanes shall be continuous from entry to exit and ships using the lanes must navigate within 50 n.m. placing the axis lanes to the width centre.[220] The vessel traversing on the lanes cannot close more than 10 percent of the width of the narrower part of the passage to the coast of islands around the lanes.[221] Moreover, similar to the strait States, for the narrow part of the passage, archipelagic States may prescribe traffic separation schemes.[222] The schemes must submit to the IMO as it does for straits.[223] The duties of archipelagic States and vessels are, *mutatis mutandis*, same as Article 39, 40, 42 and 44 of the UNCLOS. Besides, during the drawing of archipelagic baselines, as it is in the straight baseline, where the archipelagic baseline is likely to separate the territorial sea of neighbouring continental State, the archipelagic baseline shall be drawn such a way that it does not cut them off.[224] The archipelagic State, some part of which is lying within two parts of continental State, shall respect their historical and legitimate interest, and all rights stipulated bilateral or multilateral agreement existing.[225] Namely, the archipelagic State concerned must respect the fishing and other legitimate activities of neighbouring countries that have these rights traditionally.[226] Also, they shall respect existing submerged cables at the date of the UNCLOS, and permit replacement and maintenance upon due notification.[227]

Another controversial topic is whether a State which has non-ratified the UNCLOS, has the right to sea lane passage through archipelagic waters. According to *Koh*, when a relevant Article of the UNCLOS does not satisfy the criteria established by the ICJ at the case of *North Sea Continental Shelf* between Germany and Netherlands, a State of non-party of the UNCLOS may not invoke to benefit right to sea lane passage through

[219] **Lestari**, p. 510.
[220] UNCLOS, Art. 53(5).
[221] Ibid, Art. 53(5).
[222] Ibid, Art. 53(6).
[223] Ibid, Art. 53(9).
[224] Ibid, Art. 47(5).
[225] Ibid, Arts. 47(6), 51.
[226] Ibid, Art. 51(1).
[227] Ibid, Art. 51(2).

archipelagic waters.[228] However, where a large number of States ratifies the UNCLOS without reservation for relevant articles, a State of non-ratified nature may benefit by invoking the other criterion of the ICJ at the *North Sea Continental Shelf* case of "subsequent practice of States subsuming a rule in a Convention into general international law."[229] Until now, 168 of 192-member States of the UN have ratified the Convention.[230]

In other respects, the archipelagic State may, of their appreciation, apply the same rule to the States non-party to the UNCLOS without discrimination. The Indonesia case for the management of archipelagic water (Coastal Zone Management) is classified as the process of control of the utilized coastal zone for many activities and aims.[231] Indonesia aimed at implementing good governance in unified coastal management policies regardless of regional problems and diversities of regional areas.[232] Indonesia has entered into a new phase named "Decentralized Coastal Zone Management" by allocating management of natural resources of waters to regional governments. This allocation does not mean local governments will have full sovereignty over waters. Sovereignty belongs to the provincial government.[233] Moreover, the Indonesian State has regulated anew the system of management of coastal areas and small islands which emerged, following marine cadastre applied in coastal States.[234] Indonesia has still been working on a draft act on ocean management, so-called "centralized planning decentralized execution" approach. It is understood from those regulations that, the Indonesian Archipelagic water claims have limited freedom of navigation and overflight through the archipelagic waters.[235]

On the other hand, the Philippines retained its archipelagic legislation on 17 June 1961 that it said nothing about navigational rights of foreign States.[236] Moreover, while ratifying the UNCLOS, the Philippines made a declaration regarding archipelagic passage that sea lanes do not nullify and impair its sovereignty over them. She further claimed that archipelagic waters are similar to internal waters.[237]

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[228] **Koh**, p. 198.
[229] Ibid, p. 198,
[230] http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm, accessed 20.11.2019.
[231] **Puspitawati**, p. 709.
[232] Ibid, p. 709.
[233] Ibid, p. 710.
[234] Ibid, p. 712.
[235] **Draper**, p. 160.
[236] **Nong et al**, p. 217.
[237] The United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec, accessed 20.11.2019.

4. The International Straits

4.1 Basic Features

Straits are mostly within the territorial waters of a coastal State. Where a strait falls into the territorial waters of one State, whether it is used only in the condition of innocent passage as the strait States stressed[238] or used as high seas, as all of the other States including landlocked ones opined, is a matter to be solved. The strait States believed that any regime other than innocent passage is an interference with the sovereign right of their territorial waters. On the other hand, they are very important for international trade for all other States.

Putting into view that international trade is seaborne, as a checkpoint, straits are the most important lanes for navigation. On the other hand, the two super-power at the time of conference of the UNCLOS had a strong interest in free navigation through, under or over the international straits, because they wanted and still want their enhanced warships and submarines to navigate all over the world without impediments.[239]

While assessing whether a strait is an international strait, the important element is whether it connects two parts of high seas. This is to say, usage in international navigation is secondary; in other words, the volume of traffic, is not essential. However, potential use is not enough. With the influence of *The Corfu Channel* case judgment, the 1958 TSC adopted a similar understanding. Besides, the Convention added that the strait must connect not only two parts of high seas but also it may connect high seas to territorial waters.[240]

The definition of international straits is crucial for warship navigation. Because, in accordance with international custom, during peacetime, warships may traverse through international straits without prior authorization, so far as the passage is innocent.[241] The innocent navigation must not be suspended. Submarines, however, shall navigate on the

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[238] **Koh**, p. 176.
[239] Ibid, p. 177.
[240] The 1958 TSC, Art.16(4).
[241] United Kingdom of Great Britain and Northern Ireland v. Albania (The Corfu Channel Case), ICJ, No:1949/1, J.D.09.04.1949. "The Corfu Channel Case (United Kingdom of Great Britain and Northern IrelandAlbania) arose from incidents that occurred on October 22nd 1946, in the Corfu Strait: two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. The United Kingdom first brought the case before the Security Council of the United Nations; which recommended the two Governments to submit the dispute in Court.The Court held Albania responsible under international law for the explosions that had taken place in Albanian waters and for the damage and loss of life.It riased that the mines could not have been laid without the knowledge of the Albanian Government."

surface flying their flags to benefit from the right to innocent passage.[242] Divergently from territorial waters, overflight is not permissible in the context of the innocent passage of international straits at the 1958 TSC.[243]

As to the UNCLOS, during the time elapsed, the majority of States claimed 12 n.m. territorial sea and thus, international straits got accustomed to becoming a territorial sea of the strait States. Therefore, apart from the 1958 TSC, the UNCLOS has provided for detailed and divergent articles and devotes different part to international straits from the part of the territorial sea and the contiguous zone. More importantly, the UNCLOS refers to this right as transit passage not innocent passage.

According to the UNCLOS, in the assessment of international strait, it must be taken into account that passage shall be from high seas to exclusive economic zones, or *vice versa*, or between any of them.[244] Besides, it must be used for international navigation. However, the UNCLOS does not include any criterion whether the route is to be important or to have a sufficient amount of maritime traffic volume. On doing that interpretation, the *Corfu Channel* case assessment of the International Court of Justice must be reverted, and usefulness of the strait is to be efficient in assessing its status of an international strait.[245]

4.2 Sovereignty over International Straits

The UNCLOS reveals four different regimes in international straits.[246] First of all, if there is a long-standing international agreement on a strait, the governance of that strait is to be in accordance with the respective Convention.[247] Secondly, if there is another route to the destination with similar convenience, this route is to be required for navigational use, and the passage from that kind of straits is to be governed by the relevant provisions of Part VII (freedom of navigation) and V (exclusive economic zone), respectively; in accordance with Article 36.[248] Where that route uses high seas or the EEZ, then provisions of those statutes shall apply. Third, where the passage interlinks high seas or the EEZ and

[369] Ibid, Art. 16(4).
[243] **Koh**, p. 179.
[244] UNCLOS, Art. 37.
[245] **Koh**, at p. 180.
[246] Ibid, p. 181.
[247] UNCLOS, Art. 35(c). The Montreux Convention of 1936 for Turkish Straits of the Bosporus, the Sea of Marmara and the Dardanelles and the Straits of Magellan in Boundary Treaty of 1881 between Chile and Argentina.
[248] **Koh**, p. 181.

territorial waters of a foreign State, innocent passage provisions shall be applied.[249] Or, if the strait is excluded from a transit passage provision in Article 38(1) of the UNCLOS,[250] which reads as "if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics"[251], in that situation, innocent passage shall be applied. Innocent passage of straits shall not be subject to any suspension. Fourth, the regime of transit passage which is to be applied to a vast majority of international straits has been prescribed in Article 37 of the UNCLOS. The concept of transit passage had not been used in customary law and the 1958 TSC.

Even though, the innocent passage was included in the 1958 TSC, transit passage is a creative innovation in the UNCLOS and should be explained here. Despite that the innocent passage is not required continuous and expeditious traverse on the territorial sea but requires non-prejudicial to serenity, good order, and safety of the coastal State,[252] transit passage requires acting in continuous and expeditious. During transit passage, the vessel shall traverse without delay, obeying international rules on safety at sea and generally accepted regulations regarding pollution from ships, refraining from being a threat to coastal State and any other activities save for *force majeure* and distress.[253] Yet, this requirement does not impede passage through the strait; entry, departure or return from a State bordering the strait is permitted. This exception illustrates dropping by a harbour in the relevant strait to embark cargoes and continueon its way out of strait.[254]

Foreign vessels using straits shall obey six duties:[255] First, they must proceed without delay. Second, they must abstain from menaces or use of force against the coastal State's sovereignty, territorial unity or political freedom, or they must not violate the principles of international laws embodied in the UN Charter. Third, unless necessities in *force majeure* or distress, they must enjoy that right in continuous and expeditious mode. Fourth, they must respect the provisions of Part 3 of the UNCLOS, which includes the

[249] UNCLOS, Art. 45(1)(b). Examples: the Strait of Georgia and the Gulf of Honduras. However, the Strait of Tiran has been subject to the UN Security Council resolution of 242 and 338, which reaffirm freedom of navigation on that strait.
[250] UNCLOS, Art. 45(1)(a).
[251] Examples: the Strait of Pempa and the Strait of Messina.
[252] UNCLOS, Art. 19.
[253] UNCLOS, Art. 39
[254] **Koh**, p. 182.
[255] UNCLOS, Art. 39.

prohibition of marine research or hydrographic survey without prior permission, the obedience of sea-lanes and traffic separation schemes, and respect laws and regulations adopted by the strait State under Article 42 of the UNCLOS. Fifth, they must respect generally followed international regulations, practices and procedures for safety at Sea. Sixth, they must abide by the regulations, practices, and procedures internationally accepted for elimination, decline, and control of pollution from ships.

Differently from the 1958 TSC, the UNCLOS lets no room for whether military ships are entitled to transit passage. The UNCLOS, by mentioning "all ships" in Article 38(1) and ships qualified sovereign immunity in Article 42(5), clearly includes foreign military ships as having the right of transit passage from international straits. Nevertheless, if there is an agreement with regard to relevant strait it will prevail this Convention.

In deviation from the 1958 TSC, the UNCLOS does not regulate the submerged passage of submarines. However, the notion of "freedom of navigation", a term of art of which belongs to high sea navigation, has been chosen in Article 38(2) of the UNCLOS. Moreover, the Convention regulates in Article 39 the behaviour of ships enjoying transit passage. While referring to activities that be refrained in Article 39(1)(c), the Convention uses the notion of "normal mode" that submarines normal mode are submerged navigation. Therefore, submarines may navigate submerged during the transit passage in accordance with the UNCLOS.[256]

Does a State that ratified the 1958 TSC but in contrast has not ratified the UNCLOS have similar rights in the UNCLOS with regard to international straits? According to *Koh*, taking into account that relevant Article of the UNCLOS does not satisfy the criteria established by the ICJ at the case of *North Sea Continental Shelf* between Germany and Netherlands, a State of non-party of the UNCLOS may not invoke to benefit right to transit passage through international straits.[257] In the case that a large number of States ratifies the UNCLOS without reservation to relevant articles, a State of non-ratified maybe benefit by invoking the other criterion of the ICJ at the *North Sea Continental Shelf* case of "subsequent practice of States subsuming a rule in a Convention into general international law."[258] 168 of 192-member States of the UN have been ratified the Convention so far.[259]

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[256] Ibid, p. 183.
[257] **Koh**, p. 198.
[258] Ibid, p. 198.
[259] See. http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm, accessed 20.11.2019.

However, Spain and Indonesia declared that relevant articles of the UNCLOS may not be regarded as customary international law.[260]

Conversely, the strait State may, of their appreciation, avail the States non-party to UNCLOS of the same rule without discriminating them. It should be borne in mind that at international straits inward of the baseline retain internal waters, and the territorial sea announced by respective State will be subject of exercising sovereignty on, in and under it.[261] *Yturriaga* discusses that if the aircraft does not respect conditions of transit passage, this article may be resorted by coastal State.[262] There is no hindrance in using the same analogy to the vessels enjoying the right to transit passage incongruently. However, a coastal State may not regulate freely the conditions of the right to transit passage.

Coming back to the passage of warships, apart from the UNCLOS, some conventions regulate their passage and limits them in tonage, number, and even the classes of warships during peace time and war time.[263]

III. Maritme Areas Subjected to Certain Exculusive Rights of Coastal States

1. The Contiguous Zone

1.1 Basic Features

The contiguous zone may overlap with the EEZ and the fishery zone if declared because of the fact that it extends 12 n.m. from the territorial sea.[264] As a matter of fact, Article 33(2) of the UNCLOS forbids the extension of the contiguous zone[265] from 24 n.m. from the baseline of the territorial sea. There is a room for debate when a State declares below 12 n.m. territorial sea zone. One can conclude that in this situation the State concerned may declare more than 12 n.m. contiguous zone up to 24 n.m. from the baseline of the territorial zone.

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[260] **Koh**, p. 199.
[261] UNCLOS, Art. 34
[262] **Yturriaga, Jose Antonio** (1991) Straits Used for International Navigation, A Spanish Pespective, Boston, Martinus Nijhoff, p. 232.
[263] For further information see: The Montreux Convention Regarding the Regime of The Straits of 1936
[264] **Guilfoyle (2009)**, p. 12.
[265] Ibid.

1.2 Sovereign Rights over the Contiguous Zone

The contiguous zone may be declared to enforce coastal State's customs, fiscal, sanitary, and migration laws.[266] Namely, the sovereign right on those matters in the territorial sea may be extended through the announcement of the contiguous zone up to 24 n.m. According to *Shearer*, the UNCLOS allows the State concerned only to exercise a control facility to prevent infringement of its law or punish the crimes already committed within its sovereign zone.[267] He further argues that this facility is limited to inspection and warning rather than arresting.[268] Moreover, the facility of the control exercising to punish for a crime is subject to the condition that the crime must be perpetrated within its territory or territorial water.[269] Therefore, some argue that that provision may only be applicable to the ships outgoing from the territorial sea.[270]

Besides, where a ship situates herself within the contiguous zone in order to transfer illicit drugs or substances through smaller boats, under 'constructive presence'[271] doctrine, the coastal State has enforcement jurisdiction over that ship, which includes hovering mother ship.[272] According to Article 23 of the 1958 HSC, the hot pursuit must be initiated against the vessel or its boat within the internal or territorial waters, or contiguous zone of the pursuing State. Article 111(1) of the UNCLOS requires almost the same conditions. Additionally, according to the same Articles, "the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established." In accordance with that doctrine, hovering mother ships will be subject to conditions of hot pursuit

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[266] 1958 TSC, Art. 24; UNCLOS, Art. 33(1)(a).
[267] **Shearer, Ivan A.** (1986) 'Problems of Jurisdiction Law Enforcement against Delinquent Vessels' The International and Comparative Law Quarterly , Vol:35, pp. 320-343 at p. 330.
[268] Ibid; **Koh**, p. 175.
[269] UNCLOS, Art. 33(1)(b)
[270] **Koh**, p. 175.
[271] Constructive presence is divergent from hot pursuit in focus. In accordance with that doctrine, States may claim jurisdiction over the vessel not-entered their territorial sea. The vessel offending is accepted inside of the jurisdiction of the State due to relationship established with another vessel that is under the jurisdiction of that State. Constructive presence works in connection with the right of hot pursuit. Thus, coastal States have some flexibility in enforcing their laws. The doctrine eases the harshness of the requirement of the hot pursuit. Even if that vessels is not in the position of a coastal State's jurisdiction for enjoying the right of hot pursuit, the doctrine provides to the coastal States the right to pursue the vessel that is attempting to escape their law though using other craft or boats not belonging to them. See for further information: Lewis, Reece (2020) 'The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory"' *Ocean Development & International Law*, 51(1):19-34; UNCLOS, Art. 111(4).
[272] **O'Connell**, p. 1092.

Article 111(3) of the UNCLOS foresees that if a hot pursuit commences from the territorial sea, or in some cases, from the contiguous zone. That is to say, in the occurrence of violation of custom, sanitary, or immigration regulations of the coastal State, a hot pursuit is permissible in the contiguous zone.

The hot pursuit must start with visual or auditory signal and must be undertaken by warship or military aircraft or governmental vessels clearly marked to indicate the government service and authority, to that effect.[273] If those ships do not send warnings of such, hot pursuit conditions cannot be resorted to. Hot pursuit will be examined in detail in the upcoming chapters regarding the high seas.

With regard to maritime frontier, a State can impose a frontier at the outward of contiguous zone for the fact that this zone is established for the protection of immigration law. It will be examined Part III in detail.

2. The Fishery Zone

2.1 Basic Features

The freedom to fish is a fundamental freedom of the high seas.[274] That understanding depends on the presumption that fish stock is inexhaustible. However, emerging industrial fishery tools have caused over exploitation. In view of this development, States have initiated to declare a fishery zone to protect their fish stock. For instance, the US proclaimed the fishery zone of superjacent to its continental shelf in 1946 for power to announce distinct conservation zone of fishing.[275] From 1947 many Latin American States claimed 200 n.m. jurisdiction over natural resources from the coastline.[276] The US eventually declared 200 n.m. fisheries zone in 1977, though.

The fishery zone overlaps the EEZ, and the EEZ rights encompass the rights within the fishery zone. A State may or may not announce one or both of them. Unless a declaration is made, no rights emerge within the connotation of a fishery zone.

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[273] UNCLOS, Art. 111(5).
[274] **Guilfoyle (2009)**, p. 97.
[275] Proclamation no. 2668 of the US President. (1946). Proclamation by the President with Respect to Coastal Fisheries in Respect of Certain Areas of the High Seas. Washington.
[276] **Hillock, Alan** (1977) 'The Origins of 200 Mile Offshore Zones', American Journal of International Law, Vol:71, pp. 494-500.

2.2 Sovereign Rights over the Fishery Zone

After this progress in the declaration of the zone, it is prescribed in UNCLOS that a riparian State may, "in the exercise of its sovereign rights" in the EEZ, "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance" with its law.[277] Fishing and preserving that stock is to be protected via the EEZ provisions in the UNCLOS. The enforcement jurisdiction here is to preserve the fish stock and prevent it from being exploited by foreign vessels and individuals. Even though 200 n.m. fishery zone has been enclosed within the EEZ, fishery management[278] may be considered alongside.

States sovereign rights in fishery zone are to aim at protection of its fish reservation, and actions to be taken cannot go beyond that aim.

3. The Exclusive Economic Zone

3.1 Basic Features

The EEZ may be declared for up to 200 n.m. from the baseline of the territorial sea[279] and determined for the economic interests of the coastal State. Therefore, it is not a geographic but legal issue.[280] The EEZ overlaps with the fishery zone if declared and to some extent, with the Continental Shelf. Benefitting from the EEZ requires a declaration of the zone.

The coastal State has the right to explore and exploit, conserve and manage the natural resources, whether living or non-living, all over the zone. Sovereign rights in the zone extends to economically utilization and research of its reserves, such as the producing of energy from the water, streams, and winds.[281] Moreover, the coastal States have sovereign rights for constructing artificial islands, installations, and structures in that zone. The artificial island, islets, installations, and structures will be described below in chapter 3.6.1.

Additionally, if a State has reasonable grounds for particular protective measures for a certain area of its EEZ, it should submit it to an international organization, IMO, on

[277] UNCLOS, Art. 73.
[278] See Part II chapter I.4.11.
[279] UNCLOS, Art. 57.
[280] **Kuran**, p. 232.
[281] UNCLOS, Art. 56.

the grounds of oceanographic and ecological conditions, that the regular protection measures are unable to prevent that area and special mandatory measures are required.[282] Where the coastal State has the intention to introduce additional pollution preventive measures, it should present it to the IMO with the above submission. In enjoyment of its rights and acting its duties in the exclusive economic zone, the coastal State shall act in line with the rights and duties of other States and in line consistent with the provisions of the UNCLOS.

3.2 Sovereign Rights over the Exclusive Economic Zone

In accordance with Article 56(1) of the UNCLOS, the coastal States have jurisdiction to some extent over the EEZ, if it is declared by the relevant State. As mentioned above, the coastal State may exercise its researching and utilizing, conserving and administering the natural reserves, whether living or non-living, all over the zone. These rights in the zone must be of the waters superjacent to the seabed and of the seabed and its subsoil. In this case however, the rights given by the Continental shelf should be compared, because both zones overlap in a very wide area. Concerning activities for the economic researching and utilization of the zone, such as the producing of energy from the water, streams, and winds, those rights are in the scope of EEZ. However, the State concerned does not have those rights over the declared continental shelf. This is because the EEZ may be shorter than the continental shelf; and the continental shelf enables rights under the water, not on or within the water.

The coastal States have sovereign rights to construct artificial islands, installations, and structures and use them within that zone. The scope of rights the artificial island, islets, installations, and structures bestow on the landlord State will be described in chapter 3.6.1. States also have jurisdiction with regards to marine scientific research and the preservation and conservation of the marine environment within the EEZ.[283] The relevant State has limited enforcement jurisdiction to be enjoyed in order to preserve the exercise of these rights. On the other hand, the coastal State "shall have due regard for the rights and duties of other States and shall act in a manner compatible with the provisions of [the

[282] Ibid, Art. 211(6).
[283] UNCLOS, Art. 56(1).

UNCLOS].”[284] However, exploitation of the seabed and subsoil shall be subject to the provisions of the continental shelf.

According to Article 246 of the UNCLOS, a coastal State has the exclusive right to conduct marine scientific researches within the EEZ. Other States may conduct such researches provided that they are granted permission by the coastal State, to do so. For the sake of human beings, coastal States shall create rules and procedures in order to ensure the grant of such consent without delay. On the other hand, a coastal State may withhold research that requires drilling uses explosives and cause a harmful effect on the marine environment. Despite that authoritative wording, Article 246(5) reserves some specific scientific researches for the coastal State such as research and utilization of natural resources, living or non-living. Moreover, paragraph 6 of the Article reserves exploitation and exploration rights for coastal States even within the area beyond the EEZ but within the continental shelf, the area of which is elucidated below.

4. The Continental Shelf

4.1 Basic Features

Even if coastal States have rights over continental shelf regardless of proclamation or expression of its continental shelf,[285] it as an extension of landmass under the sea at the point where the seafloor begins to substantially fall off into depth ocean,[286] which is highly irregular and so its seaward edge, is not explicitly identifiable. The continental shelf of a coastal State is defined legally and geographically not geologically. Considering that islands mostly do not have continental landmass in geological terms, the notion of continental margin preferred by the convention system as legal terms is not as scientific. It comprises the seabed and subsoil of the submarine areas.[287]

Although the Truman Proclamation of 1945 was the first claim over the area of the continental shelf, the very first agreement on it is the Convention on the Continental Shelf

[284] Ibid, Art. 56(2).
[285] Ibid, Art. 77(3).
[286] **Bourcart, Jean** (1949) Geographie du Fond des Mers: Etude du Relief des Oceans, Paris, Payot, p. 130.
[287] UNCLOS, Art. 76(1)

of 1958 [Hereinafter: the 1958 UNCCS].[288] Article 2(1) of the 1958 UNCCS provides for that "the coastal state exercises over the continental shelf sovereign rights to explore it and exploit its natural resources." This provision implies that the coastal State has no exclusive rights over the adjacent sea area.

The later agreement which includes a continental shelf provision is the UNCLOS. The seaward of the continental shelf is generally either 200 n.m. from the inward of the territorial sea, namely, from the baseline or, outside its territorial sea throughout the natural extension of its land territory to "the outer edge of the continental margin", whichever is greater.[289]

There are two crucial properties at seafloor for delineation: sediment thickness (Irish/Gardiner Formula) and morphologic extent (Gradient/Hedberg formula). A coastal State may establish wider outer limit depending on those delineations. The outer limit of the shelf may be one of the constraint lines of either 350 n.m. distance from baseline or 100 n.m. beyond the 2.500 m. isobaths, whatever former properties are. The continental margin forms of seabed and subsoil of the shelf, the slope, and the rise. On the other hand, it does not include the deep ocean floor and its ridges. Submarine ridges may not let the coastal State to extend its shelf beyond 350 n.m. However, this rule does not apply to the submarine elevations. Those elevations may be plateau, caps, rises, banks, and spurs that are inherent elements of the continental margin.[290] This situation means that a coastal State may benefit from a 200 n.m. continental shelf at the minimum. If it has a continental margin that is far inward to high seas from 200 n.m., it may extend 350 n.m. maximum or 100 n.m. from 2500 meters isobaths.[291]

The UNCLOS Convention system requires State parties to submit data and other materials concerning continental shelf extending 200 n.m. to the Commission on the Limits of Continental Shelf. The Commission has right to provide scientific and technical advice to the State parties, and the announcement of the continental shelf based on this advice shall be final. The submission of the data may not exceed 10 years from the entry into force of the Convention. However, since the guideline concerning the continental shelf

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[288] The 1958 UNCCS has been ratified or accessed by 58 countries so far. See: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21&clang=_en, accessed 20.11.2019.
[289] UNCLOS, Art. 76(1).
[290] Ibid, Art. 76(6).
[291] For further explanation see:Akkutay, Ali İbrahim (2018) Kıta Sahanlığı Kavramı, Kıta Sahanlığının Yarattığı Hak ve Yetkiler ile Deniz Alanlarının Sınırlandırılmasına İlişkin Usul ve Esaslar Çerçevesinde 200 Deniz Milinin Ötesindeki Kıta Sahanlığı, Ankara, Adalet Yayınevi.

could not be adopted until 1999, the prescription period had been extended to 13 May 2009.

On the other side, in the arctic region, the ocean is formed by ridges and basins. The assumption of ridges being considered submarine elevations may let almost all of the Arctic Oceans fall under national jurisdiction.[292] Yet, a different reading of Article 76 may result in a wider area that does not fall under the national jurisdiction of a State.[293] The data submitted by the States is essential for the drawing of the outer limit. The submissions which are made by the respected State in line with the suggestions of the Commission will be legally binding and final.[294] Up till 2018, the Commission did not decide on the Arctic continental shelf though the role of ridges in the Arctic Ocean is still highly controversial.[295]

However, the submission to and duty of the Commission does not seem to allow protection rights to the States that did not become a party to the UNCLOS. Where the announced area is likely to cut off or interfere with the neighbour State's interest in this regard, the Commission's decision is most likely to become meaningless for the fact that the relevant State will not obey or respect that decision or announcement.

The determination of the continental shelf is important for the fact that where it is drawn, this line would also be the line of the EEZ of the State in question.[296]

4.2 Sovereign Rights Regarding Continental Shelf

A coastal State will have rights on the continental shelf in her territory without the need of declaration in contrast to the EEZ. A coastal State may interdict a vessel conducting an unlicensed exploration and exploitation within the State's continental shelf.[297] However, other States irrespective of being land-locked or not, possess the right to

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[292] **Macnab, Ron/ Neto, Paul/ Van De Poll, Rob** (2001) 'Cooperative Preparations for Determining the Outer Limit of the Juridical Continental Shelf in the Arctic Ocean: a Model for Regional Collaboration in Other Parts of the World' Proceedings of a Continental Shelf Workshop hosted by the Argentine Council of International Relations, Boundary and Security Bulletin, Buenos Aires Durham University, Vol:9, No:1, pp. 86-96.

[293] Proelss, Alexander/Müller, Till (2008) 'The Legal Regime of the Arctic Ocean' Heidelberg Journal of International Law , Vol:68, pp. 651-687 at p. 687.

[294] UNCLOS, Art. 76(8).

[295] **Reichert, Christian** (2009) 'Determination of the Outer Continental Shelf Limits and the Role of the Commission on the Limits of the Continental Shelf' The International Journal of Marine and Coastal Law, Vol:24, No:2, pp. 387-399 at p. 396.

[296] **Acer, Yücel** (2019) 'Doğu Akdeniz'de Deniz Yetki Alanları ve Türkiye-Libya Mutabakatı' Seta Analiz, Vol:301, pp. 1-15 at p. 9.

[297] **Guilfoyle (2009)**, p.15.

carry scientific research in the water column[298] upon the continental shelf that are beyond the EEZ.[299] Nevertheless, the categories of permissible scientific researches and the exploration bound to the consent of the coastal State in this area, are not explicitly definable.[300] Presently, another room for discussion has emerged: According to Article 246 of the UNCLOS, coastal States have the right in their exercise of jurisdiction, "to regulate, authorize, and conduct marine scientific researches" in their EEZ as well as on continental shelf of their own.[301] All researches in the EEZ and on the continental shelf of coastal States require its permit.[302] Therefore, the above mentioned exemptions will almost have no field of application. It is argued that hydrographic survey may be executed upon continental shelf since this sort of survey falls within the freedom of navigation on the high seas and thus, is not to be regulated as scientific exploration.[303]

According to the 1958 UNCCS, the coastal State is under a duty not to make any obstacle on laying and maintenance of submarine cables or pipelines,[304] and not to initiate indefensible intervention to navigation, fishing or the preservation of the living reserves.[305] However, the coastal State has right to built installations and operate them for shelf exploration and exploitation and to establish protective safety zones around them,[306] and to protect the living resources, within the safety zones, from harmful agents.[307] The littoral States enjoy exclusive jurisdiction over constant structures, installations and artificial islands on the continental shelf.[308] On the other hand, neither the UNCLOS nor the 1958 UNCCS has dealt with the specific issue of mobile offshore drilling units.[309]

According to Article 246 of the UNCLOS, a coastal State has the exclusive right to carry out marine scientific researches within the continental shelf. Foreign States may conduct such researches provided that the coastal State grants them permission to do so.

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[298] "Water column" is "[a] vertical continuum of water from sea surface to seabed". UNCLOS, Articles 56.1.a, 78, 135 and 155.2, refer to "superjacent waters," same as the Continental Shelf Convention does at Article 3. "Superjacent waters" in those articles corresponds to "Water column" (see: Walker, George K./ Noyes, Jan E. (2002) 'Definitions for the 1982 Law of the Sea Convention-Part II' California Western International Law Journal, Vol: 33, pp.191-324, p.308).
[299] UNCLOS, Art. 257.
[300] **O'Connell**, p. 1031
[301] **Guilfoyle (2009)**, p. 15.
[302] **Churchill/ Lowe**, p. 405.
[303] Ibid, p. 405.
[304] UNCLOS, Art. 4.
[305] Ibid, Art. 5(1).
[306] Ibid, Art.5 (2-3).
[307] Ibid, Art. 5(7).
[308] **Guilfoyle (2009)**, p. 15.
[309] **Churchill/Lowe**, p. 154.

For the sake of human beings, coastal States shall adopt rules and procedures which ensures the grant of such consent without delay. Despite that authoritative wording, Article 246(5) reserves some scientific research to the coastal State such as research and utilization of natural reserves, living or non-living. Coastal State may withhold research activities that require drilling and using explosives and cause a damaging effect on the marine environment. Nevertheless, paragraph 6 preserves exploitation and exploration rights for coastal State; even within the area beyond the EEZ but within the continental shelf, the area of which is elucidated above.

5. Historical Waters

Historical bays are those of which have internal water status due to historical rights over the area whatever the extent of its mouth is. The essence of the historic claim is that the bay is used as internal waters supported by a history of such usage. It should be noted that a mere claim will not create a historic bay. There is no general rule for those waters; nevertheless, every claim must be examined case by case.[310]

Article 298 of the UNCLOS provided for that the claims of historic bays and titles shall be submitted through a declaration. However, the Permanent Court of Arbitration [Hereinafter: PCA]decided at the South China Sea Arbitration that taking into account other authentic text in other languages requires all disputes regarding historical bays and titles be submitted through a declaration, for the fact that the PRC claims only historic rights which is not equal with historic title, the PRC has not entitled historic rights over the South China Sea under the UNCLOS.[311]

The PCA distinguishes these two terms as the ICJ. According to the PCA;

> "Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. 'Historic waters' is simply a term for the historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea..."[312]

[310] **Kuran**, pp. 64-65.
[311] The Republic of Philippines v. the People's Republic of China (The South China Sea Arbitration Award), PCA, No:2013/19, D.D.12.07.2016, para. 229.
[312] Ibid, para. 225.

The PCA explicitly refers historic waters are the waters exercise sovereignty and therefore it is accepted as if internal waters.

In *Tunisia v. Libya* case, the ICJ held that general international law governs historic title, and does not furnish a uniform 'regime' for 'historic waters' or 'historic bays', but every single cases of 'historic waters' or 'historic bays', will have a particular regime.[313] The historic regime is not only limited to bays such as the 1958 TSC mentioned. Indeed, there is no clear restriction for the claim of historic waters. The UN Memorandum of 1958 addresses that historic waters are applicable "to straits, to the waters within archipelagos, and generally to the various areas capable of being comprised in the maritime domain of the State."[314] On the other hand, the United State Supreme Court held a few cases that historic claims are not limited to bays.[315]

In some instance, historic claims come into play for archipelagos. Hence, Article 46 (b) of the UNCLOS mentions the notion of "or which have been historically regarded as such" while describing which group of islands can constitute an archipelagic State. Thus, the UNCLOS gives weight to historical claims regarding an archipelagic status. Additionally, the UNCLOS permits low-tide elevations without lighthouses as a base point on drawing a straight baseline, where those are "received general international recognition."[316] This notion is an implicit reference to a historic claim. Contrary to this reference for straight baseline for the deeply intended, or cut into, or having fringe of islands along the coast, it is understood from the PART IV of the UNCLOS that this kind of low-tide elevations cannot be used for the archipelagic baseline since archipelagic States are *sui generis* in comparison with regular ones.

Article 7(6) of the 1958 TSC and 10(6) of the UNCLOS regulates that provisions regarding the bays that all coasts belong to one State, shall not apply to so-called historic bays. Moreover, during delimitation of territorial sea, Article 12 of the 1958 TSC takes into account the reason of historic title. Thus, it is recognized that some bays might historically have belonged to a State. It is arguable that pre-existing internationally

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[313] Tunisia v. Libya, ICJ, No:63, J.D.24.02.1982, para. 100. "The case is related to delimitation of the Continental Shelf between Tunisia and Libya. The Court declared the principles and rules of international law, which are applicable to the delimitation of continental shelf. It counted out the relevant circumstances to be taken into account for reaching an equitable delimitation and specified the practical method to be used for the delimitation itself."

[314] Memorandum by the Secretariat of the UN. (1957, September 30). Historic Bays (Preparatory Document no. 1) A/CONF 13.1, para. 199.

[315] Louisiana v. US, The US Supreme Court, J.D.03.03.1969 [394 U.S. 11 (1969)]; Alaska v. US, The US Supreme Court, J.D.19.06.1997 [521 U.S. 1 (1997)].

[316] UNCLOS, Art. 7(4).

recognized historic claims may override any convention with no express clause within the dint of customary international law. The historic claim might be made for not only in respect of "bays", but also in other maritime areas such as territorial waters,[317] archipelagic waters and the waters lying between an archipelago and the mainland.[318]

With regard to the Gulf of Fonseca, the ICJ held in its judgment of *Land, Island and Frontier Dispute (El Salvador v. Nicaragua)*[319] case, even though the three littoral States accept maritime belts subjecting to the single sovereignty of each, but with mutual rights of innocent passage, for the remaining waters within the Gulf, there must be more rights than the territorial waters granted at historical reasons and the practical necessities of a situation. Accordingly, not only the Gulf States but also third State's vessel looking for entrance to a port in each of the three coastal States must enjoy the right of passage. Where the Gulf waters are evaluated as internal waters as if 1917 the ICJ accepted territorial[320] at that time in the case of *Land, Island and Frontier Dispute*, it is subject to a special regime of its particularity, the condominium or Co-ownership, as *sui generis*, for not only of enjoying sovereignty jointly but of rights of passage. Despite the juridical status of the Gulf being the same as internal waters not as territorial sea, it is limited with certain rights of passage that is required by historic and necessary reasons.[321]

The PCA held at the case of the *South China Sea Dispute*[322] that

> "….China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided for by the Convention. This is apparent in the text of the Convention which comprehensively addresses the rights of other States within the areas of the exclusive economic zone and continental shelf and leaves no space for an assertion of historic rights."[323]

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[317] Ibid, Art. 15; the 1958 TSC, Art. 12.
[318] UNCLOS, Art. 46.
[319] El Salvador/Honduras: Nicaragua intervening (Land, Island and Frontier Dispute), ICJ, J.D.13.09.1992. "The CJ considered the effect of colonial administrative boundaries, Spanish colonial land titles, post-independence land titles, and State practice. It took into account historical titles in deciding how to delimit certain land and maritime boundaries between Honduras and El Salvador."
[320] The ICJ describes the meaning of territorial at the time of decision of Land, Island and Frontier Dispute para.412 as "meaning thereby not territorial sea but waters that were not international and were on historical grounds claimed *à titre de souverain* by the three coastal States."
[321] ICJ, Land, Island and Frontier Dispute, 1992, para. 412.
[322] China reiterated for several times that it is not a part of that arbitration. However, Permanent Court of Arbitration stated that UNCLOS requires mandatory arbitration and even a party of do not want to become a party, it is not an issue for arbitration process.
[323] PCA, The South China Sea Arbitration, para.261.

Moreover, the PCA found that the PRC, by ratifying the UNCLOS, has relinquished its historic rights and the UNCLOS is packaged, superseding former claims of living and non-living resources at the outside of the internal and territorial sea.[324] It should be noted that that part of the judgment is with regard to fishing rights claim based on historic rights. Historic title as mentioned in Article 298(1)(a)(i) of the UNCLOS is one form of historic rights; but not a broader term than historic rights in general.[325]

On the other hand, even the PCA asserts that historic claim may not be put forward after the UNLOS come into force, *Symmons* evaluates that the doctrine of historic rights is an established part of international law of the sea.[326] The contrast understanding of this idea has been asserted. The historic title might have played a significant role in gaining rights on some waters, especially at the South China Sea. In accordance with a workshop on historic waters in the PRC, it is argued that "historic title" is "an ancient title, which has long been generally accepted to be a self-sufficient right" and gives "a right that is generated or solidified through prescription or tacit acquiescence, or a right that has been accepted in law through long and continuous possession."[327] The workshop claims that historic title of the PRC on the South China Sea is on the table and Article 123 of the UNCLOS do not limit historic title since it does not have a specific rule on cooperation for the enclosed or semi-enclosed sea.[328] However, contrary to some authors' opinion of that historic title has superseded by the UNCLOS as between parties to it, others are of the opinion that it should not override established claims in the nature of the historic title.[329]

The coastal States may close historic internal waters by claiming historic waters for itself. While establishing historic internal waters is a vague issue, some coastal States are abusing that rule. These include countries such as Canada on the Arctic Ocean continental sea and Libya on the Gulf of Sirte.[330] Canada had claimed the Hudson Bay was its internal waters under historic rights.[331] The UN secretariat established three criteria for historic claims in 1962 to put claims in order: first the coastal State has to exercise power of

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[324] Ibid, para.263.
[325] Ibid, para.228.
[326] **Symmons, Clive R.** (2008) Historic Waters in the Law of the Sea: A Modern Re-Appraisal, Leiden/Boston, Martinus Nijhoff, p. 296.
[327] Overview of the Workshop on Historic Waters and Archipelagic Regimes. (2005). China Oceans Law Review, pp. 571-576.
[328] Ibid, pp. 571-576.
[329] **Symmons**, p. 25.
[330] **Kraska, James** (2011) Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics, Oxford, Oxford Press, p. 111.
[331] **Coquia**, p. 148.

authority over the area, second that authority must be shown to be continuous, and third the coastal State should prove that other States recognize the historical status of her claimed possession, which may be tacit acceptance by not announcing non-acquiescence.[332]

After that criteria, the Burmese claimed the Gulf of Martaban at the mouth of the Sittang River as historical water of the Burmese and that it closes its mouth at a 222 n.m. closing line.[333] In 1977, through the Territorial Sea and Maritime Zones Law, she asserted that it had justification to proclaim such lines for its peculiar geographic condition and national economic interest.[334]

Hodgson&Alexander claimed that ICJ approved at the *Anglo-Norwegian Fisheries* case of Norwegian application which may depart 15° at the largest in the areas out of historic rights prevail.[335] But, *Lewis Alexander* acknowledged that the UNCLOS has not made such a linkage and never been adopted by a delimiting State.[336] Yet, determining a particular baseline may be based on the economic interest the reality and importance of which are clearly proven by historical usage.[337] It should be noted here that the ICJ at the *Anglo-Norwegian Fisheries* case held that the straight baseline system used by Norwegian to draw a line outermost base point of indented lands was in line with historical circumstances as well as geographical and economic circumstances.[338]

As is seen from the judgments and both agreements, the UNCLOS[339] and the 1958 TSC,[340] the historic claim may be made for only territorial sea delimitation, not for the delimitation of EEZs and continental shelves or other sea areas since those entitlements are new ones. However, it is noteworthy that neighbouring States may take into account the historical evidence while drawing delimitations between them.[341] *Symmons* argues that, for the historic claim, it should be consistent, clear, duly publicized and notified, effectively exercised, long usage period, prolonged and continued.[342] Nevertheless, that claims must not be protested by other States. As is seen from the judgment of the PCA, the claim of

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[332] Ibid, p. 148.
[333] **Alexander**, p. 513.
[334] **Kraska**, p. 294.
[335] **Alexander, Lewis M./ Hodgson, Robert D.** (1972) 'Toward an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls' Law of the Sea Institute Occasional Paper no. 13, pp. 52-54.
[336] **Alexander**, p. 516.
[337] UNCLOS, Art. 7(5).
[338] **Coquia**, p. 153.
[339] UNCLOS, Art. 15.
[340] The 1958 TSC, Art. 12.
[341] **Symmons**, p. 47.
[342] Ibid, p. 117-213.

historic rights may not be contested against the other Member States under the UNCLOS by virtue of that they relinquished those rights by ratifying the Convention.

