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Summary

Free movement of seafarers and their associated rights have been recognized universally throughout history. Maritime jurisdiction has always been defined territorially though conceptualized without boundaries. Threats to state territorial integrity have caused the human element to be sacrificed in favour of heightened security measures, risking the safety of the people that are a necessary to the industry.

The Maritime Labour Convention, 2006, (MLC) will change the current demarcation of jurisdictional reach towards universal protections of seamen's rights by enforcing the provisions therein over any ship that travels into a port of a member state. The Convention's highly expanded compliance and enforcement mechanisms will safeguard established rights of the seafarer. Combined with the Seafarer's Identity Documents (SIDs), seafarer's will be able to realize their rights across borders.

Abbreviations

BUNKERS	International Convention on Civil Liability for Bunker Oil Pollution Damage
CLC	International Convention on Civil Liability for Oil Pollution Damage
CMI	Comité Maritime International
CTSCZ	Convention on the Territorial Sea and the Contiguous Zone
EEZ	Exclusive Economic Zone
HNS	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous or Noxious Substances by Sea
ICJ	International Court of Justice
ILO	International Labour Organization
IMO	International Maritime Organization
ISPS	International Ship and Port Facility Security Code
ITLOS	International Tribunal for the Law of the Sea
LLMC	Convention on Limitation of Liability for Maritime Claims
MARPOL	International Convention for the Prevention of Pollution from Ships
MLC	Maritime Labour Convention
OPRC	International Convention on Oil Pollution Preparedness, Response, and Co-operation
SID(s)	Seafarer(s') Identity Document(s)
SOLAS	Safety of Life At Sea Convention

STCW	Convention on Standards of Training, Certification, and Watchkeeping for Seafarers
SUA	Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea (III)

1 Introduction

The exercise of jurisdiction both on land and at sea has always been more nuanced than traditional conceptions of territoriality admit suggesting an esoteric subterfuge to individual wields of state power that lack international acceptance. That aside, effusive exceptions and limits to jurisdictional reach have consistently been made throughout history while continuing to maintain the premise of strict staid territoriality. Examples of this are ripe in international maritime law. Borders and boundaries are uncongealed at sea compared to on land. Doctrinal principles rooted in natural law and custom, such as *res communis* and the common heritage of mankind or innocent passage and necessity, including concerns like the perils of the sea have always precluded a single sovereign from exercising unrestricted jurisdiction over seafarers. The interrelated responsibilities placed on states and people have their legal origins in the concept of *legentia localis*, which confers corresponding rights and duties upon flag states, port states, and seafarers alike. Competing legal philosophies expounding the law of the sea have always recognized and agreed on the general principles though the reasoning may be different. These principles have not, and cannot, be abrogated or successfully objected to.

The use of the sea for maritime industry has become the central vehicle and fulcrum for globalization, reconstruction, and development through trade. However, the complexities of modern, land based governance demands more comprehensive laws regulating border crossings, national security, and economic activities, *inter alia*. Individual state concerns cannot override the interests of the international community in maintaining the maritime network of commerce and protecting the lives and safety of the seafarers that fuel the industry. These interests have led to *ad hoc* accrual of customs and best practices regarding the isolated and marginalized community of international seafarers. Paralleling developments, the last century has witnessed a great increase and participation in hard legal instruments regulating international maritime affairs. Treaties and conventions have covered everything from technical requirements to piracy responses to human rights of seafarers, and all have been privileged to enjoy success in implementation and ratification without the political line drawing that other efforts in international law and human rights law have experienced.

Historical considerations have been speared into the recent work of the International Maritime Organization (IMO) and especially the International Labour Organization (ILO) in Convention 185 Seafarers Identity Documents (C185) (currently in force), the Maritime Labour Convention (MLC) (almost in force), and similarly progressive instruments such as the Paris Memorandum of Understanding (Paris MoU) and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA). Development of a convention that consolidates many earlier maritime conventions into a comprehensive, rights based convention was overdue as the next progression in international maritime law, especially after the promulgation of the United Nations Convention on the Law of the Sea (UNCLOS) and other hard instruments dealing with jurisdiction and cooperation.

The purpose of this paper is to trace and discuss the history of jurisdiction as it developed on land and at sea and the different types of jurisdictional concepts, their application, and structure. Through this exercise the direction of international maritime law is revealed. The paper then moves on to discuss the Maritime Labour Convention and Seafarer's Identity Documents and their global implications. It is a historical exposé that seeks to illuminate the path of these conventions into the modern international framework.

The method of argumentation utilized is a historical account of the development of jurisdiction in order to set the stage for legal analysis of the MLC and SIDs. The focus on history is intended to showcase the winding path towards the current understanding of jurisdiction and the balance required between state interests and free movement of people and goods. Following the origins of jurisdictional concepts as they are modified and refined to fit the evolving global-scape that is defined both by nature and people will convey the gradual curve towards universal jurisdiction in the maritime context. It has not been a smooth journey, there have been steps forward and back as the balance is stretched and contracted in favour of varying interests that have weighed heavier depending on the power structures and needs of the times. This method aids comprehension and bolsters support for the proposition that the MLC and SIDs have been conceptually viable conventions since time memorial and that regardless of the implications to touch and concern every state and corner of the maritime industry there is precedent through history and law that promote their application.

This goal of this thesis is to analyze recent developments in seafarers' rights by engaging with the historical legal positions to better understand the innovations of today. How far have seafarers' rights come? Are there areas of progress and areas of regress? What changes will the MLC bring, and how?

As the thesis will focus on the International Labour Organization's Maritime Labour Convention, 2006 and issues related to it, the scope of the paper remains within the parameters of rights. Technical and operational issues are introduced collaterally to the discussion. The thesis proceeds more or less chronologically, setting the stage for the reception of the MLC. The primary materials used are books, legal treatises, scholarly journals and articles, cases, conventions, and treaties.

2 Legal Concepts of Jurisdiction and the Legal History of Jurisdiction

The greater portion of the legal history of jurisdiction has been "moored to geographical territory and take[n] for granted that territorially defined sovereign entities . . . are the only possible relevant categories of community affiliation."[1] Territoriality is the conceptual basis for a sovereign imposing rules and laws upon people, whether citizens or not, within the sovereign's own borders. Territoriality limits sovereignty by ending power at the border. The initial conception of territoriality supposed that a state had exclusive jurisdiction within the boundaries of its territory. In theory, every state shared legal equality.[2] Concurrent jurisdiction was viewed as anarchy. Strict territoriality was valued for its predictability and efficiency though it has gradually been eroded due to its inability to deal with transboundary disputes.[3]

Whether it is seen as a transformative moment establishing the interstate system based on concepts of territorial sovereignty[4] or a compact codifying practice and custom,[5] the Westphalian treaties ending the Thirty Years' War mark the inception of the framework through which states govern and interact today.[6] Territorial control legitimized the exclusivity of state authority within the territory's defined boundaries. States were *ipso facto* powerless outside of their territories. Expressions of a state's "general power to exercise authority over all persons and things within its territory" have been refined into legal terms of art describing "jurisdiction."[7]

The rigidity of this starting point demanded exceptions and specialized rules to accommodate the reality. Over time, the use of sovereign territory as the primary basis for determining jurisdiction has been deemphasized, but newer forms of jurisdiction are still articulated through the same, territorial legal tools. The "multiple, overlapping, and often non-territorial conceptions of community" continue to create problematic legal responses to

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[1] P. Schiff Berman, 'The Globalization of Jurisdiction,' 151 *University of Pennsylvania Law Review* (2002), pp. 311-545, at 544.
[2] J. Beale, *A Treatise on the Conflict of Laws (I), Jurisdiction*, (Baker, Voorhis, & Co., New York, 1935),
[3] *See, e.g.*, *Alcoa*, *infra* note 63.
[4] Berman, *supra* note 1, p. 455, *citing* L. Gross, 'The Peace of Westphalia, 1648-1948,' 1 *Essays on International Law and Organization* (1948), p. 10.
[5] D. Philpott, 'Sovereignty: An Introduction and Brief History, 48 *Journal of International Affairs* (1995), pp. 353-368, at 360-364.
[6] Berman, *supra* note 1 p. 455-456.
[7] B. A. Garner (ed.), *Black's Law Dictionary* [Black's], 'Jurisdiction,' (West, St. Paul, 2004).

the way people actually perceive the world and define their respective communities.[8] Developments of positive law like Internet regulation or intellectual property have been forced into this framework and mode of legal expression with often unsatisfactory, inconsistent, or unrepresentative results. This has never truly been the case in international maritime law.

The *lex maritima* has consistently defied many of the jurisdictional problems experienced by other categories of positive law. The subject matter and context of the "general maritime law" developed largely outside of territorially based expressions of law, but paralleled developments in international law. The nature of jurisdiction in all of its manifestations was always fundamentally different in the maritime context, but was still expressed through the legal language of territorial sovereignty.

To elucidate how the unique authority of international maritime law operates, governs states, and influences practice, examination of the doctrinal legal terminologies of jurisdiction is necessary. Identifying the distinguishing features of jurisdictional authority in maritime law lays the foundation to demonstrate the profound expansive effect that the Maritime Labour Convention (MLC)[9] and The Seafarers' Identity Documents Convention (Revised) 185 (Convention 185) are having and will continue to have on jurisdiction in relation to seafarers' rights in the maritime context.[10]

2.1 Jurisdictional Concepts in Exercising State Power

Exercise of state power can generally be described as falling into one of three classifications of jurisdiction: (1) legislative or prescriptive jurisdiction; (2) executive or enforcement jurisdiction; and (3) adjudicative, curial, or juridical jurisdiction.

Legislative jurisdiction refers to a state's authority to create rules concerning activities, statuses, or interests and determine their application.[11] It refers to "a legislature's general sphere of authority to enact laws and conduct all business related to that authority . . ."[12] Territory continues to play an important role in determining whether a particular body possesses legitimate legislative jurisdiction, but factors such as defined subject matter, competencies, and citizenship of the law's applicative target, *inter alia*, may confer or divest a state's exercise of legislative jurisdiction.

Exercising legislative jurisdiction often defines how the rights or status of a person or thing may specifically be determined through adjudicative jurisdiction. Not all legal entitlements

[8] *Ibid*.
[9] MLC, *infra* note 456.
[10] C185, *infra* note 365.
[11] Restatement (Third) of the Foreign Relations Law of the United States [Rest. 3d FR], § 401(a) *Categories of Jurisdiction* (1987).
[12] Black's, *supra* note 7, 'Jurisdiction: Legislative Jurisdiction.'

are judicially enforceable, therefore, a cause of action providing access to adjudication must be provided for through the exercise of legislative jurisdiction.

Executive jurisdiction is a sovereign's ability to compel compliance or alternatively punish non-compliance with its legislative jurisdiction.[13] This can be accomplished by measures such as arrest, detention, and prosecution in enforcing criminal legislative jurisdiction, or through civil sanctions.

Adjudicative jurisdiction is a sovereign's courts' power and competence to subject persons and things to the judicial process where cases are heard and tried.[14] *In personam* or personal jurisdiction is adjudicative jurisdiction based on authority over people and their personal rights.[15] *In rem* jurisdiction refers to a court's authority to determine the rights to real or chattel property.[16]

Proper exercise of adjudicative jurisdiction also depends on factors related to the nature of the court and the nature of the case before it. Jurisdiction *ratione materiae* or subject matter jurisdiction refers to the court's authority to hear the type of dispute before it or afford the type of remedy sought.[17] Jurisdiction *ratione temporis* or temporal jurisdiction relates to a court's authority to hear a matter based on when it occurred. Temporal jurisdiction can be defined by the exercise of legislative jurisdiction (*e.g.* a statute of limitations) or adjudicative jurisdictional prerogative (*e.g.* prudential doctrines such as laches).

Possession of legislative jurisdiction over a specific subject matter does not necessitate exclusive jurisdiction. A court may be vested with adjudicative jurisdiction in an appropriate case, but that does not mean the jurisdiction is exclusive. Concurrent legislative jurisdiction over a river forming a border between two states may be simultaneous between the respective legislatures.[18] Foreign or domestic adjudicative bodies may possess concurrent jurisdiction over the same subject matter or dispute.[19] It may be a litigant's prerogative to choose the forum, the judiciary may make a decision based on doctrines like venue or comity, or the legislature or court may issue procedural rules that provide the answer.

These three broad categories of jurisdictional powers are imperfect, but suffice to describe the bases of *authority* in the operation of law. In other words, these concepts all describe the operation of binding law, where a state's exercise of power in relation to the individual, property, or status is supreme and controls the disposition.

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[13] Rest. 3d FR, *supra* note 11, § 401(c).
[14] *Ibid*, § 401 (b).
[15] Black's, *supra* note 7, 'Jurisdiction: Personal Jurisdiction.'
[16] *Ibid*, 'Jurisdiction: *In rem* Jurisdiction.'
[17] *Ibid*, 'Jurisdiction: Subject Matter Jurisdiction.'
[18] *Ibid*, Jurisdiction: Concurrent Jurisdiction (2).'
[19] *Ibid*, Jurisdiction: Concurrent Jurisdiction (1).'

2.1.1 Territoriality and its Limitations and Exceptions

Strict territoriality sets a clear, bright line for governance, but its simplicity cannot withstand the numerous societal and geophysical factors that modify its application. Historical context, legal tradition, governmental structure, applicable international law, and other factors, may all play a role in expanding or contracting a state's jurisdiction beyond the foundational premise of territoriality.

In reality, territorial jurisdiction is as flexible on land as it is on the high seas. Numerous exceptions are carved out to accommodate the diversity of situations, but respect for and commitment to territorial integrity and sovereignty remains of primary importance.[20]

2.1.1.1 The Influence of Religion in the International Structure and Its Limitations on Territorial Jurisdiction

Religious institutions, such as the Catholic Church, were influential and often directly in control of early international law.[21] The Holy See is the supreme spiritual jurisdictional body of the Catholic Church in Rome, and the pope, as bishop, is the ranking leader.[22] Supreme spiritual power was widely acknowledged. The pope exercised legislative jurisdiction through papal bulls, executive jurisdiction through decrees such as excommunication or interdict, and adjudicative jurisdiction to resolve disputes regarding spiritual matters as well as more directed territorial issues.[23] Spiritual jurisdiction was exclusive and was also wielded indirectly, as is the case where an individual religion was established as the state religion or through leading by moral example and instruction thereby obligating members of the community to follow.[24]

The pope was the most influential figure in the Catholic European community's international engagements, frequently "fill[ing] the political vacuum" in the relatively nascent international state system by acting as the "supreme mediator."[25] The Holy See was

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[20] *See*, *e.g.*, United Nations Security Council, *Resolution 1973 on the Situation in Libya (2011), 17 March* 2011, S/Res/1973 (2011), preamble, para. 4 (authorizing Member States to "take all necessary measures . . . to protect civilians . . .*while excluding a foreign occupation force of any form on any part of Libyan territory*," while at the same time "reaffirming [the Security Council's] strong commitment to [] sovereignty, independence, and territorial integrity . . ."), *emphasis added*.

[21] *See generally*, R. J. Araujo & J. A. Lucal, 'A Forerunner for International Organizations: The Holy See and the Community of Christendom – With Special Emphasis on the Medieval Papacy,' 20 *Journal of Law and Religion* (2005), pp. 305-350.

[22] *Ibid*.

[23] *Ibid*, p. 339 (noting Pope Alexander II's blessing of the Norman invasion of England and Adrian IV's grant of Ireland to Henry II of England).

[24] *Ibid*, pp. 337-338

[25] *Ibid*.

involved in the making of treaties between states for centuries, which greatly shaped the conduct of international relations.[26]

Papal powers naturally carried over into the physical realm, and the establishment of Papal States linked the concept of papal rule to the territorial conception of state jurisdiction.[27] The pope became the sovereign ruler of defined territories with powers similar to any other sovereign ruler.

The Holy See's spiritual jurisdiction subordinated the territorial jurisdiction of sovereigns in some concerns that were wholly secular and intrastate. The pope's jurisdiction *ratione pecatti*, or jurisdiction based on sin or moral consideration, empowered him to intervene in secular matters with moral dimensions.[28] The extent of this jurisdictional reach was tremendous. The pope was capable of releasing subjects from their duty of allegiance to territorial, spiritual sovereigns where the ruler committed sinful or morally reprehensible injustices.[29]

Though states and religious communities predated the Westphalian conception of territoriality, this power structure is markedly similar to the international system today. Sovereign states still exist and the exercise of jurisdictional powers is affected by the international legal system, which is recognized as the figurehead of the international community.

This power dynamic is not unique to Catholicism; the structure is paralleled in Islam.[30] All schools of Islam believe that anything issued from a human being, such as a status, act, or speech has an applicable legal rule (*hukm*, pl. *akham*) in the Divine Law of Islam (*al-shari'a*).[31] *Fiqh*, or the collection of *ahkam*, draw mainly on holy texts such as the Qur'an or *sunna*.[32] These sources can be regarded as the primary authority of legislative jurisdiction in the Islamic community. Only qualified Islamic legal scholars (*mujtahid*) have the jurisdiction to determine legal rules not expressly provided for by drawing upon the community consensus (*ijma*) and analogies (*qiyas*) in addition to the Qur'an and *sunna* to deduce new or modified legal rules.[33] This condensed description suffices to demonstrate the existence of a supreme set of laws that apply based on community membership irrespective of territorial concerns.

Modern international law reflects this growing recognition of community membership altering traditional jurisdictional conceptions. The UN Declaration on the Rights of

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[26] *Ibid*, pp. 338-339.
[27] *Ibid*, pp. 337-339.
[28] *Ibid*.
[29] *Ibid*, *citing* G. Goyau, 'L'Eglise Catholique et le Droit des Gens,' 6 *Recueil Des Cours* (1925), p. 169.
[30] *See generally*, A. al-Wahhab Khallaf, *Ilm Usul al-Fiqh (Science of the Roots of Islamic Jurisprudence)*, (Dar al-Kuwaytiyyah, Kuwait, 1978).
[31] *Ibid*, pp. 7-10.
[32] *Ibid*.
[33] *Ibid*.

Indigenous Peoples, though taking a soft law approach, recognizes the unique jurisdictional situation of indigenous peoples.[34] The general vision is of a people, externally and internally identified, exercising and being protected by human rights in a way that reconciles traditional territoriality with the rights of a borderless community. The analogy to the seafarer is clear, and both situations present challenges to the ways states operate internationally and domestically.

2.1.1.2 Systems of State Governance and Legal Traditions

A bedrock principle of the modern international legal system views all states as sovereign and equal among each other in the international arena.[35] There are obvious exceptions to the rule such as the permanent members of the UN Security Council, but the reasoning behind such differentiation arguably preserves the accuracy of the general legal assertion.[36]

Spiritually based jurisdictional arrangements operated under a less static dynamic than the UN system. The multilayered personal alliances and allegiances of rulers, subjects, and the *ecclesia* affected the degree of jurisdictional authority wielded by a sovereign. Conversely, the P5 states retain specific powers beyond other states.

Many modern states governance forms reflect the multiple community identities within national territories and seek to amicably apportion jurisdiction among groups and territories within the larger spectrum. Federalist states,[37] plurinational states,[38] confederations,[39]

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[34] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous People*, 2 October 2007, UN Doc. A/RES/61/295, preamble (recognizing "inherent rights" deriving from "political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources" alongside the polar historical facts of jurisdiction-stripping "colonization and dispossession" and jurisdiction-respecting "treaties, agreements, and other constructive arrangements."

[35] M. N. Shaw, *International Law* (6th ed.) (Cambridge University Press, Cambridge, 2008), p. 129 (*citing* to Hans Kelsen, Antonio Cassese, and Richard Anderson Falk, *inter alia*, to demonstrate this fundamental understanding).

[36] United Nations, *Charter of the United Nations* [UN Charter], 26 June 1945, *entry into force* 24 October 1945, 59 Stat. 1031, TS 993. "The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council," art. 23(1). "The specific powers granted to the Security Council for the discharge of th[eir] duties are laid down in Chapters VI, VII, VIII, and XII.," *ibid*, art. 24(2).

[37] *E.g.* the United States of America.

[38] *E.g.* Plurinational State of Bolivia.

[39] *E.g.* the Swiss Confederation (Switzerland).

federations,[40] secular kingdoms,[41] religious kingdoms,[42] and republics[43] are some forms that exist at the national level while unions and other arrangements exist at the international level.[44]

All of these forms carry with them unique jurisdictional capacities, but it should be noted that seafaring nations throughout history favoured the republican system.[45] The flexible, decentralized power arrangement and economic relationship not only suited the maritime industries and fostered their growth, but also the mercantile class, a community identified and affiliated through maritime trade.

Community based jurisdictional arrangements appear in many forms to suit particular contexts. Another example of community-based jurisdiction is clan-based chieftaincy in Ghana. Though challenging to the default conceptions of territoriality, chieftaincy exists alongside the Ghanaian state in a dynamic jurisdictional relationship.[46] The state system is modelled on the common law heritage of England as the last colonial power preceding Ghanaian independence in 1957.

The common law system that originated in England and transplanted itself elsewhere in the world through imperial forces has maintained much of its form in the Ghanaian governmental system as it has in many other nations. The flexible court powers of equity, judicial review, and precedent facilitate the operation of overlapping legal systems and

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[40] *E.g.* the Russian Federation.
[41] *E.g.* the United Kingdom of Great Britain and Northern Ireland.
[42] *E.g.* the State of Brunei, the Abode of Peace (Brunei, a constitutional Islamic sultanate).
[43] *E.g.* the Republic of India.
[44] *E.g.* the European or African Unions.
[45] K. Haakonssen, 'Republicanism,' *in* R. E. Goodin & P. Pettit. (eds.) *A Companion to Contemporary Political Philosophy* (Blackwell Publishers, Ltd., Oxford, 1993), pp. 568-574. Haakonssen describes the two major systems of government in the late Middle Ages running through the Renaissance as landed monarchies and commercially powerful mercantile elites based in port cities forming republics. Examples such as the Italian city-states (which did not unify until 1871) and the Hanseatic League, that included ports from Dordrecht and Amsterdam north through Bremen, Lübeck, Danzig, Königsberg, Riga, and Tallinn, and across the Baltic Sea to Wisby and Kalmar. Novgorod, Stockholm, Malmö, Copenhagen, London, and Antwerp were among the foreign depots of the Hansa.
[46] *See, e.g.*, Ghana Chieftaincy Act, 1971 (Act 370), *as amended by* Chieftaincy (Amendment) Decree, 1973(National Redemption Council Decree 166), Chieftaincy (Amendment) (No. 2) Decree, 1973 (National Redemption Council Decree 226), Chieftaincy (Amendment) Law, 1982 (Provisional National Defence Council Law 25) Chieftaincy (Amendment) Law, 1993 (Provisional National Defence Council Law 307), and Chieftaincy Act, 2008 (Act 759) (describing in sections 42 and 43 the jurisdictional arrangements between chiefs and the state government, which include a consultative process for chiefs to codify customary law within the national legal system). *See also*, Ghana Courts Act, 1993 (Act 459), sec. 57. "Subject to the Constitution, the Court of Appeal, the High Court a Regional Tribunal, a circuit Court and a District Court shall not entertain at first instance or on appeal, a cause or matter affecting Chieftaincy."

jurisdictional arrangements, and have served the jurisdictional interests of diverse populations such as in Ghana, India, and the United States.[47]

In any governance system, the extent or kinds of jurisdictional exercises available depend on the legal personality of the objects of governance, which are most commonly people. What rights and duties are held and owed to and by states and people are generally articulated through the concept of citizenship.

2.1.1.3 Citizenship and Allegiances

The initial conception of the territorial sovereign granted extraordinary authority over subjects.[48] It was a sovereign's prerogative to govern and impose rules on people within its territory in exchange for availing oneself of the sovereign's protection. Trade, diplomacy, war, and other factors encouraging the movement of people across borders presented constant challenges to the conceptions of allegiance that constituted the subject/ruler relationship. Even early, groundbreaking developments in the legal operation of territoriality, jurisdiction, and citizenship look back to ancient sources that acknowledge the special nature of differing contexts.

The 1609 English decision of *Calvin's Case*, penned by Lord Coke, dislodged the concept of citizenship from territoriality in the common law.[49] At the time that James VI of Scotland ascended the English throne in 1603, Calvin was a child born in Scotland who was denied the ability to hold a legal interest in a dwelling in London on the grounds that he was an alien.[50] The decision referred to historical precedent *ad nauseum* and the holding eventually reasoned that allegiance is owed to the physical king, and not the metaphysical king that was a creation of English law. In this way the English crown could legitimately claim the Scots as subjects.[51] Coke therefore distinguished different types of allegiances that could render legally valid jurisdiction: (1) *ligeantia naturalis*, allegiance due by nature or birth, (2) *ligeantia acquisita*, or allegiance by acquisition or naturalization, (3) *ligeantia legalis*, or allegiance owed to the king, and (4) *ligeantia localis*, or allegiance by virtue of a quasi-contractual relationship between an alien and the sovereign in whose territory the alien is located.

Of greater interest and significance than the controversy at bar is Lord Coke's discussion of *ligeantia localis*. He points to the various contents of the registers relating to the power of the king over foreign subjects within and domestic subjects outside the realm, such as issuing decrees of safe passage applicable to foreign "*admirals*, chatelains, keepers of castles, villas and other fortresses, provosts, sheriffs, mayors, customers, *keepers of ports*

[47] *Accord*, 25 U.S.C. "Indians" (United States) (codifying as law, alongside the body of precedent, a complicated and intertwined jurisdictional relationship between the United States federal government, state governments, and tribal governments).
[48] *See* discussion, *post*.
[49] *Calvin's Case*, 7 Coke's Reports 1a, *English Reports* LXXVII (Edinburgh, 1907), at 377 (S. Shepherd, trans.).
[50] T. S. Martin, '*Nemo Potest Exuere Patriam*: Indelibility of Allegiance and the American Revolution, 35(2) *The American Journal of Legal History* (1991), pp. 205-218, at 205.
[51] *Ibid*, pp. 205-206.

and other maritime places, bailiffs, ministers, and others."[52] The jurisdictional exercise, commanding safe passage, is small and framed largely as an order to refrain from malfeasance rather than to affirmatively act. As the subject of one sovereign is temporarily entering the territory of another, his *ligeantia naturalis* does not change and *ligeantia acquisita* is inapplicable. The visitor owes *ligeantia localis*, which entails the same exchange of promises regarding the sovereign and subject protecting each other. The degree is proportionally less, as "local allegiance is something mean and small, and extremely uncertain."[53]

There is a right present in Coke's reasoning, for an alien to be recognized as having rights in a foreign territory that alien should have some legitimate business such as trade, diplomacy, or acquiring necessaries. References to the customary practices of allowing seafarers sufficient access to ports based on a particular legal relationship demonstrate an awareness of the needs of particular classes of people and the time-honoured solutions. Remarkably Coke's references contain a common command directed at all agents of the foreign state's jurisdiction: "if any wrong," as recognized under the domestic conception, "is done to [subjects] owning the foreign sovereign *ligeantia localis*, that the agents of that sovereign's jurisdiction shall" cause it to be reformed, *etcetera*."[54] This rule exists *ex institutione naturae,* which is from natural law into the customary. The Royal English acts and decrees are positive manifestations of these rules.