The ICJ stated in the case of *Land, Island and Frontier Dispute* that every historic water has its own regime and it declared that innocent passage exists in the Gulf of Fonseca.[343] In other words, no general rule on the right of innocent passage on the historic waters exists in customary international law.[344] As of today, Sea of Azov, Hudson Bay, Vladivostok Bay, Finland Bay, and Tunisia Bay are recognized as historic bays.[345]

6. Maritime Areas of Islands, Rocks, Low-tide Elevations Artificial Islands and Installations

6.1 Basic Features

Islands and Rocks

As is drafted at Article 121(1) of the UNCLOS, an island is a natural area of land, which is encompassed by water and non-sinking at all times including a high tide. Where an island satisfies these conditions simultaneously, it is to possess its own territorial sea, contiguous zone, continental shelf, and EEZ.[346]

Islands and rocks may be difficult to determine because they need thorough examination and recent development in the survival of human habitation. According to the PCA, rocks are a kind of islands which is an inherently structured area of land. Rocks, as per Article 121 of the UNCLOS, must have the ability to nourish human domicile and sustain its economic life. Rock in this regard must not necessarily be composed of solid rocks. It may consist of rock-like nature, such as clays, and geomorphological criteria should be taken into view while determining the feature as a rock.[347] Likewise, the ICJ decided that an island does not need to be defined by reference to its geological composition in international law. Therefore, composing the feature of coral is irrelevant in determining whether it is an island or not.[348]

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[343] ICJ, Land, Island and Frontier Dispute, p. 590-593.
[344] **Yang**, p.82
[345] **Çaşın, Mesut Hakkı** (2013) Modern Uluslararası Hukukun Temel Esasları, İstanbul, Legal Yayıncılık, p. 657.
[346] UNCLOS, Art. 121(2).
[347] PCA, The South China Sea Arbitration Award, para. 479-482.
[348] Nicaragua v. Colombia (Territorial and Maritime Dispute), ICJ, J.D.09.11.2012, para.37. "The Republic of Nicaragua raised a case against the Republic of Colombia concerning title to territory and maritime

In February 2009 the Philippines enacted that Scarborough Shoal and the Spratly Islands belong to it under the regime of islands.[349] Later on, the PCA held that Scarborough Island is a rock and high-tide elevation under the provisions of the UNCLOS. The PCA decided that none of the elevations at the region of the Spratly Islands has the capability of islands under the UNCLOS.[350]

Moreover, the PCA has defined the meaning of human habitation in the provision. It stated that

> "the mere presence of a small number of persons on a feature does not constitute permanent or habitual residence there and does not equate to habitation. Rather, the term habitation implies a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner. Human habitation would thus require all of the elements necessary to keep people alive on the feature but would also require conditions sufficiently conducive to human life and livelihood for people to inhabit, rather than merely survive on the feature."[351]

Evaluation of a rock in this respect must be made under its natural condition, namely, the introduction of technology and extraneous material may not entitle a rock to the island with maritime entitlements.[352]

Furthermore, an island must have its "economic life of its own" the definition of which is determined by the PCA. According to the PCA view, economic life which includes producing, selling and exchanging good must be local, not imported, and purely extractive activities which do not constitute activity in the meaning of the notion.[353] The PCA has also excluded the activities carrying on perspective EEZ or continental shelf from

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delimitation. The Court decided that it had jurisdiction regarding the dispute concerning sovereignty over the maritime features claimed by the Parties, except for the islands of San Andrés, Providencia and Santa Catalina. The Court held that the treaty signed in 1928 between Colombia and Nicaragua (through which Colombia recognized Nicaragua's sovereignty over the Mosquito Coast and the Corn Islands, while Nicaragua recognized Colombia's sovereignty over the islands of San Andrés, Providencia and Santa Catalina, and the maritime features forming part of the San Andrés Archipelago) had settled the issue of sovereignty over the islands of San Andrés, Providencia and Santa Catalina. Ttherefore, the Court could not have jurisdiction over it under the American Treaty on Pacific Settlement."

[349] Republic of Philippines, Republic Act No. 9522 amending certain provisions of Republic Act No. 3046, as amended by Republic Act No. 5446. Retrieved from http://extwprlegs1.fao.org/docs/texts/phi91237.doc, accessed 20.11.2019.

[350] PCA, The South China Sea Arbitration Award, para. 626. "This arbitration concerns legal basis of maritime rights and entitlements in the South China Sea, the status of certain geographic features, and the lawfulness of certain actions taken by China in the South China Sea. The Court evaluated historical claims of China and the status of islands and effect of reclamation of them."

[351] PCA, The South China Sea Arbitration Award, para. 489.

[352] Ibid, para. 509-510.

[353] Ibid, para. 499-501.

that notion.[354] However, the PCA included activities carrying on the territorial sea of the features on the ground that those activities have a link to the feature itself.[355]

Even though rocks are a category of islands, due to the PCA, it is not intended to the high-tide elevations of sand, mud, gravel, or coral, which create a greater maritime entitlement.[356] However, it is not necessary that the feature must be composed of solid rocks.[357] A rock and a low-tide elevation cannot be transformed into the island through land reclamation[358] that has maritime entitlement.

Islets

Islet is a type of islands that is smaller in comparison with islands.[359] Therefore, in accordance with the PCA, it should have the capacity of surviving human domicile and its economic life.[360] Therefore, where it satisfies those criteria, the provisions of islands shall apply.

Low-tide Elevations and installations

In 1953 the ICJ made a decision on low-tide elevations, so-called not "capable of appropriation",[361] for its sinking nature at high-tides. Low-tide elevations are the sandy and rock features which sink on the high-tide, but present above the water on the low-tide.[362] Due to their nature, it cannot support human habitation without land reclamation; and their statuses shall not be changed through land reclamation, before the international laws of the sea.[363]

In the case that a high-tide elevation is modified by human effort and installed facilities and soils, the former feature, natural capacity of those features would be

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[354] Ibid, para. 502.
[355] Ibid, para. 504.
[356] Ibid, para. 481.
[357] Ibid, para. 482.
[358] Ibid, para. 508.
[359] Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia, "Draft Articles on the Regime of Islands," UNDoc.A/CONF.62/C.2/L.62/Rev. 1 (27 August 1974); https://dictionary.cambridge.org/dictionary/english/islet, accessed:06.05.2020
[360] PCA, The South China Sea Dispute, para. 478-506.
[361] France v. United Kingdom (The Minquiers and Ecrehos Case), ICJ, J.D.17.11.1953, p.53."The Court was requested to determine sovereignty over the islets and rocks in the Minquiers and Ecrehos groups. France alleged sovereignty because of fishing in the waters and had historical titles. On the other side, the United Kingdom maintained that Jersey had historically exercised legal and administrative jurisdiction over them."
[362] UNCLOS, Art. 13(1).
[363] PCA, the South Chine Sea Dispute, para. 508.

considered in the evaluation of its entitlement.[364] Low-tide elevations should be subject to the same principle. That is to say; human-made capacity building activities shall not change the legal status of natural features, before international law.

Artificial Islands, and Off-shore Installations and Structures

An artificial island, offshore installation, or structure refers to man-made buildings or reclamation in the territorial sea, in the EEZ or on the continental shelf of the relevant State to explore or exploit marine resources. Yet, low-tide elevations within the high seas are open to all States, even landlocked ones, and they may construct artificial buildings on such elevations.[365] The type of building allowed are those likely to be built for the purpose of marine scientific research, tide observations, and the like.

Artificial islands and off-shore installations are distinguished from natural ones in two ways: they are non-natural, and perpetually or transitionally implanted to the sea floor.[366] Even with artificial islands constructed upon low-tide elevations, they are not considered natural land. Artificial islands do not confer the right of announcement, for the territorial sea on which they are found.

The State which constructs the installation is the one that may form and can announce a security zone not exceeding 500 meters around it.[367] On the other hand, off-shore installations are designated to exploit the seabed, and contrary to artificial islands, they are not "naturally formed," and they do not form a "true portion of the territory."[368]

Off-shore installations are usually constructed with materials like concrete and steel, which do not own the same degree of consistency like artificial islands.[369] A convenient example of off-shore installation is drilling platforms floating on the seas. In the same way, Article 1 of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic [Hereinafter: OSPAR] defines installation as "Offshore Installations means any man-made structure, plant or vessel or parts thereof, whether floating or fixed to the sea-bed, placed within the maritime area for offshore activities." According to Article 1(3) of the 1988 Protocol for The Suppression of

[364] Ibid, para. 511.
[365] UNCLOS, Art. 87(1)(d).
[366] **Galea, Francesca** (2009) Artificial Islands in the Law of the Sea, Unpublished PhD Dissertation, Malta:University of Malta, p. 51.
[367] **Canca, Hakan Selim** (2012) Denizde İşlenen Suçlar, Ankara, Seçkin Yayıncılık, p. 114.
[368] **Galea**, p. 51
[369] **Papadakis, Nikos** (1977) 'The International Legal Regime of Artificial Islands' Leiden, Brill Archive, p. 6.

Unlawful Acts against the Safety of Fixed Platforms Located on The Continental Shelf, "fixed platforms' means an artificial island, installation or structure attached to the seabed permanently for exploration or exploitation of resources or other economic purposes."

More definitions have been made scholarly. In this regard; floating structures had in the identical position by anchors or other tools, implanted structures grounding on sea-bed through piles or tubes, concrete building, and buildings created by the unloading of natural materials such as sand, rocks, and soil were given examples of structures.[370] *Fitzpatrick*'s definition for artificial islands and installations, as cited by *Galea*, is as man-made, encompassed by water from all sides like an island, above high tide, hypothetically located at a specific geographical point for a certain period, and stabilized in the mode of operation at sea.[371] Ocean floating energy platforms, solar islands, energy islands, floating nuclear power plants, wind farms, and ocean thermal energy conversion devices are artificial islands and installations.

The PCA held that a low-tide elevation may not be converted into an island which has a maritime entitlement, through land reclamation, namely, its status before international law of the sea shall be determined in its natural condition.[372] Otherwise, States would run into the seas to build artificial islands and through which they will claim immense maritime entitlement. Thus, freedom of navigation on the high seas will be imperilled.

During the *South China Sea Arbitration* case, *Martin* stressed that islands must have their own water resources, soil and living spaces. Otherwise, every high-tide feature can be turned into an island. He addressed this in the hearing with regards to the rocks which do not have their own agricultural land, water and living space that "every high-tide feature, no matter how small, no matter how remote, and no matter how incapable of sustaining human habitation or economic life in its natural conditions, could be converted into an island generating a 200 n.m. entitlement, if the State that claims it, is willing to devote and regularly supply the resources necessary to sustain a human settlement."[373] It seems that the PCA adopted the same opinion and decided that an island may not be formed from reclamation. This entitlement should be with regard to the EEZ and

[370] **Soons, Alfred H.** (1974) 'Artificial Islands and Installations in International Law' Rhode Island, Occasional Paper Series 22, Law of the Sea Institute, University of Rhode Island, p. 23.
[371] **Galea**, p. 53.
[372] PCA, The South China Sea Arbitration, para. 508.
[373] **Martin, L. Howard.** Merit Hearings day 2 (22.12.2016), Retrieved from Permanent Court of Arbitration: http://www.pcacases.com/web/sendAttach/1548, accessed 20.11.2019, p. 73

Continental Shelf because that kind of reclamation shall not constitute a territorial sea of its own.

According to Article 60 of the UNCLOS, a State may exclusively construct man-made islands, installations, and buildings on elevations in its EEZ but no other State may have the power to do so. They have exclusive jurisdiction on them, including customs, fiscal, health, safety and immigration laws, and regulations.[374] However, the Article does not mention the high sea low-tide elevations.

On the other hand, the State building such artificial installations may declare a safety zone in order for navigation and building safety to be ensured.[375] However, the breadth of the zone is not strict; permitting the State to draw it in the reasonable ground not exceeding 500 meters of each outer edge point.[376] Besides, those artificial buildings cannot give entitlement to territorial sea, the EEZ and continental shelf; and cannot be their base point[377] except for installations on low-tide elevations that is internationally recognized. Furthermore, artificial installations and structures in the Area[378] shall have no such maritime entitlement.[379]

6.2 Sovereignty over Those Elevations

Once rocks as an island can nourish human domicile or its own economic, it shall deserve EEZ and continental shelf.[380] Otherwise, rocks shall have the territorial sea but not EEZ and continental shelf.[381]

On the other hand, it does not mean that every island shall have 200 n.m. EEZ and continental shelf entitlement. The Court of Arbitration in many cases held that a small island cannot create far more broad maritime entitlement then its size and length of coast. The entitlement shall be proportional in size and length of coast of the island with the neighbouring continental State's.[382]

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[374] UNCLOS, Art. 60(2).
[375] Ibid, Art. 60(4).
[376] Ibid, Art. 60(5).
[377] Ibid, Art. 60(8).
[378] "Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" [UNCLOS, Article 1(1)].
[379] Ibid, Art. 147(2)(e).
[380] PCA, The South China Sea Dispute, para. 544.
[381] UNCLOS, Art. 121(3).
[382] Cameroon v. Nigeria; equatorial Guinea intervening (Land and Maritime boundary between Cameroon and Nigeria), The Court of Arbitration, D.D.10.10.2002. "The case was concerning the question of sovereignty over the Bakassi Peninsula. The Court was requested to determine the course of the maritime

It is worth noting that even if islands have right to maritime entitlement it does not mean they have full-entitlement in every scenario. International Courts granted in some cases, in accordance with its size, human habitation capacity, length of coast, closeness to another continent etc., none or small maritime areas.[383] Moreover, it is contested that if those islands do not cross the continent on which they are located, the continent entitlement should prevail on islands' maritime entitlements, as held by international dispute resolution bodies.[384]

The Court held in the case of *Cameroon v. Nigeria* that it had been decided for only the rocks and islets that could be capable of physical appropriation given their natural inconsistency. The decision, however, did not consider the elevations to be put to other uses in various ways, by human-kind.[385] Such elevations can be turned into use as artificial islands, practice target for the military, storage, geological and archaeological research, navigational aids, advertisement or announcement, etc. Further, the ICJ held at the *Qatar v. Bahrain* case that there is no uniform State practice that such elevations can be subject of or excluded from sovereignty, and that they are not islands and may not be assimilated from the viewpoint of acquisition of sovereignty, so that beyond the coastal States' territorial sea, they cannot have a territorial sea of its own. In other words, a State's treatment to a low-tide elevation as the property is irrelevant in generating territorial sea.[386] But, such elevations are subject to State sovereignty of which territorial sea is stated. However, this sovereignty is less than the one on high tide elevations.[387]

Furthermore, the ICJ embraced the same approach in its judgment of *Nicaragua v. Colombia* on 19 November 2012 regarding the territorial and maritime dispute, by expressing that low-tide elevations cannot be appropriated.[388] According to *Lavalle,* appropriation in this context should mean sovereignty over those elevations as the ICJ

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frontier between the two States in so far as that frontier had not been established in 1975. Moreover, the question extended to the Lake of Chad and frontier at the Lake."; Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain), 16/3/2001. "The application was concerned with sovereignty over the Hawar Islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah and the delimitation of their maritime areas."

[383] Doğan, Selahattin (2020) 'A Legal Evaluation of Turkey-Libya Maritime Boundary Agreement' Uluslararası Hukuk Bülteni, pp. 10-17.

[384] Ibid

[385] **Lavalle, Roberto** (2014) 'The Rights of States over Low-tide Elevations: A Legal Analaysis' International Journal of Marine and Coastal Law, Vol:29, No:3, pp. 457-479 at p. 464.

[386] Qatar v. Bahrain (Case Concerning Maritime Delimitations and Territorial Questions between Qatar and Bahrain), ICJ, J.D.19.03.2001, para. 205-207.

[387] **Lavalle**, p.471.

[388] ICJ, Nicaragua v. Colombia, para. 26-38.

mentioned in its *dictum.*[389] He made an evaluation that the ICJ diverted its former judgment of *Qatar v. Bahrain* that non-proximate elevation may be subject to appropriation, affirming the assertion of Nicaragua's application on "to the effect that elevations cannot be appropriated."[390] On the other hand, arbitral tribunal formed under the U.N. asserted on its award that non-proximate low-tide elevations maybe assimilated by relevant State and it relegates sovereignty on some of the low-tide elevations including elevations out of the territorial sea to the parties.[391] It accepted the low-tide elevations as a part of a group of islands and assimilated to them. An important aspect at this point is that acquisition is a mode of the occupation of land. Since low-tide elevations cannot be considered as land, they should be governed under the law of the sea, not the law of the land.[392]

What happens when those elevations are situated within the EEZ? It should be borne in mind that case-law of such courts on low-tide elevations may not constitute itself a customary international law in principle.[393] Recalling that the EEZs are parts of high seas and a State cannot exercise sovereignty below high seas, *Lavalle* claims that in accordance with the dictum of the *Nicaragua v. Colombia* award, though it shall not constitute a customary international law, States may not have any right on low-tide elevations within EEZs.[394]On the contrary, the ICJ mentioned in its dictum of the *Ethiopia v. Yemen* award that States having low-tide elevations within its EEZ might claim some right on them[395]in areas not too far from the coastline.[396]

For instance, dumping on a low-tide elevation within a State's EEZ may be prevented by the relevant State; which demonstrates that the relevant State has some degree of right on low-tide elevations.[397] Besides, Article 60(1) of the UNCLOS, a State may construct artificial islands on elevations within its EEZ, an action no other State can

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[389] **Lavalle**, p. 472.
[390] Ibid, p. 473.
[391] Eritrea v. Yemen (Territorial Sovereignty and Scope of the Dispute), The Arbitral Tribunal under the U.N., D.D.09.09.1998. "The dispute was over the island of Greater Hanish in the Red Sea. The Tribunal ruledthat most of the archipelago belonged to Yemen."
[392] **Lavalle**, p. 475.
[393] Ibid, p. 474.
[394] Ibid, p. 475.
[395] Ibid
[396] UNCLOS, Art. 7(4).
[397] **Lavalle**, p. 475.

perform. It should be noted that this right does not mean that those low-tide elevations belong to the State building installations.[398]

In line with "sovereignty by absorption" doctrine, States have sovereignty over low-tide elevations within its territorial sea, even though it is not a customary rule but close to attaining that status. According to the same doctrine together with Article 56 and 60 of the UNCLOS, the relevant State shall enjoy sovereign right and jurisdiction over those islands, structures, and installations.[399] Those rights capable of enjoying on low-tide elevations include all rights enjoyable in the EEZ such as exploitation of natural resources. On the other hand, the State in question may not enjoy other powers of administrative, criminal and civil.[400] According to *Lavalle*, exercising such jurisdiction over low-tide elevations in the EEZ is gaining the status of emerging customary international law.[401]

When it comes to low-tide elevations in the high seas, if there is, no State to claim sovereignty or sovereign rights over them, in contrast with the low-tide elevations that cannot qualify as *res nullius* and *res communis*, the low-tide elevations of which are *res communis*, that is to say, they cannot be possessed in any way, but to some degree used for repress piracy.[402]

A further point in this regard, as a former president of the ICJ, *Gilbert Guillaume* mentioned, low-tide elevations are dependent to the law of the space surrounding it.[403] This means that, the coastal State that has low-tide elevations within its territorial sea and bay can claim sovereignty. In addition, archipelagic States can also claim sovereignty by location, doctrine to Article 49 of the UNCLOS; over the low-tide elevations within archipelagic waters.[404]

Low-tide elevations may be considered as base point of straight baselines if they have a lighthouse or similar installations built on them which have received general international recognition.[405] If low-tide elevations are within the territorial sea, it also becomes the base point of baselines.[406] Where the low-tide elevation is outward of the

[398] Ibid, p. 476.
[399] Ibid.
[400] Ibid.
[401] Ibid.
[402] Ibid, p. 477-478.
[403] Ibid.
[404] Ibid, p. 478.
[405] UNCLOS, Art. 7(4).
[406] Ibid, Art. 13.

territorial sea, it shall not have a territorial sea of its own.[407] Even if the UNCLOS does not make any reference to the EEZ and continental shelf, the UNCLOS implies that they have no such maritime entitlement.[408] It is postulated that if an elevation does not possess territorial sea of its own, *argumentum a fortiori* it should not be entitled to additional maritime areas.

The PCA indicated that a low-tide elevation may not be transformed into an island through reclamation; and while assessing the status of the features, the natural condition of the feature must be taken into account.[409] According to the PCA, low-tide elevations are not a part of the land territory of the coastal State. Rather low-tide elevations fall within the regime it is submerged.[410]

Artificial islands or other offshore installations are exposed to limitations and jurisdictional rights defined in the UNCLOS. Those which possess a base point status are required to position those installations permanently above the surface of the sea.[411] It should be borne in mind that the availability of those elevations as base point is only for the straight baselines not for the normal baseline. Similarly, they have the same position at the determination of the archipelagic baseline.[412] Those elevations should be suitable for the straight baselines being used for the determination of oceanic archipelagos of continental States, which is not clearly addressed at the UNCLOS. When those are determined as base point, the coastal State will have sovereignty over them due to the fact that it will fall within its internal sea.

According to Article 13 of the UNCLOS, low-tide elevations create territorial sea zone in the situation that they are found in the territorial sea of mainland or island. Otherwise, they cannot have a territorial sea of their own. For instance, low-tide elevations out of the territorial sea of the mainland do not generate entitlement of maritime zones,[413] and therefore, artificial islands which have been constructed upon them do not possess any territorial sea.[414] According to the same article, although harbour work may generate a baseline in the territorial sea, because artificial islands or other installations cannot be

[407] Ibid, Art. 13(2).
[408] PCA, The South China Sea Arbitration Award, para. 308.
[409] Ibid, para. 508.
[410] Ibid, para. 309.
[411] UNCLOS, Art. 7(4); the 1958 TSC, Art. 11.
[412] UNCLOS, Art. 47(4).
[413] PCA, The South China Sea Arbitration Award, p.471.
[414] UNCLOS, Art.11.

regarded as perpetual harbour works,[415] they will not generate maritime entitlement.[416] As mentioned above, low-tide elevations may not be transferred to an island by reclamation or installation. They do not have territorial sea, either.

7. The High Seas

7.1 Basic Features

The high seas are the sea areas beyond the territorial sea. Indeed, the EEZ, contiguous zone, continental shelf, and fishery zone are all part of the high seas in many respects. Even though EEZ, continental shelf and fishery zone are within the high seas, those areas grant some sovereign rights to coastal State as discussed earlier. However, the closer it is to the land, the stronger the effect of sovereign rights over the seas of the coastal State. As an illustration, like an electric torch light dimming gradually in the distance, so does the power the coastal State may possess towards the inward of seas. As it is, the rights of littoral States on the adjacent zones gradually fade away towards the high seas. The rest of the seas apart from those that are high seas, are being examined here.

7.2 Sovereign Rights at the High Seas

The high seas are subject to a no-State jurisdiction. No State can enforce any rules of its own on the high seas, except the vessels flying its flag.

As a customary international law, the flag State has sole jurisdiction over the vessels flying its flag. In other words, no State may interdict the vessel flying another State flag on the high seas.[417] Any State has sovereignty on the high seas upon the vessels carrying its flag. However, it is limited by customary international law and treaty law. Unless an act constitutes piracy, any violence committed within the vessel in question will be exposed to the sole authority of the flag State. For instance, incidents within the *Achille Lauro* and *Santa Maria* are under sole authority of the flag State since the incidents were committed by the passengers cruising in the vessels.

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[415] **Walker/Noyes**, p. 228.
[416] UNCLOS, Art. 60(8).
[417] The 1958 HSC, Art. 6(1); UNCLOS, 92(1); **Okur**, p. 32.

The UNCLOS bestows right of seizure on the high seas for only piracy, through warships or ships identically labelled as belonging to government service of any State and allows pirates to be subject to that State.[418] Nonetheless, visiting rights are permissible for the offenses of piracy, the slave trade, and unauthorized broadcasting. Also, the act of flying a false flag and a stateless status grants the same right. Even though UNCLOS does not provide for State prosecution of offenders who committed acts elsewhere but are discovered within the State's territorial jurisdiction, a suspect of piracy "may be tried and punished by any nation into whose jurisdiction he may come."[419] For instance, the US Navy handed over Somali pirates caught in the international waters for prosecution and subsequently, Kenyan Courts jailed them for piracy.[420] Kenyan Courts[421] still continue to prosecute and sentence the pirate acts within the international waters.[422]

Moreover, the EU and the Republic of Mauritius have signed an agreement on transfer, treatment, prosecution, trial and detention of pirates who commit or attempt to commit piracy on the high seas off Mauritius, Madagascar, Comoros Islands, Seychelles, and Réunion Island, and get detained by European Union-led naval force.[423] Although some commentators argue that a terrorist vessel that is flying a flag of convenience would be exempt from any intervention on the high seas,[424] politically motivated attacks by vessels on one another, falls into the category of piracy at international law and the UNCLOS.[425]

Because sovereign rights shall permit acts of interdiction, a detailed explanation is provided given by the subsequent headings.

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[418] UNCLOS, Art. 107.

[419] France v. Turkey (S.S. Lotus), The Permanent Court of International Justice, J.D.07.09.1927, p. 70, Judge Moore (Dissenting Opinion). "The Lotus case concerning a criminal trial between the S.S. Lotus and the S.S. Bozkourt in a region just north of Mytilene (Greece). As a result of the accident, eight Turkish nationals aboard the Bozkourt drowned." Brownlie, p. 229; Shaw, p. 549-50.

[420] BBC News, http://news.bbc.co.uk/2/hi/africa/6105262.stm, accessed 20.11.2019.

[421] EU and Kenya has come to conclusion on exchange of letter on transfer, prosecution and trial of pirates. See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22009A0325(01)&from=EN. Retrieved Jun 26, 2019.

[422] Somali Pirates Sentenced To Prison. Retrieved from https://www.maritime-executive.com/article/Somali-Pirates-Sentenced-To-Prison-2013-10-23, accessed 20.11.2019; Kenyan Court Sentences Seven Somali Pirates. Retrieved from https://worldmaritimenews.com/archives/63075/kenyan-court-sentences-seven-somali-pirates/, accessed 20.11.2019.

[423] Agreement between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-led Naval Force to the Republic of Mauritius and on the Condition of Suspected Pirate after Transfer of 2011.

[424] Garmon, Tina (2002) 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th' Tulane Maritime Law Journal, 27:257-275.

[425] **Guilfoyle (2009),** p. 41.

8. Marine Protected Areas

8.1 Basic Features

Some areas of the sea have been announced as marine protected areas in conventions; and States may also form marine protected areas within customary international law.[426] The Annexes of I, II, and V of MARPOL 73/78 determines protected areas and puts into force more stringent measures; preserving them from pollution. The Mediterranean Sea, the Baltic Sea, the Black Sea, the Red Sea, the Gulf of Aden, the Antarctic area, and the North West European Waters are among these areas.[427] Within the mentioned areas, any discharge into the sea of oil or mixture of oily wastes has been strictly banned, and oil tankers are required to build some special media. The IMO may designate particularly sensitive areas. They are significant in the ecological, socio-economical or scientific sense. This implementation requires tougher measures, including stricter discharge principles, requirements of equipment, or even prevention of entry.[428] Where a State proclaims a protected area within the area it exercises sovereignty; she may restrict anchoring or discharge.[429]

Activities of other States in the marine protected areas are thereupon dependent to the sovereignty of the coastal State. Exceptions may, however, emerge from agreements or from rights furnished by the UNCLOS or from customary law. For instance, a restriction of fishery within its zone could compete with other States' right by another agreement and would not be suitable in this incident.[430]

Marine protected area may be established within the outer continental shelf, the area beyond the 200 n.m. but within the 350 n.m. This area may not be recognized yet as continental shelf by the Commission. On the other hand, marine protected area may be declared within the high seas. Those announcements shall bind the parties of agreement. No internationally binding agreement for marine protected areas within the high seas exists

[426] **Yang**, p.239.
[427] MARPOL 73/78, Annex I.
[428] **Yang**, p. 239.
[429] Ibid, p. 240.
[430] **Zadorin, Maxim** (2011) Conservation issues in coastal waters: State sovereignty, indigenous peoples and international obligations, Small Master's Thesis Masters of Laws in Law of the Sea University of Tromsø Faculty of Law, p. 10.

yet. Under the U.N. organization, conferences have been held to conclude draft treaty on high seas marine biodiversity.[431]

8.2 Sovereign Rights over the Marine Protected Areas

Indeed, the interception measures are similar to the rights in the EEZ. However, the rights protected is a little bit different and broader in terms of the kinds of protected biodiversity species.

On the other hand, for the marine protected areas announced within the high seas, the agreement provisions are only binding for parties of the relevant treaties. There is no binding agreement yet for those areas and therefore, no provision exist for non-party States.

9. Ice-covered Areas

Article 234 of UNCLOS states that coastal States that have ice-covered areas within its EEZ have the right to regulate navigation in those areas. The aim of these laws is to be ensure obstruction, decline and control of marine contamination. Ice-covered areas have severe climatic conditions and long-standing ice over the area obstructs and poses a hazard to navigation. The pollution over these areas may result in exceptional harm and irreversible consequences to the marine environment. The adopted laws must be non-discriminatory on the basis of vessels and flags.

This Article does not require the coastal State to submit its measures and areas to the international organization for approval. The measures taken are to authorize the coastal State to enforce those laws and regulations. The expression of the EEZ within Article 234 of the UNCLOS covers *a fortiori* territorial sea. Otherwise, this article confers more right to the coastal State within the EEZ; in comparison with the territorial sea. In accordance with Article 234 of the UNCLOS, the coastal State shall have authority upon vessels within the ice covered the EEZ; regarding design, construction, manning and/or equipment

[431] See for furher anlaysis: https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/Etude/202001-ST0120-high%20seas.pdf.

of them.[432] The coastal State will have right to interdict a ship to check its suitability to the laws it has established.

10. The Area (The Seabed)

10.1 Basic Features

The Area is the part of ocean floor, subsoil and seabed beyond the limits of any national jurisdiction.[433] Namely, it consists of space below the high seas. The Area may not appropriate and no jurisdiction, sovereignty or sovereign rights can be exercised concerning it. Likewise, none of such claims may be recognized.[434] On the other hand, marine scientific research may be carried out at the Area for the benefit of mankind.[435] The resources can be extracted from the Area are all solid, fluid or gaseous mineral reserves, including polymetallic nodules, in the Area at or under the seabed.[436]

The International Seabed Authority[437] has been formed to coordinate, regulate and control all mineral-relevant works in the seabed area under the high seas for the benefit of mankind as a whole.[438]

10.2 Sovereign Rights at the Area

In order to ensure effective preservation of marine nature, measures required shall be put in implementation in line with this Convention. To this end, the Authority have right to adopt appropriate rules, regulations and procedures such as the obstruction, decline and control of contamination and other harmful to the marine nature, including flora and fauna of the marine environment. While drilling, dredging, excavation, construction and maintenance of installation or such, particular attention must be paid.[439] Construction, locating and removal of installations for such act must be in accordance with the rules of

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[432] **Yang**, p. 242.
[433] UNCLOS, Art. 1(2).
[434] Ibid, Art. 137(1).
[435] Ibid, Art. 143(1).
[436] Ibid, Art. 133(1).
[437] Ibid, Art. 156 and ff.; the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea .
[438] UNCLOS, Art. 153(1).
[439] Ibid, Art. 145

the Authority and due notice must be given for such installations. Safety zones shall be established for those installations.[440]

It seems from the wording of Article 153 of the UNCLOS, the Authority is the sole authority and sovereign rights are not vested in any State but Authority.

[440] Ibid, Art. 147 (2).(a) and (c).

PART II: RIGHT TO INTERCEPTION AT SEAS

International law provides some rules, especially through the UNCLOS III to identify the circumstances in which an interception in the high seas are legally allowed by foreign ships. In this part, these rules are going to be revealed and examined in some detail. In this section, interception and interdiction issues are to be examined and their scope are to be addressed in accordance with the maritime areas.

I. Maritime Areas, Interception and Interdiction

1. Interdiction or Interception

A vessel is regularly used for the transportation of goods or people. However, the goods may itself be a peril to the safety of the coastal State or may be used to generate funds for illegal acts. Additionally, one or more of the persons aboard may be a terrorist or smuggling for funding terrorist activities. Moreover, the vessel itself can be used as a weapon.[441] In addition, the migrants themselves may be a threat to the littoral State in question, for the flow of numbers, causing crime and social problems in the territory of the State, or housing problems. In mass migrant flows, the society of the State in question gets tense towards migrants and become intolerant to their activities. All these issues generate security concerns for the littoral States.

Interception of undocumented vessels attempting to enter a State border is an exercise of State's sovereign right and right to protect its border.[442] In general, coastal States are permitted to be involved in issues on a ship within its internal seas, only if the matter in question affects their national interests. Only when the internal matters affect the peace and good order of the coastal State, she may exercise jurisdiction on the vessel or on any situation that the master of the vessel requested help with.[443] For instance, inter-crew murder by the *Wildenhus* case, environmental protection by EU Council Directive no 93/73/EEC of 13 Sept. 1993, the safety of navigation and social standards by SOLAS, and IMO have evaluated the matters having external effects.[444]

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[441] **Mallia**, p. 29.
[442] **Blay and others**, p. 19.
[443] **Yang**, p.90-91.
[444] Ibid, p.92.

On the other hand, a vessel cruising on the international waters is dependent to the flag State's jurisdiction, including during the act of anchoring or even berthing on the high seas. This authority is not only to be enjoyed on the high seas but also in contiguous zones and EEZs. In this respect, international law does not allocate the enforcement right to a littoral State.[445] Namely, the principle of exclusive jurisdiction requires a vessel to become immune from foreign intervention unless the flag State allowed otherwise.[446] Save for Article 110 of the UNCLOS listing piracy, slave trade, unauthorized broadcasting, stateless, and having the same nationality with the intercepting vessels, seeking the permission of the State, is a requirement. However, whether pirate broadcasting creates a binding international law which occurred in the 1960s across Europe is questionable. Article 110 of UNCLOS represents only prior consent of States same as using force in the EEZ for the EEZ-related purposes, not an exhaustive list of policing.[447] Additionally, some more treaties giving enforcement right exist, which are concerning fisheries management, transitional crimes, and proliferation of weapons of mass destruction (WMD).

Maritime enforcement requires an action by the flag State or with its consent when the vessel concerned is in a location which is out of the jurisdiction of the coastal State meant to take an action. In order to enjoy flag State jurisdiction, registration is not necessary in the UNCLOS. Many nations do not require registration for small vessels and the flag State rule will be applied to those ships.[448]

Moreover, a vessel shall navigate under one flag and shall not change it during cruising or anchoring at a port. The exception to this condition is that of a real transfer of ownership. Therefore, a ship flying two or more flags at the same time may be presumed to be without nationality, that is statelessness.[449] The result of a stateless status was foreseen under Article 110 of the UNCLOS. That is, any State will have right to board and carry out inspection on a vessel without a nationality. This right to visit will generally be used via a boat sent first to examine documents, and in case of non-satisfaction, further examination may be carried out with all possible consideration.

The "right of visit," which is identical, *mutatis mutandis*, in Article 22 of the 1958 CHS, and Article 110 of the UNCLOS permitting a warship to stop and board a foreign ship on the high seas, is a scarcely-illustrated exemption to the right of freedom of

[445] The 1958 TCS, Art. 6(1); UNCLOS, Art. 92(1).
[446] Lotus case, p. 25.
[447] **Guilfoyle (2009)**, p. 276.
[448] **Meyers, Herman** (1967) The Nationality of Ships, The Hague, Martinus Nijhoff, pp. 149-150.
[449] UNCLOS, Art. 92.

navigation and the flag exclusivity rule.[450] According to Article 22 of the 1958 CHS; if there are suspicions of piracy, slave trade, or same nationality of a ship with foreign flag as the warship or without flag, then a boat can be sent to check documents so as to understand the reality; and if the condition of the vessel is still not clear, then she can be boarded for further examination. The UNCLOS includes similar provisions adding unauthorized broadcasting and being without nationality, as reasons to be able to check a vessel. If the flag of the ship is ascertained, the kind of cargo to be searched is regulated in accordance with the SOLAS, Code of the Special Measures to Enhance Security, and the new International Ship and Port Facility Security Code.

It is arguable whether a stateless vessel may be subject to seizure or not. Taking into view that they do not have any State protection, a seizure may be utilized on them. The United States and the United Kingdom exercise their jurisdiction pursuant to this understanding.[451] On the other hand, some intellectuals asserted that further jurisdictional link and the permissive rule is necessitated to justify an act of seizure despite the stateless status of the vessel and no diplomatic protection extendable to that vessel, the persons on board ordinarily be a national of a State.[452] Besides, even if it directly deals with enforcement issues, the UN Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988[453] does not include seizure rules concerning the stateless vessel.[454] Hot pursuit condition also allows the coastal State to intercept a vessel. Nevertheless, hot pursuit, if it is carried out or attempted for the crime committed within the contiguous zone, the offense must be one committed against the purpose of designation of this zone; not for every crime.[455] Seizure will depend on the sort of crime and evidentiary status or as a means of the crime committed.

Interdictions is likely to be performed by coastal States, flag States or third party States, depending on customary and conventional rights, limiting by zones. A littoral State can interdict a vessel in its regulatory zones adjacent its coasts. Broader rights have been conferred to the flag States. They have right to interdiction the high seas a vessel flying its

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[450] The National Commission of Inquiry (2011). Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, p. 53. Retrieved from http://www.mfa.gov.tr/data/Turkish%20Interim%20Report.pdf, accessed 24.08.2020.
[451] **Guilfoyle (2009)**, p. 17.
[452] **Churchill/Lowe**, p. 214.
[453] 189 States has ratified this Convention. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en, accessed 20.11.2019.
[454] **Guilfoyle (2009)**, p. 17.
[455] UNCLOS, Art. 111(1).

flag in general (i.e., it should be born in mind that ocean area is not dependent to jurisdiction of littoral State). Other States other than that of the flag State on the high seas and coastal State in adjacent zones may only carry out an interdiction act depending on a rule permitting the act under international law or consent from the flag State or, in accordance with the regulatory zone, from the coastal State.[456]

The right of a State outside of its territory was described in the judgment of the Permanent Court of International Justice in the *France v. Turkey (*known as *Lotus* case*)* case of 1927 as: [457] "… the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."

A State may not penalize or regulate any conduct outside of its jurisdiction. However, taking into view that a State's extraterritorial jurisdiction is exceptional, this kind of regulations fall within the prescriptive jurisdiction independent of enforcement jurisdiction and may be exercised in exceptional cases.[458] States may declare prescriptive jurisdiction over criminal conducts of their nationals, committed abroad and criminal conducts of non-nationals committed abroad that have a potential effect on their nationals (active and passive nationality jurisdiction).[459] As an exception to the general rule, a flag State may enjoy enforcement jurisdiction over a crime committed aboard vessels flying its flag on the high seas, and so can non-flag States; under limited circumstances.[460]

As to the consent of masters, it is limited to stopping, boarding, examining document, and investigation of the vessel. Following boarding with the consent of the master, the act of interrogation and search is out of the permissible limit given by the master. This implies that, seizure and arrest may only be performed by the consent of the flag State. Where the flag State permits boarding it overrules the refusal of master of the vessel.[461] On the other hand, control measures from signal lights to warning shots and disabling fires do not qualify as adequate, for the exercise of enforcement jurisdiction.[462]

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[456] **Guilfoyle (2009)**, p. 5.
[457] Lotus case, p. 18.
[458] **Lowe, Vaughan A. Jurisdiction: M. Evans** (eds) (2006) 'International Law' 2. edn, Oxford, Oxford University Press, p. 337.
[459] **Guilfoyle (2009)**, p. 8.
[460] Ibid, p. 9.
[461] **Mallia**, p. 20.
[462] Ibid, p. 21.

An interception may be subject to the 1907 Hague Convention, San Remo Manual,[463] and the 1949 Geneva Conventions: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention relative to the Treatment of Prisoners of War; the Geneva Convention relative to the Protection of Civilian Persons in Time of War. Among them, the 1977 Additional Protocols to the Geneva Conventions, the First Additional Protocol concerning international armed conflicts and the Second Additional Protocol concerning armed conflicts have the value of customary international law.[464] These Conventions are universally accepted as governing rules applicable during a war as customary law of international humanitarian law, and protocols may be observed under customary international law of the sea.[465] However, those will not be dealt with in this study.

States utilize their sovereignty by regulating entry into their sea borders because of security concerns. In international law of the sea, the sovereignty that can be used by States differs for various sea areas.

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[463] San Remo Manual on Armed Conflict at Sea of 1994 regulates the interception related issues in war time like: "belligerents shall have due regard for the legitimate rights and duties of those neutral States" , "merchant vessel means a vessel, other than a warship, an auxiliary vessel, or a State vessel such as a customs or police vessel, that is engaged in commercial or private service" ,"Neutral merchant vessels flying the flag of neutral States may not be attacked unless they:(a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture", "Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked", "In exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture", "A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions,... the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status", "Neutral merchant vessels are subject to capture outside neutral waters if they are engaged in any of the activities referred to in paragraph 67 or if it is determined as a result of visit and search or by other means, that they:...are breaching or attempting to breach a blockade." For the fact that the San Remo Manuals concerns wartime provisions, it is excluded from this paper.

[464] **Craig, Alan** (2013) International Legitimacy and the Politics of Security, New York, Lexington Books, p. 123-124.

[465] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinions and Orders), ICJ, D.D.08.07.1996, para. 79; **Cartens, Anne-Marie/Varner, Elizabeth** (eds)(2020) Intersections in International Cultural Heritage Law, Oxford, Oxford University Press, p. 3-4

2. Sovereign Maritime Areas

2.1 Interception in Internal Waters and Territorial Sea

In Article 18 of the UNCLOS, innocent passage is defined as "navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility."

Article 19(2) states that passage of a foreign ship in coastal State's territorial sea shall be deemed to be detrimental to the good order, peace or security of the coastal State in some cases such as

> "a) any threat to use force or active use of force against the sovereignty, territorial integrity, or political independence of the coastal State, or in any other manner which is in violation of the principles of international law embodied in the Charter of the United Nations; b) any exercise or practice with weapons of any kind; c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State; d) any act of propaganda aimed at affecting the defence or security of the coastal State; e) the launching, landing or taking on board of any aircraft or of any military device; f) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; g) any act of wilful and serious pollution contrary to [the UNCLOS]; h) any fishing activities; i)carrying out of research or survey activities; k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; l) any other activity not having a direct bearing on passage."[466]

Article 21 of the UNCLOS permits coastal States to regulate some issues in its territorial sea. Where a vessel breaches those regulations, the coastal State has the right to interdict. The issues coastal States may regulate are;

> "the safety of navigation and the regulation of maritime traffic, the protection of navigational aids and facilities and other facilities or installations; the protection of cables and pipelines; the conservation of the living resources of the sea; the prevention of infringement of the fisheries laws and regulations of the coastal State; the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; marine scientific research and hydrographic

[466] **Tanaka** (2008a), p. 87.

> surveys; the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State."

The regulations mentioned here will be basis for coastal State to interdict a vessel for breaching them.

With regard to tankers, nuclear-powered ships and ships carrying nuclear or other naturally dangerous or noxious materials, the coastal State may force them to use particular sea lanes[467] and also are to observe particular precautionary measures.[468] Not-obeying particular sea lanes and measures would subject it to interdiction.

Due to Article 25(1) of the UNCLOS, the coastal State may take the necessary precautions in its territorial sea in order to control and restrain passage which is not innocent. Illegal migrant activities including migrant smuggling which are considered as "not innocent passage" violate both the coastal State's national regulations and Article 19 of the UNCLOS. One of the measures for preventing "not innocent passage" is to take the relevant ship out of the coastal State's territorial sea. The other measure that can be applied against a "not innocent passage" is approaching to the ship and exercising the criminal jurisdiction of the coastal State.[469]

According to Article 27 of the UNCLOS, under some circumstances, the riparian State has enforcement jurisdiction over a merchant vessel. Warships or foreign government ships which are not operated for commercial purposes are not subject to those exemptions because the rubric has the heading of "Rules Applicable to Merchant Ships and Government Ships Operated for Commercial Purposes".

Article 27(1) of the UNCLOS regarding the establishment of criminal jurisdiction reads as;[470]

> "a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances."

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[467] UNCLOS, Art. 22(2).
[468] Ibid, Art. 23.
[469] **Aydın, Gökhan** (2016) Uluslararası Hukukta Deniz Yoluyla Gerçekleştirilen Yasa Dışı Göç ile Mücadele, Yüksek Lisans Tezi, İstanbul:İstanbul Üniversitesi Sosyal Bilimler Enstitüsü, p. 69.
[470] Article 19 of The 1958 TSC has similar provision.

Other than these conditions, the coastal State may not interdict and arrest vessels and investigate criminal jurisdiction over crimes committed on board.[471] According to *Shearer*, the language of the provision is operative and does not definitely ban criminal enforcement jurisdiction.[472] As the same view, *Churchill and Lowe* assert that constraint on enforcement jurisdiction is restraining the exercise out of international comity and the State's jurisdiction is absolute.[473] On the other hand, the sole certain exclusion of criminal enforcement jurisdiction is in the case that the crime "committed was before the ship entered the territorial sea" and it does pass through the territorial sea without entering the internal sea of the coastal State concerned.[474] Moreover, the vessel must start cruising from a foreign port. That is, if the ship deported from the coastal State whose territorial sea it is occupying during the innocent passage, the State concerned is to have enforcement jurisdiction over that vessel.

If a vessel engages in activities threatening the security of the coastal State such as terrorism, the coastal State has the right to board, search, seize, and arrest the ship, passenger and crew for the fact that it infringed right to innocent passage.[475] On the other hand, where the vessel traverses outward-bound within the territorial sea, the coastal State has full jurisdiction for the purpose of arrest and investigation over the ship.[476] Indeed, this power is an extension of hot pursuit,[477] which has supposed to be commenced from internal sea.

Moreover, coastal State may prevent the vessel from entering its port facilities and internal waters. It means all interdiction measures are applicable for the vessels attempting such acts in the territorial sea.[478] It should be kept in mind that innocent passage shall remain on the internal waters, which have been formed after the application of a straight baseline that was not internal waters previously.[479] Furthermore, the announcement of the security zone for the protection of States security such as weapon exercises generates

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[471] The 1958 TCS, Art. 19(1); UNCLOS, Art. 27(1).
[472] **Shearer**, p. 327.
[473] **Churchill/Lowe**, pp. 95-99.
[474] UNCLOS, Art. 27(5).
[475] **Jesus, Jose Luis** (2003) 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' The International Journal of Maritime and Coastal Law, Vol:8, pp. 363-400 at p. 397.
[476] The 1958 TCS, Art. 19(2); UNCLOS, 27(2).
[477] **O'Connell**, p.955.
[478] **Barnes, Richard**. The International Law of the Sea and Migration Control: Ryan, Bernard/Mitsilegas, Valsamis (eds)(2010) 'Extraterritorial Immigration Control: Legal Challenges' Vol.21 in Immigration and Asylum Law and Policy in Europe (Ed. by Guild, Elspeth / Niessen, Jan), Leiden, Boston, Martinus Nijhoff, p. 124.
[479] UNCLOS, Art. 8(2).

interception rights for all vessels traversing that part of the territorial sea.[480] This interdiction aims at protection of such vessels from danger of being wounded by weapon exercise.

Nevertheless, other than the riparian State, no State has right to intercept within territorial sea by claiming piracy due to the fact that violence perpetrated against a vessel within the territorial sea or internal water may not constitute an act of piracy at international law.[481] But, the littoral State may consent to law enforcement actions within its territorial zone.

At the incident of piracy off the coast of Somalia,[482] following the consent of Somalian authorities, the UN Security Council adopted a resolution which authorizes the missions deploying at the region that they operate within the territorial sea of the riparian State in question, "in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law."[483] Even where it authorizes the missions, the resolution mentions not only piracy but also armed robbery due to the fact that piracy may be committed only on the high seas including the EEZ. Remarkably, the Council underscored "in particular that it shall not be considered as establishing customary international law", and it affirmed "further that this authorization has been provided only following receipt of the letter from the Permanent Representative of Somalia."

On the other hand, within the Convention on the Conservation of Antarctic Marine Living Resources [Hereinafter: CCAMLR] area, the subsidiary agreement drawn up between Australia and France allows other's hot pursuit right regarding illegal, unreported or unregulated [Hereinafter: IUU] fishing within the territorial sea claimed around the island in the Antarctic pole, excluding physical law enforcement and other coercive action.[484] Moreover, according to the Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, controllers, with the consent of the other Party regarding IUU fishing, can exercise cooperative enforcement activities aboard an authorized vessel

[480] UNCLOS, Art. 25(3).
[481] UNCLOS, Art. 101(a); **Guilfoyle (2009)**, p. 43.
[482] See Part II chapter I.4.4.
[483] UN Security Council (2008) Resolution 1816.
[484] Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands, [came into force 2005] ATS 6, Art. 3(1-4).

of the other Party.[485] Joint enforcement activities shall be carried out in line with the law pertinent to the relevant maritime area. Should a hot pursuit be commenced in the territorial sea, the law applicable would be the law which is applicale to the relevant maritime zone.[486]

Article 4(2) and 6(1) of the MARPOL 73/78 gives right to a coastal State to initiate an investigation on the violation of the prevention of pollution and take appropriate actions to apply convention measures. That right should bestow the right to interception and interdiction, including directing the ship into a port for inspection.[487] On the same topic, Article 220(2) of the UNCLOS authorizes coastal State that she undertakes physical inspection and further detention if the ship enjoying innocent passage violates international rules and standards on obstruction, decline, and control of contamination. However, the coastal State must have a clear ground to believe the violations in question, and that it occurs in her territorial seas. A ship engaged in dumping into the territorial sea of the State in question, is under full control of the riparian State.[488] Any activities breaching innocent passage generates rights of removal of the ship from the territorial sea due to the fact that first, it will be under the full jurisdiction of the coastal State; second, if the vessel loses privilege of innocent passage then it shall not have right to be present in the territorial sea; and third, customary international law proclaim so.[489]

According to Article 210 of UNCLOS, States shall put into force regulations regarding dumping so as to prohibit, decline and control contamination of the marine nature and take other necessary measures. It may adopt laws and regulations on marine nature binding foreign ships enjoying the right to innocent passage; these laws must not hamper innocent passage.[490] If the act of pollution is "wilful and serious", then the ship's passage is no longer regarded to be innocent, and the coastal State has full enforcement jurisdiction.[491] MARPOL includes that a coastal State would have explicit grounds for

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[485] Ibid, Art. 3(1).
[486] Ibid, Art. 3(4). Due to the fact that those rules are applicable to all zones, it will not be reiterated in other maritime zones.
[487] **Yang**, p. 230.
[488] Ibid, p. 241.
[489] **Barnes**, p.124.
[490] UNCLOS, Art. 211(4).
[491] **Breide, Charlotte/ Saunders, Phillip** (2008) Challenges to the UNCLOS Regime: National Legislation Which Is Incompatible with International Law, International Hydrographic Organization, p. 4. Retrieved from https://legacy.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf5/Papers/Session5-Paper2-Breide.pdf accessed 24.08.2020.

suspecting an oil discharge violation if there are "visible traces" of oil observed on or under the surface of the water in the close proximity of the ship.[492]

Where a vessel found violating the laws and regulations which is in consonant with the UNCLOS and suitable international rules about the obstruction, decline and control of contamination from ships, is at the port or the off-shore terminal by its own choice, the coastal State may initiate proceedings regarding violation.[493] A similar rule is applicable for discharges causing or likely to contaminate internal waters. Moreover, even when the vessel navigating within the territorial sea violates those rules, the coastal State has right to a physical inspection for construction of suspicion, and if the evidence so warrants, it may proceed with further investigation actions, including detention in line with its law.[494] Nevertheless, where the permission of the coastal State granted to act, dumping in the territorial sea of coastal State is anticipated.[495]

According to Article 230(2) of the UNCLOS; the coastal State may impose penalties other than monetary, for the obstruction, decline and control of willful and serious contamination of the marine nature, executed by foreign ships in the territorial sea. Moreover, the Proliferation Security Initiative [Hereinafter: PSI] advises States to take adequate steps to stop and/or search their territorial seas. These acts may be performed against the vessel reasonably suspected of embarked with Weapons of Mass Destruction [Hereinafter: WMD] materials. Such materials might be conveyed to or from States or non-State actors. The PSI advises such cargoes to be seized; and conditions, such as boarding, search and seizure to be imposed on vessels entering or leaving their territorial seas reasonably suspecting of carrying such cargoes.[496]

Apart from the UNCLOS, the MARPOL, and the PSI, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf [Hereinafter: SUA Convention][497] is applicable in the territorial sea of riparian State due to the fact that Article 6 requires each State party to establish jurisdiction

[492] **Bodansky, Daniel** (1991) Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, Ecology Law Quarterly, Vol:18, pp. 719-777, p. 751.
[493] UNCLOS, Art. 220(1).
[494] Ibid, Art. 220(2).
[495] Ibid, Art. 210(5).
[496] Proliferation Security Initiative, Statement of Interdiction Principles. Retrieved from https://www.psi-online.info/psi-info-en/botschaft/-/2077920, accessed 24.08.2020.
[497] Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

over offenses prescribed in the SUA Convention and committed in the territorial sea. The SUA Convention will be examined in the chapter 4.6 below.

2.2 Archipelagic Waters

Articles 39, 40, 42 and 44 of the UNCLOS are applied *mutatis mutandis* to archipelagic sea lanes passage.[498] While a vessel is enjoying archipelagic sea lane passage, it cannot be prohibited from, interfered with, or closed off its use of the lanes so long as they obey the provisions incorporated in the UNCLOS.[499]

Archipelagic waters have a regime different from that of the territorial sea, which bestows more rights than the territorial sea and less power than internal sea; unless provided otherwise. On the other hand, where they are considered only as islands, the waters around them shall be assumed to be high seas and warships of foreign States would have entered in the seas between islands. Having archipelagic waters, archipelagic States have the right to intercept a vessel of an unfriendly State hovering on archipelagic waters.[500] The rights of archipelagic waters prevents foreign fishery vessel from entering the area of which, especially for the Philippines, people living in archipelagos catch their food resources.[501]

2.3 International Straits

The Strait States are the coastal States having international strait in their boundary or sharing it with another State. A Strait State has few regulatory rights on those straits that are identified in Article 41 of the UNCLOS.

According to that Article, the strait States may regulate maritime traffic in order to ensure the safety of navigation by designating sea lanes and prescribing separation of a navigation scheme. However, the IMO is the competent authority receiving and adopting such schemes and lanes.[502] But, they substitute sea lanes and separation schemes if circumstances require so after due publicity of it. On the other hand, IMO may not

[498] UNCLOS, Art. 54.
[499] **Lestari**, p. 500.
[500] **Coquia**, p. 155.
[501] Ibid, p. 155.
[502] UNCLOS, Art. 41.4.

designate such schemes and lanes without the agreement with the strait States. Those schemes should be in consonant with generally accepted international regulations.

Additionally, States bordering straits may adopt laws and regulations about prevention, reduction, and control of pollution.[503] The regulation power is limited to oil, oily waste, and noxious substances, and giving the effect of international regulations applicable to those issues in the Straits. This means that, strait States may not adopt any regulations which are not within international standards and neither deescalate existing standards.[504]

Where a vessel does violate such laws and regulations, the strait State may take enforcement action on that vessel on the condition that the violation causes or threatens to cause major damage to the marine environment.[505] In spite of this right, warships, naval auxiliary, and other vessels enjoying sovereign immunity are immune from these enforcement measures.[506]

In addition to the above regulatory right, strait States can adopt laws and regulations with regard to fishing. However, no restriction has been included in Article 42(1)(c) that those laws and regulations must be a sort of adoption of international standards in this respect. Similarly, strait States may put into force laws on loading and unloading of commodity, currency, and persons which are in contravention with national laws, not subject to restriction on adopting international standards on those issues.[507] On the other hand, those rights are subject to the general limitation of prevention of discriminatory measures in practical effect of denying, hampering or impairing.[508]

A vessel enjoying transit passage shall obey some rules in accordance with Article 38 of the UNCLOS: a) She shall proceed without delay. b) She shall abstain from any menace or use of force. Sovereignty, territorial stability or political independence of States bordering the strait is untouchable. She shall also renounce from breaching the principles of international law expressed in the United Nations Charter. c) She must not deal with any other activities diminishing continuous and expeditious transit requirement except for *force majeure* or distress. d) She shall obey generally accepted requirements for safety at sea and

[503] Ibid, Art. 42.1.b.
[504] **Koh**, p.184.
[505] UNCLOS, Art. 233.
[506] Ibid, Art. 233 and 236.
[507] UNCLOS, Art. 42(1)(d).
[508] Ibid, Art. 42(2).

the obstruction, decline and control of contamination from ships. Non-compliance of those requirements may result in the application of interception measures.

According to the UNCLOS, foreign ships are bound mandated to obey those laws and regulations. Enforcement measures applicable in section 7 of the UNCLOS may be exercised only when causing or threatening considerable harm to the marine nature of the straits regarding breaching of regulation on sea lane, and separation of scheme regulations, and prevention of marine pollutions.[509]

The enforcement measures applied must be proportional with the breach and measures that may prevent the breach.

3. Maritme Areas Subjected to Certain Exculusive Rights

3.1 The Contiguous Zone

The sovereign rights over the contiguous zone have been explained already. The riparian State may interdict a vessel based on these rights. However, the enforcement right of a coastal State is limited to the ground written at Article 111 of the UNCLOS. Namely, interdiction right is limited to those aims of preventing infringement of its customs, fiscal, immigration, or sanitary laws and regulations.

According to Article 33(1) of UNCLOS, in a contiguous zone, the coastal State has the jurisdiction to exercise the "control necessary" for preventing infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its sovereign areas, and punishing breach of above mentioned laws and regulations committed within its sovereign areas.[510] It is argued that an incoming vessel should not be subject to arrest and forcing to port. "Control necessary" provision let coastal States to check, inspect, warn, stop, and divert a vessel infringing the rules the contiguous zone was established for.[511]

Furthermore, the 'constructive presence' doctrine has been established by scholars and reflected in case-law.[512] The United States Court of Appeals, District of Colombia

[509] Ibid, Art. 233.
[510] **Tanaka** (2008a), p. 120-121.
[511] **Goodwin-Gill, Guy** (1996) The Refugee in International Law, Second ed., Oxford, Clarendon Press, p.165-66; Rothwell, Donald/Stephens, Tim (2010) The International Law of the Sea, New York, Bloomsbury Publishing, p.80.
[512] **Guilfoyle (2009)**, p. 14.

Circuit[513] discribed it that if the vessel is subjected to a stop, because of a boat committed crime, then the agents had jurisdiction to act on the high seas for a hovering vessel and probable cause is enough to justify the investigatory stop (assuming that the Fourth Amendment of the U.S. Constitution requires it in this context).[514] According to this doctrine, where a ship is found within the contiguous zone aiming to transfer illicit drugs or substances through smaller boats, under 'constructive presence' doctrine, the coastal State has enforcement jurisdiction over that ship, which includes hovering over the mother ship.[515] This doctrine has been accepted by the lawmaking body of the UN and codified in the UNCLOS and the 1958 TCS. As per Article 23 of the 1958 TCS, the hot pursuit must be commenced against a ship or its boat which was within the internal waters, territorial sea, or contiguous zone of the pursuing State. Article 111(1) of the UNCLOS requires almost the same conditions. According to Article 111(1) of the UNCLOS and Article 23 of the 1958 TCS, "the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established." The UNCLOS foresees that hot pursuit must commence from the territorial sea, or in some cases from the contiguous zone.[516]

On the other hand, with regard to piracy, the UNCLOS notion is limited to the high seas including the zones outside the jurisdiction of any State.[517] The contiguous zone is not outside of any State jurisdiction in the sense that a degree of riparian State jurisdiction exists. The UNCLOS prescribes that piracy provisions are applicable to all zones of the sea which is not included in the EEZ, the territorial sea, and the internal waters.[518] That limited jurisdiction does not repress the right to interference for acts of piracy.[519] It is, however, arguable that despite that any foreign State may conduct law enforcement action in the EEZ without interfering with the exclusive rights of the coastal State, whether any State

[513] In the U.S., most of the States established Supreme Court for last resort for appeals. Conversely, the District of Colombia established Court of Appeals for last resort in appellate process.
[514] US v. Luis Enrique Gonzalez, The US Court of Appeals for the District of Columbia Circuit, D.D.16.05.1989 [875 F.2d 875 (D.C. Cir. 1989)]. "The case was concerning conviction of Luis Enrique Gonzalez for possession of cocaine with the intent to distribute. He was arrested by customs agents while it cruised in international waters. Gonzalez contested that the stop of his vessel was illegal because the Customs Service lacked statutory authority to stop vessels on the high seas. He also claimed suppression of the cocaine seized during a warrantless search because the officials lacked probable cause to stop or search the vessel."
[515] **O'Connell**, pp. 1093-4.
[516] UNCLOS, Art. 111(3)
[517] Ibid, Art. 101(a).
[518] Ibid, Art. 86. Even if UNCLOS does not mention the contiguous zone in its wording, taking into account that the contiguous zone overlaps EEZ and the wording of Guilfoyle at page 44, same provisions will be applied to the contiguous zone.
[519] **Guilfoyle (2009)**, p. 43.

may conduct law enforcement activities within the contiguous zone. As per *Guilfoyle*, the same arguments should apply at the contiguous zone[520] by taking into account the discussion at the case of the *M/V Saiga*.[521] Additionally, the below mentioned PSI principles are applicable for the contiguous zone if declared.

3.2 The Fishery Zone

Illegal fishing refers to fishing conducted within waters controlled by the national jurisdiction of a State in contravention to its laws, or fishing that contravenes RFMOs measures binding the States whose flag the vessel is flying.[522] Where announced, the coastal State may enforce its law and interdict foreign vessel not-obeying those rules.

Article 66 of the UNCLOS restricts fishing within the EEZ of other States. Moreover, for straddling and highly migratory stocks which are not contained within EEZ, States shall seek corporation in order to impose measures to conserve and develop them.[523] For instance, Australian authorities intercepted nine vessels fishing in its Fishery Zone[524] and arrested them in accordance with its Fisheries Management Law. Section 100 of that Law criminalizes unauthorized fishing in the fishing zone, and so let the use of enforcement procedures. Section 106A of that Law requires automatic forfeiture engaging in unauthorized fishing in its fishing zone even if the vessel flies the foreign flag. The Fishery Zone overlaps the EEZ and almost all States have announced the EEZ of them. The RFMO's regulations will be examined in consecutive headings.

3.3 The Exclusive Economic Zone

Research and utilization, preserving and administering the natural reserves, whether living or non-living, all over the EEZ, belongs to coastal State as stated in Article 56 of the UNCLOS, and the coastal State has the right to interdiction right, in order to protect those rights. Since the coastal State also has jurisdiction over man-made islands, installations and buildings, marine scientific research, and the protection and conservation of the marine

[520] Ibid, p. 45.
[521] The M/V Saiga (No.2), Separate opinions of Judges Nelson, Vukas, Laing and contra. Judge Zhoa
[522] UN Food and Agriculture Organization (2001) International Plan of Action to Prevent, Deter and Eliminate İllegal, Unreported and Unregulated Fishing, Art. 3(1).
[523] UNCLOS, Art. 63.
[524] **Baird, Rachel** (2004) 'Coastal State Fisheries Management: A Review of Australian Enforcement Action in the Heard and McDonald Island Australian Fishin Zone' Victoria University of Wellington Law Review, Vol:9, pp. 91-118.

nature within the EEZ in accordance with the same Article, those jurisdictions empower it to intercept any vessel violating those rights.

Moreover, due to Article 111 of UNCLOS hot pursuit is permitted for the violations of the rights regarding the EEZ and the safety zone of installations within it. The Constructive Presence doctrine comes into play here if the mother ship or its boat or a member of team is within the EEZ. It should be borne in mind that if the coastal State does not have right to enforce within the EEZ for a kind of act, no-constructive presence doctrine is applied for that act. General hot pursuit rules are applicable here; requirement of visual or auditory signal to stop the vessel or its boat, and exercising by warships or military aircraft, or other vessels or aircraft explicitly labelled.[525]

The hot pursuit may be commenced for the crimes against the EEZ rights within the EEZ or continued in the EEZ for the violations of the rights in the contiguous zone, territorial sea or internal waters.

Same as contiguous zone, it is taken into account that piracy under the UNCLOS is limited to the seas outside of the jurisdiction of any State,[526] and bearing in mind that some degree of jurisdiction exists on the EEZ, it is not outside the jurisdiction of any State as a whole. Therefore, the UNCLOS prescribes that piracy provisions is not applicable in the EEZ.[527] The UNCLOS must be interpreted with in its entirety, by taking into account that the draft was aimed at reflecting the unified nature of oceans and the regime of the high seas in the EEZ, except with the coastal State resources.[528] The application of the rule of the high seas in the EEZ would be interpreted together with Article 86 and 58(2) of the UNCLOS by excepting the regime of the EEZ which was previously the high seas.[529] The first sentence of Article 86 of the UNCLOS reads as "does not entail any abridgment of the freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58."

The negotiations at the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1998 and the 2005 SUA Protocol which references 'located seaward of any State's territorial sea' demonstrates that States generally accepted that law

[525] UNCLOS, Art. 111(2),(4),(5).
[526] Ibid, Art. 101(a).
[527] Ibid, Art. 86.
[528] **Nordquist et al.**, p. 68-9.
[529] Ibid, p. 69.

enforcement action of foreign State is permissible as long as it does not intercept in the exclusive rights of the coastal States reserved for the EEZ.[530]

On the other hand, apart from the afore-mentioned enforcement power regarding pollution within the territorial sea, the coastal State has little jurisdiction on the EEZ regarding pollution. According to Article 220(3) of the UNCLOS, where there is pollution committed in the EEZ of the coastal State, she can request from the ship, information regarding the registry; its last and next port of call, and other relevant intelligence. This paragraph, however, does not bestow the right to interdiction. But, those rights may be evaluated somehow in the case of interception.

For the grave violations resulting in substantial discharge causing significant pollution, the UNCLOS authorizes the coastal State to inspect the vessel in question on the condition added to the para.3 that she refuses giving information or gives flawed information, and the inspection is necessary and reasonable. Furthermore, the coastal State may detain the vessel if the discharge results in considerable harm or menace of considerable harm to the coast or any resources of the territorial sea or the EEZ.[531]

The Basel Convention of 1989 incorporates in Article 4(4) that every State party shall employ appropriate measures to prevent illegal traffic of hazardous wastes in means of administrative, legal and another possible medium. The Convention clearly declares that none of the provision of this Convention shall place a restraint on the sovereign rights concerning the EEZ and continental shelf.[532] It is understood from this wording that appropriate measures taken in accordance with that Convention are applicable in the EEZ and continental shelf.

Like the territorial sea, dumping within the EEZ of coastal State needs express prior approval.[533] Where it is not received, the coastal State has the right to intercept the vessel that is dumping. This right can be evaluated as the right to self-defence if the result is grave enough. Besides, the coastal State may adopt laws and regulations for the prevention, reduction, and control of pollution from vessels traversing in its EEZ.[534] Those laws and regulation must be in harmony with international rules and regulations generally accepted.

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[530] **Guilfoyle (2009)**, p. 45.
[531] UNCLOS, Art. 220(5).
[532] Basel Convention, (1989). Art. 3(5).
[533] UNCLOS, Art. 210(5).
[534] Ibid, Art. 211(5).

That is to say; the adoptable rules cannot extend beyond the generally accepted international rules in that regard.[535]

Moreover, specially preserved areas in the EEZ by approval of the IMO is to empower the coastal State to take appropriate interdiction measures to protect that area and implementation of those rules. Hence, Article 220(1) of the UNCLOS provided for that in case of that the vessel violating the laws and regulations in conformity with the UNCLOS and applicable international rules regarding obstruction, decline and control of contamination from ships in the EEZ is at the port or at the off-shore terminal in its own choice, the coastal State may initiate proceedings regarding any violation of those rules. A similar rule is applicable for discharges causing or likely to cause pollution in internal waters.[536]

It should be borne in mind that if the vessel under suspicion of violating the laws and regulations with regard to obstruction, decline and control of contamination from ships committed within the territorial sea and the EEZ, and if the vessel is in the EEZ, the coastal State may request information regarding "its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred."[537] Similarly, under the same circumstances, major discharge causing or threatening significant contamination to the marine nature is subject to similar measures.[538] But, where the discharge causes considerable harm or threat of considerable harm to the coastline or related interests of the coastal State, the coastal State may proceed with due process and even detain the vessel in accordance with its own law.[539]

3.4 The Continental Shelf

The coverage area of the continental shelf is not the notion depicted as the surface of the water; but for the seabed and subsoil of a certain area.[540] Therefore, interception and interdiction to protect its sovereign right on the shelf may occur on the surface of the sea or more unlikely below the surface of the sea, towards submarines for the acts affecting the shelf.

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[535] **Okur**, p.189.
[536] UNCLOS, Art. 218(1).
[537] Ibid, Art. 220(3).
[538] Ibid, Art. 220(5).
[539] Ibid, Art. 220(6).
[540] UNCLOS, Art. 76(1).

Exploiting and exploring natural resources from the continental shelf are exclusive rights of coastal State. If the State does not grant express permission to foreign individuals or State, they cannot research and utilize natural reserves of that area.[541] A coastal State may interdict a vessel conducting an unlicensed exploration and exploitation within her continental shelf.[542] Due to the fact that they have exclusive jurisdiction upon the permanent buildings in the zones in question, they may as well interdict those sorts of structures constructed.

Like the EEZ, dumping within the continental shelf of a coastal State requires prior approval.[543] Where it is not received, the coastal State will have the right to intercept the vessel that is dumping. The concept of self-defence is applicableto the situation if it is grave enough.

Fixed platforms as defined in the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005 SUA Fixed Platforms Protocol) may be "an artificial island, installation or structure permanently attached to the sea-bed for exploration or exploitation of resources or for other economic purposes."[544] The Protocol allows State parties to criminalize acts such as controlling the fixed platforms by force or threat, acting with violence, endangering safety, destroying or damaging, placing any device which is likely to cause destruction, compelling a government or international organization by using any explosive, radioactive material or Biologic, Chemical, and Nuclear [Hereinafter: BCN] weapon endangering life, discharging hazardous materials from them into the sea in a level of endangering life.[545]

The 2005 SUA Fixed Platforms Protocol put a burden on the State parties to establish jurisdiction with regard to the mentioned crimes committed against or on those platforms by anyone on its continental shelf or by its nationals in any State's continental shelf. Moreover, the coastal State may further its jurisdiction towards the incidents in which it or its nationals become an aggrieved subject of threat.[546] It is obvious that such offenses trigger the enforcement jurisdiction of the coastal State. Same as the EEZ, in

[541] Ibid, Art. 60(2).
[542] **Guilfoyle (2009)**, p. 15.
[543] UNCLOS, Art. 210(5).
[544] Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 1988, Art. 1(3).
[545] Ibid, Art. 2 and 2bis.
[546] Ibid, Art. 3.

accordance with Article 111 of the UNCLOS, hot pursuit may be initiated in the case of violation of rights of the continental shelf.

4. High Seas

As is stressed here, in international law in general and in the case law in particular, freedom of navigation is well-established principle of customary international law of the sea. However, in some exigent circumstances, free-navigation may be suspended to prevent certain type of acts on the high seas.

In general terms, the jurisdiction over a vessel navigating on the high seas, belongs to the flag State. This principle is known as the "flag law" in international law.[547] The ship raising a certain State flag is regarded as a territory of that State. Therefore, the State whose flag is raised, enjoys the right to enforcement over the ship. The flag law will be applied to the ship, passengers, and crews in both civil and criminal matters. Any foreign interception to the vessel forms a breach of freedom of navigation and security of navigation on the high seas, as codified at the 1958 CHS and the UNCLOS.

In case of discharge and pollution caused upon the high seas, it is not clearly established in Article 218 of the UNCLOS whether the port State voluntarily entered may initiate proceedings against the vessels whose discharge caused pollution in the high seas, which may also affect sea areas of the coastal State. Some scholars claim that the port State has jurisdiction over that incident.[548] However, since the rules and regulations should be in conformity with generally accepted international rules, it is evaluated that it is hardly possible for a national rule to be applicable to high seas. Besides, the related Article mentions the areas of internal waters, the territorial seas, and the EEZ that investigation of port State is permitted for the acts of discharge caused pollution committed, including such acts committed other State's areas upon their request. There is no clear ground with regard to high seas.

Apart from those of below rubrics, it would be helpful to mention here the interdiction measures committed by Israeli forces beyond their territorial sea, on the high seas. In that incident, the blockade measure announced by Israel was depending on the San Marino Manuals which is, in essence, applicable to the state of war. As a result of the UN

[547] **Acer, Yücel/Kaya, İbrahim** (2019) Uluslararası Hukuk Temel Ders Kitabı, Ankara, Seçkin Yayıncılık, p. 222.
[548] **Okur**, p. 207.

commission report, the interdiction was unlawful due to the fact that (in relation with this study) there existed no reasonable suspicion that a threat had posed to Israel, neither did Israel have any legitimate defence against the *Mavi Marmara* Flotilla. Indeed, the claim of the blockade is not legitimate by virtue of the fact that Israel did not recognize the Hamas, which was a government of the Sovereign Gaza.[549]

In this section, high sea related jurisdiction issues such as hot pursuit, piracy, slave trading etc. will be examined. Additionally, evidence for interception will be dealt with in the Chapter III of this Part.

4.1 Hot Pursuit

Hot pursuit on high seas is a sort of high sea interdiction. Right of hot pursuit was firstly recognized by the Supreme Court of Canada in the judgment of *The North* case.[550] Arbitration decision concerning *I'm Alone* reiterated that understanding. Hot pursuit bestows the right to pursue and arrest the vessel having violated coastal State laws and regulations in which she has sovereignty and sovereign rights. It must be uninterrupted and continuous from the beginning into the high seas. The hot pursuit must be started because of violation of laws and regulations; that is, the coastal State must have the right to enforce jurisdiction over that vessel at the very beginning of violation.[551]

Hot pursuit may become an option for a State vessel pursuing a vessel which has just committed a crime within the coastal States jurisdiction, including internal sea, territorial sea, and contiguous sea and archipelagic waters.[552] The hot pursuit must start with visual or auditory signal and must be exercised by warship or military aircraft or providing clearly marked as acting under government service and authorized to that effect[553] visible and audible from a distance.[554] In order to exercise the right to hot pursuit on the high seas, it must be initiated when the ship or at least its boat is within the area of the State and must continue without interruption.[555] Hot pursuit may only continue until

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[549] **Canca**, pp. 96-109.
[550] The US registered vessel, the North, was fishing in the three miles territorial sea of Canada. The Canadian coast guard vessel intervened in the catch and the North fled towards high seas. However, the government vessel took two dories left by the North and caught her in within the six mile from the coast together with the freshly caught fish on the deck. The Canadian Supreme Court held that the pursuit and seizure was legal.
[551] **Guilfoyle (2009)**, p. 18.
[552] The 1958 TSC, Art. 23(1); archipelagic waters is added in UNCLOS, Art. 111(1).
[553] UNCLOS, Art. 111(5).
[554] **Mallia**, p. 65.
[555] UNCLOS, Art. 111(1).

outside the territorial sea or its own contiguous zone or that of another State.[556] Upon entering its own territorial sea or that of another State, it shall be ceased. That is to say, after entering its own territorial sea, it will no more be deemed hot pursuit and its benefits will not be enjoyed. Entering another State's territorial sea shall end the hot pursuit right; taking into account the exclusive jurisdiction of another State.

For crimes committed within the contiguous zone but not on the mother ship concept, the hot pursuit may only be commenced for the offenses violating the rights of protection for which the zone was established.[557] Additionally, Article 111 of the UNCLOS permits hot pursuit for offenses violating the laws and regulations of coastal State regarding the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations in accordance with the UNCLOS.[558] Right of hot pursuit does not only encompass interdiction but also results in indisputable right of littoral States to seize it on the high seas.[559]

Besides, Article 111(3) of the UNCLOS regulates termination of hot pursuit by the territorial sea, unlike the Harvard Research in International Law, Draft Convention on Piracy (Hereinafter: The Harvard Draft Convention), which suggested, "reverse hot pursuit" and "pursuit and entry" may permit entry into another littoral State's territorial sea, unless prohibited by coastal State.[560] When such a vessel being pursued enters into the zone which exclusive jurisdiction is exercised over, so long as it is a zone besides that of the pursuing State, the hot pursuit is to end. This rule must be applied for both hot pursuits commenced from the territorial sea, and a hot pursuit commenced on the high seas.[561]

According to Article 12 of the Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area 2003 (Hereinafter: Caribbean Area Agreement), contracting parties may enter other State's territorial sea so long as she receives consent of the relevant party in case of hot pursuit, reserving the boarding and securing exceptions for pursuing from international waters to territorial waters. Other US bilateral agreements regarding

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[556] Ibid, Art. 111(3).
[557] Ibid, Art. 111(1).
[558] Ibid, Art. 111(2).
[559] **Churchill/Lowe**, p.214-16; **O'Connell**, pp. 1075-93.
[560] **Bingham, Joseph W. et al**. (1932) 'The Harvard Research in International Law, Draft Convention on Piracy' American Journal of International Law, Vol:26, No:1, pp. 739-785.
[561] **Guilfoyle (2009)**, p. 92.

suppression of illicit drug trafficking require relevant party consent or in some cases by giving notice as early as possible.

Another concept in hot pursuit is a mother or hovering ship on the high seas with one of its boats or any kind of craft jointly working deals with illicit acts within the territorial sea or the EEZ, continental shelf and contiguous zone for the crimes for which they are established.[562] Constructive presence is a similar doctrine to bestow the right to arrest and prosecution to a coastal State under customary international law. According to this doctrine, a mother ship is present outside of the territorial sea; however, its boat commits offenses breaching coastal State law in the territorial sea.[563] Indeed, since right to prosecute and arrest emerges through the boat sent to the territorial sea, it can be said that this jurisdiction is a kind of objective territorial jurisdiction.[564] The doctrine of constructive presence is recognized in both Conventions on the High Seas of 1958 and the UNCLOS of 1982[565] in which contiguous zone and the EEZ have been added.

4.2 Flagless/Stateless Vessels

Even though the 1958 CHS does not have any provision with regard to flagless vessels, any State parties to the UNCLOS, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Hereinafter: The UN Narcotics Convention), and the 1995 FSA Agreement has right to board and inspect a vessel on the high seas where there is a reasonable suspicion exists that it is stateless.[566]

In this situation, the law of the State of which the shipowner is a national, will be applied to the stateless ships on the high seas.[567] A ship may only have one nationality, and ships having dual nationality would be regarded as stateless[568] Moreover, during the voyage, a ship may not switch to another State's flag or even following a port of call.[569] Additionally, where a vessel flies flags belonging to more than one State,[570] it results in it being a stateless ship. Even if the ship in question flies one flag at present, the change of

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[562] UNCLOS, Art. 111(4).
[563] **Mallia**, p. 65.
[564] **Gilmore, William C.** (1988) 'Hot Pursuit and Constructive Presence in Canadian Law Enforcement' Marine Policy, Vol.12, No:2, pp. 105-111 at p. 109.
[565] Convention on the High Sea, Art.23(1); UNCLOS, Art.111(1) and (4).
[566] UNCLOS, Art. 110(1)(d); the UN Narcotics Convention, Art.17(2); the 1995 FSA Agreement, Art. 21(7).
[567] **O'Connel**, p. 755.
[568] UNCLOS, Art. 91, 92(2).
[569] Ibid, Art. 92(1).
[570] Ibid, Art. 92(2).

flag during the voyage, except for the actual transfer of ownership, may result in statelessness of that ship in line with Article 92(2) of the UNCLOS. Interdicting State may confiscate the stateless vessel because no diplomatic protection is likely.[571]

Taking into account that small vessels are not registered and have the right to fly the flag of its owners, the doctrine of presumptive authority may fill the lacuna of time-consuming confirmation of the registration of those vessels. Even if it is not widely followed,[572] in practice it is a convenient tool as is in the US-UK exchange notes, the 1990 Spanish-Italian Treaty, the US agreements with Haiti and Costa Rica, and by elapsing reply-time requirements for numerous the US bilateral agreements. Moreover, as recent WMD interdiction treaties require not verification of registration but verification of nationality,[573] this procedure may be applied to incidents.

4.3 Flying False Flag

In situations where the vessel in question refuses to show its flag, or it is suspected that the flag shown is not its real flag, if the vessel has the nationality of the prospective intercepting State, the warship of that State has the right of visit in order to verify it.[574]

In that case, where it is verified that it is flying the warship flag without having the right to, the warship can take along it to her port.[575] If it is proven that the vessel is flying a false flag, it is deemed stateless and is acted against as such. Where the flag is not verified or it has no right to the flag, it is deemed stateless and acts so.

4.4 Piracy

Privateering and piracy are different notions. Privateering is when a State acts by hiring commercial vessel. They would be accepted as "members of other militias and members of other volunteer corps" so long as they meet the criteria: (1) The commander must be responsible for his subordinates. (2) The vessel must bear fixed distinctive signs

[571] **Churchill/Lowe**, p. 214.
[572] **Guilfoyle (2009)**, p. 96.
[573] Ibid, p. 96.
[574] UNCLOS, Art. 110; 1958 HSC, Art. 22(1).
[575] **Churchill/Lowe**, p. 213.

recognizable from a distance. (3) The vessel must carry arms visibly. (4) They must operate their operations in the line of the laws and customs of war.[576]

On the other hand, piracy is an act carried out by private persons who have no legal relation with any States. Privateering is wartime act under the command of a State and not among the topics of this study. Piracy is an act experienced in both peacetime and wartime, not under the command of a State or requiring belligerency.

Piracy is a crime which all States have common extraterritorial jurisdiction under customary[577] and conventional law.[578]

The offense of piracy has three aspects in international law:[579]

1- The crime requires individual liability,

2- Every State has jurisdiction on suppressing the offense and punishing the offender,

3- It is an exemption to the exclusive jurisdiction of the flag State. The offense allows boarding and seizing without the need to receive the consent of the flag State to every State regardless of its being affected by its activities.

Piracy is a *sui generis* offense, and the UNCLOS and the 1958 CHS has drafted its element for limiting enlargement of the offense. This limitation makes it difficult to apply many illegal activities upon seas. According to those treaties, the offense of piracy must have these elements:[580]

1- Illegal acts have had to possess a private end,

2- Those acts could be violence, detention or depredation,

3- It must be committed by crew or passenger of a private vessel or aircraft.

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[576] **Pictet, Jean S.** (eds) 1960 Commentary on the Geneva Conventions of 12 August 1949, vol. 2: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Switzerland, International Committee of the Red Cross, pp. 93-104; Second Geneva Convention, Art. 13(2); Third Geneva Convention, Art. 4(2).

[577] **Guilfoyle (2009),** p. 28.

[578] UNCLOS, Art. 105.

[579] **Guilfoyle (2009)**, p. 27.

[580] UNCLOS, Art. 101; the 1958 TCS Art.15. Piracy delineated at the Harvard Draft Convention Article 3 as: " Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any State:
(1) Any act of violence or of depredation, committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right …
(2) Any act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship.
(3) Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this Article." See Bingham, Joseph W. et al. (1932) The Harvard Research in International Law, p. 768-769.

4- The acts must be conducted on the high seas, or outside of the jurisdiction of any State,

5- They must be directed to another vessel, or persons or property aboard of other vessels.

The notion of 'private ends' in this issue is to be interpreted broadly and that words emphasize lack of State authority.[581]

Inciting or intentionally facilitating the acts described above will form the conduct of piracy as an act of an accomplice. Besides, any act that accumulates voluntary participation being aware of the facts of a vessel is to make it pirate on the ground that it knows the facts of former, which is a kind of act of accomplice.

As is seen from the requirements, there must be two vessels so as to describe the act as piracy. Namely, any incident occurred within one ship shall not constitute the offense of piracy no matter how severe it is. However, some authors claim that piracy is not limited with the mentioned acts above. *Halberstam* says that many the U.S. and Britain courts have accepted any unauthorized acts committed on the high seas as piracy.[582] *Oppenheim* maintained in 1955 that where crews revolts and undertakes the administration of a vessel, and where attacking vessel's crew murders one of the people on board of the attacked vessel, these acts are piratical acts even though they don't have plunder.[583]

Most of the scholars are maintaining that insurgent acts must be exempted from piracy, stressing that insurgents' action must be directed at vessels of a particular State and third States vessel should stay unharmed.[584] The vessel and nationals in them must be of the State of revolted against. As per *Guilfoyle*, the important element in this situation is not the motive of insurgents but the class of vessel targeted in the course of the civil conflict.[585] If insurgents only attack their own government vessels, this attack may be assessed outside of piracy. Other classes of vessels may not be a legitimate target in a civil war and so if they are, the act will be piracy.[586] Another point is that insurgents may not

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[581] **Guilfoyle (2009)**, p. 42

[582] **Halberstam, Malvina** (1988) 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' American Society of International Law, Vol:82. pp. 269-310 at p. 273.

[583] **Oppenheim, Lassa** (1955) International Law vol. 1, Lauterpacht, H. (eds) 8th Edition, London, Longmans, Green Co, p. 608-609.

[584] **Halberstam**, p. 275.

[585] **Guilfoyle (2009)**, p. 33.

[586] Ibid, p. 35.

have the right to visit, search and seize a vessel or cargo navigating on the high seas.[587] In case they try to do so, it may be assessed as piracy in accordance with severity of power resorted and acts made.

Article 103 of the UNCLOS may be interpreted as public vessels such as those allocated to military or government service might not be a pirate vessel, while the element of the revolt of the crew does not exist.[588] As regards *to Guilfoyle*, in the context of committing private ends, lack of State sanction upon an act of violence leads it to piracy.[589]

With regard to private ends, the Belgium Court of Cassation held in the case of *Castle John v. NV Marjlo* that;

> "The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective.Based on these considerations, the Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning of the Convention [on the High Seas]."[590]

Thus, it is contested that the defense of political motivation of protestors provided no defense, and so did it have jurisdiction over the act even if it occurred upon the vessels carrying another flag of State; for the fact that the act was piracy.

However, whether politically motivated action[591] is piracy is under debate, *Halberstam* says that neither the 1958 CHS nor the Harvard Draft Convention intended to exclude those actions.[592] According to *Halberstam*, the reference in distinguishing the act of piracy from terrorism should be made subject to State sanction and authority; not their political or subjective motive.[593] The only historical rule exempting insurgents attack on

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[587]Harvard Research, p. 857; Ronzitti, Natalino (1988) The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision: Ronzitti, N. (eds), The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries, Dordrecht, Martinus Nijhoff, pp. 1-58 at p. 11.

[588] **Guilfoyle (2009)**, p. 36.

[589] Ibid, p.37.

[590] Castle John and Nederland's Stichting Sirius v. NV Marjlo and NV Parfin, Belgium Court of Cassation, J.D.19.12.1986 (77 I.L.R 537).