Thus, there was a customary exchange of allegiances when people moved across borders in the old order. Movement was commonplace, and it conferred powers upon the sovereign as well as privileges and rights upon the subject along with his or her respective duties to the sovereign was a matter of fact proposition. Lord Coke recited the doctrine of *ligeantia localis* as a step towards establishing the new rules of allegiance. There was nothing controversial about establishing *ligeantia legalis* in the early 1600s, but as the state to subject power balance began to change in response to the shift towards governments legitimating their power in democratic principles, the notion of community in the legal conception of citizenship became more insular. This did not constitute an abrogation or abandonment of *ligeantia localis* rights, but they merely fell into disuse in legal reasoning for a period of time.

The power balance became inverted as philosophers such as Locke, Montesquieu, and Rousseau advanced the Enlightenment concept of the nation-state.[55] Jurisdictional authority was made legitimate by the consent of the people. Jurisdiction of the state required the loyalty of the people to exist and could no longer dictate allegiance. The role reversal also ushered in the idea of 'national rights,' which were areas where the sovereign's jurisdiction was defined or contracted.[56]

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[52] *Calvin's Case*, *supra* note 49, *emphasis added*. Originally, "*admirall', castellan', custodibus castrorum, villar', et aliorum fortalitiorum praepositis, vicecom' majoribus, custumariis, custodib' portuum, et alior' locor' maritimor' ballivis, ministr'*."
[53] *Ibid*. Originally, "*localis ligeantia est ligeantia infima et minima, et maxime incerta."*
[54] *Ibid*. Originally, "*Et si quid eis forisfactum fuerit, &c. reformari faciatis*."
[55] Berman, *supra* note 1, pp. 456-457.
[56] *Ibid*.

Enlightenment ideas fostered the concept of citizenship in the international jurisdictional equation. Replacing the feudal compact with the social contract diminished state jurisdiction in relation to settled subject matters. The concept of citizenship eventually favoured jurisdiction based on community over territory. The national sovereign could thus regulate the conduct of citizens abroad.

Before this shift however, other historical factors contributed to favouring a rigid form of territorial sovereignty. Desire to increase European wealth, seeking innovations in military technology, and the discovery of "new lands" prompted early international legal scholars such as Francisco de Vitoria and Hugo Grotius to advocate theories of sovereign authority that could, under strict circumstances, legally confer jurisdiction over subjects in another sovereign's territory.[57]

It should be noted that the decline of binding, spiritual jurisdictional authority did not necessarily change the degree of influence that existed over a subject, but it did change the nature of the influence. The number of constituent members of Christendom did not diminish, but the demographic changed due to countervailing forces such as the Protestant Reformation. Changes in faith contributed to the decent of papal authority over sovereigns. Papal authority became persuasive in opposition to the binding character of state authority. Statesmen and laymen alike remained reliant on the Christian moral persuasion in the new democratic forms of government. Religious principles were freely used for guidance where gaps in positive law were encountered. Moral principles served as guideposts that were articulated through 'natural law' precepts that governed Christians and heathens alike regardless of notice. These natural law precepts favoured the model of the European sovereign and laid the foundation for legitimizing colonialism. This shift once again changed the conceptions of jurisdiction. The response elevated positive law answers and modified the status of the natural law doctrine from binding to persuasive.

The modern legal notion of citizenship and its relation to jurisdiction is multifaceted. Default citizenship can be based on one of two broad territorial categories that form the starting point: *jus soli*, based on place of birth, and *jus sanguinis*, or citizenship based on blood relation.[58] *Jus soli* citizenship is thus based on a territorial community philosophy whereas *jus sanguinis* citizenship is based on an ethnic or lineal community. As Coke's characterization that "ligeance is a quality of the mind, and not confined within any place" still rings true, there are legal mechanisms such as naturalization, asylum, and refuge that can also confer citizenship.[59] The networks of international agreements and transportation however carry on the principles of *ligeantia localis* as opposed to *ligeantia acquisita* in relation to the movement of people relating to economic activity such as trade, foreign employment, or tourism.[60] Economic activity, as manifested in the *lex mercatoria*, has led

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[57] *See generally* S. L. Snell, Courts of Admiralty and the Common Law: Origins of the American Experiment in Concurrent Jurisdiction (Carolina Academic Press, Durham, 2007).
[58] Black's, *supra* note 7, '*jus soli*,' '*jus sanguinis*.'
[59] *Calvin's Case*, *supra* note 49.
[60] *See, e.g.*, *Cook v. Tait*, 265 U.S. 47 (1924). In this seminal American case regarding the

to many progressive developments in the jurisdictional exercises beyond territorial power bases. The historical relationship of the *lex mercatoria* to the *lex maritima*, *post*, at times considered one in the same, should be borne in mind as it relates to the discussion of seafarer's rights in chapter 4, *infra*.

2.1.1.4 Extraterritoriality

Many questions regarding how far jurisdiction can be extended have been answered in the adjudication of disputes involving international trade and commerce. The legal tool of effects jurisdiction perhaps represents this best.

Effects jurisdiction is a relatively recent formulated strain of jurisdiction that has taken shape largely due to the globalization of the world. It is not based on the presence of the person or thing, or the status of the individual, but rather on the reach of the act. If an act takes place wholly outside of one territory but somehow touches and concerns another territory, those effects are judiciable and can be used to bring the actor into the jurisdiction of the other territory. Effects jurisdiction is most typically applied in antitrust and environmental cases. This type of jurisdiction has the effect of holding states outside the territory to the standards imposed inside if the actions outside create effects within. Until recently effects jurisdiction was viewed by most of the world, other than the United States,[61] as straying too far from the assumption that all legislation is *prima facie* territorial.[62]

2.1.1.5 Principles of Contract Law

Modern contract law allows people to choose what laws are going to govern their contractual relationship. Parties can often agree on whatever sources of substantive law, procedural rules, adjudicative body, or forum they choose. This is true in national legal

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legal status of citizenship in relation to the federal government's power to tax, the Supreme Court held that the power to tax is not based upon the *situs* of property but on the person's relationship to the government as a citizen. This reasoning would later extend the core jurisdictional exercise of taxation based on relation.

[61] *See, e.g.*, *In re Wood Pulp Cartel: A. Ahlström Osakeyhtiö et al. v. Commission*, Nos. 89, 104, 114, 116, 117, 125, 126, 127, 128, and 129/85, ECJ, 25 May 1988, [1988] E.C.R. 5193. In *in re Wood Pulp Cartel*, the Commission alleged that the EC Commission maintains that a number of wood pulp producers are engaged in concerted practices on prices. The fact that the concerted plans took place in part outside the EU was of no consequence. The ECJ finds direct and intentional effect in the EU market. This case illustrates EU adopting the US effects test developed in case law, but it explains it in terms of territoriality. *See also*, *United States v. Aluminium Co. of America (Alcoa)*, 148 F.2d 416 (Federal Court of Appeals for the Second District 1945).

[62] *American Banana Co. v. United Fruit Co.*, 213 U.S. 247 (1909), p. 357, *citing Ex Parte Blaine*, L.R. 12 Ch.Div. 522 (United Kingdom), p. 528.

systems,[63] under regional legal arrangements,[64] and under international legal arrangements.[65] These flexible arrangements allow parties to determine their legal universe, but there are limits. These limits are best illustrated by the distinction made between mandatory and voluntary law.

Mandatory law cannot be freely bargained out of. Prime examples are criminal law or tax law. One cannot contract out of the application of criminal laws or applicable taxes. A sovereign, however, can waive their immunity through contract.[66] Voluntary law, or elective law allows a more eclectic, self-determinative approach. Voluntary law is not so much a set of laws as it presents how the law responds to transactions where people have choices. There are still limits and guidelines to such choices.

Contract law generally allows *a la carte* selection of voluntary legal obligations, while mandatory laws will be applied where needed.[67] Legislatures and courts also have power to

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[63] *See, e.g.,* Uniform Commercial Code § 1-301 'Territorial Applicability; Parties' Power to Choose Applicable Law' cmt. 1 (United States), "[§ 1-301](a) states affirmatively the right of the parties to a multi state transaction or a transaction involving foreign trade to choose their own law. That right . . . is limited to jurisdictions to which the transaction bears a "reasonable relation. Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen."

[64] *See, e.g.,* Convention on the Law Applicable to Contractual Obligations [Rome Convention] [1980] OJ C 27/34 (L266), *reprinted in* 19 I.L.M. 1492 (1980), art. 3 "Freedom of Choice," sec. (1). "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

[65] *See, e.g.,* International Chamber of Commerce/Comité Maritime International, International Maritime Arbitration Organization Rules (1978), arts. 8-10, Place of Arbitration, Procedure and Applicable Law.
"Article 8: The place of arbitration shall be that agreed by the parties. In the absence of such an agreement, the place of arbitration will be fixed by the Standing Committee.
Article 9: Unless otherwise agreed, the Rules governing the proceedings before the arbitrator shall be those set out in these Rules and, where these Rules are silent, any Rules which the parties (or, failing them, the arbitrator) may settle.
Article 10: 1. The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict of laws which he deems appropriate. 2. The arbitrator shall assume the powers of an amiable compositeur only if the parties have agreed to give him such powers."

[66] See, e.g., *Karaha Bodas Co., L.L.C. v. Perushaan Pertambangan Minyak Dan Gas Bumi Negara* [*Pertamina*], 313 F.3d 70 (Federal Court of Appeals for the Second Circuit 2002), cert. denied, 539 U.S. 904 (2003).

[67] *See, e.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The United States

choose forums for adjudication. Courts generally employ an interest analysis to determine what forum has greater interest in applying their laws to a transaction, but these interests can be extremely diverse. With or without choice of law or choice of forum clauses, interests ranging from comity (political),[68] to public policy[69] to being a global financial centre (financial) may affect the determination of a forum and the law applied.[70]

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens."[71] Though comity can be expressly provided for by treaty, it is generally a rule of custom and considered a best practice in international relations. The main legal force of comity is thus persuasive, not binding, though in practice considerations of comity frequently affect the exercise of

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Supreme Court upheld a forum selection clause choosing the High Court of Justice in London to govern a dispute arising out of a maritime contract for towing a drilling rig from Louisiana, US to Italy. Note how 'far from routine' forum choices are completely logical in the maritime context where the court states, "we are concerned with a far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea. In the course of its voyage, it was to traverse the waters of many jurisdictions. The *Chaparral* could have been damaged at any point along the route, and there were countless possible ports of refuge. That the accident occurred in the Gulf of Mexico and the barge was towed to Tampa in an emergency were mere fortuities. It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly, much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found . . . As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction, and to provide a neutral forum experienced and capable in the resolution of admiralty litigation." *Ibid*, pp. 13, 17.

[68] *See, e.g., Timberlane Lumber Company v. Bank of America*, 549 F.2d 597 (Federal Court of Appeals for the Ninth Circuit 1976) (demonstrating the proposition that, even where laws could be applied appropriately, comity may dictate otherwise).

[69] *See, e.g.*, *Roby v. Corporation of Lloyd's*, 996 F.2d (Federal Court of Appeals for the Second Circuit 1993) (demonstrating the unwillingness to apply the securities laws of another nation).

[70] *See, e.g.*, New York State Code, Law of General Obligations, Title 14 § 5-1402(1) 'Choice of Forum.' "Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding . . . any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign

jurisdiction.

The Supreme Court of the United States has proposed that international comity may limit extraterritorial application of laws.[72] However, comity tends to be applied rarely in some instances, such as antitrust cases. The concerns associated with the application of comity only come into play after the court decides that the acts complained of are subject to the Sherman Act.[73] Where comity applies it is questionable whether a court can adequately appraise a foreign sovereigns interests and do so without exhibiting bias towards ones own state interests.[74] Outside of this example, comity has not been found to significantly limit the extraterritorial exercise of jurisdiction.

2.1.1.6 Universal Jurisdiction and International Criminal Law

The polar legal opposite of restraint through comity is the exercise of universal jurisdiction. Universal jurisdiction has developed as a civil legal response to gross and systemic violations of international human rights laws, particularly *jus cogens* norms. The parallel development of international criminal law has provided a further complement to the criminal component. Both versions base their legitimacy in the universality of human rights, and the goal of freedom from violations of peremptory norms. The validity of the jurisdictional exercise is framed more as being duty based by virtue of membership in the human community, rather than as one of power or discretion. In other words, the jurisdictional exercise is proper where the focus is on protecting the right-holder rather than punishing the individual behaviour.[75] Mary Robinson, the former UN High Commissioner for Human Rights, has stated,

"[t]he principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled — and even obliged — to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim."[76]

The Princeton Principles on Universal Jurisdiction are a pre-eminent articulation of a model of a universal jurisdiction regime at the international level, though it is only focused on

corporation or non-resident agrees to submit to the jurisdiction of the courts of this state."
[71] *Hilton v. Guyot*, 159 U.S. 113 (1895), pp. 163-64.
[72] *Ibid*, pp. 163-164.
[73] *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), pp. 797-798.
[74] *See, e.g., National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (Federal Court of Appeals for the Second Circuit 1981), p. 8.
[75] Princeton University Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, (Princeton University, Princeton, 2001), foreword, p. 15 (describing international criminal law's preoccupation with ending impunity, which is not just punishing an individual but eradicating the culture of not punishing terrible acts that breeds such atrocities).
[76] *Ibid*, foreword, p. 16.

criminal liability.[77] The most common form of national response is typically through statutes conferring jurisdiction to hear cases involving violations irrespective of the parties or where the events occurred.[78] As the unilateral exercise of criminal jurisdiction in such a broad manner has more repugnant qualities than civil jurisdiction, other formulations have opted for the strategy of civil liability.[79] International consensus has not been reached in either case, but with other doctrinal developments, such as the responsibility to protect (R2P), expansion of the concepts to some degree is naturally expected.

2.1.2 Common Themes

The *lex mercatoria* and the *lex maritima*, can be likened to international common law.[80] There are basic principles that are drawn upon and altered accordingly in various jurisdictions, leading to nuanced versions of the same basic principles. As with religion, the *lex mercatoria* and *lex maritima* represent the existence of a supreme set of laws that apply based on community membership irrespective of territorial concerns. Uniformity of law is an important component to easing international trade and national legal systems are generally extremely accommodating to international commerce.[81] Territorial concerns are relaxed to facilitate an industry that is integral to the stability of the nation. With that comes a community of people whose rights must be acknowledged and protected.

Seafarers represent a borderless community of people that must be recognized by states both externally and internally in order to adequately protect their rights as well as promote safety and security. The principle of *ligeantia localis* promotes camaraderie between a state and this transitory community of seafarers instead of treating them as wholly alien and threatening to the security of the territory. Encouraging economic activity through trade and commerce has always been respected through various forms of international agreement. Financial considerations are generally applied extraterritorially. Strict territoriality is not equipped to deal with disputes across borders, which is a conspicuous facet to international

[77] *Ibid*.
[78] *E.g.* An Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 10 February 1999 (Belgium), *reprinted in* 38 I.L.M. 918 (1999). The ICJ later determined this statute to confer neither civil nor criminal jurisdiction in Belgian courts over foreign state officials. *See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium*, 14 February 2002, I.C.J. Reports 2002, p. 3.
[79] *See, e.g.*, The Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (United States) (creating a cause of action in tort for wrongful death and civil liability for extrajudicial killings or torture against anyone acting under actual or apparent authority or colour of law of any foreign nation).
[80] *See*, *e.g. The Gratitudine*, (1801) 3 C. Rob. 240, 271, 165 Eng. Rep. 450 (United Kingdom), p. 461 (recognizing the *lex mercatoria* as a practice "which all tribunals are bound to respect, wherever that practice does not cross upon any known principle of law, justice, or national policy."
[81] P. B. Stephen *et al*., *International Business and Economics Law and Policy*, (3d ed.) (LexisNexis,San Francisco, 2004), p. 139 (explaining the "accommodation of national legal systems to international commerce").

trade.

Universal jurisdiction is proper where community rights require protection from violations that are seriously pernicious to international interests. Maritime law developed mostly outside of expressions of territoriality and citizenship, but the legal language and history evinces obvious departures from strict application of the terms where there is a differently situated community. The seas are unique and demand differential jurisdictional treatment.

The next chapter looks more closely at the development of international maritime jurisdiction and its structure and nuances.

3 The Development of the International Maritime Law of Jurisdiction

International law and custom are the primary means used to govern over the seas.[82] All sovereign bodies are expected to cooperate with international maritime law and custom and are not free to act independently in this context.[83] The sea is viewed as mankind's common heritage; maritime laws suitably reference and respect the collaboration and cooperation required between states to adequately ensure equality at sea.[84] This perspective reflects the traditional uses of the seas for navigation, fishing, and transportation.[85] International maritime laws originated from time-honoured traditions and customs that have been followed throughout history no matter what boundaries were in existence, accordingly no state can unilaterally dictate to another the laws to be followed.[86] At the same time, economic considerations have always weighed heavily on codifications based on those principles. Traditional rights of the seamen have been balanced against modern economic

[82] Shaw, *supra* note 35, pp. 555-556.
[83] *See* F. X. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, The Hague, 2000) p. 114. Though the application of Perrez's argument focuses on international environmental law, the majority of his work is devoted to developing the idea that "[s]tates are no longer acting as free 'individuals, independent of other, and there remain increasingly few aspects of life which are not responding to and dependant on activities outside the artificial boundaries of a state. These changes indirectly and directly challenge the traditional understanding of sovereignty as supreme authority and independence."
[84] United Nations, *United Nations Convention on the Law of the Sea* [UNCLOS], 10 December 1982, *entry into force* 16 November 1994, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982), art. 89, *See also* United Nations, *Convention on the High Seas*, *1958*, 29 April 1958, *entry into force* 30 September 1962, 450 U.N.T.S. 82, art. 2. *Accord* United Nations General Assembly, *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, G.A. Res. 1962, U.N. Doc. A/5515 (1963), U.N. G.A.O.R. Supp. (No. 15) at 15, *and* United Nations, *International Co-operation in the Peaceful Uses of Outer Space*, 10 December 1993, U.N. Doc. A/RES/48/39, G.A. Res. 1721 (XVI); *and* United Nations, *Resolution Regarding Weapons of Mass Destruction in Outer Space*, 17 October 1963, G.A. Res.1884 (XVIII).
[85] *See* T. M. Mulvaney, 'Instream Flows and the Public Trust,' 22 *Tulane Environmental Law Journal* (2009), pp. 315-377, at 353, *and* J. A. Levick, 'From Sovereignty to Fishing Rights: The Historical Evolution of the Territorial Sea,' 3 *Digest of International Law* (1996), pp. 36-52, *and* M. S. McDougal & W. T. Burke, 'Crisis in the Law of the Sea: Community Perspectives Versus National Egoism,' 67 *Yale Law Journal* (1958), pp. 539-589, at 549, 555, 568, 588 fn. 165.
[86] Shaw, *supra* note 35, pp. 555-556.

interests effecting the degree of protection historically availed to this community of people.

3.1 Incorporating the ILO into the Modern International System

The UN was originally conceived as a post-war response to foster good international relations between states and protect individuals from such catastrophic events by recognizing and protecting the territorial integrity of states as delimited by post-WWII boundaries.[87] Scholars have noted that preservation of *uti possidetis* or territorial integrity based on "the transitional separation of the spheres of influence since 1945 had been a binding principle until 1989.[88]

Before the UN was established, the harsh reality of the working environment produced by the industrial revolution gave rise to demands for the regulation of working conditions. The first concerted effort of international regulation of labour convened in Berlin in 1890.[89] The assiduously asserted force behind the regulations was clearly humanitarian, but multilateral action was generally favoured due to concerns of economic competitiveness; unilateral action would raise costs and decrease competitiveness with other markets.[90] Fledgling national efforts aimed at regulating the facets of the work-life balance were initiated in countries such as England, but the movement never gained solid footing until international proposals took the form of uniform standards applied with contextual and national particularities.[91]

The International Congress on Labo[u]r Legislation first convened in Brussels in 1897 and subsequently succeeded in producing the first two international labour conventions.[92] The second of these, adopted in 1906, regulated the working hours for women in the industrial workforce engaged in night work.[93] The general rule established by the instrument prohibited such work,[94] but provided exceptions to the rule based on weekly working hours

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[87] F. A. Gabor, '*Quo Vadis Domine*: Reflections on Individual and Ethnic Self-determination under an Emerging International Legal Regime', 33 *International Law* (1999), pp. 809-824.
[88] *Ibid*, p. 818, *citing* V. Mastny, 'The Legacy of the Old International Order,' *in* A. Clesse *et al*. (eds.), *The International System after the Collapse of the East-West Order* (Martinus Nijhoff, Dordrecht, 1994), pp. 54-60 (referring to the collapse of the Soviet Union).
[89] Bartolomei de la Cruz *et al*., *The International Labour Organization; The International Standards System and Basic Human Rights* (Westview, Boulder U.S., 1996), p. 3.
[90] *Ibid*.
[91] *Ibid*.
[92] *Ibid*, p. 4.
[93] International Congress on Labor Legislation, 'International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment', 26 September 1906, *entry into* force 14 January 1912, *reproduced in* 4(4) *American Journal of International Law* (1910), pp. 328-337.
[94] *Ibid*, art. 1.

and periods of rest[95] or where exceptional factors required deviation from the rules.[96] No specific mention of the maritime industry was made and the individual Member States were left to determine the scope of Article 1's application to their various industries, specifically where the line between "industry" and "commerce" was to be drawn, the latter falling outside of the convention's scope.[97] It should be noted that this convention remains in force in "Algeria, Austria, Belgium, Denmark, France, Hungary, Italy, Luxembourg, Morocco, Poland, Portugal, Spain and Tunisia."[98]

Trade unions from belligerent and neutral European nations met during the 1910's to discuss the creation of an international labour legislative body notwithstanding the outbreak of the First World War. Preparations and documents were drafted with the intention of presenting them at the eventual peace conference ending hostilities.[99] The Constitution of the International Labour Organization (ILO) was incorporated into the Treaty of Versailles and included all Member States of the newly created League of Nations as its constituency.[100] The ILO maintained its autonomy from the League of Nations, and later from the United Nations (UN) in taking a more apolitical approach: Germany and Austria were accepted as members of the ILO at its inception.[101]

State participation in the international legal system materially alters the jurisdiction wielded by states through three primary tools: (1) hard law, (2) soft law, and (3) customary law. Variations are manifested in various ways. Hard law requires either a sovereign's relinquishment of jurisdictional authority in some area or context or imposes a duty on the state to address an issue domestically.[102] Soft law approaches seek to guide and persuade state jurisdiction.[103] Customary law is promulgated softly, though it is through a more informal means of practice rather than through treaty or convention. Adherence to its prescriptions can transform custom into binding law, contracting or defining the state's exercise of jurisdiction.[104]

Hans Kelsen's "pure theory of law" contains its flaws and weaknesses and can be circular at times, but its logical consistency makes it useful for describing legal obligations created by international law.[105] Kelsen's theory describes laws as sets of norms that layer and build

[95] *Ibid*, art. 2.
[96] *Ibid*, arts. 3-4.
[97] *Ibid*, art. 1.
[98] International Labour Organization, 'General Survey: Night Work of Women in Industry: Chapter 2 – Anatomy of a Prohibition: ILO Standards in Relation to Night Work of Women in Industry', Report III, Part 1B (89th Session, 2001), en. 15.
[99] Bartolomei de la Cruz *et al.*, *supra* note 89, p. 4.
[100] Treaty of Peace between the Allied and Associated Powers and Germany [Treaty of Versailles], 'Part XIII: Labour' 28 June 1919, *entry into force* 10 January 1920, *reproduced in* 13(3) *American Journal of International Law*, pp. 361-376.
[101] Bartolomei de la Cruz *et al.*, *supra* note 89, p. 5.
[102] Shaw, *supra* note 35, pp. 93-98.
[103] *Ibid*, pp. 117-119.
[104] *Ibid*, pp. 72-93.
[105] H. Kelsen, 'The Pure Theory of Law,' 50 *Law Quarterly Review* (1934), pp. 474-498.

upon each other. Through a scientific analysis of laws, one can determine the validity, and therefore binding effect, of a law by tracing it back to the norms it is built upon. The legitimacy of any law requires being able to trace it back to another prior valid norm. Regardless of whether one starts with a national or international law this process continues to look backwards until it reaches the basic norm of the whole system. That norm for Kelsen, *pacta sunt servanda*, is what all treaties, forming the second level, are based upon.[106]

The usefulness of Kelsen's theory is not what it says. It is rather self-evident to maintain that treaties are binding because they are agreed to, and that one should keep to agreements. The usefulness seems to evade Kelsen himself. As the theory was committed to remaining scientific, Kelsen was never able to successfully grasp issues such as the binding nature of custom. But his scheme describing the layering and building upon previous, general norms is accurate to describe the procession of international law. Once a set of norms has been established, it can be taken for granted to where the rules' foundations lie. When rules seem to have lost their course and new ones seem radical or *ultra vires*, they often tend to be in sight of land.[107]

Hard law approaches tend to bind states and obligate them to implement some legal principles into their domestic legal system. Once these principles are successfully incorporated and become part of the legal culture and social fabric, from whence they came is of small consequence.

Soft law approaches can be a little more difficult. Declarations and resolutions may evince custom or represent a political position adopted by a group.[108] The fact that they do not create legally enforceable obligations does not detract from their political or moral forces, or their ability to enjoy wider appeal from diverse political views on the ground level.

Custom is regarded as "an authentic expression of the needs and values of a community at any given time."[109] After this point, scholars part ways in their ideas and approach. Some regard it as too slow-moving and outdated to suit the international system today, while others believe it to be more important than hard law since it carries the potential to be universally binding.[110] Its importance to international and maritime law cannot be ignored. The current implication of heavy use of custom requires caution when receiving newly documented legal instruments. Codifications may seem broad and sweeping, but state practice may show otherwise.

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[106] Other jurists have commented that this it is "mere useless reduplication," to contend that states that obey rules agreed to ought to. *See* H. L. A. Hart, *The Concept of Law*, (Oxford University Press, Oxford, 1961), pp. 213-232.
[107] *See* discussion, *post*, of the MLC, *infra* note 456.
[108] Shaw, *supra* note 35, pp. 117-118.
[109] *Ibid*, p. 73.
[110] *Ibid*, *comparing* W. Friedmann, *The Changing Structure of International Law* (New York, 1964), pp. 121-123, *with* A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, Ithaca, 1971), p. 12.

Agreements at the international level cause states to be wary of relinquishing sovereignty, especially on paper. Memorialized documents constrict a state to conform to a particular set of norms, but the concession may have occurred in practice and the legal instrument is operating to provide a more uniform and predictable set of rights and privileges.

3.2 The Evolution of Maritime Law

The international nature of maritime law has always been central to articulations of the law of the sea. Early sea codes largely concerned mercantile matters, but also provided standards of behaviour for ship passengers and causes of action for the negligence of masters or seamen.[111] The common heritage view is a modern enunciation of the Roman principle *res communis*, "an area of territory that is not subject to legal title of any state."[112] State sovereignty, "the supreme political authority of an independent state or the state itself," does not give a state the power and ability to legislate or control the sea.[113] International law and custom are not the will of one sovereign but the will of all nations for the benefit of all people.[114] Territorial limits of state power are necessary to protect the interests of the entirety of mankind.[115] Thus traditional notions of territorial power are counterproductive to the development and integrity of international law and custom in the maritime context.

The Code of Hammurabi, was the first written law known today and contained provisions that dealt with ship leasing and collisions at sea.[116] "Since this code is undoubtedly a compilation of even earlier customary rules, it may reflect the even more ancient Sumerian customary law."[117] The Code of Hammurabi evinces a codification of customary law rather than unilateral lawmaking of an individual territorial sovereign. The Romans did not invent their own maritime law; instead they referred to the Greek Rhodian maritime law.[118] The earliest maritime code, known as the Rhodian Sea Code, despite its name, has been shown to be of Byzantine origin.[119] The Rhodian Sea Code was created with material from various

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[111] Levick, *supra* note 85, fn. 12, *citing* R. P. Anand, *Origin and Development of the Law of the Sea* (1982), p. 11.
[112] Black's, *supra* note 7, '*Res: Res Communis*'; *cf.* M. Gorina-Ysern, 'World Ocean Public Trust: High Seas Fisheries After Grotius – Towards a New Ocean Ethos?'*,* 34 *Golden Gate University Law Review* (2004), pp. 645-715, at 663-664 (explaining how UNCLOS resolved the status of the high seas in favour of *res communis* over *res nullius*).
[113] Black's, *supra* note 7, p. 1430.
[114] J. Hilla, 'The Literary Effect Of Sovereignty In International Law', 14 *Widener Law Review* (2008) pp. 77-147, at 97-98.
[115] *Ibid*.
[116] T. J. Schoenbaum, *Admiralty and Maritime Law: Practitioner's Treatise Series (5th ed.) (vols. I & II)*, (Thomson Reuters, New York, 2011), § 1-2, p. 4, fn. 9, *citing* E. C. Benedict, *Benedict on Admiralty 1*, (Matthew Bender, New York, 1983), § 2.
[117] *Ibid*.
[118] *Ibid*, § 1-3, p. 5.
[119] *Ibid*, p. 4, fn. 4, *citing* W. Ashburner (ed.), *The Rhodian Sea-Law* (The Clarendon Press, Oxford, 1909), p. cxii.

sources, but most of it derived from local custom.[120] Naming the Byzantine maritime code after Rhodes adds to its authority in customary law.[121] Rhodes had an extensively developed maritime centre and whether or not the Rhodians actually codified their maritime law traditions they did in fact have a maritime law.[122] The use of custom in the historical codification of maritime law does more than create a chain of traceable authority; it is the beginning framework that establishes the fact that maritime law is created and followed universally.

It is tradition in maritime law to refer back to the customary laws of earlier seafaring times, modifying them to the extent that they suit the particular needs of the time.[123] The codified maritime legislation throughout history is significant today because it originated from earlier customs, "developed from a common substratum as a law observed by all nations."[124] To the Romans this law was a part of the *jus gentium* and therefore applied to all peoples.[125] The Roman legal tradition passed to other western maritime cities and later in the Middle Ages passed to the rest of western Europe.[126] The concept of a law of nations or a general law of mankind erodes traditional notions of territorial state power by indicating the supreme character of the law of nations over individual states.[127]

Hugo Grotius' seminal *Mare Liberum* espoused the natural, common heritage rhetoric in the first modern treatise on the laws of the sea, but the full title, *The Freedom of the Seas,*

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[120] *Ibid*, p. 7, *citing* Ashburner, *supra* note 119, p. cxiii.
[121] *Ibid*.
[122] *Ibid*.
[123] *Ibid*, p.8, n. 11, *citing* Ashburner *supra* note 119, p. cxiii. "In fact Ashburner makes the interesting point that 'Part III [of the Rhodian Sea Code] and Book LIII [of the Basilica] fit in together and form a complete body of maritime law, while each separately is imperfect. [Ashburner] therefore infer[s] that a second edition of the Sea-Code was made either by, or under the direction of, the men who compiled the Basilica . . . Our texts represent the second edition . . . but there are traces of the earlier one or even of the texts out of which the earlier one was composed.'" (Together these books show the substantive law that was abided by in the eastern Mediterranean during the ninth century and before.)
[124] *Ibid*, p. 7.
[125] *Ibid*, p. 8, n. 13, *citing* F. R. Sanborn, *Origins of the Early English Maritime and Commercial Law*, (The Century Co., New York, 1930), p. 19.
[126] *Ibid*, n. 15, *citing* Sanborn, *supra* note 125, p. 40.
[127] B. A. Boczek, *International Law: A Dictionary*, (Lanham, Scarecrow Press, 2005), pp. 20-21. "In Roman legal theory, *jus gentium*, being derived from natural reason, represented the law common to all mankind and in this sense was identified and blurred with natural law. In fact, it was a common-sense application of natural law in the legal practice of the multi-ethnic Roman society. As an emanation of reason, it constituted a less formalistic replica of civil law . . . In the course of time, the flexible rules of *jus gentium* prevailed over the more 'legalistic' civil law, evolving into a common private law of the Roman Empire. Also gradually, because of its cosmopolitan nature, *jus gentium* became associated with something transcending the law of the empire and, expanding into some limited areas of relations with non-Roman political entities, exhibited some features of the future law of nations governing the relations between states."

or the Right which Belongs to the Dutch to Take Part in the East Indian Trade, clearly evinces the downside of the Grotian view.[128] This viewpoint has been taken to extremes and is no longer considered lawful under international law.

The 1609 work was not the result of an objective, inspired academic pursuit, but of a complex chain of historical events. Grotius was a 'hired gun' in the colloquial legal sense and *Mare Liberum* was the culmination of his client-centred approach even though it did reflect the spirit of the times.[129] After the decline of the Spanish Armada and the rise of the Dutch fleet, the Dutch were determined to maintain their status.[130] To secure access to the prominent shipping lanes and to prevent Spain or Portugal from forcing the Dutch to use the dangerous arctic routes, the Dutch East Indies Company was created and vested with extremely broad jurisdictional powers to "establish colonies, to make peace or war, to raise whatever funds it might need and to construct military establishments in the East."[131]

The militarism that the Dutch East Indies Company was imbued with led to the practice of simply capturing Spanish and Portuguese vessels. This policy was wildly unpopular with the Dutch people, and noted legal scholar Hugo Grotius was hired chiefly to defend the practices of the Dutch East Indies company.[132] Grotius covers the aforementioned jurisdictional conceptions in turn, leading to the conclusion that the seas are unique and therefore jurisdiction in that context demands different treatment.

Drawing on biblical, Roman, and Greek sources, *inter alia*, Grotius establishes the right of innocent passage as a natural right, more than a mere custom.[133] Applying the right to the Dutch situation, the right was denied by the Portuguese by preventing Dutch travel, and even more importantly preventing Dutch trade.[134] Grotius maintains that the Portuguese, or any nation, cannot exercise sovereignty over the East Indies, for those peoples have their own governments and legal systems.[135]

Grotius rejects the Portuguese claims of sovereignty through discovery on factual grounds, by arguing that the Romans, Persians, Arabs, and Venetians all 'discovered' the East Indies before Portugal, and on legal grounds, by arguing that Portugal never took actual possession of the East Indies territories through military occupation.[136] Additionally,

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[128] H. Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to take part in the East Indian Trade*, (R. Van Deman Magoffin, trans.) (Oxford University Press, New York, 1916), *available at* <http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=552&Itemid=27>.
[129] Levick, *supra* note 85, p. 40, *citing* Anand, *supra* note 111, p. 79.
[130] *Ibid.*
[131] Levick, *supra* note 85, p. 40, *citing* Anand, *supra* note 111, p. 77.
[132] *Ibid*.
[133] Grotius, *supra* note 128, ch. I.
[134] *Ibid*. "It follows therefore that the Portuguese, even if they had been sovereigns in those parts to which the Dutch make voyages, would nevertheless be doing them an injury if they should forbid them access to those places and from trading there."
[135] *Ibid*, ch. II.
[136] *Ibid*.

Grotius argues, discovery "gives no legal rights over things unless before the alleged discovery they were *res nullius*."[137]

As for the relevance of spiritual jurisdiction, Grotius gives short shrift to the idea of a Papal grant vesting title in the Spanish or the Portuguese.[138] Assuming the validity of this exercise of jurisdiction since there is no reason why the pope could not arbitrate such a dispute, however, the Papal Donation only bound the Spanish and Portuguese parties and had no bearing on the rest of the world.[139] As it so happens the exercise of jurisdiction was invalid because the pope has no "civil or temporal" lordship on earth, and his spiritual jurisdiction "has no authority over infidel nations, for they do not belong to the Church."[140] Conquest was an invalid means, for factually the Portuguese were not at war and they did not occupy territory in the East Indies.[141] Legal conquest was not applicable to the Portuguese either as there was no *ius ad bellum* to confer title.[142] Finally, as the Dutch were primarily concerned with expelling the Portuguese presence in the East Indies, Grotius draws direct attention to his reliance on the writings of leading Spanish jurist Francisco de Vitoria for support.[143]

Grotius's argument was that if the Portuguese could not acquire or extend jurisdictional power over land, they *a fortiori* have no jurisdiction to either the sea or navigational routes.[144] After distinguishing the sea from other bodies of water that may be subject to the jurisdiction of a state, Grotius demonstrates the incompatibility of using land-based legal terms expressing jurisdiction in the maritime context: "possession" or "ownership" of the sea;[145] "occupation" of the sea;[146] "discovery" of the sea;[147] exercising legislative

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[137] *Ibid*.
[138] *Ibid*, ch. III.
[139] *Ibid*.
[140] *Ibid*.
[141] *Ibid*.
[142] *Ibid*, ch. IV.
[143] *Ibid*.
[144] *Ibid*, ch. V.
[145] *Ibid*. "[T]he sea can in no way become the private property of any one, because nature not only allows but enjoins its common use;" "[T]he sea is one of those things which is not an article of merchandise, and which cannot become private property. Hence it follows, to speak strictly, that no part of the sea can be considered as the territory of any people whatsoever."
[146] *Ibid*. "[The sea] is not susceptible of occupation. . . [b]ut if the Portuguese call *occupying* the sea merely to have sailed over it before other people, and to have, as it were, opened the way, could anything in the world be more ridiculous? For, as there is no part of the sea on which some person has not already sailed, it will necessarily follow that every route of navigation is occupied by some one. Therefore we peoples of today are all absolutely excluded. Why will not those men who have circumnavigated the globe be justified in saying that they have acquired for themselves the possession of the whole ocean! But there is not a single person in the world who does not know that a ship sailing through the sea leaves behind it no more legal right than it does a track."
[147] *Ibid*. "These examples cited from ancient times are sufficient proof that the Portuguese were not the first in that part of the world. Long before they ever came, every single part of

jurisdiction over the sea or bays.[148] Even if the custom of Spain and Portugal was to exercise jurisdiction *ultra vires*, natural law is supreme and the custom alternatively, is against the law of nations.[149]

Grotius writes that jurisdiction "over the sea, which from the beginning of the world down to this very day is and always has been a *res communis,* and . . . has in no wise changed from that status."[150] Similarly, the intangible nature of "trade" or "trade routes" required the legal conclusion that these cannot be owned, possessed, or denied.[151] Nor was their equitable reason or *ius ad bellum* to legally support the Portuguese actions.[152] Grotius concludes that these natural rights are so important so as to require the Dutch to maintain these rights through peace, treaty, or war.[153] In other words, jurisdiction exercised by one sovereign is invalid unless it is consistent with natural law or through the international community's exercise of jurisdiction through positive law or established custom.[154]

Grotius's work was simultaneously well received and rejected. English jurist John Selden's rebuttal, *Mare Clausum*, rejected the idea that legislative, and thus executive and adjudicative jurisdiction could not be exercised over the seas.[155] Selden advanced the historically doubtful proposition that England's Richard the Lionheart promulgated the "Judgments of the Sea" in Oleron on return from the crusades.[156] This fact, Selden argues, demonstrates the ability to extend jurisdiction over seas irrespective of discovery, occupation, or exclusive control. The laws were promulgated from abroad and were effective over stretches of the Atlantic adjacent to lands that fell in and out of Richard I's jurisdiction.[157]

Selden's work, like Grotius's, was "political propaganda in the guise of political history."[158] Matthew Hale, a contemporary of Selden and Grotius, refuted Selden's claim regarding

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that ocean had been long since explored. For how possibly could the Moors, the Ethiopians, the Arabians, the Persians, the peoples of India, have remained in ignorance of that part of the sea adjacent to their coasts!"

[148] *Ibid*, ch. VII "

[149] *Ibid*, ch. VII. "[W]hat is clearer than that custom is not valid when it is diametrically opposed to the law of nature or of nations?" "For if there are customs incompatible with the primary law of nations, then . . . they are not customs belonging to men, but to wild beasts, customs which are corruptions and abuses, not laws and usages."

[150] *Ibid*, ch. VII.

[151] *Ibid*, chs. VIII-XI.

[152] *Ibid*, ch. XII.

[153] *Ibid*, ch. XIII.

[154] *Ibid*.

[155] Snell, *supra* note 57, pp. 63-64.

[156] *Ibid*, *citing* T. Twiss (ed.), *The Black Book of the Admiralty (Rerum Brittanicarum Medii Aevi Scriptores (Rolls Series))*, No. 55 'Monumenta Juridica,' (His Majesty's Stationary Office, London, 1871, *reprinted* (Kraus, 1965), vol. I, p. lviii, vol. II, pp. xlvii-xlviii.

[157] *Ibid*.

[158] *Ibid*, p. 64.

Richard I and the Judgments of the Sea,[159] but his work was published posthumously in the twentieth century.[160]

More objectively crafted accounts, however, shed a more interesting take on the historical treatment of jurisdiction over the seas. M. J. Pritchard and D. E. C. Yale argue that the growing commercial ties between England, Aquitaine, Bordeaux, Oleron, and other neighbouring areas resulted in the gradual absorption "in consequence with trade . . . not as the result of any political decision or legislative act by English Kings who were dukes of Aquitaine."[161] Under this account, a compilation of laws promulgated with no jurisdiction over England affected the practices, and subsequently the laws, of England.

This proposition has been extended further into the converse scenario much earlier than Pritchard and Yale's account. English Admiralty judge John Exton, writing soon after Grotius and Selden, states,

"There are likewise ancient Statutes of the Admiralty to be observed, *both upon the Ports and Havens*, the high Seas, and beyond the Seas . . . which plainly sh[o]w the Admirals Jurisdiction to be upon the Ports and Havens, as well as upon the high Seas."[162]

Exton wrote in an effort to determine substantive rules of English maritime law through the records of its Court of Admiralty. As those decisions looked back to the predating adoption of the Judgments of the Seas, which in turn looked further back in time, hence conveying that pre-existing maritime laws and custom continue to apply. To Exton, writing from the perspective of an English admiralty judge, there are laws developed upon the seas by those who navigate them. These laws govern conduct, action, and statuses not just on the seas, but in ports and havens, maritime features that blend with physical territory are directly subject to a state's jurisdiction. The legislatures, judges, and police who are determining, applying, and enforcing these rules are the seafarers themselves.

Subsequent international law treatises touching upon maritime law penned by international jurists like Samuel von Pufendorf favoured natural law over the law of nations but not without some disagreement as to the content of those laws.[163] The naturalist position soon returned to positivist theory in the vein of Grotius, most notably by Emerich de Vattel.[164]

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[159] *Ibid*, *citing* M. Hale, 'A Disquisition Touching the Jurisdiction of the Common Law and Courts of Admiralty in Relation to Things Done Upon or Beyond the Sea, and Touching Maritime and Merchants' Contracts,' *in* M.J. Pritchard & D. E. C. Yale, *Hale and Fleetwood on Admiralty Jurisdiction* (vol. 108) [Hale & Fleetwood], (The Selden Society, London, 1993), p. 61.
[160] *Ibid*, p. 351.
[161] *Ibid*, *citing* Hale & Fleetwood, *supra* note 159, p. xxxiv.
[162] *Ibid*, *citing* J. Exton, *the Maritime Dicaeology, or Sea-Jurisdiction of England*, (Richard Hodgkinson, London, 1664), *emphasis added*.
[163] *Ibid*, pp. 340-341.
[164] Vattel "virtually ignores maritime law" in his writings, but the lasting influence of his writings on international law ended up influencing maritime law later in time. *Ibid*, p. 349, fn. 187.

Vattel required that the law of nations be grounded in the law of nature to be legitimate and rejected the idea that the law of nations could be founded upon any other source.[165] His reasoning resulted in a static characterization of the international law, which applies in the maritime context. "Since the natural law is not subject to change," Vattel reasoned, " . . . it follows that the necessary Law of Nations is not subject to change."[166]

These naturalist works and others inspired the revolutionary ethos that consumed eighteenth century France and the United States, but writers like Thomas Paine abandoned the idea that the law of nations is founded upon or bound by natural law, or that bilateral maritime agreements and customs can have legal effect for non-party states.[167] This assertion was modified by the influence of Vattel, and found a wider audience. Whereas Vattel would maintain, "that no nation is bound by either 'voluntary' or 'customary' law unless it acquiesces or consents,"[168] later jurists and judges discarded such requirements, finding that these rules applied by default.[169] States could bilaterally or multilaterally contract different arrangements, but the default rules would still apply elsewhere where these agreements had not been established.[170]

The belief that one state could not unilaterally remove itself from the jurisdiction of these default rules of international law was held by James Wilson, as did Alexander Hamilton who agreed with Wilson on little else.[171] The American view thus explicitly acknowledged the jurisdictional reach of "the customary law of European Nations" as it was recognized by England and the common law. Upon independence, each American state adopted the common law and did not denounce the continuity of these natural and positive laws.[172]

All of these lofty, detailed, and at times, contrived philosophies bantered back and forth for centuries, finally coming to the consensus that the law of nations was universally binding.[173] Once that threshold question was answered, the implication for the *lex maritima* was that it

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[165] *Ibid*, p. 344, *citing* E. de Vattel, *The Law of Nations or the Principles of Natural Law, Applied to the Affairs of Nations and Sovereigns*, (French ed., 1758, C. G. Fenwick, trans., (Hein & Co., Buffalo, 1994), pp. 4-5.
[166] *Ibid*.
[167] *Ibid*, p. 345-346, *citing* T. Paine, *Compact Maritime* (Samuel Harrison Smith, Washington, D.C., 1801), p. 3.
[168] *Ibid*, p. 347, *citing* Vattel, *supra* note 165, pp. 7-9.
[169] *Ibid*, *citing* R. G. McCloskey (ed.), "Lecture 'Of the Law of Nations,'" *in The Works of James Wilson* (Samuel Harrison Smith, Washington, D.C. 1801), pp. 3, 7-9. James Wilson was an American judge, legal scholar, and co-drafter the Admiralty Clause of the U.S. constitution who incorporated the natural law basis of the law of nations into all of his works.
[170] *Ibid*.
[171] *Ibid*, pp.348-349, *citing* H. C. Syrett (ed.), 'To Defence No. XX, 23-24 October 1795,' *in The Papers of Alexander Hamilton* (Columbia University Press, New York, 1973), vol. XIX, at 329-347.
[172] *Ibid*, *citing* Syrett, *supra* note 171, pp. 341-342.
[173] *Ibid*, p. 349.

too was universally binding on the law of nations. Jurists, philosophers, and lawmakers throughout recorded history, including Cicero, Justinian, Vattel, Coke, Blackstone, Wilson, and Story were all in league with coastal fisherman, merchants, and seafarers since time immemorial.[174]

3.3 Jurisdiction in the Maritime Context

The first organized, international articulations of the universally binding, flexible maritime laws were incontrovertibly couched in natural law reasoning, but their substantive content remained unclear as the field was not codified by its nature.[175] In the United States for example, a need for jurisdictional guidance coupled with the increasing importance of maritime commerce fuelled developments in the *lex maritima*.[176] Economic efficiency thrives on legal certainty. The American Congress vested admiralty and maritime jurisdiction in the federal courts, and concurrent maritime jurisdiction in the state courts, but never adopted or promulgated a maritime code. The common law system allowed these judges to then look to European and ancient sources and incorporate the *lex maritima* into the common law.

Over time, federal and state precedent parted ways on many issues leading to jurisdictional conflict, but an overarching canon of interpretation governing placed a check on the ability of legislatures and courts to deviate from the core tenets of international law. This principle arose in the maritime context and is known as the *Charming Betsy* canon.[177]

The *Charming Betsy* involved the seizure by a French privateer of an American vessel and its cargo, owned by an American domiciled on the Danish island of St. Thomas, flying the Danish flag.[178] The ship was bound for French territory and it was seized under "an Act further to suspend the commercial intercourse between the United States and France."[179]

The court acknowledges the concept of *legentia localis* in the maritime context in its opening remarks in stating,

"An *American* citizen residing in a foreign country may acquire the commercial privileges attached to his *domicile;* and by making himself the subject of a foreign power he places himself out of the protection of the *United States,* while within the territory of the Sovereign to whom he has sworn allegiance."[180]

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[174] *Ibid*, pp. 349-352.
[175] *Ibid*, pp. 419-422.
[176] *Ibid*, pp. 420-421.
[177] *Murray v. The Schooner Charming Betsy (The Charming Betsy)*, 6 U.S. (2 Cranch.) 64 (1804).
[178] *Ibid*, pp. 64-67.
[179] *Ibid*, p. 66.
[180] *Ibid*, pp. 65-66.

The case considered whether the nonintercourse act passed by the United States congress[181] applied to an American seafarer and his cargo flying the Danish flag, thus invalidating any legal grounds for seizure.[182] The preliminary question before the court was "whether a citizen of the *United States,* can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law."

Citing to the British case of *Pollard v. Bell,*[183] the court provides an example of British courts striving to reconcile their laws with the fluidity of jurisdictional shifts in the *lex maritima* and the *lex mercatoria*.[184] *Pollard* recognizes that,

"the municipal laws or ordinances of a country do not control the laws of nations. The *British* courts have gone great lengths to modify their ancient feudal law of allegiance, so as to moderate its rigor, and adapt it to the state of the modern world, which has become most generally commercial. They hold it to be clearly settled, that although a natural born subject cannot throw off his allegiance to the king, but is always amenable for *criminal* acts against it, yet for commercial purposes, he may acquire the rights of a citizen of another country."[185]

This rule is especially applicable to the American context, as immigration was quite open at the time.[186] The court also categorically states that the seizure of a neutral, unarmed vessel on the high seas can only arise in time of war, and in peacetime, the flag must be respected. To allow such deviation from the laws of nations would injure American relations and trade interests.[187]

The court proceeds on the merits, eventually espousing the *Charming Betsy* rule of interpretation that restricts executive discretional jurisdiction and judicial review in applying and interpreting laws and acts, stating

"that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."[188]

Though this case was predominantly concerned with the external effects of statutory interpretation and jurisdictional exercise in the maritime context, the principle applies in wholly domestic contexts. Application of this principle, however, still diverged over time

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[181] 'An act Further to Suspend the Commercial Intercourse between the *United States* and *France*, and the Dependencies thereof,' 27 February 1800, vol. 5, c. X, pp. 7-11, *amending* Act of February 9, 1799, chap. 2.
[182] *The Charming Betsy*, *supra* note 177, p. 66.
[183] *Pollard v. Bell*, 8 T.R. 435 (1800) (United Kingdom).
[184] *The Charming Betsy*, *supra* note 177, pp. 68-69.
[185] *Ibid*.
[186] *Ibid*, p. 71.
[187] *Ibid*, p. 74.
[188] *Ibid*, p. 117.

among the several states and the federal government.

The Supreme Court of the United States finally refined the approach to these jurisdictional questions through trial and error, arriving at an interest's analysis to resolve maritime jurisdictional disputes.[189] The overarching consideration in these disputes, as stated by Justice Ginsburg, "centers [sic] on the extension of relief, not on the contraction of remedies, [and our precedent] recalled that 'it better becomes the human and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and flexible rules.'"[190] These recent cases still reflect the jurisdictional foundation of international maritime law that it is vested in no one, and all concurrently apply it and operate from a humanitarian standpoint.[191]

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[189] *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), pp. 737-740. The two major cases involving conflicts between federal and state jurisdiction in maritime law decided by the United States Supreme Court since *Kossick* used its reasoning and applied federal law in one instance and state law in the other. *See also Yamaha Motor Corp v. Calhoun*, 516 U.S. 199 (1996) (construing a federal cause of action and remedy to complement, rather than supersede the state remedy, and applying the better state law remedy), *and Norfolk Shipbuilding and Drydock Corporation v. Garris*, 532 U.S. 811 (2001) (creating a new federal remedy under the general *lex maritima*). There are two distinctions between these cases that may explain the results. *Yamaha* involved a much stronger state interest in protecting a non-seafarer claimant whose cause of action arose from a non-seafarer, twelve-year-old decedent. *Yamaha*, pp. 202-204. A unanimous court *Yamaha* found that federal remedies did not displace state maritime wrongful-death statutes, but that the federal remedy was in place so that seafarers were protected if a state remedy was not established. *Ibid*, pp. 207-208. *Norfolk* involved a wrongful death claim based on negligence under the general maritime law. *Norfolk*, pp. 812-813. As precedent has only considered wrongful death in the maritime context for breach of the duty of seaworthiness established by the general maritime law, the court readily and unanimously extended the cause of action and remedy for negligence. *Ibid*, pp. 813-814.

[190] *Yamaha Motor Corp*., *supra* note 189 p. 213, *citing Moragne v. States Marine Lines, Incorporated*, 398 U.S. 375 (1970), p. 387.