[591] Examples for political motivation and piracy: The Cagliari takeover of 1857. Several Civil War seizures (the Joseph L. Gerrity [In Re Tivnan], the Salvador and Guatemala plot, the Chesapeake, the Philo Parsons [Burley's Case] and the Roanoke). The takeover of the Spanish steamer Montezuma by Cuban insurgents in 1876. The seizure of the S. S. Falke in 1929 by Venezuelan revolutionaries and the commandeering of the Portuguese cruise liner Santa Maria in 1961. The *Achille Lauro* hijackers. See: Menefe, Samuel P. (1993) 'The Case Of The Castle John, Or Greenbeard The Pirate? Environmentalism, Piracy And The Development Of International Law' California Western International Law Journal, 4:1-16 at p.6-7.

[592] **Halberstam**, p. 277.

[593] Ibid, p. 276-284.

the high seas is that insurgents must confine themselves to attack the government vessels they intent to overthrow.[594]

Even if the wording of Preamble of the 1937 Nyon Arrangement on Submarine Warfare supports that a State may commit piracy, operative articles of the Arrangements regards defence of neutral vessels. Yet, the International Law Commission concluded in 1955 that ordinary understanding of piracy did not need to expand to encompass State act of aggression as piracy.[595]

In addition, even though the SUA Convention criminalizes "control over a ship by force or threat thereof" and "performing an act of violence against a person on board endangering the safety of navigation of that ship,"[596] it is ambivalent on political motivation. It is arguable that political offense exemption that has been applied in extradition requests, may be applicable at the SUA Convention; taking into view its omission on that matter. However, recent conventions have expressly excluded political offenses a ground to refuse extradition.[597] The mentioned terrorism suppression conventions and recent practices[598] on the UN demonstrate that deliberate aiming at civilians during an armed conflict and self-determination campaign is unacceptable. Where insurgents attack a government vessel of its own flag, not taking into consideration of their subjective motivation but considering its objective status at international law and choice of target under the laws of war, the vessels being used for attack could be boarded and searched basing on act of piracy under Article 110 of the UNCLOS.[599]

As a result, boarding vessels and taking hostage of civilians on the high seas by civil war insurgents shall constitute piracy so as politically motivated criminal attacks whether it is so-called terrorism, where those acts occur by a vessel against another.[600] Piracy is one of the offenses to which the UNCLOS obliges States to cooperate to the

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[594] **Guilfoyle (2009)**, p. 74; **Oppenheim**, p. 748.
[595] UN (1955) Year Book of International Law Commission, p. 37.
[596] The SUA Convention, Art. 3(1),(2).
[597] Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Art.11bis; International Convention for the Suppression of Terrorist Bombings of 1997, Art.11; International Convention for the Suppression of Terrorist Financing of 1999, Art.14; International Convention for the Suppression of Acts of Nuclear Terrorism of 2005, Art.15
[598] UN (2004) High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Responsibility, Un Doc A/59/565 para. 160; Slaughter, Anne-Marie/Burke-White, William (2002) An International Constitutional Moment. Harvard International Law Journal , 43(1):1-23; Prosecutor v. Kupreski, International Criminal Tribunal for the former Yugoslavia, No:IT-95-16, J.D.04.01.2000, para. 521.
[599] **Guilfoyle (2009)**, p. 42.
[600] Ibid, p. 40-41.

fullest possible extent on the high seas.[601] Applicable law to pirates is the national law of the interdicting State, and therefore investigation and seizure are to be subject to that law.[602]

4.5 Slave Trade

Slavery requires exercising power to annex the right of ownership over a person.[603] Slave trade includes capturing, acquisition or disposal of a person for slavery; selling, exchanging, transporting and trading him for the same purpose.[604] Debt bondage, serfdom, forced marriage, and child labour are other forms of slavery.[605] However, International Criminal Court [Hereinafter: ICC] Statute defines enslavement as "the exercise of any or all the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular, women and children."[606] According to ICC, ownership encompasses "purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."[607] The enslavement has a broader meaning than that of slavery in general international law.[608] It should be borne in mind that ICC Statute binds signatories and do not constitute a binding customary international law.

Besides, Article 99 of the UNCLOS regulates slave trade but not defines what slavery includes. It bans the slave trade and obliges every State to punish this kind of trade transported by a vessel flying or unlawfully flying its flag by preventing its usage. Contrary to the crime of piracy regulation, the UNCLOS does not oblige States to cooperate in suppressing this crime. The 1958 CHS and the UNCLOS contain the right to visit and inspect on the high seas by a warship of foreign vessels so as to confirm a vessel's

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[601] UNCLOS, Art. 100.
[602] Ibid, Art. 105.
[603] Slavery Convention or the Convention to Suppress the Slave Trade and Slavery of 1926, Art.1.
[604] Ibid, Art. 1(2).
[605] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, Art. 1.
[606] Rome Statute of the International Criminal Court of 1988, Art. 7(2)(c).
[607] The International Criminal Court (2017) Elements of Crimes. Retrieved from https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf, accessed 20.11.2019.
[608] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, ICTY, No:IT-96-23 and IT-96-23/1, J.D.12.06.2002, para. 541. See for further explanation on elements of enslavement, para. 542. "The case was related to the rape of members of the Bosnian Serb armed forces as an instrument of terror against Muslim women and girls. An instrument they were given could be applied whenever and against whomsoever they wished. Women and girls were treated like chattels, pieces of property at the arbitrary disposal of the Serb occupation forces, as if slave."

right to fly the flag.[609] No right has been prescribed beyond the boarding and inspection. Given this, boarding vessels have limited right to search but not to seizure.[610]

On the other hand, this crime is evaluated under Article 5 of the UN Convention against Transnational Organized Crime (Hereinafter: UNTOC)[611] concerning aggravated organized crimes, having transnational nature. Under the UNTOC, serious crimes should be committed to directly or indirectly gain a financial or another material benefit.[612] However, Article 15 of the UNTOC requires that the jurisdiction should be established by the States that nationals of which commits this crime or are exposed to them (passive personality), "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[613] Therefore, flag State jurisdiction is vested upon those vessels.

As is seen, the slavery-like practice would result in maritime interdiction although it may not be proven that the trafficked persons are to be forced in any range for such practice.

4.6 Unlawful Acts against Safety of Maritime Navigation

With the effect of the *Achille Lauro*[614] incident, international actors discussed a response to that sort of acts. As that incident was politically motivated, the SUA Convention concluded at the end that offences set forth in Article 3 "shall be deemed as extraditable offenses" and State parties be obliged to include those offenses in the treaties between them. Thanks to this provision, State parties have not refrained from extraditing the offender who commits such crimes by accepting them as a political offense, that is, applying a political offense exemption clause.[615] Stricter wording is added to the Protocol

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[609] UN Convention on the High Seas of 1958, Art. 22; UNCLOS, Art. 110.
[610] **Guilfoyle (2009)**, p.78.
[611] The UN Convention against Transnational Organized Crime (UNTOC) came into force 29 Sep. 2003. Except Iran and Congo all States have ratified, accessed or approved.
[612] UNTOC, Art. 5.
[613] Ibid, Art. 4.
[614] On 7 October 1985, the members of the Palestinian Liberation Front hijacked the vessel on the Mediterranean sea in order to force Israeli government to release Palestinian captive. After negotiations the hijackers and an alleged mastermind of the operation, Mr Abbas, were ensured to safe flight. As the airliner was returning to Egypt, United States military aircraft intercepted the airliner and forced it to land in Sicily. While Italy took the four hijackers into custody and eventually prosecuted and convicted them, Italy allowed Mr Abbas to escape to Yugoslavia.
[615] **Guilfoyle (2009)**, p. 38. See for political offence exemption: Article 11 of the International Convention for the Suppression of Terrorist Bombings of 1997, 2149 UNTS 256; Article 14 of the International

of 2005 to the SUA Convention,[616] regarding suppression of traffic in WMD, by saying that none of the offenses foreseen in that Protocol may be regarded as a political offence in extradition or mutual assistance.[617]

As per Article 3 of the SUA Convention, the following acts endangering safety of maritime navigation deemed as offence:

a) Seizing or exercising control over a ship[618] by force or threat or any other form of intimidation,

(b) Committing violence against a person on board a ship, on the condition that that act is likely to put in danger the navigational safety of that ship,

(c) Demolishing a ship or causing harm to a ship or to its freight which is likely to put in danger the navigational safety of that ship,

(d) Placing or inducing to be placed a device or substance on a ship that the mean is likely to destroy that ship or its cargo, or cause damage to them to the extent of endangering or being likely to put in danger the navigational safety of that ship,

(e) Destroying or seriously harming navigational equipment or seriously intervening its navigational capacity provided that such an act is likely to endanger the safe navigation of a ship,

(f) Tipping false information, thereby menacing the safe navigation of a ship,

(g) Injuring or killing any person, during the commission of above offenses or the attempted commission of them.

In 2005, a new Article 3*bis* has been added to the Convention. According to that Article, acts intimidating a population, a government, or an international organization to do or abstain from particular acts falls within the Article, if it is likely to cause death, serious injury, or damage. The acts in question should have this effect by its nature or context. Article lists acts that may evaluated such:

"(a)…

(i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN [Biologic, Chemical, Nuclear]...

Convention for the Suppression of Terrorist Financing of 1999, (2000) 39 ILM 268; Article 15 of the International Convention for the Suppression of Acts of Nuclear Terrorism of 2005.

[616] Full name of the Protocol is Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. The 2005 Protocol came into force on 28 July 2010 and as of 18 Jul. 2019 it has been ratified by 49 States. See for more information: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx

[617] The SUA Convention, Art. 11bis.

[618] According to Article 1 of SUA Convention, ship means: "a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft."

(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, … in …[capable]quantity or concentration …

(iii) uses a ship [itself]…

(iv) threatens, with or without a condition, as is provided for under national law, to commit an [above] offence …;

(b)…transports on board a ship [for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act]

(i) …[any BCN weapon], any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, ... death or serious injury or damage;

(ii) …

(iii) …any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity [not internationally lawful]…

(iv) …. any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention… [to use] for such purpose."

The SUA Convention is applicable to the contiguous zone, the EEZ, continental shelf, and the high seas.[619] In the territorial sea and internal sea, the littoral State's own laws will be effective. Yet, where a vessel navigates or is scheduled to navigate into, through, or from those maritime areas, the SUA Convention will have room to be applied. Article 6 of the SUA Convention requires each State to establish jurisdiction over those offenses committed on its territorial sea, by its nationals, and against ships or on board a ship flying its flag. Paragraph 2 of that Article enables a State party to establish jurisdiction over incident which is committed by stateless persons habitually residing in its territory, during which acts such as seizure, threat, battery or murder are committed against its nationals, and the aim of which is to compel the relevant State to abstain from performing a specific act.

However, it is understood from the wording of Article 8bis as added to the SUA Convention that boarding may be processed only where the flag State authorizes so. Requesting permission for any interception measures is subject to confirmation beforehand

[619] The SUA Convention, Art. 4.

that the vessel has the nationality of the State of the flag it is flying.[620] In addition, where State party submits a prior grant to the Secretary-General while or after ratification, accession, approval or acceptance, the intervening State party is not required to receive express permission from the flag State if it does not respond the request of confirmation within four hours. The State party may also grant prior permission to the vessels flying its flag, without the need for confirmation and authorization process.[621]

On the other hand, the International Convention for the Suppression of the Financing of Terrorism requires all State parties to take measures to establish their jurisdictions over terrorism-related offenses when "the offense is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offense is committed, or the offense is committed by a national of that State."[622] Paragraph 2 of that Article facilitates a State party to establish jurisdiction over an incident which is against its nationals, the relevant State or its equipment abroad, perpetrated by stateless person usually residing in its territory, committed on board an aircraft operated by the relevant State, and aim of which is to oblige the relevant State to renounce taking a particular action.

The preamble of the mentioned International Convention stresses solemn reaffirmation of the UN Member States' unequivocal condemnation of all terrorism-related acts, wherever and whenever they are committed. This wording encourages that this Convention may be applied for terrorism acts committed at sea, including the high seas.

4.7 Illicit Narcotics Traffic

Coastal States jurisdiction over a vessel dealing with illicit traffic of narcotic substance is provided with Article 19(1)(d) of the 1958 TSC and Article 27(1)(d) of the UNCLOS. Both of those read as:

> "The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases…d) If it is necessary for the suppression of illicit traffic in narcotic drugs."

[620] Ibid, Art. 8bis(5).
[621] Ibid, Art. 8bis(5)(d) and (e).
[622] The International Convention for the Suppression of the Financing of Terrorism of 1999, Art. 7.

While those Conventions do not reflect interdiction at the high seas, rights on the high seas are more narrow than the territorial zones but similar to innocent passage. If those Conventions give right to intercept a foreign vessel enjoying innocent passage on the grounds of drug trafficking, permission *argumentum a fortiori* should be given on the high seas. As a result, the 1988 UN Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances has been signed so as to regulate interdiction on the high seas.

Before that Convention, many agreements had been made between the UK and US to prevent illicit rum traffic, such as the 1924 Liquor Treaty. Other major treaties on this regard are the 1990 Spanish-Italian Treaty, the 1995 Council of Europe Agreement on Illicit Traffic by Sea, implementing UN Narcotics Convention and many US bilateral agreements with neighbouring States.

There was a conflict between the US and the UK with regard to illicit rum traffic, and it resulted with the treaty mentioned above. Although the UK was opposed to the act of the US that of putting to arrest hovering vessels outside the territorial zone,[623] the US continued to do so. As it is, the US "has long adhered to the objective principle of territorial jurisdiction, which holds that it has jurisdiction to attach criminal consequences to extraterritorial act… intended" to affect the US.[624] Moreover, the US Federal Court consistently upheld that the US had the right to seize stateless vessels on the high seas in accordance with drug-smuggling law irrespective of any direct link between the conduct and the US.[625] Despite those judicial decisions, the US has changed its practice of not

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[623] Grace and Ruby, The United States District Court for the District of Massachusetts, D.D. 18.09.1922 (283 Fed . 475); France Louise, The United States Court of Appeals for the 2nd Circuit, D.D. 1924 [1 Fed.(2nd) 1004]; The Marjorie E. Bachman, The US District Court for the District of Massachusetts, D.D.27.02.1925 [4 Fed. (2nd) 405].

[624] US v. Postal, The US Courts of Appeals 5th Circuit, J.D.15.02.1979 [589 F.2d 862 (5th Cir. 1979)], p.23. "The Court held that a United States Court has jurisdiction over persons arrested on a foreign ship beyond the U.S. navigable waters in case the arrest breaches a treaty to which the U.S and the foreign country are parties."

[625] US v. Bravo, The US Court of Appeals 1st Circuit. D.D. 29.05.2007 [489 F.3d 1 (2007)]. "During the incident, the vessel's name was written on its stern, but the vessel did not have a visible registration number, port identification, or country flag. Considering the vessel was "stateless" or "without nationality," the vessel is considered to be within U.S. jurisdiction. The Maritime Drug Law Enforcement Act allows the U.S. to conduct drug law enforcement outside of the United States, and more specifically, exercise jurisdiction over stateless vessels. The district court held that "the Fourth Amendment does not apply to activities of the United States against aliens in international waters"; US v. Tinoco, The US Court of Appeals 11th Circuit, D.D.04.09.2002 (304 F.3d 1088), p.100. "During the incident, patrolling units encountered a fiberglass vessel approximately 475 nautical miles west of the Columbian/Ecuadorian border in international waters. When the crew first observed the vessel, it was approximately 300 miles from the nearest point of land. The unit did not see any markings of identification or a flag on the vessel. Even if the vessel did not respond to radio communication, it later answered that they are from Colombia. It was seen that they were dumping items into water. Some items thrown were identified as cocaine. It was decided that the Act's jurisdictional requirement is an element of the offense and the vessel was subject to the U.S. jurisdiction."

requiring flag State consent before interdicting a vessel in international waters; but not for stateless vessels.[626] On the other hand, the law of the US does not require consent for the hovering vessels within the contiguous zone.

Coming back to the UNCLOS, Article 108(1) prescribes cooperation requirement among States for preventing illicit drug trafficking on the high seas. Albeit the second paragraph of Article regulates only requests by flag States for other States' cooperation about a vessel she has enough grounds to believe engages in illicit drug trafficking, the lacuna that whether any State suspecting a vessel to be dealing in drug trafficking and flying another State's flag may request consent, has been filled by Article 17 of the UN Narcotics Convention. Article 17(3) of the said Convention provides that a party having plausible grounds to presume that a vessel flying the flag of another party and enjoying freedom of navigation, is engaging in illicit drug trafficking and may call for the alleged flag State to confirm the registration if so, to grant authorization to take appropriate measures. Measures must be taken by warships or military aircraft, or other ships or aircraft explicitly labelled and identifiable as being on government service and authorized to that effect. Nevertheless, no requirement exists about the obligation upon flag States to authorize. Unless an authorization is received no boarding or a search may be conducted.[627] These requirements are necessary on the high seas and in the EEZ, namely beyond the territorial sea.[628]

In this context, an efficient agreement has been made between Spain and Italy in 1990. According to Article 4(2) and 5(1) of the 1990 Spanish-Italian Treaty, where reasonable doubt exists on dealing with illicit drug trafficking, the other party may enjoy the right to board the vessels flying the other party's flag as its agent and check the documents, question persons on board, and search the vessel if suspicion remains. In spite of the UN Narcotics Convention being silent on preferential jurisdiction when the requesting State was not relinquished, the 1990 Spanish-Italian Treaty keeps flag State law applicable during an interdiction.

The Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances came into force on 1 May 2000. However, only fifteen of the

[626] The US Maritime Drug Law Enforcement Act, 46 USCA§70502.c.
[627] The UN Narcotics Convention, Art. 17(4).
[628] UN Office on Drugs and Crime (2004) Practical Guide for Competent National Authorities Under Article 17 of the UN Narcotics Convention, New York, United Nations, p. 5.

contracting parties of the COE have ratified the Convention. According to Article 4(1) of the said Convention, if a Party has plausible grounds to suspect that a ship flying its flag has committed an offense of drug trafficking, it may call for the assistance of other parties in order to suppress its use for that aim. The parties so requested shall extend such assistance in available means. However, preferential jurisdiction of flag State remains valid over any relevant offense initiated on board its ship.[629] The number of signatory States demonstrates that it is off the full power in the region and doesn't even come close to regional custom.

On the other hand, the US made twenty-four[630] bilateral agreements on suppressing illicit drug trafficking, those of which address consensual boarding and enforcement jurisdiction over vessels, their cargo and crew in international waters.[631] Those agreements include automatic consent mechanism if requested party does not reply within two or three hours in accordance with the bilateral agreement,[632] or only notice like Haitian and Costa Rican agreement. Additionally, some agreements contain a ship-rider clause.[633] According to this clause, law enforcement officials of parties are appropriately entitled to launch on law enforcement vessels or aircraft of the other party.[634] Applicable waters and airspace are those within which each party performs sovereignty in line with its own laws and international law, including the UNCLOS.[635] Those agreements mean that the US or another party may intercept a vessel flying other party's flag even if it is cruising or

[629] The Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1995, Art. 3(4).
[630] Antigua and Barbuda, Bahamas, Barbados, Belize, Colombia, Costa Rica, Dominica, Dominican Republic, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Malta, Nicaragua, Panama, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United Kingdom, and Venezuela.
[631] **Guilfoyle (2009)**, p. 89.
[632] Two hours time limit for Guatemala, Honduras, Nicaragua, Panama and Venezuela; three hours for Colombia, Barbados, Jamaica.
[633] For similar provisions: Barbados Agreement, Articles 3 and 4; Costa Rica Agreement, Article 4; Haiti Agreement, Articles 4–10; Honduras Agreement, Article 4; Jamaica Agreement (as amended), Articles 7–9; Nicaragua Agreement, Articles 4 and 5; Agreement Concerning a Cooperative Ship-rider and Over-flight Drug Interdiction Program (US–Bahamas exchange of notes) 1996, KAV 4743 (Bahamas Agreement), paras. 1–2.; Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area of 2003 (Caribbean Area Agreement), Articles 8–10. (For the US treaties: see https://www.state.gov/s/l/treaty/)
[634] 13088 Honduras - Agreement Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances of 2000, Art. 4(g).
[635] Ibid, Art. 4(b).

hovering within the internal, territorial or archipelagic waters, on condition of the other party's consent.[636]

However, Article 6 provides for that "any operation to prevent and combat illicit traffic conducted in waters and airspace over which one of the parties exercises sovereignty in accordance with its domestic laws shall be conducted by the law enforcement authorities of such Party."

The Contact Center,

> "in accordance with Honduran and international law, has sufficient authority to issue authorizations expeditiously for law enforcement authorities of the Parties to conduct boarding, search and detention operations of vessels suspected of engaging in illicit traffic located in waters within which Honduras exercises sovereignty in accordance with joint operations programs, and outside the territorial sea of any State if the vessel is sailing under the Honduran flag."[637]

The agreement tried to accelerate the process of consent in reducing it to a single centre, by the aim of rapid intervention.

Drug interdiction bilateral agreements of the US require constructing a mechanism of which the flag State waive or consent to exercising of jurisdiction by the other party and require the establishment of jurisdiction on those vessels for boarding State so as to exercise jurisdiction in case of relinquishment.[638] Anyhow, flag State consent is in force as is customary international law in this regard.

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[636] Ibid, art. 6. Similar provision: Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area of 2003 (Caribbean Area Agreement), Arts 11-12; Agreement between the US and Saint Kitts and Nevis concerning Maritime Counter-Drug Operations of 1995, KAV 4231 (Saint Kitts and Nevis Agreement), Art. 2; Agreement between the US and Santa Lucia concerning Maritime Counter-Drug Operations of 1995, KAV 4240 (Saint Lucia Agreement), Art. 2; Agreement between the US and Saint Vincent and the Grenadines concerning Maritime Counter-Drug Operations of 1995, TIAS 12676 (Saint Vincent and the Grenadines Agreement), Art. 2; Agreement between the US and Suriname concerning Maritime Law Enforcement of 1999, KAV 5631 (Suriname Agreement), Art. 3; and cf. Jamaica Agreement (as amended), Article 10(4); Barbados Agreement, Article 5; Colombia Agreement, Art. 4 (exclusively reserving such operations to the coastal State); Costa Rica Agreement, Article 3; Agreement between the US and Dominica concerning Maritime Counter-Drug Operations of 1995, TIAS 12630 (Dominica Agreement), Art. 2; Agreement between the US and the Dominican Republic concerning Maritime Counter-Drug Operations 1995, TIAS 12620 as amended by the 2003 Protocol to the Agreement, KAV 6186 (Dominican Republic Agreement (as amended)), Art. 2; Agreement between the US and Grenada concerning Maritime Counter-Drug Operations of 1995, TIAS 12648 (Grenada Agreement), Art. 2; Guatemala Agreement, Art. 3; Haiti Agreement, Art. 3; Honduras Agreement, Art. 3; Nicaragua Agreement, Art. 3

[637] 13088 Honduras -Agreement Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, Art. 6.

[638] **Guilfoyle (2009)**, p. 251.

4.8 Unauthorized Broadcasting

This kind of on-air broadcasting issue took place in the 1960s and onwards in 13 European countries.[639] Since radio broadcasting was under the monopoly of the relevant State and they were slow to keep abreast of times in music etc., several broadcasting stations were established beyond the territorial sea of the relevant countries.[640] There were attempts to ban unauthorized broadcasting which jeopardizes public safety, emergency frequencies' interference and intervening in sea and air traffic control frequencies. As stated in the *Lotus* case that "Far from laying down the general prohibition of the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rule", *Smith* claimed that effect stated in this case perhaps covers not the effect on listeners of the related nations but the effect upon national broadcasting policy.[641] Yet, the International Telecommunications Union did not refer to any extraterritorial maritime jurisdiction, such as objective territorial jurisdiction.[642] For instance, even if it was a monopoly in the UK, while stateless vessels have been under the jurisdiction of the UK law, the UK radio telegraphy legislation does not extend its jurisdiction to the high seas.[643]

The European Agreement for the Prevention of Broadcasting transmitted from Stations outside National Territory of 1965 was the first international agreement defining pirate broadcasting. The broadcasting stations and nationals outside national territories, installed on board of ships, aircraft, or any other floating or airborne objects, transmitting broadcasts within any part of the territory of any Contracting Party, causing harmful interference to any radio-communication service of any Contracting Party, is under the jurisdiction of the State bearing nationality. Where they are within the territory of the State concerned, it has jurisdiction over them, either. Similarly, Nordic legislation and the UK1967 Marine and Broadcasting Act establishes jurisdiction over its nationals on the

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[639] **Guilfoyle (2009)**, p. 170. The State exposed to are United Kingdom, France, West Germany, Netherlands, Belgium, Switzerland, Austria, Italy, Spain, Portugal, Ireland, Sweden, Denmark, Norway and Finland. See: Hunnings, March N. (1965) 'Pirate Broadcasting in European Waters' International and Comparative Law Quarterly, Vol:14, pp. 410-436 at p. 416.

[640] **Robertson, Horace B.** (1982) 'The Suppression of Pirate Radio Broadcasting: A Test Case of the International System for Control of Activities outside National Territory International Telecommunications' Law and Contemporary Problems, 45:71-101 at p.72.

[641] **Smith, Dan D.** (1967-68) 'Pirate Broadcasting' The Southern California Law Review, Vol:41, pp. 771-815 at p. 782.

[642] **Robertson**, p. 73.

[643] **O'Connel**, p. 815.

high seas and within its territory.[644] A broad legislation introduced in Australia included any vessels that is using transmitter for the purpose of transmitting to Australians or in a manner to interfering radio communication in Australia or between Australia and outside.[645]

Even though this kind of incident requires flag State consent before the UNCLOS, once a State cancels a ship registration broadcasting upon the high seas, it will be enforceable by an aggrieved party State.[646] On the other hand, registration of fixed platforms used for that aim in the international waters cannot be cancelled since they do not have registration in the State in question. Such platforms may not be subject to any flag State jurisdiction.[647] However, according to Article 60(1)(b) and (2), and 80 of the UNCLOS, a coastal State has prescriptive and enforcement jurisdiction covering fixed platforms on its continental shelf and the EEZ.[648] Article 109(2) of the UNCLOS grants same rights with vessels for the installations on the high seas and fixed platforms may be evaluated as installations in this regard.

Article 109(4) of the UNCLOS provides that the unauthorized broadcasting is the one of either ground for enforcement jurisdiction over the high seas; beyond the right of visit and inspection. The enforcement jurisdiction includes arresting persons and vessels, including apparatus. Any State apart from those who have exclusive jurisdiction, those receiving the broadcast in its territory and suffering interference with its radio frequency, have jurisdiction over them.

Apart from exclusive construction rights on the EEZ as per Article 60 of the UNCLOS, Article 109 provides that installations without nationality may be subject to the jurisdiction of receiving or suffering party State. Regard must be given on that the UNCLOS is binding only upon the States ratifying it with regard to unauthorized broadcasting and cannot be considered as systematizing of eduring customary law.[649]

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[644] **Guilfoyle (2009)**, p. 174.
[645] Australia Radiocommunications Act of 1992, Art. 195.
[646] For instance, the UK referred Radio Caroline making pirate broadcasting to the International Telecommunication Union, and Panama cancelled its registration.
[647] **Guilfoyle (2009)**, p. 172.
[648] This rule was drawn up after Dutch legislation permitted to apply the law enforcement to Radio Nordzee broadcasting above continental shelf of it. Legal vacuum on exceptional illegality, international law would not tolerate actions effecting its legal interests even if it occurs beyond the national jurisdiction.
[649] Reuland, Robert C. (1989) '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, No:5, pp. 1161-1230 at p. 1164.

As an attempt to initiate jurisdiction further from the one the UNCLOS bestows, the UK made law on unauthorized broadcasting in 1990 before accession to the UNCLOS; that it has jurisdiction over vessels and persons as the UNCLOS permits. This Act will give further jurisdiction over the vessels flying the flag of States other than those ratifying the UNCLOS. Nevertheless, that enforcement jurisdiction may raise the question of inconsistency with general international law.[650]

4.9 Weapons of Mass Destruction

WMD material refers to nuclear, radiological, chemical and biological weapons of mass destruction and precursors used for their construction and delivery system. The difference between other crimes permitting interdiction on the high seas and WMD materials is the legality of the latter's trade and produce. However, the UN Security Council Resolution [Hereinafter: UNSCR] 1540 affirms it through a statement[651] that those systems are a threat to international security and peace. It suggests new obligation over the States to suppress WMD materials to be delivered by non-State actors and criminalize those acts. According to this Resolution, State parties must be criminalized for WMD material trade, including materials falling under the Biological Weapons Convention and the Chemical Weapons Convention, no limiting for use of terrorist intent.[652] With regard to the obligation of criminalization of WMD material trade, 93 States regulate framework legislation, and 71 describe it as crime.[653]

Guilfoyle asserts that although the Resolution does not include maritime interdiction clause; no consequences may be obtained without maritime jurisdiction.[654] The US bilateral agreements in this respect have adopted drug interdiction treaties and the 2005 SUA Protocol. Due to the fact that WMD materials and its trade are not a crime in every State, the issue of jurisdiction has arisen where the cargo and nationals aboard belong to third countries but interdiction carried out by another State upon the consent of flag State. Therefore, the 2005 SUA Protocol and UNSCR 1540 initiate a trade of that material to be

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[650] **Guilfoyle (2009)**, p. 179.
[651] Note by the President of the Security Council. (31 , Jan. 1992). Retrieved Jul. 18, 2019, from United Nations: http://undocs.org/s/23500.
[652] **Crail, Peter** (2006) 'Implimenting UN Security Council Resolution 1540: A Risk-Based Approach' Nonproliferation Review, Vol:13, No.2, pp. 355-399 at p. 356.
[653] The Committee established pursuant to Security Council Resolution 1540 (2004). (2008). Report, p. 8.
[654] **Guilfoyle (2009)**, p. 232.

criminalized at international law. The right to interdict in this respect is also grounded on the "other power conferred by treaty" under Article 110(1) of the UNCLOS.

In June 2002, G8 (the Group of Eight, the most industrialized countries) agreed on the Kananaskis Principles, Statement by G8 leaders, the Global Partnership against the Spread of Weapons and Materials of Mass Destruction, Kananaskis Summit, Canada. According to the statement, all States ought to develop and sustain efficient law enforcement cooperation aiming interdiction of illicit trafficking of WMD materials, and the G8 States are to provide assistance to the States those of which do not have sufficient expertise or resources.

In line with the UNSCR 1540, a voluntary initiation was established in 2003, and over a hundred States endorsed[655] the initiative so far.[656] The Proliferation Security Initiative (PSI) aims at uniting the States concerned about the proliferation of WMD materials. The PSI seeks corporation among States that have a stake in non-proliferation to take a step in stopping the flow of such items at sea. Moreover, the initiative pursues the cooperation of any State whose vessels, flags, ports, territorial waters, might be used for proliferation purposes by States and non-State actors of proliferation concern.[657] That principle advises States to engage in effective steps for interdicting transfer of WMD materials and take specific action for interdicting efforts. Additionally, it encourages States "to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other State,… seize such cargos" on the ground of reasonable suspicion.

Apart from the UNSCR 1540, it also advises interdiction of cargos transferring one State to another. Hence, the PSI principles do not create a new mechanism of law enforcement at seas except enhancing effective and cooperative use of the existing international rules.[658] Following the PSI, Germany acted in line with its principle and

[655] See for endorsing states: http://www.psi-online.info/Vertretung/psi/en/03-endorsing-states/0-PSI-endorsing-states.html, accessed 21.11.2019.
[656] The Proliferation Security Initiative. Who we are. Retrieved from https://www.psi-online.info/psi-info-en/-/2075520, accessed 21.11.2019.
[657] Proliferation Security Initiative: Statement of Interdiction Principles
[658] Remarks by National Security Advisor Stephen J. Hadley at the Proliferation Security Initiative Fifth Aniversary Senior Laevel Meeting, 28 May 2008. Retrieved from https://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080528-3.html, accessed 25.08.2020.

ordered a German-owned vessel to berth Italian port in Oct 2003, the BBC China, Antigua and Barbuda flagged vessel.[659]

As a result, taking into account that Article 19 of the UNCLOS permits innocent passage on the ground that the passage shall be conducted without entering internal sea and prejudiced security, good order and peace of the coastal State, exercising in conformity with the UNCLOS and other international laws, which is not a basis for interdiction a vessel carrying WMD materials in the territorial sea; Article 27 of the UNCLOS that asserts criminal jurisdiction over vessels navigating in the territorial seas regardless of its passage being innocent may be a basis to interdict a vessel carrying WMD material in line with the treaty-like UNSCR 1540 obligations.[660] The requirement embedded in Article 27(5) of the UNCLOS that a crime committed before the vessel entered into territorial seas may not be the reason for interdiction, may not be a case in this scenario because the criminal act would be ongoing at every stage of the navigation, i.e. a continuous crime.[661]

However, within the contiguous zone, between 12 to 24 n.m. if announced, taking into view that enforcement jurisdiction may apply for the crimes committed within the territory encompassed outlines of the territorial sea and attempted to be committed within that area; custom laws for the control of listed material of WMD would be extended to inspection.[662] On the other hand, where the shipowner directs the vessel to a port appropriate for meeting the request, then national customs law enforcement could prevent the transhipment of WMD materials.

Apart from those multilateral agreements, the US entered into bilateral treaties with some undeveloped countries such as Panama, Liberia, Belize, Marshall Islands, etc., and those agreements function understanding of flag-State consent within the framework of PSI principles.[663] The agreement with Panama, Belize, Marshall Islands, Mongolia, and Liberia has a deemed consent provision; based on the condition that the requested State does not reply within 2 or 4 hours.[664] For instance, the Belizean agreement gives authority to the requesting State to board and search after the second fruitless initiation if the

[659] **Roach, J. Ashley** (2006) Proliferation Security Initiative (PSI): Countering Proliferation by Sea. In Nordquist et al., p. 357.
[660] **Guilfoyle (2009)**, p. 243.
[661] Ibid, p. 243.
[662] Ibid, p. 243.
[663] **Guilfoyle (2009)**, pp. 247-8.
[664] See for agreements: https://2009-2017.state.gov/t/isn/trty/index.htm, accessed 25.08.2020.

requested State does reply in a timely manner.[665] Furthermore, almost all of those agreements bestow the right to visit another party where the vessel is not flying any flag but claiming other party's nationality.[666] It should be borne in mind that those agreements are applicable beyond the territorial sea.[667] However, those agreements allow another party enjoy the right to board on the contiguous zone and primarily enforcement jurisdiction in case of boarding.[668]

Those PSI agreements prescribe primarily flag State jurisdiction concerning seizure, forfeiture, arrest, and prosecution.[669] After the PSI initiation, the first international instrument, the SUA Protocol was adopted on 14 October 2005, came into force 29 July 2010. It attempted to describe WMD trade as a crime and aimed to suppress it through high seas interdiction. Article 3bis(1) of the Convention added through the 2005 SUA Protocol defines substantive terrorist offenses which include WMD materials. First of all, intentional act through a ship must aim at, by its nature or context, intimidating a population, or obliging a government or an international organization to do or to refrain from acting in any way. The second prong of the crime is the means, namely a ship and the third prong is the subject, against, on or from a ship which any explosive, radioactive material or BCN weapon is used or discharged; or from a ship which oil, liquefied natural gas, or other hazardous or noxious substance are discharged; or on a ship which any explosive or radioactive material, any BCN weapon or material, any fissionable nuclear activity material is transported. The fourth prong of the crime is the effect or purpose of the subject which is causing or likely causing death or serious injury or harm. The most important prong is the buyer, who must not be a State party to the Treaty on the Non-Proliferation of Nuclear Weapons.

However, State parties tend to request permission on dual-use materials. Therefore, the Wassenaar Agreement has been reached among 42 States[670] that this Agreement lists

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[665] Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, 2005, Art. 3(c) and (e).

[666] Belizean PSI Agreement, Art. 4(4); Liberian PSI Agreement, Art.4.4; Croatian PSI Agreement, Art. 4(6); Cypriot PSI Agreement, Art. 4(4); Maltese PSI Agreement, Art.5.4; Mongolian PSI Agreement, Art. 4(4); Marshall Islands PSI Agreement, Art. 4(4).

[667] See for the agreements: https://2009-2017.state.gov/t/isn/trty/index.htm, accessed 25.08.2020.

[668] See: https://2009-2017.state.gov/t/isn/trty/index.htm, accessed 25.08.2020; for instance Marshall Islands PSI Agreement, Art. 5(2).

[669] **Guilfoyle (2009)**, p. 251.

[670] Parties are Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea,

dual-use materials.[671] Where a party requests permission to board, parties are to check the materials on that list, not in their customs list. Moreover, parties to the 2005 SUA Protocol must establish perspective jurisdiction (*Personam* Jurisdiction) in accordance with SUA Convention over individuals committing those crimes, vessels using to be committed, and offender caught upon its territory. On the other hand, *Guilfoyle* states that States may exercise prescriptive jurisdiction on offenses aiming at its nationals or threatening itself.[672]

According to Article 8bis, boarding is subject to the consent of the flag State on confirmation of its nationality, not its registry. Yet, boarding permission may not result in enforcement jurisdiction over person aboard and a vessel including cargos. Article 8bis(8) of the SUA Convention retains exclusive jurisdiction over flag State unless otherwise a consent was given to the boarding State in line with Article 6.

Noticeable resolutions of UNSCR are on North Korea and Iran. The UN Security Council calls upon States to only prevent transferring WMD materials to Iran consistent with international law[673] and calls upon States to restrain from entry into or transit through their territories of individuals related to the Iranian nuclear program.[674] The UN Security Council decides,

> "that all States shall take the necessary measures to prevent the supply, sale or transfer directly or indirectly from their territories, or by their nationals or using their flag vessels or aircraft to, or for the use in or benefit of, Iran, and whether or not originating in their territories, of all items, materials, equipment, goods and technology which could contribute to Iran's enrichment-related, reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems."[675]

Additionally, the Security Council concluded many resolutions as regards North Korea (Democratic People's Republic of Korea). Resolution 1718 (2006) requires State parties to prevent direct or indirect delivery, trade or conveyance to North Korea, through their territories or by their nationals or using their flag vessels or aircraft carrying certain materials including WMD materials.[676] Later on, in 2009, the UN Security Council

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Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States.

[671] www.wassenaar.org, accessed 21.11.2019.

[672] **Guilfoyle (2009)**, p. 256.

[673] UNSCR 1696 (2006), para. 4.

[674] UNSCR 1747 (2006), para. 2.

[675] UNSCR 1737 (2006), Para. 3.

[676] UN Security Council (2006). Resolution 1718, para. 8

requested from all Member States to inspect vessels, by receiving permission of the flag State, on the high seas, if they have intelligence that ensures plausible grounds to believe that the freight of such ships carry items for the delivery, trade, conveyance, or export of WMD materials.[677] There are many resolutions with regards to North Korea.[678] The more severe one is UNSCR 2397 (2017), which forbidding the direct or indirect delivery, trade, or conveyance to North Korea, by their nationals, or vessels using their flag, aircraft, pipelines, and whether or not they originate in their territories, of all industrial machinery, transportation vehicles, and iron, steel, and other metals.[679]

The case in point incident is the *So San* case on 10 December 2002. In the incident, the Spanish Navy in accordance with the will of the United States intercepted the vessel, claiming that an unnamed and un-flagged vessel was carrying missiles to Yemen. Following boarding by Spanish ship on the high seas some 600 n.m. from the coast of Yemen, an un-flagged and unnamed ship which had been carrying fifteen Scud missiles, not enlisted in the ship's manifest, following verification Yemen had bought those missiles, the United States Administration determined to liberate the ship and its freight. The US came to conclusion that, despite the fact that the lack of a flag gave legitimate base for the primary boarding of the ship, there was no explicit jurisdiction for seizing the missiles under international law, which prohibits the maritime transport of missiles.[680] At the incident, Yemen claimed that she purchased the items, namely Scud missiles, and dual-use chemicals; and the vessel and cargo were released. It is essential to draw attention to the fact that the vessel was not flying any flag, obscured its name and home port, and before boarding, flag-State consent of Cambodia was sought and received, State where the master declared it to have been registered.

4.10 Crimes against Humanity

The term 'crimes against humanity' emerged during the First World War for the mass killing of civilians. Later on, some special courts established to prosecute those incidents. The statutes of special courts described the acts which constituted crimes against humanity and thus jurisdiction of the court.

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[677] UNSCR 1874 (2009), para. 12.
[678] See for other resolutions: http://unscr.com/en/resolutions/, accessed 21.11.2019.
[679] UNSCR 2397 (2017), para. 7
[680] **Becker, Michael A.** (2005) 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' Harvard International Law Journal, Vol:46, pp. 131-231 at p. 153.

For instance, the establishing Charter of the International Military Tribunal [Hereinafter: IMT] in Nuremberg[681] and IMT for the Far East in Tokyo[682] described the offense in a different way. Both establishing Charters included a similar definition of the crime. At the Charter of IMT in Nuremberg of 1945, the crimes against humanity provided for in Article 6(c) as

> "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

The Article aimed to punish war criminals and did not specifically describe the crime against humanity as war crimes.

At the Charter of IMT for the Far East of 1946, the crimes against humanity provided for in Article 6(c). The Article removed the religious ground from the predecessor one. The Article as a predecessor established to punish war criminals and did not also particularly depict the crime against humanity as war crimes. Later, the establishing Charter of the International Criminal Tribunal of the Former Yugoslavia of 1993[683] [Hereinafter: ICTY] made a definition for crimes against humanity. For the first time, it described the crime as a war crime by saying "committed in armed conflict."[684] The Article counts physical elements as murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts. It departs from predecessors by listing additional elements of "imprisonment, torture, rape, persecutions" as crime.

Similarly, the establishing Charter of the International Criminal Tribunal for Rwanda of 1994[685] defined the crimes against humanity like the charter of ICTY. The latest example describing such crimes is the charter of the International Criminal Court of 2002. Article 7 of the Rome Statute establishing a treaty of the court provides for a wide description for the crimes. It requires widespread or systematic attack towards civilians

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[681] The UK of Great Britain and Northern Ireland, the USA, France and the Union of Soviet Socialist Republics were signatories.
[682] The Court had established by Major General Richard J. Marshall, Chief of Staff of General Staff Corps. by the order of the Supreme Commander of Allied Powers General MacArtuher.
[683] The establishing charter of ICTY was adopted by the UN Security Council in 1993 by the Resolution No 827 and amended several times afterwards.
[684] The Charter of ICTY, Art. 5(1).
[685] The establishing charter of ICTR was adopted by the UN Security Council in 1994 by the Resolution No 955.

with the knowledge of the attack. The main elements for the crime as the physical element are murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, grave forms of sexual violence, persecution, forced disappearance of persons, the crime of apartheid, or other inhumane acts. As is seen from the Statute, the types of acts are not limited in number. The attacks must be "a course of conduct involving the multiple commissions of acts."[686] The Statute added two more elements of the crime of apartheid and enforcement disappearance.

The 'crimes against humanity' do not require a specific ethnic group like a genocide. The target is civilians; the identity and affiliation are not taken into account. None of those charters and statutes include any clause with regard to interdiction or interception on the sea. However, the general rules of international law must be applied when that kind of crime committed upon the sea and the suspect is in a vessel on the sea. These acts form grave violation of human rights, and this violation should bestow the right to intercept upon the high seas. And the UNTOC provisions should be applicable.