[191] Justices Ginsburg, Souter, and Breyer dissented from one sentence of Justice Scalia's opinion in stating, "In Part II-B-2, the Court counsels: 'Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes ... allow, to leave further development to Congress.' *Ante,* at 1933. *Moragne* itself, however, tugs in the opposite direction. Inspecting the relevant legislation, the Court in *Moragne* found no measures counselling against the judicial elaboration of general maritime law there advanced. *See* 398 U.S., at 399-402, 409, 90 S.Ct. 1772; *see also ibid.,* at 393, 90 S.Ct. 1772 ('Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favo[u]ring recovery in the absence of a legislative direction to except a particular class of cases.'). In accord with *Moragne,* I see development of the law in admiralty as a shared venture in which 'federal common lawmaking' does not stand still, but 'harmonize[s] with the enactments of Congress in the field.' *Ante,* at 1933 (quoting *American Dredging Co. v. Miller,* 510 U.S. 443, 455, 114 S.Ct. 981, 127 L.Ed.2d

3.3.1 Analogues to Territoriality and *Situs*-specific Features of Maritime Jurisdiction

"International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas."[192] Jurisdiction over internal waters may invoke the maritime jurisdiction of a nation, but such bodies of water are rarely described as subject to multiple sources of jurisdiction.[193] Coastal states have a generally unfettered right to condition access to internal waters.[194] Exceptions include where the use of straight baselines encloses parts of territorial or high seas into internal waters[195] or forming part of the border between nations.[196]

The various recognitions of innocent passage in the Law of the Sea Convention for the territorial sea and the contiguous zone shows just how questionable the supremacy of a sovereign's laws and regulations actually are.[197] Sovereignty, in this context, cannot be supreme because the state cannot prevent a ship from entering its territorial sea innocently when all ships enjoy this right.[198]

UNCLOS explains twelve activities that would not fall into the meaning of innocent.[199] Professor Schoenbaum explains,

"[t]he effect of this elaborate listing of non-innocent activities is to clarify the international law relating to innocent passage and to allow states less discretion in applying the doctrine. This reformulation was not intended to limit the doctrine, but only to make it more certain."[200]

This type of limitation on a sovereign's ability to regulate its territory reveals a dichotomy

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285 (1994)). I therefore do not join the Court's dictum." *Norfolk*, p. 820-821.
[192] B. Clinton, *Presidential Proclamation 7219,Territorial Sea of the United States of America*, 2 September 1999, 1999 American Maritime Cases, p. 302.
[193] *See*, *e.g.* United Nations, Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, *entry into force* 10 September 1964, 516 U.N.T.S. 205, art. 1. "The sovereignty of a State extends, beyond it land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."
[194] *Ibid*, art. 16. "In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of conditions to which admission of those ships to those waters is subject." *Cf.* MLC, art. V, *infra* note 456.
[195] *Ibid*, art. 5 (preserving a right of innocent passage in such instances). *See also* UNCLOS, *supra note* 84, arts. 3-26.
[196] United Nations, Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, G.A. Res. 51/229, annex, U.N. Doc. A/51/149, supp. 49. 36 I.L.M. 700, art. 2(b).
[197] UNCLOS, *supra* note 84, art. 17.
[198] *Ibid*.
[199] *Ibid*, art. 19.
[200] Schoenbaum, *supra* note 116, § 2-22, p. 73, *emphasis added*.

in the understanding of state sovereignty. On land a sovereign would be able to exclude people from entering its territory as territorial integrity is a fundamental principle of international law, but within a states territorial waters it is unable to exclude in the same manner.[201] The international community's attempt at making and enforcing laws that effectively limit state discretion in areas related to the sea has been more successful than any limits it has tried to place on other actions of states for the interests of humanity on land, further evincing a comity of nations that is not just respect, but recognition of the truly supreme character of international law over the sea.[202]

UNCLOS goes further to limit state sovereignty by stating the extent to which a coastal state may adopt laws and regulations related to innocent passage through territorial seas.[203] The coastal state may adopt laws and regulations that are in conformance with the rest of the Convention and rules of international law, which include safety of maritime traffic, protection of various facilities and installations, conservation of living marine resources and the environment, prevention of infringement against custom, fiscal, immigration, sanitary, and fishery laws and regulations, and marine research.[204] Though the state may adopt laws and regulations to protect the environment, the Convention limits the states ability to apply

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[201] *See generally*, Title 8 U.S.C. 'Aliens and Nationality.' *See also Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), pp. 573-574 (discussing the doctrine of discovery and the derivative right to exclude). "The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them." *See also* Shaw, *supra* note 35, pp. 487-488; *contra.* Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (confirming the fundamental freedom of the free movement of persons that generally confers the right "to move and reside freely within the territory of Member States" upon EU citizens).

[202] *Compare*, United Nations General Assembly Plenary on Piracy, *Press Release: Secretary General Calls for Broader Cooperation, New Push for Stability in Somalia to Combat Resurgence of Piracy as General Assembly Meets to Examine Global Scourge*, GA/10940 14 May 2010, *available at* <www.un.org/News/Press/docs/2010/ga10940.doc.htm> (describing the statements of Secretary General Ban Ki-Moon attributing UNCLOS as the legal foundation creating the first precedents of universal jurisdiction.); *with* A. V. Tomlinson, 'Slavery in India and the False Hope of Universal Jurisdiction', 18 *Tulane Journal of International and Comparative Law* (2009), pp. 231-261, at 255-261 (describing the fact that though claims of universal jurisdiction for *jus cogens* violations appear to be a growing trend, there still is no precedent, the ICC's limited grant of jurisdiction in regard to *jus cogens* crimes, and the problematic nature of asserting universal jurisdiction over *jus cogens* violations like slavery where comity, cultural considerations, and underlying societal issues are seriously implicated, calling for a less "ill-fitted and coarse" approach.).

[203] UNCLOS, *supra* note 84, art. 21.

[204] *Ibid*.

its laws to the construction or equipment of foreign ships unless the laws are simply giving effect to generally accepted international rules or standards.[205] The extent of the supremacy of international maritime law and custom over state sovereignty is such that it prevails over any state that wants to do more or less than what international maritime law and custom require[206] or is unable to meet agreed upon standards with respect to the mandatory language of the Convention.[207]

A state's legislative jurisdiction is extremely narrow; no state can legislate on the high seas.[208] A state can only legislate in territorial seas to the extent that international law allows. Territorial seas exist in the first place because international law and custom allows for the exercise of sovereignty over seas where a state is actually capable of enforcing its sovereign authority.[209]

Customary international laws regarding piracy coincided with the onset of claiming territorial waters, which indicates that sovereignty of territorial seas was applicable insofar as to protect the land from invasion.[210] In contrast, a states adjudicative jurisdiction is much broader.[211] The United States has extremely broad adjudicative jurisdiction in maritime law because maritime cases do not arise under the United States Constitution; they arise under the time-honoured international customs of the sea.[212] The United States can hear claims

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[205] *Ibid*.
[206] *See* F. Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea*, (Pinter Publishers, London, 1990), p. 195. "As far as the territorial sea proper is concerned, its maximum breadth of 12 nautical miles is accepted almost globally. With this development, there have been increases in the rights, responsibilities and risks of coastal States, and of the ships exercising the right of innocent passage. One of these increases is that *possession of this maritime zone is not optional,* nor dependent on the will of the coastal State*, but compulsory*." *emphasis added*, *citing Fisheries Jurisdiction*, *infra* note 360, Dissenting Opinion of Sir Arnold McNair, p. 160.
[207] *See, e.g.*, UNCLOS, *supra* note 84, art. 98 (obligation to cooperate in regional search and rescue service in order to, *inter alia*, meet the Duty to Render Assistance described in article 98); art. 140 (obliging developed states to use the "Area" in consideration of the needs and futures of developing states and peoples of non-self-governing territories); art. 144 (technological assistance through transfer); *and* art. 194 (obligation to take joint environmental measures as appropriate).
[208] *Ibid*, arts. 89, 136-138, 140-141. *See also*, *e.g.*, *USA-USSR Joint Agreement*, *infra* note 297, art. 185
[209] B. G. Heinzen, 'The Three-Mile Limit: Preserving the Freedom of the Seas', 11 *Stanford Law Review* (1959), pp. 597-664, at 601-605 (discussing the historical development of the customary three mile territorial sea limit from maximum land-based cannon range). *See also* M. Madden, 'Trading the Shield of Sovereignty for the Scales of Justice: A proposal for Reform of International Sea Piracy Laws', 21 *University of San Francisco Maritime Law Journal* (2009), pp. 139-166, at 145.
[210] Madden, *supra* note 209, p. 144-145.
[211] *See*, *e.g.*, UNCLOS, *supra* note 84, arts. 100-101.
[212] *American Insurance Company* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828), p. 512. "A case in admiralty does not, in fact, arise under the Constitution or laws of the

arising anywhere on the high seas that are subject to contacts or nationality of ships or crew.[213] The ability to try cases that originate outside the jurisdiction of the United States is an extreme enhancement of the enforcement mechanisms available in international maritime law, but is also common elsewhere.[214]

This ability assists in disabling a states power to attempt to escape the jurisdictional holds of international maritime law and custom. States are subject to enforcement of international law and custom no matter where they are in the seas and are capable of being haled into court in a jurisdiction that has no connection to the parties. The implications of this are that the supreme character of international maritime law and custom over all state sovereigns is integral to the national law and that state cooperation through adjudicative jurisdiction to aid enforcement is possible because of the participant status that states have in the decision making process. This is evident in the international maritime law governing the determination of different classes of bodies of water through baseline measurement.

Due to the ever-changing physical aspects of the earth from natural conditions, baselines are considered "ambulatory" irrespective of the greater potential for change anticipated by rising sea levels.[215] When such changes permanently reshape the geographic features used to determine baselines, there is no current consensus in *opinio juris* as to whether international maritime law requires[216] baseline redrawing or creates a negative implication to do so.[217] Whether there is a binding obligation on coastal States to reformulate their baselines in light of changed or changing geophysical features or not, the anticipated changes will bring differing views to a head as States will assuredly voice and maintain different positions on how to address the new physical and legal landscapes. The flexibility of the *lex maritima* and the interrelated jurisdictional responsibilities of states suggest that this concern can be readily addressed under existing international law.

United States. These cases are as old as navigation itself; and the law of admiralty and maritime, as it existed for ages, is applied by our Courts to the cases as they arise." *See also*, *Titanic* v. *Haver*, 24 March 1999, 1999 A.M.C. 1330 (Federal Court of Appeals for the Fourth Circuit), p. 1344-1346. (outlining the broad and historical adjudicative jurisdiction of the United States, where "[s]ince the Founding, federal courts sitting in admiralty jurisdiction have steadfastly continued to acquiesce in this *jus gentium* governing maritime affairs.").

[213] *Ibid.*

[214] *See, e.g.*, The Supreme Court Act, 1981, ch. 54, sec 21(2-4) (United Kingdom) (vesting similarly broad admiralty jurisdiction over the Queen's Bench.

[215] J. Lusthaus, 'Shifting Sands: Sea Level Rise, Maritime Boundaries and Inter-state Conflict', 30(2) *Politics* (2010), pp. 114, *citing* D. D. Caron, 'Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict' in S. Y. Hong and J. M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Nijhoff, Leiden, 2009), p. 9.

[216] R. R. Churchill & A. V. Lowe, *The Law of the Sea*, (3d ed., Manchester University Press, Manchester, 1999), p. 38.

[217] A. H. A. Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries', 37(2) *Netherlands International Law Review* (1990), pp. 216-217.

Article 5 of the United Nations Convention on the Law of the Sea (UNCLOS)[218] and Article 3 of the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ)[219] provide an identically worded starting point for determining baselines that push the territorial sea to its maximum reasonable limit: "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."[220]

Beyond the starting point for baseline construction, UNCLOS and the CTSCZ provide variants on the general rule for baseline determinations regarding reefs,[221] heavily indented or island-fringed coasts (straight baselines),[222] river mouths and deltas,[223] bays,[224] harbours and other man-made works,[225] islands,[226] straights,[227] and archipelagos.[228]

Though a "coastal State may determine baselines in turn by any of the methods provided for in [UNCLOS] to suit different conditions," the creation of inequitable results that disregard principles of stewardship by abusing the method of determining straight baselines was restricted by the International Court of Justice (ICJ), and later incorporated into UNCLOS and the CTSCZ, in the *Anglo-Norwegian Fisheries* case.[229] Straight baselines "must not depart to any appreciable extent from the general direction of the coast," they must ensure that "sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters," and may individually take into account "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."[230] Despite these limitations, studies suggest that nearly two-thirds of currently drawn straight baseline systems depart from the principles of stewardship and seek to swallow vast swaths of ocean through territorial, exclusionary claims.[231]

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[218] UNCLOS, *supra* note 84, art. 5.
[219] Convention on the Territorial Sea and the Contiguous Zone [CTSCZ], 29 April 1958, *entry into force* 10 September 1964, 516 U.N.T.S. 205, art. 3.
[220] Churchill, *supra* note 216, 'Baselines', in *The Law of the Sea* (3d ed. Manchester University Press, Manchester, 1999), p. 33.
[221] UNCLOS, *supra* note 84 art. 6.
[222] *Ibid*, art. 7; CTSCZ, *supra* note 219, art. 4.
[223] UNCLOS, *supra* note 84, arts. 7, 9; CTSCZ, *supra* note 219, art. 13.
[224] UNCLOS, *supra* note 84, art. 10; CTSCZ, *supra* note 219, art. 7.
[225] UNCLOS, *supra* note 84, arts. 11-12; CTSCZ, *supra* note 219, arts. 8-9.
[226] UNCLOS, *supra* note 84, arts. 6, 10(3), 11, 13; CTSCZ, *supra* note 219, arts. 7(3), 10-11.
[227] UNCLOS, *supra* note 84, art. 15; CTSCZ, *supra* note 219, art. 12.
[228] UNCLOS, *supra* note 84, art. 47.
[229] *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, 18 December 1951, ICJ, *I.C.J. Reports 1951*, p. 116.
[230] *Ibid*, p. 133.
[231] Churchill, *supra* note 216, p. 39, *citing* The Geographer, U.S. Department of State, *Limits of the Sea No. 106*, 'Developing Standard Guidelines for Evaluating Straight Baselines (1987); *and* J. R. V. Prescott, 'Straight and Archipelagic Baselines', in G. Blake (ed.), *Maritime Boundaries and Ocean Resources* (Croom Helm, London, 1987), pp. 38-51.

Though these claims are not afforded much weight by the international community, the inherent responsibility incurred by the state in making such contentions is accepted in some areas. Article 216 of UNCLOS relates the rights and duties of a coastal state *and* of flag states in exercising jurisdiction with respect to pollution by dumping in coastal, territorial areas.[232]

These examples show that it is sometimes more accurate to characterize international law as modifying or defining the exercise of a state's sovereign authority over some subject matter or location rather than extending or limiting it. For example, UNCLOS also provides monitoring and reporting requirements and enforcement mechanisms.[233] Where any environmental harm is sustained in violation of any "national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment[,]" criminal adjudicative jurisdiction may only be exercised in instances of "wilful [sic] and serious act[s] of pollution in the territorial sea" of the concerned coastal state.[234]

Article 4 of MARPOL is unabashed in its jurisdictional grant to states to address environmental degradation. It neither proscribed nor prohibits a specific civil or criminal law response to MARPOL violations.[235] MARPOL merely states that proceedings in accordance with established law should be carried out to address violations and that penalties "shall be adequate in severity to discourage violations of [MARPOL] and shall be equally severe irrespective of where the violations occur."[236] MARPOL thus provides another example of the fluidity of maritime jurisdiction over acts giving rise to legal injury.

Once baselines are established, their coordinates determine the location and extent of the territorial sea, the contiguous zone, EEZ, and the continental shelf. Territorial seas are established from base-points on a coastal State's shoreline and extend outward twelve

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[232] UNCLOS, *supra* note 84, art. 216. "1. Laws and regulations adopted in accordance with this Convention and applicable international rules and standards established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment by dumping *shall be enforced*:
(a) by the coastal State with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf;
(b) by the flag State with regard to vessels flying its flag or vessels or aircraft of its registry;
(c) by any State with regard to acts of loading of wastes or other matter occurring within its territory or at its off-shore terminals.
2. No State shall be obliged by virtue of this article to institute proceedings when another State has already instituted proceedings in accordance with this article." *Emphasis added*.
[233] *See generally* UNCLOS, *supra* note 84, Part XII.
[234] *Ibid*, art. 230.
[235] 1973 International Convention for the Prevention of Pollution from Ships [MARPOL], 17 February 1978, *entry into force* 2 October 1983, 1340 U.N.T.S. 184, *as amended* 1 January 2010, art. 4.
[236] *Ibid*, art. 4(4).

nautical miles into the sea.[237]

If a State chooses to establish a contiguous zone, it can extend a further twelve nautical miles seaward from the breadth of the territorial sea using the same base-points.[238] Though contiguous zones do not constitute sovereign territory to the extent of territorial seas, "coastal states may exercise the control necessary to prevent or punish infringement of customs, fiscal, immigration, and sanitary laws in its territory or territorial sea."[239]

The EEZ is measured from the baselines of the territorial sea under UNCLOS and the optional establishment of an EEZ provides a coastal state with specific, limited sovereignty over the waters of the 200-nautical mile zone.[240] The legislative and adjudicative jurisdiction afforded a State within its EEZ applies its permitted laws and regulations to vessels operating within such waters.[241] The primary activity that States can engage in within their EEZ relates to the exploration, exploitation, conservation, and management of natural and living resources.[242] Whereas the establishment of an EEZ provides rights and obligations relating to the waters and contents therein, the establishment of a continental shelf creates a congruent, coterminous set of rights and obligations in relation to the seabed and subsoil.[243]

Islands can support an EEZ or continental shelf, whereas other, less significant geographic features such as "rocks" cannot.[244] Inundation of islands resulting in sufficient submersion or inland retreat of shorelines through sea level rise will result in loss of jurisdiction over significant portions of these large areas.[245]

3.3.2 Analogues to Extraterritorial Jurisdiction

The articulations of maritime jurisdictional legal concepts emanate from territorial terms of art but are imbued with context-specific characteristics. Each application demonstrates an awareness of the international community's communal interest in exercising maritime jurisdiction equitably.

The application of binding international law in the international forum is akin to the

[237] UNCLOS, *supra* note 84, art. 3.
[238] *Ibid*, art. 33.
[239] C. Di Leva & S. Morita, The World Bank Law and Development Working Paper Series 5, *Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?*, 7 April 2008, *available at* <www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/08/04/000333038_20080804014247/Rendered/PDF/449020NWP0Box311number5010JULY02008.pdf>, p. 13; *see also*, *Ibid*.
[240] UNCLOS, *supra note* 84, art. 56.
[241] *Ibid*, art. 62.
[242] *Ibid*, arts. 56, 61.
[243] Di Leva & Morita, *supra* note 239, p. 14.
[244] UNCLOS, *supra* note 84, art. 121(3).
[245] Lusthaus, *supra* note 215, p. 116.

extraterritorial application of domestic law in that most cases involve the enforcement of a sovereign's domesticated version of the international legal rules over persons and entities subject to another sovereign by virtue of citizenship, registry, or location. International law is promulgated from no territory, but is applied over sovereign territory and property automatically or through the recognised means of treaty ratification.[246]

Most forms of international maritime law concern a specific subject matter and regulate it through acknowledgment of its supremacy over the same subject matter in national legal systems.[247] Thus, where a specified crime is committed or regulation is violated the authority of the relevant rule of international maritime law controls irrespective of the physical location of a vessel or seafarers.

3.3.2.1 Jurisdiction Aboard Vessels and Over Persons Aboard Vessels

The concepts of *in rem* and *in personam* jurisdiction have a particular application in the maritime context. In a Court of Admiralty, *in rem* jurisdiction is a suit proceeding against the ship or its cargo to perfect maritime liens, whereas *in personam* suits pursue any legal person potentially liable.[248] Still, the ship is anthropomorphised in law, possessing its own competence to contract and commit tortuous and criminal offences.[249] The action *in rem* has become the most popularly used procedural device since the nineteenth century, though there is evidence of its employment well before the Elizabethan era.[250] The modern theory of maritime liens is linked to and evolved due to the dominance of the action *in rem*.[251] The American maritime cases have contributed substantially to the modern reinvigoration of this principle.[252]

The ship is seen, as a moving object that is subject to the laws of the territory it is in, so another state's jurisdiction may territorially attach to it. *In rem* jurisdiction is a peculiarity and distinguishing feature of admiralty because there is not the same extent of default *in personam* jurisdiction over people aboard the ship.

The concept of having rights against the ship allows for a more efficient process when the owner of the ship could be anywhere in the world. In courts of common law *in rem*

[246] VCLT, *infra* note 478, arts. 31-32.
[247] *Contra* UNCLOS, *supra* note 84, *e.g.*, (enumerating sets of laws relating to specific areas of the sea as opposed to subject matters).
[248] *See, e.g.*, Corpus Juris Secundum, 'Admiralty', sec. 92, 'Nature and Kinds of Remedies: Generally,' *citing The Sabine*, 101 U.S. 384 (1879), pp. 386-388.
[249] D. Lind, 'Pragmatism and Anthropomorphism: Reconceiving the Doctrine of Personality of the Ship,' 22 *University of San Francisco Maritime Law Journal* (2010), pp. 39-121, at 40-41 (tracing this idea back to ancient roots in customary law).
[250] F. L. Wiswall, Jr., The Development of Admiralty Jurisdiction and Practice Since 1800: An English Study with American Comparisons, (Cambridge University Press, Cambridge, 1970), p. 155.
[251] *Ibid*.
[252] *Ibid*., pp. 41-42.

jurisdiction is used as a procedural device to take control of the property of a person in order to compel that person to come to court and defend their property thus enabling the court to gain *in personam* jurisdiction over the person. This strategy is used because actions *in rem* can only result in judgments against the vessel and *in personam* actions cannot.[253]

Though some have argued that proceedings *in rem* operate to "tak[e] one man's property to satisfy another man's wrong," the historical and social context of personifying vessels is rooted in ancient practice and appropriately found its way into maritime legal doctrine.[254] In order to effectuate the arrest a ship, the legal fiction of *in rem* proceedings against it prevent the evasion of effective exercise of jurisdiction over the "legal fact" that some lienor holds an interest in the vessel.[255]

In respect to the extension of jurisdiction over people aboard a vessel, the legal construction of a vessel as the extension of the flag state's territory can affect such exercise.[256]

3.3.2.2 Vessels as Extensions of Territory

Vessels in international waters may legally constitute a sovereign's territory depending on the flag the vessel is flying.[257] Similar to the territorial status of states in international law, vessels do not generally lose this character even in the face of military occupation.[258]

The criminal law example is straightforward. The flag of the vessel is legally operational and the flag state has legitimate interests in regulating the conduct aboard its vessel and of ensuring proper conduct in foreign ports. Concurrent criminal jurisdiction will exist for acts that spill over into the port or harbour, and the *legentia localis* transition to the port state's jurisdiction upon docking or engaging in shore leave is commonsensical.

The application of civil regulatory laws over vessels flying foreign flags is more problematic in light of the consideration that vessels operate as extensions of flag state territory. The Supreme Court of the United States issued a fractured opinion on this general

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[253] *Ibid*, pp. 51-52.
[254] *The Steam Tug Eugene F. Moran v. New York Central and Hudson River Railroad Company (The Eugene F. Moran)*, 212 U.S. 466 (1909), p. 474.
[255] *Merchants National Bank v. The Dredge General G. L. Gillespie*, 1982 AMC 1, 663 F.2d 1338 (Federal Court of Appeals for the Fifth Circuit), p. 1245
[256] *See United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820), p. 185 (holding that the United States has jurisdiction to punish all crimes committed on vessels flying its flag). *Accord The Queen v. Anderson*, 1 L.R.C.C.R. 161 (1868), p. 166 (holding that the Crown could take criminal jurisdiction over acts committed aboard British vessels in foreign territory).
[257] *See Furlong*, *and The Queen v. Anderson*, *supra* note 256.
[258] *See The Queen v. Serva*, 169 Eng. Rep. 169 (1845), pp. 170-175 (holding that mere apprehension of illegal Brazilian slave ships by British military personnel does not automatically result in lawful possession giving rise to the exercise of criminal jurisdiction by British courts).

question in the 2005 case of *Spector v. Norwegian Cruise Line Ltd.*[259] The question presented was whether a section of the Americans with Disabilities Act (ADA) applied to foreign cruise ships in US waters?[260] The plaintiffs were disabled cruise ship passengers submitting a complaint about the ship's ability to accommodate them. The federal Court of Appeals for the Fifth Circuit below answered the question in the negative, using doctrine requiring clear legislative intent to apply general statutes to foreign-flag ships.[261] Another federal circuit had answered the question in the affirmative, prompting *certiorari*.

The Supreme Court divided on every subpart of the main question presented. It garnered five votes, a majority, agreeing that cruise ships fall within the definitions and interpretations of the ADA, despite no specific mention of cruise ships.[262] It also gathered five votes agreeing that barrier removals for disabled accommodations would put cruise ships in non-compliance with SOLAS if the safety of passengers as a whole is compromised for disabled access and that congress would never intend that result.[263] The case was remanded to consider if the ADA's own limitations prevent the imposition of requirements that would conflict with international law or threaten safety under the *Charming Betsy*. Throughout the plurality opinion, some justices adopt an all-or-nothing approach and would require wholesale application or non-application of the ADA. The majority of the justices recognize the jurisdictional considerations inherent in exercising jurisdiction over international maritime affairs over foreign flagged ships.

3.3.2.3 Jurisdiction over Marine Insurance Contracts

Generally, the requirement of insurance coverage for maritime ventures is a universally accepted practice that has become international law. Protection and Indemnity (P&I) clubs provide policies irrespective of borders.

P&I clubs began when prominent stakeholders in the shipping industries proactively banded together to provide mutual assurance against common risks left unguarded by the developing insurance market.[264] Reasoning that the joint bearing of risk in the spirit of reciprocity would reduce the risk of an individual financial ruin, these clubs have consistently expanded coverage to the new and more frequent risks associated with maritime ventures.[265] This lockstep expansion of coverage appears on its face to be a positive sign of promoting safe practices and protecting life at sea.

States essentially disregard the extraterritorial application of maritime insurance contracts that violate principles of national contract law or public policy. This could also be

[259] Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005).
[260] *Ibid*, p. 125.
[261] *Ibid*.
[262] *Ibid*, p. 129.
[263] *Ibid*, pp. 131-132.
[264] N.J. Ronnenberg, Jr., 'An Introduction to the Protection and Indemnity Clubs and the Marine Insurance they Provide.', 3 *University of San Francisco Maritime Law Journal* (1990), pp. 1-36, at 3-4.
[265] *Ibid*.

characterized as the application of a State's own conduct regulating and loss allocating rules extraterritorially where a court determines interests are strong enough and justice will be achieved. Perhaps the most common example is the direct action statute.