4.11 Fishery Management

Industrialization has even affected fishing machines and vessels built for that purpose. Emerging industrial fishery tools resulted in over exploitation even if fishery zones for that of straddling and highly migratory stocks were announced. States concluded international agreements and have formed many Regional Fishery Management Organizations [Hereinafter: RFMOs] to co-operate with, in fishing in certain high sea areas for defined stocks, including conservation measures.

IUU fishing refers to illegal, unregulated, and unauthorized fishing within the management zone. Unregulated fishing is that of fishing carried out by vessels flying non-party State's flag in a manner contrary to RFMOs regulation in the relevant management area.[687] This act of unregulated fishing is not prosecuted under any RFMOs. The policing of RFMO rules has been conducted by the fishery inspector, whose activities remain an extension of member States of relevant RFMO's.[688]

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[686] The Rome Statute, Art. 7(2)(a).
[687] UN Food and Agriculture Organization, Art. 3(3).
[688] **Carroz, Juan E./ Roche, Amy G.** (1968) 'The International Policing of High Sea Fisheries' Canadian Year Book of International Law, Vol:6, pp. 61-88 at p. 88.

Illegal fishing is fishing that is carried out by any vessels within waters under the national jurisdiction of the coastal State concerned; by breaching its national rules, or fishing done by vessels flying State party to RFMO, in contradicting its measures binding upon that State.

Unreported fishing depicts any catch which is subject to reporting but remained unreported to the relevant authority of littoral State or RFMO.[689] Unreported fishing also includes catch-reports which are below the actual catch.[690]

UNCLOS

The UNCLOS provisions mainly consist of negotiation, co-operation and taking necessary measures with regard to fishery management. Article 87(1)(e) of the UNCLOS acknowledges State parties' right of fishing on the high seas. It leaves further regulation to State parties for their nationals for the preservation of the living resources.[691] The UN Food and Agriculture Organization [Hereinafter: FAO] endorsed the approach that States may enforce those regulations to their nationals who are committing IUU fishing regardless of the vessels flying a flag. The FAO Action Plan put the responsibility on the States parties that they should take measures against their nationals not to engage in or to support IUU fishing.[692] This approach consents enforcement jurisdiction of States upon their nationals concerning IUU fishing once they re-enter their territorial jurisdiction.[693] For highly migratory stocks, States shall seek to conserve and ensure optimum utilization within and beyond the EEZ.[694]

The US Practice

Although the US is not a party of the UNCLOS, she regulated violation of applicable fishery regulation as a crime.[695] It reads as

> "It is unlawful for any person… (2) to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce a) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law…"

[689] **Guilfoyle (2009)**, p. 98.
[690] Ibid.
[691] UNCLOS, Art. 117.
[692] FAO (2001) Action Plan, Para. 18.
[693] **Guilfoyle (2009)**, p. 101.
[694] UNCLOS, Art. 64.
[695] USA, 16 USC§§3371-3378 The Lacey Act.

In accordance with that provision, the US District Court for the Southern District of Florida decided that fishing by breaching Bahamas EEZ regulation violated that provision.[696]

The 1995 FSA Agreement

In 1995 a UN agreement was ratified and came into force in 2001, the United Nations Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995 [Hereinafter: the 1995 FSA Agreement]. Article 3(1) of the Agreement requires that "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". This agreement applies as well as, *mutatis mutandis,* to other fishing entities whose vessels fish on the high seas.[697] The vessels of non-member States of RFMO in question are not exempt from obeying that RFMO measures, which are established in accordance with Article 8 of the 1995 FSA Agreement.[698] State parties to the 1995 FSA Agreement shall request within the relevant area to cooperate fully with such organization in implementing the preservation and administration measures it has created.[699]

According to the 1995 FSA Agreement any State party to it, must ensure that vessels flying their flag observe the measures of RFMO and do not promote activities impairing their success,[700] authorize its vessels to fish on high seas so long as it is capable of effectively exercising its responsibilities,[701] implement monitoring system and have them refrain unauthorized fishing within the region of another RFMOs,[702] and enforce

[696] US v. Shelhammer, The US District Court for the Southern District of Florida, D.D.18.03.1988 [681 F. Supp. 819 (S.D. Fla. 1988)]. "The defendants were alleged to have violated the Bahamian Fisheries Resources Act, prohibiting foreign fishing in the Bahamian EEZ without permit. The Bahamian EEZ extends 200 nautical miles. The court denied motion to dismiss the indictment."
[697] The 1995 FSA Agreement, Art. 1(3).
[698] Ibid, Art. 17.
[699] Ibid, Art. 17(3).
[700] Ibid, Art. 18(1).
[701] Ibid, Art. 18(2).
[702] Ibid, Art. 18(4).

RFMO measures irrespective of where breaches are committed.[703] The State parties are under obligation to impose sanctions adequate in severity and expeditiously.[704]

With regard to IUU fishing, Article 21 and 22 of the 1995 FSA Agreement regulates boarding and inspection. Article 21(1) reads as follows:

> "In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organization or a participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement."

As is seen from the Article, State party to RFMOs have right to board, irrespective of reasonable suspicion of illicit conduct, vessels of all State party to the 1995 FSA Agreement. However, this right may be used only by RFMOs parties that are a party to the 1995 FSA Agreement, not by the non-party to the 1995 FSA Agreement.[705] Following the inspection, evidence found must be secured, and the flag State must be contacted. Inspectors are required to fulfil generally recognized international regulations, schemes, and practices concerning to the safety of the ship, its crew, and quality of the catch on board.[706] The inspection[707] may be fulfilled by the flag State or boarding State in line with the authorization of the flag State.[708] Inspecting State may direct the vessels to its port; nevertheless, the flag State can request the release of the vessel together with the outcome of the inspection.[709] During boarding of a fishing vessel, the inspector provides a credential to the master of the vessel, notice the flag State at the time of boarding, let the master

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[703] Ibid, Art. 19(1)(a).
[704] Ibid, Art. 19.
[705] **Guilfoyle (2009)**, p. 106.
[706] The 1995 FSA Agreement. Art. 21(10).
[707] Article 21(8) regulates enforcement procedures. "Where, following boarding and inspection, there are clear grounds for believing that a vessel has committed a serious violation, and the flag State has either failed to respond or failed to take action as required under paragraphs 6 or 7, the inspectors may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port, or to such other port as may be specified in procedures established in accordance with paragraph 2. The inspecting State shall immediately inform the flag State of the name of the port to which the vessel is to proceed. The inspecting State and the flag State and, as appropriate, the port State shall take all necessary steps to ensure the well-being of the crew regardless of their nationality."
[708] The 1995 FSA Agreement, Art. 21.7.
[709] Ibid, Art. 21.12.

communicate with the flag State authorities, and deliver a copy of inspection and boarding.[710]

The 2004 WCP Fishery Agreement

According to Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean [Hereinafter: the 2004 WCP Fishery Agreement];

> "each member of the Commission shall, at the request of any other member, and when provided with the relevant information, investigate fully any alleged violation by fishing vessels flying its flag of the provisions of this Convention or any conservation and management measure adopted by the Commission."[711]

For the fishing vessels flying RFMO Party States, if reasonable grounds exist for believing that a fishing vessel on the high seas has initiated an unauthorized fishing within an area under the national jurisdiction of a member of the Commission, the flag State of that ship, in line with the call of the member State concerned, shall promptly and rhoroughly investigate the issue.[712] The same Article requires that the flag State are to cooperate with the member State in question in adopting adequate enforcement action and may empower the relevant member State authorities to board and inspect the vessel on the high seas.

ICCAT

The International Commission for the Conservation of Atlantic Tunas [Hereinafter: ICCAT] was established on 14 May 1966. The ICCAT boarding and inspection scheme had been drafted in 1975 and came into force in 2007. This scheme requires that ships conducting international boarding and inspection duties are to fly a special flag or pennant approved by the ICCAT, a report of the inspection shall be drawn up, and its copy shall be given to the master of the vessel and the government of the inspection party.[713]

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[710] Ibid, Art. 22(1).
[711] The 2004 WPC Fishery Agreement, Art. 25(2).
[712] Ibid, Art. 25(6).
[713] ICCAT, Joint Scheme of International Inspection. Retrieved from https://www.iccat.int/en/Inspection.html, accessed 25.08.2020.

NPAFC

The Convention for the Conservation of Anadromous Fish Stock in the North Pacific Ocean [Hereinafter: NPAFC] prescribes that authorized officials of a State party may board a fishing vessel of other parties upon reasonable suspicion of conduct of infringing the Convention and examine the vessel; furthermore, question persons aboard; that it must be carried out with the minimum interference and inconvenience to vessels;[714] that a person or vessel which is reasonably believed to have contradicted the Convention may be arrested.[715] Overlapping the control area, the US and the PRC came to an agreement that either party is allowed to visit and inspect vessels fishing within the management area.[716] Before that agreement, the PRC Government gave permission to parties to that Convention so as to board and inspect Chinese vessels within the management area.[717] In practice, many IUU fishing vessels flying non-member State flag were boarded and inspected by member States of the NPAFC.[718]

NEAFC

In spite of NPAFC's wide warrant on board and inspection, North-East Atlantic Fisheries Commissions [Hereinafter: NEAFC] inspection schemes force contracting parties to ensure allowing each contracting party inspector to inspect on board of their fishing vessels.[719] Before boarding, the inspecting vessels must give prior notice and an inspector may "examine all relevant areas, decks, and rooms of the fishing vessels, catch (whether processed or not), nets or other gear, equipment, and any relevant documents."[720] However, enforcement shall be rest upon the flag State of the infringing vessel[721] even if for serious infringement.[722] On the other side, once an inspector comes across a non-IUU - party vessels fishing, he shall request permission of the master of the vessel,[723] even if

[714] NPAFC, Art. 5(2)(a).
[715] Ibid, Art. 5(2)(b).
[716] Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of 20 December 1991, Washington, 1993.
[717] **Rayfuse, Rosemary G.** (2004) Non-Flag Enforcement in High Seas Fisheries, Leiden, Martinus Nijhof, pp. 130-1.
[718] **Guilfoyle (2009)**, pp. 120-124.
[719] NEAFC Scheme of Control and Enforcement of 2017, Art.15(2).
[720] Ibid, Art. 18(2).
[721] Ibid, Art. 28.
[722] Ibid, Art. 30.
[723] Ibid Art. 38(2).

there are reasonable grounds for suspecting it is without nationality,[724] due to the fact that the scheme addresses them as "non-contracting party vessel." However, it is assumed that the rules of the UNCLOS regarding stateless vessel shall come into play at these circumstances.

NAFO

According to the Northwest Atlantic Fisheries Organization Conservation and Enforcement Measures [Hereinafter: NAFO], each contracting party inspector may board a fishing vessel by prior notice, displaying pennant of NAFO.[725] Where an infringement found, even if it is serious, the flag State contracting party shall take measures against that vessel following notification of inspection report.[726] In case of sighting IUU fishing of a non-contracting party vessel, following the inspector's notification, the Secretariat of Commission attempts to communicate the relevant vessel to stop its conduct of IUU fishing, if permission is granted to board by masters of non-contracting party vessel, inspectors can board.[727]

CCAMLR

According to the text of the CCAMLR, any vessel present within the management area shall stop or take appropriate action for the inspector to board following receiving the signal.[728] Inspectors have the right to check catch, nets, and other fishing apparatus as well as harvesting and scientific research activities.[729] However, due to the fact that the region of Antarctic has severe weather conditions, this right to board is not enjoyable; therefore, authorities perceive the flag-State follow-up procedure.[730]

Additionally, as per the Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island

[724] Ibid, Art.1(h) and 38(1).
[725] NAFO Conservation and Enforcement Measures of 2019, Art. 34.
[726] Ibid, Arts. 37 and 38.
[727] Ibid, Art. 50.
[728] The Convention for the Conservation of Antarctic Marine Living Resources, Part 9, Art. V. Retrieved from https://www.ccamlr.org/en/organisation/camlr-convention-text, accessed 25.08.2020.
[729] Ibid, Part 9, Art. VI.
[730] **Guilfoyle (2009)**, p. 140.

and the McDonald Islands, controllers, with the consent of the other Party, can exercise cooperative enforcement activities aboard and authorize vessels of the other Party.[731] Joint enforcement activities are to be conducted in accordance with the law pertinent to the relevant maritime area or, speaking of hot pursuit, the law of the maritime area from which the hot pursuit is ineagurated.[732]

SEAFO

The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean [Hereinafter: SEAFO] was been adopted in 2001. From that date on, the Convention parties did not put into enforcement, the system till two years after the Convention came into force. Therefore, Article 21 and 22 of the 1995 FSA Agreement will be applicable for the interdiction incidents in the management area.

On the other hand, the SEAFO allows State parties to take preventive measures before IUU fishing and corrective measures after IUU fishing for the acts violating the RFMO measures.[733]

WCPFC

The Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean [Hereinafter: WCPFC] came into force in 2004. Even Article 6(2) of it is administering the interdiction issue, prescribing that the Article requires the masters and crew of a party's vessel to promptly abide by the instructions of an authorized officer such as stop and move to a safe location, parties were not of the opinion that this Article might apply without further operational agreement.[734] To this end, the Commission adopted an inspection scheme in 2006 which is very similar to NEAFC Scheme and included fishing entities to inspect the vessels of allowing States.

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[731] The Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, Controllers of 2007, Art. 3(1).
[732] Ibid, Art. 3(4).
[733] Jackson, Andrew (2002) 'The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean 2001' International Journal of Marine and Coastal Law, Vol:7, pp. 33-77 at p. 45.
[734] **Guilfoyle (2009)**, p. 159.

5. The Area (The Seabed)

As explained above, the Area is the soil and seabed under the high seas. However, there are UNCLOS specially designated for research and utilization of the Area. For this purpose, vessels must use high seas. The UNCLOS gives right to regulate, permit and coordinate exploitative actions of resources. Furthermore, in accordance with the UNCLOS, the International Seabed Authority has right to control actions whether they obey permissions, rules, and conditions of protection of environment. State parties shall support the Authority in ensuring compliance of rules.[735]

Moreover, the Enterprise has been established through the UNCLOS so as to research and utilize the resources of the Area together with State parties in association with the Authority.[736]

It is understood from the wording that the Authority and State parties have some degree of interception rights. Notable among them is State parties being responsible for the vessels flying their flag.[737]

II. Interception and Interdiction in Certain Activities

1. Right to Self-defence

Article 221 of the UNCLOS established self-defence provision concerning maritime casualties. According to that Article, States have the right to take and enforce proportionate measures for the actual or threatened harm beyond their territorial sea, under international law, both customary and conventional. The aim of measures is to preserve their coastline or related interests such as fishing, contamination or threat of contamination emerging from such casualty, which is likely to result in considerable damaging consequences. Right to self-defence is not limited to fishing and pollution. If there are direct threat to security of a State, it may use the right to self-defence. Furthermore, active assault to any vessel generates self-defence provision.

Article 1(1) of the International Convention relating to Intervention on the High Seas in Case of Oil Pollution Casualties dated 1969 empower coastal States to take appropriate measures after a maritime casualty, which is “necessary to prevent, mitigate or

[735] UNCLOS, Art. 153(4).
[736] Ibid, Art. 153 and 170.
[737] Ibid, Art. 153(1).

eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil…" In that case, the pollution should likely to be expected to end up with major harmful consequences. The later Protocol dated 1973 widened the intervention caused by oil casualties to other substances, which results in major harmful consequences at the coastline or related interests.[738] These provisions grants States intervention rights on vessels and this right may be evaluated under self-defence.

On the other hand, the *Caroline* case is an example of self-defence action taken by the coastal State. According to the reached understanding between the US and the UK, accepted doctrine of anticipatory self-defence in customary international law must exist in two-fold. First, the necessity for self-defence, which is prompt, overwhelming, and leaving no choice of means, and no moment of deliberation. Second, the responded action to the threat must be proportionate.[739] The UK had rested upon the right to self-defence in bombarding Liberian vessel in the case of *Torrey Canyon*. In that incident, the UK troops bombed the ship to sink it with the intent of prevention more leakage of oil to seas.

Self-defence provision is customary international law that any threat or use of force against a vessel or territory may deserve using force in the degree of preventing that act. Where active response with appropriate tool can be resorted to, the lower class of rights in comparison with that response should be imposable.

2. Hostage Taking

The International Convention against the Taking of Hostage was accepted at the UN Conference of 17 Dec. 1979. The Convention does not include particular rules concerning intervention on the seas. It requires State parties to consider the act of taking hostage as a crime in their domestic laws. Article 1 of the Convention describes the offense of hostage-taking as seizing or detaining and threatening;

> "to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage..."

[738] Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution 0f 1973, Art. 1(1).
[739] **Arrend, Anthony Clark** (2003) 'International Law and Preemtive Use of Military Force' The Washington Quarterly, Vol:26, pp. 89-103 at p. 90.

Following a State party criminalizing the offense; it will be applied all over its territory. Meaning, the hostage-taking laws are applicable upon internal seas, the territorial sea, and archipelagic waters, and for the flag State on the vessel on the high seas.[740] It is evaluated that the law is applicable to all vessels regardless of its flag on the territorial sea since that vessel is not enjoying innocent passage during hostage taking; at least, if the hostage is the subject of coastal State or the aggrieved party is the coastal State or the subject of the State concerned. It should be kept in mind that the Convention considers the international organizations, natural and juridical persons, or a group of persons as an aggrieved party of crimes. For the vessels flying another State's flag on the high seas, general cooperation under the UNTOC and the UNCLOS may be applicable upon the request or permission of the flag State. Besides, where such act is criminalized, *personam* jurisdiction is to be enjoyable against the individuals of the related Stated by that State.

3. Natural and Cultural Heritage

According to Article 7 of the Convention on the Protection of the Underwater Cultural Heritage, States have exclusive sovereignty over underwater sunken wrecks within its internal waters, archipelagic waters and territorial sea. It can regulate and authorize those heritages under its discretion. Within the contiguous zone, without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303(2) of the UNCLOS, States parties have the right to regulate and authorize underwater activities concerning cultural heritage within their contiguous zone.[741] Where a State does so, the annexed rules to the Convention shall be applied to the incident.

Those rights entitle States to interdict any vessel breaching its rules with regard to underwater heritage within its internal water, territorial sea, and archipelagic waters as well as under the contiguous zone. As Article 303 of the UNCLOS obliges States with responsibility of protection of underwater geological and historical heritage, removing those objects within the contiguous zone will be a breach of the coastal State laws as it is in the territory or territorial sea.[742] Therefore, Article 8 of the Convention justifies the coastal State to regulate the activities within the contiguous zone.

[740] The International Convention against the Taking of Hostage of 1979, Art. 5(1)(a).
[741] The UN Convention on the Protection of the Underwater Cultural Heritage 0f 2001, Art. 8.
[742] UNCLOS, Art. 303(2).

Even though a coastal State has no right on granting authorization regarding a cultural heritage under the EEZ or within the continental shelf, it has the right to protect its sovereign rights concerning those areas, if it is prejudiced during activities. If it can do so, it may prohibit or authorize the activities directed to the cultural heritage.[743] In all circumstances, the activities and finding should be reported to the relevant coastal State and UNESCO.

Within the Area, under the high seas, States are responsible for the protection of heritages in line with Article 149 of the UNCLOS. All activities and findings are to be reported to the relevant State of the flag and UNESCO.

4. Human Trafficking

Human trafficking is defined in Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; supplementing the UN Convention against Transnational Organized Crime 2000 (The Human Trafficking Protocol), entered into force on 25th December 2003.

Human trafficking was first defined in this Protocol encouraging States to combat those crimes and facilitate international corporation. According to that Protocol, human trafficking is the act of recruitment, transfer, harbouring and transportation of persons for the purpose of exploitation. Exploitation that may occur include sexual exploitation, slavery or similar practice, servitude and forced labour. The act must be committed by means of coercive action, fraud, deception, abuse of power or vulnerability of the aggrieved person. In fact, many persons trafficked are individuals who wish to migrate, aim to receive better work opportunities. Thus trafficking can be described as a form of irregular migration that leads to exploitation.[744] It is to say that no one can be trafficked with consent. As is seen, slavery has been listed as exploitative practice.

However, it is argued whether economic hardship is a coercive causal factor for prostitution. According to *Malone*, economic coercion resulted in the conditions of individual women; or the situation of the area of living should be evaluated as satisfying the "means" element of the Human Trafficking Protocol, which is in consistent with the

[743] The UN Convention on the Protection of the Underwater Cultural Heritage, Art. 10.

[744] **Ollus, Natalia** (2002) The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel. Retrieved from https://www.unafei.or.jp/english/pdf/RS_No62/No62_06VE_Ollus1.pdf, accessed 11.01.2017.

intent of the Protocol and necessary to achieve its intent.[745] Economic hardship is coercion under the Protocol on international trafficking in persons.[746]

The gravest form of human trafficking, the slave trade, only permits the right of visit and inspect.[747] However, the Human Trafficking Protocol has no provision for interdiction. Unless otherwise defined such as migrant smuggling or slave trade, human trafficking may not have attracted interdiction right.[748] But, the UNTOC has provisions on interdiction and this Protocol supplements it. Therefore, those provisions are applicable to the offense of human trafficking.

The UNTOC[749] is concerned with aggravated organized crimes, such as money laundering, corruption and obstructing justice, which is having transnational nature.[750] Serious crimes should be committed to gain directly or indirectly a financial or another material benefit.[751] Human trafficking should be evaluated as serious crimes under this Convention. Because serious crime in this Convention means the offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.[752]

Like former conventions on the subject,[753] Article 15 of the UNTOC requires that the jurisdiction should be established by the States that nationals of which commits this crime or are exposed to them (passive personality), "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[754] Therefore, flag State jurisdiction vested upon those vessels. On the other hand, the Protocol to the UNTOC on human trafficking aims at vulnerable people such as women and children for the fact that the

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[745] Malone, Linda A., (2001) 'Economic hardship as coercion under the protocol on international trafficking in persons by organized crime elements' Fordham International Law Journal, 25:54-94 at p.91.
[746] Ibid, p. 68-69 and 70.
[747] See Part II chapter I.4.5
[748] **Guilfoyle (2009)**, p.181.
[749] This Convention came into force 29 Sep. 2003. Except Iran and Congo all States have ratified, accessed or approved.
[750] UNTOC, Arts. 5, 6, 8 and 23.
[751] Ibid, Art. 5.
[752] Ibid, Art. 2.
[753] See International Agreement for the Suppression of the White Slave Traffic of 1904, 1 LNTS 83; International Convention for the Suppression of the White Slave Traffic 1910 (as amended), 98 UNTS 101; International Convention for the Suppression of the Traffic in Women and Children 1921, 9 LNTS 415 (as amended); Convention for the Suppression of the Traffic in Women of Full Age 1933, 150 LNTS 431 (as amended); and Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 21 March 1950, 96 UNTS 271.
[754] Ibid, Art. 4.

prominent trafficked persons are women and immature or recently matured girls, that is because sexual exploitation and forced labour is exercised mostly over those vulnerable.[755]

The International community should consider application of the rules of slave trade in this matter due to the fact that both crimes somehow have similarities. An analogy may be made for this crime.

5. Migrant Smuggling

The right to interdict in this respect is based on the "other powers conferred by treaty" under Article 110(1) of the UNCLOS. The term "treaty" means any other treaty that might have been concluded other than the UNCLOS III. Therefore, there is not actually any clear expression of "migrant smuggling" in the context of the right to visit as defined by the UNCLOS III. All these issues are going to be examined in Part III as the main topic of this study.

III. Evidence for Interception

Interception measures impair free navigation although the right of visit is temporary in its nature. It should be borne in mind that certain situations like slave trade attract a right to visit.[756] Right to visit covers approaching and boarding as well.

All evidence obtained through regular investigation such as tabbing communications, surveillance by technical means,[757] undercover agents, tips and testimonies can be basis for intercepting a vessel. Evidences may also be taken through INTERPOL or other international or bilateral agreement from a foreign government.

The level of evidence has been formulated in the UNCLOS "reasonable ground"[758] for right to visit and "good reason to believe"[759] for hot pursuit.

"Reasonable ground" can be built upon all evidence obtained in accordance with law of intercepting State or requesting/permitting State. The level of suspicion here should

[755] UNODC (2016) Global Report Trafficking in Person, New York, United Nations, p. 1.
[756] UNCLOS, 92(2) and 110.
[757] **Baird Reachel** (2009) Arrests in a Cold Climate (Part 2) -Shaping Hot Pursuit through State Practice, Antarctic and Southern Ocean Law and Policy Occassional Papers, Vol:13, pp. 1-21 at p. 8.
[758] UNCLOS, Art. 108(2), 110(1).
[759] Ibid, Art. 111(1).

be more than mere suspicion and must be evaluated case by case.[760] The evidence must demonstrate a fact or information sufficient an impartial observer to conclude that suspicion. Namely, suspicion should be away from subjective consideration.

Similarly, the level of suspicion at "good reason to believe" must be more than mere suspicion; however, it does not require actual knowledge.[761]

For instance, at the *M/V Siaga* incident, the Guinean authorities had been attacked and boarded the ship at the south of southern limit of its EEZ while she was waiting a fishing vessel for supplying gas oil but fuelled three before. The crime charged was committing the crimes of contraband, fraud and tax evasion. However, the Tribunal reached that the evidence submitted by Guinean authorities was not more than suspicion she was violated its law of the EEZ.[762]

> "Good reason to believe" may have been formulated in a treaty. For instance, Australia-France Treaty has defined as "i. direct visual contact with the fishing vessel or one of its boats by the authorized vessel; or ii. evidence obtained by or on behalf of the authorised vessel by technical means."[763]

The level of "good reason to believe" for hot pursuit is to be an element only at the territorial sea for all crimes, and only for the limited jurisdiction on other maritime zones.

For migrant smuggling, overloading a boat may, first of all, be a basis for interception. Since many such boats are visibly overloaded, such a situation could well be a basis for intercepting such boats. For instance, at the incident which was the basis for the *Hirsi Jama v. Italy* case, in accordance with readmission agreement the Italian law enforcement official intercepted three vessels carrying 200 migrants in totals.[764]

Another basis could be flaglessness of the boat or a boat with a false flag, which are clearly stated situations for rights to visit to raise. Flagless vessels are commonly used for

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[760] **Papastavridis Efthymios** (2014) Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans, London, Bloomsbury, p. 62; Coppens Jasmine (2013) Migrant Smuggling by Sea: Tackling Practical Problems by Applying a High-Level Inter-Agency Approach, Ocean Yearbook Online, Vol:27, No:1, pp. 323-358 at p. 325.

[761] **Baird** (2009), at 6; **O'Connell**, at p. 1088; **Reuland Robert C.** (1993). The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention, Virginia Journal of International Law, Vol:33, pp. 557-582 at p. 569.

[762] M/V Siaga (no.2), para. 31-36 and 147.

[763] Agreement on the Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories and Heard and McDonald Islands, 8 January 2007, [Australia-France Treaty].

[764] https://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/, accessed 23.08.2020.

migrant smuggling.[765] Any State can intercept those vessels and arrest them.[766] Indeed, flaglessness is a basis for interception without reason of full of migrants.

Where boarding and visiting measures reveal some evidence or suspicions that one of the acts mentioned above has been committed, further interception measures may be initiated depending on agreements or consents.

Through visual evidence on the sea, the vessel can be evaluated that one of acts constituting crimes that may be intercepted has been committed. For instance, WMD materials or migrants aboard can be visualized or drug that has been draining under the sea may be confirmed through watch.

[765] **Gallagher, Anne T./ David, Fiona** (2014) The International Law of Migrant Smuggling, New York, Cambridge University Press, p. 422.
[766] European Commission Staff Working Document, "Study on the International Law Instruments in Relation to Illegal Immigration by Sea" at para. 2.2.2.

PART III: INTERNATIONAL RULES ON INTERDICTION OF VESSELS CARRYING ILLEGAL MIGRANTS OR ASYLUM SEEKERS

The worldwide influx in migration especially through sea routes has caused an upsurge in interdiction of vessels carrying irregular migrants, smuggled or trafficked persons, or asylum-seekers, by coastal States. The interdictions are made either in the territorial sea of a State or on the high seas. Some countries try to intercept vessels carrying illegal migrants at points very far from their territorial sea and disembarking them at the territorial waters or a territory of other countries or her dependent territories.[767] Some of them push them back by their maritime frontier even putting them in danger of losing their lives at sea.

Three exclusionary strategies are applied by States to stay protected from the immigration influx.[768] One of them is the interception strategy by which the State denies illegal immigrants from entering her territory. The second is defining the notion of entry restrictively by excluding some area of sea. The last one is, in one way or the other, diverting immigrants to another country.[769]

I. Some Concepts Relevant to Interdiction at Sea

1. The Concept of Illegal Migration, Smuggling and the Characteristics of Migration at Sea

1.1 Migrant and Illegal Migrant

Migrants are those people who move to escape armed conflict, poverty, lack of food, persecution, terrorism, human rights violations and abuses, adverse effects of climate change, natural disasters, or other environmental factors. In many cases, combination of these reasons cause migration of people.[770]

Illegal migrants and irregular migrants refer to the same kind of migrants. In 1975, the UN advised to use the notion of non-documented or irregular migrant for those

[767] UNHCR ExCom (2000) Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach, EC/50/SC/CRP.17, para.12. Retrieved from https://www.refworld.org/docid/49997afa1a.html, accessed 23.11.2019.
[768] **Blay and others**, p. 8.
[769] Ibid.
[770] https://refugeesmigrants.un.org/migration-compact, accessed 25.08.2020.

migrants. In accordance with the UN definition, irregular migrants are those who violate regular admission procedure of the State they enter into. They include those of whom asylum applications are rejected and residence permissions are not granted. They also must be deportable.[771] These migrants cover persons who lack of suitable authorization to enter into a State or do not leave the relevant State following their visa expiration.[772] However, the notion of illegal migrant criticized on the grounds that being "illegal" belongs to crimes, and persons may not be illegal.[773]

Migration is a widely encountered phenomenon due to unrests, and other economical and violent reasons emerging in many countries. It occurs especially from the undeveloped countries to the developed countries. In some serious cases, people flee from domestic clashes between groups, or States and groups. In very stringent cases, people just flee from the situation of persecution, massacre, or genocide as done by the Government of Myanmar or Syria. These travellers trying to enter a country have been named as irregular migrants, illegal migrants, undocumented travellers, improperly documented travellers, or unauthorized arrivals.

The Global Compact for Safe, Orderly and Regular Migration [Hereinafter: The Global Compact] adopted by General Assembly of the UN on 10 Dec. 2018 is the first regulation covering all dimensions of the migration issue. It;

- "aims to mitigate the adverse drivers and structural factors that hinder people from building and maintaining sustainable livelihoods in their countries of origin;
- intends to reduce the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights and providing them with care and assistance;
- seeks to address the legitimate concerns of states and communities, while recognizing that societies are undergoing demographic, economic, social and environmental changes at different scales that may have implications for and result from migration;
- strives to create conducive conditions that enable all migrants to enrich our societies through their human, economic and social capacities, and thus facilitate

[771] UN Recommendations on Statistics of International Migration of 1998, para.23.
[772] https://www.law.cornell.edu/wex/undocumented_immigrant, accessed:01.09.2020.
[773] **Paspalanova, Mila** (2007) Undocumented vs. Illegal Migrant: Towards Terminological Coherence. Retrieved from http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1665-89062008000100004, accessed: 01.09.2020.

their contributions to sustainable development at the local, national, regional and global levels."[774]

Restricted opportunities to migrate legally into developed countries create demand for irregular migration. Illegal migration by sea has lower risk to be caught than the land and air lines.[775] According to a report of the Italian Department of Public Security, Office for Central Immigration and Border Police, in the first half of 2016, the number of unaccompanied minors reaching the country by sea increased by about 10,000, doubling for the same period in the previous year.[776]

In the last few decades, arrivals from the sea have increased, and many people died during the attempt of crossing seas. The flow of migrants skyrocketed in 2014 to 220.000 from 70.000 in the former year.[777] For instance, in 2017, 28,350 persons arrived in Europe by sea, and in the first seven months of 2018, 58,158 persons entered Europe by sea. Moreover, 3,140 migrant died in 2017, and a total of 1514 migrant died in the first seven months of 2018.[778] Crisis in North Africa, the Horn of Africa and especially the Middle East resulted in an influx in migration through the Mediterranean Sea. Instability in the Middle East caused Turkey to be a destination and transfer country. Nowadays, Turkey has become the State holding the most migrants during the Syrian crisis.

1.2 Migrant Smuggling

The flow of illegal migration creates unlawful businesses such as migrant smuggling and human trafficking. Taking into account that many migrants do not have knowledge on the routes at the sea, passages and landing places at the destination State, business in coordinating the smuggling or trafficking issue in different countries emerges.

The very first international regulation with regard to migrant smuggling is the Mirant Smuggling Protocol. It defines criminals as

"a structured group of three or more persons, existing for the period of time and acting in concert with the aim of committing one or more serious crime or offences

[774] https://refugeesmigrants.un.org/migration-compact, accessed 25.08.2020.
[775] **Schloenhardt, Andreas** (1999) Organized Crime and the Business of Migrant Trafficking: An Economic Analysis. Retrieved from https://www.cestim.it/argomenti/30traffico/30traffico_economia.pdf, accessed: 25.08.2020.
[776] UNODC (2016), p. 61.
[777] **Miltner, Barbara** (2015) 'The Mediterrenean Migration Crisis: A Clash of the Titans' Obligation' The Brown Journal of World Affairs, Vol:22, No:1, pp. 213-236 at p. 214.
[778] UN, Advance Unedited Reporting Material, para.30. Retrieved from https://www.un.org/Depts/los/general_assembly/Unedited_A_73_368.pdf, accessed 25.08.2020.

established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."

The distinction should be made between migrant smuggling and human trafficking. Migrant smuggling means "the procurement, in order to obtain, directly or indirectly, a financial or another material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."[779]

Migrant smuggling may occur by procurement in return of financial benefits for persons to enter into a State where they are not nationals or permanent domicile,[780] as per the Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the UNTOC [Hereinafter: The Migrant Smuggling Protocol] entered into force on 29 Sept. 2003. It is questionable to punish where a person supports a migrant without financial benefit, for instance, when it is done for of humanitarian reasons for someone in an inhumane situation.

As for human trafficking, it means;[781]

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

The main difference between the two is that of coercion is prong to human trafficking; but consent of the aggrieved person is present, in the migrant smuggling cases. Although in some cases, consent seems to be sought from the aggrieved in trafficking in persons, consent in these cases, would have been obtained by coercion or fraudulent, which is not likely to be evaluated as consent given under free will. It turns out that some migrant smuggling cases turn into trafficking via coercive or fraudulent actions upon arrival at the destination country.[782] Distinctively, where a person agrees to be smuggled and

[779] The Migrant Smuggling Protocol, Art. 3(a).
[780] Ibid, Article 3. (a)-(b), and Art. 6.
[781] The Human Trafficking Protocol, Art. 3(a).
[782] Ibid, p. 11.

subsequently exploited at the destination territory, the case will constitute migrant smuggling, not human trafficking.[783]

Smuggling is intermediacy of illegal entry of a person into a State territory that he/she is not national in return for a benefit.[784] As is seen from the definition, smuggling requires crossing the frontier of a State. It should be taken into account that smuggling may be interrupted by enforcement action; in what constitutes just an attempt. On the other hand, trafficking in person envisages force, fraud, coercion, payment, abuse of power, abduction, threat, etc. for exploitation. The exploitation here encompasses sexual, slavery, forced labour, servitude, or removal of organs.[785] Contrast to smuggling; trafficking may occur within the border of the same State, that is, crossborderness of crime is not a requirement.[786]

Refugees are a particular sub-group of migrants who move for the reason of a well-founded fear of persecution, conflict, violence, or other circumstances which have disrupted public order on a serious scale. Amended Article 33(1) of the 1951 Refugee Convention with Article 1 of 1967 Protocol relating to Status of Refugees provided for: A person who "owing to well-founded fear of being persecuted for reason of race, religion nationality, membership of a particular social group or opinion…is unable… or unwilling to avail himself of the protection of that country...." However, it is defined in Africa a little bit different from the European perspective. Article 1(2) of the 1969 Organization of African Unity Convention Governing the Specific Aspect of Refugee Problems in Africa [Hereinafter: OUA Convention] has made the additional description to refugees as:

> "…every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

As is seen from the wording of UN approach, it does not include external occupation or foreign domination. On the other hand, American continent reflected the OUA Convention approaches and the Cartagena Declaration of 1984[787] stated that refugees are the persons fleeing "because their lives, safety or freedom have been

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[783] **Guilfoyle (2009)**, p. 227.
[784] The Migrant Smuggling Protocol, Art. 3(a).
[785] The Human Trafficking Protocol, Art. 3(a).
[786] **Mallia**, p. 11.
[787] The Cartagena Declaration on Refugees of 1984, adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico and Panama of 1984, Part III, para. 3.

threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." It should be borne in mind that the Declaration is not binding. On the other hand, even if it is not recognized as a customary rule in the international field, the OUA Convention is binding for the States party to the Convention. Refugee status does not grant a permanent basis in the sense of permanent residence, and the 1951 Refugee Convention has ceasing clauses in Article 1C(1-4). The opinion of granting asylum is not mandatory for the fact that the 1951 Refugee Convention makes use of only 'to seek and to enjoy' in its wording, is outdated and the ECtHR recognized its mandatory feature in the dictum of the judgment of *MSS v. Belgium and Greece*[788] for the Council of Europe Countries.

The Global Compact also aims to establish a comprehensive policy about exploitation and abuse of migrants and victims of trafficking in person.[789] Article 25 and 26 of the Global Compact ensures intensifying joint efforts in cooperation to prevent, investigate, prosecute and penalize the migrant smugglers and their accomplice as well as human traffickers in order to end the impunity of smuggling networks. Articles advise all States to make definition concerning migrant smuggling and human trafficking, and distinct each from the other.

At the EU level, the Council Directive 2002/90/EC imposes that;

> "Each Member State shall adopt appropriate sanctions on: (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens."

The Council accepted the Framework Decision 2002/946/JHA on 28 Nov. 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit, and residence, including penalization and confiscation of means. Besides,

[788] MSS v. Belgium and Greece, ECtHR, No:30696/09, J.D.21.01.2011, para. 54. "The Afghan applicant seek asylum in Belgium and sent back to the Greece by Belgian authorities. The Applicant contested that Belgian authorities did not evaluate the deficiency of Greece migration policy on asylum seekers. They did not consider that Greece authorities could have sent the applicant back to Afghanistan where he may subject to persecution. For this reason, the Court held that Belgium breached Article 3 and 13 of ECoHR."

[789] UN General Assembly (2018) Global Compact for Safe, Orderly and Regular Migration, Art. 23(b).

according to the UNTOC, every State shall establish their jurisdiction on its territory on transnational aggravated crimes,[790] which is related to human trafficking.

Almost all migrant groups are exploited by traffickers and smugglers. The flow of migrants mostly happens through smugglers at sea because migrants mostly lack adequate financial sufficiency and knowledge of the route. Smugglers take lower risk routes which are cheaper than other routes, for soaring numbers of illegal migrants. Illegal trafficking in and transporting of migrants forms flagrant exploitation of people in distress at sea for safety at sea requirements.

2. Maritime Frontier

A frontier is the outward limit of sovereignty and stable in nature. The land frontier of a State is the borders which are drawn by an agreement or acqusition or even *de facto* situation. The borders encompases the areas where State exercises its sovereignty. The land frontier may be discussesed regarding the area occupied, the area anew State declared its liberty, or for the State which has no concrete border. Moreover, land frontiers are established at the airport for the fact that flights enter first to another State in those areas in controllable situations. On the other hand, States announce transit area around those airports in order for transit passengers to fly conveniently, extending miles away.[791]

In contrast to the land frontier, there is no fixed frontier at sea. It is exercised in line with the delimitation of the sea. The maritime frontier presents some unique jurisdictional problems as the line cannot be visibly marked. Instead of a boundary setting off the territorial authority of a State from that of another, there is just an imaginary limit differing the so-called territorial seas from the seas which are free. If jurisdiction on one side is territorial in nature, on the other side it seems to be personal or national.[792]

It is argued that the frontier at sea is the edge of the territorial water.[793] The UNHCR Executive Committee [Hereinafter: ExCom] maintained that the State within territorial sea of which interception occurs is responsible for the protection to persons of

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[790] UNTOC, Art. 4.

[791] **Ömeroğlu, Abdullah** (2020) 'Extradition of Offenders arrested in Transit Area' Uluslararası Hukuk Bülteni, Vol:20, pp. 30-36.

[792] **Dickinson, Edwin D.** (1926) 'Jurisdiction at the Maritime Frontier' Harvard Law Review, Vol:40, No:1, pp. 1–29, p. 1.

[793] **Magner, Tara** (2004) 'A Less than 'Pacific' Solution for Asylum Seekers in Australia' International Journal of Refugee Law, Vol:16, No:1, pp. 53-90 at p. 74.

which needs it.[794] On the other hand, *Barnes* argues that extending the responsibility to such a far distance may cause prevention of implementation of migration law.[795] It should be recalled that the coastal State has jurisdiction relating to migration law to some extent within the contiguous zone.[796]

As is seen from the above judgment of *Hirsi Jamaa*, issues of *non-refoulement* principle come into play while patrolling the open seas for migration control. Preventive actions away from the territorial border for de-territorializing border control, generates a maritime frontier. This frontier, which is not physically attached to the territorial border, is a matter of question on refoulement power of the coastal State, taking into account that this frontier is not within the exclusive jurisdiction of the coastal State.

3. Control of Migration

Control of migration is the very effort to prevent irregular migrants' entry into the respecting State, which may be visibly legal entry, residence or work permission. It occurs by correctly checking entry and making evaluations on whether the migrant is to be admitted or not.[797] For control of migration as well as preventing other crimes, States have taken administrative measures including visa requirements, safe country, and carrier obligations,[798] or physical measures including building walls, reinforcing fences, and other military obstacles. Control of border means to protecting the relevant State from illegal movement of weapons, narcotics, commodities, and people.[799] It is critical for security, economic prosperity, national sovereignty,[800] and health, which results control of migration in any sense. The physical measures to be taken is the same as mentioned above for migration control. However, the administrative measures including law enforcement measures may vary depending on the level of threat or acts about to be happened.

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[794] UNHCR ExCom (2003) Conclusion on Protection Safeguards in Interception Measures No 97, para. a.1.
[795] **Barnes**, p.121.
[796] **Trevisanut, Seline** (2014) 'International Law and Practice: The Principle of Non-refoulment and the De-territorialization of Border Control at Sea' Leiden Journal of International Law, Vol:27, No:3, pp. 661-675 at p. 672.
[797] **Vogel, Dita** (2000) 'Migration Control in Germany and the United States' The International Migration Review, Vol:34 No:2 pp. 390-422.
[798] **Baird, Theodore** (2017) 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' European Journal of Migration and Law, Vol:19 No:3 pp.307-334.
[799] https://web.archive.org/web/20180327050413/https://www.dhs.gov/border-security, accessed 03.09.2020.
[800] Ibid.

Control of maritime border aims at same objectives. However, it occurs at the maritime frontier, which is explained above. Physical measures are hard to be applicable upon the seas and right to innocent passage is exception of that control, which detailed in the territorial sea heading above.