Direct action statutes disregard the legal obligation of indemnity policyholders to pay a claim or judgment before the insurer is liable to reimburse the policyholder.[266] The most "pure" example of the reach of a direct action statute[267] is that of Louisiana.[268] The statute states in relevant part, "right of direct action shall exist . . . whether or not such policy contains a provision forbidding such direct action . . . "[269] More maritime insurance cases arise under this statute than in any other U.S. state.[270] The reasoning behind providing direct action irrespective of a shipowner's limitation fund is that the "insurance is for the benefit of the injured party rather than for the protection of the assured."[271] The United States Fifth Circuit Court of Appeals, which includes Louisiana, has characterized the public policy behind the Louisiana direct action statute as "proclaim[ing] that liability insurance-including purported indemnity insurance-is issued primarily for the protection of the public rather than the insured."[272]

Despite such divided opinions, the United States Court of Appeals for the Fifth Circuit later deferred to the Supreme Court of Louisiana on the question of whether or not an injured party could bring a direct action against a marine P&I indemnity insurer by certifying the question to the state court in *Grubbs v. Gulf International Marine, Inc*.[273] The Supreme Court of Louisiana held that "the text, purpose, and legislative history of the Louisiana Direct Action Statute and the Louisiana Insurance Code lead us to conclude that within its

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[266] N.R. Foster, 'Marine Insurance: Direct Action Statutes and Related Issues', 11 *University of San Francisco Maritime Law Journal* (1999), pp. 267-268.
[267] *Ibid*. pp.261-298, at 270-271.
[268] Louisiana Revised Statutes, Title 22: Insurance, Section 655(B)(2) (1997 & Supp. 19940 (United States).
[269] *Ibid*.
[270] C.D. Hooper, 'Limitation of Liability and the Direct Action Statute: A Troubled Marriage,' 55 *Louisiana Law Review* (1995), pp 843-860, at 843, n.1.
[271] L.J. Buglass, *Marine Insurance and General Average in the United States* (3d ed. Cornell Maritime Press, Cambridge, MD, 3d ed. 1991) p. 434.
[272] Hooper, *supra* note 270, p. 845, *citing Olympic Towing Corp. v. Nebel Towing Corp.*, 419 F.2d 230 (United States Court of Appeals for the 5th Circuit (1969), p. 237, *as amended* 24 November 1969, *rehearing en banc denied*, 23 March 1970, *cert. denied*, 397 U.S. 989 (1970), *overruled by Crown Zellerbach Corp. v. Ingram Indus., Inc.*, (United States Court of Appeals for the 5th Circuit) 1986, 783 F.2d 1296, *cert. denied*, 479 U.S. 821 (1986). *Compare* Hooper, *supra* note 271, p. 846. A vigorous dissent argued, "As long as the Direct Action Statute subjects the insurer to no greater liability than the assured would have, it fulfills the Louisiana policy of public protection and avoids troublesome questions of conflict between state and federal maritime law. The Court's reading rewrites the contract, imposes liability beyond that of the assured and ignores substantive limitations on liability under maritime principles."
[273] *Grubbs v. Gulf International Marine, Inc.*, 625 So.2d 496, (Supreme Court of Louisiana, 1993), pp. 497-498, 503-504.

terms the statute permits *all* injured persons to maintain direct actions against *all* liability insurers, including P&I insurers."[274]

Limitation of liability and the protection of injured parties could potentially be at odds with each other, however, it seems that injured parties especially in tort are given deference or a thumb on the scale. Protection of life at sea is weighted heavier than limiting liability, as demonstrated recently by the IMO.[275]

Other U.S. jurisdictions provide direct action statutes, though none are as victim-friendly as that of Louisiana. These jurisdictions include New York, Wisconsin, Puerto Rico, and California.[276] Other state courts and legislatures, such as New Mexico, Alaska, Missouri, Arizona, and New Jersey, have held or declared that such direct actions are not permissible.[277] The vastly different results of the legislative actions of these states in enacting or prohibiting direct action statutes and the legislative intent behind such actions renders daunting any attempt at adopting a comprehensive, uniform maritime insurance act in the United States.[278] An *ad hoc* committee for developing such a marine insurance act was formed by the Maritime Law Association (MLA) in 1995 with the express intent of resolving the perceived problems that resulted from the *Wilburn Boat*[279] decision and its progeny and creating a statutory scheme that would be more in line with the Canadian and British models.[280] In the international maritime context, legal responses have overridden the typically territorial application of contract law.[281]

3.3.2.4 The High Seas

The high seas are traditionally regarded as a purely international area where not one sovereign but the international community as a whole can agree upon the governing rules expressly or through conduct. An alternative view emerging in relation to international

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[274] *Ibid*, pp. 503-504.
[275] *See, e.g.*, International Maritime Organization, *Adoption of Amendments of the Limitation Amounts in the Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims, 1976*, 19 April 2012, Res. Leg.5(99)/14, annex 2 (increasing the liability limits available in maritime insurance claims involving injury or loss of life). *See also*, International Maritime Organization, Press Briefing, *Limits of Liability for Shipping Raised with Adoption of Amendments to 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims*, 19 April 2012, *available at* <www.imo.org/MediaCentre/PressBriefings/Pages/12-LLMC-Prot-limits.aspx>.
[276] Foster*, supra* note 266, pp. 270; 281-282.
[277] *Ibid*, p. 287-288.
[278] *Ibid*, pp. 296-297.
[279] Maritime Law Association, MLA Doc. No. 719, 30 September 1995, p. 10187.
[280] C.S. Haight, Jr., 'Babel Afloat: Some Reflections on Uniformity in Maritime Law, 28 *Journal of Maritime Law and Commerce* (1997), pp. 189-205, at 203.
[281] *See, e.g.*, L. R. Russ & T. F. Segella, *Couch on Insurance* (3d. ed.), § 24:8, 'Applicability of Law of Place Where Contract Made' (demonstrating the prevailing view on the interpretation of American life and automobile insurance contract is that the law of the state where the policy was issued controls).

environmental laws involves a shift from an anthropocentric to a geocentric jurisprudential model.[282] "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[283] Through developments in international human rights law, international environmental law, and international maritime law, the legal recognition of the high seas and nature itself as possessing judicially cognizable interests or even rights is gaining force and shaping the corpus of laws dealing with these matters. The implication for humans and states under these developments is the placement of correlating duties to respect the proposed rights or interests of the natural entities and forces. This movement should be encouraged and combined with an expansion of liability for environmental harms, especially in the realm of criminal law. Other features of this proposal should include further development of an 'earth jurisprudence' perspective of state responsibility, universal jurisdiction, citizen suits, public trust, and legal personality or expression.[284]

The general idea embodied by the principle of common heritage of mankind was used by the United States in the nineteenth century when it argued that it had a right and a duty to act for the benefit of mankind in an area outside of its jurisdiction.[285] Though the argument was rejected, regulations were adopted in favour of the preservation efforts of the United States indicating that there would be the possibility for abuse if a state were allowed to act unilaterally and that cooperation is necessary to act in areas that are the common heritage of mankind.[286] In 1970, the United Nations declared "'the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (. . .) as well as the resources of [this] area' to be 'the common heritage of mankind.'"[287] "The principle of common heritage of mankind embraces the following objectives and elements: (1) it internationalizes the interest in, the authority over, and the benefits of a particular issue, (2) it reserves an issue for future generations, and (3) it limits the use of resources for the benefit of mankind and for peaceful purposes."[288] The principle limits state sovereignty by requiring states to account for the needs of mankind through cooperative measures, but also indicates a removal of the boundaries that traditionally allow for the supreme authority of a state over its territory in favour of a system where states are merely representatives of interest groups

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[282] J. E. Koons, 'What is Earth Jurisprudence?: Key Principles to Transform Law for the Health of the Planet', 18 *Penn State Environmental Law Review* (2009), pp. 47-69, at 48.
[283] *Sierra Club v. Morton*, 405 U.S. 727 (1972) (Douglas, J., *dissenting*), pp. 741-742, *citing* C. D. Stone, 'Should Trees have Standing?: Toward Legal Rights for Natural Objects', 45 *Southern California Law Review* (1972), pp. 450-456.
[284] Koons, *supra* note 282, pp. 47-49; 59.
[285] *Pacific Fur Seal Arbitration (United States* v. *United Kingdom)*, 15 August 1893, Special Arbitration, *reprinted in* P. Cobbett, 'Behring Sea Arbitration, 1893', 1 *Cases and Opinions on International Law* (1909), pp. 127-130. *See also* R. Bratspies, 'Finessing King Neptune: Fisheries Management and the Limits of International Law, 25 *Harvard Environmental Law Review* (2001), pp. 213-258, at 229-231.
[286] Bratspies, *supra* note 285, pp. 239-231.
[287] Perrez, *supra* note 83, p. 293, *citing* United Nations General Assembly, *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*, G.A. Res. 2749 (XXV).
[288] *Ibid*, p. 294.

that must advocate, though ultimately accept their participatory role in the preservation of mankind's common heritage whatever their earlier advocative position may have been.[289]

The principle of *res communis* implies that everyone has a right of access to the sea.[290] Using the word "right" to describe a generally unopposable ability to do something, such as the right to access the sea, is often employed to emphasize the fundamental nature or importance of that ability.[291] Application of Wesley Hohfeld's seminal work, which distinguishes legal relationships through jural correlatives and jural opposites,[292] to the articles relating to passage in UNCLOS, clarifies that the relationship between a coastal state's authority and the ships passing through foreign territorial seas must, in the maritime context, be exercised in accordance with international law.[293] If individuals and their ships possess a right to navigate the high seas and to pass through territorial seas, then coastal states and other individuals and ships have a duty to respect others' rights of navigation and passage under international law. UNCLOS has codified international custom into international law and created custom through many of its legal provisions, both progressions are particularity notable in regard to navigational laws.[294] The legal implication of this development as related to navigational rights and duties is that all states must follow international maritime law as it is written. Conversely, states that are not parties to UNCLOS regard it as custom.[295] By combining the right and duty distinction with

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[289] *Ibid*, p. 294, *citing* P. Sands, *Institutionalizing Doubt*, lecture 5.
[290] Black's, *supra* note 7, '*Res: Res Communis*.'
[291] *See* C. Nyquist, 'Teaching Wesley Hohfeld's Theory of Legal Relations', 52 *Journal of Legal Education* (2002), pp. 239-241 (encapsulating the Hohfeldian distinction between the four uses of the word "right": right, privilege, power, and immunity).
[292] W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* (1913), pp. 16-59, at 28-59. Hohfeld notes lexographic distinctions of the term "right" beyond Nyquist, *supra* note 291, in observing in several judicial decisions that the term can refer to, *inter alia,* interests, power, legal power, prerogative, property, authority, and investiture.
[293] UNCLOS, *supra* note 84, arts. 17-19 (stating the right of innocent passage and qualifying the extent of the right, which in a Hohfeldian sense imposes a strict duty upon the coastal state to "not hamper" the innocent passage); 21 (describing the power, in a Hohfeldian sense, of the state to exercise legislative jurisdiction in its territorial sea); 24-25 (describing the duties and rights of the coastal state, which in a Hohfeldian sense can also be described by placing the jural opposite of "disability" on the passing ship to alter the territorial state's legislation or action when it is within the capacity that the previous articles allow and by placing the jural correlative of "liability" on the passing ship to describe its lack of ability to prevent its entitlement to innocently pass from being altered by the state within the parameters of UNCLOS).
[294] G. K. Walker, 'Defining Terms in the 1982 Law of the Sea Convention III: The International Hydrographic Organization ECDIS Glossary', 34 *California Western International Law Journal* (2004), pp. 211-271, at 232-235. *See also*, *USA-USSR Joint Statement*, *infra* note 297 (describing how innocent passage as defined in UNCLOS was "decisive[ly] push[ed] into customary law").
[295] *USA-USSR Joint Statement*, *infra* note 297. The reliance of the U.S.S.R. and the U.S.A. on the navigational articles of UNCLOS at a time when only the U.S.S.R. was a signatory

the implications of the "common heritage of mankind" constraints, the relationship between sovereign states and the sea can be described as a state possessing only the right to act in accordance with what international law allows, which means a state has a duty to act precisely as international law requires.

Problems arise where states refuse to recognize internationally accepted norms or fail to similarly comprehend and apply them. The Black Sea bumping incident between the Soviet Union and the United States in 1988 demonstrates this problem.[296] At the time neither party had ratified UNCLOS even though the United States actions were undertaken in reference to the right of innocent passage embodied both in custom and the Convention; both parties sought to clarify the parameters of the right beyond what is spelled out in Article 19.[297] The dispute was resolved through political and diplomatic channels between the two sovereigns and not through the resolution mechanisms set out in UNCLOS.[298] The United States sought to commission transit through the Black Sea as part of its Freedom of Navigation program, but the Soviet Union advanced the opinion that Freedom of Navigation exercises were not necessary and that for passage to be innocent it had to be necessary.[299] The United States maintained their position that passage was innocent provided it was continuous, expeditious, and not prejudicial to the peace, good order, or security of the coastal state.[300] UNCLOS does not define passage using the term necessary except with regard to stopping and anchoring[301] and its list of what will be considered prejudicial to the peace, good order or security of the coastal state does not significantly alter the meaning of passage provided the passage is in conformity with the Convention and there is no interference with the integrity of the coastal states laws and regulations on land.[302] The necessity argument necessarily fails, as it would completely deplete the concept of innocent passage, thus allowing states to prevent ships from passing through its territorial waters and leaving the bones of the necessity defence in its place for those instances where a ship has no choice

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to the convention demonstrates the binding, customary nature of those provisions. The agreement unequivocally states, "1. The relevant rules of international law governing innocent passage of ships in the territorial sea stated in the 1982 United Nations Convention on the law of the Sea (Convention of 1982), particularly in Part II, Section 3. 2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required." *See also*, UNCLOS, *supra* note 84.

[296] *See generally* Rolph, J. W., 'Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage be?', 135 *Military Law Review* (1992), p. 160.

[297] *USA-USSR Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage*, *reprinted in* Lowe, V., 'Uniform Interpretation of the Rules of International Law Governing Innocent Passage', 6 *International Journal of Estuarine and Coastal Law* (1991), pp. 73-76.

[298] *Ibid*.

[299] Rolph, *supra* note 296, p. 160.

[300] *Ibid*.

[301] UNCLOS, *supra* note 84, art. 18.

[302] *Ibid*, art. 19.

but to enter the territorial waters of a state that does not allow its presence.[303] If sovereignty is to be exercised with limitations it would logically be the international community that would set those limitations, which is precisely what custom and international law do.[304]

Innocent passage is a key part to understanding the concept of freedom of the sea because it conveys a message that is closely tied to the comprehension of state sovereignty applicable to the seas and has existed as part of international law since before the drafting of UNCLOS.[305] The *Corfu Channel* case evinces this message of the inviolable nature of innocent passage to state sovereignty. In that case it was argued that the passage of the British warships on October 22, 1946, was not innocent because it was a political mission to test Albania's attitude toward innocent passage that Albania had tried to impose by firing upon passing ships.[306] The United Kingdom conceded that the purpose of sending warships through the strait was, in addition to passing for the purpose of navigation, to test Albania's illegal attitude on a right that had been unjustly denied.[307] The Court said that the United Kingdom was not bound by Albania's pronouncement of authority that was exercised to prevent passage provided the measures taken were carried out in a manner consistent with international law.[308] The evidence showed that the British warships proceeded through the strait in a line, their guns were in the usual peacetime position, and that their movements did not change until after the first explosion, at that point the measures taken were necessary to protect human life and the mined ships.[309] It was not unreasonable that the ships were at action station in order to retaliate if fired on considering Albania's previous behaviour.[310] In view of the facts in this instance the Court said that Albania's sovereignty was not violated by the actions of the British Navy.[311]

In contrast, the Court viewed the actions of the British Navy, sweeping for mines through the Corfu Channel in Albania's territorial waters, on November 12 and 13 as a violation of Albania's sovereignty.[312] Freedom of the seas is indicative of freedom of passage, but to act further within the sovereign area of another state requires cooperation. The difference between the actions of the United Kingdom on the dates at issue show that passage, on its

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[303] Rolph, *supra* note 296, pp. 160-161.
[304] Shaw, *supra* note 35, pp. 70; 212.
[305] There are several other provisions of UNCLOS (including *sovereign immunity* and provisions related to land-locked states, which I discuss briefly) that I would label as key to explaining my premise about the more extreme limitations international maritime law and custom are to traditional notions of sovereignty, but I have chosen to focus most on innocent passage because the cases and incidents discussing this right are rich with evidence of the dichotomic character of sovereignty as applied to land and water, which suit my purposes most strongly for comparative analysis.
[306] *The Corfu Channel Case (United Kingdom v. Albania)*, 9 April 1949, ICJ, I.C.J. Reports 1949, p. 30.
[307] *Ibid*.
[308] *Ibid*.
[309] *Ibid*, pp. 30-31.
[310] *Ibid*.
[311] *Ibid*, pp. 32.
[312] *Ibid*, pp. 36.

own, through the seas is almost invariably unable to be restricted; it does not even matter whether it is necessary to use a particular area of the sea to gain access to another area, passage cannot be entirely prohibited.[313] Sovereignty becomes an issue when a foreign state exercises unnecessary control over the territorial waters of another. The act of sweeping for mines was labelled intervention and a manifestation of the policy of force that went beyond the wide interpretation of innocent passage by attempting to secure possession of evidence, which the Court viewed as a right that could be seriously abused and lead to perverting the administration of justice.[314] It is quite certain that if there had been cooperation or consent, the minesweeping efforts would have been viewed differently.[315]

The sovereign immunity that applies to warships and other non-commercial government ships further enhances the concept of freedom of the seas by allowing ships fulfilling governmental functions to traverse the seas exercising their freedoms without being hindered by or subjected to inspection and scrutiny.[316] However, each state is expected to act consistently with the Convention.[317] This shows how territorial sovereignty follows these ships as they navigate the seas, not restricted by another sovereign's authority, yet still limited by the supremacy of international maritime law.

In order to allow for a land-locked state to exercise its rights to access the sea international maritime law and custom extend onto the land. A land-locked state's right of access to the sea include the right to cross the land-based territory of another sovereign to gain access to the sea and exercise their rights in the freedom of the seas.[318] The implication to the sovereignty of the coastal state that must allow for another states crossing is the strength of the supremacy of international law and custom in enforcing the right.

Lastly, UNCLOS contains an oft-repeated phrase that could have had promise for the earth jurisprudential perspective. The "Common Heritage of Mankind" (CHM) states "[t]he Area and its resources are the common heritage of mankind."[319] Rather than portray the "area and its resources" as constituting an entity deserving of consideration apart from humankind's designs for it, CHM characterizes "the area and its resources" as *belonging* to mankind. The word *heritage* has the same etymological Latin root as words like *inherit*, *heir*, or *hereditary*, which all connote something of a birthright or a reservation of rights – an unassailable, personal possessory interest granted by virtue of being. Thus, the implication of CHM is that humans must act in regard to the interests of *other humans*, and not to the oceans or their ecosystems, when seafaring, mining, drilling, or conducting any other activities in "the area." The CHM area of the world's oceans is not merely subject to national jurisdiction, but are exploitable and under the jurisdiction of the international maritime tribunals and the International Seabed Authority.[320] "[T]heoretically all of

[313] *Ibid*, pp. 28.
[314] *Ibid*, pp. 34-35.
[315] *Ibid*, pp. 33-34.
[316] UNCLOS, *supra* note 84, art. 236.
[317] *Ibid*.
[318] UNCLOS, *supra* note 84, art. 125.
[319] *Ibid*, art. 136.
[320] M. A. Harry, 'The Deep Seabed: The Common Heritage of Mankind or Arena for

humanity became the sovereign over the international commons."[321] CHM developed not as an earth jurisprudential recognition of the need to preserve and protect the rights or interests of oceanic ecosystems, but was the first codification of a property rights regime that transcended national sovereignty."[322]

3.3.2.5 Universal Jurisdiction in the Maritime Context

Due in large part to the specific international nature of jurisdiction in the maritime context, incorporation of universal jurisdictional features into areas such as piracy and environmental law has been successful. Another factor contributing to these developments is the potential for all states and individuals to be harmed.

The reasoning supporting the extension of universal jurisdiction over piracy is threefold, being "primarily based on the locus of the crime, its effect on many States, and its alleged heinous nature."[323] Arguments for analogical extension of universal jurisdiction to cover human trafficking apply equally as well to environmental crimes, where,

"[l]ike pirates, human traffickers often operate across international borders and the widespread impact of their activities has the potential to harm all States. Furthermore, the analogy between these two criminal enterprises is supported by the gravity of the crime rationale--a rationale that has formed the basis for expanding the universal jurisdiction doctrine to other crimes of universal concern."[324]

Incorporation of environmental crimes into a framework such as the Princeton Principles on Universal Jurisdiction is logically plausible and reflects the policy behind an earth jurisprudential view on protecting the environment and criminalising such behaviour.[325] Such incorporation need not grapple with the academic debate as to whether or not environmental protections should be incorporated into international human rights doctrine because the focus is on prevention of diffuse harm and the criminality of the behaviour. The application of the Princeton framework to environmental crimes furthers the aforementioned policy rationales supporting an earth jurisprudential extension of criminal law to international maritime environmental protection. The Princeton Principles promote international judicial cooperation,[326] dismantle sovereign immunity, promote state and individual responsibility,[327] and dispense with statutes of limitations.[328]

Unilateral Exploitation?', 40 *Naval Law Review* (1992), pp. 207-228, at 209-212.

[321] S. J. Shackelford, 'The Tragedy of the Common Heritage of Mankind', 28 *Stanford Environmental Law Journal* (2009), pp. 109-169, at 110.

[322] *Ibid*, p. 114.

[323] M. Cohen, 'The Analogy between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction', 16 *Buffalo Human Rights Law Review* (2010), pp. 201-235, at 201-202.

[324] *Ibid*.

[325] The Princeton Principles, *supra* note 75.

[326] *Ibid*, principles 1; 3; 4; 8; 9.

[327] *Ibid*, principles 5; 7; 10; 13.

[328] *Ibid*, principle 6.

Actual examples of incorporating such principles into substantive international maritime law are abundant. Article 194 of UNCLOS requires states to "take. . . all measures . . . necessary to prevent, reduce and control pollution of the marine environment from any source . . ."[329] Article 207 specifically obliges states to similarly "reduce and control pollution of the marine environment from land-based sources."[330] Article 208 addresses the "reduc[tion] and control [of] pollution of the marine environment arising from or in connection with seabed activities" and article 209 involves pollution arising from any activities in the Area.[331] Article 210 relates to reduction and control of pollution by dumping, article 211 to pollution from vessels, and article 212 to the "reduc[tion] and control [of] pollution of the marine environment from or through the atmosphere."[332]

UNCLOS also provides monitoring and reporting requirements and enforcement mechanisms.[333] Where any environmental harm is sustained in violation of any "national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment[,]" criminal adjudicative jurisdiction may only be exercised in instances of "willful [sic] and serious act[s] of pollution in the territorial sea" of the concerned coastal state.[334]

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) was drafted to preclude any jurisdictional gaps that inhibit the prosecution of particularly abhorrent crimes at sea.[335] Article 6 provides different jurisdictional hooks for flag states, coastal states, states of which the offenders are citizens, and states of which the victims are citizens to exercise jurisdiction over enumerated crimes.[336] SUA also provides methods for amicably agreeing on applicable laws and the forum between all interested states[337] and such provisions should be read in light of IMO resolutions on the same.[338] These instances all demonstrate the communal exercise of

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[329] UNCLOS, *supra note* 84, art. 194.
[330] *Ibid*, art. 207. *See also ibid*, art. 213.
[331] *Ibid*, arts. 208-209.
[332] *Ibid*, arts. 210-212.
[333] *See generally ibid*, Part XVII.
[334] *Ibid*, art. 230.
[335] International Maritime Organization, *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* [SUA], 10 March 1988, *entry into force* 1 March 1992, 1678 U.N.T.S. 221, 27 I.L.M. 668.
[336] *Ibid*, art. 6.
[337] *Ibid*, arts. 7-9.
[338] International Maritime Organization, *Resolution A.922(22): Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, 29 November 2001, IMO Doc. A 22/Res.922, 22 January 2002, art. 5.5. "Recognition should be given to the different national interests that may be involved in each case, including: flag State of the ship; country in whose territorial waters the attack took place; country of suspected origin of the perpetrators; country of nationality of persons on board; country of ownership of cargo; and country in which the crime was committed. In cases of piracy and armed robbery against ships outside territorial waters, the flag State of the ship should take lead responsibility, and in other cases of armed robbery the lead should be taken by the State in

jurisdiction for the benefit and protection of seafarers.

3.4 The Significance of Custom in Establishing Maritime Jurisdiction

By looking at the development of international maritime law throughout history, the currently operating conventions that seek to contextualise and codify international maritime law and custom, and the operation of treaties in maritime dispute resolution, the function of sovereignty in the maritime context can more readily be understood to be a fiction that only defines the entities that are representatives and participants in the codification process. Traditional conceptions of state sovereignty are not enough to unilaterally override the historically developed customs that define maritime law today and have been slow to change throughout the history of people's use of the sea.

International maritime law, the *lex maritima,* resulted from the development of commerce, which in turn caused increased interaction of nation-states necessitating a uniform body of law that would touch and concern everyone involved; it was not the will of any single lawmaking authority, but the reciprocal observance of procedures that benefited and protected mankind.[339] Over time, but particularly in the seventeenth century, the *lex maritima* became part of national law, though general maritime law has always been recognized in most national courts.[340] Before the seventeenth century it had been assumed that political and sovereign authority could be exercised over the sea even though there was clearly recognition and knowledge of the interconnectedness and reliance on the historical codification of custom observed by earlier nation-states.[341] Claims of sovereignty were exercised but they were also ignored by rival powers.[342] In Roman times the principle of *res communis* referred to a class of territories where sovereignty or private ownership could not be gained through occupation or capture, such as the high seas and air, but neither were they considered public property, *res publica*, which later became important to modern writers on the concept of freedom of the seas.[343]

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whose territorial waters the attack took place. In all cases it should be recognised that other States will have legitimate interests, and therefore liaison and co-operation between them is vital to a successful investigation."

[339] *See generally* Schoenbaum, *supra* note 116, § 2-1.

[340] *Ibid*, n. 4, *citing* W. Tetley, 'The General Maritime Law – The *Lex Maritima*', 20 *Syracuse Journal of International and Comparative Law* (1994), pp. 105-145, at 105.

[341] *See Ibid*, n. 5, *citing* A. Reppy, 'The Grotian Doctrine of Freedom of the Sea Reappraised', 19 *Fordham Law Review* (1950), pp. at, 247–51; *see also* L. Benton & B. Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice', 28 *Law & History Review* (2010), pp. 1-38, at 9-10, 19 (describing how the Treaty of Tordesillas between Portugal and Spain marked off spheres of influence rather than sovereignty thus requiring further acts to establish dominion over territories within the spheres).

[342] Ibid.

[343] *See* Benton, *supra* note 341, p. 15.

Hugo Grotius developed the foundations of the legal doctrine, freedom of the seas, in his *Mare Liberum*.[344] Although challenged by his predecessors, his view of the sea as the common property of mankind requiring that the ships of all nations have freedom to navigate the seas ultimately prevailed as customary international law due to the inability of any single nation to exercise complete dominion and control over the seas.[345] It was a practical necessity for nations to concede sovereignty as in turn they were able to gain greater access to the seas with the increased confidence that safety for the goods and people on board their ships would be reciprocated when they came into contact with other nations.[346] The absence of a single international sovereign-type authority over the sea that has the ability to make and declare law means that the source of international maritime law comes from states common will.[347] The continued process of codifying international customary practice into treaties and national law has obscured the distinction between customary law and treaty law making it more complex for states not to follow the written law when it is declared and ratified by most maritime participating states.[348]

There is a resemblance between national and international maritime law because custom is used as the foundation to create much of the legislation. International law requires reciprocity in order to adequately function and be relied on. By reciprocating maritime customs whether by signing onto a treaty, enacting substantially similar legislation at the national level, or silence and failure to protest, a state acquiesces and connects itself to the international community as a global participant seeking the same respect that it gives in return.[349] It has been argued that regardless of a state's acceptance of custom, it is binding to all[350] and thus unlike treaty formation, which allows for the ability to make reservations, custom, " . . . by its very nature, must have equal validity for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion."[351]

The effect of customary international law is that of a binding international agreement that does not need to be formally agreed to.[352] The nature of custom itself limits state

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[344] Grotius, *supra* note 128.
[345] Schoenbaum, *supra* note 116, § 2-1.
[346] *See generally ibid*.
[347] *See ibid*, n. 9, *citing* L. B. Sohn, 'The Law of the Sea: Customary International Law Developments,' 34 *American University Law Review* (1985), pp. 271-280, at 279.
[348] *Ibid*.
[349] *Ibid*.
[350] M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument, (Cambridge University Press, Cambridge, 2005), p. 392, citing *North Sea Continental Shelf, Judgment (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [*North Sea Shelf Cases*], 20 February 1969, ICJ Reports 1969, pp. 38-39. "'[The] ICJ held that custom 'cannot… be subject of any right of unilateral exclusion.'" (discussing the relationship between custom and UNCLOS arguing that custom is binding irrespectively of State will).
[351] Ibid, p. 398, citing *North Sea Shelf Cases*, pp. 38-39.
[352] Shaw, *supra* note 35, p. 72 n. 8, *citing* R. M. Unger, *Law in Modern Society* (London,

sovereignty. Custom restricts a sovereign's authority by requiring it to comply with what the international community recognizes. Sovereignty is not absolute, but supreme.[353] Pufendorf ultimately defines sovereignty as merely supremacy, yet "supremacy requires limitations to prevent its usurpation of the entire authority, but any limitations imposed do not . . . indicate that the supreme power is not 'sovereign.' According to Pufendorf, the only essential quality of the sovereign is that it be the supreme authority within the state; it is not essential that the sovereign be absolute."[354] State sovereignty is subject to international law, effectively creating an umbrella where states are under the authority of the international community.[355] Hence, the supremacy of sovereignty is relative.[356] "A State's legal authority may be said to be 'supreme' insofar as it is not subjected to the legal authority of any other State; and the State is then sovereign when it is subjected only to international law, not to the national law of any other State."[357] Pufendorf's theory that the only essential attribute of sovereignty is its need to be the supreme authority of the state does not stretch as lucidly to the sea, including a states territorial sea, because the supreme authority of the sea is only international law and custom.[358] This concept is more extreme than state sovereignty over land-based territory because a sovereign state can only legislate and regulate the sea in so far as international law and custom allows.[359] The supremacy understanding of sovereignty is a misnomer particularly as related to the sea because a state's authority over the sea is not the highest or greatest authority. A state's authority is so limited that if a state endeavours to go further than or not adequately implement international maritime law and custom its efforts will not withstand scrutiny if they become confronted or lack international consent.[360]

1976), p. 49. *See also*, Koskenniemi, *supra* note 350, p. 392.

[353] Hilla, *supra* note 114, pp. 97-98.

[354] *Ibid*.

[355] H. Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53 *Yale Law Journal* (1944), pp. 207-220, at 207-208.

[356] *Ibid*.

[357] *Ibid*.

[358] Hilla, *supra* note 114, p. 97-98.

[359] *See, e.g.*, UNCLOS, *supra* note 84, arts. 27-28; 300-301.

[360] *See*, *e.g.*, *Fisheries Jurisdiction* (*United Kingdom* v. *Iceland*) [*Fisheries Jurisdiction*], 25 July 1974, *I.C.J. Reports 1974*, pp. 3-35. In *Fisheries Jurisdiction*, Iceland, against provisions of UNCLOS II and bilateral agreements with the U.K., unilaterally declared a 50-mile exclusive fishing zone around Iceland, terminated U.K. rights in that area, and resumed fishing in "traditional" zones where Iceland had relinquished fishing rights to the U.K. Iceland reasoned that their special economic and alimentary dependence on fishing as a small, island nation and declining local fisheries required such action. The U.K. protested and submitted the matter to the I.C.J. The court held that the preferential rights of a coastal state does not comport with excluding all foreign fishing. Further, the court held that "[n]either right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation." Iceland was found to

Custom is extremely important in establishing the application of rules of maritime law for nations that tend not to ratify international legal instruments. In the United States, maritime law is primarily derived from international customary maritime law, international treaties, and the "general maritime law" as a body of federal common law rules.[361] As noted above, the admiralty and maritime decisions of the United States Supreme Court and the federal courts have played an influential role in defining the national scope and force of such laws.

3.5 Effects of Treaty- and Convention-making

The success the international community has had in maritime law is incomparable to the strained attempts to protect life on land through international human rights and humanitarian law, which shows a universal recognition of the view that the sea is vital to humanity.[362] Protecting rights to the sea is a fundamental aspect of protecting mankind.[363] The sea is fundamental to people, which is why a states role is to guard the associated rights

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be able to use their traditional zone of fishing, but the U.K. was not obligated to accept Iceland's unilateral termination of UK fishing rights in the area. The court's remedy was for the two states to negotiate. The discussion and holding of the case show that the coastal state cannot restrict what international law allows foreign states to do in their territorial waters and that states can only agree through cooperative measures between themselves as to what they will or will not do in regard to certain areas of the high seas in relation to what international law does or does not allow.

[361] R. Force, 'An Essay on Federal Common Law and Admiralty', 43 *St. Louis University Law Journal* (1999), pp. 1367-1388, at 1367, *citing In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804, (Federal Court of Appeals for the Second Circuit 1994), p. 828.

[362] G.A. Critchlow, 'Stopping Genocide Through International Agreement when the Security Council Fails to Act', 40 *Georgetown Journal of International Law* (2009), pp. 311-343, at 311. "Despite the development of positive, explicit and clearly applicable international law, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the United Nations (UN) has been unable or unwilling to prevent or stop the most extreme and widely publicized cases of human rights abuses.", *citing* L. Feinstein, Council on Foreign Relations, 'Darfur and Beyond: What is Needed to Prevent Mass Atrocities', 22 C.S.R. (2007), p. 7, *available at* <www.cfr.org/content/publications/attachments/DarfurCSR22.pdf> (listing incidents of genocide and politicide since 1955).

[363] *Cf. Illinois Cent. R. Co.* v. *Illinois*, 146 U.S. 387 (1892), pp. 452-454 (providing a passionate description of the nature and purpose of public doctrine in requiring the state reserving, maintaining, and protecting communal bodies of water such as rivers, bays, inlets, coasts, and lakes for the benefit, use, and enjoyment of the people). "[Public trust] is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Ibid*.

and freedoms for the benefit of all. State sovereignty is almost nonexistent as applied to the sea because international maritime law and custom have limited states role and discretion to prevent abuse under the pretence of sovereign power.

Maritime treaties and conventions codifying custom and encourage uniformity and predictability of laws. Even conventions touching on subjects that the international community has received with mixed results, such as economic, social, and cultural rights, such as the MLC, *post*, are either well-received through ratification or through individual state practices accommodating or mirroring those protections when they are placed in the maritime context.

4 Human Rights and Labour Rights of Seafarers

Seafarers represent a distinct community of people that primarily work and live at sea. They are citizens from nearly every country in the world, yet the nature of their employment not only separates them into a unique interstitial group existing between the fringes of society, but also subjects them to a myriad of foreign laws and jurisdictions. Ostensibly, they are people requiring the same protections afforded to workers on land, however, disparate complexities arise when the same rights are not protected in different jurisdictions. Seafarers must have assurances about their rights no matter where their venture takes them.

Though this community and industry is controlled through territorial regulations adopted by and implemented into state law, what is attempting to be controlled is extraterritorial activity. As a ship sets sail away from its flag state, the master, officers, and ratings remain accountable to the applicable laws of the flag state. Whether the ship makes it to its final destination or veers off course due to inclement weather or other foreseeable and unforeseeable events, the seafarers come directly into contact with the laws of other nations. Seafarers' rights encompass a range of employment regulations as well as rights, such as shore leave, transit, transfer, and repatriation that more precisely affect the ports the ship sails into.

After the tragedies of the September 11, 2001 attacks in the United States there was an influx of heightened preventative measures established to protect homeland security. The most impertinent of these measures effecting the life and sanity of a seafarer is the denial of shore leave. Measures designed to protect the shipping industry have been wielded truculently to further isolate the seafarer in an already unreliable and dangerous existence. Shore leave is the seafarers' primary means to walk on land, associate with other people, relieve seasickness, escape from the strident conditions onboard the ship, contact family, and generally enjoy what is easily taken for granted by those of us unaccustomed to life at sea.

Seafarers' welfare is being subjugated to port state security. Deprivation of shore leave suggests that the customary rights of the seafarer are not integral to international trade. Reconciliation in the shipping industry between security and seafarers' rights is necessary to promote the wellbeing of the seafarer as well as the safety of the vessel and the cargo. Negative treatment towards seafarers by port state security has adverse repercussions for the lives of the individual workers and the entirety of the venture. Safety is compromised by not enabling the seafarer to rest from the burdens associated with life on a ship. It is well known that healthy and happy workers accomplish higher quality work. The environmental risks involved in the shipping industry are not risks that the world would like to be made more vulnerable towards.

The Maritime Labour Convention (MLC) and Seafarers Identity Documents are a pithy act to combine previous ILO conventions, formalize the rights of the seafarer thereby easing their plight, and achieve recognition internationally. The enforcement mechanisms of the MLC remove the enervated toothless approach to safeguarding seafarers rights and replace it with more vigorous duties for flag states and port states alike. Seafarers are truly global citizens created by the nature of employment and should be protected by and equipped to raise their rights in any port they sail into. In order to realize seafarers' rights it is necessary to establish uniform harmonized legal recognition within each state that promotes the health and safety of this conspicuous community of people. Eventually no state will be able to deny the rights of seafarers with impunity.

4.1 Legal Personality of Seafarers - Identity Documents

The legal personality of a seafarer can be a complicated network. Seafarers may be a citizen of State A, recruited in State B, hired in State C, working aboard a ship owned by a citizen of State D but flagged in State E, docked in a port of State F, and ready to sail to State G with cargo from State H. It is not difficult to see how extreme these scenarios can become when insurance, contracts, and perils of the sea are factored in and the seafarers onboard any given ship may be from a number of different countries. It is important to facilitate seafarers' rights through an identification system that respects the need for port state security. Seafarers' rights and port security do not have to be at odds with one another, but they do have to be reconciled to provide adequate reliance.

The maritime industries have developed to the point where "basically all [162] coastal countries are connected to each other" though a global network of shipping services and hub ports.[364] The adoption of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)[365] (Convention 185) was accelerated in the wake of the September 11, 2001 events.[366] It sought to address states' heightened security concerns while "facilitat[ing] the temporary admission of genuine seafarers to foreign territory for shore leave and for transit, transfer, or repatriation."[367] Additional security measures, especially those relating to ports, have also been promulgated.[368]

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[364] United Nations Conference on Trade and Development, *Review of Maritime Transport: 2011*, UNCTAD/RMT/2011 (Geneva 2011) pp. 89-90.
[365] International Labour Organization, Seafarers' Identity Documents Convention (Revised) 185 [C185], 19 June 2003, *entry into force* 9 February 2005.
[366] International Labour Organization, International Standards Department Sectoral Activities Programme, 'Consultations on the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185): Background Paper' [185 Background Paper], 24 September 2010, CSID/C.185/2010, p. 1, para. 2.
[367] *Ibid*, para. 3.
[368] *See, e.g.*, Paris Memorandum of Understanding on Port State Control [Paris MoU], 3 May 2011, *entry into force* 1 July 2011 (including two categories of inspection, three forms of extended inspections for all ship types, and widened banning and arrival requirements).

Convention 185 has received twenty-four ratifications[369] and has entered into force.[370] The ILO identified several primary obstacles to wider adoption than Convention 185 received: the availability of technology, expertise, and other resources necessary to implement the regime;[371] creating a verified list of states compliant with minimum standards;[372] setting a global standard for biometric identification data.[373]

Responses to Convention 185 have seen mixed results and include both *ad hoc* actions by ILO Member States and formal resolution actions by the ILO regarding the problematic aspects. The United States Trade and Development Agency has financed the large-scale preparatory work for two ILO Member States,[374] directly enabling Indonesia to ratify Convention 185.[375] Speaking at the 2010 meeting of the Consultations on Convention 185, vice-chairperson and seafarer spokesperson from the United States, Dave Heindel, stated,

"the lack of ratification of Convention No. 185, by major port States, was undermining its value. He recalled that the United States had advocated the need for a new Convention, yet was disappointed that the government agencies responsible for implementing were not represented at the meeting. The Convention was considered to be of great importance to the seafarers who still faced difficulties getting ashore without a visa. It was regrettable that so little had happened since the adoption of the Convention."[376]

The government representative of the United States reiterated the legitimate security concerns[377] in relation to Article 6 as the one of the world's largest port states.[378] Post-

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The Paris MoU also references the provisions of fifteen other international maritime instruments.

[369] Albania, Azerbaijan, Bahamas, Bosnia and Herzegovina, Brazil, Croatia, France, Hungary, Indonesia, Jordan, Kazakhstan, Republic of Korea, Lithuania, Luxembourg, Madagascar, Marshall Islands, Republic of Moldova, Nigeria, Pakistan, Philippines, Russian Federation, Spain, Vanuatu, and Yemen.

[370] International Labour Organization, Information System of International Labour Standards, 'Ratifications of C185 – Seafarers' Identity Documents Convention (Revised), 2003 (No. 185),' *available at* <www.ilo.org/dyn/normlex/en>.

[371] *Ibid*, p. 2, paras. 5-6.

[372] *Ibid*, pp. 3-4, paras.7-9.

[373] *Ibid*, pp. 4-5, paras. 10-12.

[374] *Ibid*, p. 2, para. 6.

[375] International Labour Organization, 'Consultations on the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185): Final Report' [C185 Final Report], 24 September 2010, CSID/C.185/2010/4, p. 3, para. 13.

[376] *Ibid*, p. 6, para. 33.

[377] *Ibid*, para. 34.

[378] C185, *supra* note 365, art. 6. "1. Any seafarer who holds a valid seafarers' identity document issued in accordance with the provisions of this Convention by a Member for which the Convention is in force shall be recognized as a seafarer within the meaning of the Convention unless clear grounds exist for doubting the authenticity of the seafarers' identity document. 2. The verification and any related inquiries and formalities needed to ensure

September 11 Enhanced Border Security and Visa Entry Reform[379] was passed, requiring any "person not a citizen or national of the United States" to obtain a biometric entry visa from the Immigration and Naturalization Service.[380] This clearly applied to foreign seafarers. In the month of June preceding the meeting, the United States Senate had passed the Coast Guard Authorization Act of 2010, which President Obama signed into law nearly three weeks after the meeting, on October 15, 2010.[381] The act included a long-awaited revision of the port entry requirements for seafarers and authorized studies of seafarer identity documents (SIDs) as alternatives to visas.[382]

The Coast Guard Authorization Act of 2010 more importantly authorized measures for satisfying U.S. national security concerns regarding ratification of Convention 185. It established assistance programs for the antiterrorism and anti-trafficking operations of

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that the seafarer for whom entry is requested pursuant to paragraphs 3 to 6 or 7 to 9 below is the holder of a seafarers' identity document issued in accordance with the requirements of this Convention shall be at no cost to the seafarers or shipowners. Shore leave: 3. Verification and any related inquiries and formalities referred to in paragraph 2 above shall be carried out in the shortest possible time provided that reasonable advance notice of the holder's arrival was received by the competent authorities. The notice of the holder's arrival shall include the details specified in section 1 of Annex II. 4. Each Member for which this Convention is in force shall, in the shortest possible time, and unless clear grounds exist for doubting the authenticity of the seafarers' identity document, permit the entry into its territory of a seafarer holding a valid seafarer's identity document, when entry is requested for temporary shore leave while the ship is in port. 5. Such entry shall be allowed provided that the formalities on arrival of the ship have been fulfilled and the competent authorities have no reason to refuse permission to come ashore on grounds of public health, public safety, public order or national security. 6. For the purpose of shore leave seafarers shall not be required to hold a visa. Any Member which is not in a position to fully implement this requirement shall ensure that its laws and regulations or practice provide arrangements that are substantially equivalent. Transit and transfer: 7. Each Member for which this Convention is in force shall, in the shortest possible time, also permit the entry into its territory of seafarers holding a valid seafarers' identity document supplemented by a passport, when entry is requested for the purpose of: (a) joining their ship or transferring to another ship; (b) passing in transit to join their ship in another country or for repatriation; or any other purpose approved by the authorities of the Member concerned. 8. Such entry shall be allowed unless clear grounds exist for doubting the authenticity of the seafarers' identity document, provided that the competent authorities have no reason to refuse entry on grounds of public health, public safety, public order or national security. 9. Any Member may, before permitting entry into its territory for one of the purposes specified in paragraph 7 above, require satisfactory evidence, including documentary evidence of a seafarer's intention and ability to carry out that intention. The Member may also limit the seafarer's stay to a period considered reasonable for the purpose in question."

[379] Enhanced Border Security and Visa Entry Reform Act of 2002, 8 U.S.C. § 1701 *et seq*. (2002) (United States).

[380] *Ibid*, §1701(1), 'Alien,' *incorporating by reference* 8 U.S.C. § 1101 (a)(3) (2000), *amended by* 8 U.S.C. § 1101 (2011) (United States).

[381] Coast Guard Authorization Act of 2010 [CGAA 2010], Pub. L. No. 111-281, 124 Stat.

foreign ports and facilities so that the U.S. would be assured of the security of SIDs issued by them.[383] The U.S. Coast Guard, as the agency primarily charged with coastal and port security at the federal level, was authorized to "lend, lease, donate, or otherwise provide equipment, and provide technical training and support" to foreign ports and facilities.[384] These assistance programs aimed at both bringing foreign ports up to "applicable international Ship and Port Facility Code standards"[385] and to "assist the[se] port[s] or facilit[ies] in correcting deficiencies" related to the security concerns identified by the U.S.[386] As a wealthy nation with active ports, the U.S. has the resources and interest to invest in preparatory work domestically and abroad, but cost will be prohibitive of Convention 185's consideration elsewhere.

So, the U.S. perspective is that the cart was placed before the horse in promulgating a convention on SIDs and shore leave before coming to a greater consensus and realization of port security measures and seafarer background checks. Model global interoperable biometric identity documents or uniform fingerprinting methods, something rather necessary to make Convention 185's aspirations of uniformity a reality, have not yet been offered.[387] There is no agreement on whether SIDs should feature a bar code, a chip, or both.[388] How national border and immigration authorities are to coordinate with and receive information from the international SID system, effectively double-checking to alleviate security concerns, is also unresolved.[389]

The post-9/11 U.S. is also not prepared to ratify a convention that would eliminate the involvement of any government agency in administering entry requirements for international transit and commerce.[390] This is evident in national laws such as the condition precedent of a "comprehensive port security assessment" placed on U.S. Coast Guard assistance to foreign ports and facilities.[391] The U.S. is willing to assist states in reaching the standards of the MLC and Convention 185, but only where the security concern is duly addressed. Regarding its own obligations as an ILO Member State and as a participant in the growing Convention 185 system, the U.S. has begun to "ensure that its laws and regulations or practice provide arrangements that are substantially equivalent."[392]

The U.S. has created and tested identity document technology that could read both a chip

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2905 (codified as amended in scattered sections of 14, 33, and 46 U.S.C.).
[382] Title 46: Shipping, Subtitle VII: Security and Drug Enforcement, Chapter 701: Port Security, 46 U.S.C. § 70101 *et seq*. [Port Security] (2006), (United States) *amended by* CGAA 2010, *supra* note 381.
[383] *Ibid*, § 70110(e).
[384] *Ibid*, § 70110(f).
[385] *Ibid*, § 70110(f)(1)(A).
[386] *Ibid*, § 70110(f)(1)(B).
[387] C185 Background Paper, *supra* note 366, pp. 4-9, paras.10-24.
[388] *Ibid*.
[389] *Ibid*.
[390] C185, *supra* note 365, art. 6(6).
[391] Port Security, *supra* note 382, § 70110(f)(2)(B).
[392] C185, *supra* note 365, art. 6(6).

and a barcode and the U.S. Coast Guard has issued a rule rendering the use of Convention 185 SIDs as an acceptable form of entry documentation in anticipation of the uniform regime.[393] The US-VISIT program, in place in fifteen seaports in six countries, Puerto Rico, and Canada following the adoption of Convention 185, collects and stores biometric data of seafarers upon entry to contribute to the growing data sets.[394] Such data collection is crucial in implementing an effective SID and shore leave regime,[395] as is internal coordination of data collection and reporting.[396] US-VISIT inspects approximately five million seafarers annually, one million of which arrive aboard cargo ships[397] and has led to the development of portable SID scanning technology in the interests of efficiency and security.[398] Portable technology addresses security concerns by allowing shore leave inspections to be conducted on board docked vessels, decreasing the likelihood of absconders[399] and deserters[400] entering illegally.[401]

Impeding ratification progress is the lack of requested reporting by states to the ILO on measures implemented in respect of meeting Convention 185's minimum requirements, leaving little guidance or precedent.[402] As the MLC and Convention 185 together form a comprehensive seafarers' international human rights legal regime, the ILO is explicit in its understandings of the ways in which Member States become bound to comply with the provisions of conventions in force irrespective of individual ratifications.

Fifty-eight ILO Member States are parties to the earlier Seafarers' Identity Documents Convention, 1958 (No. 108)[403] (Convention 108) that entered into force upon only two

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[393] C185 Final Report, *supra* note 375, p. 7-8, para. 39.
[394] United States Government Accountability Office, 'Maritime Security: Federal Agencies have Taken Actions to Address Risks Posed by Seafarers, but Efforts can be Strengthened,' *Report to the Ranking Member, Committee on Homeland Security, House of Representatives* [GAO Report], GAO-11-195 (2011), p. 21, fn. 32.
[395] United States Government Accountability Office, 'Standards for Internal Control in the Federal Government' [GAO Standards], GAO/AIMD-00-21.3.1 (2009), *accord* International Labour Organization, Labour Statistics Convention 160, 25 June 1985, *entry into force* 24 April 1988, *ratified* 11 June 1990 (United States).
[396] GAO Standards, *supra* note 395, pp. 28-29.
[397] GAO Report, *supra* note 394, p. 21, fn. 33.
[398] *Ibid*, p. 22, fn. 36.
[399] *Ibid*, p. 24, fn. 40. "An absconder is a seafarer CBP has refused a conditional landing permit to leave the vessel while it is in port and is ordered detained on board, but departs the vessel without permission."
[400] *Ibid*. " A deserter is a seafarer with a valid non-immigrant visa CBP has granted a conditional landing permit to enter into the United States, but does not depart when required."
[401] *Ibid*, p. 22, fn. 36.
[402] C185 Background Paper, *supra* note 366, p. 12, paras.33-34.
[403] International Labour Organization, Seafarers' Identity Documents Convention, 1958 (No, 108) [C108], 13 May 1958, *entry into force* 19 February 1961, *closed to ratification by operation of article 13(1)(b)* 09 February 2005 *by* C185, *supra* note 365.

ratifications.[404] Convention 108 requires non-party port state ILO Member States to recognize the non-uniform, security featureless identity SIDs held by seafarers under Convention 108.[405] The issuance of Convention 185 SIDs will have the same coercive effect on port states that do not formally ratify Convention 185 by extension of the interpretive principle. In relation to other developments in identification documents globally, passports are increasingly requiring biometric chips. The number of actual passport holders worldwide greatly exceeds the number of potential SID holders, so these developments will facilitate and encourage formal support or acquiescent practice of port States in accepting Convention 185 SIDs.[406]

Port states will also have more incentives to engage in greater international cooperation and assistance. Many seafarers come from developing countries that do not issue biometric chip passports or E-Passports, but still issue SIDs under Convention 108 that must be recognized by ILO member states.[407] Programs and agency authorizations like those under the U.S. Coast Guard Authorization Act are likely to expand to address the security concerns raised by the international obligations of ILO conventions.[408]

The headway made by international conventions seeking uniforms SIDs for seafarers was an integral step to securing greater recognition of seafarers' human rights. Denial of shore leave due to security concerns was an unfortunate trend following 9-11.[409] Increased security measures aimed at protecting interests of port states have decreased the safety and security of seafarers.

These practices have trampled over shore leave, "one of the most longstanding customary practice[s] in shipping."[410] The effect was not isolated and other traditional maritime practices protecting seafarers have been eroded, leading to harmful results on a larger scale.

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[404] *Ibid*, art. 8(2).
[405] *Ibid*, art. 6. *See also*, C185 Final Report, *supra* note 375, p. 8, para. 40. "Whether or not a member State had ratified [Convention 108], and regardless of the legal effect given by port States, seafarers could not be deprived of their right to a valid SID under the Convention."
[406] *Ibid*, p. 12, para. 73.
[407] *Ibid*, pp. 13-14, para. 80.
[408] CGAA 2010, *supra* note 381.
[409] C. A. E. Graham, 'Maritime Security and Seafarers' Welfare: Towards Harmonization, 8(1) *World Maritime University Journal of Maritime Affairs* (2009), pp. 77-87, at 77-78.
[410] *Ibid*, p. 73, *citing* P. K. Mukherjee & A. M. Mustafar, 'The International Ship and Port Facility Security (ISPS) Code and Human Element Issues, *in* M. Q. Mejia (ed.), *Contemporary Issues in Maritime Security: A Selection of Papers and Presentation from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security, 30 August to 1 September 2004*, (WMU Publications, Malmö, 2005), pp. 277-285.