Extraterritorial control of border is checking the persons who initiate entry to a State, outside of its formal border on land and thus, preventing them to enter into territory of destination State by not issuing visas and to submit protection claims.[801] The extra-territorial control of border is different from the traditional border control; de-territorialized borders shift the controls from territory-based to a function-based regime. The new type of border control consists of not only performing access point checks, but also a range of activities detached from the territory.[802] The issue of migration has become exception to the doctrine of State sovereignty. Non-entrée policy,[803] including visa regime, carrier sanctions, or departure control inspections in the other States' border breaches State sovereignty.

The gross of total migration and death toll during the voyage on the sea requires the States to take precaution to prevent irregular migration. Therefore, State acts proactively to protect their border not only land but also sea before the passengers reach their formal maritime frontier. Even if that control is not similar with the extraterritorial control on land due to the fact that no fixed control area establishable, patrolling by government vessels outward of maritime frontier will form extraterritorial maritime border control. That de-territorialized border control may extend far beyond the maritime frontier of a State into territorial sea of other through advanced identification technologies.[804] Those extraterritorial controls affect flow of migrants. For instance, Spain has tightened its

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[801] **Frelick, Bill/Kysel Ian M./Podkul Jennifer** (2016) 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' Journal on Migration and Human Security, vol:4 No:4 pp. 190-220.

[802] **Trevisanut**, p. 662.

[803] James Hathaway firstly used the term in, 'The Emerging Politics of Non-Entrée' (1992), Refugees, pp. 40-41. Whereas refugee law is precluded refoulement, the politics of non-entrée by-passes non-refoulement requirement through ensuring that refugees shall not be allowed to arrive. That policy keeps most refugees from accessing jurisdiction of the State in question.

[804] **Bjarte, Vandvik** (2008) 'Extraterritorial Border Controls and Responsibility to Protect: A View From ECRE' Amsterdam Law Forum. Retrieved from https://www.researchgate.net/publication/26612023_Extraterritorial_Border_Controls_and_Responsibility_to_Protect_A_View_From_ECRE, accessed: 08.09.2020.

surveillance on the sea, and the route has been shifted towards Malta, in the wake of its admittance to the EU.[805]

Detached border controls are criticized by scholars since it is in contradiction with the principle of *non-refoulement*.[806] However, States have the right to protect their borders and national security, as long as they are under the responsibility of protection of humanitarian principles.[807]

Indeed, interception measures are an impediment for enjoying the right to seek asylum. However, interception itself does not merely intend prevention of enjoying the right to seek asylum but control of its border. The interception right should be enjoyed in conjunction with international law and the 1951 Refugee Convention. Interception may occur in both cases of interception; for prevention of entry and interception for rescue in distress.

An interception occurs when the security of the relevant State is at stake. For almost all cases, the reason of interception is security in general meaning. Interception in migrant smuggling indeed depends on security matters as the last resort. This kind of interception harbours humanitarian consideration apart from other maritime security threats. Similarly granting assistance to the vessels in distress has humanitarian consideration to some extent; which is not the case in migrant smuggling. However, the vessel smuggling migrant may be, as usually happens, in distress.

The modern form of interdiction only permits interception as in the drug trafficking model. The practice in this regard becomes complicated taking into account refugee law and safety of life at sea, obligations. Successive action of receiving asylum claims or another kind of temporary acceptance, is not an issue examined in this work.

4. The Principle of *Non-Refoulement*

The notion emerges from "*refouler*" in French, which means "return" in English. *Non-refoulement* mentions not to return a person to the State where he/she bears

[805] **Mallia**, p. 14.
[806] **Trevisanut**, p. 663; Non-refoulement principle is regulated in the 1951 Geneva Convention on the Status of Refugees. It is a restriction on the right to refuse entry into or expel from the territory of the State in question.
[807] **Mallia**, p.17.

nationality. It includes all kind of return embracing police conduct, and in narrow interpretation, it is legal internationally to deny a refugee to enter into the country.[808]

The principle of *non-refoulement* has been recognized as a fundamental principle of international refugee law. The principle bans repatriation or deportation of an asylum-seeker to the country where he/she is likely to be subject to persecution in discriminatory manner.[809] Discriminatory manner can be based on race, religion, nationality, membership of a particular social group or political opinion.[810] However, Article 3 of the CAT incorporated into *non-refoulement* principle and defines broadly the principle. According to that definition, not only return but also expel and extradition are prohibited to the place where they may expose to torture or inhuman treatment. While making evaluation, samples of extreme, notorious or mass violations of human rights shall be taken into view. Article 7 of the 1966 International Covenant on Civil and Political Rights [Hereinafter: ICCPR] recalls identical prohibition.

The Universal Declaration of Human Rights [Hereinafter: UDHR] states that everyone has the right to leave a country[811] and "the right to seek and enjoy other countries asylum from persecution."[812] Moreover, Article 31(1) of the 1951 Refugee Convention guarantees that unlawful entry shall not result in exclusion of asylum seekers from the protection of *non-refoulement*. In addition to those conventions, *non-refoulement*, is indeed, guaranteed in other international human rights conventions: Article 22(8) of the 1969 American Convention on Human Rights, Article 5 of the 1981 African Convention on the Protection of Human and People's Rights, Article 45 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in the Time of War.

The ExCom recognized that *non-refoulement*, including non-rejection at the frontier, must be exercised during large-scale influx at least on a temporary basis.[813]

Non-refoulement is a principle directly related to the migration and refugee matters. The ExCom has repeatedly reaffirmed its overriding character and recognized its character of acquiring the preemptory rule of international law.[814]

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[808] **Wouters**, p. 51.
[809] **Trevisanut**, p. 668 ff.
[810] The 1951 Refugee Convention, Art. 33(1). Similar provision incorporated in Article 1 of the OUA Convention.
[811] The Universal Declaration of Human Rights, Art. 13(2).
[812] Ibid, Art. 14(1).
[813] UNHCR ExCom (1981) Conclusion No. 22 (XXXII); reaffirmed during the crisis in former Yugoslavia, in UNHCR ExCom (1994) Conclusion No. 74 (XLV), para. (r).
[814] UNHCR ExCom, Interception of Asylum-seekers and Refugees, para. 21.

It forces the contracting State not to expel or return a refugee to the territories where his/her life or freedom is in danger because of his/her "race, religion, nationality, membership of a political group or political opinion." The requirement of the Article is the possibility of persecution which includes the risk of life or freedom because of armed conflict or mass violence if he/she returns.[815] Moreover, refoulement to a third country which repatriates them to the country of origin where the refugee is subject to persecution, has been constituted an indirect breach of the principle of *non-refoulement*.[816]Some courts and international human rights mechanisms construed the *non-refoulement* to apply to other serious human rights violations. "Inhuman or degrading treatment, flagrant denial of the right to a fair trial, risks of violations, of freedom of the person, serious forms of sexual and gender-based violence, death penalty or death row, female genital mutilation, or prolonged solitary confinement, degrading living conditions, lack of medical treatment, or mental illness" have become reason not to extradite or expel a person.[817] For instance, the judgments of the ECtHR reveals that in the case the refugee in *de facto* may have a risk of subjecting threat to his life, or torture or ill-treatment, a State may not expel such person to the country of origin.[818]

Non-refoulement is widely accepted within the meaning of non-rejection at the frontier.[819] Non-admission into the territorial sea and internal waters would amount to a breach of *non-refoulement* principle at the frontier.[820]

Because *non-refoulement* is related to asylum seekers and refugee status, the division of "statutory refugee" and "*de facto* refugee" should mentioned here. The statutory refugee is the person whose conditions fit to the 1951 Refugee Convention. In fact, Article 1 of that Convention guarantees asylum seekers not to be submitted to the departure country and guarantees them entry to the asylum country. However, if the applicant condition does not meet the terms of statutory refugee status, "*de facto* refugee"

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[815] Ibid, p.666

[816] UNHCR ExCom, Interception of Asylum-seekers and Refugees, para. 22.

[817] https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf, accessed: 03.09.2020.

[818] F.G. v. Sweden, ECtHR, No: 43611/11, J.D.23.03.2016, para.116. "An Iranian national claimed asylum in Sweden in 2009. The request was based on political activities and his conversion from Islam to Christianity shortly after arrival to Sweden. Nevertheless, the applicant gave up relying on conversion as a ground for asylum since it is a private matter. Sweden rejected his claim on the basis that his political activities did not put him at risk from the Iranian authorities and therefore, he would not be subject to risk of persecution."

[819] **Lauterpacht, Sir Elihu/Bethlehem, Daniel** (2003) The scope and content of the principle of non-refoulement: Opinion: Feller E/Türk V./Nicholson F. (eds). Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge, Cambridge University Press, 87-177.

[820] **Mallia**, p. 52.

status becomes issue. Where asylum seekers are not recognized as refugees within the meaning of Article 1 of the 1951 Refugee Convention, the Council of Europe Parliamentary Assembly recommended that those are "*de facto* refugees", and should be treated similar to statutory refugees.[821]

In accordance with Article 33 of the 1951 Refugee Convention, migrants who enter a State from an international border will have right to statutory refugee status. An international border is not only at the land but also at the seas. International borders may be territorial sea or internal sea border or ports.[822] Therefore, *non-refoulement* principle is applicable to asylum seeker coming from sea routes.

The principle of *non-refoulement* bans immigrant from being forced back to the country in which they may be persecuted. But this principle does not require an interdicting State to accept the vessel into her territorial sea. Where the Convention is being narrowly read, an intercepting country may divert a vessel towards the country in which asylum seekers will not be subject to persecution. This means that, interdicting State may refuse the vessel entry into its territory,[823] force it to stay remained in the territorial sea or even push it to another State's territorial sea, which is not a breach of the 1951 Refugee Convention.[824] Any other zone apart from the territorial sea, such as the migration zone established by Australia that includes only physical territory or a port of her, is a breach of Article 33 of the Refugee Convention.[825]

Goodwin-Gill says that "categorical refusal of disembarkation can only be equated with *refoulement* if it actually results in the return of refugees to persecution."[826] Yet, the United Nations General Assembly is of the opinion that no person "shall be subjected to measures such as rejection at the frontier" and the exception would be "for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons."[827] In other cases, screening and protection should be provided to asylum seekers.

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[821] Council of Europe Parliamentary Assembly (1976), Recommendation No:773.
[822] **Wouters, Kees** (2009) International Legal Standards for the protection from Refoulement, Cambridge, Intersantia, p. 52.
[823] **Goodwin-Gill, Guy S.** (1986) 'Non-Refoulement and the New Asylum-Seekers' Virginia Journal of International Law, Vol:26, No:4, pp. 897-902.
[824] **Mallia**, p.89-90.
[825] Ibid, p. 86.
[826] **Goodwin-Gill/Mc Adam**, p. 233.
[827] UN General Assembly (1967) Declaration on Territorial Asylum, A/RES/2312(XXII). Retrieved from https://www.refworld.org/docid/3b00f05a2c.html, accessed 09.01.2019. General Assembly resolutions are an evidence for status of customary international law.

On the other hand, using live fire to block departure from the territorial sea of the State they may be persecuted in and trying to escape, should amount to a breach of *non-refoulement* obligation.[828] If this sort of act occurs at the border of other country's territorial sea, it would amount to a breach of sovereignty of other State, either. A State has not only right to protect its sea border, but also the right to navigate other part of the seas at the high seas. The State using live fire may not always prove that those illegal migrants aim at her country, taking into account that the vessel may divert to any country during the voyage at the open sea.

The UNHCR and the ExCom are of the opinion that the *non-refoulement* obligation obliges States not only to ban expulsion or return but also to ensure the right to access official proceedings of refugee screening. Indeed, this view has been backed in literature.[829] Precondition is that, international protection must be requested by the relevant migrants.

The State of the intervening vessel in both rescue and interception, is under obligation to take claims before the refoulement process; to make a distinction between genuine asylum-seekers and illegal immigrants. Doing otherwise will infringe on refugee rights.[830] A person passing territorial sea and internal waters of transit State,[831] and residing in an embassy or consular premises[832] may not seek refugee protection. Any diplomatic agency may not accept refugee application while within the territory of claimant residence.[833] Nevertheless, UNHCR field office in a country accepts refugee resettlement claims and forwards it to the State the refugee requested diplomatic protection.[834]

Non-refoulement rule is evaluated as a customary rule nowadays in human rights and humanitarian law.[835] Moreover, the UNHCR reiterates that the prohibition of

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[828] **Mallia**, p. 89-90.
[829] **Fischer-Lescano, Andreas/Tillmann, Lohr/Tohidipur, Timo** (2009) 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' International Journal of Refugee Law, 21:256-296 p. 284.
[830] **Mallia**, p. 91.
[831] **Trevisanut**, p. 666.
[832] **Wouters**, p. 49.
[833] Ibid, p. 49.
[834] https://www.icmc.net/icmc-unhcr-resettlement-deployment-scheme, accessed 02.01.2020
[835] **Allain, Jean** (2001) 'The Jus Cogens Nature of Non-Refoulement' International Journal of Refugee Law, Vol:13, pp. 533-558; **Greig, Dan W.** (1983) 'The Protection of Refugees and Customary International Law' Australian Yearbook of International Law, Vol:8, pp. 108-141 at p. 106; **Mathew, Penelope** (1994) Sovereignty and the Right to Seek Asylum: The Case of the Cambodian Asylum-Seekers in Australia', Australian Yearbook of International Law, Vol:15, No:1, pp. 35-101 at p. 35.

refoulement has the status of customary law.[836] This prohibition is also applicable to asylum-seekers pending decision for their claim of refugee status.[837]

Furthermore, some authors argue that persons to face the risk of persecution should not be sent back to their country of origin; thus, *non-refoulement* has the nature of *jus cogens.*[838]

II. Regulations on Interception of Vessels Carrying Illegal Migrants and Asylum Seekers

1. Basis of Interception of Vessels at Sea Carrying Illegal Migrants or Asylum Seekers

Interception and interdiction, and the difference between both have been explained earlier in Part I. Interdiction is narrower and describes a two-step process: The boarding, and inspection and searching a vessel at seas.

Interception, however, has a wider spectrum embracing all measures applicable at the outside of the national territory of a State. Measures include stopping, blocking, diverting, deflecting, boarding, searching, seizing a ship while it passes through or enters into a coastal State's internal or territorial seas, and in certain circumstances, on the other sea areas. Where "good reason to believe" to interfere or "reasonable ground" for intervention concerning an outlawed act and arresting the ship and people aboard or seizing freight, exist, adequate interdiction measures is likely to be resorted to, proportionally to halt the vessel in question.

The UNCLOS regulates stateless vessels, vessels flying false flag, vessels flying more than one flag and change of flag during voyage.[839] All of those conditions create the stateless status of the vessel. Where a vessel carrying migrant is deemed stateless, the UNCLOS provision on stateless vessel becomes practicable.[840] In accordance with the UNCLOS and the 1958 TSC, the coastal State has exclusive jurisdiction over vessels at the territorial sea for the crimes having potential effect to the coastal State and internal sea for

[836] UNHCR (2010) Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims: Legal Standarts and Policy Considerations with Respect to Extraterritorial Processing, para. 12.
[837] Ibid, para. 13.
[838] **Allain**, p. 558.
[839] See, Part II, II.4.2
[840] UNCLOS, Art. 110(1)(d).

the crimes committed.[841] The migrant smuggling breaches immigration law of the coastal State, and so does innocent passage. Therefore, the vessel in question may not benefit from the rules of innocent passage. In the case that those vessels direct to the coastal State, for the fact that it will breach coastal State law, interception measures become lawful.[842]

Moreover, the UNCLOS has a rule that a coastal State may take decisions and executive actions against a vessel by directing it to internal waters or ports of the coastal State in order to prevent a breach of its internal/port admission conditions.[843] Namely, if next port of call of the vessel cruising at the territorial sea is one of port of the coastal State the territorial sea belongs, the Coastal State has jurisdiction on that vessel in the territorial sea and contiguous zone, condition of which is explained above, Part II, I.3.1.

For instance, based on this rule, the US and Australia have put into force the requirement of advance notice before arrival. Any suspicion will be taken on the basis for boarding outward of the territorial sea.[844] In recent years, more technological equipment is available for determination of the vessel's position, such as Automatic Identification System, Long-range Identification and Tracking System, and Ship Security Alert System. Those systems let coastal States receive more information concerning the vessels approaching them.

The migrant Smuggling Protocol requires State parties to criminalize smuggling acts and hold responsible State parties responsible to cooperate fullest extent possible.[845] For flagless vessel or the vessels deemed flagless, which is explained above at Part II, I.4.2, UNCLOS provisions are applicable. However, for the vessel flying a flag and where it is confirmed, flag State consent is required to take additional measures.[846]

Interception of a vessel carrying migrants outside of a jurisdictional zone may be based on protective jurisdiction doctrine. According to that principle, a State may have protective jurisdiction on any act outside of its territory, threatening its security or vital economic interests.[847] Indeed, the US Federal Courts support that doctrine asserting that in the areas where no State has jurisdiction, Congress has the right to enact laws regarding

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[841] UNCLOS, Art. 2; the 1958 TSC, Art. 2.
[842] See, Part III, II.2.1.
[843] UNCLOS, Art. 25(2).
[844] **Mallia**, p. 34
[845] The Migrant Smuggling Protocol, Art. 7.
[846] Ibid, Art. 8.
[847] **Bingham, Joseph W. et al**. (1935) Harvard Research on International Law, Draft Convention on Jurisdiction with Respect to Crime, American Journal of International Law, Vol:29, No:1, pp. 439-442, Published online by Cambridge University Press: 12.04. 2017, Art. 7.

them without bounding them by international law relating stateless vessels in drug trafficking even if there is no nexus with the US.[848] Interdiction measures taken by Australia are based on protective jurisdiction due to the fact that migrant smuggling is evaluated as a maritime security threat. And that principle allows Australia's such action to be lawful, upon persons on board.[849]

As far as the enforcement (executive) jurisdiction is concerned, the situation seems to be more complicated and degree of control may be an issue for responsibilities. Concerning effective control of persons or vessels on the high seas, more lenient from the ECtHR evaluation, *Fischer-Lescano, Lihr* and *Tohidipur* is of the opinion that

> "Effective control on the high seas can result when State vessels use their physical presence and strength in order to make smaller, more vulnerable or less maneuverable vessels move back or return to ports in the country of origin or transit country by threatening or exerting physical force."[850]

The opinion regards that blocking or diverting smaller vessels may constitute effective control. However, the ECtHR is of the opinion that the State in question should control effectively the vessel or area, namely, under control of that State authority.[851]

As has been explained above,[852] migrant smuggling differs from the other type of smuggling/trafficking on the point of subjects of the offense; namely, a person as the subject. Since the subject of the offense is human-beings, the State intervening the vessels carrying migrants should take into account the dignity of migrants, their security, right to claim refugee status, *non-refoulement*, right to life, obligation of rendering assistance and safety at sea. At the same time, human rights shall come into play while interventions happen.

Those concerns result in conflicts between the legitimate interest of the State and international mandates; a jurisdiction with humanitarian consideration, and State sovereignty with protection. It should be taken into view that the vessels carrying migrants mostly lack adequate equipment for navigation and conditions for traversing at open

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[848] US v. Pinto-Mejia, The United States Courts of Appeals Second Circuit, D.D.14.10.1983 720 [F.2d 248 (2d Cir. 1983)], para. 42.
[849] **Klein, Natalie** (2014) Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountibility for Maritime Interception of Irregular Migrants, Vol:15, No:2, pp. 414-443 at p. 422.
[850] **Fischer-Lescano/Lohr/ Tohidipur**, p. 275-6.
[851] See, ECtHR, Hirsi Jamaa and others v. Italy, Medvedyev and others v. France,Cyprus v. Turkey, Varnava and Others v. Turkey, Al-Skeini and Others v. England.
[852] See for detailed information, Part III, I.1.2.

seas.[853] These situations require more careful actions during interception towards those of them in distress.

2. Rules Applicable to Different Maritime Areas

2.1 Internal Waters

Internal waters are the area of seas in very proximity of the coastal State, which is inward of baseline. Internal waters as well as other areas as treated internal waters, and sovereignty over those areas explained above in Part I, II.1. How baselines are drawn and base point are determined are explained above in Part I, II.2.2. Besides, historical waters which is treated as internal waters is also explained above in Part I, III.5. Interception measures applicable at the internal waters clarified in Part II, I.2.1.

Just a reminder, inward of straight line of bays, ports, roadsteads, inward of fringe of islands, inward of very indented coasts, historical waters, inward of closing line of river mouths, inward of light houses etc. are internal waters. Coastal State has exclusive sovereignty over those areas and no vessel has innocent passage at this area save for very exceptional situations of internal waters-after-straight-baseline-drawn.

Since internal waters are regarded legally almost identical to the land territory of the coastal State, it has full sovereignty over those waters. This connotes that, it has the right to regulate irregular migration as well as migrant smuggling and human trafficking within those areas regardless of the flag being flown by relevant vessel.[854] The coastal State can make national regulations regarding illegal migration on its internal sea, take appropriate measures and in case of a breach of regulations, and use its jurisdiction power. But then, the coastal State is required to abide by international agreements while using its authority. Unless otherwise regulated by an agreement or the coastal State requests the assistance, other States cannot use any jurisdiction in internal sea of the relevant coastal State.

The coastal State can adopt measures such as boarding, interception, examination or prosecution against a vessel embarked with migrants which enters into its internal waters legally or illegally. Even if a ship committing an unlawful act such as smuggling, espionage, piracy, etc. encounters distress, it cannot claim immunity from local

[853] **Mallia**, p. 15.
[854] UNCLOS, Art. 11; **Barnes**, p. 117.

jurisdiction,[855] apart from those of conditions in distress. That is to say, albeit the vessel in distress is immune from local law of port State during that period, the vessels in smuggling cannot benefit from this immunity.

In case of migrants entering into a State's internal sea individually without any smuggling organization; these persons can be sanctioned for their illegal entrance to the relevant State. However, if the illegal entrance or exit occurs with a smuggling organization, migrant smuggling as a crime will be in question. State parties to the Migrant Smuggling Protocol shall criminalize acts described at the Article 6 as well as non-party State may criminalize such acts. Where a coastal State criminalizes an act, no matter what the flag of a vessel is, she has full jurisdiction over a vessel which is used for smuggling organization.

In this context, while smugglers are to be punished for the crime of migrant smuggling, Article 5 of the Migrant Smuggling Protocol states that migrants shall not become liable to criminal prosecution under this Protocol since they have been the object of conduct set forth in Article 6 of this Protocol. Besides, Article 31(1) of the 1951 Refugee Convention guarantees that unlawful entry shall not result in exclusion of asylum seekers from the protection of *non-refoulement*. The States shall not institute penalties, concerning their illegal entry or existence, on refugees who, arriving directly from the territory in which their life or freedom was in danger, enter or are present in their territory without permission, on the condition that they declare themselves immediately to the authorities and show good reason for their illegal entry or existence.

Another measure which is applied against a vessel embarked with migrants which entered into its internal waters is, preventing the entrance of the vessel into internal sea and pushing it back. However, in this case, the principle of *non-refoulement* becomes more of an issue. As the principle forces the States not to expel or return a refugee to the territories where his/her life or freedom is in danger because of his/her "race, religion, nationality, membership of a political group or political opinion",[856] migrants should be classified due to whether they seek for asylum or not. Non-admission into the internal waters would correspond to a breach of *non-refoulement* principle at the frontier.[857] In other words, a case of not asking the migrants whether they seek for asylum or not, would result with the

[855] **Mallia**, p. 67.
[856] The 1951 Refugee Convention, Art. 33; CAT, Art. 3; Similar provision at OUA Convention, Art. 1.
[857] F.G. v. Sweden, para.116.

breach of principle of *non-refoulement* for the vessels pushed back from the frontier of internal waters.[858]

Besides, push-back policy might breach the rule of supporting vessels in distress and danger to life at sea. This is because, vessel carrying migrant is mostly primitive and not suitable for sailing at open seas. Rescue operations in this area is under responsibility of coastal States. Taking into account that those areas are under full sovereignty of the relevant coastal State, all national and international law shall be applied: interception measures and subsequent acts. Namely, positive and negative obligation of right to life and its procedural requirement shall become binding on that State which is party to ICCPR and the European Convention on Human Rights [Hereinafter: ECoHR].

Consequently, for the migrants on vessels prevented from entry into the internal waters, it is evaluated that the vessel should be boarded and the migrants should be asked whether they seek for asylum or not. As the related requests would be received by vessels and personnel who are authorized for this reason, the boarding should be undertaken by the same vessels and personnel.

2.2 Territorial Sea

Territorial seas are the area of seas in proximity of the coastal State, which is outward of baseline. Territorial seas, its extent, baseline, sovereignty over those areas are explained above in Part I, II.2. Innconet passage in this area detailed, either. Sovereignty over the territorial sea analyzed in Part II, I.2.1.

In short, the territorial sea is the sea area 3 n.m from baseline up till 12 n.m. inwards of seas. As explained above, 3 n.m. territorial sea is customary internanatinal law. Any State can announce territorial sea uptill 12 n.m. or less. This announcement depends on positions of neigbouring coastal States, islands, or international relations. Coastal State has full sovereignty over this area including below and above. However, innocent passage for outgoing, incoming, and passing vessels have been recognized as an exception.

Moreover, in case a crime committed upon a vessel affects or is likely to affect coastal State, the coastal State my intervene in the incident as exception of innocent passage. While benefitting from innocent pasage, vessels shall not prejudice security, good order, and peace by directing any threat to use of force or actively use a force against the

[858] Mallia, p. 91.

sovereignty, territorial stability, or political independence of the coastal State.[859] Illegal migration is assessed as a threat to national security.[860]

Article 19(2)(l) of the UNCLOS stipulates that any other activity that is not directly connected with passage can be considered as non-innocent. Maritime migrant smuggling is conflicting with the immigration laws of the coastal State and innocent requirement of passage.[861] Therefore, such action allows interception for the exercise of enforcement jurisdiction in accordance with Article 25(1) of the UNCLOS.[862] Namely, the coastal State may apply the measures required in its territorial sea to prohibit passage which is not innocent.

Article 19(2)(g) of the UNCLOS states that "the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State" are grounds for non-innocent passage evaluation. Any State has the right to regulate innocent passage for preventing a breach of its immigration law within the territorial sea.[863] Carrying illegal migrants and asylum-seeker abolishes the status of innocent passage for the vessel in question.[864] Where a ship proceeds towards territorial waters, the State in question shall have the right to take necessary steps to prevent breaching its law.[865] Similarly, Article 17 of the 1958 TSC requires that foreign vessels shall obey coastal State's laws and regulations while enjoying innocent passage.

One of the crucial measures in territorial sea concerning a passage which is not innocent is to prevent the vessel from being outside of its territorial sea. Another measure is to exercise enforcement and criminal jurisdiction by approaching to the vessel and taking control on the vessel. Article 27(1) of the UNCLOS expresses that the coastal State has the criminal jurisdiction on a vessel in which the consequences of the crime committed has been extended to the coastal State; and the crime committed annoys the good order of territorial sea or peace of the coastal State. Taking into account that migrant smuggling is an offense in almost all countries, smuggling action will promote interception and criminal

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[859] UNCLOS, Art. 19(1)-(2).
[860] **Klein**, P.422.
[861] There is a diversion between commentators on whether Article 19(2) of the UNCLOS is exhaustive or not. Barnes states that following application of States and rejection of restriction list during drafting process proves that that Article is not exhaustive and more offenses can be based to interdiction such as hazardous materials, substandard ships, and irregular migrants. (Barnes, p.122-4)
[862] **Mallia**, p. 48.
[863] UNCLOS, Art. 21(1)(h).
[864] **Goodwin-Gill/Mc Adam**, p. 274.
[865] Ibid, Art. 25(2).

jurisdiction over the vessel traversing in the territorial sea. That is to say, any State that criminalizes that kind of smuggling or illegal migration action shall have the right to prosecute crimes and therefore enforce its law. If irregular migrant on board of a vessel does not create a threat to coastal State as regulated Article 27 of the UNCLOS, they are still subject to flag State jurisdiction.[866]

However, it should be taken into account that immigration laws of the coastal State shall be applied to the vessels destined for that State, but not for the vessels passing through. In the case that the vessel in question carrying smuggled persons is cruising towards the coastal State, she has the right to intervene in the vessel.[867] Article 27(2) of the UNCLOS and 16(2) of the 1958 TSC permits coastal States to prosecute and arrest the vessel leaving internal waters for any crimes committed within its internal waters; apart from the additional rights giving permission of interception here in Article 27(1) of the UNCLOS.

Where the vessel exercising the right of innocent passage is just passing through the territorial sea of the coastal State and not intend to enter into internal sea or ports of the coastal State, then the results of the crime committed on the ship cannot be extended to the coastal State. Therefore, according to Article 27(1) of the UNCLOS, interception in this situation is not permitted as an exercise of jurisdiction unless the master of the vessel or diplomatic agent or consular of the flag State so requests. Within the scope of this situation, States generally prefer to bar the vessel in question from its territorial sea due to the provision of Article 25(1) of the UNCLOS which allows States to prevent non-innocent passage.[868] As the related vessel does not have any intention for entering into internal sea or its ports, there would be no problem for the State concerning infringement of *non-refoulement* principle. However, in case of a vessel leaving from internal waters with migrants or taking the migrants from internal or territorial seas or intending to enter into internal seas, then the State would have the right of exercising all enforcement or criminal jurisdiction over the ship.

On the other hand, the EU Commission's Staff Working Document, which is explanatory fiches for specific principle, on the International Law Instruments in Relation to Illegal Immigration by Sea, elucidates the EU position with regard to vessels carrying

[866] **Barnes**, p. 121.
[867] **Mallia**. p. 49.
[868] However, the EU policies require the coastal State to intervene in that vessel. (European Commission Staff Working Document, "Study on the International Law Instruments in Relation to Illegal Immigration by Sea" SEC(2007) 691, 15.05.2007, para. 2.1.3)

immigrants. As per the Document, a vessel with intention to disembark immigrants in the territory of an EU State cannot benefit from the innocent passage.[869] Therefore, the littoral State has the right to push that vessel back to the high seas or arrest it. The same obligation is regarded for vessels with the intention to disembark immigrants to other member States territory. Inasmuch as there is no internal borders among them and established just external borders surrounding all EU countries. *Per contra*, a member State may put surveillance and interdict vessels flying third State flags subject to permission of relevant member State.

Although the coastal State has enforcement jurisdiction for the vessel carrying migrants that is contrary to its immigration law and has the right to prevent its entry into her territorial sea. It seems international law and in connection with it, national law permits a State to effectively fight against migrant smuggling in its territorial sea. However, some of exercise resorted during this fight seems in breach of some other rights of migrants. While fighting the offence subject of which is human, humanitarian deliberations must be taken into view and responsibilities must be in the fore.

An intercepting State has to take necessary considerations of two situations. One of which is in the case of the vessel embarked with asylum seekers or persons who have the right to claim refugee status. The other is that the vessel is in distress, as generally happens when overloaded with persons and/or people on board or on sea are in imminent danger to loss of life at sea. The coastal State whose immigration law has been violated should not prevent the vessel in distress from entering its waters, on the assertion that it breached the law of the State in question.

When an interception measure has been resorted to, it is likely that human rights and refugee rights will come to the fore. Right to life, *non-refoulement,* and prohibition of torture will have a room to be applied. Indeed, *non-refoulement* principle covers in some extent right to life and prohibition of torture within the positive obligation of a State.

The wording of Article 33 of the 1951 Refugee Convention results that only who enter the country from an international border deserve statutory refugee status under the protection of *non-refoulement*. International borders include not only the borders on land but also the territorial sea and internal waters and ports of the destination country.[870] As a result, the *non-refoulement* principle is the obligation for the States; not only in instances

[869] Ibid.
[870] **Wouters,** p.52. For the counter argument see **Goodwin-Gill, Guy S./ McAdam, Jane** (2007) The Refugee in International Law, Newyork, Oxford University Press, p. 279.

within internal waters but also in the territorial sea, since those are described as territorial sea exercising the sovereignty of the coastal State.[871]

Some authors argue that Article 33 of the 1951 Refugee Convention shall apply not only within the border of the country but also in any place that the State in question exercises its jurisdiction.[872] In the case of making an asylum claim within the territorial sea, the coastal State has to receive that claim.[873] Nevertheless, this rule is controversial to the rule of illegal immigration recognized at Article 21(1)(h) of the UNCLOS. Unless the asylum claim is not made in the territorial sea or before the claim has been made, the coastal State may push back the vessel or block entering into the territorial sea under Article 25 of the UNCLOS. Entry into the territorial sea of a State in any situation will permit immigrants aboard to claim asylum and *non-refoulement* principle comes into play for the fact that that vessel is under the jurisdiction of that coastal State.[874] Being on board a vessel owned by the intercepting State will put the persons under the jurisdiction of that State. Following that situation, in order not to breach the *non-refoulement* principle, pre-screening on board the maritime vessel is appropriate as long as asylum claims are examined in the land territory. The full process of claims may not be carried out on board for the fact that a vessel is not adequate for the full procedure, lasting some amount of time in which asylum seekers need intake of fresh water, food, treatment, a confidential interview, etc.[875]

If the State excludes the vessel in question from its territorial sea, the existence of asylum-seekers in that vessel would result with the breach of *non-refoulement* principle.[876] It is so because territorial sea is accepted within the scope of the coastal State, due to Article 31 of the 1951 Refugee Convention allows the asylum seekers to request asylum in that State. The case of not providing this opportunity for asylum seekers would result with the automatic rejection of asylum requests and infringement of *non-refoulement* principle as such. Consequently, the coastal States are required to create a suitable ground for seeking asylum and evaluate these requests with fair approaches. It is assessed that this

[871] UNCLOS, Art.2; **Mallia**, p. 50.
[872] **Trevisanut**, p. 66.
[873] **Mallia**, p. 86.
[874] Ibid, p. 88.
[875] UNHCR (2010) Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing, para.56.
[876] **Mallia**, p. 85.

ground would be created by landing the asylum seekers and enabling them to request for asylum.

A similar case is in question for vessels carrying asylum-seekers which reach to the territorial sea frontier. Most of States execute preventive actions in order not to permit these vessels' entrance into the territorial sea. Although the States aim to refrain from liabilities regarding creating a ground for seeking asylum in this manner, it is evaluated as an infringement of *non-refoulement* principle.[877] But in this case it is necessary to mention an exceptional case on preventing entry into the territorial sea would result with the migrants being expelled to the territories where his/her life or freedom is in danger. If the State which asylum-seekers escape from is contiguous with the coastal State or very close to it, pushing back the vessel from its territorial frontier will constitute an infringement of *non-refoulement* principle. But if asylum-seekers are not pushed back to the State they escape from, then pushing back the vessel from its territorial frontier may not result with infringement of *non-refoulement* principle.

However, even in this situation, the State that vessel would arrive is not guaranteed to accept them[878] and finally they may return the State they escaped from, which breaches *non-refoulement* at the latest.

Besides, the United Nations General Assembly declared that no person "shall be subjected to measures such as rejection at the frontier" and "overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons" become and exception[879]

Additionally, even if rescue operations will be analysed below, the situation of right to life and prohibition of torture had better be mentioned here. States have positive obligation in order to protect lives and torture and negative obligation in order not to kill without reason and resort torture concerning right to life and prohibition torture, and procedural obligation for investigating such act.[880] State is under the obligation of not

[877] **Mallia**, p. 52.
[878] **Klein**, p. 427.
[879] UN General Assembly (1967) Declaration on Territorial Asylum, A/RES/2312(XXII). Retrieved from https://www.refworld.org/docid/3b00f05a2c.html, accessed 09.01.2019. General Assembly resolutions are an evidence for status of customary international law.
[880] See for deatail: **Kourf, Douwe** (2006) The right to life A guide to the implementation of Article 2 of the European Convention on Human Rights, Human rights handbooks, No. 8, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4e, accessed 20.09.2020; **Reidy, Aisling** (2003) The prohibition of torture A guide to the implementation of Article 3 of the European Convention on Human Rights, Human rights handbooks, No. 6,

killing unlawfully any one, and torture and ill-treat persons under her custody. This obligation requires that a State cannot expel, extradite, or return any one his life or freedom is in danger or subject to torture or ill-treatment.[881] Hence, some international commissions and court have decided such expulsion or extradition is unlawful under international human rights law.[882]

Where such push back or expulsion happens within the territorial sea for the vessel in distress, or unseaworthy vessel, or vessels asylum seeker on board, considering that that area is under full sovereignty of the relevant coastal State, breach of right to life, both in positive and negative obligation, is to be occurred. Moreover, if those persons are exposed to torture or ill-treatment at the State they arrive or their State of nationality, prohibition of torture is to be violated.

Push back at the territorial frontier should be evaluated under same obligation. Due to the fact that while pushing a vessel back, taking into view that the pushed back vessel must be smaller than the pushing vessel, the smaller one will be under the authority of pushing vessel and if the vessel is in danger and loss of lives is imminent, it means right to life is violated. Same consideration should be made for the persons they are to be subject to torture or ill-treatment at the State they arrive or at the State of origin. Even if it is argued that repelling vessels without diversion by force does not violate the principle of *non-refoulement*,[883] the intervening party shall not put the lives of persons aboard in danger.

Moreover, where the vessel is in distress, push back practice amount to a breach of right to life. In accordance with Chapter V(7) of the SOLAS, put into force on 1st Jan. 2020, obligation of rescues at sea are upon the coastal State and she is regarded responsible for as on land territory; due to the fact that internal waters, territorial sea and archipelagic waters are under the relevant State's exclusive jurisdiction. as a consequence of this responsibility, in case the relevant State is very close to render assistance to any person in distress and in the imminent danger of a loss of life, the negative and positive obligation of right to life should be applied to the case incorporated in Article 2 of the ECoHR and Article 6 of ICCPR, which are about the right to life.[884]

(https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4c, accessed 20.09.2020.

[881] See Part III, I.4

[882] Ibid.

[883] **Trevisanut**, p. 673-4.

[884] Nowadays, it is seen a number of push back incident at the news, especially resorted by Greece in Mediterrenian Sea agaisnt irregular migrants, many of them most likely has right to seek aylum as Syrians. Some of them died at the sea, drawning. See some news:

UNHCR is of the opinion that the persons aboard the pushed back vessels are under the *de facto* jurisdiction of the pushing States.[885] With regard to the extraterritorial applicability of the ICCPR, the Human Rights Committee stated that all States have to ensure the Covenant rights of the persons within their territory, and subject to their jurisdiction. State parties must further respect the persons within their territory, and under their effective control. Those rights must be available every person, including asylum seekers, refugees, migrants, stateless persons etc. Effective control may occur through control power, international peace keeping, or peace enforcement operation.[886]

Any other zone apart from the territorial sea, such as the migration zone established by Australia that includes only physical territory or a port of her, is a breach of Article 33 of the Refugee Convention.[887]

2.3 Contiguous Zone

Contiguous zone is the area that a coastal State may establish from the edge of territorial sea to the inward of high seas for only control of sanitary, immigration, custom and fiscal law. The detail is given in Part I, III.1 and Part II, I.3.1.

As regulated in Article 33 of the UNCLOS,[888] the coastal State has the right to impose enforcement jurisdiction with regard to preventing and punishing breach of its migration law applicable in the territorial sea and land territory. The 24 n.m. from the baseline is declarable limit for the contiguous zone for the relevant State whether or not it has proclaimed the territorial sea up to 12 n.m. Therefore, it may differ depending on length of territorial sea declared and the length announced for that zone. The punishment right allowed by Article 33 demonstrates that the coastal State has an explicit entitlement on control over the zone for border control and any interception measures trigger *non-refoulement* principle for persons aboard of the vessel.[889] Any boat embarked with migrant

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https://www.asylumineurope.org/reports/country/greece/asylum-procedure/access-procedure-and-registration/access-territory-and-push; https://www.aa.com.tr/en/europe/migrants-violently-pushed-back-from-greece-to-turkey/1912815; https://www.hurriyetdailynews.com/another-migrant-found-dead-after-greece-pushback-to-turkey-139514.

[885] UNHCR (2011) Rescue at Sea, Stowaways and Maritime Interception Selected Reference Metarials, 2nd Ed., Geneva, p. 115.

[886] UN Human Rights Committee (2004) General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13. Retrieved from https://www.refworld.org/docid/478b26ae2.html, accessed 20.11.2019, para. 1.

[887] **Mallia**, p. 86.

[888] Article 24 of TCS has similar provision.

[889] **Klug/Howe**, p. 93.

is subject to interception measures of boarding for inspection purpose even if no crime has yet been committed.[890]

It should be borne in mind that even if there is limited judgment where simple interception measures shall trigger jurisdiction over such persons on the sea, *Xhavana and others v. Italy and Albania* suggest that any action on the sea would result in the responsibility of that State since it has exercised jurisdiction over that person.[891]

The wording of the UNCLOS and the 1958 TCS lets it be construed that only outgoing vessels may be exposed to an enforcement action of the coastal State because the Convention permits punishment of the vessel committing a crime within inward of the territorial sea line.[892] Contrary to this view, like early interpretation before the UNCLOS, there should be legislative jurisdiction for the contiguous zone so as to prevent infringement of laws applicable within inward of the territorial sea.[893] A vessel presenting on contiguous zone without violating or intending to violate the coastal State's law; however, if it enters to the territorial sea its acts constitute a violation, this mere presence will not amount right to interception.[894]

In the case where the vessel disembarked illegal migrants and quitted from the internal waters of the relevant coastal State, that State pursues and exercise its jurisdiction over the vessel while it is sailing in the contiguous zone as an attempt of fleeing.[895] Namely, even if the vessel breaching immigration law of the coastal State within the territorial sea is first sighted within the contiguous zone, hot pursuit is permissible as if it started from the place the relevant crime was committed.[896] This is because the contiguous zone is established for the protection of immigration law.

In addition, the right to hot pursuit provided at Article 111 of the UNCLOS can be enjoyed for the offenses committed within the internal waters, the territorial sea, contiguous zone, and the archipelagic waters. May it be recalled here that the right to hot pursuit can be enjoyed for the offenses committed in the contiguous zone against the rights for the preservation of which the zone was created.[897] It is the weakness of the UNCLOS

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[890] **Shearer**, p. 330.
[891] **Klug/Howe**, p. 94.
[892] **Fitzmaurice, Gerald** (1959) 'Some Results of the Geneva Convention on the Law of the Sea' The International and Comparative Law Quarterly, Vol:8, pp. 73-121 at p. 113.
[893] **Mallia**, p. 57.
[894] M/V Siaga (No.2) separate opinion by Judge Laing, para. 14-15
[895] UNCLOS, Art. 33.
[896] **Mallia**, p. 58-59.
[897] UNCLOS, Art. 111(1).

that it is not permitted to exercise jurisdiction including for the migrant smuggling offenses committed just outside of the territorial sea but in the contiguous zone through disembarking on a boat and enjoying right to innocent passage thereafter.[898] In such situations, the concept of hovering by mother ships explained above is thought applicable, where the hot pursuit conditions are met.

As for the incoming vessels committing migrant smuggling offense, in case of these vessels' entrance into the contiguous zone, the coastal State may take preventive measures by executing preventive controls such as intercepting, boarding, inspecting or changing its sea lane under protective jurisdiction. On the other hand, some intellectuals asserts that arresting and forcing to port is not covered by "control necessary" provision which only covers checking, inspecting, warning, stopping, and diverting a vessel breaching migration law of coastal State.[899] On the other hand, after a vessel commits the crime against the coastal State and is seen in its contiguous zone, the coastal State has the right of executing criminal jurisdiction over that vessel.