These include the decline in ports of refuge and safe harbour,[411] right to innocent passage,[412] duty to render assistance,[413] and the duty to protect the marine environment.[414] These violations persist despite the exhortation of modern international port security instruments, including Convention 108,[415] the International Ship and Port Facility Code (ISPS),[416] the Convention on the International Regime of Maritime Ports,[417] and the Convention on the Facilitation of International Maritime Traffic 1965 (FAL).[418] Regional attempts have also been made at addressing the backsliding on seafarer rights.[419]

Politics has displaced just tradition and reason.[420] Allowing ports of refuge and shore access for ships and seafarers is in the financial and security interests of vessel owners, ship captains, cargo owners, coastal state governments, ports and port facilities, insurers,

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[411] Lt. L. E. Whitehead, 'No Port in a Storm – A Review of Recetn History and Legal Concepts Resulting in the Extinction of Ports of Refuge,' 58 *Naval Law Review* (2009), pp. 65-86, pt. II, 'Ports of Refuge – A Look at the Past' (discussing the potential for environmental catastrophe in denying ships safe harbour).

[412] *Ibid*, pt. III(A), 'Right to Innocent Passage.'

[413] *Ibid*, pt. III(B), 'Duty to Render Assistance.'

[414] *Ibid*, pt. III(C), 'Duty to Protect the Marine Environment'

[415] C108, *supra* note 403, art. 6. "1. Each Member shall permit the entry into a territory for which this Convention is in force of a seafarer holding a valid seafarer's identity document, when entry is requested for temporary shore leave while the ship is in port. 2. If the seafarer's identity document contains space for appropriate entries, each Member shall also permit the entry into a territory for which this Convention is in force of a seafarer holding a valid seafarer's identity document when entry is requested for the purpose of-- (a) joining his ship or transferring to another ship; (b) passing in transit to join his ship in another country or for repatriation; or (c) any other purpose approved by the authorities of the Member concerned."

[416] International Maritime Organization, *International Ship and Port Facility Code* [ISPS], 12 December 2002, *entry into force* 1 July 2004, preamble, art. 11. "Recognizing that the Convention on the Facilitation of Maritime Traffic, 1965, as amended, provides that foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reasons of public health, public safety or public order, Contracting Governments when approving ship and port facility security plans should pay due cognisance to the fact that ship's personnel live and work on the vessel and need shore leave and access to shore based seafarer welfare facilities, including medical care."

[417] *Convention on the International Regime of Maritime Ports*, 58 L.N.T.S. 285, 9 December 1923, *entry into force* 26 July 1926, art. 2. "Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers. The

environmentalists, salvors, and of course seafarers.[421] Instead of enlisting the world's seafarers as part of the security *response*, they have been unduly regarded as part of the security *threat*.[422]

The "human element" in shipping has been a term of art since the 1970s, referring to the need to acknowledge the well being of seafarers in order to promote safer practices.[423] The Standards of Training, Certification, and Watchkeeping Convention (STCW)[424] of 1978 was aimed at correcting poor safety practices and working conditions so that accidents are reduced. It sought to do so through a host of measures.[425] Promotion of the well-being of seafarers has been a peripheral concern, however, and it has been argued that the constant focus on training seafarers "subsume[s seafarers in] the rhetoric of incompetence, fault, and blame."[426]

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equality of treatment thus established shall cover facilities of all kinds, such as allocation of berths, loading and unloading facilities, as well as dues and charges of all kinds levied in the name or for the account of the Government, public authorities, concessionaries or undertakings of any kind."

[418] International Maritime Organization, Convention on the Facilitation of International Maritime Traffic, 1965 [FAL], 9 April 1965, *entry into force* 5 March 1967, annex, sec. 3, subsec. F, Standard 3.19. "Foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reasons of public health, public safety or public order."

[419] *E.g.*, EU Council Directive 2002/59/EC, 27 June 2002, arts. 19-20 (requiring member states to create plans for providing port refuge for ships in distress).

[420] *E.g.*, T. Shanker, *China's Denial of Port Calls by U.S. Ships Worries Navy*, New York Times, 28 November 2007 (recounting China's denial of two emergency requests to dock at Hong Kong sent by two US Navy minesweepers).

[421] Whitehead, *supra* note 411, p. V, 'Varied Perspectives of Parties of Interest.'

[422] *See, e.g.*, Graham, *supra* note 409, p. 76, *citing* P. K. Mukherjee, 'Criminalisation and Unfair Treatment: The Seafarers' Perspective,' 12 *Journal of Maritime Law* (2006), pp. 325-336; *and* p. 71, *citing* M. Grey, 'Seafaring Victims of the Day Trust Died,' 184 *The Sea* (2006), p. 5. "Those who crew the world's ships should be part of the defence against international terrorism. Instead they are treated as part of the threat."

[423] Graham, *supra* note 409, p. 78.

[424] International Maritime Organization, *International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978* [STCW78], 7 July 1978, *entry into force* 28 April 1994, *as amended* 22 May 1991, *entry into force* 1 December 1992, *as amended* 25 May 1994, *entry into force* 1 January 1996, *as amended* 7 July 1995, *entry into force* 1 February 1997, *as amended* June 1997, *entry into force* 1 January 1999, *as amended* 9 December 1998, *entry into force* 1 January 2003, *as amended* May 2006, *entry into force* 1 January 2008, *as amended* 25 June 2010, *entry into force* 1 January 2012.

[425] *See generally*, *ibid*.

[426] Graham, *supra* note 409, p. 78. These include measures to prevent fraudulent practices in certification, strengthen evaluations process through monitoring, revised hours of work, substance abuse, and medical fitness standards, new certification requirements for able seafarers ,new technology training requirements, marine environment awareness &

Objectification of seafarers is what allows states to deny the basic human rights and customary maritime traditions without so much as a second thought.[427] This is despite the perpetual acknowledgement that living aboard a ship is like "being in prison," or "living in an abnormal world."[428] The "fast track" procedure by which the ISPS code was promulgated, save for the "human element" provisions, supports this contention of seafarer objectification.[429] Only the ILO has remained primarily focused on the welfare of the seafarer, placing economic and other concerns on the periphery, but by no means excluding them as integral both to match reality and to garner ratifications.[430] Article 6 of C185's practicality is being more accepted today, due in part to the reasonable flexibility incorporated into the majority of ILO conventions and because of the appropriateness of linking the development of a new SID to the global trends in passport issuance.

4.2 The ILO's Path to the MLC

The earlier enforcement mechanisms attached to conventions in the *corpus* of ILO seafarer conventions were toothless.[431] As maritime conventions began to include much more

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leadership and teamwork training, new certification requirements for electro-technical officers, update of the competence requirements for personnel serving on all types of tankers, new security training, including piracy response training, polar waters training, new training for Dynamic Positing systems.

[427] *Ibid*, p. 77-78, *citing* M. Nussbaum, *Objectification*, *available at* <http://spruce.flint.umich.edu/~simoncu/167/nussbaum.htm>.

[428] *Ibid*, *citing* B. L. Jensen, *The Isolated Seafarer: Educational for Occupational Health Nurse* (2002), WMU Library Holding, unpublished), *and* E. Kahveci, *Port Based Welfare Services for Seafarers: Summary Report*, (Seafarers International Research Centre, Cardiff University, 2007), *and* M. Thomas, *Lost at Sea and Lost at Home: The Predicament of Seafaring Families*, (Seafarers International Research Centre, Cardiff University, 2003)

[429] Mukherjee & Mustafar, *supra* note 410, p. 284.

[430] *See, e.g.*, International Labour Organization, *The Global Seafarer: Living and Working Conditions in a Globalized Industry*, (International Labour Organization, Geneva, 2005).

[431] International Labour Organization, Minimum Age (Sea) Convention, 1920 (No. 7) [C7], 9 July 1920, *entry into force* 7 September 1921, *revised by* C58 (1936), *and* C38 (1973), *and* MLC (2006) (stating in article 9 that "each Member which ratifies this Convention agrees to bring its provisions into operation . . . and to take such action as may be necessary to make these provisions effective."); International Labour Organization, Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8) [C8], 9 July 1920, *entry into force* 16 March 1923, *revised by* MLC (2006) (containing the same wording in article 8); International Labour Organization, Placing of Seamen Convention, 1920 (No. 9) [C9], 10 July 1920, *entry into force* 23 November 1921, *revised by* MLC (2006) (containing the same wording in article 15); International Labour Organization, Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16) [C16], 11 November 1921, *entry into force* 20 November 1922, *revised by* MLC (2006) (containing the same wording in article 8).

detailed provisions, the enforcement requirements proportionally increased.[432] Still, some conventions apply to flag states exclusively[433] and some merely set out a blanket prohibition with some small exceptions that all parties were required to adhere to.[434]

At the twenty-eighth International Labour Conference in 1946, a series of post-WWII maritime conventions pioneered the layered and targeted manner of conditioning a convention's entry into force used in the MLC. These conventions required ratifications from a set number of specifically named countries and a representation of a minimum gross tonnage.[435] Enforcement duties still fell exclusively on flag states, but it is evident that this requirement was implemented to create a persuasive lure to ratification. By singling out some of the major economic and maritime countries in the world as being necessary for these conventions to enter into force, smaller maritime countries would not be bound to

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[432] International Labour Organization, Seamen's Articles of Agreement Convention, 1926 (No. 22) [C22], 24 June 1926, *entry into force* 4 April 1928, *revised by* MLC (2006) (containing the same wording as Conventions 7, 8, 9, and 16 in article 19, but after reciting several areas that national law "shall" address in articles 3, 8, 9, 11, and 12, requires "National law shall provide the measures to ensure compliance with the terms of the present Convention" in article 15). *See also* International Labour Organization, Repatriation of Seamen Convention, 1926 (No. 23) [C23], 23 June 1926, *entry into force* 16 April 1928, *revised by* C166 (1987), *and* MLC (2006) (creating duties for the port state in article 3(4) by stating "[t]he conditions under which a foreign seaman engaged in a country other than his own has the right to be repatriated shall be as provided by national law or, in the absence of such legal provisions, in the articles of agreement. The provisions of the preceding paragraphs shall, however, apply to a seaman engaged in a port of his own country.").

[433] *E.g.* International Labour Organization, Repatriation Officers' Competency Certificates Convention, 1936 (No. 53) [C53], 24 October 1936, *entry into force* 23 March 1939, *revised by* MLC (2006) (limiting the scope in article 3(1) by stating "No person shall be engaged to perform or shall perform on board any vessel to which this Convention applies.").

[434] *E.g.* International Labour Organization, Minimum Age (Sea) Convention (Revised), 1936 (No. 58) [C58], 24 October 1936, *entry into force* 11 April 1939, *revised by* C138 (1973), *and* MLC (2006) (prohibiting almost all instances of children under the age of fifteen working on vessels).

[435] *See* International Labour Organization, Food and Catering (Ships' Crews) Convention, 1946 (No. 68) [C68], 27 June 1946, *entry into force* 24 March 1957, *revised by* MLC (2006) (stating in article 15(2) that C68 "shall come into force six months after the date on which there have been registered ratifications by nine of the following countries: United States of America, Argentine Republic, Australia, Belgium, Brazil, Canada, Chile, China, Denmark, Finland, France, United Kingdom of Great Britain and Northern Ireland, Greece, India, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Sweden, Turkey and Yugoslavia, including at least five countries each of which has at least one million gross register tons of shipping. This provision is included for the purpose of facilitating and encouraging early ratification of the Convention by Member States."); *See also*, International Labour Organization, Certification of Ships' Cooks Convention, 1946 (No. 69) [C69], 27 June 1946, *entry into force* 22 April 1953, *revised by* MLC (2006), art. 8(2),

standards unless a sizeable portion of the world's maritime industries also agreed to implement and maintain the same standards.

The ILO's third convention on working hours and wages, the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93) (C93) contained the first truly innovative enforcement mechanism in a maritime convention.[436] C93 stated,

"For the purpose of giving mutual assistance in the enforcement of this Convention, every member which ratifies the Convention undertakes to require the competent authority in *every port in his territory* to inform the consular or other appropriate authority of any other such Member *of any case* in which it comes to the notice of such authority that the requirements of the Convention are not being complied with in a vessel registered in the territory of that other Member "[437]

The spirit of this approach was continued in the Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133) (C133), where all parties, irrespective of flag or port state status, are required to inspect and enforce the convention's protections.[438] C133

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and International Labour Organization, Social Security (Seafarers) Convention, 1946 (No. 70) [C70], 28 June 1946, *revised by* MLC (2006), art. 12(2), *and* International Labour Organization, Paid Vacations (Seafarers) Convention, 1946 (No. 72) [C72], 28 June 1946, *revised by* C91 (1949), *and* MLC (2006), art. 13(2), *and* International Labour Organization, Medical Examination (Seafarers) Convention, 1946 (No. 73) [C73], 29 June 1946, *entry into force* 17 August 1955, *revised by* MLC (2006), art. 11(2), *and* International Labour Organization, Accommodation of Crews Convention, 1946 (No. 75) [C75], 29 June 1946, *revised by* C92 (1949), *and* MLC (2006), art. 21(2). *Cf.* International Labour Organization, Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76) [C76], 29 June 1946, *revised by* C93 (1949), *and* C109 (1958), *and* C180 (1996), *and* MLC (2006), art. 26(2-3). C76 established a three-pronged entry into force requirement more demanding than, but under the same reasoning as, the later MLC in stating, " 2. It shall first come into force six months after the date at which the following conditions have been fulfilled:
(a) the ratifications of nine of the [same] Members [listed under C68, above,] have been registered; (b) at least five of the Members whose ratifications have been registered have at the date of registration each not less than one million gross register tons of shipping; (c) the aggregate tonnage of shipping possessed at the time of registration by the Members whose ratifications have been registered is not less than fifteen million gross register tons.
3. The provisions of the preceding paragraph are included for the purpose of facilitating and encouraging early ratification of the Convention by Member States."

[436] International Labour Organization, Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93) [C93], 18 June 1949, *revised by* C109 (1958), *and* C180 (1996), *and* MLC (2006).

[437] *Ibid*, art. 23, *emphasis added*. *Accord* International Labour Organization, Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109) [C109], 14 May 1958, *revised by* C180 (1996), *and* MLC (2006), art. 24.

[438] International Labour Organization, Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133) [C133], 30 October 1970, *entry into force*, 27 August 1991, *revised by* MLC (2006), art. 4.

was the first maritime convention to encourage persuasive enforcement of its provisions not by assigning the lion's share of duties to the flag state but through remaining ambiguous on the point. The ILO recognized this trend of placing duties on port states as effective in subsequent maritime conventions.[439]

The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) (C147)[440] was the first ILO maritime convention to explicitly elaborate upon the importance of port state control.[441] This idea was taken to its pinnacle in the MLC, but the maritime work of the ILO made several other advances toward constructing the seafarers as a global citizen before 2006.

The 1996 Protocol to C147 added another enforcement tool that was also taken further by

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"1. Each Member for which this Convention is in force undertakes to maintain in force laws or regulations which ensure its application.
2. The laws or regulations shall—
(a) require the competent authority to bring them to the notice of all persons concerned;
(b) define the persons responsible for compliance therewith;
(c) prescribe adequate penalties for any violation thereof;
(d) provide for the maintenance of a system of inspection adequate to ensure effective enforcement;
(e) require the competent authority to consult the organisations of shipowners and/or the shipowners and the bona fide trade unions of seafarers in regard to the framing of regulations, and to collaborate so far as practicable with such parties in the administration thereof." *Cf.* International Labour Organization, Prevention of Accidents (Seafarers) Convention, 1970 (No. 134) [C134], 30 October 1970, *entry into force*, 17 February 1973, *revised by* MLC (2006) (noting applicability equally to port and flag states).

[439] *E.g.*, International Labour Organization, Seafarers Annual Leave with Pay Convention, 1976 (No. 146), 29 October 1976, *entry into force*, 13 June 1979, *revised by* MLC (2006), art. 13. "Effective measures appropriate to the manner in which effect is given to the provisions of this Convention shall be taken to ensure the proper application and enforcement of regulations or provisions concerning annual leave with pay, *by means of adequate inspection or otherwise*." *Emphasis added*. *See also* International Labour Organization, Seafarers Welfare Convention, 1987 (No. 163) [C163], 8 October 1987, *entry into force*, 3 October 1990, *revised by* MLC (2006), art. 6.
"Each Member undertakes-
(a) to co-operate with other Members with a view to ensuring the application of this Convention; and
(b) to ensure co-operation between the parties engaged and interested in promoting the welfare of seafarers at sea and in port," *and* International Labour Organization, Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164) [C164], 8 October 1987, *entry into force*, 11 January 1991, *revised by* MLC (2006), art. 4 ("guarantee[ing] seafarers the right to visit a doctor without delay in ports of call where practicable.").

[440] International Labour Organization, Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) [C147], 29 October 1976, *entry into force*, 28 November 1981, *revised by* MLC (2006), art. 4. "1. If a Member which has ratified this Convention and in whose port a ship calls in the normal course of its business or for operational reasons

the MLC.[442] The 1996 Protocol requires each party to "undertake" to, *inter alia*, "satisfy itself that the provisions of such laws and regulations [regarding minimum standards] are substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to this Convention, in so far as the Member is not otherwise bound to give effect to the Conventions in question."[443] Thus, the ILO obligated states that ratified the 1996 Protocol to give effect to the substantive content of many earlier maritime conventions, a practice that eventually subsumed nearly all ILO seafarer conventions under the MLC.

The Seafarers' Welfare Convention, 1987 (No. 163) (C163) represents the first ILO effort to providing seafarers with a single comprehensive legal instrument respecting their welfare.[444] C163 requires "[e]ach Member . . . [to] undertake[] to ensure that adequate welfare facilities and services are provided for seafarers *both in port and on board ship*,"[445] where "welfare facilities and services" includes "welfare, recreational, and information facilities and services."[446] The focus on the duties of port states is in this way retained and expanded in C163, and the convention requires "[e]ach Member [to] ensure that the necessary arrangements are made for financing the welfare facilities and services provided."[447] Port state parties to C163 cannot merely rely on the availability of welfare facilities and services, but must actively finance such welfare facilities and services and

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receives a complaint or obtains evidence that the ship does not conform to the standards of this Convention, after it has come into force, it may prepare a report addressed to the government of the country in which the ship is registered, with a copy to the Director-General of the International Labour Office, and may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health.
2. In taking such measures, the Member shall forthwith notify the nearest maritime, consular or diplomatic representative of the flag State and shall, if possible, have such representative present. It shall not unreasonably detain or delay the ship.3. For the purpose of this Article, complaint means information submitted by a member of the crew, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the ship, including an interest in safety or health hazards to its crew."

[441] International Labour Organization, 'Rules of the Game: A Brief Introduction to International Labour Standards' (rev. ed.) [Rules of the Game], (International Labour Organization, Geneva, 2009), pp. 68-69.

[442] International Labour Organization, Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) [C147 Protocol], 22 October 1996, *entry into force*, 10 January 2003, *revised by* MLC (2006).

[443] *Ibid*, art. 2(a)(iv). The 1996 Protocol did not revise earlier conventions like the MLC, therefore closing them to further ratification upon entry into force. Instead, it incorporated by reference earlier maritime conventions on age (C7, C58, C138), safety, health, and sickness (C53, articles 3,4, C55, C56, C68 article 5, C73, C92, C130, C134 articles 4, 7), and articles of agreement (C22), as well as two conventions of general application on the freedom of association, the right to organize, and the right of collective bargaining (C87, C98). *See* C147 Protocol, *supra* note 442, appendix.

[444] C163, *supra* note 439.

[445] *Ibid*, art. 2(1), *emphasis added*.

[446] *Ibid*, art. 1(1)(b).

[447] *Ibid*, art. 2(2).

frequently review them to ensure they remain appropriate and relevant to seafarers' needs.[448]

C163 also requires both flag and port Member States to co-operate with each other in implementing this convention[449] and with "the parties engaged and interested in promoting the welfare of seafarers at sea and in port."[450] This broad net includes but does not limit itself to the providers of welfare facilities and services as earlier ILO work clearly includes any party interested in realizing these goals.[451] Efforts even reached out to include fishing vessels and fishermen that were long the subject of their own particular conventions due to the unique demands of that profession by urging ratifying states to "apply [C163] to commercial maritime fishing."[452]

The focus on the tremendous effect that port states have in ensuring the adoption of maritime labour standards was presented in one more incarnation before the MLC combined all of these techniques and angles aimed at ensuring the safety of the seafarer. The Labour Inspection (Seafarers) Convention, 1996, (No. 178) (C178)[453] strives to create a system that ensures that seafarers enjoy the host of labour and other rights, termed "seafarers' working and living conditions," that international law has established.[454] Though port states are not vested with nearly the same jurisdictional power to inspect and enforce as in the MLC, flag states are presented with relatively rigorous inspection and enforcement

[448] *Ibid*, art. 5.
[449] *Ibid*, art. 6(a).
[450] *Ibid*, art. 6(b).
[451] International Labour Organization, Seafarers' Welfare Recommendation, 1970 (No. 138) [R138], 19 October 1970, art. I(3-6). "3. There should be national, regional and/or port welfare boards, on which representative shipowners' and seafarers' organisations, the competent authorities and, where desirable and appropriate, *voluntary organisations and social bodies concerned should be represented*. 4. The functions of such boards should include surveying the need for, and assisting and co-ordinating, welfare facilities in the area for which the board is responsible. 5. Consuls and local representatives of foreign welfare organisations should, as appropriate, be associated with the work of regional and port welfare boards, 6. Measures should be taken to ensure that, as necessary, technically competent persons are employed full time in the operation of seafarers' welfare facilities, in addition to voluntary workers." *Emphasis added*.
[452] *Ibid*, art. 1(3).
[453] International Labour Organization, Labour Inspection (Seafarers) Convention, 1996 (No. 178) [C178], 22 October 1996, *entry into force*, 22 April 2000, *revised by* MLC (2006).
[454] *Ibid*, art. 1(7)(e). "[T]he term seafarers' working and living conditions means the conditions such as those relating to the standards of maintenance and cleanliness of shipboard living and working areas, minimum age, articles of agreement, food and catering, crew accommodation, recruitment, manning, qualifications, hours of work, medical examinations, prevention of occupational accidents, medical care, sickness and injury benefits, social welfare and related matters, repatriation, terms and conditions of employment which are subject to national laws and regulations, and freedom of association as defined in the Freedom of Association and Protection of the Right to Organise Convention, 1948, of the International Labour Organization."

duties that must be satisfied before any applicable vessel flying its flag leaves its homeport.[455] Port states, however, are not specifically empowered to inspect the foreign vessels of C178 parties.

4.3 The Jurisdictional Safety Net the MLC Creates for Seafarers

The Maritime Labour Convention, 2006 (MLC) is a groundbreaking international legal convention in many respects not limited to the maritime field.[456] It revised thirty-six conventions, meaning that when the MLC enters into force, all of these earlier conventions will be closed to further ratification.[457] These conventions will remain in force for Member States who have ratified them but not the MLC.[458] The content of the MLC is based upon approximately seventy ILO conventions and recommendations, but updated and amended "to reflect modern conditions and language."[459]

At first glance, this mass incorporation and consolidation of maritime labour standards will have the likely affect of dissuading ILO Member States from ratifying the convention, but the international labour standards promulgated by the ILO are not meant to merely be hard, black letter legal provisions. The standards of any ILO convention are hard law provisions, but at the same time they are meant as "models and targets for labour law" for states that have not ratified a particular instrument.[460] Some states therefore engage in a decision-making process that starts with an examination of laws and practices, then proposing changes before it implements them, finally seeking ratification.[461] Other states opt to immediately ratify conventions, using the ILO supervisory bodies and technical assistance to reach the given convention's objectives.[462] Ratification to the ILO, then, can validly be either the first or last step to the process of implementing standards protecting the rights of

[455] *Ibid*, arts. 2-7 (establishing minimum periodic inspections, allowing discretionary warnings, providing enforcement powers such as detention until rectification, and preserving a ship's ability to appeal such actions judicially or administratively).
[456] International Labour Organization, Maritime Labour Convention, 2006 [MLC], 23 February 2006, 45 I.L.M. 792, *revising* C7, C8, C9, C16, C22, C23, C53, C54, C55, C56, C57, C58, C68, C69, C70, C72, V73, C74, C75, C76, C91, C92, C93, C109, C133, C134, C145, C146, C147, C163, C164, C165, C166, 1996 Protocol to C147, C178, C179, C180, *ante*.
[457] *Ibid*, art. X. *See also* International Labour Organization, 'Maritime Labour Convention, 2006 (MLC, 2006) Frequently Asked Questions (FAQ), Online Revised Edition 2012 [MLC FAQ], p. 11, A.19, *available at* <www.ilo.org/global/standards/maritime-labour-convention/WCMS_177371/lang--en/index.htm>, '*What will happen to the maritime labour Conventions adopted before 2006?*'
[458] *Ibid*.
[459] Rules of the Game, *supra* note 441, p. 68.
[460] *Ibid*, p. 20.
[461] *Ibid*.
[462] *Ibid*.

seafarers and also in any other ILO endeavours.

The MLC's objective is considerable in that is seeks "to create a single, coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour Conventions."[463] The MLC is not currently in force and will enter into force twelve months after at least thirty ILO Member States representing at least thirty-three percent of the world's gross tonnage ratify and register the convention.[464] There are currently twenty-six ratifications of the MLC[465] representing approximately fifty-six percent of the world's gross tonnage.[466]

Agreement on the requirements for the convention to enter into force and the effect of entry into force was not immediate and was the result of much deliberation. At the time of the MLC's adoption, the ILO expected it to enter into force within five years of adoption.[467] Though the threshold for entry into force was set quite high in comparison to other maritime conventions, it reflects the broad scope of the convention and represented a compromise after three separate working groups addressed the problem.[468]

Part of the reason why the numbers were set relatively high is due to the innovative enforcement provisions of the MLC, both explicit and implicit. The MLC's article V implementation and enforcement responsibilities are drafted particularly well and create broad enforcement powers rather quietly.