Similar to the innocent passage evaluation made just above heading, the interception that may resorted to, for the act of migrant smuggling may not go beyond for the interception applicable to circumstances of innocent passage. Namely, only vessels carrying illegal migrants that is outgoing from or incoming to the relevant coastal State may be intercepted. The incident basis for interception must have direct link to territory or territorial water of coastal State.[900] That means, a State cannot use more jurisdiction at the area of less sovereignty from the area of more sovereignty. The vessel traversing towards other States cannot be subject to interdiction measures[901] or intend to enjoy innocent passage for transit voyage unless consent has been taken in line with procedure established. A vessel shall enjoy freedom of high seas at the contiguous zone unless such infringement has been committed.[902] For the vessel stateless or deemed stateless, they can be interdicted without authorization of any State, even though they do not intend to enter into territorial sea.

It seems that consent requirement will diminish the fight against migrant smuggling and illegal migration. Automatic consent must be incorporated into international

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[898] **Mallia**, p. 50.
[899] Goodwin-Gill (1996), p.165-66; Rothwell/Stephens (2010), p.80.
[900] UNCLOS, Art. 33(1)(a)-(b).
[901] **Gallagher/David**, p.240.
[902] M/V Siaga, No.2, para.15.

agreements or relevant State of contiguous zone must be able to intercept a vessel without consent where she has clear ground regarding migrant smuggling.

Coming to the refugee rights and human rights issue in this regard, the analysis made for territorial sea above is *mutadis mutandis* applicable at the contiguous zone. Because a coastal State establishes that zone for enforcement of its immigration law. *Non-refoulement*, right to life and prohibition of torture is violated once push back, expel or divert measures are applied within the contiguous zone. Maritime frontier is not the outward of contiguous zone for the implementation of non-refoulement; however, maritime frontier at the territorial sea falls within the contiguous zone. Extraterritorial application of *non-refoulement* and right to life take place at his zone.

Apart from the intent of the original drafters of Article 33 of the UNCLOS, which is regarded a contiguous zone, the UNHCR suggests (which is not binding) that in the case that a coastal State has intercepted within the contiguous zone, *non-refoulement* obligation of that State emerges irrespective of the location of interception.[903]

2.4 The EEZ and Continental Shelf

The EEZ and Continental shelf has been assessed in Part I, II.3-4 and Part II, I.3.3-4. Indeed, those zones are part of high seas and the coastal State has limited rights with regard to researching utilizing natural reserves.[904] In the EEZ and continental shelf freedom of navigation is essential for States including laying submarine cables and pipelines, and operations associated with those acts.[905]

The EEZ and continental shelf areas have devoted same rights on this matter to the coastal State. The UNCLOS does not have any particular provision for migration issues at the EEZ, continental shelf and high seas, freedom of navigation on the high seas shall apply to the migration matters within the EEZ and continental shelf.[906]

The exception of navigational freedom on the EEZ is that of offshore installations on which coastal State has exclusive jurisdiction regarding customs, fiscal, health, safety and migration laws, and regulations.[907] The migration targeted those facilities will amount to the right to interception on behalf of the State where the facilities belong.

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[903] **Mallia**, p.88.
[904] UNCLOS, Art.56 ff, 76 ff.
[905] UNCLOS, Art. 58, 78.
[906] **Barnes**, p. 128.
[907] UNCLOS, Art. 60(2).

3. High Seas

The high seas are the area of all oceans and seas save for internal waters, territorial sea, and archipelagic waters. International straits are territorial seas insomuch as covered by it and the rest is the high seas. Freedom at the high seas includes freedom of navigation, freedom of over flight, freedom of laying cables, freedom of fishing, freedom of scientific research, and freedom of constructing artificial islands and installations.

Over the high seas, States are not allowed to claim exclusive sovereignty on any part of it. Freedom of the high seas allows every State to exercise same rights for both coastal and land-locked. Ships are obliged to sail solely under the one State flag throughout of its journey and they are dependent to their exclusive jurisdiction on the high seas. However, there are some exceptional case, mentioned above. As the high seas are not under exclusive sovereignty of any State, the principle of personality jurisdiction and jurisdiction power of flag State on the same flag flying vessel are applied. The other States are obliged to request permission from the flag State to take adequate measures concerning a vessel engaged in the irregular migration on the high seas. However, the principle of flag State's jurisdiction on high seas is limited, with some exceptions.

The high seas are open seas for every vessel without limitation except for the right of visit. According to Article 110 (1):

> "Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship."

Therefore, there is a right to visit if there is a "reasonable ground for suspecting" for slave trade, piracy, illicit trafficking of narcotic substances, unauthorized broadcasting and flaglessness of a vessel as mentioned namely by the above provision of the UNCLOS.

Article 110(2), on the other hand, explains in some details what "right to visit" means practically.

> "…the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion

remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration."

Accordingly, the warship may advance to verify the vessel's right to fly its flag, and if suspicion stands after the documents have been reviewed, it may advance to a detailed inspection on board the vessel. The same article in its paragraph 3 explains what happens if all suspicions prove baseless.

However, it does not clearly explain what happens if they prove true. Based on paragraph 2, it may be said that "may proceed to a further examination on board the ship, which must be carried out with all possible consideration" can be interpreted widely. Therefore, the visiting authority may take all enforcement jurisdiction necessary including prosecution.

What is the situation as to illegal migration or asylum seekers? Taking into account that migrant smuggling offenses on seas are generally committed via vessels without nationality, the right of visit can be practised over those vessels.

Although Article 110 of the UNCLOS allows the States to apply measures of boarding and examination for vessels without nationality or deemed without nationality, it is argued that it is impossible to execute more jurisdiction since the consent of flag State cannot be requested for those vessels. In this case, if the owner of the vessel is also not known, it is accepted that every State has right to execute legal jurisdiction on that vessels.[908]

Following visiting where suspicion remains, boarding is permissible as per Article 110(2) of UNCLOS. As mentioned above, interdicting State has jurisdiction on the stateless vessel based on personal jurisdiction if they were its own. Taking into account that stateless vessels have no protection of any State, no State can object to the enforcement action of the interdicting State. Therefore, the seizure of the vessels in that situation is legitimate under customary international law.[909] Indeed, this sort of interdiction is based not migrant smuggling, but statelessness.

Besides, there are more explicit provisions in the Migrant Smuggling Protocol regarding the vessels without nationality. Article 8(7) of the Migrant Smuggling Protocol states that;

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[908] **Mallia**, p. 69, 72.

[909] Naim Molvan v. Attorney-General for Palestine, Judicial Committee of Privy Council of the United Kingdom, D.D.2004.1948.

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

As a result of the Migrant Smuggling Protocol, the State parties are allowed to board, search and apply more jurisdiction on the vessels without nationality used for smuggling of migrants. Due to Article 9(1) of the Migrant Smuggling Protocol, where a State party applies measures against a ship without nationality, it is obliged to secure the safety of the persons on board and treat humanely, and take into view of the requirement not to put into jeopardy the safety of the vessel or its cargo.

For the vessels flying true flag, flag State authorization is paramount in accordance with UNCLOS, the 1958 HSC, and the Migrant Smuggling Protocol.[910] Along with the flag State jurisdiction and, in exceptional cases, the other States' jurisdiction against illegal migrants on the high seas, intervening States are allowed to execute jurisdiction with consent of flag State. Due to Article 8(2) of the Migrant Smuggling Protocol,

> "a State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel."

The flag State is allowed to authorize the requesting State for boarding or searching the ship and if suspicion of engaging in the migrant smuggling is grounded by evidence, implementing adequate measures regarding the ship and crew including passengers and freight on board.[911] Some bilateral agreements allow States to furnish with ship-rider. The ship-rider on board is authorized to grant permission to boarding and such.

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[910] UNCLOS, 92(1); the 1958 HSC, Art. 6(1); the Migrant Smuggling Protocol, Art. 8.; **Okur**, p. 32.

[911] The US-Bahamas 2004 Agreement (Agreement between the Government of the United States of America and the Government of the Commonwealth of the Bahamas Concerning Cooperation in Maritime Law Enforcement) is another model agreement and includes unsafe transport and migrant smuggling. Article 6 of the Agreement permits the US patrols to carry out operations without ship rider of the Bahamas, including stop, board, search, and detain, until three nautical miles from the low-tide line of the Bahamas coast on the vessels flying the flag of a States other than Bahamian. The US law enforcement officers do not need any additional permission to make operation in the areas for migrant smuggling incident. On the other hand, where a ship rider is on the board of the U.S. vessel in accordance with Article 5 of the Agreement, the ship rider coordinator is authorized to grant permission to enter the Bahamian territory and waters, and board and search such vessels suspected. Moreover, Article 5(2)(b) gives permission the coordinator to assist boarding

As is explained, hot pursuit is another situation on high seas for pursuing and arresting a vessel which violates the coastal State laws and regulations within its sovereign area or sovereign rights within the other areas. A hot pursuit must be uninterrupted and continuous chase from the beginning into the high seas. It shall be commenced rightly within the area of having enforcement jurisdiction. Thus, coastal State forces its jurisdiction far beyond the territorial sea. Right to the hot pursuit and constructive presence recognized in customary international law, the 1958 HSC and the UNCLOS, enables the coastal State with arresting and prosecuting where she has that right under domestic law in her sovereign areas; namely, if she does put into force any law for illegal immigration, and it is breached.

In case that the vessel is stateless, such status of which is recognized at the high seas, the hot pursuit provisions should first be exercised. Self-defence concept may be resorted to for the vessels carrying illegal migrant to coastal States. Nevertheless, in the case that vessel carrying migrant is too far from the coast, the coastal State cannot rest upon the self-defence argument for the danger is not imminent, unquestionable and exceptionally serious.[912]

Some authors argue that even if the practice of slavery is not a matter nowadays, migrant smuggling which is not mentioned in the UNCLOS may be included within the terms of slavery in a broader sense.[913] Namely, slavery terms should be applied by analogy to migrant smuggling issue.

The provisions of the Migrant Smuggling Protocol are to be applied on the high seas. It is noteworthy that the UNTOC shall be appertained to the migrant smuggling

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and searching of vessels flying the Bahamas' flag within 200 nm from the Bahamas territorial sea line. In case of a claim of the nationality of the Bahamas without flying its flag, unless the Bahamas Government verified as such the US law enforcement vessel has right to board, but the priority of exercising jurisdiction over vessel belongs to the Bahamian ship rider. In fact, despite those additional permission to the US law enforcement service, the Agreement rests upon general international rules in the suppression of illicit drug trafficking and migrant smuggling by reiterating at Article 3 that "Operations.., in the territory, waters, and airspace of a Party are the responsibility of, and subject to the authority of, that Party". Article 8 of the Agreement urges parties to respond in four hours whether the vessel cruising within 200 n.m. in seaward of the territorial sea and flying the flag of the State concerned has the nationality of that State. If the claim is being confirmed then authorization process comes into play. If not, then the requesting party enforces Article 4 that is for vessels without nationality, if applicable to the situation. Even though the US-Colombia Shiprider Agreement regarding illicit drug smuggling deems permission has been given in case of not responding within 3 hours, the Agreement in question does not have such provision. It seems that the US-The Bahamas Agreement preserves vessels with the nationality of others in 200 nm from enforcement. When taking into consideration the naval force of both parties, the Agreement grants prior permission to the US even if the Agreement seems to bestow equal rights to each other in some provisions. But, Article 6 and 7 is unilateral to the US in authorization priorly permitted.

[912] **Mallia**, p. 66.

[913] Ibid, p. 67.

unless any provision regarding the matter has not been set out in the Migrant Smuggling Protocol.[914] The Protocol establishes the migrant smuggling as a transnational crime committed by criminal groups.[915] It has to some extent necessitated State parties to interdict such vessels. So much so that "States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea."[916]

The wording of Article as "shall" and "fullest extent possible" should be interpreted as an imposition on State parties to respond the verification request expeditiously, to permit boarding if nationality is verified or even entering her territorial waters.[917]

What happens if a country seals its border before the asylum seekers on board come and claim refugee status, or push them back from entering the State border? Push back practice has raised several complex questions in branches of international law, international refugee law, the law of the sea, human rights law, and rule on prevention of human trafficking. The push back policy applied on the Mediterranean Sea has resulted in many lives lost and is not a rare implementation.[918]

Even if the subject of interception seems vessels and rules of international law of the sea regulates interception of vessels, the persons on board, whatever their status are, such as crew, smuggled and trafficked persons, or migrants, become subjects. In case of a State executing measures on the high seas such as boarding, that State is obliged to put into view the asylum seeker's requests and to comply with *non-refoulement* principle. Otherwise, EHRC and 1951 Refugee Convention would be infringed.

Some States may argue that their obligation of *non-refoulement* cannot be applied outside of their land or sea territories such as the US and Australia; meaning, *non-refoulement* does not have extraterritorial force.[919]

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[914] The Migrant Smuggling Protocol, Art. 1.
[915] Ibid, Art. 4.
[916] Ibid, Art. 7.
[917] **Mallia**, p. 159.
[918] **Borelli, Silvia/ Stanford, Ben** (2014) 'Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights' Review of International Law and Politics, Vol:10, pp. 29-67 at p. 40.
[919] The US, Executive Order No 12807, 24.05.1992, (57 Fed Reg 23133); the US Supreme Court, Sale v Haitian Centers Council Inc, 1993, 509 US 155, 181-2; Minister for Immigration and Border Protection, 'Submissions of the Defendants', Submission in CPCF v Minister for Immigration and Border Protection, S 169/2014, 30 September 2014, [20]-[21].

However, during enjoyment of enforcement jurisdiction, responsibility of a boarding State is questionable. The European Court stated in the judgment of the *Medvedyev and others v. France* that;

> "…, as this was a case of France having exercised full and exclusive control over the Winner and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention."[920]

This judgment demonstrates that the ECoHR is applicable to the high seas if the State party has full and effective control over a vessel on the high seas. Even if the ECtHR restrict its judgment in the *Issa* [921] case for military operations, taking into account that no State may be unaccountable for a violation perpetrated within that territory, it should be accountable for violations committed outside of its territory through its agent. Moreover, for vessels being used for governmental purposes and is a part of the relevant State's entity, any act that is perpetrated in those vessels is an act by the State in question who is responsible for those acts from the beginning of the interception; for the fact that she has effective control and authority over the interdicted vessel.[922]

Same as the ECtHR, the Committee against Torture makes a significant contribution to the extra-territoriality of *non-refoulement* at the decision of the *JHA v. Spain.*[923] The Committee decided with regard to the case including a challenge to expulsion that even if the applicant is outside the territory of Spain, by reiterating General Comment No. 2 (2007), CAT/C/GC/2/CRP.1/Rev.4, para. 16, "the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law." Furthermore, the Committee accepted that effective control over a person or area results in the

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[920] Medvedyev and others v. France, para. 67.
[921] Look at Issa and others v. Turkey, ECtHR, No:31821/96, J.D.16.11.2004.
[922] **Mallia**, p. 95.
[923] "In the incident, the vessel, Marine I was, at the international sea in distress. A Spanish vessel saved the vessel and persons aboard. Under an agreement with Mauritania the passengers were detained in Mauritania under Spanish control. They received asylum requests and at their wish, could be repatriated to the country of origin. During the detention, Spain had the authority over thedetention center. Applicants submitted applications to the Committee and it was decided that, whiles at the detention center and during transfer to Spain, the applican remainedunder the jurisdiction of Spain."

extraterritorial application of the CAT.[924] It thus accepted extra-territoriality of the *non-refoulement* principle.

In addition to that judgment, the ECtHR held that even when the individual is under suspicion of terrorism, the unequivocal character of Article 3 of the ECoHR secures the person from refoulement to where he/she is most likely to be endangered to torture or ill-treatment.[925] It is agreed that torture must be to some degree of severity; while ill-treatment in the understanding of the Court is less severe. Therefore, it is not arguable that the notion of persecution in the 1951 Refugee Convention may be considered less severe than that of the Courts evaluation made for Article 3 of the ECoHR. That is to say, *non-refoulement* obligation has two-fold for States party to the ECoHR, the 1951 Refugee Convention and the ECoHR requirements.

At the judgment of the *Hirsi Jamaa and others v. Italy*, regarding interdiction of vessel within the EEZ carrying migrant to Italy and returning Eritrean and Somali migrants to the Libyan shore, the Court held that Italy had a positive obligation with regard to conducting research on treatment against refugees in the country of origin, identification of persons aboard, ascertaining fulfilment of international obligation of Libya regarding protection of refugees. The Court decided that Italy had violated the prohibition of torture and inhuman and degrading treatment, the ban of collective expulsion of aliens, right to an effective remedy in national law. This judgment has extended application of the principle of *non-refoulement* to the seaward of the territorial sea. However, it invoked the consideration that an Italian military ship is the land of Italy as stated in the Italian Code of Navigation.[926]

The judgment of *Hirsi Jamaa* is important for *non-refoulement* principle not only for the torture and ill-treatment prong similar to a "well-founded fear of persecution" but also finding an infringement of the ban of collective expulsion of foreigners even if they are at the high seas. This ban bounds the State party not only on their land territory but also at the area they are effectively controlled, which is applicable to all migrant interception cases on the high seas. According to the Court, the individualized assessment procedure

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[924] UN Committe against Torture (2006) Concluding Observation: United Satates of America: UN doc. CAT/C/USA/CO/2, para.15.

[925] ECtHR, Saadi v. Italy, Application No. 37201/06, 28/2/2008, "a Tunisian national entering Italy several times between 1996 and 1999, Mr Saadi, was arrested on 9 October 2002 on suspicion of involvement in international terrorism. the Assize Court sentenced him to four years and six months' imprisonment on the charges of criminal conspiracy, forgery of a large number of documents, and receiving stolen goods. The Assize Court also ordered that he was to be deported after serving his sentence."

[926] **Trevisanut**, p. 673.

must be implemented with adequate interpreters, legal advisors, and personnel trained for an interview. Furthermore, the Court stated in the judgment that effective national remedy in practical and legal terms capable of suspending the expulsion measures, must be in force. However, push back action leaves no room for contesting such a decision effectively before criminal courts of Italy.

Moreover, the Inter-American Commission of Human Rights decided that interdiction on the seas bring the persons on board under the jurisdiction of interdicting State[927] which is similar to the ECtHR; but otherwise is the Supreme Court of US. *Non-refoulement* principle does not necessarily require acceptance of asylum-seekers into the territory of the intercepting State. *Non-refoulement* principle comes into play if the asylum-seeker will be subject to persecution in the country of origin when returned there. Otherwise the intervening State is not forced to accept refugees under Article 33 of the 1951 Refugee Convention.[928]

Even where an interception occurs without the authorization of flag State or the territorial State, the intercepting State is responsible for *non-refoulement* principle for the fact that it enjoyed *de facto* jurisdiction over those persons.[929] Interception within the 12 n.m. zone of the country of origin and transit country will emerge the application of *non-refoulement* within the meaning of the 1951 Refugee Convention and the CAT.[930] According to Article 12(2) of the ICCPR, any person has the right to leave his/her country of origin.

In accordance with the UNHCR's view, the persons aboard the pushed back vessels are under the *de facto* jurisdiction of the pushing States.[931] As it does not have a binding effect on all States, the resolution will be examined here with the opinions of formal international institutions. Concerning the extraterritorial applicability of the ICCPR, the

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[927] The Haitian Centre for Human Rights v United States, The Inter-American Commission of Human Rights, No:10.675, D.D.13.03.1997, para. 171. "Many boat people reaching to the U.S. had a reasonable fear that they would be persecuted if returned to Haiti. However, the U.S. denied such claims and returned them to Haiti on the basis of promises given by Haitian Government. Returned persons were subjected to detention and torture. The Committee found that the action of interdiction and subsequent repatriation, breached the right to life, right to liberty, right to equality before law, right to resort to a court, right to seek and receive asylum."

[928] **Blay and others**, p. 19.

[929] **Klug, Anja/ Howe, Tim** (2010) The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures: Ryan B, Mitsilegas V. (eds). Extraterritorial Immigration Control: Legal Challenges: Guild E, Niessen j. (eds). Immigration and Asylum Law and Policy in Europe, Vol 21, Leiden Bostan, Martinus Nijhoff, p. 96.

[930] **Fischer-Lescano/ Lohr/ Tohidipur**, pp. 277-9.

[931] UNHCR (2011) Rescue at Sea, Stowaways and Maritime Interception Selected Reference Metarials, 2nd Ed., Geneva, p. 115.

Human Rights Committee held that all States have to uphold the Covenant rights of the persons within their territory, and dependent to their jurisdiction. State parties must further respect the persons within their territory, and under their effective control. Those rights upheld must be available not to only citizens but also every person, including asylum seekers, refugees, migrants, stateless persons etc. Effective control may occur through control power, international peace keeping, or peace enforcement operation.[932]

The Council of Europe has advised State parties to "refrain from any practices that might be tantamount to direct or indirect refoulement, including on the high seas." According to UNHCR's interpretation, the principle has a capacity of extraterritorial application.[933]

Moreover, Article 3 of CAT and Article 7 of the ICCPR can be applied to a similar effect. As stated by the ECtHR, those Articles require effective control over area or person for extraterritorial application.[934]

According to the UNHCR, *non-refoulement* obligation does not imply geographical boundaries, understanding it otherwise will result in a fruitless claim made by migrants in the vessel intercepted at the great distance of the coastal State and it throw them into a more fragile position in the possibility of them returning to the country of origin where they are likely to be subject to persecution or the like.[935]

But this principle does not require an interdicting State to accept the vessel into her territorial sea. Where the Convention is being narrowly read, an intercepting country may divert a vessel towards the country in which asylum seekers will not be subject to persecution. This means that, interdicting State may refuse the vessel entry into its territory,[936] force it to stay remained in the territorial sea or even push it to another State's territorial sea, which is not a breach of the 1951 Refugee Convention.[937]

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[932] UN Human Rights Committee (2004) General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13. Retrieved from https://www.refworld.org/docid/478b26ae2.html, accessed 20.11.2019, para. 1.
[933] Council of Europe Parliamentary Assembly (2011) The interception and rescue at sea of asylum seekers, refugees and irregular migrants, para. 9.4.
[934] **Klein, Natalie** (2014) A Case for Harmonizing Laws on Maritime Inteerceptions of Irregular Migrants, International&Comparative Law Quarterly, Vol:63, No:4, pp. 787-814 at p. 800.
[935] UNHCR ExCom (2000) Interception of Asylum-Seekers and Refugees, EC/50/SC/CRP.17.
[936] **Goodwin-Gill, Guy S.** (1986) 'Non-Refoulement and the New Asylum-Seekers' Virginia Journal of International Law, Vol:26, No:4, pp. 897-902.
[937] **Mallia**, p.89-90.

4. Search and Rescue Operations

Search and rescue operations are humanitarian aspects of international law of the sea. Although some authors assert that it is not customary but a conventional obligation,[938] the duty of assisting persons in distress at sea, rescue at sea, may be regarded as customary international law for the fact that every multilateral convention concerning maritime law includes a similar provision.[939] The assistance obligation is not only the duty for the government vessel but also any merchant vessel.[940] Assisting persons aboard the vessel in distress[941] is the cornerstone of international maritime law as is the *non-refoulement* principle in the Refugee Law.

Distress conditions are not defined in UNCLOS and SOLAS. However, International Convention on Maritime Search and Rescue (Hereinafter: SAR Convention) offers a definition. Distress requires "a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance."[942] Namely, a vessel must be in the situation of grave and immediate danger and this situation must require urgent relief. These circumstances are to put persons on board in imminent danger to loss of life.

The UNCLOS regulates essential obligations for States regarding maritime search and rescue services. According to Article 98(1) of the UNCLOS, every State is obliged that the master of a ship flying its flag is required to extend assistance to any person upon the sea in the possibility to loss of his life, unless he can act so without putting serious danger to the vessel, the crew or the passengers; to advance with all possible as much rapid as to the rescue of persons in distress, if learned their need of help, in so far as such action may plausibly be awaited from him; following a crash, to extend assistance to the other vessel, its crew and its passengers and, it is possible, to notify the other ship of the name of his own vessel, its port of registry and the closest port at which it is navigating.

Besides, Article 98(2) states that every coastal State is required to support the establishment, operation, and maintenance of an appropriate and sufficient search and rescue service concerning safety on and over the sea, and if circumstances requires, by way of bilateral or multilateral arrangements, to cooperate with neighbouring States for this

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[938] **Blay and others**, p. 15.
[939] **Mallia**, p. 96.
[940] UNCLOS, Art. 98(1).
[941] It is prescribed at the UNCLOS, the SOLAS, the SAR, and the 1958 CHS.
[942] SAR Convention, Annex, Chapter 1, Regulation 1.3.13.

purpose. Consequently, not only the masters are responsible, but it has been struck the balance out between State parties and masters.[943]

After SAR Convention came into force in 1979, IMO separated world seas into 13 search and rescue areas. Article 1.3.4 of the SAR Convention defines "coast watching unit" as a land unit, stable or mobile, allocated for maintaining a watch on the security of vessels in coastal areas, and Article 1.3.5 defines "rescue unit" as a unit consisting of trained personnel and provided with equipment suitable for the expeditious conduct of search and rescue operations. These areas are considered to determine the States responsible for coordinating search and rescue operations. Due to Article 3.1.1, parties are responsible for coordinating their search and rescue organizations and, whenever necessary, coordinating search and rescue operations with those of neighbouring States.

Article 3.1.2 states that;

> "a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory of rescue units of other Parties solely for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties. In such cases, search and rescue operations shall, as far as practicable, be coordinated by the appropriate rescue co-ordination centre of the Party which has authorized entry, or such other authority as has been designated by that Party."

Moreover, Article 2.1.1 expresses that parties are obliged to secure that necessary compromises are made for the provision of appropriate search and rescue duty for persons in distress at sea, around their coasts.

After the SAR Convention, SOLAS which requires ship masters to intervene in rescue operation,[944] came into force. However, as a result of sinking incidents such as the *Tampa* case[945] regarding the vessels used for smuggling migrants, and the problems in rescuing casualties, IMO decided to make amendments to the SAR Convention and the SOLAS in 2004. The 2004 amendments to the SAR Convention[946] and the SOLAS[947] hold responsible party States "to co-ordinate and co-operate to ensure that master of ships…are

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[943] **Mallia**, p. 130.
[944] SOLAS, Chapter V, Art. 33(1).
[945] In August 2001, the Howard Government of Australia refused permission for the Norwegian freighter MV Tampa, carrying 433 rescued refugees (predominantly Hazaras of Afghanistan from a distressed fishing vessel in international waters) and 5 crew to enter Australian waters. See **White**, p. 1-4.
[946] SAR, Para. 3.1.9.
[947] SOLAS, Chapter V/33.1.1.

released from their obligation with minimum further deviation from the ship's intended voyage..."[948]

As is above, Article 58(2), 86 and 98 of the UNCLOS put responsibility upon the coastal State for search and rescue operations within the high seas and the EEZ. On the other hand, the UNCLOS does not cover internal sea, the territorial sea and archipelagic waters for these operations. Fortunately, Chapter V/7 of the SOLAS covered that gap by putting an obligation on the coastal State for search and rescue operation within the sea around its coast.

By that regulation that was just put into force on 1st Jan. 2020, a coastal State shall be regarded responsible for obligation of rescues at sea as on land territory; for the fact that internal waters, territorial sea and archipelagic waters are under the relevant State's exclusive jurisdiction. In accordance with this responsibility, where the relevant State is as close as to reach any person in distress and in the imminent danger of a loss of life, the positive obligation of right to life should be applied to the case for Article 2 of the ECoHR and Article 6 of ICCPR, which is about the right to life.

Besides, with regard to asylum seekers, during interdiction of a vessel whether or not in a rescue operation, even if it is regarded that vessels flying a flag is subject to that State jurisdiction, international law does not impose on the flag State to recognize those asylum seekers being received aboard as refugee for durable sense save for *non-refoulement* principle. Determination of their status is the responsibility of the State of next port of call disembarked.[949] The intercepting State has stronger responsibility for asylum seekers for the fact that the interception measures may only be made through governmental vessels allocated for enforcement.[950]

Non-refoulement principle is directly related to Article 3 of the ECoHR, Article 7 of ICCPR, and Article 2 of CAT, which are prohibition of torture. When a person returned to the country may be subject to persecution, torture, or ill-treatment, and after he/she become exposed to one of those practices, the refoulement constitute breach of prohibition of torture. This is because, if such circumstances are likely, refoulement shall violate that rule.[951]

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[948] SAR, Chapter 3, Art. 3(1)(9).
[949] UNHCR (2002) Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea, para. 24.
[950] Ibid, para. 26.
[951] https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf, accessed: 03.09.2020.

Nevertheless, the intervening party is under the obligation of letting persons seek asylum in their country without forcing them back. The persons in a certain condition must be given opportunity to enjoy right to seek asylum. On the other hand, several States have claimed that they are not under an obligation of screening refugee claims of those in vessels interdicted at sea, contrary to the Protocol Relating to the Status of Refugees.[952]

Together with human right problems, at some instances States have brought into consideration of State sovereignty and security for migration issue at sea. Rescue at sea brings to front disembarkation issue. Disembarkation is at the end in relation with rights of migrants and asylum seekers. The rescue operation is not over just after rescuing, it lasts at end of disembarkation to place of safety. This is because disembarkation matter is touched upon here.

Taking into account that disembarkation is required to receive persons at the land territory by the destination State under international law,[953] State security interests do not normally allow that to happen as it occurred in the incident of the *Cap Anamur*.[954] Similarly, the *Marine I*[955] rescued 400 migrants at sea in February 2007; however, it could barely find a State to disembark those migrants for several days after. The UN adopted several resolutions concerning smuggling aliens and rescue at sea at this regard.[956]

The ExCom with its Conclusion No.6 has brought forward the argument of granting asylum to whom are aboard vessels in distress, wishing to seek asylum.[957] As is explained above, the vessel in distress and under *force majeure* has the right to claim safe harbour or entry into a port to avoid the situation. [958] It is a universal right under customary international law.[959] However, a non-immediate threat such as persecution on persons if they return to their country of origin is not a reason for distress evaluation.[960] Even so, the coastal State may refuse entry into its port if she considers that the ship poses a threat to

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[952] **Guilfoyle (2009)**, p. 231.
[953] **Mallia**, p. 80.
[954] At that incident, the recued migrants from a vessel in distress taking onto board could not disembarked for weeks and Italy, finally accepting State, prosecuted the crew for promoting illegal immigration.
[955] "The vessel was carrying 400 people and located West African coast. It was not permitted to disembark those persons for several days. Successive actions in the Mauritania brought before the Committee against Torture, the case of JHA v. Spain."
[956] See UN General Assembly, 12.12.1996, A/RES/51/62.
[957] UNHCR ExCom (1979) Conclusion N.6 (XXVIII), para.(c).
[958] **Yang**, p. 64 and **Jessup, Philip C.** (1927) The Law of Territorial Waters and Maritime Jurisdiction, New York, G.A. Jennis Co., p. 194.
[959] **Schwarzenberger, Georg** (1957) International Law as Applied by International Courts and Tribunals, 3rd Edition, London, Stevens, p. 197.198 ; **Lowe, A.W.** (1977) The right to Entry into Maritime Parts in the International Law, San Diego Law Review, Vol:14, No:3, pp. 597-608.
[960] **Mallia**, p. 52.

safety, environment, health, and security of that State in accordance with the non-binding guidelines of IMO.[961]

The IMO Guideline[962] with regard to the rescue at sea demonstrates the action to be taken during a rescue at sea. According to the Guideline, a rescuing State should not ask persons whether they desire to disembark to their country of origin; and they must not share their personal data with that country.

Article 3(1)(9) of the SAR, and Chapter V Regulation 33, para. 1(1) of the SOLAS requires a rescuing State to deliver the persons to a place of safety. The SOLAS provision reads as:

> "...master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so…"

And the SAR Convention provision which obliges State party to regulate serving assistance stated in Article 2(1)(10) as: "…ensure that assistance be provided to any person in distress at sea… regardless of the nationality or status of such a person or the circumstances in which that person is found" and in Article 1.3.2 "…provide for their initial medical or other needs, and deliver them to a place of safety."

Moreover, the SAR Convention as amended in Article 3(1)(9) and the SOLAS as amended in Regulation 33 reads requiring State parties to "co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage..."

The determination of a vessel in distress should be evaluated with the factors of seaworthiness, numbers of passengers and size of the vessel, passengers in special need, the presence of qualified crew, other equipment required for safety and navigation, and weather and sea condition.[963] If the vessel is not in distress, interception measures should be relied on the UNCLOS instead of the SOLAS and the SAR.

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[961] UNHCR/IMO (2004) Guidelines on the Treatment of Persons Rescued at Sea, MSC.167(78).
[962] UNHCR/IMO, Rescue at Sea Guideline
[963] Council Decision of 26 April 2010 Supplementing the Schengen Borders Code as regards the Surveillance of the Sea External Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010], annex part II 1.3.

The rescue in maritime law extends up to the delivery of rescued persons to the next port of call.[964] Namely, the operation is not considered ended just after saving people's lives by receiving them into the rescuing vessel. Since the next port of call may not be so obvious, coastal States incline to apply this rule with resettlement guarantees. Next port of call is deemed to be the closest port in terms of geographical vicinity for overriding safety concerns. Another option is considered to be the next scheduled port of call. This option is evaluated as appropriate in cases that rescued people is small in number and the safety of the vessel and those on board is neither imperiled nor likely to be required a deviation from its intended course. However, in some situations the next port of call may not be the closest port but rather the port which is best furnished for the aim of acepting injured victims and subsequently handling asylum applications. In other instances, interfering State vessels that intercepted irregular migrants, the closest port of that State could be deemed as the most adequate port for disembarkation goals. From a security and humanitarian perspective, securing the safety and dignity of persons rescued and of the crew, must be the revoking consideration in determining the port of disembarkation.[965]

Furthermore, Article 3(1)(9) of the SAR Convention as amended in 2004 obliges masters of ships to deliver the rescued persons to a place of safety determined by the SAR State within that area. How place of safety requirements in the SOLAS and the SAR Convention is defined is an essential issue in rescue operations and push back strategies. Namely, the question is whether the interdicting State, following stopping a vessel, can place them into a lifeboat and push back.

In para. 3(1)(9) of the SAR Convention 2004, and Chapter V Regulation 33, para. 1(1) of the SOLAS requirements of the place of safety are explained in Guidelines on the Treatment of Persons Rescued at Sea ('IMO Guidelines'), adopted by the IMO in 2004. It depicts 'place of safety' as a location in which the operations are considered ended; the survivors' life is no longer in danger, and their essential needs can be satisfied; their transportation to next or final destination can be arranged.[966]

Even if it is likely to be advocated that boarding a seaworthy lifeboat which is sufficient to sail to a nearby land is a place of safety, it seems such behaviour is not lawful under international law. Due to the fact that it is not fully defensible as land and also it is not guaranteed that the other land or State will accept them into their territory given that

[964] SAR Convention, Annex, Chapter 1, para. 1.2.3
[965] UNHCR, Background Note, para. 30.
[966] UNHCR/IMO, Rescue at Sea Guideline.

the vessel is no more seaworthy and passengers are considered in distress. This situation is also valid for the irregular migrants on board or rescued from sea. This is by virtue of the fact that no State is under obligation of letting irregular migrants rescued at sea to be disembarked on its territory and accepting persons rescued at sea.[967] However, it is a valid argument for the rescuing State that it has no obligation to accept rescued persons other than the primary role of cooperation and coordination, putting aside ethical, humanitarian and *non-refoulement* considerations, and push back policy or placing seaworthy vessel can be considered lawful.[968]

On the other hand, the establishment of SAR zone, in this respect, may be mentioned so that masters of a merchant vessel are not so required to render assistance much within that zone because primary responsibility in those areas is upon the relevant State party to the SAR convention.[969] The SAR zone State is under responsibility to find a safe place to disembark those rescued; together with cooperation and coordination.[970] The rescued people at sea cannot be disembarked to the place where they may face torture, persecution, or other serious harm,[971] including ill-treatment by the jurisprudence of the ECtHR.[972]

According to the ExCom, the rights of coastal States are;

> "The measures which coastal States can take under the Convention [UNCLOS] to suppress this type of criminal activity include: exercising criminal jurisdiction on board a foreign ship passing through the territorial sea (article 27); punishing in the contiguous zone the infringement of immigration laws and regulations committed within a State's territory or territorial waters (article 33); exercising the right of hot pursuit of a foreign ship which has violated the immigration laws and regulations of the State (article 111); exercising the right of visit where a ship is without nationality or conceals its true nationality (article 110); and enforcing the relevant provisions of the Convention in respect of seaworthiness."[973]

[967] **Klein**, p. 427.
[968] Ibid, p. 428.
[969] **Mallia**, p. 100
[970] SAR, Art. 3(1)(9).
[971] UNHCR, Refugees and Asylum-Seekers in Distress at Sea-how best to respond? Expert Meeting in Dijibouti, 8-10 November 2011, Summary Conclusions, para. 7.
[972] ECtHR, Saadi v. Italy, 2008
[973] UN General Assembly (1998) Report of Secretary General on Oceans and the Law of the Sea, p. 23.

III. The EU Response to Migration Influx at the Mediterranean Sea

1. EU Attitude and Regulations on Illegal Migration

As sample, due to migrant influx flow into EU from undevelopped African, Middle-Eastern and Asian States, EU and individually EU countries emradeced regulations, agreements, memorandum of understandings etc in order to avoid influx.

As a tool for fighting illegal migration is readmission agreements, and together with Amsterdam Treaty of 1997[974], put into force in 1999, that changed EU establishing charter, European Commission has been authorized to negotiated on readmission agreements. Since then the Commission discussed such agreements with many states. The Commission had accepted a standart approach regarding readmission agreement, which requires certain modelity in negotiation of reciprocal obligations. In many document articles regarding readmission included.[975] At EU level, in 2005, a global approach and in 2011, a global approach and mobility document on migration had been finilazed.[976]

In 2015, EU Agenda for Migration was been published and EU Commission declared the 2015-2020 Plan. The Plan regulated border control, forfeiture of assets, dismantling the vessels used, and checking the regulations. It focuses on information garthering and sharing, investigation, close coorporation with relevant countries, and prohibiting migrant smuggling.[977]

Italy made an agreement with Libya in 2009, permitting interception in Libyan Territorial Sea.[978] Later on, the Council of EU made a declaration on

[974] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 1997.
[975] EU Parliamament Directorate-General for Internal Policies, Policy Department Citizen's Right and Conctitutional Affairs (2010) Readmission Policy in the European Union, p.14-15.
[976] **Martin, Marie** (2013) 'The Global Approach to Migration and Mobility: The State of Play' Statewatch, https://www.statewatch.org/media/documents/analyses/no-215-gamm-state-of-play.pdf, accessed 19.09.2020.
[977] https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-action-plan-against-migrant-smuggling, accessed 16.09.2020.
[978] Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya of 2009.

migration through Libya. It aimed to help Libyan Government on handling migrants, including training, capacity building, information sharing etc.[979]

The EU has established a joint task for to prevent migration in Nov. 2017, together with UN and African Union. The task force intended to reduce migration from African Continent and in particular, Libya.

The European Council concluded on following issues on 28-29 June 2018:

"-step up efforts to stop migrant smugglers operating out of Libya or elsewhere

-continue to support Italy and other frontline EU countries

-increase its support for the Sahel region, the Libyan coastguard, coastal and Southern communities, humane reception conditions and voluntary humanitarian returns

-enhance cooperation with other countries of origin and transit as well as voluntary resettlement."[980]

At EU level, FRONTEX was established in 2004 to protect the EU border. In 2014, 2016 and 2018, new Frontex regulations were accepted. In subsequent headings, Frontex for applying interception measures in Mediterrenean Sea and readmission agreements made by EU will be detailed.

2. Frontex as Supranational Law

Frontex was established in 2004 as coast guard of the EU for managing the crossing of the external borders efficiently. Frontex has taken over the operation as affiliated to the EU. It is an organization for coordinating operations instead of carrying them out by its officials. That is to say; the State parties are responsible for participating in the operations.

The EU responded to the influx of migrants through the Mediterranean Sea following Italy's agreement with Libya and pushing migrants back the State in question there, which is not a member of the 1951 Refugee Convention, and later on followed by unilateral search and rescue program. According to the Italy-Libya agreement, Italy gained the right to intercept vessels flying the Libyan flag and entering the territorial sea of Libya for the aim of migrant smuggling interception.[981]

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[979] Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route. Retrieved from https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/, accessed 16.09.2020.

[980] European Council Conclusions, https://www.consilium.europa.eu/en/meetings/european-council/2018/06/28-29/, accessed 16.09.2020.

[981] The Treaty on Friendship, Partnership and Cooperation between Italy and Libya of 2008.

Frontex carried out many joint operations and recently a joint operation with Italy, Spain, and Greece. Despite being in force since 2004, the *Hirsi Jamaa* judgment explained above, affected Regulation (EU) No 656/2014 of the European Parliament and of the Council (2014) Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Hereinafter: The Frontex Regulation).

The 2014 Frontex Regulation has governed how an interception can be implemented. According to Article 5, if the joint units detect a vessel participating in migrant smuggling by sea or other suspected action at the time of entering the territorial sea or the contiguous zone of member States, the unit shall collect information concerning the vessel and other circumstances of persons aboard, and proceed to submit it to its centre. The national centre of State of the territorial sea or contiguous zone will provide relevant information following receiving the request from the centre.

The unit encountering the suspicion of migrant smuggling within the territorial sea of the host or participating neighbouring State shall request authorization for an interception. The host State or the relevant neighbouring State unit may authorize the unit for a variety of measures. It begins requesting information, documentation, registration, identity, and nationality of persons on board and reaches stopping, boarding, searching of the vessel and questioning persons aboard.[982] If it is established that the vessel is participating in migrant smuggling or are stateless vessels carrying persons intending to circumvent checks, the coastal State of the territorial sea may authorize the unit on seizing the vessel and apprehending persons on board, instructing the ship to alter its course outside of the territorial sea and escorting it to ensure that alteration, and guiding the vessel or persons to coastal member State. In case there exists intercepted persons, disembarkation is to be processed in the coastal State.[983]

Article 8 attributes Article 6(1), and therefore, the measures mentioned above are suitable to the contiguous zone. It regulates the vessel in the voyage of transit within the contiguous zone of a Member State that has not participated in the joint operation. The unit may stop and search the stateless vessel under suspicion with the reasonable ground of migrant smuggling to verify its statelessness. Following verification, in line with the

[982] The 2014 Frontex Regulation, Art. 6(1).
[983] Ibid, Art.10(1)(a)

instruction of the host State, the unit may take measures of seizing the vessel and apprehending persons on board, warning it not to enter the territorial sea, instructing the ship to modify its direction outside of the contiguous zone and escorting it to ensure that alteration, and guiding the vessel or handing over the persons to a third country or the host or neighboring State. In case there are intercepted persons, they are to be disembarked to the coastal State.[984]

On the other hand, Article 7(14) attributed to Article 8(2) does only authorize monitoring and giving information to the relevant coastal State. However, the measures mentioned just above must be applicable for the stateless vessel as well without the need of authorization. For the vessels flying a flag of another State not a member of the EU and nationality is confirmed, the monitoring shall prevail in accordance with customary international law concerning exclusive jurisdiction of flag State and need flag State authorization.

The measures to be applied to a ship offshore with reasonable reasons for its involvement in migrant smuggling are specified in Article 7 of the Regulation.[985] Article 7 of the 2014 Frontex Regulation attributes a flag State's exclusive jurisdiction on the high seas and requires the permission of the flag State for vessels being suspected of engaging in migrant smuggling. These measures are the same as the measures to be applied to a ship suspected in its territorial waters, and differently, it is foreseen that the ship will be requested to act in accordance with the Migrant Smuggling Protocol and other relevant provisions of international law by requesting the authority from the flag State.[986]

Upon permission, one or more of measures of requesting information, documentation, registration, identity, and nationality of persons on board, and extended to stopping, boarding, searching of the vessel and questioning the persons aboard, is likely to apply. If it is established that the vessel is participating in migrant smuggling, the flag State may authorize the unit on seizing the vessel and apprehending persons on board, ordering the vessel to alter its course outside of the territorial sea and escorting it to ensure that alteration, and guiding the vessel or persons to coastal member States.

All of those measures must be in line with the Migrant Smuggling Protocol, and national and international law. In the case that the flag State does not permit interception

[984] Ibid, Art. 10(1)(a).
[985] Ibid, Art. 7.
[986] Ibid, Art. 7(1).

measures, the unit shall survey it in a prudent distance.[987] In case there is evidence to confirm doubts about the ship in the open sea, in line with the powers given by the flag State; further measures may be applied to seize and warn the ship, to warn the arresters, not to enter territorial waters or adjacent areas, to instruct them to change course when necessary, to direct the ship or the persons on board to the member State or to a third country, or to deliver it to third-party officials.[988]

Additionally, together with Frontex operations, the 2018 Frontex Regulation authorized the European Border Surveillance System (EUROSUR) to monitor vessels used for illegal immigration or human trafficking.

In case there exists intercepted persons, they are disembarked to the State assuming the vessel has departed. If it is not possible, the host State of joint operation shall host disembarkation.[989]

For the vessel flying the flag of the host or participating neighbouring State of operation, that State has the right to give permission for the above measures on the high seas. However, the Regulation did not mention the Migrant Smuggling Protocol and national and international law in this paragraph.[990]

Where the vessel is flying the flag of a State not participating in the operation, the authority of the flag State prevails. That State itself may act or do so, through member States in operation. In either case, they are not just attempted; the unit informs the operation centre and the centre intervenes in the process. It is understood from the wording that the centre and the unit may not act at its own discretion of and the permission of member flag State shall be taken to carry out an interception.

In the condition of flying a false flag and refusing to show it, where the unit suspects that it has the nationality of a participating State; it may verify its nationality, to determine if it has reasonable ground; this may be done even by boarding. If it emerges that the suspected Member State is not participating in the operation, the unit shall verify the right to fly the flag.[991] However, the Regulation does not embody how this will happen. Therefore, the right to visit found in general international law, should be resorted to. If the nationality of a member or participating State is verified, the above measures are

[987] Ibid, Art. 7(10).
[988] Ibid, Art. 7(2).
[989] Ibid, Art. 10(1)(b).
[990] Ibid, Art. 7(5).
[991] Ibid, Art. 7(7).

applicable. For the stateless vessel, the just above measures mentioned in the paragraph regarding the contiguous zone shall be applied on the high seas.

Article 9 of the 2014 Frontex Regulation regulates search and rescue operations in detail. For the fact that vessels and persons in distress are to be rescued in accordance with the SOLAS, the Regulation has made clear the situation and put into it in an "uncertainty" situation. The rescued person at sea can be disembarked to a place of safety determined by the host or participating State. If it is not possible, disembarkation shall occur within the host State.[992]

The Regulation does respect *non-refoulement* principle in Article 4 and prohibits data exchange with a prospective country within which actions can take place, contrary to *non-refoulement* principle. The Article forbids expulsion to a country where "there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment." Moreover, the Article prohibits the transfer of intercepted person at sea to the country where his or her life or freedom would be threatened because of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion. Additionally, if the serious risk of expulsion, removal, or extradition to another country is in contravention of the principle of *non-refoulement* exists, expulsion is forbidden.

The 2016 Frontex Regulation established "fundamental rights officers" and complaint system. Any person affected directly by the actions of officials involved in a joint operation as well as rapid border intervention, migration management support team deployment, return operation or return intervention, may submit a written complaint to the Agency, based on being subject to an action breaching his or her fundamental rights. The same complaint system is reiterated in Article 108 of the 2018 Frontex Regulation.

The Frontex made patrols in the Operation Triton and Poseidon, as well as the EU, responded to the 2015 migration crisis with additional force, the EU Naval Force in the Mediterranean, known as operation Sophia. The operation Poseidon continued at the end of 2017, and the Triton ended in 2018 by being replaced with Operation Themis. The recent operation of the Frontex is the Operation Themis in the Central Mediterranean Sea, from the shores of Turkey to Morocco, which is the largest one and started in 2018. It aims to combat illegal migration and cross border crime in the Central Mediterranean.

[992] Ibid, Art. 10(1).

The core mandate of the Operation Sophia from 2015 to 2018 by the EU Naval Force was;

> "to undertake systematic efforts to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers, in order to contribute to wider EU efforts to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean and prevent the further loss of life at sea."[993]

Operation Themis is successive to Operation Sophia in a wider area. The mandate of the Operation Themis is same as with Operation Sophia.

3. The Readmission Agreements

The aim of readmission agreement is to return irregular migrant to the State where they come from, passed through, or a safe country. It is argued whether those readmission agreements are lawful under international law or human rights law.[994]

For the EU countries, readmission agreements and return are to be governed by Article 33 of the 1951 Refugee Convention, Article 78(1) of EU Treaty, Article 19 and 21 of the Charter of Fundamental Rights and the Qualification Directive, Article 2 and 3 of ECoHR, Article 1 of CAT and as well as Article 6 and 7 of ICCPR.

Refugee status, non-refoulement principle, and human rights requirements force State to host some of migrants. Within this context, asylum seekers will receive long term protection. However, in an influx of asylum seekers, States react for short term emergency response as temporary protection. The status has been applied for the mixed flows including asylum seekers which are not distinguishable. The relationship of this protection to the 1951 Refugee Convention and the 1967 Protocol has not been concerted.

Another type of protection is 'complementary' or 'subsidiary' protection that is applied for the persons enjoying the *non-refoulement* principle and applies individual basis, not to the mass movement of persons as temporary protection.[995] Additionally, the OUA Convention recognizes *prima facie* refugee status, which requires evidentiary shortcut

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[993] EUNAVFOR MED Operation Sophia. Retrieved from https://www.operationsophia.eu/about-us/, accessed 25.08.2020.

[994] **Ekşi, Nuray** (2016) Türkiye Avrupa Birliği Geri Kabul Antlaşması, Beta Basım Yayım Dağıtım AŞ, p. 4-5.

[995] **Edwards, Alice** (2012) Temporary Protection, Derogation and the 1951 Refugee Convention, Melbourne Journal of International Law, Vol:13, pp. 595-635 at p. 604.

recognition. They enjoy all refugee rights; nonetheless, they are subject to some ceasing clause in the convention.[996]

Even if that kind of status is applicable, States are reluctant on hosting migrants. The readmission agreements as a solution let destination or intercepting State to return migrants to State of transit or origin. In recent years the phenomenon is increasingly being used for rapid return. In fact, even if States argue that those agreements are not designed to deny accessing asylum system and peril human life, the vagueness and lack of declaration of its provisions led to this result.

It is claimed that those agreements allow the destination States to legally remove illegal immigrants, failed asylum claimants, and those whose assertion need to be evaluated elsewhere. Besides, it should be taken into view that refoulement implemented is the final step of the procedure and often do not include the safeguards against such a decision.[997] In contrast, the IMO/International Chamber of Shipping/UNHCR Guide to Principles and Practice as Applied to Migrants and Refugees of 2015 recommends that the interdicted migrants should not disembark to the country of origin or the Country they left.

At the EU level, before the 1999 Amsterdam Agreement, the Union had put readmission clauses or migration management clauses to the cooperation and partnership agreements. After that Agreement, it commenced special readmission agreements.

The first agreements signed in this respect was with Hong Kong in 2002, Macao in 2004, Sri Lanka and Albania in 2005.[998] Since 1996, readmission clauses were inserted in trade and cooperation agreements.[999] Which means readmission agreements must talked to, but does not mean both parties accept readmission. The EU Parliament and the Council concluded a Directive regarding readmission agreements and return of illegal migrants on 16 Dec. 2008.[1000] By this Directive, readmission agreements are emphasized and return is accepted to be made to States those a readmission agreement dealt with.[1001]

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[996] Ibid, p. 605-606.

[997] **Kelley, Ninette** (2007) 'International Refugee Protection Challenges and Oppurtunities' International Journal of Refugee Law, Vo:19, No:3, pp. 401-439 at p. 430.

[998] Readmission Agreements, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_05_351, accessed 15.09.2020. For the list of readmission agreements: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en, accessed 16.09.2020. Since 1999, readmission agreements has been concluded with Albania, Bosnia and Herzegovina, FYROM, Hong Kong, Macao, Moldova, Montenegro, Russia, Serbia, Sri Lanka, Ukraine, and Turkey, Pakistan, Georgia, Armenia, Azerbaijan, Cape Verde as of 2020.

[999] Ibid.

[1000] Directive 2008/115/Ec of The European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals. Retrieved from

Every readmission agreement made by EU contains obligation of receiving a migrant who is the citizen of the party of agreement, or illegally entered and resided in that party. Readmission agreements resulted in accelerated return and let the asylum seekers to initiate its asylum claim in the safe third country. Even if European Commission stated that asylum seeker shall not be returned unless his/her claim is concluded by a court,[1002] readmission agreements does not include non-refoulement safeguards explicitly,[1003] but mentions the above named conventions. However, there is no guarantee that the safe third country may not send the asylum seekers to return the country which result breach of non-refoulement.

Indeed, even though many bilateral agreements include the only readmission of individuals of the State parties of the agreement, the wider one is the one made between the EU-Turkey, not only scope of provision but also number of applicable persons. It covers any person, regular or irregular migrants, including the ones that may seek asylum such as Syrians. Namely, any Turkish citizen or foreigner but passed via Turkey may as well return after the expiration of permits for refugee or residence.[1004] For instance the agreement signed with Georgia does not include persons who illegally enter into Georgia and finally reach EU countries.[1005] The agreement made with Turkey in 2014[1006] had a suspense clause for illegal migrants and Syrians for three years. However, on 19 Mar. 2016, a new deal was made and it included all migrants coming from Turkey to Greek Islands in the Aegean region as of 20 Mr. 2016 is to return Turkey; in return of any returned Syrian to Turkey, EU will resettle in her region one Syrian from Turkey.[1007] It should be stressed here that the goal of that agreement is not to ensure refugee rights and their human rights but refrain from migrant influx by EU and join the visa-free-regime by Turkey.

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https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602915554293&uri=CELEX:32008L0115, accessed 20.09.2020.

[1001] Ibid, Art. 3.

[1002] European Commission (2015) https://ec.europa.eu/eurostat/cache/metadata/Annexes/migr_eil_esqrs_it_an1.pdf, p.7

[1003] **Coleman, Nills** (2009) European Readmission Policy: Third Country Interests and Refugee Rights, Leiden, Martinus Nijhoff Publishers, p. 224.

[1004] **Ekşi**, p .69, 117.

[1005] Agreement between the European Union and Georgia on the readmission of persons residing without authorisation of 2011, Art. 4.

[1006] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation of 2014.

[1007] https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_963, accessed 19.09.2020.

It also includes accelerated return process. Once an illegal migrant is caught at the custom, border, or airport, application is to be made in three days and readmission request replied in five days.[1008] According to Article 4 of the Agreement, not only persons staying in Turkey but also persons directly or illegally entering Turkey and reaching to EU States will be subject to readmission procedure.

Nevertheless, recent progress demonstrates that Turkey suspended the agreement claiming that the EU side does not act accordingly with the agreement and let all burden on Turkey of the migration influx from Syria. It seems the EU side does not even support Turkey's operation made on humanitarian basis in order to block additional migration. However, the main reason for increased tension between Turkey and EU is not only concerned with lack of implementation of the obligation the EU assumed; but also regional tensions.[1009]

IV. Lacunae at the Regulations and Suggestions

The general conditions on interdiction measures to be applied to the vessels on the sea and specific provisions regarding illegal migrant have been examined. As a result of all those examinations, it is concluded that there are various lacunae on related issues.

Primarily, it can be said that the rules, process, and techniques produced in a specialized sub-field of international law should not be applied in other areas of international law, such as from international human rights law to international law of the sea. Nonetheless, they are not completely immune from application in another field.[1010]

1. Management of Illegal Migration through Sea

The UNCLOS doesn't not have a self-executing effect and enables States to adopt their individual laws for offenses and actions to be taken. For instance, Article 19 of the UNCLOS on limits of innocent passage is based on a violation of national migration law, as migration by sea is heavily dependent on domestic law regulations. However, failure of

[1008] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation of 2014, Art. 7(4).
[1009] https://www.milliyet.com.tr/dunya/geri-kabulu-askiya-aldik-6004216, accessed 18.09.2020.
[1010] **Barnes**, p. 104.

a State on search and rescue operations under domestic obligations would be meaningless, particularly in a State of low interest to other States.[1011]

Likewise, in a drug trafficking incident, the flag of convenience or flag States is often unable to effectively intercept all suspected vessels around the world and/or reply to request to this regard.[1012] The flaw in exercising criminal jurisdiction over vessels carrying smuggled migrants or offenders has the same result. Taking into account that the sea route is prone to danger and freedom of navigation may be abused harshly and global approach for punishment is required, criminalization and punishment should not be left to the individual countries, because some of these countries are vulnerable to patrolling.

Moreover, the UNCLOS is silent on the matter of migrant smuggling and human trafficking. The UNCLOS has no provisions concerning human rights matters, and this limits its capacity to intervene in irregular migration.[1013] However, it is evaluated that the right of visit, the right of hot pursuit, the duty to render assistance and stateless vessel provisions of the UNCLOS should be applicable to the smuggling issues.

The 1951 Refugee Convention was promulgated just after the World-War Two, and it focused on the problems experienced during those periods. Therefore, as it mainly focused on individual persecution issue, it does not include any provision with regard to migration influx through boats. Article 9(3) of the Migrant Smuggling Protocol regulates the flag State rights, obligations, and exercise of jurisdiction of coastal State protected as saying "take due account" of them. Namely, the Protocol preserves flag State authority on the vessels flying its vessel. However, this reservation impedes fights against offender of migrant smuggling and not protect the coastal State against an influx of migration by sea. Anyhow, it is assessed that the notion of "take due account" is not absolute for those rights and obligations.

The lacuna on the measures of the Protocol that are likely to be taken at the territorial sea of others is based on well-established international law of receiving permission from the relevant coastal State. Therefore, it is not restated within the Protocol. However, the Migrant Smuggling Protocol lacks self-executive provisions and leaves States to take appropriate laws to put it into force. The Protocol focuses on smugglers and offenses related to smuggling. It does not stress on smuggled persons, like the Trafficking Protocol did. Smuggled persons should be taken into due account as is done for trafficked

[1011] Ibid, p. 107.
[1012] **Mallia**, p. 141.
[1013] Ibid, p. 111.

persons. Many irregular migrants migrate because their lives or peaceful life is in danger in their respective countries.

Flag States are under the commitment of expeditious response to requesting State about enforcement measures. It can be shortened, and a general understanding should be implemented for an expeditious response. The absence of response must result in automatic permission for migrant smuggling vessels. However, care must be taken not to abuse this right. If the commitment of expeditious response is not fulfilled accordingly, the requesting party may take action legitimately, and she is obliged to show only reason to act and prove the necessity of interception. Otherwise, time limit would be meaningless.[1014]

Interception measures, such as rescue and later on disembarkation and moreover *non-refoulement* obligation, cause States to hesitate to intercept those flagless boats and force States to push them into further high seas or territorial sea of others or departure States. In addition to rescue operations, even if the masters of the rescuing vessels are of discretion of selecting next port of call as a place of safety in accordance with above criteria, repartition of responsibilities between different countries is lack of clarification.[1015] For the rescuing State has no obligation to accept rescued persons other than the primary role of cooperation and coordination, push back policy or placing seaworthy vessel can be considered lawful. The core challenge in the rescue at sea operation is that of identification of place of safety.[1016] Therefore, an international organization and fund should be formed for the interdicting States to be funded and to deliver the interdicted people to suitable countries in coordination of that organization. Otherwise, interdicting States and vessels will refrain from doing so.

The conflict on sharing of responsibilities has been solved to some degree within the level of the EU by the joint letter of member States in the Mediterranean Sea coast which states financial aid and resource deployment to this end.[1017] Moreover, in order for the prospective-interdicting vessel to refrain from extending rescue, there must be a manual that identifies the place of safety in case of rescue operation at sea. And those should have a communication contact points for instruction and notification. In any case,

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[1014] **Mallia**, p. 158.

[1015] EU Commmission Staff Working Document, "Study on the international law instruments in relation to illegal immigration by Sea", para. 2.3.4.

[1016] UNHCR, Refugees and Asylum-Seekers in Distress at Sea-how best to respond? Expert Meeting in Dijibouti, 8-10 November 2011, Summary Conclusions, para. 10.

[1017] The Joint letter to the EU Presidency from the Heads of States of Cyprus, France, Greece, Italy, Malta, Portugal, Spain and Slovenia, 25.09.2006.

there must be a place of safety regulated and operated by an international community by which the persons rescued have had to be accepted, and no burden should be placed on the interdicting State. It should be avoided that operations are categorized into search and rescue through which States get the opinion that they may get rid of disembarkation responsibilities. Yet, the international community must accord successive action for those disembarked in the place of safety and not let them be a burden on the State hosting this place of safety.

Furthermore, any other deterrent punitive measures against vessel companies and shipmasters that have disembarked to a place of safety must be avoided by the landing States. Likewise, States must not put a requirement on shipmasters, shipping companies, and their insurers to cover repatriation costs of rescued people.[1018]

In order to ease burdens, the *non-refoulement* principle may be exempted for the countries receiving a mass influx of economic migrants, or burden of proof should be on the claimant. Or even destination country should have the right to transfer some of them to another country on its own discretion or maybe through an international organization.

Taking into account that small vessels are not registered and have the right to fly the flag of its owners, confirmation of registration will be time-consuming and without being fruitful because the State of interest might not have any registration with regard to that vessel. There is no specific rule for that lacuna in conventions. Even if it is not widely followed, in practice, it is a convenient tool of right to board as is in the US-UK exchange notes, the 1990 Spanish-Italian Treaty, the US agreements with Haiti and Costa Rica and by elapsing reply-time requirements for numerous the US bilateral agreements.[1019] Moreover, as a case in point, recent WMD interdiction treaties require not verification of registration but verification of nationality.

On the other hand, the added Article 8bis(5) of the SUA Convention by the 2005 Protocol has the method of prior grant of 4 hours confirmation time-limit. However, this is of the appreciation of the State parties and clear expression be made through ratification, accession, approval or acceptance. Those kinds of commitments can be necessary requirements.

[1018] UNHCR (2008) The Treatment of Persons Rescued At Sea: Conclusions and Recommendations from Recent Meetings and Expert Round Tables Convened By UNHRC, A/AC.259/17, para. 28-30. Retrieved from https://www.refworld.org/docid/49997aeb27.html, accessed 25.08.2020.
[1019] See Part II, chapter I.4.9.

The instance of slave trade only permits the right of visit and inspect if so suspected. However, the Human Trafficking Protocol has no provision for interdiction. Therefore, unless otherwise defined to be migrant smuggling or slave trade, human trafficking may not attract interdiction right. But this lacuna should be construed within the framework of the Protocol's supplementary position to the UNTOC, which has interdiction provisions. However, the lacuna exists for the States which are not a party to the Convention.

The UNCLOS is not permitted to exercise jurisdiction including for the migrant smuggling offenses committed just outside of the territorial sea but in the contiguous zone through disembarking on a boat and afterward, enjoying the right to innocent passage. In such situations, the concept of hovering mother ships explained earlier is considered applicable.

2. Protection of Illegal Migrants

It is likely to be advocated that placing seaworthy lifeboat which is sufficient to sail to nearby land is adequate; it seems such behaviour is not lawful under international law, since the boat is not fully defensible as land and it is also not guaranteed that the other land of State will accept them into their territory, given that the vessel is no more unseaworthy and considered in distress.

This is also valid for the irregular migrants on board or saved from the sea. By virtue of the fact that no State is under obligation of letting irregular migrants rescued at sea being disembarked of its territory and accepting persons rescued at sea.

The lacunae existing for the SAR Convention and the SOLAS with regard to disembarkation of those rescued at sea and bringing them to the place of safety has been filled by the amendment mentioned above on 24 May 2004.[1020] The consideration here is, reserving protection of border, migration control and trafficking of human beings, to respect the rights and dignity of the rescued persons. Even if the place of safety has been introduced into the SAR Convention in 2004, it is still not clear which State will receive the migrants rescued. The incident of *M/V Pinar E* of 2009 demonstrates the lacunae on disembarkation of which State is responsible, either the SAR zone State or the closest port State. Indeed, the amendment ensures that the masters of the ship rescuing persons in

[1020] IMO, MSC 78/26/Add.1.

distress are permitted to disembark to the place of safety which is in the route and distance of minimal disruption of the vessel's planned voyage; and the SAR zone State is responsible for coordination and cooperation.[1021]

The *Hirsi Jamaa* judgment of the ECtHR is a threshold in the extraterritorial application of the ECoHR. Though other human rights conventions such as the ICCPR and the CAT have similar clauses with the ECoHR, there is no such binding decision-making body to expand its similar provision to the high seas. States that are party to those latter conventions, which are in fact, widely ratified or even accessed, construed its rule of their discretion. It is noteworthy that the Inter-American Commission of Human Rights decided on similar lines with the ECtHR with regard to the applicability of the convention on the high seas at the judgment of the *Haitian Centre for Human Rights v the United States*. In some situations, a vessel is likely to act in accordance with a State's request. According to *Goodwin-Gill* and *McAdam*, if a vessel is ordered to intercept a vessel carrying migrants, the same provision will be applied by virtue of acting on behalf of the relevant State.[1022]

Human rights conventions suffer from provisions regarding extraterritorial application. Like the ECtHR application in the *Hirsi Jamaa* case and the Inter-American Commission of Human Rights in the *Haitian Centre for Human Rights v the United States*, an explicit reference to the extraterritorial application in the conventions should be included.

No clear rule exists in international agreements regarding challengablity of extraterritorial interception of the stateless vessel on the high seas. But it should not be construed by the international community that where they act upon the high seas, they are immune from liability and they may intercept a stateless vessel and return them. Accepting such an assumption means that States can make decisions and take action upon the sea without any responsibility towards stateless vessels. Therefore, an explicit rule may be added to the conventions regarding stateless vessels and extraterritorial application of human rights convention regarding them.

Similarly, some States argue that *non-refoulement* does not have an extraterritorial effect. It is right that any provision hardly includes such an explicit rule. *Non-refoulement* obligation is effective at territory but not effective on the outside of territorial waters since restricted expulsion is "to the frontiers of territories where his life or freedom would be

[1021] SAR Convention with 2004 amendments, para. 3.1.9.
[1022] **Goodwin-Gill/McAdam**, p. 385.

threatened."[1023] To protect the lives of migrants and restrict States from acting exclusive with migrants, an inclusionary provision must be added to migrant and refugee conventions and protocols. Therefore, push back measures are to be prevented on the high seas and interpretation of frontier is to be restricted.

An additional solution may be the construction of "Mobile Protection Response Team" which is to be offered at an expert meeting.[1024] The prospective Team will aim to help to ensure the immediate need of migrant is met at reception/disembarkation points.[1025] Indeed, this solution serves as a protection of migrant's life and health.

Furthermore, the phrase of "in any manner whatsoever" in Article 33 of the Refugee Convention should be interpreted in line with humanitarian purpose as made by the ECtHR in the *Hirsi Jamaa* case mentioned earlier. The existence of no binding judgment or provision for all/at least many of States gives room for States to play a game of *non-refoulement*.

For the *non-refoulement* obligation, it is important when refugee status is revealed. The debate on refugee status whether it is a pre-existing status because they migrated to another State for a well-founded fear of persecution, seems humanitarian and broader than the application of Conventions. However, screening by the local government is required for the diagnosis of the situation. This opinion results in a breach of the *non-refoulement* when the diagnosis is mistaken and burdens more risks on States. This may cause a gap in refugee protection.[1026] Therefore, the determination procedure should exist, but there should be a cross-check mechanism in order for the procedure not to be abused.

As is touched upon at the ExCom's comprehensive approach on Interception of Asylum Seekers and Refugees, interception measures should put into view the essential difference between refugees and asylum seekers, and other migrants.[1027] And therefore, while taking measures, which it is most likely that persons in need of international protection may exist aboard must be borne in mind.

[1023] The 1951 Refugee Convention, Art. 31(1).

[1024] See further explanation: UNHCR, Refugees and Asylum-Seekers in Distress at Sea-how Best to Respond? Expert Meeting in Dijibouti, 8-10 November 2011, Summary Conclusions, para.20.

[1025] See for detail https://www.unhcr.org/4ef338da9.pdf, accessed 23.12.2019. Team is responsible for arrival arrangements, including accomodation and immadiate needs, and frofiling refugee.Their activities are 1) Providing information/legal assistance; 2) Carrying out initial identification; 3) Conducting capacity-building and training of reception staff; 4) Contributing to the development of a referral system.

[1026] **Barnes**, p.116-7.

[1027] ExCom, Interception of Asylum-Seekers and Refugees, para. 34.a.

It is not clear from the Conventions wording that where a State party is as close as to reach a person in distress who is in the imminent danger of loss of life, the extraterritorial application of human rights convention is practicable. Human rights conventions lack provisions in this regard. Moreover, there is no decision made by an international court or commission in this respect. Where a State or vessel becomes reluctant to protect life at sea, there must be responsibility within right to life and Samaritan Law, taking into account severity of loss of life at sea.

According to Article 58(2), 86 and 98 of the UNCLOS, coastal States are responsible for search and rescue operations as explained above within the high seas and the EEZ. But the UNCLOS does not necessitate those operations within the territorial sea. Nevertheless, Chapter V/7 of the SOLAS encompassed that lacuna by providing the obligation to the coastal State on search and rescue operations at sea around its coast. The rescue operation within the territorial sea at least in this regard should be evaluated under Article 2 of the ECoHR and Article 6 of the ICCPR, right to life.

Migrant smuggling incident may result in danger to life. Where lives are under such imminent danger, it is required that vessels of any State party to the Migrant Smuggling Protocol, including non-parties, must intervene in the situation in accordance with Article 8(5) as is the SOLAS. Moreover, the multilateral and bilateral agreement can be a base for intervention in such situations. However, if the vessel is not under such imminent danger but a most likely encounter with that situation due to the fact that the vessel is not so suitable for cruising, and at the time it is on the open sea very far from the coast, conventions suffer from a lack of explicit wording for that situation. Such situations should be evaluated as being so close to imminent danger, and trigger rescue provisions.

Still, the UNCLOS provision can be applied to incidents which are in a manner more sympathetic to human rights affairs. The 1951 Refugee Convention has the geographical scope and let States make a reservation for specific areas. Even though the 1967 Protocol to the Convention has extended the scope of application, Article 1(3) of the Protocol, however, allows the State parties to maintain their former reservations to the 1951 Refugee Convention which is weak in application.

Moreover, migration control and suppression of human trafficking must be handled with international law of the sea and international human rights law. Indeed, it is not a mere issue of criminal justice. Taking into account that human rights law, as the extraterritorial application of the ECtHR, may govern migration issues, the Court is able to divert to the practice of member States of the Council of Europe.

Migrant smuggling and human trafficking have similarity with slave trade.[1028] Slavery terms in the UNCLOS and the 1958 TSC should be applied by analogy to migrant smuggling and trafficking issue.

All measures taken must be in line with seeking the welfare of the refugees; thus none of them should obstruct their ability to seek protection.

[1028] Contemporary forms of slavery includes traditional slavery, forced labour, debt bondage, serfdom, children working in slavery or slavery-like conditions, domestic servitude, sexual slavery, and servile forms of marriage. See Human Rights Council Resolution 33/1 and www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx.

CONCLUSIONS

When the several significant points as to the international regulations regulating illegal migration in both migration management and protection of right as refugee and human are assessed with regard to jurisdictional powers of States in the law of the sea, various points arise in relation to legal situation in maritime areas.

First of all, it is clear that the coastal State can make national regulations to prevent illegal migration in its internal sea, take appropriate measures, and use its jurisdictional powers in case of a breach of regulations. The coastal State has the authority in adopting measures such as boarding, interception, examination or prosecution against a vessel embarked with migrants which enters into its internal waters illegally.

In case of migrants entering into a State's internal sea individually without any smuggling organization; it can be argued that these persons may be sanctioned for their illegal entry. However, if the illegal entry or exit occurs via a smuggling organization, then, migrant smuggling crime should be considered as a separate issue. In this situation, the provisions of the Migrant Smuggling Protocol must be applied. Accordingly, while smugglers are to be punished for the crime of migrant smuggling, migrants shall not be held responsible to criminal prosecution since they have been the object of conduct set forth in Migrant Smuggling Protocol.

However, it is essential to state that unlawful entry shall not result in exclusion of asylum seekers due to the protection by *non-refoulement* rule. In other words, States should not expel from the country, on account of their non-legitimate entry or existence, refugees who, entering directly from a territory where their life or freedom is endangered. ın this situation they declare themselves immediately to the officials and show the acceptable reason for their illegal entry or presence.

As the principle prevents States from returning or expelling an asylum seeker to the territories where his/her life or freedom is in danger, migrants should be classified based on whether they seek for asylum or not. Non-admission into the internal waters would amount to a breach of *non-refoulement* principle at the frontier. In other words, the case of not asking the migrants whether they seek for asylum or not, would result in an infringement of the principle of *non-refoulement* for the persons on board of the vessels pushed back from the frontier of internal waters. As relevant requests would be received by

vessels and personnel who are authorized for this task, the boarding should be undertaken by the same vessels and personnel.

With regard to the territorial sea, any State possesses the right of adjusting innocent passage to prevent a breach of its immigration law internally. Where a ship proceeds through territorial waters, the State in question shall have the right to take required steps to preserve a violation of its law. As maritime migrant smuggling act is contrary to the immigration laws of the coastal State and innocence of passage, such an act allows interception for the exercise of enforcement jurisdiction.

One of the necessary measures in territorial waters is the exercise of enforcement and criminal jurisdiction by approaching the vessel and carrying out checks on the vessel. Considering that migrant smuggling is criminalized by almost all countries, a suspicion for an act of smuggling enables the State to intercept and conduct criminal jurisdiction over the vessel traversing in the territorial sea.

On the other hand, the consequences of the crime committed on the vessel cannot be regarded to extend to the coastal State if the vessel intends to benefit from the right of innocent passage for mere passage through the territorial sea, without intention of entering internal sea or ports, of the coastal State. Within the scope of this situation, where it is found out that a crime committed and the consequences of which may extend to a State in question, general approach is to prefer barring the vessel in question from its territorial sea. In such a situation, infringement of *non-refoulement* principle will not be an issue. However, ingoing to or outgoing from internal waters with migrants, or embarkation of migrants within internal or territorial seas, or intention to enter into internal seas, will trigger the law enforcement measures or criminal jurisdiction over the vessel.

Although the coastal State has enforcement jurisdiction for the vessel carrying migrants contrary to its immigration law and has right to prevent its entry into her territorial sea, there are two options for the coastal State. First, the status of innocent passage is not valid for the vessel embarked with asylum-seekers. Exclusion of vessels embarking with asylum-seekers from its territorial sea would constitute a breach of *non-refoulement* principle. Not providing the claim of asylum opportunity would result in the automatic rejection of asylum requests and infringement of *non-refoulement* principle. As a result, creation of a suitable ground for seeking asylum and evaluation these requests with fair approaches will require landing the asylum seekers and enabling them to request for asylum. Secondly, the coastal State should not criminalize the vessel in distress asserting that it breached the immigration law of the State in question.

As to the vessels carrying asylum-seekers that approach the territorial sea frontier, actions can legally be initiated in order not to prevent these vessels' entrance into the territorial sea. Here at this point, international law lacks adequate and clearly defined safeguards for the protection of the fundamental right to life of the illegal migrant. That is the failure of international law that should be remedied by new international regulations. However, it will, in many cases, form an infringement of *non-refoulement* principle. Where the State of origin escaped from is contiguous or very close to intervening State, pushing the vessel back from its territorial frontier will constitute an infringement of *non-refoulement* principle. On the other hand, if asylum-seekers are not pushed back to the State they escaped from but to a safe country, the act will not form infringement of *non-refoulement* principle at first glance. In that case, if the latter State does not receive and they finally return to country of origin where they are subject to danger in life or freedom, the first intervening measure constitute breach of *non-refoulement*.

As for the vessels committing migrant smuggling offenses, entering into the contiguous zone, actions like interception, boarding and inspection can be taken as preventive measures by the coastal State. Accordingly, criminal jurisdiction of the coastal State is applicable to the vessel which has committed the crime in the contiguous zone.

In the high seas, which are open to all vessels of any nationality, all vessels can sail without any interception. There are however clearly defined exceptions in the UNCLOS, if there are serious suspicion for piracy, slave trade, human trafficking, illicit trafficking of narcotic substances, WMD, unauthorized broadcasting, flying false flag, and flaglessness.

In such cases, warships or authorised State ships may proceed to verify the vessel's situation. If the suspicion proves real after the documents have been examined, it may proceed to a detailed examination on board the vessel. Taking into account the fact that most of the ships engaged in migrant smuggling offenses on seas are without a flag, the right of visit can be applied to all such vessels. Moreover, since stateless vessels have no protection of any State whatsoever, it is unlikely that there would be an objection to such interception by any other State. The seizure of such vessels is considered legitimate under customary international law.

Thanks to the Migrant Smuggling Protocol, the party States are allowed to board, search and apply more jurisdiction on the vessels without nationality, used for smuggling of migrants. However, they are obliged to secure the safety of the persons on board and treat humanely and take into account of the requirement not to put into jeopardy the safety of the vessel or its shipment.

Besides the flag State's and in exceptional cases, the other States' jurisdiction against illegal migrant on high seas, any jurisdiction is only allowed with the consent of flag State. In case of a State executing measures on high seas such as boarding, that boarding State is obliged to receive asylum seeker's requests and to comply with *non-refoulement* principle. Otherwise, the right to life, prohibition of torture, and non-refoulement principle of the ECoHR, ICCPR and the 951 Refugee Convention would be infringed.

Assisting persons aboard the vessel in distress is the one of the fundamental rules of international maritime law as is the *non-refoulement* principle in the Refugee Law. The States are responsible with coordinating their search and rescue organizations and, whenever required, coordinating search and rescue operations with neighbouring States.

Where lives are under imminent danger, the vessels of any State must intervene in accordance with Migrant Smuggling Protocol which obliges a State not to take additional measures without the explicit permission of the flag State, except those necessary to save persons in imminent danger and those derived from relevant bilateral or multilateral agreements.

As a result of all those examinations, it can be seen that there are various lacunae in the existing rules and regulation on these issues. Such insufficiencies in the relevant rules cause some failures in preventing the illegal migration and smuggling as well as for the protection of the fundamental rights of illegal migrants, especially right to live.

There are first of all many omissions in conventional law with regard to place of safety, punishment for smuggling on the high seas, lack of adequate resources for interception, breaching of *non-refoulement* using push back policy, rapid intervention in smuggling issues, and violating rights of migrants by making readmission agreement. Those lacunae should be filled in appropriate regulations and procedures.

The UNCLOS has no self-executing effect and States must adopt their own laws for the offenses and actions to be taken. Moreover, it has no clear provisions regulating illegal migration, migrant smuggling and as well as human trafficking. The UNCLOS has no provisions concerning human rights matters, either. Those shortcomings limit its capacity to intervene in irregular migration.

It is known that the rules, process, and techniques produced in a specialized sub-field of international law should not be applied in other areas of international law, such as from international human rights law to international law of the sea. However, the right of visit, the right of hot pursuit, the duty to render assistance, and stateless vessel provisions

of the UNCLOS must be applicable in smuggling issues which is likely to be controlled by human rights law.

The Migrant Smuggling Protocol preserves flag State authority over the vessels flying its flag. However, this reservation may impede fights against offenders in migrant smuggling and not protect coastal State against an influx of migration by sea. It has been shown that the notion of "take due account" is not absolute for those rights and obligations of flag State. The lacunae on the measures of the Protocol that are likely to be taken at the territorial sea of other States is based on well-established international law of receiving permission from the relevant coastal State. Therefore, it is not restated within the Protocol. However, the Migrant Smuggling Protocol lacks self-executive provisions and leaves enforcement of appropriate laws at the discretion of States. The Protocol focuses on smugglers and offenses related to smuggling. It does not stress on smuggled persons like in the case of the Trafficking Protocol.

Rescue at sea is part of customary international law and the duty to render assistance is to be applied for all maritime zones. An international organization and fund may be formed for the interdicting States to be funded and to deliver the interdictees to suitable countries under the coordination of that organization.

The State requested authorization to intervene in the suspected vessel is under the commitment of expeditious response. The response requirement must be shortened, and a common view must be achieved for an expeditious response. In case that a State does not reply in time or in expeditious manner, this must result in automatic permission for intervention to migrant smuggling vessels. Namely, the expeditious response requirement does not fulfill accordingly, the requesting party should have right to legitimate intervention. The intervening party is obliged to merely unveil the reason of the action and prove the necessity of interception. Nevertheless, the possibility to abuse of rights should be taken into consideration.

On the other hand, the SAR Convention and the SOLAS Conventions suffered from lack of disembarkation process of those rescued at sea. The lacuna concerning the place of safety for rescued persons was filled on 24th May 2004 by the amendment mentioned previously. With regard to place of safety reserving protection of border, migration control and trafficking of human beings, respect of the rights and dignity of the rescued persons must be utmost. Even though the place of safety incorporated into the SAR Convention in 2004, for the non-party States to it, place of safety is still not clear.

In accordance with the responsibility regarding rescue in the SOLAS, it must be considered that if the State is as close as to reach any person in distress and in the imminent danger of loss of life, then extraterritoriality should be applied to the case as in Article 2 of ECoHR, which is about right to life.

Rescue requirements, disembarkation issues, and *non-refoulement* obligation make States hesitant to intercept flagless boats and they force such boats to traverse into further high seas or territorial sea of other States or departure States. Following the rescue operations, masters of the rescuing vessels have discretion to select a place of safety in accordance with criteria touched upon above. Yet, disembarkation of rescued migrants and repartition of responsibilities between different countries constitutes a lack of clarification. The State that the master of rescuing vessel selects must be put under obligation of receiving rescued people and burden must be distributed among different countries, such as destination, origin, disembarked and neighbouring States.

Within the level of the EU, some States have been declared financial aid and resource deployment in the meaning of sharing of responsibilities through a joint letter. For instance, in order for the prospective-interdicting vessel to refrain from extending rescue, there must be a manual that identifies the place of safety and communication contact points for instruction and notification.

Enforcing any deterrent punitive measures by the landing States must be avoided for vessel companies and shipmasters that have disembarked to a place of safety. Likewise, a requirement on shipmasters, shipping companies, and their insurers to redress repatriation costs of rescued people must not be implemented. “Mobile Protection Response Team”, which aims to help to ensure the immediate needs of migrants are met at reception/disembarkation points, may be another solution.

On the other hand, to secure rights of migrants sailing in a stateless vessel, lack of challengablity of interception on the high seas must be filled with responsibility in line with extraterritorial application of human rights and refuge rights. They should not be immune from liability, thus intercept the stateless vessels and return them. Otherwise, States can act freely, claiming that they are not responsible. Therefore, an explicit rule may be added to the conventions regarding the stateless vessels and extraterritorial application of human rights convention regarding them.

Similarly, since the *non-refoulement* provision does not include an explicit rule in order to protect the lives of migrants and restrict States from acting exclusive on them, an inclusionary provision must be added to migrant and refugee conventions and protocols

concerning extraterritorial application of this principle. Thus, push back measures are to be prevented on the high seas and interpretation of frontier is to be restricted.

Furthermore, regarding non-refoulement principle, “in any manner whatsoever” in Article 33 of the Refugee Convention must be construed humanitarian. For the fact that no binding rule exist, for all/at least many of States, States incline to use the lack of explicit non-refoulement rule. Restricting such use and protecting migrants, *non-refoulement* principle may be exempted for countries receiving a mass influx of economic migrants, and/or burden of proof should be reversed. Alternatively, a right to transfer of migrants by the destination country or through an international organization to another country should be recognized.

The discussion on a pre-existing refugee status is important for the *non-refoulement* obligation. To preclude States from the acts of push back or non-acceptation of migrants, the screening by the local government must be maintained. To avoid the responsibility of mistakenly not awarding refugee status, which may cause a gap in refugee protection, the determination procedure should exist. However, a cross-check mechanism in order for the procedure not to be abused should be involved.

Where a State party is as close enough to reach a person in distress who is in the imminent danger of loss of life, even if human rights conventions lack provisions on extraterritorial application of human rights, extraterritoriality be applied to the case as in Article 2 of the ECoHR and Article 6 of the ICCPR, which is about right to life. International courts or commissions in this respect must act proactively and thus right to life of human rights law may be a tool for rescue operations and interdiction incidents.

Apart from extraterritorial application of those rules, rescue operation within the territorial sea at least or rescue requirements in this regard must be evaluated under Article 2 of the ECoHR and Article 6 of the ICCPR, right to life, for the fact that this sea areas are under sovereignty of relevant State.

Taking into account that small vessels are not registered and have the right to fly the flag of its owners, and that confirmation of registration will be time-consuming and fruitless because the State of interest might not have any registration with regard to that vessel, the right to visit ought to be an option at least. Such vessels on the high sea may be regarded as stateless concerning right to visit following exceeding confirmation time-limit. Only cases of slave trade as a smuggling-like crime permit the right of visit and inspection if so suspected. The Human Trafficking Protocol however has no provision for interdiction. The lacuna in human trafficking concerning interdiction rights must be

construed within the framework of the Protocol's supplementary position to the UNTOC, which has provisions on interdiction. However, for the non-party States the lacuna still exists. The UNCLOS provision of slave trade may be interpreted by analogy to implement human trafficking for those States' vessel on the basis of similarity of acts.

Furthermore, due to the similarity of migrant smuggling and human trafficking with slave trade, slavery concept in the UNCLOS and the 1958 TSC for all States' vessels may be applied by analogy to migrant smuggling and trafficking issues.

Besides, migration control and suppression of human trafficking must be approached with international law of the sea, and international human rights law. Those acts are not a mere criminal justice issue. However, such issue is likely to bring before the ECtHR, extraterritorial application of human rights may govern migration issues, and the Court may divert the practice of member States of the Council of Europe to more humanitarian. In order to ensure the ECtHR gets involved in those issues, more cases must be brought before the Court, even by States, international/regional organizations, or pro-bono lawyers.

Taken into account that the sea route is very dangerous and freedom of navigation may be abused harshly, a global approach for punishment is required. Criminalization and punishment should not be left to the individual countries, some of which have deficiencies in patrolling. Human rights must be preeminent and must govern extraterritorial MLE acts and interception on the high seas. All measures to be taken must be in line with the welfare of refugees; that is, none of them should obstruct their ability to seek protection.

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