Members are first required to "implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under [the MLC] with respect to

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[463] MLC, *supra* note 456, preamble.
[464] *Ibid*, art. VIII(3).
[465] *See* International Labour Organization, Information System on International Labour Standards, *Ratifications of the MLC – Maritime Labour Convention, 2006*, *available at* <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:1830437550262004::NO:11300:P11300_INSTRUMENT_ID:312331:NO>. The countries that have ratified the MLC are, in alphabetical order: Antigua and Barbuda, Australia, Bahamas, Benin, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Denmark, Gabon, Kiribati, Latvia, Liberia, Luxembourg, Marshall Islands, Netherlands, Norway, Panama, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Singapore, Spain, Switzerland, Togo, and Tuvalu. Liberia was the first country to ratify the MLC on 7 June 2006 and Poland's ratification of 7 May 2012 is the most recent.
[466] International Labour Organization, *Ratifications of the MLC: Percentage of World Gross Tonnage of Ships*, *available at* <www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm>.
[467] International Labour Conference, Provisional Record 7, Ninety-fourth (Maritime) Session, 7 February 2006, ILC94-PR7(Part I)-2006-02-0376010En.doc, *available at* <www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-7-i.pdf>, paras. 212, 239
[468] J. I. Blanck, Jr., 'Reflection on the Negotiation of the Maritime Labor [*sic.*] Convention 2006 at the International Labor [*sic.*] Organization,' 31 *Tulane Maritime Law Journal* (2006), pp. 35-55, *at* 54.

ships and seafarers under its jurisdiction."[469] This obviously applies to flag states in relation to ships flying their flag, but "under its jurisdiction" is broad enough to include the jurisdiction of port states over the ships and activities in their ports and harbours. This is particularly evident when article V(1) is read alongside article V(2),[470] which states,

"Each Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention, including regular inspections, reporting, monitoring and legal proceedings under the applicable laws."[471]

The interpretive canon of consistency of purpose indicates a presumption favouring the vesting of port states with implementation and enforcement jurisdiction.[472] The ILO was indubitably aware of the many inferential canons of interpretation, such as *expressio unius*[473] and *casus omissus*,[474] In article V(2), as well as in Article V(3), flag states are mentioned exclusively, thus excluding port states.[475]

The remaining Article V subsections (1, 4-7) refer only to "Members,"[476] "Member other than the flag state,"[477] "jurisdiction,"[478] "ports,"[479] "territory,"[480] "ships to which this convention applies," and "ships that fly the flag of any state that has not ratified [the MLC]."[481] The implementation and enforcement responsibilities and prerogatives of port states and flag states in relation to each other under the MLC are thus intertwined by using narrow terms in only two articles and much broader terms in the other five. When all of this

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[469] MLC, *supra* note 456, art. V(1).
[470] *E.g.*, Vienna Convention on the Law of Treaties [VCLT], 23 May 1969, *entry into force* 27 January 1980, UN. Doc. A/Conf.39/27, 1155 U.N.T.S. 331, art. 31(1). "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Accord,* Rest. 3d FR, *supra* note 11, § 325(1) *Interpretation of International Agreement* (using precisely the same phrasing except for employing the phrase "international agreement" instead of "treaty").
[471] MLC, *supra* note 456, art. V(2).
[472] *E.g.*, J. R. Cornwell, 'Smoking Canons: A Guide to Some Favorite Rules of Construction,' 10 Chicago Bar Association Record (1996), pp. 43-48, *citing State v. French*, 360 N.W.2d 2, (Supreme Court of the State of Minnesota, 1990), p. 7.
[473] *Ibid*, p. 352, fn. 42. "The inclusion of one thing indicates exclusion of others."
[474] *Ibid*, 'Omissions are Intentional' (defining *casus omissus* as stating "that a matter omitted by a legislature is deemed to be intentionally omitted, so a court may not fill in the gap with its own inferences.").
[475] MLC, *supra* note 456, art. V(3). "Each Member shall ensure that ships that fly its flag carry a maritime labour certificate and a declaration of maritime labour compliance as required by this Convention."
[476] *Ibid*, art. V(1, 5-7).
[477] *Ibid*, art. V(4).
[478] *Ibid*, art. V(1).
[479] *Ibid*, art. V(4).
[480] *Ibid*, art. V(5).
[481] *Ibid*, art. V(7).

is read alongside article V(7)'s "no more favourable treatment" clause, the scope of jurisdictional powers granted by the MLC are tremendous, but completely consistent with the historical legal development of jurisdiction in the maritime context.

The effects of these jurisdictional grants are manifold, benefiting governments,[482] maritime organizations and maritime labour generally,[483] and shipowners.[484] Most importantly and beyond the host of other benefits for seafarers, is the contribution to the legal personality of the seafarer as a global citizen – a member of any community travelled to, able to raise and enforce legal rights on board and ashore.[485] Member port states will influence the practices of non-member flag states, and to a lesser extent but equally as important, member flag states will be able to influence the practices of non-member port states through the enforcement and implementation framework.

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[482] International Labour Organization, 'Advantages of the Maritime Labour Convention, 2006, 22 March 2011, *available at* <www.ilo.org/global/standards/maritime-labour-convention/WCMS_153450/lang--en/index.htm>. "Simplification of reporting obligations (One Convention rather than many); Wider powers of enforcement on all ships; Improved quality of shipping services; Improved protection of the environment; Additional flexibility with firmness of rights and flexible as how to implement, making the Convention easier to ratify and implement; Certification system mandatory only for ships over 500 GT; Protection against unfair competition from substandard ships through "No more favourable treatment" for ships of non-ratifying countries; Implementation of mandatory requirements through measures that are substantially equivalent, except for Part V; Advantages given to ships of ratifying countries."

[483] *Ibid*. "4th pillar of quality shipping (with SOLAS, STCW, MARPOL); A comprehensive set of basic maritime labour principles and rights; Simplification of international requirements; A strong enforcement regime, backed by a certification system; Verifiable compliance with basic minimum employment and social requirements; Application to all ships including those of non-ratifying Members; Improved working and living conditions for seafarers; A more secure and responsible maritime workforce; A more socially responsible shipping industry; Improved social dialogue at all levels; Seafarers better informed of their rights and remedies; Improved supervision at all levels: the ship, the company, the flag state, the port state, and the ILO; Global and uniform compliance and verification; Improved possibilities of keeping labour conditions up to date; Permanent review of maritime labour situation; Positive impact on safety at sea; Positive impact on the protection of the environment."

[484] *Ibid*, "A more level playing field to help ensure fair competition and to marginalize substandard operations; Will benefit from a system of certification, including a certification system possible for ships less than 500 GT, if the Shipowner so requests; A more socially responsible shipping industry; A better protected and more efficient workforce; Help ensure that ships are operated safely and securely with few problems and few delays in ports; New Convention contains minimum standards that are well within the current industry practice and should easily be met by most shipowners."

[485] *Ibid*, "A comprehensive set of basic maritime labour principles and rights as well as ILO fundamental rights; Convention spells out in one place and clear language seafarers' basic employment rights; Seafarers better informed of their rights and of remedies available; Improved enforcement of minimum working and living conditions; Right to make

The MLC regulations obligate member port states to carry out inspections for compliance with the MLC on *every* foreign ship.[486] This requirement is made mandatory under Article VI,[487] though not immediately apparent reading Article V alone.[488] MLC member flag states have the preliminary inspection burden and must issue a maritime labour certificate and a declaration of maritime labour compliance under the MLC.[489] The issuance of these documents creates the rebuttable presumption that the verified ship is *prima facie* in compliance with the MLC.[490]

One consideration in ensuring a sufficient number of MLC Member States before it entered into force was the burden on port state inspections if there are a high number of ships that are not in compliance with the MLC.[491] An MLC member port state may inspect any ship regardless of the flag state's ratification or non-ratification of the MLC, hence, a large number of ships with different standards entering a port elevates the burden of inspection.

There are two reasons for the elevation of the burden of inspection in port states. First, the MLC's "no more favourable treatment" provision under article V demonstrates that MLC member port states' efforts to implement the convention are not just for their own state, or MLC Member States, but for all ships that come into its ports.[492] The ILO is quite clear about preventing states that are not MLC members from gaining any competitive or economic advantage over the states that ratify the MLC.[493] It has unequivocally explained,

"Since countries that have not ratified the MLC, 2006 cannot, by definition, produce a maritime labour certificate and declaration of maritime labour compliance issued under the Convention, they can always be the subject of a port State control inspection, especially in

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complaints both on board and ashore; Clear identification of who is the shipowner with overall responsibility, for the purposes of this Convention."

[486] MLC, *supra* note 456, reg. 5.2.1, 'Inspections in Port.'

[487] *Ibid*, art. VI(1). "The Regulations and the provisions of Part A of the Code are mandatory." This means that all substantive sections headed "Regulation" or "Standard" are binding, whereas "Guidance" sections are not.

[488] *Ibid*, art. V(4). "A ship to which this Convention applies *may* . . . be inspected . . ."

[489] *Ibid*, reg. 5.1.3, 'Maritime Labour Certificate and Declaration of Maritime Labour Compliance.'

[490] *Ibid*, reg. 5.1.1(4), 'General Principles.' "A maritime labour certificate, complemented by a declaration of maritime labour compliance, shall constitute prima facie evidence that the ship has been duly inspected by the Member whose flag it flies and that the requirements of this Convention relating to working and living conditions of the seafarers have been met to the extent so certified."

[491] Blanck, Jr., *supra* note 468, p. 54-55.

[492] MLC, *supra* note 456, art V(7). "Each Member shall implement its responsibilities under this Convention in such a way as to ensure that the ships that fly the flag of any State that has not ratified this Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it."

[493] MLC FAQ, *supra* note 457, p. 4, A.4, '*What is meant by the "no more favourable treatment" clause?*'

the light of the obligation on ratifying countries to ensure no more favourable treatment to ships of non-ratifying countries."[494]

Port states thus have tremendous influence in encouraging states to adopt the MLC, or to at least actively seek to promote compliance with it. Regulation 5.2.1(1) sets a permissive standard for port inspections.[495] Foreign ships flying flags of non-party states are specifically targeted by inspections "to help ensure that the working and living conditions for seafarers on ships entering a port of the Member concerned meet the requirements of this Convention (including seafarers' rights)."[496]

Second, the MLC radically confers upon its Member States acting in port capacity broad jurisdiction over ships and seafarers. A Member State in a port capacity is required under its article V implementation and enforcement responsibilities to both prohibit and remedy violations of the MLC committed by any calling ship.[497] Remedies can take the form of sanctions or corrective measures.[498] A port state is advised to forbid a ship from sailing from port where MLC violations are such that,

"(a) the conditions on board are clearly hazardous to the safety, health or security of seafarers; or
(b) the non-conformity or non-conformities found constitute a serious or repeated breach of the requirements of the Convention (including seafarers' rights, whose violation is relevant for the consideration of the seriousness of a non-conformity) (Standard A5.2.1, paragraph 6; see also Guideline B5.2.1, paragraph 2)."[499]

In both of these instances, a port state control officer (PSCO) must prevent the ship from setting sail until the violations are rectified or until a copasetic plan has been reviewed and accepted by the PSCO.[500] These two instances are rather vague and discretionary at first glace, but the ILO has provided a non-exhaustive list of the types of violations that warrant

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[494] *Ibid*, p. 50, C5.2.i, '*When may the foreign ships of non-ratifying countries be inspected in a port State?*'
[495] MLC, *supra* note 456, reg. 5.2.1(1). "Every foreign ship calling, in the normal course of its business or for operational reasons, in the port of a Member *may* be the subject of inspection in accordance with paragraph 4 of Article V for the purpose of reviewing compliance with the requirements of this Convention (including seafarers' rights) relating to the working and living conditions of seafarers on the ship," *emphasis added*.
[496] *Ibid*, reg. 5.2.1(4).
[497] *Ibid*, art. V(6). "Each Member *shall* prohibit violations of the requirements of this Convention and *shall*, in accordance with international law, establish sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such violations," *emphasis added*.
[498] *Ibid*.
[499] International Labour Organization, *Guidelines for Port State Control Officers Carrying Out Inspections under the Maritime Labour Convention, 2006*, (International Labour Organization, Geneva, 2009), pp. 66-67, para 96.
[500] *Ibid*, p. 67, para. 97.

the detention of any foreign ship not in compliance with the MLC.[501] Additionally, where a ship does not possess the required documents or there is clear reason to believe that the ship is not in conformance with provisions respecting the rights and safety of the seafarer the provisions of the MLC take on mandatory language of "must" and "shall" that distinctly alters any permissive character of the Convention.[502]

These jurisdictional exercises of enforcement and implementation created by the MLC may appear to run counter to general principles of international law and specifically the ILO constitution, which states in relevant part:

"if the Member does not [ratify a convention], no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention."[503]

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[501] *Ibid*, pp. 67-69, para. 98. "the presence of any seafarer on board under the age of 16 (Standard A1.1, paragraph 1); the employment of any seafarer under the age of 18 in work likely to jeopardize their health or safety (Standard A1.1, paragraph 4) or in night work (see Standard A1.1, paragraphs 2 and 3); insufficient manning (Regulation 2.7 and Standard A2.7), including that caused by the removal from the SMD of under-age seafarers; any other deficiencies constituting a violation of fundamental rights and principles or seafarers' employment and social rights in Articles III and IV; any non-conformity applied in a way that violates those fundamental rights (for example, the attribution of substandard accommodation based on the race or gender or trade union activity of the seafarers concerned); repeated cases of seafarers without valid certificates confirming medical fitness for duties (Standard A1.2); seafarers on board the same ship repeatedly not in possession of valid seafarers' employment agreements (SEAs) or sea-farers with SEAs containing clauses constituting a denial of seafarers' rights (Regulation 2.1, paragraph 1); seafarers repeatedly working beyond maximum hours of work (Standard A2.3, paragraph 5(a)) or having less than the minimum hours of rest (Standard A2.3, paragraph 5(b)); ventilation and/or air conditioning or heating that is not working adequately (Standard A3.1, paragraph 7); accommodation, including catering and sanitary facilities, that is unhygienic or where equipment is missing or not functioning (Standards A3.1, paragraph 11, and A3.2, paragraph 2; Regulation 4.3, paragraph 1); quality and quantity of food and drinking water not suitable for the intended voyage (Standard A3.2, paragraph 2); medical guide or medicine chest or medical equipment, as required, not on board (Standard A4.1, paragraph 4(a)); no medical doctor for passenger ships engaged in international voyages of more than three days, carrying 100 persons or more, or no seafarer in charge of medical care on board (Standard A4.1, paragraph 4(b) and (c)); repeated cases of non-payment of wages or the non-payment of wages over a significant period or the falsification of wage accounts or the existence of more than one set of wage accounts (Standard A2.2, paragraphs 1 and 2)."

[502] *See generally*, MLC, *supra* note 456.

[503] International Labour Organization Constitution, 28 June 1919, *entry into force* 10 January 1920, 15 U.N.T.S. 40, art. 19(5)(e).

The obvious focus of the MLC is protecting the safety and wellbeing of seafarers. The innovative effect on seafarers that the enforcement and maritime jurisdiction provisions of the MLC are and will continue to have is not a question of degree. At the same time, implementation of the provisions of the MLC is not so much a question of states assuming binding legal obligations[504] as it is recognizing longstanding principles of maritime law reframed in the modern context.[505] As the ILO is establishing obligations to respect fundamental rights and principles, it is simultaneously linking the *corpus* of labour rights into more specific, consent-based and legally binding conventions. The way this is accomplished, as in the MLC, is by requiring a MLC Member State "to satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, [] fundamental rights." [506] In this way the features of fundamental rights are linked to the specificities of the MLC in relation to seafarers. Article IV then allows the implementation

[504] The ILO has been moving in the direction of recognizing binding obligations upon Member States solely by virtue of their membership in the ILO. Specified "fundamental conventions" which, regardless of a state's ratification, are in effect binding on Member States. *See* International Labour Organization, Declaration on Fundamental Principles and Rights at Work [Fundamental Principles Declaration], 18 June 1998, *annex revised* 15 June 2010. Article 1 recalls,
"that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization."
Article 2 carries more force, declaring,
"that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: **(a)** freedom of association and the effective recognition of the right to collective bargaining; **(b)** the elimination of all forms of forced or compulsory labour; **(c)** the effective abolition of child labour; and **(d)** the elimination of discrimination in respect of employment and occupation."

[505] *See* International Labour Organization, ILO Declaration on Social Justice for a Fair Globalization [Globalization Declaration], 10 June 2008 (International Labour Office, Geneva, 2008). This declaration builds upon the idea of the obligations inherent in ILO membership. "[A]ll members of the [ILO] must pursue policies based on the strategic objectives [of] employment, social protection, social dialogue, and rights at work.," p. 2. The declaration was crafted to provide "a historic opportunity and responsibility to reinforce the capacity of the ILO," p. 4. "Members have a key responsibility to contribute, through their social and economic policy, to the realization of a global and integrated strategy for the implementation of the strategic objectives . . .," pp. 13-14.

[506] MLC, *supra* note 456, art. IV, 'Seafarers' Employment and Social Rights,' (listing the fundamental rights as "(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation").

of employment and social rights of seafarers[507] to be achieved through the fundamental right of collective bargaining or "in practice."[508] The MLC goes beyond creating consent-based provisions by enforcing through port state control that non-member ships that use a members port are required to be in compliance whenever they are in the members port and control.[509]

The ILO is articulating self-evident *obligatio erga omnes* in its sphere of authority in light of a globalized world of labour. In the maritime context, these obligations merely relate to respecting basic, established rights of seafarers. The ILO has already broken ground in the world's maritime countries by establishing the legal personality of seafarers in these countries as right-holders. Respecting these inherent and voluntarily assented to obligations requires, at a minimum, successful implementation of the fundamental rights by virtue of ILO membership. The context of seafarers and the provisions of the MLC recognize and are representative of the peculiar jurisdictional nature of international maritime law and its focus on the predicament of seafarers. In a globalized world dependent on borderless labour, the millions of seafarers exist in an increasingly entangled web of nationalities for different purposes. This is not merely eroding the traditional nation state perspective of international law making, but again demonstrating the unique nature of the *lex maritima*.

Under the MLC, seafarers are the holders of the entire host of labour rights as expressed in the maritime context. These rights focus exclusively on the health, welfare, safety, and wellbeing of seafarers. Seafarers as conceptualized in international maritime law are associated with nations and territories fluidly, thus at the mercy of fluctuating jurisdictions. Citizenship, flag or port state status, and location all affect the exercise of seafarers' basic rights. The MLC, with C180, are merely a modern re-articulation of the established needs and requirements of the maritime industries, and of the natural and positive rights of seafarers. The ability, indeed duty, of Member port states to ensure that seafarers are enjoying the basic features and protections inherent in that status through inspection and enforcement on vessels flying the flag of *any* state, not just ILO Member States.[510]

The MLC represents the next step in constructing the seafarer as a universal citizen under international maritime law. It would be unfair to cast these developments as a power grab of international law. Rather, these developments represent the modern common

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[507] *Ibid*, art. VI(1-4). "1. Every seafarer has the right to a safe and secure workplace that complies with safety standards. 2. Every seafarer has a right to fair terms of employment. 3. Every seafarer has a right to decent working and living conditions on board ship. 4. Every seafarer has a right to health protection, medical care, welfare measures and other forms of social protection."

[508] *Ibid*, art. VI(5).

[509] *Ibid*, art. V(7).

[510] Ten UN Member States are not members of the ILO: Andorra, Bhutan, Liechtenstein, North Korea, Micronesia, Monaco, Nauru, Palau, South Sudan, and Tonga. *Compare* International Labour Organization, *Alphabetical List of ILO Member Countries (183 Countries)*, *available at* <www.ilo.org/public/english/standards/relm/country.htm>, *with* United Nations, *Member States of the United Nations*, *available at* <www.un.org/en/members/index.shtml>.

understanding of international law, specifically human rights in the maritime context, and a state's obligations in an increasingly globalizing world. The role of the maritime industries and the people employed therein are integral to the functioning of all international interactions. The historical evolution of maritime jurisdiction has paved the way, allowing the MLC to expand upon earlier innovation in the enforcement mechanisms of ILO conventions. This path has been sketched in some detail for clarity and to establish precedent and practice, but *non omnium quae a majoribus nostris constituta sunt ratio reddipotest*.[511]

4.4 The Substantive Rights Furthered by the MLC

The MLC's universality can then be articulated through its substantive provisions. The most obvious of these seafarer rights[512] are those that fall under core, fundamental rights[513] or governance instruments[514] under recent declarations.[515] These rights originate in natural law and have already been individually assented to by the overwhelming majority of states,

[511] D. R. Coquillette, 'Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607, 61(1) *Boston University Law Review* (1981), pp., 1-89, at. 33, fn. 125. "A reason cannot be given for all the laws that have been established by our ancestors."
[512] MLC, *supra* note 456, titles 1-4.
[513] These eight conventions, and their substantive content, constitute legal instruments directly addressing the fundamental principles and rights at work from which no ILO member my derogate by virtue of implicit membership obligations and the modern context, *post*. The conventions are: Forced Labour Convention, 1930 (No. 29) [C29], 28 June 1930, *entry into force* 1 May 1932; Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) [C87], 9 July 1948, *entry into force* 4 July 1950; Right to Organise and Collective Bargaining Convention, 1949 (No. 98) [C98], 1 July 1949, *entry into force* 18 July 1951; Equal Remuneration Convention, 1951 (No. 100) [C100], 29 June 1951, *entry into force* 23 May 1953; Abolition of Forced Labour Convention, 1957 (No. 105) [C105], 25 June 1957, *entry into force* 17 January 1959; Discrimination (Employment and Occupation) Convention, 1958 (No. 111) [C111], 25 June 1958, *entry into force* 15 June 1960; Minimum Age Convention, 1973 (No. 138) [C138], 26 June 1973, *entry into force* 19 June 1976; Worst Forms of Child Labour Convention, 1999 (No. 182) [C182], 17 June 1999, *entry into force* 19 November 2000.
[514] These four conventions are referred to as "priority instruments" most significant to labour governance and the international labour system. These conventions are: Labour Inspection Convention, 1947 (No. 81) [C81], 11 July 1947, *entry into force* 7 April 1950; Employment Policy Convention, 1964 (No. 122) [C122], 9 July 1964, *entry into force* 15 July 1966; Labour Inspection (Agriculture) Convention, 1969 (No. 129) [C129], 25 June 1969, *entry into force* 19 January 1972; Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) [C144], 21 June 1976, *entry into force* 16 May 1978.
[515] *See, e.g.*, Fundamental Principles Declaration, *supra* note 506, *and* Globalization Declaration, *supra* note 505.

creating solid, binding positive law.[516] The other rights are more penumbral in emanation, though neither less established in international law nor less important to the seafarer.[517] All of these rights are well established in maritime law, but have been veiled behind the employment relationship.

Most importantly for the context of the seafarer are the rights enshrined in the Discrimination (Employment and Occupation Convention, 1958 (No. 111) (C111),[518] which requires "equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."[519]

[516] MLC, *supra* note 456, regs. 1.1 'Minimum Age.' "1. No person below the minimum age shall be employed or engaged or work on a ship. 2. The minimum age at the time of the initial entry into force of this Convention is 16 years." (*see* C138, C182); 2.1 'Seafarers' Employment Agreements.' "1. The terms and conditions for employment of a seafarer shall be set out or referred to in a clear written legally enforceable agreement and shall be consistent with the standards set out in the Code. 2. Seafarers' employment agreements shall be agreed to by the seafarer under conditions which ensure that the seafarer has an opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing. 3. To the extent compatible with the Member's national law and practice, seafarers' employment agreements shall be understood to incorporate any applicable collective bargaining agreements." (*see* C87, C98); 2.2 'Wages.' "All seafarers shall be paid for their work regularly and in full in accordance with their employment agreements." (*see* C87, C98, C100, C111); 2.3 'Hours of Work and Hours of Rest.' (*see* C29, C87, C98, C105); 2.4 'Entitlement to Leave.' (*see* C29, C105, C111); 2.5 'Repatriation.' (*see* C29, C105, C111);
[517] *Ibid*, regs. 1.2-1.4, 2.6-2.8, 3.1, 4.1-4.5 (*see* C87, C87, *and* C29, arts. 13-18).
[518] C111, *supra* note 513 (obliging each Member State to eliminate and rectify discrimination based on national extraction, *inter alia*).
[519] *Ibid*, art. 2.

5 Conclusion

The economic, cultural, and social rights of seafarers are established and recognized through the Maritime Labour Convention (MLC) and the Seafarers Identity Documents (SIDs). Whether or not they receive widespread ratification, the interconnectedness of the maritime system and the established jurisdictional practices therein will virtually require universal application once the MLC enters into force due to the unique jurisdictional tools the MLC uses. By utilizing an approach that places inspection duties on flag states, port states, and labour supply states, and provides them with enforcement responsibilities that forbid treating non-MLC ships and seafarers differently all ships that enter into the port of a member state will be required to comply with the MLC. The MLC demonstrates an acute awareness of the functioning of the maritime industry and the operation of maritime law and takes full advantage of established tools. The scope of the MLC in terms of jurisdictional grants is neither shocking nor unprecedented. The promotion of economic, cultural, and social rights through hard law enforcement tools is what is innovative and groundbreaking.

This promotion will in turn provide the industry with increased reliability, economic efficiency, and fewer liabilities due to the higher standards and support that the human rights focus will espouse. The standards of the industry will be raised in all aspects, not only through operational best practices, but also through enforcing a human rights culture that is sensitive to the specific needs of the seafarer and advancing an open dialogue and resolution process for problems that arise. By upholding labour standards that foster a work-life balance through hours of work and rest, leave, repatriation, as well as association and collective bargaining the entire industry will reap benefits.

Governments will significantly raise the performance standards of ships and crews because there will not be more favourable treatment and uniform standards will increase the power of enforcement and cooperation. Additionally, the focus on safety will have effects on lowering the number of disasters at sea that occur from the human element or the quality of the ship. Shipowners and employers will experience more efficiency and fewer liabilities through increased protection of workers. The MLC will also help developing economies develop the maritime resources needed to increase their involvement in the industry beyond supplying labour, registration, and scrapping ships. By encouraging similar practices these countries can enter the market with sufficiently similar practices due to the flexibility of the Convention and simplification of reporting systems under one document will lower costs. The cooperation of member states through inspections and reporting will also encourage ships to remain compliant. Costs will be spread throughout the entire industry because of the duties on flag states, port states, and labour supply states. The no more favourable treatment clause will prevent a race to the bottom because there are disincentives to contract with substandard ships and labour. Seafarers will benefit widely upon entry into force, as the MLC is essentially a hard law instrument setting out a host of seafarers' rights. Clarified requirements on articles of agreement and documentation inter alia, will ensure that seafarers are aware of who the shipowner with ultimate responsibility is.

The history of jurisdiction over people and things in maritime law show clear precedent for the rights the MLC embraces. The combined force of the MLC and SIDs will heighten the protections and rights of seafarers to a standard that was original in history but had been eroded due to changing times that weighed rights of the seafarer against security and economic concerns. The MLC together with SIDs will advance the rights of the seafarer into a protected and enforced class of international maritime laws that protect health, safety, and rights. The MLC is a needed addition to the IMO pillar structure and will take ranks among MARPOL, SOLAS, and STCW and continue to further their united goals at sea.

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